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World Trade Organisation members' compliance with article XXIV of the General Agreement on Tariffs and Trade: The case of Tanzania

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by

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at the

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8 October 2021

DECLARATION

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DEDICATION

To my family and mentors.

ACKNOWLEDGMENT

As they say, ‘it takes a village to make a man.’ I would be ungrateful if I would not acknowledge the contribution of the following people towards this milestone: the Almighty for giving me the strength and perseverance throughout this intensive programme especially in these challenging times – Covid-19; my family for always supporting me in my endeavours – my parents Leonidas and Gillian, siblings Esperance, Patience, Providence and Peace; Dr Charles Okehalam for tuition support through the Charles Okehalam Scholarships that made me pursue my long-awaited programme; my supervisor Dr Olufemi Oluyeju for his guidance in writing my mini-dissertation; Prof Patricia Lenaghan and Dr Magalie Masamba for their comments that made me improve my mini-dissertation; our programme manager Dr Jonathan Kabre for making sure we have a smooth experience throughout our studies – keep up the good work! This also goes to our tutor Ms Marie- Louise Aren, our administrator Ms Thandeka Ratsetsoke as well as our head on unit Prof Daniel Bradlow; Dr Kehinde Olaoye who brought this programme to my attention, her advice and support in making sure I pursue it – I owe you; my all-time favourite mentor and spiritual guide Fr James Mweyunge; my career mentor Mr Emmanuel Masalu; my aunty Grace Bwakeya, Noel Orwothwun as well as Mr and Mrs Mhando; REPOA for offering me a place to present a poster of my dissertation at their 25th Annual Research Workshop. Last but not least, my classmates from various regions on the continent for making this such an amazing experience. Let us keep up that Pan-Africanist spirit!

LIST OF ABBREVIATIONS

AfCFTA	African Continental Free Trade Area
AU	African Union
CET	Common external tariff
CoO	Certificate of origin
CU	Customs union
DTIS	Diagnostic trade integration study
EAC	East African Community
EACCU	East African Community Customs Union
EI	Economic integration
EPAs	Economic Partnership Agreements
EU	European Union
FDI	Foreign direct investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GS1	A global system of standards
GSP	General system of preference
FTA	Free trade area
MFN	Most favoured nation
PTAs	Preferential trade agreements

RI	Regional integration
RIT	Regional integration theory
RIOs	Regional international organisations
RECs	Regional economic communities
RoO	Rules of origin
RTAs	Regional trade agreements
SADC	Southern African Development Community
STR	Simplified trade regime
TCCIA	Tanzania Chamber of Commerce, Industry and Agriculture
TM	Transparency mechanism
Tralac	Trade Law Centre
TSh	Tanzania shilling
T&D	Trade and development
VAT	Value added tax
ZNCC	Zanzibar National Chamber of Commerce
ZRB	Zanzibar Revenue Board
WTO	World Trade Organisation

ABSTRACT

WTO provides the bedrock of international trade law. Thus, it supports open and predictable trade. Regional trade arrangements have become an accepted channel for trade development, consequently, they are recognised by WTO under article XXIV of GATT and the Enabling Clause. Most RIs are brought about by regional trade arrangements. The most common forms of RI are CUs and FTAs. WTO legal framework on RTAs in CUs and FTAs with regards to trade in goods are governed by the Text of Article XXIV GATT.

Tanzania has three RTAs – EAC, SADC and AfCFTA. The focus of this study is on two – EAC and SADC. Tanzania is in a multilateral preferential trade arrangement that is inconsistent with WTO requirements on RTAs. That is to say, Tanzania as a member of EAC which is a CU implies that she has to comply with WTO requirements on RTAs as provided for under article XXIV of GATT. The major being to enter into trade agreements collectively with other members of CU and not individually, since they operate as a single customs territory with a common external trade regime. However, Tanzania is both a member of a CU – EAC and a member of an FTA – SADC to the exclusion of other members of CU.

WTO members are required to notify WTO upon the formation of RTAs so that the same can be examined by the Committee on RTAs. However, the Committee has enjoyed little success in assessing the consistency of the RTAs notified to WTO over the years. Therefore, functions of the Committee should be reviewed to serve as a forum for notification and provision of clarity on RTAs to WTO members on the basis of a factual presentations by WTO Secretariat.

Due to multiple memberships of member states in various RECs, both EAC and SADC use RoO to determine whether goods originate from partner states in order to qualify for community preferential treatment. The administration of EAC CET faces a number of challenges including the lack of a customs authority at the regional level that would ensure uniformity in the management of CU. Another setback in the implementation of the CET is multiple memberships of member states where preferential treatment is still extended to other RECs despite a restricting provision and existence of CU, thus, eroding the gains of such union. This is brought about by problems in drafting Treaties where partner states exploit loopholes, for instance, Protocol on EACCU does not prohibit EAC member states from maintaining trade arrangements they had prior to the formation of CU or signing individual agreements thereafter such as FTAs. This became evident during the ratification of AfCFTA Agreement.

Keywords: WTO, article XXIV of GATT, customs union (CU), free trade area (FTA), regional trade agreements (RTAs), EAC, SADC, AfCFTA, Tanzania

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CHAPTER ONE: INTRODUCTION

1.1 Background

World Trade Organisation (WTO) provides the bedrock of international trade law. To such end it supports open and predictable trade.[1] Regional trade arrangements have become a well-accepted channel for trade advancement and development, as a result, it is recognised by WTO under the most favoured nation (MFN) principle. This is accompanied by a departure provided for under article XXIV of the General Agreement on Tariffs and Trade of 1994 (GATT), that include the potential of regional trading arrangements. Most regional integrations are brought about by regional trade arrangements. The typical forms of regional integration are preferential trade agreements (PTA), free trade areas (FTA), customs unions (CU), common markets and economic unions.[2] According to WTO rules, preferential trade assumes three major forms namely unilateral, bilateral and regional or mega-regional.[3] For preferential trade to occur trade agreements are inevitable between member states thereto. Trade agreements at present make up approximately 60 percent of global trade, and the percentage is getting higher.[4] As of 30 June 2021, 350 regional trade agreements (RTAs) by WTO members were in force.[5]

The primary focus of this study is on FTAs and CUs in the area of goods and RTAs. WTO legal framework on RTAs in CUs and FTAs in the area of trade in goods are governed by the Text of Article XXIV of the General Agreement on Tariffs and Trade of 1994 (GATT) complemented with the Text of Note Ad Article XXIV[6] and its updates together with the Text of the Understanding on the Interpretation of Article XXIV of GATT of 1994 (GATT Understanding).[7]

[1] MS Akman and others 'World trading system under stress: Scenarios for the future' (2020) 11(3) *Future scenarios for the world trading system* 360 at 362.
[2] J Rutaihwa & N Rutatina 'What does the intra-industry trade data on EAC tells us?' (2012) 1(5) *International Journal of Academic Research in Economics and Management Sciences* 174 at 176.
[3] Akman and others (n 1) 362.
[4] As above.
[5] WTO 'Facts & figures: Regional trade agreements 1 January 2021 – 30 June 2021' https://www.wto.org/english/tratop_e/region_e/rtafactfig_e.pdf (accessed 25 September 2021).
[6] https://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm#adarticleXXIV (accessed 20 September 2021).
[7] WTO 'Regional trade agreements' https://www.wto.org/english/tratop_e/region_e/region_e.htm#rules_ita (accessed 20 September 2021).

An FTA means a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.[8]

A CU means,

> [9]the substitution of a single customs territory for two or more customs territories, so that
>
> (i) duties and other restrictive regulations of commerce…are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and
>
> (ii) …substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.

That is, the constituent members of CU are supposed to put in application substantially similar duties and other regulations of commerce to external trade with third countries. Thus, the constituent members of CU are supposed to put in application a common external trade regime, in relation to both duties and other regulations of commerce.[10]

Establishing a CU or an FTA is a right of all WTO members under article XXIV of GATT.[11] However, there are limitations as provided for under article XXIV:5 of GATT. Furthermore, in the establishment or expansion of CU, member states thereto are required to the largest feasible degree refrain from bringing about negative impacts on the trade of other partner states,[12] but to facilitate trade.[13]

The provisions of article XXVI of GATT are applicable to the metropolitan customs territories of the contracting member states and to any other customs territories. Every such customs territory shall, entirely for the object of the territorial application, be regarded as if it

[8] Art XXIV:8(b) of the General Agreement on Tariffs and Trade 1994 (GATT). https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXIV (accessed 17 May 2021).
[9] Art XXIV:8(a) of the General Agreement on Tariffs and Trade 1994 (GATT).
[10] *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Appellate Body (22 October 1999), WTO Doc WT/DS34/AB/R (1999) (*Turkey-Textile* case).
[11] *Turkey-Textile* case (n 11) para 11.
[12] Preamble to the Text of the Understanding on the Interpretation of Article XXIV of General Agreement on Tariffs and Trade of 1994 (GATT Understanding) https://www.wto.org/english/docs_e/legal_e/10-24_e.htm (accessed 17 May 2021).
[13] Art XXIV:4 of GATT.

were a contracting party.[14] That is to say, after member states forming a CU, such a union will be regarded as a single territory with the intention of territorial application and therefore, the rules of article XXIV of GATT shall be applicable accordingly. Thus, member states of CU are to trade collectively and not individually since they operate as a single customs territory with a common external trade regime.

With regards to regional trade, Tanzania has three RTAs – the East African Community (EAC), the Southern African Development Community (SADC)[15] and the recently ratified highly ambitious African Continental Free Trade Area (AfCFTA).[16] In other words, Tanzania is a member of three regional economic communities (RECs). That is, EAC which is a CU with a common external tariff (CET),[17] SADC which is an FTA[18],[19] and AfCFTA which is an FTA.[20] The focus of this study is on the two RECs – EAC and SADC. Over 21 percent of Tanzanian's total trade is intra-Africa and about 75 percent of Tanzanian's main African trading partners are member states of EAC and SADC under the conditions of preferential market access.[21]

With the exception of South Sudan which is an observer, all state parties to the two RECs including Tanzania are WTO members.[22] Therefore, every member is completely accountable to adhere to the entire provisions of GATT. Consequently, they are obliged to take such feasible actions as may be accessible to them to establish such compliance by regional and local governments and authorities in their territories.[23]

1.2 Research problem

Tanzania is in a multilateral preferential trade arrangement that is inconsistent with WTO requirements on RTAs. To be specific, Tanzania as a member of EAC which is a CU implies

[14] Art XXIV:1 of GATT.
[15] O Mashindano, D Rweyemamu & D Ngowi 'Deepening integration in SADC: Tanzania – torn between EAC and SADC' (2007) 9 *Regional Integration in Southern Africa* at 107.
[16] Tralac 'Status of AfCFTA ratification' https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (19 November 2021).
[17] 'Trade Policy Review: East African Community' (20 September 2006) WTO Doc WT/TPR/S/171 at viii.
[18] Trade Policy Review (n 17) 9.
[19] Trade Policy Review (n 17) 1.
[20] G Erasmus 'Should the RECs disappear in order to have the AfCFTA?' tralac trade brief no. S21TB04/2021 (2021) at 9 https://www.tralac.org/documents/publications/trade-briefs/tb2021/4413-s21tb042021-erasmus-should-the-recs-disappear-in-order-to-have-the-afcfta-01112021/file.html (accessed 20 November 2021).
[21] Tralac 'Tanzania: Intra-Africa trade and tariff profile 2018' https://www.tralac.org/documents/publications/trade-data-analysis/2948-tanzania-trade-and-tariff-profile-2018-infographic/file.html ((accessed 21 November 2021).
[22] WTO 'Members and observers' https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 20 June 2021).
[23] Art XXIV:12 of GATT Understanding.

that she has to comply with WTO requirements on RTAs as provided for under article XXIV of GATT. The major being to enter into trade agreements collectively with other members of CU and not individually, since they operate as a single customs territory with a common external trade regime. However, Tanzania is both a member of CU and a member of an FTA to the exclusion of other members of CU. Members of CU are supposed to apply CET and enter into trade arrangements with third parties as a block but Tanzania is in an FTA arrangement as an individual. Despite a lot of scholars on RTAs and regional integration finding this arrangement problematic, they have neglected to look at it in depth. Therefore, this study seeks to so ascertain the basis and modality that Tanzania has used to enter into such an arrangement and managed to maintain it to date.

1.3 Research questions

The major question this study seeks to address is what is the basis for Tanzania as a member of EAC which is a CU entering in an FTA arrangement to the exclusion of other members of CU contrary to article XXIV of GATT?

In addressing this question, the following ancillary questions will also be answered:

i) Which customs regime does Tanzania use in these two trade arrangements especially with respect to goods from an FTA?
ii) What challenges does an FTA arrangement in question pose, has posed or might pose to other CU members and the effective operation of a CU in line with the Protocol on the Establishment of the East African Community Customs Union?
iii) What is the extent of effects to other members of CU and the CU itself – if any?

1.4 Research objectives

The overall objective of this study is to ascertain the basis of Tanzania as a member of the EAC which is a CU entering into an FTA arrangement to the exclusion of other members of the CU contrary to article XXIV of GATT. The specific objectives of this study are:

i) To determine the customs regime Tanzania uses in the two trade arrangements especially with respect to goods from an FTA
ii) To examine the challenges that an FTA arrangement in question poses, has posed or might pose to other CU members and the effective operation of a CU in line with the Protocol on the Establishment of the East African Community Customs Union
iii) To examine the extent of effects to other members of CU and the CU itself – if any.

1.5 Thesis statement

The central argument in this study is that parties in RTAs ought to abide by the rules as provided for by WTO under article XXIV:1 of GATT. Tanzania's membership in the EAC which is a CU ought to be consistent with WTO rules on RTAs. That is, *inter alia*, she should not enter into trade arrangements that are inconsistent with the operation of CU or that would adversely affect the trade of other members of CU. Her membership in an FTA ought to be collective – as a block with other CU members due to the presence of a CET. Therefore, this study seeks to so ascertain the basis and modality that Tanzania has used to enter into an FTA arrangement to the exclusion of other members of the CU and managed to maintain it to date.

1.6 Justification of the study

This study is necessary because it describes and analyses the present status of Tanzania in relation to RECs in question. Not only that but this study also sheds some light to the unanswered questions concerning such an extraordinary arrangement Tanzania is into. This could also be used as a case study if at all such arrangements can exist all together to the benefit of all members in both arrangements.

1.7 Literature review

Nicolas and Andrew argue that article XXIV:8(a)(ii) of GATT insists on members of CU to put in application substantially similar duties and other regulations of commerce to the trade with third countries. This demand creates a common external trade regime or a common commercial policy where parties are obliged to coordinate their individual external trade procedures governing trade with third countries.[24] They further state that under an FTA, members are under not obliged to adopt collective external regulations for external trade, that is, member states to an FTA normally carry on to apply their separate external trade rules. However, there may be circumstances where the formation of an FTA may coordinate particular domestic regulations, such as sanitary and phytosanitary measures, and consequently reforming the commensurate external regulations.[25] This study thus seeks to find out the tariffs Tanzania applies with respect to the two trade arrangements.

[24] NJS Lockhart & AD Mitchell 'Regional trade agreements under GATT 1994: An exception and its limits' in AD Mitchell (ed) *Challenges and prospects for the WTO* (2005) 217 at 20-21.
[25] NJS Lockhart & AD Mitchell 'Regional trade agreements under GATT 1994: An exception and its limits' in Mitchell (n 24) 22.

Fiorentino, Verdeja and Toqueboeuf argue that members in CUs, if played by the rules, restricts individual members' option for future RTA memberships as a smooth operation of CU demands that any arrangement with a third country to include CUs as a unit. They further stress that the requirement in CU of CET and harmonisation of the members' commercial policies does not permit in general a 'go alone' policy whereby one member state individually negotiates a preferential arrangement with a third country. This is because such a circumstance would interfere with the operation of CU as goods from the third country could enter the union at a preferential rate through the bilateral RTA, resulting to a loss of tariff revenues for the other member states to CU.[26]

Gerhard Erasmus similarly argues that in a CU the partner states are deprived of the policy space over the use of the import tariff and cannot individually conclude trade deals with third parties. In an FTA the state parties maintain individual policy space, while concurrently engage in national and REC-related integration agendas.[27]

WTO secretariat is of the view that membership in overlapping preferential agreements, particularly the combination of FTAs – SADC and CU – EAC, makes their trade regimes complicated, and hard to administer. This may limit the perfect operation of EAC as a CU.[28] This study thus seeks to investigate whether Tanzania's stance affects the proper functioning of the EAC CU.

Furthermore, WTO is of the view that the rise of RTAs has created the phenomenon of overlapping membership. This can impede trade flows especially when traders strive to comply with numerous collection of trade regulations. Additionally, as the range of RTAs widen to incorporate policy areas not monitored multilaterally, there may be greater chances of disparities between various arrangements. For instance, most older RTAs included tariff liberalisation and associated regulations such as trade defence, standards and rules of origin only. Gradually, RTAs have progressed to cover liberalisation of services as well as obligations in services regulations, investment, competition, intellectual property rights, electronic

[26] RV Fiorentino, L Verdeja & C Toqueboeuf 'The changing landscape of regional trade agreements: 2006 update' Discussion paper no. 12 (2007) at 7.
[27] Erasmus (n 20) 8.
[28] Trade Policy Review (n 17) ix.

commerce, environment and labour. This could result into administration uncertainties and enforcement difficulties.[29]

Josie Knowles says that, despite lack of awareness, a large majority of Tanzanians are positive about the proposed economic aspects of integration, including CU. However, elite figures do not approve of Tanzania's membership in SADC, they find it problematic.[30] Moreover, from the surveys conducted the approval of citizens – Tanzanians on CU was 60 percent in 2008 that somewhat declined to 55 percent in 2012, whereas disapproval of CU had risen from 19 percent to 35 percent in the same period.[31] Therefore, this study seeks to question the elite assertion with regards to Tanzania's membership in an FTA.

