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RESEARCH ARTICLE

MULTILATERAL TRADE RULES ON REGIONAL TRADE: A CASE STUDY OF THE EAST AFRICAN COMMUNITY

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ABSTRACT

The first EAC was established in 1967 under the Treaty of East African Cooperation. It collapsed in 1977 and was re-established in 1999 under the East African Community Treaty. This article addressed the legal instruments under which the EAC has been re-established. The revival of EAC integration occurred after the establishment of the World Trade Organization (WTO), which is the premier institution for the regulation of international trade. All EAC partner states are members of the WTO. The EAC must therefore be consistent with WTO rules and disciplines on formation of Regional Trade Agreements (RTAs). This article reviewed the revived EAC in the light of WTO rules and disciplines. Previous studies and reviews on the EAC integration generally fail to assess the legal instruments from this perspective.

INTRODUCTION

The majority of Sub-Saharan African countries are members of more than one Regional Trade Agreement (RTA). The history of regional integration in Africa has shown that integration has been evolving over time.[1] Most of the attempts at RTAs were in the early 1950s and 1960s.These attempts are referred to as the first wave of RTAs. Initially, integration was aimed at steering African countries away from colonial rule and towards economic growth and development. Trade under these RTAs was based on import substitution: imports from foreign countries were blocked in order to protect local infant industries. The RTAs focused mainly on political, industrial and economic development,[2] a shallow level of integration. It only involved the reduction and elimination of barriers to trade in goods. This was not attained due to various challenges including: political turmoil; reluctance to cede sovereignty; different levels of development; ideological differences and lack of commitment to regional trade liberalization.[3] The new wave of RTAs has aspired for a deeper level of integration, involving elements of harmonizing trade and economic policies, and adopting a more open approach to multilateral trade liberalization and departing from import substitution economic policies. The new era of RTAs in Africa emphasizes on socio-economic growth and development within the region. The first attempt at post-colonial integration in East Africa was the EAC of 1967 which collapsed in 1977 due to: limited participation by the private sector and civil societies in 'communal' activities; inequitable sharing of community benefits; ideological differences and lack of political will. In 1999, Kenya, Uganda and Tanzania passed a Treaty for the establishment of the revived EAC aiming at: the establishment of a market economy; the inclusion of the private sector and civil society in cooperation activities; participation in multilateral trade and the promotion of political, social and economic development in the region.[4] All the partner states of the EAC are WTO members. The WTO was established on 1st January 1995 as the premier institution for the regulation of international trade. It provides a forum for conducting multilateral trade negotiations, a mechanism for the resolution of trade disputes and a framework for the administration of numerous multilateral trade agreements that include RTAs entered among subsets of its members.[5] The WTO regulates multilateral trade agreements covered in Annexes 1, 2 and 3 of the Marrakesh Agreement. Therefore, the relevant text in this study was Article XXIV of GATT 1994.[6] The Treaty envisages that cooperation in trade and development area would evolve in a linear fashion. The first step is a Customs Union followed by a Common Market, Monetary Union and a Political Federation.[7] The Protocol establishing the EAC

[1] C. Hill, *International Business: Competing in the Market Place*, New York, McGraw Hill, 2005, p. 291

[2] M. Maruping, "Challenges for regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and monetary Coordination" In J. Teunissen and A. Akkerman(ed), *Africa in the world Economy-the National, Regional and International Challenges*, The Hague , Forum on Debt and Development (Fondad), 2005, pp.129- 130

[3] C. Hill, *International Business*, p.291

[4] M. Maruping, "Challenges for regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and monetary Coordination" In J. Teunissen and A. Akkerman(ed), *Africa in the world Economy-the National, Regional and International Challenges*, The Hague , Forum on Debt and Development (Fondad), 2005, pp. 129- 130

[5] Article III of the Marrakesh Agreement Establishing the World Trade Organization,1994

[6] It should be noted that this study focuses on those provisions related to trade in goods and not services. Article V of the General Agreement on Trade in Services (GATS) is therefore not analyzed in any detail.

[7] Article 75, Treaty for the Establishment of the East African Community (1999)

Customs Union was concluded in 2004. The Protocol's objectives include trade liberalization; efficiency in production; enhanced investment and economic development. The intra-EAC tariff liberalization process commenced on 1st January 2005 and is expected to be concluded by January 2010. The Common External Tariff (CET) was established on 1st January 2005 but was effectively applied as of February 2005 after reconfiguration of the partner states' customs systems.[8]

Objectives

The objective were to study: the East African Community: the revived EAC Treaty and the EAC's legal instruments, studied in the light of multilateral trade rules and disciplines administered by the WTO, in order to determine whether the EAC Treaty is consistent with these rules.

Sources of Information

This study was based on the EAC Treaties of 1967, 1994 and relevant aspects of WTO's law. The primary sources included: The East African Cooperation Treaty of 1967; The EAC Treaty of 1999; The Marrakesh Agreement Establishing the WTO and GATT (1994). The secondary sources consisted of literature on East African Integration. The secondary material was obtained from books, journals, newspapers, conference presentations, internet resources and previously written theses and dissertations. Recent secondary sources focus on the revived EAC. Under discussion are the efforts required to revive East African Cooperation in the 1980s, the trade liberalization provisions of the current EAC Treaty and the CU Protocol,[9] the opportunities, likely challenges and constraints to the integration process.[10] Some of the sources provide recommendations on the way forward for the EAC and other African arrangements.[11]

THE WTO REGULATORY REGIME FOR RTAs
Constitutional aspects of the WTO

The WTO is the premier institution for the regulation of multilateral trade. The WTO was established under the Marrakesh Agreement which was concluded at the end of the Uruguay round of negotiations in April 1994. It entered into force on 1st January 1995. The functions of the WTO include: to provide a framework and facilitate the implementation; administration and operation of multilateral and plurilateral trade agreements; to provide a forum for negotiations among its members concerning their multilateral trade relations and to administer the Understanding on Rules and Procedures Governing the Settlement of Disputes.[12] Annexes 1, 2 and 3 refer to multilateral trade agreements. Annex 1 is in three parts: Annex 1A refers to trade in goods under GATT 1994; Annex 1 B refers to trade in services under GATS 1994 and Annex 1 C refers trade-related aspects of intellectual property rights. Annex 2 refers to the understanding of rules and procedures governing the settlement of disputes. Annex 3 refers to the Trade-Policy review mechanism. These agreements are binding on all members under the single undertaking principle.[13] Plurilateral trade agreements are provided in Annex 4 and include the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement. These agreements are binding on those members that have adopted them.

The WTO texts relevant to RTAs are GATT 1994 and GATS 1994. GATT 1994 consists of: GATT 1947 with further amendments and additional provisions; the Decision on Differential and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries (Enabling Clause) and the Understanding on the interpretation of Article XXIV. Under GATS 1994, regulations on RTAs are provided under Article V. Since the EAC Treaty refers to trade in goods, this study focused on the provisions of Article XXIV of GATT 1994.

Article XXIV of GATT 1994

The preambles of GATT 1947 and the Marrakesh Agreement provide some indication of the informing principles and core disciplines of the multilateral trading system. These include promoting reciprocal and mutually advantageous arrangements aimed at substantial reduction of tariffs and other barriers to trade and observing non-discrimination in international commerce. The two sets of rules that reiterate the principle of non-discrimination are the Most Favored Nation Treatment (MFN) and National Treatment rules. The MFN rule in Article I of GATT 1994 requires that any advantage, favor, privilege or immunity granted to a product from one member to another shall immediately and unconditionally be accorded to like products from all other WTO members. The National Treatment rule in Article III of GATT 1994 requires that imported and locally produced goods should be treated equally in terms of internal taxation and internal market regulation. For GATT to gain wide acceptance, the agreement had to incorporate RTAs as exceptions to the Most Favored Nation (MFN) principle. RTAs in the form of Customs Unions (CUs) and Free Trade Arrangements (FTAs) were permitted under Article XXIV by way of exception to the MFN rule. Article XXIV has been assessed and analyzed under four themes: the purpose of admitting RTAs; the effect of RTAs on trade with third parties; the level of intra-RTA trade liberalization and notification and surveillance.

