Customs Law of the East African Community

in light of WTO Law and the Revised Kyoto Convention

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Foreword

This study was accepted as a dissertation by the Law Faculty of the Wilhelminian University of Muenster in Westphalia during the winter semester of 2008/2009.

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Muenster, in April 2009 Edward Kafeero

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ABBREVIATIONS AND ACRONYMS

CET	Common External Tariff
COMESA	Common Market for Eastern and Southern Africa
CIF	Cost, Insurance and Freight
EAC	East African Community
FID	Foreign Direct Investment
FOB	Free on Board
GATS	General Agreement on Tariffs and Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
HS	Harmonized System
Ibid.	*Ibidem* (Same author, same book and page)
Id.	*Idem* Same author and same book
i.e.	*Id est* (that is to say)
IMF	International Monetary Fund
op. cit.	*opus citatum*
ORRC	Other Restrictive Regulations of Commerce
p./pp	page/pages
RKC	Revised Kyoto Convention
RTA(s)	Regional Trade Agreement(s)
SADC	Southern African Development Community
SAT	Simple Average Tariff
SITC	Standard International Trade Classification
UNO	United Nations Organization
WCO	World Customs Organisation
WTO	World Trade Organisation

GENERAL INTRODUCTION

"Partner States shall *honour their commitments* in respect of other *multinational and international organisations* of which they are members."[1]
"The customs law of the East African Community consists of: …; and *(f) relevant principles of international law*."[2]
The cited Articles are the starting point of this study which focuses on *customs law* of the East African Community in light of customs-related rules of the World Trade Organisation and of the *Revised Kyoto Convention*.[3]

The *Treaty for the Establishment of the East African Community* (EAC) was signed by the presidents of Kenya, Tanzania and Uganda on 30th November 1999, in Arusha, Tanzania. The Treaty entered into force on 7th July 2000 and it was formally launched on 15th January 2001. This was followed by the signing of the *Protocol on the Establishment of the East African Customs Union* on 2nd March 2004, which entered into force on 1st January 2005. The East African Community currently comprises five countries, following the accession of Burundi and Rwanda on 18th June 2007.

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1 EAC Treaty-1999, Article 130 (1) [emphasis added].

2 *Protocol on the Establishment of the East African Customs Union*, Article 39 (1) (f) [emphasis added].

3 The International Convention on the Simplification and Harmonisation of Customs Procedures (*Kyoto Convention*) was signed at Kyoto, Japan on 18th May 1973; it entered into force on 25th September 1974. It was amended on 26th June 1999 (hence the name: Revised Kyoto Convention, which entered into force on 3rd February 2006). See, WCO Document: PG0156E1a, Brussels, 19th August 2008. * The Revised Kyoto Convention is hereinafter abbreviated 'RKC'.

RESEARCH PROBLEM

To understand the research problem dealt with in this work the following propositions must be borne in mind:

It should be noted that the East African Community is a *Regional Trade Agreement (RTA)*;[4]

As the Articles cited above indicate, the contracting parties to East African Community 'pledge' to honour their commitments in respect of the multilateral and international organisations to which they are members;

Some of the customs-related rules of the World Trade Organisation are also meant to regulate the tension between regionalism and multilateralism (or to regulate the so-called *systemic issues*; and

The Revised Kyoto Convention – adopted as a *blueprint* for modern and efficient customs procedures in the 21st century[5] – is indispensable with regard to customs legislation and customs administration at both national and international levels.

From these four propositions two research questions are developed, namely:

What is the relationship between the EAC and WTO and what is the legal status of the East African Community in light of WTO law?

To what extent does the EAC customs law reflect the international customs law of the World Trade Organisation and of the Revised Kyoto Convention?

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[4] For details on the concept of "Regional Trade Agreements", see chapter 7 (*number 7.2*) of this work.

[5] See www.wcoomd.org/home, accessed on 16th December 2008, 19:00 GMT + 01:00.

METHOD AND STRUCTURE OF THE WORK

The work is divided into three parts. And each part contains three chapters. *Part I* elaborates the fundamental concepts and laws pertinent to Customs, particularly at an international level. It is, so to say, the 'dogmatic' part of the work. In the first place, the meaning of the term Customs is expounded from *historical*[6] and linguistic points of view. This is followed by the exposition of the major tenets of customs law as contained in the GATT/WTO legal and economic system. Lastly, the fundamental pillars of the Revised Kyoto Convention (and of the World Customs Organisation, under whose auspices the convention was signed) are elucidated.