Crawford and Fiorentino argue that there is enough proof to indicate that the negotiation and management of numerous arrangements overburden the institutional capacity of developed countries too and such may lessen commitment for liberalisation at the multilateral stage. RTAs generate conferred interests intended to evade reducing preferential scopes, while cumbersome rules of origin make global trade extra costly and complicated. They further argue that RTAs may present a risk to an even growth of global trade through multiple trade and investment diversion, specifically if liberalisation on a preferential arrangement is not associated with simultaneous MFN liberalisation where the smallest and weakest states may find themselves marginalised.[32]

Henry Mutai argues that within the law, member states to CU are constrained to participate in any separate trade negotiations with third countries, but to negotiate as a whole. To that end, the discrimination of members through entering individual, preferential agreements with third countries would thus, be prevented.[33] He further argues that the major historical problem encountering trade liberalisation in the Eastern and Southern African regions and that has presented itself in the increase of overlapping RTAs is the absence of a consistent, practical policy to govern the process. Although the Lagos Plan of Action of 1980 and the

[29] WTO 'Regional trade agreements and the WTO' https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 20 September 2021).
[30] J Knowles 'East African federation: Tanzanian awareness of economic and political integration remains poor, but there is growing support for political links' Afrobarometer briefing paper no. 146 (2014) at 2.
[31] Knowles (n 30) 5.
[32] J Crawford & RV Fiorentino 'The changing landscape of regional trade agreements' Discussion paper no. 8 (2005) at 16.
[33] HK Mutai 'Regional trade integration strategies under SADC and the EAC: A comparative analysis' (2011) 1 *SADC Law Journal* 81 at 90.

Treaty Establishing the African Economic Community of 1991 provide for a general insight of a united Africa, they unwittingly established the foundation for the increase of RTAs. He further stress that with all RECs having similar overall goals, there was no disincentive to participate in as plenty as were accessible in the label of cooperation with one's neighbours. When this was in place, nonetheless, problems presented by sovereignty and myopic interests have demonstrated to be a hinderance to effective liberalisation.[34]

1.8 Research methodology

This study is desk and library based. The University of Pretoria Oliver R Tambo Law Library is the main resource. The researcher also used resources available on websites of relevant institutions such as AfCFTA, EAC, SADC, tralac, WTO and other online resources to gather relevant existing data and information.

1.9 Scope and limitations of the study

The scope of this study is CUs and FTAs in the area of goods and RTAs. Limitations of this study is that some relevant resources are not available or accessible online – over the websites of the relevant institutions. Therefore, secondary sources were used where applicable.

1.10 Overview of chapters

This study is structured into six chapters with the following breakdown.

Chapter one provides an introduction of the research subject matter, sets out the context of the study, identifies the problem as well as objectives, explores relevant literature on the research subject matter and outlines the methodology.

Chapter two explores the conceptual framework for the existence and relevance of regional integration as well as the concepts of CU and FTA.

Chapter three explains the concept of RTAs and WTO as well as processes that involve notifications of RTAs by WTO members and bodies that examine the same as well as reasons as to why members are not compliant to the WTO rules.

Chapter four details the history of Tanzania in RECs in question and investigates the basis for Tanzania as a member of EAC which is a CU entering in an FTA arrangement.

Chapter five discusses customs implications of Tanzania in RECs – EAC and SADC.

[34] Mutai (n 33) 95.

Chapter six provides a summary of findings, makes a conclusion of the study and proposes recommendations.

CHAPTER TWO: THEORETICAL FRAMEWORK FOR REGIONAL INTEGRATION

2.1 Introduction

Regional integration (RI) came to light as a separate field of scholarship in 1950s.[35] RI refers to the collaboration or unification of more than two[36] independent states aiming at reciprocal expansion of trade and other economic and progressively non-economic spheres.[37] Regional interactivities that go beyond economics include culture, social and political facets of the society.[38] In a broader sense RI may be interpreted as a union of countries to advance free movement of products, services and the means of production aiming at advancing wellbeing, decreasing poverty and advancing economic growth.[39]

RI is usually found in trade and economic phrases due to the fact that the customarily those were basic purposes of integration.[40] Bela Balassa defines economic integration (EI) as both a process and as a state of affairs. As a process EI involves actions drawn to eradicate bias between economic components that belong to individual states. EI as a state of affairs can be illustrated by the lack of different designs of bias among national economies.[41]

Balassa also provides the difference between integration and cooperation arguing that the distinction is both qualitative and quantitative. He defines cooperation to include measures intended to lower biasness. That is, the EI process comprises of actions that suppress some types of bias. For instance, international arrangements on trade policies fit in the domain of international cooperation, whereas the abolition of barriers to trade is a measure of EI.[42]

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[35] F Schimmelfennig 'Regional integration theory' (2018) at 5 https://www.researchgate.net/publication/325392599 (accessed 23 August 2021).
[36] Schimmelfennig (n 35) 3.
[37] Rutaihwa & Rutatina (n 2) 176.
[38] F Onditi 'Dominatarian theory of regional integration' (2021) 13(1) *Insight on Africa* 76 at 81 https://orcid.org/0000-0003-0931-7752
[39] Rutaihwa & Rutatina (n 2) 176.
[40] AF Lwaitama, J Kasombo & K Mkumbo 'A synthesis research report on the participation of citizens in the East African Community integration process' (2013) at 7 https://library.fes.de/pdf-files/bueros/tanzania/10173.pdf (accessed 01 September 2021).
[41] B Balassa *The theory of economic integration* (2011) at 1 http://ebookcentral.proquest.com/lib/pretoria ebooks/detail.action?docID=1195820 (accessed 04 September 2021).
[42] Balassa (n 41) 2.

Francis Onditi argues that the regionalism outlook was built on the concept that RI would provide guidance to globalisation in 1980s and 1990s. This idea was specifically relevant for developing countries since the majority of economies were experiencing impacts of structural adjustment programmes.[43]

Among the reasons for the sudden multiplication of RTAs around 1990s was the rapid increase of bilateral and plurilateral free trade agreements between nations of the former Council for Mutual Economic Assistance.[44]

Regional integration theory (RIT) explains the institution and evolution of regional international organisations (RIOs). The following are attributes of RIOs namely state memberships, organisational capacity, multilateralism, and geographical proximity. First, RIOs are created by states and have states as their members. Second, RIOs are organisations, in the sense that, they have a physical headquarters and their own staff; they have consistent systems such as meetings of their member states; and they have the capacity to make decisions and implement them. Third, RIOs are made up of more than two member states. Last but not least, their membership is geographically proximate and restricted. The third and fourth attributes are illustrated by figures 1 and 2 which are the maps of SADC and EAC member states respectively. However, with the proliferation of RTAs – FTAs in particular, geographical proximity has now become controversial. RIOs are different from universal organisations such as the United Nations organisations; and from organisations with restricted membership if member states are geographically faraway from one another such as the Commonwealth.[45]

Governments often justify RI with the objective of taking advantage of benefits from the economies of scale thoroughly that were previously inhibited by national trade barriers.[46] Economies of scale comprise of every cost-cutting justifiable action taken by firms, the erection of new plants and centralising production in the most effective plants.[47]

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[43] Onditi (n 38) 81.
[44] R Pomfret 'Regional trade agreements' in M Fratianni (ed) *Regional economic integration* (2006) 12 at 42 https://web-b-ebscohost com.uplib.idm.oclc.org/ehost/detail?sid=646bf46c-4459-46fa-a125 addbe041dc96@sessionmgr101&vid=0&format=EB&rid=1 (accessed 04 September 2021).
[45] Schimmelfennig (n 35) 3.
[46] B Gavin & PD Lombaerde 'Economic theories of regional integration' in M Farrell, B Hettne & LV Langenhove (eds) *Global politics of regionalism: Theory and practice* (2005) at 71 http://ebookcentral.proquest.com/lib/pretoria-ebooks/detail.action?docID=3386522 (accessed 04 September 2021).
[47] B Gavin & PD Lombaerde 'Economic theories of regional integration' in Farrell, Hettne & Langenhove (n 46) 72.

The major objective of EI has been described to be an improvement in welfare. Welfare consists of a actual earnings and an equity component.[48] Not only that but EI also advances economic growth by strengthening the bargaining capacity and minimising external vulnerability of member states. EI also acts to prevent biasness brought by trade and payments limitations and heightened state intervention, and it is made to reduce recurring variations and to improve the development of national income. The least developed nations' endeavour is to protect economies from possible adverse effects of other EIs.[49]

According to Balassa EI can assume various configurations that depict different levels of integration. The forms include an FTA, a CU, a common market, an economic union, and complete EI. This study focuses on FTAs and CUs. An FTA is the simplest level of EI whereby states enter into an agreement to liberalise their internal trade but every state keeps autonomy in its external degree of protection. A CU takes integration one step further by creating not only internal free trade but also a CET. This means that member states consent to give up their national sovereignty over trade policy towards non-members and to commit it to a central community authority.[50] However, the clash between national sovereignty and economic self-interest can be settled only if there is a political interest and political will to do so. EI therefore appears as part of a political process the end result of which is decided by fundamentally political factors.[51] These two varying degrees of integration are further explored in detail below.

2.2 Customs union (CU)

CU is one of the fundamental degrees of EI. CU theory originates from a partial equilibrium analysis of the welfare outcomes of tariff removal under state of perfect competition.[52] According to the definition given under article XXIV of GATT, a CU should satisfy the following conditions namely, the removal of substantially all tariffs and other kinds of trade

[48] Balassa (n 41) 205.
[49] Balassa (n 41) 6.
[50] B Gavin & PD Lombaerde 'Economic theories of regional integration' in Farrell, Hettne & Langenhove (n 46) 69.
[51] B Balassa 'Types of economic integration' in F Machlup (ed) *Economic Integration: Worldwide, regional, sectoral* (1976) at 30 https://www.google.com/url?sa=t&source=web&rct=j&url=https://documents.worldbank.org/curated/en/657491468178769801/pdf/REP69000Types0of0economic0integration.pdf&ved=2ahUKEwigo6nEyO_yAhVMG6YKHU2iBzwQFnoECCkQAQ&usg=AOvVaw1AjRpQecWbjBaPUY5Zaumt (accessed 08 September 2021).
[52] B Gavin & PD Lombaerde 'Economic theories of regional integration' in Farrell, Hettne & Langenhove (n 46) 70.

restrictions between member states and the creation of common tariffs and other rules of foreign trade with non-member economies.[53] EAC partly satisfies these conditions as a few goods still attract customs duties and non-tariff barriers (NTBs) still exist. Some products also attract very high tariff peaks above EAC CET as rightly pointed out in chapter five.

Trade creation and trade divertion are among the impacts of a CU. The former describes newly established trade among member states of CU, the latter to trade diverted from a foreign country to a member state, both as an outcome of the abolition of tariffs in CU.[54] Trade creation occurs when there is a move from a high-cost source outside CU to a low-cost internal source, which means a general growth in productive efficiency in the world. [55] Trade diversion occurs when a move of purchases from lower-cost to higher-cost manufacturers acts in the opposite direction. Beneficial outcomes of CU will prevail if trade creation is greater than trade diversion.[56]

As noted above RTAs could result in costly trade diversion rather than welfare-enriching trade creation once trade is moved from efficient manufacturers outside an RTA to preferential trading partner states that manufacture at high costs. In such a situation, governments loose tariff revenues on imports from third countries, without internal manufacturers taking advantage, to a relative degree, from the reduced import prices.[57] It is also argued that, the abolition of intra-regional trade barriers among least developed states has the possibility of creating great trade diversion and low trade creation.[58]

The creation of CU signifies fixing obligations that consequently remove the unpredictability linked with trade constraints and variations in constraints. However, the unpredictability brought by probable variations in monetary, fiscal, and other policies will remain in existance as long as the coordination of economic policies has not been attained.[59]

[53] Balassa (n 41) 21.
[54] Balassa (n 41) 25.
[55] B Gavin & PD Lombaerde 'Economic theories of regional integration' in Farrell, Hettne & Langenhove (n 46) 70.
[56] Balassa (n 41) 26.
[57] Mashindano, Rweyemamu & Ngowi (n 15) 110.
[58] Mashindano, Rweyemamu & Ngowi (n 15) 138.
[59] Balassa (n 41) 179.

Trade diversion is in most cases politically admissible than trade creation for the reasons that losers from trade diversion including local taxpayers and non-preferred foreign traders have minimal effect in the policy formulation process, while the costs from trade creation are borne by local manufactures interests, who are normally well organised and very influential in structuring policies. Therefore, there is a probable trade diverting discrimination in CU or an FTA arrangement, which is one ground for article XXIV of GATT condition that an FTA or CU should include practically all trade so that states cannot design RTAs to cover only categories where trade diversion is very probable.[60]

2.3 Free trade area (FTA)

In an FTA in contrast to CU, the elimination of trade constraints is not accompanied by the establishment of common tariffs and other regulations of commerce with third countries, but rather member states uphold their individual tariffs and the liberty of deciding and reforming their commercial policies.[61] The application of varying rates of tariffs in trade with non-participating countries will generate probabilities for deflection of trade, production, and investment. Deflection of trade occurs if trade constraints of high-tariff member states are circumvented by way of importation of goods that have their origin outside an FTA from low-tariff members states[62] and then move duty-free to other member states.[63]

Creation of an FTA may also result inro an non-viable design of production. That is, the production of goods which include a high percentage of foreign constituted matters and semifinished goods will move to low-tariff member states when variations in tariffs exceed variations in manufacturing costs.[64]

Moreover, the participation of many states in an FTA intensifies to the complication of the problem. This is due to the fact that the reallocation of resources will have adverse outcomes on world efficiency, as the design of effective undertaking will not go along with comparative advantage but rather the variation in tariffs. Deflection of productivity may also go with undesirable shift of investment resources. This is illustrated by the creation of 'tariff factories', that is, foreign investors will shift resources to member states with low-tariffs on raw items and

[60] R Pomfret 'Regional trade agreements' in Fratianni (n 44) 47.
[61] Balassa (n 41) 70.
[62] As above.
[63] MW Schiff, LA Winters & M Schiff *Regional integration and development* (2003) 16 http://ebookcentral.proquest.com/lib/pretoria-ebooks/detail.action?docID=3050563 (accessed 04 September 2021).
[64] Balassa (n 41) 70.

semifinished goods. Comparably, manufacturing facilities will be established to erect items manufactured in third countries with cheap labor expenses if tariff benefits make this undertaking productive.[65]

2.3.0 Methods to avoid trade deflection

Numerous approaches have been suggested to circumvent trade deflection, production, and investment. Suggested approaches include the percentage rule, the rule of transformation, and applying compensating taxes in intra-regional trade. Both percentage rule and the rule of transformation are shaped to decide whether goods can be determined as having their origin in the region or not. Products that are regarded as regional goods do not attract any tariff, while every member state apply her prevailing tariffs on non-regional goods. Compensating taxes, in contrast, are used to remove tariff variances on traded products.[66]

2.3.1 Percentage rule

The percentage rule for the verifying the origin of goods is based on the assessment of value addition for each commodity. Products whose costs include a predetermined percentage of value addition within an FTA would be traded duty-free under this rule. The initial challenge that occurs in respect of this rule is that of ascertaining the cut-off point. Two concerns will operate in reverse course here: on one hand, a small percentage will give rise to the probability of trade deflection; on the other hand, a high cut-off point will limit the potential trade creation outcomes. The percentage rule chosen ought to be the one that increases the benefits from the union; this would demand the equalisation of the minor benefits of trade creation and the minor problems of trade and production deflection.[67]

Apart from the problems experienced in determining the percentage rule that would result in the maximisation of benefits in an FTA other challenges occur in the actual implementation of the rule. First, accounting methods differ among member states, though the determination of the percentages of value addition would need uniformity. Second, variations in the world market prices of raw materials will result in differences in the percentage portion of value addition in the cost of several goods and may need constant reclassification of these products. Third, similar commodities may constitute varying percentages of the price of the

[65] Balassa (n 41) 71.
[66] As above.
[67] As above.

commodity, contingent on quality. Fourth, manufacturers will be encouraged to increase prices so as to be eligible under the rule and may, in parallel, lower prices to customers. Lastly, the application of this rule demands substantial control, and regulatory administration is hard to attain since the manufacturer as well as his country of origin are significantly concerned to avoid the payment of compensating taxes.[68]

2.3.2 Transformation rule

In view of deficiencies of the percentage rule, the rule of transformation has been proposed as a supplement. Under the rule of transformation, a register of manufacturing procedure is designed, and that a member state is considered a country of origin if the necessary procedure of transformation is carried out. This rule circumvents some of the problems of the value addition procedure but has a couple of problems of its own. That is, problems will be experienced in trying to halt the ordinary register, and protectionist interests may have significant influence on the result. Additionally, though the implementation of the transformation rule would be fairly easy in some industries such as textile or shoe production, reliable outcomes would not be attained in others such as the machine tool and chemical industries, where the technological procedure is very complicated and a large share of the industry's production is utilised as raw materials by the industry itself. Therefore, administrative problems of the percentage rule can also be seen in the implementation of this rule as well.[69]

2.3.3 Compensating taxes

Compensating taxes ought to be paid automatically in an FTA in instances where variations in tariffs between the exporting and importing member states surpass a particular ceiling. The ceiling, as well as the set of duties selected as a standard, are suggested to be negotiated individually category by category. The implementation of this rule will be associated with some level of harmonisation in duties in an FTA.

Apart from problems experienced in reaching a settlement in respect of the applicable ceiling and the relevant duty standards, the very obvious problem of this rule rest in its neglect of deflections in production. Through the payment of compensating taxes, trade deflection would be circumvented, but, the lack of compensation for variations in duties on raw items and

[68] Balassa (n 41) 72.
[69] Balassa (n 41) 73.

intermediate goods, member states that charged low tariffs on these raw items would maintain variational benefits in the area of production where these were utilised as inputs. There is a proposal that, as a means to circumvent the outcomes of inefficiencies in the allocation of productive activity, tariffs paid on all inputs ought to be considered in ascertaining the quantity of compensating taxes. Nonetheless, in the latter suggestion, the cost of regulation and the probability of manipulation would become greater, and the practicability of this rule is uncertain.[70]

2.4 Customs union versus free trade area

On one hand, from the outlook of progressive tariff policies, an FTA would be better than CU, if all member states are required to have a common tariff among themselves against every product from third countries. The overall tariff line will be higher if other member states maintain the freedom to carry on with their own policies with regards to external tariffs. Nonetheless, it is controversial, whether individual member states would be willing to implement liberal trade policies than a CU, bearing in mind that individual protectionist interests might vocal in the structuring of commercial policies in the former instance than in the latter. Nevertheless, it is possible that tariff variations between member states to an FTA would be advantageous, because their self-interest might persuade member states to lower tariffs so as to circumvent trade and production deflection, provided that the loss to manufacturers as a result of lower tariffs against third countries are not higher than the loss due to deflection of trade and production in the union at a higher tariff line.[71]

Moreover, most FTAs are related with preferential market access, usually unlimited by geographical factors whereas in CUs, geographical considerations are instrumental in determining the purpose of economic – and often political integration between member states involved.[72] This is illustrated by figures 1 and 2 which are the maps of SADC and EAC member states respectively.