[8] H..Stahl, "Tariff Liberalization Impacts of the EAC Customs Union in Perspective, Tralac Working Paper No 4/2005, August 2005, p.3

[9] A. K. Mullei, "Integration Experience Of East African Countries", Paper presented at the Symposium marking the 30th Anniversary of Banco De Mocambique on May 17,2005 in Maputo, Mocambique; K. Apuuli, " Fast Tracking East African Federation: Asking the Difficult Questions", Paper presented at a Development Network of Indigenous Voluntary Associations(DENIVA) Public Dialogue on Fast Tracking East African Federation Dialogue, Hotel Equatoria Kampala,24th November 2006

[10] D.B Kamala, "The achievements and Challenges of the new East African Community", Paper presented at an open lecture at the University of Hull,U.K, May 3,2006; H. Stahl," Tariff Liberalization Impacts Of the EAC Customs Union In Perspective", Tralac Working Paper No.4/2005; A. K. Mullei, "Integration Experience Of East African Countries", Paper presented at the Symposium marking the 30th Anniversary of Banco De Mocambique on May 17,2005 in Maputo, Mocambique

[11] African Centre for Economic Growth, "Steering East Africa Towards Enhanced Integration", Policy Bulletin No.5, January 2003; M. Maruping, "Challenges for regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and monetary Coordination" In J. Teunissen and A. Akkerman(ed), *Africa in the World Economy-the National, Regional and International Challenges*,The Hague, Forum on Debt and Development (Fondad), December 2005; M. Busse, "Trade effects of the East African Community: Do we need a transitional fund?" Hamburg Institute Of International Economics, 2003

[12] Article III of the Marakesh Agreement establishing the WTO, 1994

[13] Article II(2)

Purpose of RTAs

Article XXIV (4) of GATT 1994 states that the contracting parties recognize the desirability of increasing freedom of trade, by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize the purpose of a CU or FTA should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties to such territories. The MFN rule gives way to the formation of CUs and FTAs among subsets of WTO members because RTAs may be a stepping-stone towards multilateral trade liberalization. This provision also shows that RTAs are permissible if they facilitate trade among partner states and do not raise barriers to trade with third countries. This is reaffirmed in the preamble to the 1994 Understanding of Article XXIV. An RTA is not permissible if its formation restricts trade with other WTO members.

Effect of RTAs on trade with third countries

Paragraph (a) and (b) of Article XXIV (5) both provide that such an agreement should have more advantages and/or less restrictions than pre-existing arrangements to the members and/or parties in such agreements. The provisions of Article XXIV (4) and (5) state that the effect on trade with third countries needs to be monitored during the formation of RTAs. Paragraph (c) of Article XXIV (4) provides the timeframe for transitional arrangements, stating that any interim agreement referred to in subparagraph (a) and (b) shall include a plan and schedule for the formation of such a Customs Union or of such a free-trade area within a reasonable period of time. Paragraph 3 of the Understanding on the interpretation of Article XXIV of GATT 1994 indicates that a reasonable length of time shall be 10 years and parties requiring more time shall seek extension from the Council for Trade in Goods under exceptional circumstances.[14] The problematic issues that arise under these provisions are on the meaning of the term Other Regulations of Commerce, the assessment of the effects of duties and ORCs and the length of time for the transition period of RTAs. The meaning of ORCs has been generally defined as measures that control the inflow and outflow of trade.[15] The relevant measures identified as ORCs by some WTO members are border measures, anti-dumping duties, preferential rules of origin, technical standards subsidies and countervailing measures whose scope is quite broad. However, there is no agreement on this.[16] The second systemic issue concerns the assessment of the effects of duties and ORCs: whether there should be one single requirement for duties and ORCs or whether they have to comply separately. The 1994 Understanding refers to two overall assessments for tariffs and ORCs. Other members argue that the word "on the whole" indicates that there is only one assessment for duties and ORCs.[17] The third systemic issue arises on the length of time for transitional arrangements: it has been defined in the Understanding as 10 years and time extension is allowed only in exceptional cases.[18] With the recent surge of RTAs, transition periods have been known to exceed 10 years for most RTAs.[19] The issue that arises is under what circumstances time extensions should be allowed. As it is not easy to predict, this must be determined on case-by-case basis. The provision is also vague on whether interim agreements must fulfill the requirements under paragraphs 5 at the time of entry of force of the RTA or when the RTA has been fully implemented. The requirements under paragraph 5 need to be assessed at the beginning of the transition period because it addresses the interests of the third world countries which need to be protected during the transition period.

Extent/ level of internal trade liberalization

The definition of a CU in Article XXIV has two elements: that duties and other restrictive regulations of commerce (ORRCs), except those permitted by Articles XI, XII, XIII, XIV, XV and XX, are to be eliminated with respect to substantially all trade between the partner states or at least with respect to substantially all the trade in products originating in the region,[20] that the members of the CU are also obliged to apply substantially the same duties and other restrictive regulations of commerce (ORRCs) in trade with third countries[21] and that FTAs consist of two or more customs territories in which duties and other restrictive regulations of commerce (except those mentioned above) are eliminated on substantially all the trade between the partner states in products originating in such territories. Paragraph 8 establishes the standard for internal trade liberalization in CUs and FTAs, requiring partner states to eliminate duties and ORRCs with respect to SAT between them. It also sets a condition for CUs to establish a common external tariff in addition to free flow of trade amongst the parties. This provision seeks to ensure that parties to these arrangements are fully committed towards liberalization of trade. The SAT requirement ensures that partner states fully commit towards intra-trade liberalization. The systemic issues under this provision are in reference to the definition of ORRCs and the SAT requirement. ORRCs (except the aforementioned) are to be eliminated in respect to substantially all the trade between partner states. This provision, however, does not give a precise scope and definition of ORRCs. There also lacks a mechanism for assessing and determining the level of ORRCs.[22] Other members have argued that the list of exceptions is not exhaustive since safeguards and antidumping measures are not within the list of permissible ORRCs.[23] Issues raised include whether there is a relationship between ORCs and ORRCs and the on the meaning of SAT. It is notable that the concept of ORCs is used in paragraph 5 while ORRCs are applied under paragraph 8. Paragraph 8 deals mainly with those measures that are related to internal trade in the CU or FTA whereas ORCs under paragraph 5 are related to trade with third countries. ORRCs are considered more restrictive than ORCs because they are applied in trade among the partner states. Internal disciplines such as application of technical standards, e.g. TBT, SPS and competition laws, need to be monitored

[14] Para 3 of the Understanding On The Interpretation Of Article XXIV Of GATT 1994
[15] Synopsis of systemic issues related to regional trade agreements, WTO Doc WT/REG/W/37, March 2000, para 62
[16] "Synopsis of systemic issues related to Regional Trade Agreements", p. 17
[17] Synopsis p.27
[18] Para 3 of the Understanding on the interpretation of Article XXIV
[19] WTO, "Synopsis on Systemic Issues" p.18
[20] Article XXIV(8)(a)(i),GATT 94
[21] Para (8)(a)(ii)
[22] WTO, "Synopsis on systemic issues", p.22
[23] S. Laird, "Regional Trade agreements: Dangerous Liaisons?" *Facultad Latinoamericana de Ciencias Sociales, Argentina,1*999 para.11. Url:www.latn.org.ar/pdfs/pape-laird-agreements.pdf, accessed on 13 July 2007

since they may in the long run affect trade with third countries.[24] Article XXIV does not give a definition for the term SAT. Notable contrasting views are those advanced by Australia and the EU in the Doha negotiations.[25, 26]