Part II first traces the development of the East African Community and then describes its structure and functioning. In chapters 5 and 6, the substantive and procedural customs law of the East African Community is then expounded and interpreted. It should be noted that a number of comparisons and contrasts are also made in these chapters.

Part III is basically evaluative. First, the concept of Regional Trade Agreements is analyzed and defined. This is followed by the explication of the systemic issues which concern the WTO disciplines on Regional Trade Agreements. This is very helpful, *inter alia*, in assessing the legal status of the East African Community vis-à-vis the World Trade Organisation, which assessment is made precise within chapter 8. The last chapter then evaluates the laws relating to certain customs procedures available in the EAC, indicating their level of conformity with the Revised Kyoto Convention.

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[6] This, of course, entails the social, economic and political aspects.

PART I
FUNDAMENTALS OF INTERNATIONAL CUSTOMS LAW

Chapter 1
CUSTOMS LAW: MEANING AND DEVELOPMENT OF THE TERM

1.1. INTRODUCTION

According to the Oxford English Dictionary the term 'customs' refers to both the duties levied by a government on imported goods and to the official department that collects and administers such duties. Although in the English language the term customs dates back to the reign of King Edward I (1272-1307)[7], the reality it represents is traceable far back to ancient civilisations, albeit with some differences. That means the concept 'customs' has been changing in the course of history. However, despite the changes customs has always had something to do with trade – be it local, national or international.[8] A look at the historical development of customs will therefore highly contribute to proper understanding of customs law.

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[7] "Like the customs of many other European countries, the English customs, including the name 'customs' itself, were local in origin. The first national taxes on trade were not specifically called 'customs' but '*lastage*', '*scavage*', '*cornage*', '*prise*', '*fifteenth*' and '*aid*'. The first national customs to which the name is exclusively and continuously applied were those of 1275 after King Edward I obtained from Parliament the permission to receive duties on the export of wool, wool fells and hides." H. ASAKURA, *World History of the Customs and Tariffs*, World Customs Organisation, Brussels 2003, pp. 147 and 152.

[8] "*Der Zoll ist eine Begleiterscheinung des Handels*", which can be translated as: "Customs is a concomitant of trade". E. DORSCH, *Der Brüsseler Zollrat*, in „Zeitschrift für Zölle und Verbrauchsteuern" (cited hereinafter as '*ZfZ'*), 1985, (pp. 294 – 302), p. 294.

1.2. HISTORICAL DEVELOPMENT OF CUSTOMS

1.2.1. Customs in the Ancient Civilisations

Customs is traced back to many of the world's ancient civilisations such as Mesopotamia, Egypt, the Kingdom of Kush, China, India, Greece and Rome. In Egypt for instance, by interpreting the inscriptions on the stele of King Necho II (609 – 594 BCE) historians have confirmed the existence of the *one-tenth* customs.[9] Moreover, there is historical evidence of the existence of customs or similar organisations in Mesopotamia relating to the period of the Seleucid Empire (approximately 332 – 129 BCE).[10]

In the classical Greece around 413 BCE the Athenians are said to have instituted a 5% duty on imports and exports.[11] Moreover, some historians even point the existence of an organized form of customs administration during this period. When, for instance, a ship entered the port of Piraeus and moved to berth in the front of an emporium, the importer had to make a declaration to the so-called *pentecos-tologue*, the customs officer in charge of collecting the one-fifth duty, and pay him the duty before the merchandise could be released from the emporium or sold to someone else. And the violation of this rule was punished with a fine of as much as ten times the amount of duty normally applicable.[12] It should also be noted that in classical Greece indirect taxes were preferred to direct taxes and that taxes were mostly collected

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9 See H. MASPÉRU, *Les Finances de l'Egypte sous les Lagides*, 1905, p. 117.
10 See H. ASAKURA, *op. cit.*, p. 24.
11 See H. FRANCOTTE, Finance des Cités Grecques, 1909, p. 106.
12 See DU MESNIL-MARIGNY, Histoire de l'Économie Politique des anciens Peuples, 1873, p. 14.

through a *tax farming*[13] method. Obviously with the expansion of trade in the Hellenistic world customs gained more currency.