On the other hand, from an economic outlook, CU is advantageous to an FTA because of the deflection of production and investment as well as greater costs in regulating the latter. Deflection of production and investment will occur, whether the percentage rule or the rule of transformation is used. In the first option, tariff variations on inputs utilised offer a differential

[70] Balassa (n 41) 73.
[71] Balassa (n 41) 78.
[72] Crawford & Fiorentino (n 32) 4.

benefit in the production of products that are eligible for preference in an FTA except the improbable event when no inputs constitute components with their origin out of an FTA. Comparably, the register of transformation procedure is certainly restricted, thus the probability of deflection in production continues to exist.[73]

Furthermore, the abolition of tariff barriers among member states involved within CU result in administrative economies. Under an FTA, any process applied to circumvent deflection in trade and production will demand substantial regulation. Thus, the extra cost of regulation can be deemed to exceed the cost saving in the fiscal instrument that result from the restriction of tariff barriers. *Ceteris paribus,* an FTA will result into a low efficient resource allocation than CU, and inefficient costs will also be greater.[74]

Notwithstanding the fact that Balassa's taxonomy often understood as an order in the direction of a complete economic union, the determination to establish an FTA or CU appears to be an option rather than an order. It is easy to negotiate an FTA, since it does not demand an arrangement on a common external policy or sharing tariff revenues. Nonetheless, an FTA is afflicted by the challenge of trade deflection. Direct trade deflection, that is, non-state parties directing their consignment of goods through the low-tariff member state as a gateway to an FTA although the target is a high-tariff member state, can be prevented by applying rules of origin. When the low-tariff member state has a sizeable local production, then rules of origin may not avoid indirect trade deflection, whereby external imports go to the low-tariff member state while that state's own manufacturers export to the high-tariff – and therefore high price, member state. The result is a race to the bottom, since the low-tariff member state collects the whole of FTA's tariff revenues while the high-tariff member state to a greater extent does not equally get the desired protection for its manufacturers. therefore, real FTAs are few, even though the expression has been taken over and used to RTAs that are not CUs.[75]

[73] Balassa (n 41) 74.
[74] As above.
[75] R Pomfret 'Regional trade agreements' in Fratianni (n 44) 45.

2.5 Regional integration theories

2.5.1 Neofunctionalism

Neofunctionalism, nowadays generally named supranationalism, was derived to a greater extent from prior institutionalism to describe the impetus in European integration.[76] The emergence of neofunctionalism occurred simultaneously with the earliest move to RIOs in the effects of World War II and decolonisation.[77] Neofunctionalism was derived on and expanded on the functionalist theories of international cooperation and organisation at the centre of international relations idealism. They prescribed methods to defeat the balance of power behaviour and frequent warfare that realists deem endemic characteristics of international politics. [78]

Neofunctionalism propounds that state priorities not only change exogenously due to geopolitical or local changes, but also endogenously intersect in response to integration itself. Furthermore, the interaction that government officials, parties, and interest groups encounter by taking part in RI may develop their integration-friendly attitudes.[79] For instance, countries with a democratic electoral system such as Tanzania when government phases change, there is always a risk that a non-supportive regime coming on board might shelf RI agreements, thus derailing efforts to achieve a faster and deeper convergence.[80] This has in various occasions happened within EAC denying East Africans the benefits that accrue from integrated markets.

Generally, neofunctionalism advocates for an effective and modern integration process, which evades the absolute dominance of governments as a result of spillovers and path-dependence. Whether spillovers translate into broadening, deepening, or widening depends on the degree of preference modification that occurred, reasonable expenses of renationalisation against deeper integration, and the decision formulation procedures established. The magnitude of earlier integration progression therefore plays a significant role. The deeper the earlier integration, the very probable it presents both spillover and path-dependency. In contrast, harmonised policies have a greater chance of becoming stagnant and falling apart in the occurrence of intergovernmental clashes and problems if they continue to exist at sub-critical

[76] Schimmelfennig (n 35) 7.
[77] Schimmelfennig (n 35) 5.
[78] Schimmelfennig (n 35) 6.
[79] Schimmelfennig (n 35) 21.
[80] Mashindano, Rweyemamu & Ngowi (n 15) 121.

degrees of transnational interdependence and supranational dimension.[81] For instance, national interests over community's, ideological difference that made member states pursue different economic policies, Tanzania's closure of the common border with Kenya that halted community activities and intergovernmental clashes between member states such as Tanzania and Uganda that led to a war were among of the reasons for the collapse of the former EAC. Had there been a supranational body maybe the situation would have been different.

Path-dependence and interaction are the two constructive feedback processes that interpret neofunctionalist reasoning on RI and differentiate it from intergovernmentalism.[82] From a neofunctionalist point of view, intergovernmental negotiations that intergovernmentalism centre on are rooted in a vigorous transnational and supranational condition that experience notable reforms over time. While intergovernmental negotiations are the immediate makers of reform in RI, in a longer-term vantage point, they are equally the effects of spillovers and path-dependencies created by initial integration.[83]

2.5.2 Intergovernmentalism

Intergovernmentalism, the major contender of neofunctionalism propounds that RI is the result of intergovernmental negotiations. Governments' reasonable bargaining capacity is what governs to what degree they can realise their preferences.[84] In emphasising the main role of governments, state sovereignty and national identity, intergovernmentalism present central presumption of IR realism to RIT.[85] It has been argued that least developed and developing countries including Tanzania fail to realise their preferences in multilateral trading system due to the lack of reasonable bargaining capacity.

Intergovernmentalism puts governments as core players in global politics. Not only that but they are also seen as at least minimally or boundedly rational actors. It further propounds that, global interdependence generate demand, and international institutions assist to supply, international cooperation.[86]

[81] Schimmelfennig (n 35) 22.
[82] Schimmelfennig (n 35) 18.
[83] Schimmelfennig (n 35) 22.
[84] Schimmelfennig (n 35) 11.
[85] Schimmelfennig (n 35) 6.
[86] Schimmelfennig (n 35) 12.

For weaker states, RI may increase independence as a trade-off for sacrificing formal sovereignty whereas, for powerful states outside the region, RI serves as an association, as it pools resources of the regional states together to support effectual external stability.[87]

Governments take part in integration as a way to obtain commercial benefits for manufacturer groups, conditional on administrative and budgetary restrictions. Subject to how aggressive these strong manufacturers are on the regional market; states require either market liberalisation or protectionist policies. Furthermore, they aim for arrangements on administrative policies that strengthen the aggressiveness of local manufacturers.[88] For instance, South Africa as a regional powerhouse has firms with the capacity and resources to focus on larger markets offered by membership to SADC that could benefit her disproportionably vis-à-vis other small SADC members such as Tanzania while imposing protectionist policies with regards to some industries like automobiles.[89]

Intergovernmentalism does not theorise any regular feedback processes of RI. RI continues to exist in the authority of the governments and its operation indicates and creates the intergovernmental groups of favouritism and authority that created it. Organisations that governments create are targeted to enclose intergovernmental agreements, not to allow independent supranational intervention and endogenous reform.[90] All RECs in Africa do not have independent supranational interventions like the European Union.

Decision-making procedures for improving RI are normally very restrictive. They constantly demand agreement between governments and generally national approval as well. This makes intergovernmental integration arrangements difficult to attain but also difficult to alter when they are in established.[91] In Africa the establishment of RECs result from agreements between governments as well as the approval from national assemblies.

[87] Schimmelfennig (n 35) 13.
[88] Schimmelfennig (n 35) 14.
[89] Mashindano, Rweyemamu & Ngowi (n 15) 159.
[90] Schimmelfennig (n 35) 17.
[91] Schimmelfennig (n 35) 21.

2.5.3 Postfunctionalism

Postfunctionalism originates from the presumption that RI has come to be constantly immersed in the mass politics of the member states. That is to say, it has become politicised. Justifications of RI thus, demands to commence with the perspectives of citizens, their shared identities, and their backing for integration.[92]

Postfunctionalism theory expands on multi-level governance, party and electoral research. The idea of multi-level governance came into being from the study that political power is scattered covering various spatial and functional authorities. That is, RIOs in the similar region may be practically distinguished, for example, the European Union (EU) for the economy, the North Atlantic Treaty Organisation (NATO) for security, and the Council of Europe for human rights.[93]

Postfunctionalism centres on self-determination – national and democratic rather than the efficiency costs of integration.[94] Efficiency normally requires an enlargement of political units whereas, self-determination is more suitable in little units.[95] That is, instead of generating transnational and supranational force for deeper integration, self-determination matters normally initiate local force for a little integration.[96] The more that integration broadens, deepens, and widens, the more it weakens the common self-determination of national communities. Specifically, if widening involves policies that are pertinent to the character and unity of the community, deepening restricts national democracy, and broadening escalates cultural diversity. Furthermore, when RI advances and infiltrates member states, it changes the prevailing political divisions.[97]

Postfunctionalism propounds that party as opposed to national preferences determine negotiations and alliances at regional level. Moreover, politicisation restricts the freedom of manoeuvre that governments take advantage of in negotiations. Rather than setting governments free from the restrictions of local politics, as intergovernmentalists suppose, regional politics gets to be bound by the growing media observation and scrutiny by opposition parties. Thus, governments are required to centre their attention considerably on the

[92] Schimmelfennig (n 35) 23.
[93] As above.
[94] Schimmelfennig (n 35) 24.
[95] Schimmelfennig (n 35) 23.
[96] Schimmelfennig (n 35) 24.
[97] Schimmelfennig (n 35) 25.

possibilities of approval of coordinated policies – and their particular re-election possibilities – in intergovernmental negotiations than during the liberal agreement. Thus, intergovernmental arrangement tends to be difficult, and negotiations have a very high probability of failing. The degree in which politicisation impacts RI hinges on the channelling band between national and regional politics which includes elections, government formation, and referendums. Referendums have manifested to be a very influential tool of politicisation, Eurosceptic mobilisation, and integration fiasco. Similarly, nations in which subjects have powerful dedicated national characters are a little integrated and very probable to withdraw.[98] This is evident in Europe than in Africa and Brexit is the best example.

2.5.4 Domitarianism

Domitarianism propounds that personness in the integration process is as essential to the process as the integration itself. This theory incorporates people at the heart of the process.[99] This approach to thinking integration is likely to shift the emphasis of integration from the worldly character of affairs and politics to the actual centre of human society, which is the person.[100] To that end, the definition of RI needs to capture human aspects.[101]

According to Onditi the study of the three fundamental elements of classical RI theories - economy, institutions and politics bring to light the weakness of these frameworks in describing the role of personness in RI processes, particularly in the African context.[102] Taking into consideration recent events in the world, such as the trend for nations to praise unilateralism and the neglected overlapping problems of regional organisations in Africa.[103] It is obvious that the classical theoretical framework is irrelevant to resolve the contemporary dilemmas encountering African RECs. Moreover, Onditi argues that regional scholarship lacked a contemporary theoretical framework to describe the evolving circumstances in regions.[104] For this reason he introduces a new approach – dominatarianism as an alternative theoretical framework for comprehending the hidden human features such as like and hate as elements of RI processes.[105]

[98] Schimmelfennig (n 35) 26.
[99] Onditi (n 38) 84.
[100] Onditi (n 38) 90.
[101] Onditi (n 38) 91.
[102] n 38, 76.
[103] Onditi (n 38) 77.
[104] n 38, 85.
[105] Onditi (n 38) 78.

This new theoretical framework postulates that the process itself is rooted in the personness of things - ideas, culture, identity, norms and value systems. That, integration itself is impossible in the absence of the person. It presents distinctly why the personness element is very important in RI as it exerts influence on judgement by way of biological responses and consciousness.[106] The theory further propounds that, problems encountering African organisations and increasingly RECs are greatly embedded in doctrinal attitudes - personalities, values and interests.[107] For instance, the recent Kenya-Tanzania border trade dispute following Covid-19 fears exposed African political leaders as the weak link in promoting African integration. Thus, for intra-African trade to be achieved, African leaders must put their political act together to ensure there is political will.[108]

Onditi further says that dominatarianism is circumstantial and domination is both a natural phenomenon and a social construct.[109] While dominance can be understood as affording no chance to garner from the process, the acts of dominance do not automatically suggest oppressive deeds. That is why, in a positive association, the dominating state can provide public goods to the smaller or weaker states.[110]

In the investigation of explanations and associations, the dominatarian process deals with human value system, identity and improvement of people's welfare, as opposed to the regulatory value of persons, economy, institutions and politics. Onditi proposes that RI ought to thus be an amalgamation of people, institutions and geo-economy, as follows, 'person + economy + institutions + politics = an integrated regional society.' He also acknowledges the fact that the association between people and institutions is a complicated affair that involves give and take. Comparably, in RI process, some individual state's interest may be sacrificed for the common good of the society.[111]

[106] Onditi (n 38) 90.
[107] Onditi (n 38) 79.
[108] P Kirui, Why the Kenya-Tanzania border row undermines prospective African free trade, 2020 https://www.researchgate.net/publication/343906144_why_the_Kenya-Tanzania_border_row_undermines_prospective_African_free_trade/link/5f4796b792851c6cfde70b8a/download (accessed 20 November 2021).
[109] n 38, 86.
[110] Onditi (n 38) 88.
[111] Onditi (n 38) 85.

Therefore, the theory of dominance introduces players in a web-like form with the personness initiative in-between the classical RIT and the regionalism approach.[112] As such, Onditi suggests a web-like edge as a systematic apparatus that introduces the association between four elements of the dominatarian theory namely: economy – material resources; institution – values, norms; politics – power relations; and the fourth element, which is the centre of the new theory is personness – feelings, attitudes and perception.[113]

2.6 Conclusion

Contemporary EI theory draws attention to the dynamic consequences of EI, that is, the interplay between trade and investment and the position of institutional arrangements as incentives for RI. As an outcome of organisational changes in the global economy in 1990s brought about by globalisation, foreign direct investment (FDI) has turned out to be progressively significant in the global economy.[114]

Governments opt for regional trade liberalisation because by negotiating with a few states, they can lower several particular interests affected. Therefore, the trade-off is between regional trade liberalisation with a restricted number of states resulting to deep integration and international trade liberalisation that continues to exist at the degree of shallow integration. Multilateral trade liberalisation strengthens international trade that add to transport costs relative to regional trade. RI will favour FDI at the expense of trade because investment costs are decreasing relatively very quickly than transport costs.[115]

Politicians are in most cases attracted to engage in RTAs for political reasons, but research describes why economic forces act in opposition to such setting practically. Most RTAs that involved developing states disintegrated because every member state might have enjoyed trade diversion on the side of its individual inefficient production firms, but did not wish to put up with the trade diversion costs of importing from its partner states' inefficient industries.[116] The following chapter discusses in detail RTAs as well as their governing body WTO.

[112] Onditi (n 38) 80.
[113] n 38, 90.
[114] B Gavin & PD Lombaerde 'Economic theories of regional integration' in Farrell, Hettne & Langenhove (n 46) 73.
[115] B Gavin & PD Lombaerde 'Economic theories of regional integration' in Farrell, Hettne & Langenhove (n 46) 74.
[116] R Pomfret 'Regional trade agreements' in Fratianni (n 44) 44.

CHAPTER THREE: REGIONAL TRADE AGREEMENTS AND THE WORLD TRADE ORGANISATION

3.1 Introduction

World Trade Organisation (WTO) was established on 01 January 1995, but its trading system is about 73 years old. Since 1948, GATT had provided rules for the system and 1998 was its 50th anniversary. GATT developed between various rounds of negotiations whereby the last and largest round, was the Uruguay Round between 1986 to 1994 that resulted in the establishment of WTO. Whilst GATT had principally dealt with trade in goods, WTO and its agreements currently deal with trade in services and intellectual property – traded inventions, creations and designs.[117]

With regards to this study WTO's meaning may range from an organisation for liberalising trade as well as a forum for governments to negotiate trade agreements. WTO operates a system of trade rules. As noted above, WTO came into being out of negotiations, and every single thing WTO does is the result of negotiations. A huge share of WTO's present function comes from the Uruguay Round and prior negotiations under GATT. For instance, in the event that countries have encountered trade barriers and needed them reduced, negotiations have assisted to liberalise trade. However, WTO is not limited to liberalising trade, as in some instances its rules provide for support to trade barriers, for instance, those aiming to safeguard end users or stop the spread of disease.[118]

At the heart of WTO there are agreements negotiated and endorsed by a good share of the globe's trading member states. These legal arrangements lay down basic principles of international commerce. As such, they are ideally agreements binding governments to manage their trade practices in accordance with consented terms. Despite the fact that they are negotiated and endorsed by governments, the aim is to help manufacturers of products and services, exporters, and importers to handle their businesses as freely as possible through transparent and predictable rules.[119]

[117] WTO 'What is the world trade organisation?' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (accessed 20 September 2021).
[118] As above.
[119] WTO 'What is the world trade organisation?' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (accessed 20 September 2021).