Notification and surveillance of RTAs

Article XXIV (7) provides for the notification requirements for RTAs. It provides that any country deciding to enter into a CU or FTA shall promptly notify the WTO and avail information regarding the proposed union or area to all contracting parties. The country makes reports and the WTO members make recommendations.[27] Although the indication of the time required for notification is not specifically defined, members have interpreted the words "promptly" and "deciding to enter" to indicate that notification should occur before the RTA comes into force. Article XXIV (6) and paragraph 4 of the Understanding on Article XXIV requires that negotiations must begin before the commencement of compensatory adjustments. At the end of the Tokyo round in 1979, parties were encouraged to notify their RTAs in advance of the implementation of measures. This obligation was applicable to RTAs notified under Article XXIV and the Enabling Clause.[28] RTAs in the GATT were initially notified under Article XXIV. Examination was done by individual working parties reporting to the Council for Trade in Goods. Decisions were supposed to be taken by consensus. In 1979, with the introduction of the Enabling Clause, the Understanding regarding notification[29] was modified and notifications under the Enabling Clause were examined by individual working parties reporting to the Committee of Trade and Development. This was done with other notifications regarding special treatment for developing countries such as GSPs. It was very rare to reach consensus on these RTAs and, in all the years, only one RTA was passed on agreed consensus following notification under Article XXIV: the Czech-Slovac Customs Union.[30] The growth in RTAs has continually increased since the 1990s. By July 2007, 380 RTAs had been notified to the WTO. Of these, 300 RTAs were notified under the Enabling Clause and 58 under Article V of the GATS. In total, 400 RTAs are scheduled to be implemented by 2010. This indicates a large growth in the number of RTAs compared to the 205 that are already in force.[31] In order to streamline the procedural process, the General Council of the WTO replaced the previous system of separate working parties with the establishment of the Committee on RTAs in February 1996 whose mandate is to carry out the examination of agreements referred to it by the CTG which deals with agreements under Article XXIV of the GATT 1994 and the Council for Trade in services which deals with agreements under Article V of GATS. The CRTA's responsibilities include: to make recommendations on the reporting requirements for each type of agreement; to develop procedures to facilitate and improve the examination process; to consider the systemic implications of such agreements and regional initiatives for the multilateral trading system and make appropriate recommendations to the General Council; and carry out any additional functions assigned to it by the General Council. In order to standardize the provision of initial information by the RTAs to the WTO, a standard format for the information on RTAs with guidelines, also referred to as 'Chairman's Guidelines', were developed by the CRTA.[32] The information includes: background information; trade provisions; general provisions of the agreement and other relevant information related to the agreement. The CRTA has also formulated guidelines on the examination process. Once the agreement has been notified, the chairperson establishes a work program for the examination of the RTA. One recent and significant development by the negotiating group on rules is the transparency mechanism. On 14th December 2006, the General Council established, on a provisional basis, a new transparency mechanism for all regional agreements. Under this mechanism, notification of RTAs is to be done following the ratification of the RTA and before the application of preferential treatment between the parties. To notify the RTA, the parties shall specify under which provisions it has been notified. It will also provide the full text of the agreement they have decided to apply and any related Schedules, Annexes and Protocols.[33]

Dispute settlement by WTO is provided under Article XXII and XXIII of the GATT and is elaborated in the Dispute Settlement Understanding. Paragraph 12 of the 1994 Understanding on the interpretation of Article XXIV made it clear that the provisions of Articles XXII and XXIII may be invoked in respect to matters arising from the application of provisions of Article XXIV. This has also been discussed in some disputes such as the *India-Quantitative Restrictions* and the *Turkey-Textiles* case. These cases are significant because they indicate that the WTO has taken steps to ensure that it has an independent dispute resolution mechanism. This will enhance the probability of members complying with their RTA obligations.

THE REVIVAL OF THE EAST AFRICAN COMMUNITY

Background to the revival of the EAC

After the collapse of the East African Cooperation in 1977, Kenya, Uganda and Tanzania negotiated and signed a Mediation Agreement for the division of assets and liabilities of the organization in 1984. In Article 14 (2) of the Agreement, the states agreed to explore and identify further areas for future cooperation and to work out concrete

[24] See J. Crawford and S. Laird, 'Regional Trade Agreements and the WTO', Paper presented to Centre for research in economic Development and International trade(CREDIT),United Kingdom, May 2000, p.12.Url: www.nottingham.ac.uk/economics/credit/researchpaper/pap accessed on 13 July 2007

[25] Submission on Regional Trade agreements by Australia,TN/RL/W/180,para.4

[26] Second Submission on Regional Trade agreements by the European Communities,TN/RL/W/179para. 8

[27] Article XXIV (7)(a)

[28] Understanding regarding notification, consultation, dispute settlement and surveillance, GATT BISD,26th Supp 210,GATT Doc L/4907 (1979) 3

[29] Annex 6 of the Understanding regarding notification, Consultation, Dispute settlement and surveillance, GATT BISD,26th Supp 210, GATT Doc L/4907 (1979)

[30] See J. Crawford and S. Laird, 'Regional Trade Agreements and the WTO',p.8

[31] See WTO list of RTAs and related negotiations available on www.wto.org/english/tratop_e/region_e/provision_e.xis, accessed on 2nd June 2008

[32] Standard Format for Information on Regional Trade Agreements, WTO Doc WT/REG/W/6, (1996).

[33] Part B, Transparency Mechanism For Regional Trade Agreements(Draft Decision) WTO Doc JOB(06)/59/Rev.5,29 June 2006

arrangements for such cooperation.[34] This provided a framework for the resolution of mutual claims and also laid down the basis for subsequent initiatives on the revival of the EAC.[35] In 1991, the Heads of State of Kenya, Uganda and Tanzania, while attending the Commonwealth Head of Government and State meeting in Harare, announced their intention to revive East African co-operation.[36] The respective ministers in charge of foreign affairs and international co-operation were instructed to work out a programme to reactivate and deepen cooperation. The following year, a committee of experts was formed to identify areas of common economic interest. On 30th November 1993, a Permanent Tripartite Commission, responsible for the coordination of economic, social, cultural, security and political issues and entrusted with the formation of policies leading to the revival of East African Cooperation, was established.[37] A Ministerial Forum headed it with a subsidiary senior official's organ called the Coordination Committee of Officials. The Secretariat of the Permanent Tripartite Commission was launched on 14th March 1996 in Arusha, Tanzania.

At a Summit of East African Heads of State in Arusha on 29th April 1997, the Heads of State reviewed and approved the East African Cooperation Development Strategy for the period 1997-2000. This strategy was to provide more precise medium-term guidelines for economic and social development. They also directed the Tripartite Commission to embark on negotiations leading to the upgrading of the Agreement into a Treaty. Its Secretariat was responsible for drawing up the Treaty.[38] On its recommendation, the Treaty for the re-establishment of the East African Community was passed and signed by the Heads of State on 30th November, 1999 in Arusha. The Treaty entered into force on 7th January 2000. The EAC Treaty was notified to the WTO under the Enabling Clause on 9th October 2000.[39]

Important aspects of the reconstituted EAC Treaty

The EAC Treaty of 1999 consists of 153 Articles grouped into 29 chapters. The Treaty provides for trade and development as one of its important pillars and envisages the establishment of a CU as the first step towards the integration process, followed by a Common Market, a Monetary Union and, ultimately, a Political Federation.[40]

Membership

The original members of the EAC are Kenya, Uganda, and Tanzania. Following the admission of two new members, the current membership consists of Kenya, Uganda, Tanzania, Rwanda, and Burundi. These countries are in the Great Lakes Region of Eastern Africa.[41] The Republic of Rwanda and Burundi acceded to the EAC Treaty on 18 June, 2007 and became full members of the Community with effect from 1 July, 2007. There are notable variations in economic structure among the member states. Kenya is the strongest economy in the region and is a developing country. The other partner states are all Less Developed Countries.[42] The World Bank has classified them as heavily indebted poor countries.[43] Apart from Tanzania, all the EAC partner states have faced political instability.

The admission of Rwanda and Burundi into the EAC indicates that the organization is open to new members. Article 3(3) of the Treaty lays down the conditions a country needs to fulfill before becoming a member of the Community. It must: accept and adhere to the principles, social and economic policies of the Community as set out in the Treaty; practice and respect the principles of good governance, democracy and the rule of law; uphold human rights and social justice; be geographically proximate to the region; have a market economy; pursue social and economic policies compatible to those of the Community' and have the potential to contribute to the strengthening of integration in the region. However, these are considered tight conditions for membership. For example, geographical proximity should not be considered as a qualification for regional integration. Membership should be open to African countries with similar values and interests.