Customs in the Roman Empire fell under the category of taxes referred to as *portorium*. This category comprised customs duty collected at the frontiers of the provinces or states for the account of the state, the *octroi* collected at the time of entry into or departure from the city as well as the *toll*, which was a passage tax paid, for example, for using a road or crossing a bridge.[14]

"Although statistics concerning the amount of tax collected are not readily available, many historians agree that the *portorium* was a very important source of revenue for the Roman Empire. The rate of *portorium* on the eastern frontier of the Empire is said to have been as high as 25% ad valorem.[15] However, within the Empire the rate generally ranged between 2 and 5% ad valorem."

With the customs tariff of Palmyra dated 18th April 137 A.D., Roman customs is remembered for the birth of customs tariff. This customs tariff was engraved on a huge stone on which other taxes of Palmyra were also inscribed. It listed different merchandise with different rates of duty. And the duties were based on quantity, which quantity was often derived from the means of transport, for example, per donkey or per camel.[16]

In sub-Saharan Africa, well established kingdoms such as the Kush (established in 560 BCE with its headquarters at Monroe), or Mali (with

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13 *Tax farming* is a system whereby the responsibility for tax revenue collection is assigned to private individuals or groups.

14 See Dictionnaire des antiquités Grecques et Romaines, 1905, p. 586.

15 H. ASAKURA, *op. cit.*, p. 57; N.B.: '*Ad valorem*' is Latin for 'on the value'.

16 See *Id.*, p. 72.

its largest commercial centre Djenné) collected customs duties. Later, the kingdom of Ghana, which existed as early as 400 CE, derived its success mainly because of its ability to control the process of trade including the levying of customs duties: one dinar of gold for each donkey-load of imported salt; and two dinars of gold for each donkey-load of exported salt.[17]

To the Indian sub-continent too customs has never been foreign. For instance, the *Arthasastra*, a manuscript written roughly between 400 BCE – 400 CE gives a detailed description of the ancient Indian customs systems. Moreover, the *Laws of Manu*, an Indian text said to have been written in the 2nd century BCE refers to the customs, among others to penalties for customs fraud.[18]

There is also evidence that some form of customs existed in ancient China. For instance, there is a passage from an ancient text *Zuo Zhuon* which indicates that that as early as in 626 BCE the king awarded Daiban a barrier-gate for his distinguished services in war and allowed him to collect customs duty for his own benefit.[19]

1.2.2. Customs in the Middle Ages

Customs has continuously developed along political, cultural and economic changes in various epochs and in various regions. Medieval Europe, for instance, was marked by a multiplicity of toll-houses. For example, in the 14th century, there were 74 tolls along the river Loire and there were 13 toll-houses on the Rhine between Mainz and Co-

[17] See C. BUYONGE, "History and Development of Customs in Africa" in *African Customs Review*, Vol. 1, Issue 2, July 2008, (pp. 1-3) p. 2.
[18] See H. ASAKURA, *op. cit.*, p. 93.
[19] *Id*., p. 100.

logne.[20] Of course the existence of so many toll-houses was a very a big barrier to trade.

From the above description one can already note that from antiquity to the medieval times customs mainly consisted in being *service fees* imposed on traders for the use of roads, bridges, ports, markets and the like or being *protective duties* intended to regulate the flow of trade. Moreover, it was one of the surest ways of raising revenue for any government.[21]

1.2.3. Customs in the Modern Times

The early modern period (approximately 1500 to 1800) did not only see the rise of centralised governments in western Europe, the colonisation of the Americas, Africa, and some Asian countries by European superpowers or the improvement of transportation and communication but it was also during this period that *mercantilism*[22] gained currency. With the mercantilist economic theory, customs acquired a *protectionist* aspect in that many states introduced protective tariffs, thereby discouraging imports while encouraging exports so as to have a positive balance of trade.

With the ushering of economic liberalism which has its roots in the Enlightenment and whose tenets were first propounded by the eco-

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20 See H. ASAKURA, *op. cit.*, p. 123.