3.2 Regional trade agreements (RTAs)

Under WTO, RTAs refer to any mutual trade agreement amongst two or more member states not essentially affiliated to a similar region.[120] RTAs are now a crucial instrument in international trade dealings. They have increased in quantity, depth, complexity and scope over the years. As of June 2016, all WTO members had an RTA in operation.[121]

In WTO, preferential trade arrangements are unilateral trade preferences. They comprise of the general system of preference (GSP) schemes - under which developed countries accord preferential tariffs to imports from developing countries as well as other non-mutual preferential schemes accorded a deferral by the General Council.[122]

The establishment of RTAs is propelled by a range of aspects including economic, political and security factors. Beginning we economic motivations, the establishment of RTAs may be motivated in pursuit of access to huge markets, that might be simple to bring about at the regional or bilateral level, especially in the lack of a readiness between WTO members to liberalise easily on a multilateral footing. Further, participation in RTAs presents a reasonable motivation to liberalisation at the multilateral stage by advancing trade liberalisation on various aspects. RTAs can also be utilised by member states as a channel for encouraging deeper integration of their economies than is currently obtainable through WTO, especially for matters that are not thoroughly handled multilaterally, including investment, competition, environment and labour standards. Membership in RTAs is also presumed to present a channel of ensuring FDI, especially for a state with little labour expenses that has preferential access to a huge, further advanced market. For instance, it is said that developing countries might be ready to sacrifice the advantages presented by GSP schemes and as an alternative to bind themselves to signing mutual RTAs with developed countries so as to gain access to their markets.[123]

[120] WTO 'Regional trade agreements and the WTO' https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 20 September 2021).
[121] As above.
[122] WTO 'Committee on trade and development' https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm (accessed 25 September 2021).
[123] Crawford & Fiorentino (n 32) 16.

Other countries may be attracted into RTAs for defensive purposes, for instance, as a way of conserving market access chances in the lack of MFN driven liberalisation. Moreover, RTAs might be appealing for states that intend to secure benefits from trade in commodity sectors where they cannot contend globally.[124]

Lately political considerations have become key in fostering RTAs. For instance, governments strive to stabilise peace and strengthen regional security with their RTA member states, or to strengthen their bargaining capacity in multilateral negotiations by obtaining dedication at the very beginning on a regional footing, or as a measure to indicate good governance and to prevent backsliding on political and economic improvements. RTAs may as well be utilised by developed members states to create new geopolitical associations and secure diplomatic bonds, thus securing or satisfying political backing by presenting greater preferential access to a huge market. Progressively, the selection of RTA member states seems to be on the basis of political and security considerations, thus possibly threatening or weakening the economic reasoning that was traditionally practiced in promoting the engagement in RTAs. As such where developing states consider RTAs as a defensive necessity, developed countries may aim at RTAs to refrain from being left in isolation.[125]

Non-bias between trading partners is amongst the key tenets of WTO. This is due to the fact that WTO members have dedicated, as a whole, not to have a bias towards a single trading partner over the other. However, RTAs that are mutual PTAs among two or more partners, comprise some of the exceptions and are authorised under WTO, depending on a number of rules.[126] RTAs in essence, are biased as exclusively those that signed the agreement benefit from preferential market access preconditions. WTO members recognise the acceptable function of RTAs that intend at accelerate trade among its members but that do not increase trade barriers in relation to third parties.[127] Moreover, WTO members have asserted that RTAs should continue to be supplementary to and not a replacement for the multilateral trading system.[128]

[124] As above.
[125] As above.
[126] WTO 'Regional trade agreements' https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts (accessed 25 September 2021).
[127] WTO 'Regional trade agreements and the WTO' https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 20 September 2021).
[128] As above.

As noted earlier, WTO members are allowed to participate in RTAs under particular preconditions that are explained in three sets of rules. The first rule covers the establishment and functioning of CUs and FTAs relating to trade in goods under article XXIV of GATT. The second rule covers regional or global agreements for trade in goods among developing member states under the Enabling Clause. The last one deals with arrangements constituting trade in services under article V of the General Agreement on Trade in Services (GATS). In general, RTAs should constitute substantially all trade except if they are under the Enabling Clause and support trade movement without restriction between member states within an RTA in the absence of increasing barriers to trade with third countries.[129] The focus of this study is on the first rule that covers CUs and FTAs, but the study will also touch on the second rule governed by the Enabling Clause since EAC was notified to WTO under it.

WTO members are required to notify RTAs in which they enter. Therefore, all of WTO members have notified involvement in one or more RTAs. Notifications may also refer to the accession of new member states to an agreement that already exists.[130] The first RTA was notified in 1948.[131] As of 30 June 2021, there were 568 notifications from WTO members, counting goods, services and accessions separately.[132] Notifications made pursuant to article XXIV of GATT are 319, whereas those under the Enabling Clause are 61.[133] The essence of notifications is to allow the Committee on Regional Trade Agreements to examine an agreement's compliace with WTO rules.

3.3 Committee on Regional Trade Agreements

Before the establishment of the Committee on Regional Trade Agreements (Committee on RTAs), that is, during GATT years, RTAs were evaluated in separate working parties, and reports on their evaluation were adopted by GATT Council. As such a new working party was created for every new arrangement notified to the Secretariat. This went on even after the creation of WTO. When WTO was created on 01 January 1995, 14 working parties of the GATT 1947 were present. When the Committee on RTAs was formed in February 1996, 12 additional working parties were already formed by either the Council for Trade in Goods or

[129] As above.
[130] WTO 'Regional trade agreements' https://www.wto.org/english/tratop_e/region_e/region_e.htm#facts (accessed 25 September 2021).
[131] As above.
[132] WTO 'Facts & figures: Regional trade agreements 1 January 2021 – 30 June 2021' https://www.wto.org/english/tratop_e/region_e/rtafactfig_e.pdf (accessed 25 September 2021).
[133] WTO *Regional trade agreements database* http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (accessed 25 September 2021).

the Council for Trade in Services. From the creation of WTO to the creation of the Committee on RTAs, similar processes were administered. Nevertheless, no report on the evaluation of an RTA was approved by the appropriate WTO organ.[134]

The Committee on RTAs is a one organ under WTO that is in charge of the evaluation and consideration of individual RTAs. It also has a mandate to hold dialogues on the structural consequences of the agreements for the multilateral trading system and the relationship between them. Other roles are to determine the manner in which essential reporting on the functioning of agreements ought to be conducted and to initiate rules to simplify and develop the evaluation process. The current Chair of the Committee on RTAs is Ambassador Cleopa Kilonzo Mailu (Kenya).[135]

Before the provisional Transparency Mechanism on RTAs was created in 2006.[136] The Committee on RTAs was specifically in charge of administering the evaluation of RTAs notified under article XXIV GATT and, when required, under article V of GATS.[137]

Since GATT deals with international trade in goods, the operations of GATT agreement are the task of the Council for Trade in Goods (Goods Council) that is made up of representatives from all WTO partner states. The current Chair of the Goods Council is Ambassador Lundeg Purevsuren (Mongolia). The Goods Council has 10 Committees that deal with particular issues including rules of origin, market access and trade facilitation to mention just a few. These Committees also consist of all WTO member countries.[138]

RTAs under article XXIV were notified to the Goods Council, which approved the scope and limitations and handed over the agreement to the Committee on RTAs for evaluation. Examination was mandatory in the case of RTAs notified under article XXIV of GATT but optional under the Enabling Clause. The evaluation of an agreement in the Committee on RTAs

[134] WTO 'Work on RTAs prior to the establishment of the Committee on RTAs' https://www.wto.org/english/tratop_e/region_e/rta_prior_establishment_e.htm (accessed 20 September 2021).
[135] WTO 'The Committee on regional trade agreements' https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed 25 September 2021).
[136] Art 22 of the Text of the General Council Decision on the Transparency Mechanism for Regional Trade Agreements of 2006 (Text on Transparency Mechanism for RTAs) https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/671.pdf&Open=True (accessed 25 September 2021).
[137] WTO 'Historical background on Committee work (1996 – 2006)' https://www.wto.org/english/tratop_e/region_e/historical_background_rta_e.htm (accessed 20 September 2021).
[138] WTO 'GATT and the Goods Council' https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm (accessed 25 September 2021).

served two functions namely, to ensure the transparency of RTAs and permitted WTO members to examine an RTA's compliance with WTO requirements.[139]

Evaluation was conducted basing on details presented by members to RTAs in a prescribed standard format developed by the Committee on RTAs – including by the means of written responses to written questions presented by WTO members or by means of oral responses to questions presented at the Committee on RTAs gathering. As soon as the factual evaluation was brought to an end, the Secretariat wrote the evaluation report. Subsequently, discussions were carried out and once the report was approved by the Committee on RTAs, it was presented to the appropriate superior organ for approval.[140]

Nonetheless, due to the absence of agreement between WTO members, no evaluation report has been carried out since 1995, when evaluation of RTAs were administered in separate working parties prior to the establishment of the Committee on RTAs. Under reporting, the Committee on RTAs initiated a consistent arrangement for the presentation of biennial reports relating to those RTAs where an evaluation report had already been approved. In 2006, the Committee on RTAs postponed any undertaking in this regard and after the adoption of the transparency mechanism the tradition of presenting a schedule for biennial reports has been discontinued.[141]

The function of the Committee on RTAs was considerably reviewed as a n outcome of the General Council Decision of 14 December 2006, that created a Transparency Mechanism for Regional Trade Agreements on a provisional basis. The Committee on RTAs is now tasked with executing the transparency mechanism for RTAs falling under article XXIV of GATT and article V of GATS. The Committee on Trade and Development on the other hand considers RTAs falling under the Enabling Clause – covering trade agreements among developing countries.[142]

[139] WTO 'Historical background on Committee work (1996 – 2006)' https://www.wto.org/english/tratop_e/region_e/historical_background_rta_e.htm (accessed 20 September 2021).
[140] As above.
[141] As above.
[142] WTO 'The Committee on regional trade agreements' https://www.wto.org/english/tratop_e/region_e/regcom_e.htm (accessed 25 September 2021).

3.4 Committee on Trade and Development

RTAs falling under the meaning of the Enabling Clause are notified to the Committee on Trade and Development (Committee on T&D).[143] The Committee on T&D acts as a focal point for the examination and harmonisation of operations on development in WTO. To that end it examines a wide scope of matters in relation to the trade of developing states. The current Chair of the Committee on T&D is Ambassador Dr. Muhammad Mujtaba Piracha (Pakistan).[144]

Committee on T&D acts as the body for the notification and examination of RTAs between developing states. The Committee on T&D also examines non-mutual preferential arrangements in favour of developing states authorised under the Enabling Clause, specifically the GSP – arrangements by developed states according preferential duties to imports from developing states.[145]

On 14 December 2006, the General Council adopted a Decision on a Transparency Mechanism for Regional Trade Arrangements.[146] The decision directs the Committee on T&D to execute the RTA Transparency Mechanism for RTAs falling under paragraph 2(c) of the Enabling Clause that allows preferential agreements between developing states on goods trade. Under the transparency mechanism, WTO members negotiating a new RTA are obliged to present to WTO details on the RTA, inclusive of its range, whichever anticipated calendar for its coming into operation and any other pertinent particulars. The decision also specifies that the Committee on T&D will convene in the allocated period to discharge the roles provided under the mechanism including examining notified RTAs basing on factual presentation by WTO Secretariat.[147]

Committee on T&D also carries out the transparency mechanism for PTAs, that was created by the General Council Decision of 14 December 2010.[148] The mechanism pertains to the non-mutual preferential arrangements of WTO members. The Committee on T&D convenes in dedicated period to examine notified PTAs. It has an authority to keep under

[143] WTO 'Historical background on Committee work (1996 – 2006)' https://www.wto.org/english/tratop_e/region_e/historical_background_rta_e.htm (accessed 20 September 2021).
[144] WTO 'Committee on trade and development' https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm (accessed 01 october 2021).
[145] As above.
[146] Text on Transparency Mechanism for RTAs.
[147] WTO 'Committee on trade and development' https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm (accessed 26 September 2021).
[148] WTO 'Transparency Mechanism for Preferential Trade Arrangements' (16 December 2010) WTO Doc WT/L/806 (2010) https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/806.pdf&Open=True (accessed 25 September 2021).

constant examination the engagement of developing member states in the multilateral trading arrangement. As assistance to the Committee on T&D in its examination, WTO Secretariat regularly issues an update to its statistical report on the engagement of developing states in international trade.[149]

3.5 Transparency mechanism for regional trade agreements

On 14 December 2006, the General Council Decision created on a provisional basis a new transparency mechanism (TM) for all RTAs. The new TM was negotiated in the Negotiating Group on Rules making it the first outcome from the negotiations. The new TM elucidated the rules relating to the timing of notification of RTAs to WTO and created the procedure by which these RTAs are examined by WTO members. That is, either in the Committee on RTAs or the Committee on T&D basing on factual presentation by WTO Secretariat. For greater certainty, the Committee on RTAs is mandated to execute TM in respect of RTAs falling under articles XXIV of GATT and V of GATS whereas the Committee on T&D, meeting in a dedicated period, examines the decision with regards to notifications falling under the Enabling Clause. WTO's database on RTAs was also established under TM.[150]

TM is executed on a provisional basis. WTO members are to examine, and where required, alter the decision and substitute it by a permanent mechanism adopted as part of the general outcomes of the Doha Round. The examination by WTO members of a notified RTA ought to be ordinarily finalised in a year from the date of notification. WTO Secretariat will draft an accurate calendar for the examination of an RTA in discussion with the members thereto at the time of the notification. Members to an RTA shall present information as expressed in precisely in the Annex to the transparency decision available to the Secretariat, where feasible, digitally, as soon as practicable – but usually in a period of ten or 20 weeks with regard to RTAs including only developing states from the date of notification of the arrangement.[151]

Procedurally, one official gathering will be dedicated to the examination of every notified RTA, where there is any supplementary exchange of particulars it is done in written form. WTO Secretariat's factual presentation, as well as any supplementary particulars

[149] WTO 'Committee on trade and development' https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm (accessed 25 September 2021).
[150] WTO 'Transparency mechanism for RTAs' https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 21 September 2021).
[151] WTO 'Transparency mechanism for RTAs' https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 21 September 2021).

presented by members, is to be disseminated in all WTO official languages within eight weeks prior to the relevant Committee on RTAs gathering. WTO Members' written questions or comments on the RTA under examination are to be disseminated to the RTA members through the Secretariat within four weeks prior to the Committee on RTAs gathering and will be disseminated, accompanied with the responses, to all WTO members within three working days prior the gathering. In the closing of the RTA's examination session, RTA members shall present to WTO a short-written report on the realisation of liberalisation obligations in an RTA as originally notified. Article 22(b)[152] provides for a factual abstract to be drafted by the Secretariat in order to submit characteristics of RTAs that the Committee on RTAs has closed the factual implementation by 31 December 2006.[153]

During the 10th Ministerial Conference in Nairobi in 2015, WTO members agreed to act in the direction of the change of the present provisional TM into a permanent mechanism, in the absence of bias to inquiries in respect of notification conditions.[154]

3.6 Conclusion

The text of article XXIV of GATT does not restrict the approval of RTAs that are not in compliance with its rules. Thus, evaluating whether or not RTAs comply with WTO requirements has been a challenge as the interpretation of the rules remain unresolved. Therefore, the rules have been subject to different interpretations for years, something that resulted to a circumstance of exceptional ambiguity with regards to the relation between RTAs and the multilateral trading system. As such, members in 2001 agreed in the Doha Declaration to negotiate with the intention of simplifying and developing disciplines and procedures under the prevailing WTO provisions applicable to RTAs. It also provides that, negotiations take into account the developmental aspects of RTAs. Negotiations on RTAs fall under the work of the Negotiating Group on Rules, which reports to the Trade Negotiations Committee.[155]

Such negotiations were inevitable because the prevailing WTO rules on RTAs have demonstrated beyond doubt over the years to be ill-equipped to cope with the actualities of RTAs. This is further manifested by the fact that the Committee on RTAs has enjoyed inconsequential success in evaluating the conformity of RTAs notified to WTO, due to diverse

[152] Text on Transparency Mechanism for RTAs.
[153] WTO 'Transparency mechanism for RTAs' https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (accessed 21 September 2021).
[154] WTO 'Negotiations on RTAs' https://www.wto.org/english/tratop_e/region_e/region_negoti_e.htm (accessed 25 September 2021).
[155] As above.

political and legal problems, majority of which were inherited from GATT years. Moreover, there are existing debates on the interpretation of WTO rules against which RTAs are evaluated, and institutional hitches emanating from either the wanting of WTO rules, for instance, on preferential rules of origin, or from the problematic inconsistencies between the prevailing WTO rules and those included in some existing RTAs.[156] To that end, the Committee on RTAs has been incapable of carrying out successfully its roles of reviewing and overseeing the implementation of RTAs.

[156] Crawford & Fiorentino (n 32) 19.

CHAPTER FOUR: TANZANIA WITHIN REGIONAL ECONOMIC COMMUNITIES

4.1 Introduction

Tanzania is a union of two previously independent states, Tanganyika – also known as mainland Tanzania and Zanzibar, that merged in 1964 to form the United Republic of Tanzania. Tanganyika gained independence in 1961, whist Zanzibar revolution was in 1963. With the establishment of independent states, free trade relations that existed during colonial times were not continued.[157]

Tanzania is a signatory and a founding member of WTO.[158] She was a member of WTO since 1964.[159] Tanzania is also an active member of EAC, SADC and recently AfCFTA. Thus, on the continent, she is implementing EACCU and SADC FTA[160] and AfCFTA.

One of Tanzania's key political priorities is to promote considerable integration and deepen relations with other African states and other regional communities. To that end she played a significant part in re-establishing EAC, actively supports the deepening of SADC integration[161] and recently ratified AfCFTA. This chapter explores the status of Tanzania in the two RECs, that is, EAC and SADC in detail.

4.2 Southern African Development Community (SADC)

Tanzania is a founding member of SADC; she was there since the establishment of frontline states. SADC existed since 1980, when it was established as a free association of nine majority-ruled states in Southern Africa known as the Southern African Development Coordination Conference (SADCC) in Lusaka, Zambia. The major purpose of SADCC was to harmonise development programmes so as to lower economic reliance on at that point in time apartheid South Africa.[162] The conversion of the association from a Coordinating Conference into a Development Community (SADC) occurred on 17 August 1992 – came into effect on 30 September 1993 at Windhoek, Namibia, when the Declaration and Treaty of the Southern African Development Community of 1992 (Treaty of SADC) was signed at the Summit of

[157] B Balassa 'Types of economic integration' in Machlup (n 51) 27.
[158] World Bank 'Tanzania diagnostic trade integration study (DTIS) update 2017: Boosting growth and prosperity through agribusiness, extractives, and tourism' (2018) (Tanzania DTIS) at 19.
[159] Tanzania DTIS (n 158) 33.
[160] Tanzania DTIS (n 158) 19.
[161] Mashindano, Rweyemamu & Ngowi (n 15) 102.
[162] SADC 'History and Treaty' https://www.sadc.int/about-sadc/overview/history-and-treaty/ (accessed 16 September 2021).

heads of state and government, consequently granting the association a legal personality.[163] That is, from a free alliance into a legally binding agreement.