Under these conditions, the Democratic Republic of Congo may be the only country around the region to qualify to join in future. Rwanda and Burundi were granted full membership after the conclusion of the Treaties of Accession.[44] Although accession negotiations were conducted, the Treaty does not provide details on accession. Article 3(2) says that the terms and manner of negotiation for the granting of membership shall be determined by the partner states. Article 3(4) of the Treaty provides for the granting of observer status to any interested country or organization.

Objectives

Article 5(1) of the Treaty indicates that EAC will be an entity through which partner states expect to deepen cooperation in political; economic; social and cultural fields; research and technology; defense; security; legal and judicial affairs for their mutual benefit.[45] The EAC undertakes to establish in accordance with the provisions of its Treaty, a CU, a Common Market, a Monetary Union and, ultimately, a Political Federation.[46] The CU and Common Market are transitional stages to the Community.[47] The CU Protocol came into force on 1st January, 2005. The specific objectives of the revived EAC include: the promotion of sustainable growth and development in order to raise standards of living in the

[34] Article.14.02 of The Agreement for The Division of Assets and Liabilities of the Former East African Community (Mediation Agreement)
[35] D. B. Kamala, "The Achievements and Challenges of The New East African Co-operation", Research Memorandum No. 58 ,June 2006, p. 7
[36] EAC Secretariat, "Brief on the East African CU",19 Feb 2004, found on the EAC website: www.eac.int/EAC_customs_U:htm# ,accessed on 14 December 2007
[37] EAC Secretariat report, "Brief on the East African CU" , Arusha, Tanzania
[38] K. Kamanga, "Some Constitutional Dimensions Of East African Cooperation" p.16
[39] WTO document no. WT/COMTD/N/14,East African Community; notification by parties to the agreement dated 11 October 2000
[40] Article 5(2) and Article 75,EAC Treaty (1999)
[41] Energy Information Administration report, "Country Analysis of the Great Lakes Region", February 2004. Url:www.eia.doe.gov,accessed on 6 March, 2008
[42] This is based on the United Nations Criteria of Classification
[43] Energy Information Administration report, "Country Analysis of the Great Lakes Region", February 2004. Url:www.eia.doe.gov accessed on 6 March, 2007
[44] Joint Comminique of the eighth Summit of EAC Heads of State, held in AICC, Arusha Tanzania, 30 November ,2006 p. 14, Communique of the 5th extraordinary Summit of EAC Heads of State, "EAC enlargement for peace, security, stability and development of the East African Region", held in Kampala Serena Hotel, Uganda, 18 June ,2007, p 3.
[45] Article 5(1) ,EAC Treaty (1999)
[46] Article 5(2)
[47] Article 2(2)

region,[48] utilization of natural resources and protection of the environment.[49] It intends to mainstream of gender in all its programs and enhance the role of women in development.[50] Article 7 is a new provision that lists the operational principles of the Community: a people and market driven cooperation; the provision of an adequate and appropriate enabling environment; the establishment of an export oriented economy with free movement of goods, persons, labour, services, capital, information and technology; equitable distribution of benefits and measures to address economic imbalances; and the principles of subsidiarity, variable geometry, asymmetry and complementarity. Among the operational principles, subsidiarity ensures that programmes and activities are based on consultations between governments and relevant stakeholders. Variable geometry allows partner states to progress through the levels of cooperation at different speeds. The principle of asymmetry permits variations in the implementation of integration objectives, allowing those able to do so to assume more obligations. The principle of complimentarity defines the extent to which the economic variances of partner states will support each other in economic activity.[51]

Scope

The EAC operates on a five-year development plan. The Summit, with the hopes of having a Common Market by 2010, a Monetary Union in 2012 and eventually a Political Federation, launched the EAC 2006-2010 development strategy. The development plan to achieve full integration within a specific timeframe is not guaranteed as there are challenges to be overcome: structural factors, e.g. the successful implementation of the CU, harmonisation of trade policies in order to facilitate the establishment for the Common Market; economic factors, e.g. lack of financial resources and capacity to implement agreed programmes and political factors, e.g. civil strife and political instability.

Institutional framework[52]

Summit

The Summit is the highest decision making organ. It consists of the Heads of State and Government of the partner states[53] and is chaired by each member state for one year.[54]. The functions of the Summit include: to give overall policy direction to and oversee the functioning of the EAC; to consider the annual progress reports and other reports submitted to it by the Council; reviewing the state of peace, security and good governance within the EAC and review the progress achieved in the pursuit of its goals. It is also responsible for the appointment of judges of the East African Court of Justice and the admission of new states as members to the EAC. The Summit shall meet at least once every year and may hold extraordinary meetings at the request of any member of the Summit.[55] For the purpose of efficiency, the Seventh Summit meeting held on 5th April, 2006 addressed this issue and decided that there would be two regular Summit meetings annually. These meetings include the Annual Summit meeting, which will be held every November, and a Working Summit, held every June.[56] The Treaty provision is yet to be amended to reflect this agreement. In order to further improve the efficiency of the organization, there is need for the Summit to be flexible enough to allow junior organs to make binding decisions on the day-to-day administrative issues.

Council of Ministers

It is the policy-making organ of the Community.[57] It consists of the ministers responsible for the regional co-operation in each partner state and other ministers as each state shall determine.[58] The Council's functions are spelt out in the EAC's articles. [59, 60, 61] Like the Summit, the decisions of the Council are made by consensus.[62] It does not pass binding decisions. Some of the Summit's decision-making powers could be devolved to the Council of Ministers. The Council of ministers could be mandated to take decisions in between the annual meetings of the Summit in order to ensure that all critical policy decisions are addressed whenever the need arises.

Co-ordination Committees

The Co-ordination Committee is one of the new organs created under the 1999 Treaty. It comprises of the Permanent Secretaries responsible for regional co-operation in each partner state.[63] The Committee reports to the Council of Ministers. The main functions of the Coordination Committee include submission of reports and recommendations to the Council either on its own initiative or upon the Council's request, implementation of the decisions of the Council, receiving and considering reports of Sectoral Committees. The Committee may request a Sectoral Committee to investigate any particular matter.[64] The Co-ordination Committee shall meet at least twice a year before the meetings of the Council and may hold extraordinary meetings at the request of the Committee. The chair will be a Permanent Secretary on rotational basis from member states.[65]

Sectoral Committees

They report to the Coordination Committee. Article 20 empowers the Co-ordination Committee to recommend to the Council the establishment, composition and functions of Sectoral Committees as may be necessary for the achievement of the objectives of the Treaty. The Sectoral Committees prepare comprehensive implementation programmes, setting

[48] Article 5(3)(a) and (b)
[49] Article 5(3)(c)
[50] Article 5(3)(e)
[51] See interpretations under Article 1 of the Treaty.
[52] Article 9 (1)
[53] Article 10
[54] Article 12 (2)
[55] Article 12 (1)
[56] Communique of the 7th Summit Meeting Of Heads of State Of the East African Community, Arusha, Tanzania on 5 April, 2006. www.eac.int/news_2006_04_7th_Summit_communique.htm accessed on 6 January, 2008
[57] Article 14 (1)
[58] Article 13
[59] Article 14
[60] Article 15(1)
[61] Article 15(2)
[62] Article 15 (4)
[63] Article 17
[64] Article 18
[65] Article 19

out priorities with respect to the various sectors. They also monitor the implementation of these programmes.[66] They shall meet as often as necessary and submit reports and recommendations to the Coordinating Committee.[67]

East African Court of Justice

It is established under chapter 8 of the Treaty. Article 24 fixes the composition of the court at six judges: two from each member state. They are appointed by the Summit from among sitting judges of any national court of judicature or from recognized jurists. The Council appoints the Registrar of the court.[68] The judges shall hold office for a maximum period of seven years.[69] This composition is quite rigid and does not take into consideration admission of new members to the EAC. The Court is charged with the duty of implementing the laws of the EAC, ensuring that the laws are interpreted in line with the Treaty.[70] The Court's mandate is clearly spelt out in the EAC's frameworks.[71,72,73,74, 75]

The East African Legislative Assembly

It is the organ responsible for the legislative process of the EAC. The Assembly interacts with the National Assemblies of the member states on EAC matters, debates and approves the EAC budget, considers annual reports, annual audit reports and any other reports referred to it by the Council. It also makes recommendations to the Council on the implementation of the Treaty.[76] Article 48(1) provides that the East African Legislative Assembly shall consist of 27 elected members. Each partner state shall elect nine members.[77] In addition, there are five *ex officio* members consisting of the three ministers responsible for regional cooperation and the Secretary General and the Counsel to the Community.[78] The Assembly is presided over by a Speaker.[79] Decisions are passed by way of voting. *Ex officio* members are not allowed to vote.[80] This composition is quite rigid and does not anticipate the expansion of EAC membership.