21 See P. WITTE & H.-M. WOLFFGANG, *Lehrbuch des Europäischen Zollrechts*, NWB Verlag, Herne/ Berlin 2003, p. 30.

22 Some of the basic tenets of mercantilism were (are) that the prosperity of a nation depends upon its capital and that capital is best increased through a positive balance of trade with other nations (also referred to as a *trade surplus* and which simply means *exporting more than is imported*). According to the mercantilist view, therefore, the state should play a *protectionist* role in the economy by encouraging exports and discouraging imports so as to have a trade surplus.

nomic thinkers Adam Smith (1723 – 1790) and David Ricardo (1772 – 1823), mercantilism began to wane.[23] Consequently, there was a decrease in levying protectionist customs duties. Moreover, countries (especially the economically developed ones) began to rely more on other sources of revenue such as Value Added Tax other than customs duties.

This era of economic liberalism is the order of the day. And institutions such as the World Trade Organisation (WTO) are championing its cause. It is worth mentioning here that the WTO and its sister organisation the World Customs Organisation (WCO) have always played a leading role in customs matters at an international level.[24]

However, it should also be noted that despite the currently dominant model of trade liberalisation, protectionism is to some extent still practiced. And such levying of protectionist duties may be justified, for instance, on the account of protecting infant industries or some specific branches of rather big industries, curbing of an economic crisis,[25] or countervailing the adverse effects of dumping and subsidies.[26]

This review of the historical development of customs illuminates the outstanding features and rationale of customs from antiquity to the present day which include:

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23 These tenets are basically contained in Adam Smith's book titled "*An Inquiry into the Nature and Causes of the Wealth of Nations"* published on March 9th 1776; and in David Ricardo's "*On the Principles of Political Economy and Taxation*", published by John Murray in 1817.

24 More details about the legislative and administrative role of the WTO/WCO in customs matters at an international level are found in Part I, chapters 1 and 2 of this work.

25 See M. LUX, „Allgemeines Zolltarifrecht" in R. REGUL, *Gemeinschaftszollrecht*, Nomos Verlagsgesellschaft, Baden-Baden 1982, p. 83.

26 See GATT, Article VI.

a) Considering customs as one of the taxes imposed on imports or exports in order to raise a state's revenue (fiscal tariffs);
b) Considering customs as charges imposed on traders for the use of certain services such as roads, bridges, ports, markets etc.(usage fees); and
c) Considering customs as one of the economic policy instruments used by a state, for instance, in view of getting a trade surplus, protecting some industries against foreign competitors (protective tariffs).

Obviously, these aspects of customs have been in different epochs and in different countries (or regions) variously emphasized. For example, while developed countries are no longer largely relying on customs as a source of a state's revenue less developed countries are still doing so. As M. KEEN observes, despite the significant liberalisation of trade over recent decades, in many countries trade tax rates continue to be quite high, and the receipts they yield are a key component of public finances.[27]

1.3. DEFINITION OF CUSTOMS LAW

1.3.1. Linguistic Approach

'Customs law' is a compound term which stems from two words: 'customs' and 'law'. The word 'customs' may be considered as an adjective that qualifies the noun 'law'. However, used as a compound term,

[27] M. KEEN, "The Future of Fiscal Frontiers and the Modernisation of Customs Administration", in M. KEEN (ed.), *Changing Customs: Challenges and Strategies for the Reform of Customs Administration*, IMF Publication Services, Washington 2003, p.3.

'customs law' is a full-fledged noun standing autonomously and capable of being modified by adjectives.

Whereas this work has already significantly dealt with the concept 'customs', the concept 'law' has been more or less taken for granted – basically understood as a body or system of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its subjects.

Granted that 'customs' essentially deals with import or export duties, procedures and formalities as well as transit issues, 'customs law' would therefore refer to a body or system of rules that regulates the levying of import or export duties and other related charges as well as the general administration of import or export procedures and formalities.

1.3.2. International Conventions and the Definition of Customs Law

The General Agreement on Tariffs and Trade (GATT 1994)[28] and the Revised Kyoto Convention are the two outstanding international conventions containing fundamental regulations that govern customs matters.[29]

[28] The General Agreement on Tariffs and Trade was first signed in 1947. And in conclusion to the *Uruguay Round* (1986 – 1994) of multilateral trade negotiations (which revised the multilateral trading system of GATT 1947 and paved way to the formation of the WTO) the text of the GATT 1947 was incorporated in GATT 1994.