Community means the organisation for EI.[164] The aim of converting SADCC into SADC was to foster deep economic cooperation and integration to assist in addressing a lot of challenges that make it hard to maintain economic development and socio-economic growth, such as prolonged reliance on exports of a couple of basic products. It was thus, inevitable for SADC member states to quickly change and reform their economies. The little volume of their separate markets, poor socio-economic infrastructure, high per capita costs of equipping infrastructure and their small revenue base, created hardships for them to separatelly stimulate or support key investments for their sustained development.[165]

The main objectives of SADC are to increase partner states' economic development, investment, job creation and equitable intra-regional growth.[166] SADC is currently made up of 16 partner states namely: Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. SADC headquarters are in Gaborone, Botswana.[167] Figure 1 provides an illustration of SADC member states.

Member states and SADC are allowed to enter into trade arrangements with third countries, regional and international organisations whose purposes are consistent with those of SADC and provisions of the Treaty of SADC.[168]

SADC is dedicated to deepen the integration processes among its member states and has approved the regional indicative strategic development plan (RISDP) so as to present key recommendations in the draft and development of SADC programmes, projects and activities that would help in attaining development and economic growth, elimination of poverty, improving the level and conditions of lives of the citizens of Southern Africa and providing for the community deprived with the aid of RI.[169]

[163] Art 2(1) of Treaty of the Southern African Development Community of 1992 (Treaty of SADC).
[164] Art 1 of Treaty of SADC.
[165] Mashindano, Rweyemamu & Ngowi (n 15) 181.
[166] Mashindano, Rweyemamu & Ngowi (n 15) 15.
[167] Art 2(2) of Treaty of SADC.
[168] Art 24(1) of Treaty of SADC.
[169] Mashindano, Rweyemamu & Ngowi (n 15) 3.

Figure 1: A map of SADC member states

Source: SADC 'SADC overview' https://www.sadc.int/about-sadc/overview/ (accessed 16 September 2021)

In 2004 Tanzania notified WTO through its Permanent Mission that SADC member states subscribed to a Protocol on Trade in the Southern African Development Community Region aiming at establishing an FTA as provided for under article XXIV of GATT.[170]

4.2.1 Tanzania's implementation of Protocol on trade in the Southern African Development Community Region

Protocol means an instrument of implementation of the Treaty whereas region means the geographical area of the SADC member state.[171] SADC has been attempting consistently to establish policies applicable to accelerate trade, since trade has been one of the very essential strengths of integration and a source of development of a lot of states.[172] For that reason the

[170] WTO 'Southern African Development Community Free Trade Area: Notification from Tanzania' (9 August 2004) WTO Doc WT/REG176/N/1 (2004).
[171] Art 1 of Treaty of SADC.
[172] Mashindano, Rweyemamu & Ngowi (n 15) 182.

Protocol on trade in the Southern African Development Community Region **(**SADC Protocol on Trade) was adopted in 1996 and came into force in 2001.[173] Therefore, SADC Protocol on Trade in goods and services is one of the core fields of cooperation between the partner states. Partner states' goals, as provided for in the Protocol, cover the liberalisation of intra-regional trade in goods and services on the footing of fair, mutually equitable and beneficial trade arrangements and the establishment of an FTA including partner states.[174] SADC Protocol on Trade aimed at removing intra-regional trade barriers and transforming the community into an FTA for 85 percent of goods by 2008, and for all goods by 2012. That is, to accelerate trade in the absence of any restrictions, by removing import duties,[175] abolishing export duties[176] and NTBs.[177]

As noted above SADC Protocol on Trade was notified to WTO under article XXIV of GATT[178] and referred by the Council for Trade in Goods to the Committee on RTAs for evaluation.[179] Evaluation of the Protocol's provisions demonstrate a close link between the rules set out under the Protocol and the rules found in WTO agreements, with several rules on various disciplines having been embraced directly from WTO. Although this move had the advantage of assuring that there is no inconsistency between these provisions, the chance to design the provisions to the needs of SADC partner states some of whom were not WTO members at the time was lost.[180]

Tanzania has made laudable improvement in administering SADC Protocol on Trade. Barriers to intra-SADC trade have been gradually removed – especially those connected to the elimination of tariffs and non-tariff barriers and import duties. The liberalisation of Tanzania's trade regime has led to lowering of its tariffs at nearly 7 percentage points since the middle of 1990s. Tanzania's import duties have also fallen evidently lower than the regional average.

[173] SADC 'Documents & publications' https://www.sadc.int/documents-publications/show/Protocol%20on%20Trade%20 (accessed 17 September 2021).
[174] Art 2 of Protocol on Trade in the Southern African Development Community Region **(**SADC Protocol on Trade).
[175] Art 4 of SADC Protocol on Trade.
[176] Art 5 of SADC Protocol on Trade.
[177] Art 6 of SADC Protocol on Trade.
[178] WTO 'Southern African Development Community Free Trade Area: Notification from Tanzania' (9 August 2004) WTO Doc WT/REG176/N/1 (2004).
[179] WTO 'Protocol on Trade in the Southern African Development Community: Notification from Tanzania' (27 August 2004) WTO Doc WT/REG176/1/Rev.1 (2004).
[180] Mutai (n 33) 84.

Notably, all tariffs are ad valorem, and there are no seasonal duties, tariff quotas, or variable levies.[181]

In 2003, EAC and SADC constituted approximately 10 percent of Tanzania's exports, with substantial trade to EAC members revolving around agri-food products and for SADC, primarily minerals and industrial goods. With regard to imports, in 2003, SADC was virtually three times as significant as EAC as a source of goods.[182]

Protocol on Trade[183] as well as Treaty of SADC[184] recognise the provisions of other RTAs, bilateral trade agreements, and multilateral trade agreements and rules under GATT and WTO.[185] Moreover, member states are allowed to conclude new preferential trade agreements among themselves, as long as such agreements conform to the provisions of the Protocol.[186]

SADC Protocol on Trade, that constitutes the framework of SADC trade regime, is in fact older than the new EAC Treaty, as it was signed in August 1996 whereas EAC Treaty was signed in November 1999. Nonetheless, it was not until four years later, in 2001 that it came into effect. Such a delay in Protocol's coming into effect was, presumably, an earlier indication of the region's absence of willingness to participate in trade liberalisation.[187]

SADC Protocol on Trade prohibits members states to conclude preferential trade agreements with third countries that may hamper or defeat the purposes of the Protocol and that any benefit, concession, privilege or power accorded to a third country under such arrangements ought to be accorded to other partner states.[188] Since the signing of EACCU, Tanzania has accorded market access preferences to Kenya and Uganda that are greater than those provided to her SADC partner states. This means Tanzania is required to grant EAC free intra-regional trade preferences to all SADC partner states. Nonetheless, SADC Protocol on Trade also provides SADC partner states a deviation from the commitment to grant benefits if the supplementary privileges are dealt with in the circumstances of an arrangement that came before the SADC Protocol on Trade.[189] Since EAC Treaty entered into effect three months prior to SADC Protocol on Trade, the waiver could apply to Tanzania. However, as integration

[181] Mashindano, Rweyemamu & Ngowi (n 15) 17.
[182] Mashindano, Rweyemamu & Ngowi (n 15) 108.
[183] Art 27(1) of SADC Protocol on Trade.
[184] Art 24(1) of Treaty of SADC.
[185] Mashindano, Rweyemamu & Ngowi (n 15) 34.
[186] Art 27(2) of SADC Protocol on Trade.
[187] Mutai (n 33) 84.
[188] Art 28(2) of SADC Protocol on Trade.
[189] Art 28(3) of SADC Protocol on Trade.

deepens, these matters need to be determined or else it might result to unreasonable trade deflection.[190]

Comparably, in SADC, Protocol on Trade made provisions for the removal of barriers to intra-SADC trade and lowering tariffs. Such removal and lowering were to be implemented under the principle of asymmetry, that were supposed to be attained in an eight-year period, that was, by 2008.[191] That was a lengthy transition period than that assumed by EAC, although SADC process commenced in advance. The schedule formulated by partner states catered for the five Southern African Customs Union (SACU) member states to spearhead the abolition of their tariffs. Moreover, the removal of barriers to intra-SADC trade takes into account the existing PTAs between and among member states.[192] Protocol on Trade also provides for goods to be classified into various categories aimed at lowering tariffs. Therefore, goods in Category A were to be liberalised instantly; those in Category B were singled out for progressive liberalisation; while Category C constituted of goods recognised as being sensitive and whose tariffs are last to be liberalised.[193]

The following are impacts of SADC Protocol on Trade on regional trade. First, rules of origin (RoO) on a number of products are more restrictive than those of EAC. Second, additional costs to member states as costs of negotiating in a number of forums are high and customs officials have to be trained in all RECs in order to make efficient business decisions.[194] Third, infant industries of small states like Tanzania could be forced to close as more powerful members like South Africa intensify regional competition. Fourth, possible losses of customs revenue due to unwarranted trade deflection[195] as well as possible losses of government revenue due to the phasing out of tariffs on intra-regional trade. Fifth, the opening of domestic markets to partner countries can increase competition in sectors with previously highly concentrated industrial structures. This would tend to reduce the monopolistic pricing power on incumbents - increasing welfare for the economy as a whole.[196] Sixth, the possible costly trade diversion rather than welfare-enhancing trade creation, if trade is shifted from efficient producers outside SADC to preferential trading partners that produce at higher costs. In both cases, government loses tariff revenue on imports from third countries, without domestic

[190] Mashindano, Rweyemamu & Ngowi (n 15) 113.
[191] Art 3(1)(b) of SADC Protocol on Trade.
[192] Art 3(1)(a) of SADC Protocol on Trade.
[193] Mutai (n 33) 85.
[194] Mashindano, Rweyemamu & Ngowi (n 15) 112.
[195] Mashindano, Rweyemamu & Ngowi (n 15) 113.
[196] Mashindano, Rweyemamu & Ngowi (n 15) 137.

producers benefiting to a corresponding extent from lower import prices the elimination of intraregional trade barriers between small countries is likely to generate more trade diversion and little trade creation. The risk for trade diversion to occur is particularly high because trade within SADC countries accounts for only a small share of overall trade. Last but not least, SADC FTA will be net-improving, with small economies like Tanzania reaping smaller benefits in relation to its GDP than other SADC members.[197]

4.3 East African Community (EAC)

EAC is a regional intergovernmental organisation of six member states – admission of the seventh is ongoing. The three founding partners states are the Republics of Kenya, Uganda and the United Republic of Tanzania. The Republics of Burundi and Rwanda joined in 2007 and the Republic of South Sudan joined in 2016. EAC headquarters are in Arusha, Tanzania.[198]

East African RI dates far back to the early 20th century, at that point in time comprising of three of the current partner states of EAC namely Kenya, Tanzania and Uganda. The formal social and economic integration measures in the East African region began with, *inter alia*, the establishment of the Customs Collection Centre in 1900.[199] The history of cooperation can be traced as far back as in 1917 when the British protectorates of Kenya and Uganda were united altogether in CU,[200] that subsequently the then Tanganyika became a member in 1927.[201]

The initial move in attempting to re-establishing EAC would be traced back to measures taken by Presidents Arap Moi of Kenya, Ali Hassan Mwinyi of Tanzania and Yoweri Museveni of Uganda that led to the signing of an agreement for the establishment of a Permanent Tripartite Commission for East African Co-operation, in Arusha, Tanzania, on 30 November 1993, in the attendence of the late Mwalimu Julius Kambarage Nyerere. The Secretariat of the Commission was formed in 1996, followed by the signing of the Treaty reving EAC on 30 November 1999 – Treaty for the Establishment of the East African Community of 1999 (Treaty for EAC). The Treaty came into effect on 7 July 2000[202] with the official inauguration on 15 January 2001.[203]

[197] Mashindano, Rweyemamu & Ngowi (n 15) 138.
[198] EAC 'Overview of EAC' https://www.eac.int/overview-of-eac (accessed 17 September 2021).
[199] Preamble to the Treaty for the Establishment of the East African Community of 1999 (Treaty for EAC).
[200] Mutai (n 33) 82.
[201] EAC 'History of the EAC' https://www.eac.int/eac-history (accessed 16 September 2021).
[202] Lwaitama, Kasombo & Mkumbo (n 40) 12.
[203] Rutaihwa & Rutatina (n 2) 175.

Figure 2: A map of EAC member states

Source: EAC 'Overview of EAC' https://www.eac.int/overview-of-eac (accessed 17 September 2021)

The overall objective of the EAC regional bloc is to strengthen the integration process through the co-operation in liberalisation and advancement of intra-regional trade.[204] To that end, EAC member states agreed to develop and adopt an East African trade regime[205] including an undertaking to establish among themselves, *inter alia*, a CU.[206] Article 75 of Treaty for EAC provides for the formation of CU to be detailed in a Protocol. Consequently, Protocol on the Establishment of the East African Community Customs Union of 2004 (Protocol on EACCU) was signed on 02 March 2004 at the EAC Summit. Article 2 of the Protocol on EACCU establishes EACCU. EACCU became operational on 01 January 2005.[207] As per the Treaty, CU was to be established progressively over the course of a transitional period.[208] Therefore, EACCU became fully-fledged on 01 January 2010 following the end of a five-year transitional period.[209] This arrangement was fairly unusual as EAC did not follow a linear model to EI as both an FTA and CU stages were implemented simultaneously.[210]

[204] Rutaihwa & Rutatina (n 2) 175.
[205] Art 74 of Treaty for EAC.
[206] Art 5(2) of Treaty for EAC.
[207] EAC 'History of the EAC' https://www.eac.int/eac-history (accessed 16 September 2021).
[208] Art 75(2) of the Treaty for the Establishment of the East African Community of 1999 (Treaty for EAC).
[209] EAC 'History of the EAC' https://www.eac.int/eac-history (accessed 16 September 2021).
[210] Mutai (n 33) 83.

EAC was notified as an RTA to WTO under the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries Decision of 28 November 1979 (Enabling Clause) on 9 October 2000.[211] The differential and more favorable treatment for developing countries under the Enabling Clause was formulated to accelerate and boost the trade of developing states.[212] Therefore, WTO members may grant differential and more favourable treatment to developing states without granting such treatment to other members.[213] This is with regards to the exceptional economic problems and the special development, financial and trade demands of the least developed countries[214] whereby developed states do not require mutual obligations made by them in trade negotiations to lower or abolish tariffs and other barriers to the trade of developing states,[215] for instance, under GSP measures.[216] EAC reflects the regional agreements entered into between less developed member states for the reciprocal lowering or abolition of tariffs.[217] This kind of arrangement is also known as partial scope agreements.[218] Similar to article XXIV of GATT, the Enabling Clause is an exception[219] to MFN principle[220] although less stringent.

EAC was notified to the WTO as a CU on 01 August 2012.[221] Although EAC's notification was not under article XXIV of GATT, the provisions of the Protocol on the Establishment of the East African Community Customs Union do conform to the provisions of article XXIV in terms of definition and conceptualisation of a CU. And as indicated earlier the Text of article of XXIV of GATT are the governing provisions with respect to CUs.

[211] WTO *'Regional trade agreements database'* https://rtais.wto.org/UI/PublicAllRTAList.aspx (accessed 17 September 2021).
[212] Art 3(a) of the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries Decision of 1979 (Enabling Clause).
[213] Art 1 of Enabling Clause.
[214] Art 6 of Enabling Clause.
[215] Art 5 of Enabling Clause.
[216] Art 2(a) of Enabling Clause.
[217] Art 2(c) of Enabling Clause.
[218] Crawford & Fiorentino (n 32) 5.
[219] *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report (1 December 2003) WTO Doc WT/DS246/R (2003).
[220] WTO 'Principles of the trading system' https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 17 September 2021).
[221] WTO *'Regional Trade Agreements Database'* http://rtais.wto.org/UI/PublicAllRTAListAccession.aspx (accessed 17 September 2021).

4.3.1 Tanzania's implementation of Protocol on the Establishment of the East African Community Customs Union

Protocol on the Establishment of the East African Community Customs Union (Protocol on CU) was signed on 2 March 2004 and came into effect on 1 January 2005.[222] As an active member of EAC, Tanzania was executing CET since 2004.[223] She consequently changed her trade policy regime in January 2005, when together with Kenya and Uganda joined EACCU. Thus, EAC members states adopted a CET.[224] As a result, the Community is required to harmonise its trade dealings with third countries in order to accelerate the operation of a common policy in the area of external trade.[225] CET means a similar percentage of tariff charged on products imported from foreign countries.[226]

The major objective of CU is to promote the liberalisation of intra-regional trade in goods on the condition of reciprocal favourable trade deals between member states.[227] Protocol on CU provides for, among other things, the abolition of tariffs and other levies of similar character on imports and the establishment of CET.[228] Since the then three member states were at distinct status of economic growth, the method opted for was continuous and uneven, with instant duty-free transportation of goods from Tanzania and Uganda to Kenya, and between Tanzania and Uganda.[229] Goods transported from Kenya to Tanzania and Uganda were classified into two categories namely, Category A goods qualified for instant duty-free preference, whereas Category B goods qualified for a progressive lowering of tariffs.[230]

4.4 African Continental Free Trade Area (AfCFTA)

AfCFTA is a member-driven[231] trade arrangement in the form of an FTA.[232] AfCFTA is established under article 2 of the Agreement Establishing the African Continental Free Trade Area of 2018 (AfCFTA Agreement) that was signed at the 10th Extraordinary Summit of the African Union (AU) Assembly of heads of state and government held on 21 March 2018, in

[222] EAC 'History of the EAC' https://www.eac.int/eac-history (accessed 17 September 2021).
[223] Tanzania DTIS (n 158) xvii.
[224] Mashindano, Rweyemamu & Ngowi (n 15) 133.
[225] Art 37(2) of Protocol on EACCU.
[226] Art 1(1) of Protocol on the Establishment of the East African Community Customs Union of 2004 (Protocol on EACCU).
[227] Art 3(a) of Protocol on EACCU.
[228] Art 2(4) of Protocol on EACCU.
[229] Arts 11(1) & (2) of Protocol on EACCU.
[230] Art 11(3) of Protocol on EACCU.
[231] Art 5(a) of the Agreement Establishing the African Continental Free Trade Area of 2018 (AfCFTA Agreement).
[232] Erasmus (n 20) 9.