Secretariat

The 1967 Treaty did not provide for a Secretariat as one of the main institutions in the EAC but as an institution of the Common Market. The reconstituted EAC Treaty has improved on this. It is part of the EAC Institutional framework. The Treaty provides for the composition of the Secretariat, its functions and the tenure and duties of the Secretary General, the Head of Secretariat. Article 66(1) establishes the Secretariat as the executive organ of the Community. It is headed by the Secretary General who shall be assisted by two deputy secretaries General and Counsel to the Community and is appointed by the Summit upon nomination by the relevant Head of State under the principle of rotation. The Secretary General shall serve a fixed five-year term.[81] The Secretary General is the Principal Executive Officer of the Community. In addition to being head of the Secretariat, the Secretary General shall be the Accounting Officer of the Community and the Secretary of the Summit.[82] Article 71 lists the administrative and executive duties of the Secretariat.[83]

Financial matters

The Council makes the financial rules and regulations of the Community.[84] The budget of the Community shall be prepared by the Secretary General. It is then considered by the Council of Ministers and approved by the Legislative Assembly.[85] The budget shall reflect all expenses of the Community in a financial year. The financial year of the EAC has been specified and shall run from 1st July to 30th June the following year.[86] The budget of the Community shall be funded by equal contributions by the partner states.[87] The contributions need to be asymmetrical, calculated on the basis of the economic strength of each country. Apart from contributions from member states, other sources of finance include grants from regional and international donations, income generated from the Community's activities and other sources as determined by the Council.[88] The EAC has established a partnership fund to improve the coordination and accounting of finance received from international donations. The EAC partnership fund commenced operations in July 2007.[89]

Compensatory mechanisms

Due to the collapse of the East African Community in 1977, there were fears that there would be a reoccurrence of trade imbalance in the new EAC on the establishment of the CU and Common Market mainly due to the different levels of development among the member states. Article 77 of the Treaty and states that the Community will take measures to address the imbalances that may arise from the application of the provisions of the Treaty. It is not clear, however, what measures may be taken. In April 2006, the EAC Summit held in Arusha addressed plans to pass a protocol on the establishment of a development fund to address infrastructural development issues, development imbalances and introduce compensatory mechanisms for the less developed countries. The fund's constitution and functions are herein given.[90] It is not clear whether the development fund includes a formula to determine the rate of contributions by each member state

[66] Article.21
[67] Article 22
[68] Article 24
[69] Article 25 (1)
[70] Article 23
[71] Article 27
[72] Article 36
[73] Article 35 (3). This aspect was adopted from the 1967 Treaty on grounds of review of the decisions passed by the Common Market tribunal under art 22 of the statute of the Common Market Tribunal provided under Annex VIII of the 1967Treaty.
[74] Article 35(1) and (2)
[75] Article 23 of the WTO dispute settlement understanding
[76] Article 49
[77] Article 50
[78] Article 48(1)
[79] Article 56
[80] Article 58
[81] Article 67
[82] Article 67(3)
[83] Article 71
[84] Article 135(1)
[85] Article 132(2)
[86] Article 132(7)
[87] Article 132(4)
[88] Article 133
[89] Communique of the 5th Extraordinary Summit Of Heads of State, "Theme: EAC enlargement for Peace, Security, Stability and Development Of the East African Region", held at Kampala Uganda, 18 June, 2007, p.11
[90] Communique of the 5th Extraordinary Summit Of Heads of State,' Theme: EAC enlargement for Peace, Security ,Stability and Development Of the East African Region", held at Kampala Uganda 18 June, 2007, p.11

based on their levels of development or whether the member states will continue contributing equally to the EAC. Under SACU, the revenue distribution formula incorporates a factor to compensate the less developed members for loss of development potential by virtue of the Customs Union.

The establishment of the East African Customs Union

Internal Tariff

Article 11 of the Protocol provides for the elimination of all internal tariffs and other charges of equivalent effect of trade among them.[91] In keeping with the principle of asymmetry, the CU Protocol allows a full CU to be in force over a five-year period. Within this period, the CU Protocol provides that Kenya eliminates its tariffs on imports originating in Tanzania and Uganda, with immediate effect, on the first day of the implementation of the Protocol. This was on 1st January, 2005.[92,] One of the negative effects of trade liberalization within an RTA is loss of revenue. The World Bank has estimated that revenue losses in the EAC Customs Union will increase after 2009 due to the elimination of tariffs on imports from Kenya and the substitution of third world country imports by duty free intra-EAC imports,[93] especially Kenya even though it has the smallest share of intra-EAC imports because it eliminated its tariffs on imports from the two EAC members immediately in 2005 thus having a long-term effect.

Non-Tariff Barriers

Article 13 of the EAC CU Protocol obliges member states to remove, with immediate effect, all the existing non-tariff barriers (NTBs) to the importation of goods from partner states and to refrain from imposing new NTBs. The Protocol defines NTBs as laws, regulations administrative and technical requirements other than tariffs imposed by a partner state whose effect is to impede trade.[94] NTBs are difficult to identify and clarify because different forms of NTBs are always being introduced. Article 13(2) of the Protocol requires the partner states to formulate a mechanism for identifying and monitoring the removal of non-tariff barriers. The EAC introduced national monitoring committees responsible for the removal of NTBs at national level.[95]

Common External Tariff

Article 12(1) of the Protocol establishes a three band common external tariff set at a minimum rate of 0%, middle rate of 10% and maximum rate of 25%. The maximum rate of 25% is to be reviewed in 2010.[96] The first category of goods with the rate of 0% is that of primary or raw materials and capital goods viewed as essential for production. Intermediate goods are those that have been partially processed and require further processing before they are ready for consumption and have the middle rate of 10%. Final goods are those that have been fully processed and ready for consumption and have the maximum rate of 25%.[97] The EAC has identified 59 products included in EAC sensitive products list that require additional protection in excess of the maximum CET band of 25% but lower than WTO tariff bindings.[98] These products are mainly agricultural and are the most protected commodities. The classification of the sensitive list of products has also raised some concerns as the list does not have a harmonised maximum rate for different products, especially in agriculture.[99]

Rules of origin

All preferential trade agreements require their evolution and application to identify which products are entitled to preferential treatment. The EAC rules of origin are provided in Annex III of the CU Protocol. The rules of origin adopted by EAC are similar to those of COMESA.[100] The rules provide for the determination of the origin of a product based on whether several factors.[101,102] It has been suggested that rules of origin may not be required after 2009 when the transition period of the EAC CU has ended and intra tariff trade is tariff free.[103]

National treatment

This entails according the same treatment to imported and locally produced goods once foreign goods have entered national markets. Article 15(1) provides that partner states shall not enact legislation or apply administrative measures which directly discriminate against the same or like products of other states nor impose on each other's products any internal taxation of such a nature as to afford indirect protection to other products. Article 15(2) states that no partner state shall impose, directly or indirectly, on the products of other partner states, any internal taxation of any kind in excess of that imposed, directly or indirectly, on similar domestic products. NT is provided for under Articles III (2) and III (4) of GATT 1994. Although Article 15 is an attempted reproduction of Article III of GATT 1994, there are differences in their interpretation. Both provisions show the purpose of the National Treatment rule. Both provisions reflect the strict rule against excess taxation of imports. However, the language used in these provisions differs. They also restrict excess and/or internal taxation to imported and domestic products and that imports and domestic products shall be accorded the same treatment in respect of all regulations and requirements affecting their purchase, distribution, transportation, internal sale or use contrary to Article III (1), indicating that any differences in taxes or competitive edge of domestic products over imports will constitute an infringement of national treatment. This part has not been reflected in Article 15 of the Protocol. Article 15(1) (a) has no such elaboration. This shows that the EAC