[29] Details about the General Agreement on Tariffs and Trade and of the Revised Kyoto Convention are found in Part I, chapters 2 and 3 of this work.

Whereas the GATT 1994 does not give normative definition of customs law, Article I (1) of the GATT 1994[30] clearly shows that customs law essentially deals with duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, the method of levying such duties and charges, and other rules and formalities in connection with the importation and exportation.

Unlike the GATT 1994 the Revised Kyoto Convention gives a definition of customs and of customs law. 'Customs' is defined as the government service which is responsible for the administration of customs law and the collection of duties and taxes and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods. And 'customs law' is defined as the statutory and regulatory provisions relating to the importation, exportation, movement or storage of goods, the administration and enforcement of which are specifically charged to the customs, and any regulations made by the customs under their statutory powers.[31]

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[30] This is the Article that contains the non-discrimination principle known as the *Most Favoured Nation Treatment.* It reads: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to the rules and formalities in connection with the importation and exportation, and with respect to all the matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accord immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

[31] Revised Kyoto Convention (RKC), General Annex, E6 (definition of 'customs'); E10 (definition of 'customs law').

These definitions sound a bit tautological. This is essentially due to the fact that the term 'customs' is applied both to the government institution and to the duties it collects as well as the body of rules pursuant to which it operates. Nevertheless, they encompass the general reality of customs and customs law.

In the *Glossary of International Customs Terms* published by the World Customs Organisation, it is observed that the term 'customs' is also used when referring to any part of the customs service or its main or subsidiary office. Moreover, also used adjectivally in connection with officials of the customs, import or export duties or control on goods, or any other matter within the purview of the customs such as customs officer, customs duties, customs office, customs declaration etc. In addition, it is maintained that customs law generally includes provisions concerning:

- the structure and organisation of customs administrations and their functions, powers and responsibilities, as well as the rights and obligations of the persons concerned;
- the various customs procedures, together with the conditions and formalities relating to their application;
- the factors relating to the application of import and export duties and taxes;
- the nature and legal consequences of customs offences; and
- the ways and means of appeal.[32]

1.3.3. The EAC and the Definition of Customs Law

Article 1 of the *Protocol on the Establishment of the East African Customs Union* defines 'customs duties' as import or export duties and

[32] WCO, *Glossary of International Customs Terms*, Brussels 2006, p. 8.

other charges of equivalent effect levied on goods by reason of their importation or exportation, respectively, on the basis of legislation in the *Partner States*[33] and includes fiscal duties or taxes where such duties or taxes affect the importation or exportation of goods but does not include internal duties and taxes such as sales, turnover or consumption taxes, imposed otherwise than in respect of the importation or exportation of goods.

In addition to defining customs duties the Protocol[34] also gives the content of customs law of the East African Community. This customs law consists of relevant provisions of the EAC Treaty-1999, the Protocol and its Annexes, regulations and directives made by the Council[35], applicable decisions made by the Court,[36] Acts of the East African Community enacted by the Legislative Assembly, and relevant principles of international law.

1.3.4. Consolidated Definition of Customs Law

The exposition on the development of customs in the course of history has already revealed the multifarious, ever evolving and complex nature of customs law. This view may further be substantiated with the current situation whereby there is considerable attention about the role of customs in securing the national and international supply chain fol-

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33 As of 2008 the 'Partner States' of the East African Community included the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania, the Republic of Burundi and the Republic of Rwanda.

34 See Article 39 (1) of the *Protocol on the Establishment of the East African Customs Union*.

35 'Council' means the Council of Ministers of the East African Community established by Article 9 of the *EAC Treaty-1999*.

36 'Court' means The East African Court of Justice established by Article 9 of the *EAC Treaty-1999*.

lowing the *September 11th*[37]. Moreover, there are differences across countries with regard to what governments perceive to be the role of customs.[38] Consequently, many of the definitions of customs law tend to be descriptive – some are even tautological. Mindful of this complexity, a consolidated definition would therefore refer to customs law as:

> A system of rules that govern the levying of duties and charges of any kind on or in connection with importation or exportation, the movement or storage of goods, the administration import and export procedures and formalities as well as the institutional organisation of the agency or agencies which enforce those rules.