Kigali, the Republic of Rwanda.[233] The agreement entered into force on 30 May 2019 and became operational on 7 July 2019. The commencement of trading under AfCFTA Agreement began on 1 January 2021. As at 9 September 2021, 38 countries had deposited their instruments of ratification and 41 countries had ratified the agreement.[234] AfCFTA is aimed at creating a single continental market for goods and services facilitated by movement of persons[235] with an estimate of 1.2 billion consumers that is projected to reach 2.5 billion by 2050.[236] Thus, AfCFTA is projected to be the largest FTA in the world in terms of numbers of participating countries since the establishment of WTO.[237]

Tanzania ratified the ambitious AfCFTA Agreement on 09 September 2021.[238] AfCFTA aims, is determination and committed to promote intra-African trade in goods.[239] AfCFTA also aims to resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.[240] This is due to the fact that RECs FTAs are acknowledged as building blocks towards the establishment of AfCFTA.[241] AfCFTA Agreement defines RECs to mean RECs recognised by the AU including EAC and SADC.[242]

Essentially, state parties that are members of other RECs, regional trading arrangements and CUs that have attained among themselves higher levels of regional integration including the elimination of customs duties and trade barriers than those provided for under AfCFTA Agreement and Protocol on Trade shall maintain and where possible improve upon those such higher levels of trade liberalisation among themselves.[243]

Furthermore, AfCFTA is premised on the preservation of the *acquis*.[244] The *acquis* is not defined in AfCFTA texts but is meant to refer to what has already been achieved. The effect is

[233] AU 'AU member countries create history by massively signing the AfCFTA agreement in Kigali' Press release N.XX/2018 https://au.int/sites/default/files/pressreleases/34053-pr-pr_-_au_member_countries_create_history_at_the_afcfta_extraordinary_summit_in_kigali_f.pdf (accessed 28 September 2021).
[234] Tralac 'Status of AfCFTA ratification' https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (accessed 19 November 2021).
[235] Art 3(a) of the Agreement Establishing the African Continental Free Trade Area of 2018 (AfCFTA Agreement).
[236] AfCFTA 'Who we are' https://afcfta.au.int/en/who-we-are (accessed 28 September 2021).
[237] AfCFTA 'Who we are' https://afcfta.au.int/en/who-we-are (accessed 28 September 2021).
[238] Tralac 'Status of AfCFTA ratification' https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html (19 November 2021)
[239] Art 3(a) of AfCFTA Agreement; Preamble to the AfCFTA Protocol on Trade in Goods; art 2(2)
[240] Art 3(h) of AfCFTA Agreement.
[241] Preamble to the AfCFTA Agreement; Art 3(c); Art 5(b) of AfCFTA Agreement.
[242] Art 1 of AfCFTA Agreement.
[243] Art 19(2) of AfCFTA Agreement; art 8(2) of Protocol on Trade.
[244] Art 5(f) of AfCFTA Agreement.

that the tariff concessions extended as part of AfCFTA negotiations, would only be among those state parties 'that have no preferential arrangements in place between them.' Intra-REC trade is fully governed by the relevant REC FTA regimes and will not see any liberalisation via the AfCFTA negotiations.[245]

All in all, what makes AfCFTA distinct from other African RECs is the provision providing for the review of the agreement every five years after its entry into force by state parties to ensure its effectiveness, achievement of deeper integration and adapting to the evolving regional and international developments whereby state parties may make recommendations for amendments taking into account the experience acquired and progress achieved during the implementation of the agreement.[246]

4.5 Comparative analysis of Tanzania's position within regional economic communities

With regard to trade relations with third countries, SADC's situation is unlike that applied by EAC in that SADC Protocol on Trade incorporates an MFN clause.[247] Thus, member states are allowed to grant or maintain PTA with third countries, on the condition that such agreements do not hinder the purposes of the Protocol and any benefit, concession, privilege or power afforded to a third country under such agreements should also be granted to other member states.[248] The consequence of this provision for Tanzania, which is EAC member state, is that the privileges and benefits afforded to the other EAC member states ought to also be afforded entirely to all the other SADC member states. However, SADC Protocol on Trade goes on to stipulate that partner states are not required to grant preferences of another trading group to which they were a member at the time of the Protocol's entry into force.[249] When SADC Protocol on Trade entered into force Tanzania was already a member of EAC. Therefore, this unusual circumstance is an evident instance of legal problems brought about by overlapping memberships or the spaghetti bowl syndrome.[250]

One of the fundamental features of CUs is that member states ought to conduct trade arrangements with third countries as a block, however, EAC is conscious of individual member states commitments in other RECs.[251] Thus, it requires partner states to adhere to their

[245] Erasmus (n 20) 7.
[246] Art 28 of AfCFTA Agreement.
[247] Art 28(1) of SADC Protocol on Trade.
[248] Art 28(2) of SADC Protocol on Trade.
[249] Art 28(3) of SADC Protocol on Trade.
[250] Mutai (n 33) 90.
[251] Preamble to the Protocol on EACCU.

commitments with regards to other multilateral and international organisations to which they are members.[252] This implies that Tanzania, which was by that time a member of SADC and had signed SADC Protocol on Trade before the new EAC became operational, is not obliged to suspend her commitments under SADC. Nonetheless, this can evidently result to uncertainties where Tanzania's EAC commitments are in conflict with those of SADC. Moreover, it indicates the absence of a consistent trade policy.[253] Additionally, EAC member states are allowed to separately or individually enter or alter trade arrangements with third countries.[254]

Given the prevalence of overlapping RTAs in the Southern African region when SADC was established, it was crucial to cater for member states that were already party to other arrangements. To realise this, SADC partner states are allowed to uphold preferential trade and other trade associated agreements that were in place when the Protocol on Trade came into effect.[255] They are also allowed to participate in new preferential trade agreements between themselves.[256] This is the implementation of the principle of variable geometry, that allows member states that want to liberalise trade among themselves at a swift speed to do so. Although this has the advantage of making sure that member states that are economically strained do not delay their partners, it also hinders the implementation of commitments in the Protocol.[257] Tanzania has not been able to participate in the variable geometry initiatives both in EAC and SADC as she was absent in the Northern Corridor Integration Project of EAC as well as the Accelerated Programme for Economic Integration of SADC.

Although member states are not required to carry out negotiations as a block, they are strongly encouraged to harmonise their trade policies and negotiating positions in regards to dealings with third countries or groups of third countries and international organisations.[258] However, due to proliferation of RECs this is impractical and had proved failure, for instance, in the negotiations with the EU regarding Economic Partnership Agreements (EPAs), a group of SADC countries – Angola, Botswana, Eswatini, Lesotho, Mozambique, Namibia and South Africa were negotiating as a group. The six other members – the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe were negotiating under the

[252] Art 130(1) of the Treaty for EAC; Art 37(1) of Protocol on EACCU.
[253] Mutai (n 33) 94.
[254] Art 37(4) of Protocol on EACCU.
[255] Art 27(1) of SADC Protocol on Trade.
[256] Art 27(2) of SADC Protocol on Trade.
[257] Mutai (n 33) 94.
[258] Art 29 of SADC Protocol on Trade.

Eastern and Southern Africa arrangement, while Tanzania was negotiating an EPA with her EAC partners.[259]

At present all EAC member states except for South Sudan have entered AfCFTA Agreement separately and not as a block. This is a clear indication of the absence of a consistent trade policy within EAC.

As indicated above the major objective of EAC is to promote the liberalisation of intra-regional trade which aligns with AfCFTA's objective, determination and commitment. However, the effective and coordinated implementation of AfCFTA as a continental regime will be a major challenge for state parties, AfCFTA institutions, RECs, existing trade arrangements, and CUs. This will take time, will require assistance, adjustments, and careful monitoring of progress.[260] The World Bank also acknowledges the fact that the implementation of AfCFTA will be a significant challenge despite offering big opportunities for development in Africa.[261]

However, despite these challenges – including overlapping memberships, it appears each REC that Tanzania is a member – EAC, SADC and recently AfCFTA has its distinct benefits to state parties making it difficult to cure the same. Thus, AfCFTA foresees the co-existence of several African trade regimes alongside each other. That is to say, RECs with their own regional integration agendas will pursue their strategies on deeper integration, as well as other disciplines considered to be necessary for specific regional agendas.[262] For instance, some of them have developed wide-ranging additional functions and have adopted obligations over matters not covered in AfCFTA and they are not parties to AfCFTA Agreement – a good illustration is SADC that has a Protocol on Trade, Finance, Investment and more than 20 additional ones.[263]. The best move would be for state parties to different RECs including Tanzania to critically weight the benefits against drawbacks of each before opting out.

Moreover, since overlapping memberships are a long-standing problem and AfCFTA intends to cure the same through RECs' FTAs acting as 'building blocks.'[264] AfCFTA

[259] Mutai (n 33) 94.
[260] Erasmus (n 20) 2.
[261] World Bank 'The African Continental Free Trade Area: Economic and distributional effects' (2020) at 8 https://www.tralac.org/documents/news/3965-the-african-continental-free-trade-area-economic-and-distributional-effects-world-bank-july-2020/file.html (accessed 20 November 2021).
[262] Erasmus (n 20) 7.
[263] Erasmus (n 20) 7.
[264] Art 3(h); Art 5(b) AfCFTA Agreement.

Agreement does not contain indications of how or when this will happen. This leaves a room for debate about how RECs will support AfCFTA, and about tackling the long-standing issues around overlapping REC memberships.[265]

4.6 Conclusion

Approaches adopted by the two RECs – EAC and SADC are similar. That is, they both attempt to take into account the economic disparities existing between member states. Lack of certainty in the applicable WTO rules on what to do and what not with respect to RTAs accords WTO members considerable room to manoeuvre when drafting such agreements. From an analysis above it is evident that member states to both WTO and RECs in question had the option to design their RTAs in the manner they please. That is why provisions of the Treaty for EAC which is a CU allow member states to maintain relations they had before the formation of CU and also to enter into agreements with other countries, regional and international organisations contrary to the letter and spirit of article XXIV:8(a) of GATT. For instance, all EAC member states except for South Sudan have entered AfCFTA individually and not as a block. It is thus safe to say that, the absence of uniform interpretation leads to liberal interpretation. Therefore, Tanzania's membership to SADC is a product of this state of affairs. Due to this unusual arrangement Tanzania is into, it is unclear as to which customs regime she applies with respect to goods from SADC which is an FTA. The following chapter addresses this question in detail.

[265] Erasmus (n 20) 7.

CHAPTER FIVE: CUSTOMS IMPLICATIONS OF TANZANIA WITHIN REGIONAL ECONOMIC COMMUNITIES

5.1 Introduction

Tanzania Revenue Authority (TRA) is the lead agency charged with the duty to manage the borders and customs clearances in the United Republic of Tanzania.[266] TRA was established in 1995.[267] It is in charge of managing the assessment, collection, and accounting of all central government revenues.[268] TRA is a semi-autonomous agency that works together with the Ministry of Finance and Planning (MoF).[269] Tax revenue is the major source of domestic revenue in Tanzania. Other tax revenues include customs duty, value added tax (VAT), and excise duty – imports and local.[270] In the 2014 fiscal year, trade taxes accounted for 15.5 percent of total tax revenues.[271]

Approximately 70 percent of all trade is operated through the port of Dar es Salaam. Clearances are authorised at 86 customs stations, including 25 seaports, and eight airports, though more than 90 percent of all clearances are through nine major border posts. TRA also operates six transit-monitoring stations. All the major border posts use electronic clearance. However, at present, customs control is premised on the obsolete idea of prioritising real-time physical inspection, rather than applying substantial use of risk assessment. Thus, all containers are liable to mandatory physical scanning, that adds to costs and slows down port clearance timeframes. That is to say, approximately 80 percent of cargo is still being singled out for inspection.[272] There are 680 licensed freight forwarders in Tanzania, who are also members of the Tanzania Freight Forwarders Association. All freight forwarders are licensed by the Customs Department of TRA.[273]

Since the union with mainland Tanzania in 1964, Zanzibar has been a semi-autonomous state in the United Republic of Tanzania. Thus, she administers her own development projects and she is in charge of her own financial matters.[274] Zanzibar Tax administration remains

[266] Sec 2 of Tanzania Revenue Authority Act [Cap 399 RE 2006] (TRA Act).
[267] Sec 4(1) of TRA Act.
[268] Secs 5(1)(a) & (b) of TRA Act.
[269] Tanzania DTIS (n 158) 35.
[270] Mashindano, Rweyemamu & Ngowi (n 15) 83.
[271] Tanzania DTIS (n 158) 20.
[272] Tanzania DTIS (n 158) 35.
[273] Tanzania DTIS (n 158) 45.
[274] Tanzania DTIS (n 158) 144.

complicated and onerous for private businesses. That is, businesses are obliged to pay taxes singly to TRA, the Zanzibar Revenue Board (ZRB), and municipal and district councils. While TRA accounts for central government taxes in mainland Tanzania as well as union taxes in Zanzibar, ZRB is responsible for domestic consumption taxes other than customs, excise, and income taxes on behalf of the government of Zanzibar.[275] Major domestic taxes administered by ZRB include VAT, excise duty local, hotel levy, restaurant levy, tour operation levy, stamp duty, airport service charge, sea port service charge, road development fund, petroleum levy, fuel sector development fund, road license fees, motor vehicle registration fees, driving license fees, ministry collections, and parastatal contributions.[276] Having seen the office mandated to manage borders and customs clearances in the United Republic of Tanzania, the following sections provide customs implications of Tanzania in RECs.

5.2 Southern African Development Community (SADC)

SADC launched its FTA in September 2001. In 2007 by then 14 member states had begun phasing in an eight-year schedule for the abolition of tariffs on a variety of products with their origin within an FTA.[277] By 2012 SADC FTA had eliminated most tariffs, nonetheless, obstructive rules of origin on essential agricultural and labour-intensive categories persist to restrict the prospects for trade creation.[278]

Tanzania's trade policy intends to accelerate open cross-border trade in order to improve economic growth, diversification and industrialisation. To that end, Tanzania has concluded an agreement with other SADC members states on rules of origin for majority of goods.[279]

Rules of origin (RoO) are an inherent characteristic of FTAs because they are used to regulate products that qualify for preferential treatment.[280] Without RoO, imports from third countries would be able to penetrate an FTA through member state with the lowest external tariffs before moving on to other member states to an FTA, thus denying the latter of customs revenues.

A member state which is a party to various RTAs each one with distinct sets of RoO may demand exporters to attune their goods in conformity with a formidable range of requirements

[275] Sec 3 of Zanzibar Revenue Board Act 7 of 1996 [RE 2013].
[276] Tanzania DTIS (n 158) 147.
[277] Mashindano, Rweyemamu & Ngowi (n 15) 34.
[278] Tanzania DTIS (n 158) 22.
[279] Mashindano, Rweyemamu & Ngowi (n 15) 105.
[280] Mutai (n 33) 85.

so as to be eligible for preferential treatment in various markets. Research has demonstrated that exporters may sometimes decide to give up preferential tariffs provided within an RTA, on the assumption that the scope of preference is not immensely sufficient to counterbalance the regulatoty obligations of adhering to regulations.[281]

In SADC, Annex I to SADC Protocol on Trade sets out RoO used to govern which goods qualify for preferential treatment as originating goods.[282] Originating goods are goods of a member state.[283] Annex is a legal instrument of implementation of the Protocol, which forms an essential part thereto, and has a similar legal effect.[284]

SADC RoO provide for two different criteria under which goods can be regarded as produced within a partner state. The first category comprise of goods that have been wholly manufactured within any partner state.[285] Another category comprise of products that have been procured within any partner state including raw materials that have not been wholly manufactured there, on the condition that such commodities have gone through adequate working or procedure within any partner state.[286] This provision further refers to a distinct Appendix framing out the requirements to be satisfied by such goods.[287] This is a complicated procedure that is not appropriate for simple implementation by the business community. The risk of such a complicated RoO regime is that it will deter traders from pursuing the advantages of reduced tariffs as the time frame and costs of complying with the rules will be challenging. consequently, the tariff line will be underutilised and the consideration of those for whom it was established will be gone.[288] The Annex also provides for functioning and procedures regarded as inadequate to substantiate an assertion that products were produced within a partner state.[289]

As assertion that products were produced from a member state ought to be accompanied by a certificate (SADC certificate of origin) given by the exporter or their authorised

[281] Crawford & Fiorentino (n 32) 17.
[282] Art 12 of SADC Protocol on Trade.
[283] Art 1 of SADC Protocol on Trade.
[284] Art 1 of SADC Protocol on Trade.
[285] Rules 2(1)(a) & 4 of Annex I to SADC Protocol on Trade Concerning Rules of Origin for Products to be Traded between Member States of SADC (Annex I to SADC Protocol on Trade).
[286] Rule 2(1)(b) of Annex I to SADC Protocol on Trade.
[287] Rule 2(2)(a) & Appendix I of Annex I to SADC Protocol on Trade.
[288] Mutai (n 33) 87.
[289] Rule 3 of Annex I to SADC Protocol on Trade.

representative in prescribed form. Furthermore, the certificate ought to be verified by a seal of an agency appointed for such function by each partner state.[290]

If the manufacturer is not the exporter with regards to products aimed for export, he shall provide the exporter with a written declaration (Declaration by the producer) acknowledging that products meet the requirements as produced within the partner state.[291]

Where there is a doubt, the competent agency appointed by an importing partner state may in an unusual situation and regardless the submission of a certificate require additional confirmation of the declaration included in the certificate. In such circumstances partner states via their competent agencies ought to cooperate with one another. The confirmation is required to be done within three months of the request being made. A form used for this purpose is entitled 'Form of verification of origin.'[292]

As a means to accelerate trade, the importing partner state shall not preclude the importer from getting hold of the consignment of products merely on the reason that it demands additional proof, but may demand collateral for any tariff or levy to be paid. However, the requirements for the consignment under collateral shall not be applicable if such products are liable to any restrictions.[293]

5.3 East African Community (EAC)

As note above Tanzania joined EACCU in January 2005. As such she has applied and she is currently implementing EAC CU CET since 2005 on all products imported into EAC.[294] This is with the exception of chosen agricultural products – wheat and corn, processed pulses, wheat flour, olive oil; iron and steel structures; grinding and cutting machinery; and vehicles.[295] In EAC, every member state's revenue agency accounts imports on intra-EAC trade as they are mandated to levy VAT on majority of goods.[296]

[290] Rule 9(1) & Appendix II of Annex I to SADC Protocol on Trade.
[291] Rule 9(2) & Appendix III of Annex I to SADC Protocol on Trade.
[292] Rule 9(3) & Appendix IV of Annex I to SADC Protocol on Trade.
[293] Rule 9(4) of Annex I to SADC Protocol on Trade.
[294] Tanzania DTIS (n 158) 19.
[295] Tanzania DTIS (n 158) 21.
[296] Tanzania DTIS (n 158) 20.