[91] Article 10
[92] Article 11(1)
[93] C. K. de la Rocha, " World Bank Africa Region Working Paper", Series No.72, August 2004
[94] Article I of the CU Protocol
[95] Communique of The 8th Summit of EAC Heads of State, held at AICC, Arusha Tanzania on 30 November, 2006
[96] Article 12
[97] H. Stahl, "Tariff Liberalization Impacts Of the EAC CU In Perspective", Tralac Working Paper No.4/2005,pg 3
[98] H. Stahl," Tariff Liberalization Impacts Of the EAC CU In Perspective", Tralac Working Paper No.4/2005, p. 4
[99] "East Africa: Common External Tariff Poses Problem," *The Citizen newspaper*, Dar es Salaam, 20 December, 2007
[100] H. Stahl," Tariff Liberalization Impacts Of the EAC CU In Perspective", Tralac Working Paper No.4/2005, p. 32
[101] Annex III to the CU Protocol
[102] Ibid
[103] H. Stahl," Tariff Liberalization Impacts Of the EAC Customs Union in Perspective", Tralac Working Paper No.4/2005, p. 32

provisions on national treatment are more relaxed than the WTO provisions.

Restrictions and Prohibitions to trade

These issues relate to exceptions to the trade liberalisation requirements under the CU Protocol. Article 22(1) of the Protocol states that a partner state may, after giving notice to the Secretary General of her intention to do so, introduce or continue to introduce or continue to execute restrictions or prohibitions affecting: the application of security laws and regulations; the control of arms, ammunition and other military equipment or items; the protection of human life, the environment and natural resources; public safety, public health or public morality and the protection of animals and plants. Article 22 (2) states that a partner state shall not exercise the right to introduce or continue to execute the restrictions or prohibitions conferred in this Article in order to restrict the free movement of goods within the Community.

This invites comparison with Article XX and Article XXI of GATT 1994. The Protocol has merged some of the provisions in Article XX on general exceptions and XXI on security exceptions. On security exceptions, Article 22 (a) and (b) of the Protocol are similar to Article XXI (a) and (b) of GATT 1994. Article 22(c) and (d) on general exceptions are comparable to Article XX (a) (b) and (g) of GATT 1994. It's therefore observed that Article XX of GATT 1994 has a wide scope of exceptions listed from a to j. Only three grounds have been reflected in Article 22 of the CU Protocol. Article XX illustrates that these measures should be applied in good faith. They shall not be adopted in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries or a disguised restriction on international trade. Article 22(2) has not referred to arbitrary or unjustifiable discrimination. It only requires that the partner states shall not exercise the right to introduce or continue to execute the restrictions or prohibitions in order to restrict trade. Article XX of GATT 1994 is very specific and bears conditions to be fulfilled in the application of these general exceptions. Words such as 'necessary', 'relating', 'essential' and 'provided' have been used to emphasize the preset conditions. Article XX of GATT 1994 is a much litigated provision in the WTO. One WTO case in which interpretation and application of the provision was discussed in the *Shrimp Turtle Case.*[104] The Appellate Body suggested a three-step analysis in the application of Article XX: establish the ground to be relied upon; assess whether the requirements and conditions in the particular exception are applicable and apply the good faith requirement in the chapeau of Article XX. It is not clear that the interpretation and application of Article 22 of the CU Protocol can benefit from this WTO jurisprudence.

Trade remedies

Anti dumping measures

Dumping occurs where the export price of imports is less than the normal value of like products in the market of the country of origin. Article 16(1) of the CU Protocol prohibits dumping if it causes or threatens material injury to an established industry in any of the member's states, materially retards the establishment of a domestic industry therein, or frustrates the benefits expected from the removal or absence of duties and quantitative restrictions of trade between the partner states.[105] Annex IV to the Protocol lays down steps to be taken towards the application of antidumping measures. The aggrieved party shall first notify the offending Partner State and request for consultations to address the matter. If consultations fail, the aggrieved partner state may notify the Committee on trade remedies. The Committee will then report its findings to the Council. If the aggrieved party is not satisfied with the Committee's decision, it may appeal to the Council. Where the Council fails to reach a decision, the aggrieved party may take the matter to the Court of Justice within 20 days. The Secretariat shall then notify the World Trade Organization on the anti dumping measures taken by the partner states in accordance with the WTO regulations.[106]

Subsidies

The CU Protocol defines a subsidy as assistance by a government of a partner state or a public body to increase the production, manufacture, or export of specific goods. This may be in the form of direct payments such as grants or loans or measures with equivalent effect such as guarantees, operational or support services, or facilities and fiscal incentives.[107] The Protocol requires notification of certain subsidies to other partner states. These are subsidies in form of income or price support that operates directly, or indirectly to distort competition by favouring certain undertakings or the production of certain goods. The partner states shall be notified in writing.[108] The notification should contain the extent and nature of subsidization, the effect of subsidization, the quantity of the affected products exported to the partner states and the circumstances making the subsidization necessary.[109]

The Protocol distinguishes three types of subsidies: prohibited, actionable and non-actionable. Prohibited subsidies are those that are provided based on export performance and to encourage the use of domestic inputs as opposed to imported goods. An actionable subsidy has an adverse effect on the interests of other partner states. Action will be taken if the subsidy leads to injury to the domestic industry of other partner states to nullification or impairment of benefits accruing to the other partner states under GATT 1994 and to serious prejudice to the interest of another partner state. Non-actionable subsidies on the other hand are non-specific in nature in that they are not directed to specific enterprises or industrial sectors, but are provided to support research activities for the development of disadvantaged regions of a country and to implement newly introduced environmental requirements. Non-actionable subsidies are permissible only if they do not have negative effects on partner states. To ensure this, a Partner State intending to provide subsidies has to inform the Committee in advance for approval.[110]

[104] WTO Appellate Body Report on US-Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R, October 12,1998 [hereinafter Shrimp/ Turtle],available at http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm,accessed on 6 February, 2008

[105] Article 16(1)
[106] Article 16 (2) of the CU Protocol
[107] Article 1 of the CU Protocol
[108] Article 17 (1)
[109] Article 17 (2)
[110] A. K. Mullei, "Integration Experience Of East African Countries", paper presented at the Symposium marking the 30th Anniversary of Banco De

Any partner state that establishes that subsidies of another partner state will have negative effects on its domestic industry, and that such effects would be difficult to reverse, is allowed to request for consultations with the aim of finding a mutually acceptable solution. [111] If consultations fail, the affected partner State can take up the matter with the Committee on Trade Remedies, which upon review may request the State providing the subsidy to take remedial measures. If the State does not implement the decision of the Committee within six months, the Committee will authorize the affected Partner State to take countervailing measures.[112]

Countervailing measures

The Community may, for the purposes of offsetting the effects of subsidies, levy a countervailing duty on any product of a foreign country imported into the CU territory. The duty shall be equal to the estimated subsidy granted on the manufacture, production, or export of that product in the country of origin.[113] The implementation of subsidies and countervailing duties shall be in accordance with the EAC CU regulations in Annex V to the Protocol.[114] Before countervailing duties are imposed, investigations must be carried out to determine the existence, degree and the effects of the subsidization. In particular, to justify an action, investigations must establish the existence of the subsidy, its amount, injury caused and the causal link between subsidised imports and the injury.[115] If investigations produce evidence of a subsidy and the resultant injury or threat of injury, then countervailing duties shall be applied. The offending State may agree to voluntary price undertakings in the form of elimination or reduction of the subsidy or price revisions to the extent that the effect of the subsidy is eliminated. While the duty should not be higher than the subsidy, it could be less if it is sufficient to remove the injury to the affected industry. The Committee shall make the decision on whether the countervailing duty shall be the full amount of subsidy or less.[116] A countervailing duty shall be levied for as long as and to the extent necessary to redress the injurious effect of the subsidy. The duration of the duty may be reviewed by the investigating authority on its own initiative or at the request of the affected party. Countervailing duties have a maximum duration of 5 years.[117] Article 17 refers to subsidization by partner states, but Article 18 refers to Countervailing duties to be imposed on foreign products imported into the CU. It is therefore not clear whether the CU Protocol deals with intra- regional or extra-regional subsidization.