In EAC, CET has three bands structure[297] with a minimum rate of zero percent on raw commodities, capital goods and meritorious goods, such as medical, pharmaceutical and educational supplies. A middle rate of ten percent on intermediate goods, and a maximum rate of 25 percent on finished goods. Tariffs on a few sensitive goods – 61 tariff lines are higher than 25 percent and therefore, do not adhere to the three-tier framework of CET. Agricultural goods constitute most of the sensitive products namely, milk at 60 percent, wheat at 35 percent, corn at 50 percent, rice at 75 percent or US$345 per metric ton, and sugar at 100 percent or US$ 460 per metric ton. Other goods like cement attract a 35 percent CET, primary cells and batteries attract 35 percent, matches attract 50 percent, and Khanga, Kikoi, and Kitenge fabrics that attract a 50 percent CET also constitute the sensitive list.[298] Overall, EAC member states have classified 58 products as sensitive, which qualifies them to declare tariffs above EAC maximum CET of 25 percent.[299]

In 2010, after a five-year transitional period to cater for tariff adjustments in some member states, imports among EAC partner states were totally liberalised. EAC reviews the maximum rate of CET after a five-year period. [300] However, since the adoption of CET in 2005 there have been no significant changes of the tariff structure with the exception of sensitive goods. Tanzania's tariff schedule has 5 437 tariff lines with a large number of them appearing in one of the three standard CET rates. That is, 37 percent of tariff lines attract zero tariff, 21 percent attract a ten percent tariff, and 40 percent attract a 25 percent tariff. Approximately one percent of tariff lines form a part of the sensitive register and attract tariffs above 25 percent. In WTO, Tanzania bound 13.5 percent of tariffs at 120 percent, constituting all agricultural goods – as provided for by WTO and one-tenth of one percent of non-agricultural goods also at 120 percent.[301]

[297] Art 12(1) of Protocol on EACCU.
[298] Tanzania DTIS (n 158) 19.
[299] Tanzania DTIS (n 158) 22.
[300] Art 12(2) of Protocol on EACCU.
[301] Tanzania DTIS (n 158) 19.

Table 1: Tanzania's tariff structure

No. of tariff lines	CET (%)	% of tariff lines
2 011	0	36.90
1 170	10	21.50
2 194	25	40.40
13	35	0.20
1	40	0.02
19	50	0.35
16	60	0.29
4	75	0.07
9	100	0.17
Total = 5 437		

Source: Tanzania DTIS (2018)

EAC's food category incorporate the highest maximum tariffs and has the highest standard deviation. This is indicated by the high degree of tariff protection provided to the sugar, corn, wheat, milk and rice categories. High tariffs levies on some products jeopardise the competition of downstream industries or the incentives for local production. For example, sugar which is an important input for many food products is charged a very high tariff – 100 percent or US$460 per metric ton that could have an effect on the competition of industries that utilise it as an input. Though normally tariffs for sugar imported by industrial users are lowered under the duty remission scheme, it appears that only a small number of enterprises gain the benefits from the scheme – 25 enterprises in 2014 as the procedure of applying or lobbying to be included in the scheme might be over and above the resources of many small and medium-sized enterprises. Equally, tariffs on textiles inputs that range from ten to 25 percent might lower the likelihood of the growth of the local apparel industry that has manifested to be a convenient method of job creation in other African countries.[302] Manufacturers utilising mostly imported inputs, with reasonably little local value addition, the capability to acquire duty rebates presents considerable inducement to trade in EAC market instead of manufacturing for export.[303]

EAC CET for majority of agricultural inputs is zero, while agricultural products that are manufactured in Tanzania have been protected. Cane or beet sugar and chemically pure sucrose in solid form are charged a CET of 35 to 100 percent. Importation of sugar for industrial use is charged a 100 percent CET to promote the consumption of domestically or EAC manufactured

[302] Tanzania DTIS (n 158) 20.
[303] As above.

sugar for industrial uses.[304] CET for imported palm oil is low to meet the demand for the local market as both domestic production and production throughout EAC is still low. Nonetheless, imported rice attracts a 75 percent CET to protect domestic manufacturers from the contestation of efficient manufacturers in Pakistan and Vietnam to mention just a few. Comparably, imported processed maize flour attracts a 25 percent CET to develop and protect the milling industry in EAC. Goods that Tanzania has a comparative advantage, such as cashew nuts, coffee, tea, and tobacco, all attract 25 percent CET. Levying duties on these competitive sectors acts as a discouragement to agro-industrial growth and diversification by multiplying input costs, in spite of the fact that this is mitigated by EAC and SADC preferences whereby many inputs and agricultural products such as maize and rice can be imported duty-free.[305]

As noted earlier EAC CET implemented in the United Republic of Tanzania, nevertheless, Zanzibar has an exception to retain substantially lower tariffs on imports of rice and sugar intended for household consumption. The justification of the exception to CET by the government of Zanzibar is that such low tariffs benefit Zanzibar households, nonetheless, the quantity imported regularly surpass household needs. International trade and customs administration are union matters, while internal trade, industry and consumer protection are the mandate of the government of Zanzibar.[306]

Administration of EAC CET is faced with a number of problems which includes the lack of a customs authority at the regional level that would ensure uniformity in the management of the CU. This promotes a low degree of customs adherence, sluggish process of adoption of regional legislation in national legal systems and the continued seeking of stay applications in court which frustrates the uniform application of the CET.[307] As noted above another setback in the operation of the CET brought about by multiple memberships of partner states to various RECs where preferential treatment is still extended to them – SADC and COMESA in particular despite concluding a CU, thus, eroding the gains of such a union. This also includes preferential treatments for goods approved by the Council of Ministers of EAC that still persist.

[304] Tanzania DTIS (n 158) 60.
[305] As above.
[306] Tanzania DTIS (n 158) 148.
[307] EAC '5th Development Strategy 2016/17 - 2020/21' http://repository.eac.int/bitstream/handle/11671/1952/5th%20EAC%20Development%20Strategy-%20Final%20Version.pdf?sequence=1&isAllowed=y (accessed 14 April 2021).

These facts make member states reluctant to eliminate NTBs and most importantly, demonstrate the significance of the RoO.

Table 2: Tanzania's agriculture common external tariff

Product	CET (%)
Milk (powder or solid)	60
Cashew nuts	25
Coffee	25
Tea	25
Maize (corn seed)	25
Rice or paddy (in the husk)	75
Raw cane sugar	35
Sugar (and sugar for industrial use)	100
Tobacco	25
Fertiliser	0
Cotton	0
Cotton (sewing thread)	25
Agricultural machinery	0
Tractors	0

Source: Source: Tanzania DTIS (2018)

In EAC products for products to be recognised as qualifying for community tariff preference solely on the condition that they have their origin in the member states.[308] For benefit of ascertaining if products have their origin within the member state, the Protocol incorporates a comprehensive Annex providing for EAC CU's RoO.[309] The prescribed RoO as set out by the East African Community Customs Union (Rules of Origin) Rules, Annex III to the Protocol on EACCU (EAC RoO) serve to implement the provisions of Protocol on EACCU and to assure that there is consistency between member states in the administration of RoO and

[308] Art 14(1) of Protocol on EACCU; sec 111(1) of the East African Community Customs Management Act of 2004 [RE 2009] (EACCMA) https://www.eac.int/documents/category/acts-of-the-community (accessed 03 October 2021).
[309] Art 14(3) of Protocol on EACCU.

that to the degree practicable the procedure is unambiguous, answerable, just, foreseeable and in comformity with the provisions of the Protocol.[310]

Prior to 31 December 2012 EAC partner states accorded preferential tariff treatment to goods imported under SADC and the Common Market for Eastern and Southern Africa (COMESA) arrangements as prescribed in the partner state's legislation.[311] However, despite such a restricting provision the situation is still the same as good from SADC destined to Tanzania are still accorded preferential treatment. Similarly, preferential treatment can still be applied to goods imported under any other tariff arrangement that may be approved by the Council of Ministers of EAC.[312]

EAC RoO prescribes four distinct conditions under which products can be recognised as having their origin in partner states. The first condition classifies products that are completely manufactured in a member state.[313] The second condition classifies products manufactured completely or partly from imported matters if the cost, insurance and freight (c.i.f.) value of the imported matters does not go beyond 60 percent of the total cost of the matters utilised.[314] The third condition classifies products that value addition constitute at least 35 percent of the products' ex-factory cost.[315] The last condition classifies products which are categorised or become as such under a tariff heading other than the tariff heading under which they were imported.[316] Although these conditions are justly simple, there have been conflicts among partner states over their implementation. For example, Tanzania refused to permit automobiles erected in Kenya to enter Tanzania duty-free for the reason that they did not satisfy the conditions of the rules.[317] Foreseeing such circumstances, EAC Committee on Trade Remedies was created to handle issues concerning, *inter alia*, rules of origin,[318] and dispute settlement.[319]

[310] Rule 2 of East African Community Customs Union (Rules of Origin) Rules, Annex III to the Protocol on EACCU (EAC RoO).
[311] Sec 112 (2) of EACCMA as amended by sec 2 of East African Community Customs Management (Amendment) Act of 2011 https://www.eac.int/documents/category/acts-of-the-community (accessed 03 October 2021).
[312] Sec 112 (1)(b) of EACCMA.
[313] Rule 4(1)(a) & 5 of EAC RoO.
[314] Rule 4(1)(b)(i) of EAC RoO.
[315] Rule 4(1)(b)(ii) & First Schedule to EAC RoO.
[316] Rule 4(1)(b)(iii) & Second Schedule to EAC RoO.
[317] Mutai (n 33) 86.
[318] Art 24(1)(a) of Protocol on EACCU.
[319] Art 24(1)(e) of Protocol on EACCU.

The Committee constitutes of nine members, qualified and proficient in matters of trade, customs and law.[320]

Moreover, satisfying the requirements in order to take advantage of community preferential treatment can be burdensome for smallholder farmers and small-scale agricultural traders, particularly women especially in relation to complying with EAC RoO, presenting a valid single-entry document and, when required, remunerating for the work of a clearing agent.[321]

As a means to address such problems, a simplified trade regime (STR) has been established as part of EACCU. The scheme presents a simplified clearance process for goods that have their origin in EAC of commercial value not exceeding US$2 000, and incorporated in the schedule of qualifying goods – mostly agricultural and livestock products. Farmers and traders who fulfil those essential conditions qualify to clear their consignment duty-free by presenting a document called EAC simplified certificate of origin (CoO). This is a simplified version of the single-entry document, normally issued by customs officials of members states at the border, that ought to be fairly easy for any small-scale trader to complete without the help of a clearing agent.[322]

Considering the fact that the intention of STR is noble, and the possibly that it might have been instrumental in increasing small-scale trade in EAC, knowledge of the advantages of the regime tends to be poor amongst desired recipients. Implementation by border officials is also occasional and difficult. For example, a series of field surveys administered by the Eastern African sub-regional support initiative for the advancement of women in 2012 with women cross-border traders at selected EAC borders including Mutukula (Tanzania and Uganda) and Namanga (Tanzania and Kenya), indicated that to a greater extent participants lacked awareness of STR, or the preferential treatment accessible under EACCU. A significant percentage of women at Mutukula revealed that they were still being charged duty by customs officials.[323]

[320] Art 24(2)(a) of Protocol on EACCU.
[321] Tanzania DTIS (n 158) 61.
[322] Tanzania DTIS (n 158) 61.
[323] As above.

The assertion that products have their origin within a member state ought to be accompanied by a certificate (EAC certificate of origin) to be presented by the exporter or their authorised representative in prescribed form whereby the same needs to be verified by a competent agency.[324] The competent authority means a body or organisation appointed by the community to administer the customs law of the community.[325]

If the producer is not the exporter with regard to products aimed for export, he shall provide the exporter with a written declaration (Declaration by the producer) indicating that products have their origin within a member state.[326]

Where there is a doubt, a competent agency may in unusual occasions and regardless the submission of a certificate require additional authentication of the declaration incorporated in the certificate.[327] Authentication is required to be made within three months of the request being made. The form used for this purpose is entitled 'Form of verification of origin'.[328]

Similar to SADC, in order to facilitate trade, the importing member state ought not prohibit the importer from getting hold of the consignment of products merely by the reason that it needs additional proof, but may demand collateral for any duty or levy that is to be paid.[329] However, the requirement for delivery under collateral shall not be applicable if such products are liable to any restrictions.[330]

Although a fully-fledged CU does not require RoO because member states apply CET to imports, EAC needs these rules because of the progressive character of the integration process, many exceptions to CET[331] and multiple memberships of member states in various trade arrangements.

[324] Rule 12(1) & Third Schedule to EAC RoO; Sec 111 (2) of EACCMA.
[325] Art 1(1) of Protocol on EACCU.
[326] Rule 12(2) & Fourth Schedule to EAC RoO.
[327] Rule 12(3) of EAC RoO.
[328] Rule 12(4) & Fifth Schedule to EAC RoO.
[329] Rule 12(5) of EAC RoO.
[330] Rule 12(6) of EAC RoO.
[331] Mutai (n 33) 86.

5.4 Agencies authorised to issue certificates of origin in Tanzania

Partner states in both RECs – EAC and SADC apply RoO to determine goods originating from other partner states as a qualification for community preferential treatment. However, Tanzania is yet to comply with the directive that requires customs administrations to issue CoO, and lack of recognition of CoO by border customs officers is a persistent challenge.[332]

Member states in all RECs are required to deposit with their Secretariats the names of administrative divisions or competent authorities with a mandate to issue CoO. This includes samples signatures of officers with a mandate to validate certificates and the impressions of the official stamps to be used for that purpose, whereby such is to be disseminated to the partner states by the Secretariat.[333] Copies of CoO and other pertinent documents are to be maintained by the appropriate administration of member states for a minimum of five years from the date of issuance.[334] Below are detailed explanations of agencies that are authorised to issue CoO in Tanzania.

5.4.1 Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA)

TCCIA is a voluntary member based private sector association which was established in 1988 with the help of the government of Tanzanian to promote the growth and strengthen the private sector. TCCIA is a non-profit, autonomous organisation which operates regional chambers in 26 regions of Tanzania Mainland and over 120 district chambers in the country – which are semi-autonomous in their operational activities. TCCIA is the sole country member of International Chamber of Commerce in Tanzania, a member of East Africa Chamber of Commerce, Industry and Agriculture, Pan African Chamber of commerce and Industry and East African Business Council EABC.[335]

All 26 regional chambers have nominal membership fees for its members. TCCIA currently has over 30 000 members. Services administered by TCCIA to the business community ranges from business information, training, advocacy, business supportive initiatives such as the issuance of CoO and processing business licenses as well as business promotion activities, for example, trade fairs and missions.[336]

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[332] Tanzania DTIS (n 158) 22.
[333] Rule 9(6) of Annex I to SADC Protocol on Trade; Rule 12(8) of EAC RoO.
[334] Rule 9(5) of Annex I to SADC Protocol on Trade; Rule 12(7) of EAC RoO.
[335] TCCIA 'About TCCIA' http://www.tccia.or.tz/page/about-tccia (accessed 21 September 2021).
[336] TCCIA 'Our history' http://www.tccia.or.tz/page/our-history (accessed 21 September 2021).

TCCIA is the only institution in Tanzania Mainland entrusted with a full mandate to authenticate the origin of all products produced or processed in the state for the export market issuing CoO.[337] TCCIA defines CoO as an essential international trade certificate verifying that products in an export consignment have been wholly obtained, produced, manufactured, or processed in a state. CoO is also an attestation by the exporter. There are two major types of CoO, namely non-preferential CoO – issued for products that do not benefit from any preferential treatment and preferential CoO – issued in the conditions of preferential trade arrangements that enables exporters to take advantage of tariff exemption or reduction for qualifying exports. CoO may be requested by customs authorities, importers, freight forwarders or banks for clearance of letters of credit.[338]

TTCIA further defines RoO to mean the conditions that prescribe procedures essential to be undertaken domestically in order for products to be regarded as originating locally. RoO play a considerable part in global trade and is widely classified into two of criteria: non-preferential and preferential RoO. Non-preferential RoO are a set of rules used to allocate the origin of goods entering a state or territory and are normally a set of comprehensive conditions that enable customs administrations to characterise a state of origin to the imported goods entering its territory. On the other hand preferential RoO are those sets of rules and criteria that determine whether goods have obtained domestic economic origin and are connected directly to trade preferences and market access.[339] Essentially each state in the world takes into account the origin of imported products when determining the tariff applicable to products or, in some instances, whether or not the products may be legally imported at all.[340]

TCCIA commenced to issue CoO in 1999 after the government of Tanzania's decided to entrust such role to the private sector. While this audacious and significant milestone was new in Tanzania, the function of chambers of commerce in administering CoO and RoO can be traced back to the Geneva Convention of 1923 relating to simplification of customs formalities provided for under article 11 as ultimately championed by the Kyoto Convention. The rationale of entrusting this function to TCCIA was, *inter alia*, the organisation's nationalwide network, reliability, impartiality, direct connection with exporters thus, making it possible to efficiently serve the business community across the state.[341] To that end TCCIA

[337] TCCIA 'Commerce' http://www.tccia.or.tz/page/commerce (accessed 21 September 2021).
[338] TCCIA 'Frequent asked questions' http://tccia.com/eco/faq.html (accessed 21 September 2021).
[339] As above.
[340] As above.
[341] TCCIA 'About' http://tccia.com/eco/about.html (accessed 21 September 2021).

offers international trade facilitation through the issuance of CoO,[342] capacity building of the compliance with the RoO for export of manufactured goods as well as industrial products verification for compliance with the RoO which provide an opportunity for Tanzania products to trade within EAC and SADC duty-free. [343]

Table 3: Tanzania chamber of commerce, industry and agriculture certificate of origin – issuance fees sheet

S/N	Certificate type	Specification	Applicable fee (in TShs)
1.	AGOA	N/A	20,000/-
2.	China	N/A	20,000/-
3.	EAC	N/A	5,000/-
4.	SADC	N/A	20,000/-
5.	EURO1	N/A	30,000/-
6.	GSP	Less than (<) 10 Million TShs	20,000/-
		Greater than (>) 10 Million TShs and less than (<) 50 Million TShs	30,000/-
		Greater than (>) 50 Million TShs	50,000/-
7.	International	Less than (<) 10 Million TShs	20,000/-
		Greater than (>) 10 Million TShs and less than (<) 50 Million TShs	30,000/-
		Greater than (>) 50 Million TShs	50,000/-

NB: Fee is subject to change from time to time

Source: TCCIA website http://tccia.com/eco/docs/fees_sheet.pdf (accessed 21 September 2021)

[342] TCCIA 'Business support' http://www.tccia.or.tz/page/business-support (accessed 21 September 2021).
[343] TCCIA 'Industry' http://www.tccia.or.tz/page/industry (accessed 21 September 2021).