Safeguard measures

Article 19 and Annex VI to the Protocol cover safeguard measures. These measures deal with the restriction of imports of a product on a temporary basis in order to protect domestic industries. Partner states agree to apply safeguard measures in situations where there is a sudden surge of imports into a partner state, which is likely to cause, serious injury to domestic producers in the country.[118] Article 19(2) states that, during a transitional period of five years after coming into force of the Protocol, where a partner state demonstrates that its economy will suffer serious injury as a result of the common external tariff on industrial inputs and raw materials, the partner state shall inform the partner states through the Secretary General on the measures it proposes to take.

The omission of the provisions after the transition period may cause problems, e.g. in relation to the application of CET on industrial inputs and raw materials. Safeguard measures can take the form of raising tariffs above the CET or restrictions of imports by volume or though allocation of quotas. In the case where restrictions are imposed on imports by volume, the volume of imports shall not fall below the average of the last three years for which the data is available. Where quotas are applied, the allocations are to be in agreement with exporters, or are to be allocated according to the previous supply in quantity or values of total imports.[119] Where provisional safeguard measures are imposed while investigations are carried out, the measures will not be applied beyond 200 days. The measures will be in the form of tariff increases that shall be refunded where investigations fail to establish serious injury to domestic industry. Safeguard measures are applicable for a year, renewable annually, but may not be applied for more than three years.[120]

Cooperation in the investigation of practices requiring imposition of trade remedies: Article 20(1) of the Protocol provides that the partner states shall co-operate in the detection and investigation of dumping, subsidies, and sudden surge in imports and in the imposition of agreed measures to curb such practices.[121] Article 20(2) further provides that, where there is evidence of any sudden surge in imports or dumping or export of subsidized goods by a foreign country into any of the partner states that threatens or distorts competition within the Community, the affected partner states may request the partner state in whose territory there is a sudden surge in imports, dumped goods, or subsidised imports, to impose trade remedies to counteract these practices.[122] If the country requested to impose trade remedies does not act within 30 days on notification of the request, the requesting partner state shall report to the appropriate customs authority, which shall take the necessary action.[123]

Competition: Article 21(1) requires partner states to prohibit any practice that adversely affects free trade, including any agreement, undertaking or practice that will prevent, restrict or distort competition within the Community. This shall not apply to certain agreements such as agreements, undertakings or practices that improve production, distribution of goods, promote technical or economic development, or which have the effect of promoting consumer welfare. This exception

Mocambique on 17 May, 2005 in Maputo, Mocambique, p.13
[111] Ibid
[112] Ibid
[113] Article 18 (1)(a)and(b)
[114] Article 18 (2)
[115] Annex V, CU Protocol
[116] A. K. Mullei, "Integration Experience Of East African Countries", paper presented at the Symposium marking the 30th Anniversary of Banco De Mocambique on May 17,2005 in Maputo, Mocambique, p.13
[117] Ibid
[118] Article 19 (1)
[119] A. K. Mullei, "Integration Experience Of East African Countries", paper presented at the Symposium marking the 30th Anniversary of Banco De Mocambique on May 17,2005 in Maputo, Mocambique, p.13
[120] A. K. Mullei, "Integration Experience Of East African Countries", paper presented at the Symposium marking the 30th Anniversary of Banco De Mocambique on May 17,2005 in Maputo, Mocambique, p.13
[121] Article 20 (1)
[122] Article 20 (2)
[123] Article 20 (3)

applies so long as the agreement does not impose restrictions inconsistent with the attainment of objectives of the CU, nor has the effect of eliminating competition.[124] The Act also contains provisions on mergers, consumer welfare, unfair competition and subsidies.[125]

Trade relations with countries and organizations outside the Customs Union: Each country is free to negotiate new bilateral agreements subject to notification to the other partner states.[126]

Table 1: EAC partner states and their membership in other Regional Trade Arrangements

COUNTRY	COMESA	EAC	SADC	IGAD
Kenya	✓	✓		✓
Uganda	✓	✓		✓
Tanzania		✓	✓	
Rwanda	✓	✓		
Burundi	✓	✓		

Overlapping membership of partner states in other RTAs makes the EAC trade regime complex and difficult to manage. COMESA has agreed to introduce a CU in 2008. Once this occurs, Kenya, Uganda, Rwanda and Burundi are likely to be members of two CUs. This will be technically impossible unless the CET and Rules of origin, among other provisions, are made identical.[127] They will therefore have to decide whether to ascribe to EAC or COMESA. This will be the same case for Tanzania when SADC, as proposed, advances to become a CU by 2010. Following the complications arising from overlapping membership, partner states have agreed to uphold tariff preferences granted to third countries as a temporary exception of the East African Community. This also applies to tariff preferences under COMESA and SADC. EAC as a block intends to negotiate preferential trade agreements with COMESA and SADC respectively to overcome WTO inconsistent trade arrangements and address the problem of overlapping membership in various regional initiatives.[128]

Article 37 of the CU Protocol provides that the Community shall foster cooperative arrangements with other regional and international organizations whose activities have a bearing on the objectives of the Community and that the partner states shall formulate mechanisms to identify issues arising out of their obligations with other integration blocs and organizations and establish convergence on those matters for the purposes of the CU. The Protocol provides that a partner State may separately conclude a trade agreement if the terms of agreement are not in conflict with the Protocol provisions.[129] Part 8 of the SADC Trade Protocol also specifies that partner states are obliged to accord MFN treatment to one another and extend preferences under the new trade arrangements to other partner states. Under this requirement, Tanzania could infringe SADC obligations after it fully liberalized trade with Uganda and did not extend this to SADC partner states. The application of MFN helps reduce complications arising out of overlapping membership by ensuring that preferential tariffs are harmonised between RTAs. In addition, the EAC as a bloc is currently negotiating with the EU for the creation of an Economic Partnership Agreement (EPA). Tanzania pulled out of the SADC EPA to negotiate under the EAC EPA. The EAC partner states have signed a partial framework agreement with the EU. This step indicates that the EAC members need to enter negotiations as a bloc in order to establish a strong negotiating force in trade arrangements with developed countries. This marks the first step and building bloc towards a more comprehensive EPA with the EU. The framework agreement will be applied provisionally from 1st January 2008. During this time, the parties should put in place necessary regulations and procedures, including the adoption of transitional arrangements by the EC in order to avoid any disruption in the flow of trade between the parties.[130]

Dispute settlement

The dispute settlement institutions are the East African Committee on Trade Remedies, the Council, and the East African Court of justice. The relevant national customs authorities handle dispute settlement on customs offences. Part XVII of the EAC Customs Management Act provides for the prosecution of various customs offences. The Commissioner and National authorities have the jurisdiction to resolve customs disputes and deal with customs offences and, for each partner state, is appointed in accordance with national legislation. Under Section 219(1), the commissioner deals with cases where there is an admission of a customs offence and metes out the penalties. Unlike the ordinary court, there is no prosecution and conviction when an offence is brought before the Commissioner.

If the Commissioner establishes that the offender committed the offence, he will issue an order specifying the offence committed and the penalty imposed.The order is enforceable in the same manner as a decree or order of the High Court in accordance to the relevant laws of the partner states.[131] Part XX of the Customs Management Act generally covers appeals. If a person is dissatisfied with the decision of the Commissioner, an application for review should be lodged with the Commissioner within thirty days. [132] Where one is dissatisfied with the Commissioner's decision on review, an appeal can be made to a Tax Tribunal within 45 days after service of the decision.[133] For this reason, every partner state is expected to have a Tax Tribunal set up under national legislation to deal with such appeals. The decision passed by the Tribunal will be final.