5.4.2 Zanzibar National Chamber of Commerce (ZNCC)

ZNCC was created to unite voices of the private sector. It serves as a linkage between members, the government and other stakeholders. ZNCC acts as an umbrella organisation representing members of the private sector and serving them in all matters to do with trade and business, marketing and trading opportunities, business advisory services and entrepreneurial skills. ZNCC collaborates with similar organisations within EAC and SADC regions. ZNCC is a co-chair of Zanzibar taxation forum which is co-hosted by TRA, Zanzibar Revenue Board (ZRB) and the private sector.[344]

ZNCC's definition of CoO is similar to that of TCCIA. Similarly, ZNCC issues two types of CoO namely, preferential and non-preferential. Interested stakeholders for CoO are also similar to those of TCCIA. Similarly, the government of Zanzibar's delegated the function of issuing CoO in the isles to the private sector – ZNCC.[345]

Other roles of ZNCC are to manage and issue the barcode system used by retailers, suppliers and their partners, on behalf of GS1.[346] Not only that but ZNCC also advises members on trade opportunities and how to access regional and international markets such as EAC, SADC, ASEAN, Europe and United States to mention just a few.[347] ZNCC charges their members US$13.75 (TSh30 000) for a CoO for exports to third countries, while non-members are charged US$18. Also, the issuance of EAC CoO costs US$2.25.[348]

5.6 Conclusion

CU may need an agreement on revenue sharing owing to the fact that the collection of customs duties under CET is not equitably distributed across partner states, for instance, landlocked partner states may have fewer imports than partner states that operate ports. SACU could be a good learning point with regards to revenue sharing.

Both RECs – EAC and SADC do not issue electronic CoO. This contributes to delays in verification. For instance, in Tanzania since customs authorities do not issue CoO, verifications with other agencies such as TCCIA and ZNCC where there are suspicions could

[344] ZNCC 'ZNCC background' https://zncc.or.tz/index.php/about-us/about-zncc (accessed 21 September 2021).
[345] ZNCC 'Issuance of certificate of origin' https://zncc.or.tz/index.php/pemba-2/certificate-of-origin (accessed 21 September 2021).
[346] ZNCC 'Barcode' https://zncc.or.tz/index.php/pemba-2/organization-structure-2 (accessed 21 September 2021).
[347] ZNCC 'Benefits of becoming a member of ZNCC' https://zncc.or.tz/index.php/pemba-3/why-join-zncc (accessed 21 September 2021).
[348] Tanzania DTIS (n 158) 149.

be challenging. Communication channels are not always efficient and effective as well due to poor infrastructure.

Generally, in spite of the fact that all countries in Eastern and Southern Africa have liberalised their trade regimes, Tanzania's import duties have fallen evidently lower than the regional average. However, most cargoes are still singled out for manual inspection which takes a great amount of time to clear.

One of the major reasons for Tanzania's involvement in RECs is to facilitate trade. However, small-scale traders do not enjoy preferences that come with these RTAs. As we have seen above among the reasons behind include lack of awareness which is prevalent among small-scale traders that prompt them to evade official borders and use porous borders even for goods that would not attract duties. On the other hand, customs officials can also manifest insufficient awareness of prevailing trade regimes or in some instances, intentionally decline to put them in application to obtain illicit payments from traders. Therefore, considerable sensitisation amongst both traders and customs officials, and consistent observation of the implementation of trade facilitation measures on the ground, become, of greatest significance to thoroughly take advantage of the export and growth opportunities existing in EAC and SADC inclusive of small-scale agricultural traders, especially women.

Also, the fact that traders ought to transact with various authorities, and deal with numerous taxes, levies, and fees – increases the cost of compliance, in terms of both time and financial resources. That is, the cost becomes greater than it could be when taxes are managed under a single umbrella, and especially onerous for small businesses. This adds to the probability of tax evasion, with ensuing considerable revenue losses for the government.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Summary of findings

6.1.1 Assessment of regional trade agreements

Article XXIV of GATT comprises of strict requirements, that have hardly on any occasion, been entirely complied with in reality.[349] This is due to the fact that, the Text of article XXIV of GATT does not restrict the approval of RTAs that do not adhere to its requirements. Thus, examining whether or not RTAs comply with WTO requirements has been problematic as the interpretation of the rules remain unresolved. Thus, WTO members agreed to negotiate aiming to explain and improve disciplines and mechanisms in the prevailing WTO rules applicable to RTAs.

The examination of notifications is carried out basing on the information provided by members to an RTA as well as through written responses to questions presented by WTO members or through oral responses to questions presented at the Committee on RTAs meetings. The Committee on RTAs does no go beyond this and once factual examination is concluded, the Secretariat drafts the examination report. Thereafter, consultations are carried out and once the report is agreed by the Committee on RTAs, it is handed over to the relevant superior body for approval.

Nonetheless, because of the absence of an agreement amongst WTO members, no evaluation report has been completed since 1995 when evaluations of RTAs were carried out in separate working parties before the Committee on RTAs was established. After the creation of the Committee on RTAs, it initiated a consistent calendar for the presentation of biennial reports applicable to RTAs when an evaluation report had already been approved. In 2006, the Committee on RTAs postponed any action with this regard and since the adoption of TM the procedure of presenting a schedule for biennial reports was halted. To that end, the Committee on RTAs has been incapable of carrying out successfully its roles of reviewing and overseeing the implementation of RTAs the fact that gives WTO members a considerable room to manoeuvre in drafting such agreements.

[349] R Pomfret 'Regional trade agreements' in Fratianni (n 44) 43.

6.1.2 Rules of origin (RoO)

EAC and SADC use RoO to determine whether or not goods originate from partner states as a condition for eligibility to community preferential treatment. However, RoO been very poorly enforced. RoO are not clear and transparent to all members and to traders. Since the rules are not clear there is a considerable lack of awareness which is prevalent among small-scale traders that encourage them to circumvent official borders and porous borders even for goods that would not attract duties. On the other hand, customs officials can also manifest insufficient awareness of prevailing trade regimes or, in some cases, intentionally decline to put them in application to obtain illicit payments from traders. Furthermore, Tanzania's membership to SADC may affect the implementation of Protocol on EACCU in the sense that it may cause trade deflection especially where CoO could be fabricated after goods entering Tanzania duty-free. Consequently, EAC member states stand to lose customs revenues.

6.1.3 Regional economic communities (RECs)

Tanzania is a member of EAC, SADC and recently AfCFTA. These overlapping memberships, whose objectives are seldom similar, present considerable problems in terms of conformity, successful performance of agreements, and the actual transparent RI. Multiple memberships have put significant overburden on Tanzania's inadequate administrative and diplomatic capacity that has impaired her efficiency and more rapid implementation of agreements.[350] Thus, Tanzania bears some transaction costs, including the costs of negotiating in numerous forums that are always high. Not only that but also many trade-offs have to be settled prior attaining an agreement to execute a broad scope of consented policies, majority of which are either inconsistent with one another or unrelated.[351] This necessitate forging additional attempts to realign EAC agreements with those required under SADC[352] in order to avoid possible losses of customs revenue.[353] COMESA-EAC-SADC tripartite FTA negotiations to coordinate trade regimes of these distinct blocks have been encouraging but, considering the divergent aspirations of the three RECs, such negotiations do not provide great optimism of a short-term answer.[354] Although AfCFTA aims to resolve these challenges of multiple and overlapping trade regimes to achieve policy consistency by expediting the regional and continental integration processes. AfCFTA Agreement does not contain indications of how or when this

[350] Mashindano, Rweyemamu & Ngowi (n 15) 159.
[351] Mashindano, Rweyemamu & Ngowi (n 15) 112.
[352] Mashindano, Rweyemamu & Ngowi (n 15) 103.
[353] Mashindano, Rweyemamu & Ngowi (n 15) 113.
[354] Mutai (n 33) 95.

will happen. This leaves a room for debate about how RECs will support AfCFTA, and about tackling the long-standing issues around overlapping REC memberships.

6.1.4 Customs administration

The administration of EAC CET is faced with numerous problems including the absence of a customs authority at the regional level that would ensure uniformity in the management of CU. This promotes minimal customs compliance, slow processes in adopting regional legislation in national legislative systems and the continued seeking of stay of applications in court which frustrates the uniform application of the CET. Another setback in the performance of CET is multiple memberships of partner states in various RECs where preferential treatment is still extended to them – SADC and COMESA in particular despite a restricting provision and existence of CU, thus, eroding the gains of such a union. This is brought about by problems in drafting Treaties where partner states exploit loopholes, for instance, Protocol on EACCU does not prohibit EAC member states from signing individual agreements such as FTAs. Therefore, officials need to be trained in both RECs for them to act coherently in their line of work. There is also persistence of preferential treatments for goods that are approved by Council of Ministers. These make member states reluctant to eliminate NTBs and most importantly, demonstrate the significance of RoO.

TRA has increased the rate of manual inspections and unnecessarily bureaucratic procedures due to concerns over revenue losses. This is despite new developments associated with the new customs clearance software (Tanzania Customs Integrated System (TANCIS)). Thus, the extent and complications of such *modus operandi* persist to levy additional trade costs in Tanzania on both importers and exporters, which decelerate and discourage formal transactions while exhorting parallel trade.

6.1.5 Availability of information

In Tanzania getting correct and legitimate details on prevailing trade rules and procedures is still a major challenge. In spite of most administrative agencies maintaining a website, the available information is in many instances incomplete or outdated. This applies even to agencies with a good website, as the information is not always kept up to date. This makes getting correct information especially on trade rules and procedures burdensome and time consuming to the general public.

6.2 Conclusion

WTO members' non-compliance with article XXIV of GATT is brought about by the existing situation in WTO whereby the assessment of RTAs compliance is not possible due to lack of consistency in the interpretation of rules. Therefore, the functions of Committees on RTAs and T&D are just to receive notifications. Then information and clarification are provided through factual presentations issued by the Secretariat.

This however, does not remove the fact that RI can be an essential force for sustainable development as it can be used to advance economic development, lower poverty, promote social growth or conserve the environment. However, it can also have negative economic and social effects, particularly if the domestic regulatory framework is incompetent or not applied successfully.[355]

Obstacles to deeper RI in East Africa are usually at the policy level. There is no link between obligations made under regional agreements and execution because barriers impeding integration efforts to RI are not just physical but institutional as well. Thus, expenses to tackle these obstacles, considering the essential political will and dedication, are reasonable in comparison to some of the other investments desired, but the prospective advantages are noteworthy. Although RTAs are intended to benefit member states, anticipated advantages may not be realised if distortions in resource allocation as well as trade and investment diversion are not reduced.[356]

Furthermore, obstacles to integration advanced by the nature of the constitutive instruments is that, from a legal outlook, members involved will not find it simple to adhere to commitments incorporated thereto. For instance, some of the language setting out the commitments is vague, and the timeframes desired to adhere to them are impractical. Moreover, majority of provisions comprise overambitious objectives in conjunction with elaborate exemptions that completely compromise the purpose of establishing rules-based organisations.[357] Given the increase of RTAs across Africa as a whole and in Eastern and Southern Africa specifically, this is a call, not for creating more of such agreements, but for

[355] Mashindano, Rweyemamu & Ngowi (n 15) 3.
[356] WTO 'Regional trade agreements and the WTO' https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 20 September 2021).
[357] Mutai (n 33) 95.

the operationalisation, rationalisation and implementation of commitments under those agreements that already exist.[358]

In the EAC, one notable institutional hindrance is the absence of coordination and complementarity between the trade and transport policies of the various member states. Thus, member states have devoted themselves to initiate coordinated and complementary policies, nonetheless, such devotion usually stays on paper, while every member state still approach policy development as a domestic exercise, considering only national precedence. Therefore, political will is key.

6.3 Recommendations

6.3.1 Reviewing and redefining WTO rules on RTAs

WTO rules on RTAs – CU and FTAs should be reviewed and redefined so as to avoid ambiguity, ensuring practicability and stricter application. This will cure the very elastic and vague GATT rules and promote implementation since non-compliance is commonplace. This will also ensure that WTO has real authority with a rule-based system in the eyes of its members and the general public.[359]

6.3.2 Revision of the roles of Committees on Regional Trade Agreements and Trade and Development

The role of the Committee on RTAs in the examination of RTAs falling within the meaning of articles XXIV of GATT and V of GATS is to evaluate RTAs' compliance with WTO requirements whereas the Committee on T&D examines RTAs falling with the meaning of the Enabling Clause – including trade agreements amongst developing and least developed states. However, the Committee on RTAs has shown minimal successful outcomes in examining the compliance of RTAs notified to WTO over the years. Therefore, the roles of these Committees should be reviewed to serve as forums for notification and provision of clarity on RTAs to WTO members as it is presently, basing on factual presentations issued by WTO Secretariat. This role would be more realistic than the ones it has been unable to carry over the years.

[358] Mutai (n 33) 81.
[359] A Saurombe 'The Southern African Development Community trade legal instruments compliance with certain criteria of GATT Article XXIV' (2011) 14(4) *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* at 311 & 312 http://dx.doi.org/10.4314/pelj.v14i4.10 (accessed 20 November 2021)

6.3.3 Certainty of ease and ready access to accurate and relevant information

Since there are more than 30 distinct offices associated with trade clearances across borders in Tanzania, with close to 102 distinct trade associated documentation including distinct kinds of permits and approvals.[360] There needs to be certainty of easy and readily accessible correct and relevant details on rules and regulatory procedures necessary for importation and exportation by way of the government integrated information trade gateway where all the relevant information on administration – office opening hours, location, enquiry points and formalities can be accessed through a single simple search network. Online information also needs to be updated frequently. This can reduce costly clearance delays that in turn will also reduce trade costs.

Extensive sensitisation amongst both traders and customs officials, as well as consistent observation of the implementation of trade facilitation processes on the ground should be of prime significance to thoroughly take advantage of the export and growth golden chances handy at EAC and SADC inclusive of small-scale agricultural traders, women in particular.

6.3.4 Harmonisation of preferential rules of origin

When preferential RoO regimes are harmonised, it could allow the intersection with regards to a particular intercontinental preferential RoO regime. Therefore, significantly removing complexities from the network of regulations currently functioning. I am optimistic that AfCFTA will tackle this issue especially in the African context by adopting simple – clear and understandable, transparent, predictable and trade facilitating RoO for businesses and trade operators. Moreover, since EAC and SADC still the use of paper documents as CoO, digitalisation will reduce clearance time frames for imports and exports. This might also reduce documents fabrication and verification may be simple and timely. It is also about time Tanzania abides to the directive that customs authorities issue CoO in line with other member states.

6.3.5 Simplification and modernisation of customs procedures

The simplification and modernisation of customs procedures at the borders will multiply revenues and lessen trade expenses. This is a call for Tanzania to maintain modernising customs clearance policies by administering a comprehensive electronic single window system and embracing EAC Protocol on One-Stop Border Posts. Tanzania also ought to keep up modernising the port of Dar es Salaam. Upgrading digital data administration and digital

[360] Tanzania DTIS (n 158) 38.

procedures will allow Tanzania to intensify the operation of risk management and risk profiling.

This should be accompanied by the requirement for all government agencies to embrace risk management procedures that will minimise administrative pressure for cooperative producers and traders and allow TRA, Tanzania Bureau of Standards and other administrative organs to assure greater safety and security. This could be facilitated by demanding administrative organs to issue data on examination, trial, or adherence rates. This will in turn assist administrative organs in the allocation of their scant resources including laboratories and experts to tackle predominantly major risks.

6.3.6 Reducing very high tariff peaks and encouraging revenue sharing between customs authorities; alternatively, forming of a regional customs authority

The prevailing sensitive sectors with tariff peaks above EAC CET maximum tariff of 25 percent range from 35 to 100 percent should be removed gradually as they are against the Protocol on CU. The prevailing tariff line has an implication of inducing a system that inhibits the growth of manufacturing for exports, but promote manufacturing for the local markets, causing unreasonable costs for essential food, that lowers lifestyle quality thus presenting unreasonable detrimental effects on the poverty-stricken class. Reducing the maximum CET would significantly mitigate the anti-export discrimination of the prevailing CET.

Lowering trade tariffs, while economies of Tanzania and other EAC member states are under major financial problems and budget shortfall, demands harmonising any external tariff alteration with extensive tariff modification. There should be a requirement to harmonise this with all EAC member states.[361] I am optimistic that all these will be reflected in CET which is in the pipeline. Lowering tariff and NTBs to regional trade potentially shifts Tanzania into an excellent development path accompanied by concrete rewards derived from gaining access to a substantially huge market with the potential to bring about jobs and decrease poverty.

Moreover, since EAC is a CU, there should be an arrangement on customs revenue apportionment since duties collected by revenue authorities of member states under CET

[361] Tanzania DTIS (n 158) 25.

cannot be said to be reasonably administered among them. Thus, lessons can be learned from SACU particularly on revenue sharing between customs authorities.

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