Trade Remedies under the CU Protocol

Article 24(1) (e) of the CU Protocol establishes a Committee on trade remedies to handle matters pertaining to dispute settlement. Unlike customs offences, trade remedy disputes can only be initiated by partner states. In Annex IX to the CU Protocol, the partner states have agreed to the principles for the administration and management of disputes. The partner

[124] Article 21
[125] See WTO Trade Policy Review, p 25
[126] Article 37
[127] H. Stahl, "Tariff Liberalisation Impacts of the EAC CU In Perspective" Tralac Working Paper No.4/2005, pg 4
[128] Ibid
[129] Article 37(4) ,CU Protocol
[130] EAC news press release, "EAC and EU agree on process towards EAC-EC EPA " Nov 2007
[131] Section 219(3)(e)
[132] Section 229
[133] Section 230

states have committed themselves to: accord due consideration to representations or complaints by other partner states; accord adequate opportunity for consultation on representations by other States and implement, in good faith, decisions made through the dispute settlement mechanism.[134] This Committee comprises of nine members, three from each country.[135] Following the additional membership of Rwanda and Burundi, this provision needs to be revised in order to accommodate them. The Committee is responsible for settling disputes under the Dispute Settlement Mechanism on matters related to rules of origin; antidumping measures; subsidies and countervailing measures; safeguard measures; and any other matter referred to it by the Council.[136, 137]

Article 24 of the CU Protocol stipulates that the decisions of the Committee with regard to dispute settlement shall be binding.[138] Where an aggrieved party is not satisfied with the Committee's decision, the party may appeal to the Court.[139] After the Court has pronounced judgement, the parties have an obligation to implement it. The EAC has not provided for an implementing authority for decisions on trade remedies. Considering that the partner states are also members of other RTAs, provisions need to be made in order to avoid forum shopping. For example, Kenya and Uganda would have to choose either EAC or COMESA dispute settlement mechanisms.

Industrial growth and development schemes

The aspect of industrial growth and development was adopted in the EAC Treaty and CU Protocol in the form of export promotion schemes and the establishment of special economic zones. These regimes are yet to be fully implemented at the EAC level.

Export promotion schemes

Article 25 of the Protocol states that the partner states agree to support export promotion in the Community for the purposes of accelerating development, promoting and facilitating export oriented investments, producing export competitive goods, developing an enabling environment for export promotion schemes and attracting foreign direct investment.[140] Under export promotion schemes, the goods produced and manufactured shall be primarily for export to foreign countries. In the event that these goods are sold in the customs territory, they shall be liable for duties, levies and other charges provided in the CET in trade with foreign countries.[141] Such sale shall be limited to 20% of the annual production of the manufacturing company.[142]

Special economic zones

These are in the form of free ports. Free ports are customs controlled areas where imported duty free goods are stored for the purpose of trade within the region. The functions of the free port include: the promotion and facilitation of trade in goods imported into the free port; provision of facilities such as storage; warehouses and simplified customs procedures and the establishment of international trade supply chain centres in order to enhance market opportunities and enhance competitiveness in multilateral trade.[143] Goods entering into the free port are granted total relief of duty and other export levies except where the goods are intended for use within the region.[144] The revenue authorities in each partner state manage the free ports. The implementation of these free ports shall be in accordance with the free port operation regulations specified in Annex VIII to the Protocol.[145] The member states are to adopt a harmonised list provided by the customs law of the Community.[146]

Conclusion

This study observed that the EAC has attempted to be consistent with the WTO rules. The CU Protocol has been notified to the WTO and will be considered under the new Transparency Mechanism. In reference to the provisions of Article XXIV, the EAC intends to liberalize trade fully between partner states within a five-year timeframe. This is consistent with the SAT requirement and the ten-year timeframe under Article XXIV (8) and 5(c). In compliance with Article XXIV(5)(a), the EAC has adopted a three band CET of 10% for raw material,15% for intermediary goods and 25% for finished goods. This structure entails rising of tariffs for Uganda which may lead to modification of schedules under Article XXIV (6) of GATT 1994. The EAC should have adopted a CET rate based on the most liberal rate applied by the partner states in order to be consistent with WTO rules.
The CU Protocol provides for trade remedies. These include antidumping measures, safeguards, subsidies and countervailing duties. The CU Protocol appears to allow the application of antidumping measures, and subsidies in trade among partner states. WTO rules are uncertain as to whether this is permissible. Article XXIV (8) (ii) lists examples of ORRCs that may be retained in the formation of a CU. The list does not include these measures. For purposes of liberalization on substantially all the trade, it is better if these measures were not applied among partner states.

The Protocol allows for the application of safeguards within the five-year transition period. There are no further provisions on the application of safeguards after the lapse of the transition period. This provision also needs to be amended to provide for safeguards even after 2010. There is also need for these provisions to be harmonized and have common investigation procedures. The Protocol provides for the application of subsidies by partner states, but countervailing duties are imposed on foreign products imported into the CU. It is therefore not clear whether the CU Protocol deals with intra- regional or extra-regional subsidization. This provision needs to be revisited and clarified. Due to the existence of a CET, there is need for a uniform approach and a common institution for imposition of trade remedies in respect of foreign products within the CU. The EAC needs to address the overlapping of RTAs. Each partner state needs to take account of its obligations in both old and new trade

[134] Article 41 of the CU Protocol
[135] Article 24 (2)
[136] Article 24 (1)
[137] Article 24 (4)
[138] Article 24(5)
[139] Annex IX to the CU Protocol
[140] Article 25(1)
[141] Article 25(2)
[142] Article 25(3)
[143] Article 31(2)
[144] Article 31(3)
[145] Article 31(5)
[146] Article 33

arrangements. The provisions are weak and need to be made more stringent in order to protect the interests and obligations of the EAC partner states. Old arrangements need to be reviewed and preferential treatment accorded to partner states. The EAC has introduced export promotion schemes and special economic zones as a way of promoting industrial growth and development. These schemes offer assistance through the facilitation of exports and promotion of foreign direct investment. There are incentives offered such as total relief from duty on imported raw material and other export levies. These incentives are in the form of subsidies. The EAC needs to consider its WTO obligations and ensure that the application of these incentives do not adversely affect the interests of other partner states.

The EAC operates on a timeframe towards achieving full integration. It hopes to have a Common Market by 2010, a Monetary Union in 2012 and eventually a political union. However, obtaining this within set timeframes is not guaranteed. There are challenges that the EAC needs to address before this can be achieved. One challenge is lack of manpower, expertise and material resources to implement the set programs and policies at national level. The EAC should liaise with WTO in order to obtain technical assistance to assist in capacity building. This would be in relation to customs management, the development, and implementation of standards and technical requirements amongst others. The ongoing EPA negotiations with the EU could be an avenue for the EAC to obtain support and resources for capacity building. The partner states have taken advantage of special and differential treatment provisions and have notified the EAC under the Enabling Clause. Although there is no assessment by member states under the Enabling Clause, the EAC legal framework should be consistent with WTO norms. This is because the EAC aspires to attract foreign direct investment and progress into a deeper level of integration. The standard WTO norms are significant since the Enabling Clause does not include trade in services or trade related aspects of intellectual property rights. The CU Protocol and the EAC Treaty were drafted when its membership consisted of Kenya, Uganda, and Tanzania. Some provisions in the Treaty and CU Protocol are rigid and not flexible enough to accommodate Rwanda and Burundi who recently joined the bloc. Although the EAC has addressed the need to amend the provisions, these rules need to be flexible enough to accommodate all future new members. The EAC has adopted new operational principles. These principles include the principle of subsidiary, variable geometry asymmetry and complementarity. This is a welcome development since these principles will assist in addressing issues such as the different levels of development of partner states and will assist in the implementation of regional integration. In addition, the EAC shall be a people-centered and market driven co-operation. The partner states undertake to abide by the principles of good governance, democracy, the rule of law, observance of human rights and social justice.

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