It should be noted that by using the phrase 'a system of rules' this definition manages to integrate all possible sources of customs law such as constitutions, statutes, case law, administrative regulations, civil codes, administrative regulations, and even customary law. In addition, the definition incorporates the fundamental idea that customs law has a necessary connection with the importation or exportation of goods.

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37 On September 11, 2001 terrorists affiliated with al-Qaeda carried out a series of co-ordinated suicide attacks upon the United States of America by high-jacking four commercial passenger jet airliners, two of which they crashed into the World Trade Centre, the third into the Pentagon and the fourth into a field near Shanks Ville in Pennsylvania.

38 See T. T. MATSUDAIRA, "Trade Facilitation, Customs and the World Customs Organisation: Introduction to the WCO Trade Facilitation Instruments", in *Global Trade and Customs Journal*, Vol. 2, Issue 6, 2006, (pp. 243-254), p. 247.

Chapter 2

CUSTOMS LAW IN THE SYSTEM OF WTO LAW

2.1. INTRODUCTION: FROM GATT 1947 TO WTO

Just as it is hardly possible to discuss international customs law without discussing the World Trade Organisation (WTO) law it is hardly possible to discuss WTO law without discussing the General Agreement on Tariffs and Trade (GATT). And in order to appreciate the systemic issues of the GATT/WTO customs law it is important to give at least a brief account of the political-economic circumstances that surround the birth and growth of the GATT and the subsequent WTO.

The period between World War I and World War II was characterised by extensive unilateral protectionism the world over. The 1930 Hawley-Smoot Tariff Act of the United States, which increased average tariffs to 51%, is a very good example of such tariff escalations. As the Great Depression set in, world trade at large collapsed together with many domestic economies, setting the stage on the way to World War II.[39]

Though it should be emphasized that protectionism was not the cause of the Great Depression, it should be noted that the Great Depression was certainly deepened by the escalation of protectionism and protection-inspired trade wars of the 1930s. And in fact, the Great Depression, World War II and the collapse of global trade became so indelibly linked in the minds of policymakers that they created the *Breton Woods*

[39] See T. COTTIER, M. OESCH, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland*, Staempfli Publishers Ltd., Berne 2005, p. 14.

system in order to prevent a recurrence of those evils.[40] Although over 150 years had passed since the theory of economic liberalism had been introduced, these political-economic circumstances that culminated in the World War II re-enkindled the fires of trade liberalisation[41] and multilateralism[42].

Consequently, in 1944 a multilateral conference was held in Bretton Woods, USA (hence the term '*Bretton Woods* system') with an objective of developing a post-war multilateral system of international economic relations. Its core mandate was to create three key international institutions, namely the *International Monetary Fund* (IMF), the *International Bank for Reconstruction and Development* (World Bank) and the *International Trade Organisation* (ITO). All of them were thought to be placed under the umbrella of the United Nations. Subsequently, the IMF and World Bank were established and are commonly referred to as *Bretton Woods* institutions. The ITO was intended to become the main pillar of the of the new multilateral, liberal world trading regime. However, unlike the IMF and the World Bank, the ITO failed to come into existence largely due to opposition in the U.S. Congress.[43]

It should be noted that during the negotiations over the ITO and the post-war international trading system at large, a multilateral treaty con-

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40 See B. E. MOON, *Dilemmas of International Trade*, Westview Press, Oxford 2000, p. 81.

41 Trade liberalisation (sometimes referred to as Open Trade or Free Trade) refers to a system in which the trade in goods and services between or within countries flows without (or with minimum) government-imposed restrictions such as tariffs and import/export quotas.

42 In international relations multilateralism refers to multiple countries working in concert on a given issue. The post-World War II period saw the 'birth' of a number of multinational institutions such as the UN, the Bretton Woods Institutions, and many others have been formed in the subsequent years.

43 For a detailed history of the Bretton Woods system, see M. D. BORDO, *A Retrospective on the Bretton Woods System*, University of Chicago Press, Chicago 1993.

taining general principles of trade, namely, the GATT had been prepared. It provisionally[44] entered into force on 1st January 1948 pending the conclusion and entry into force of the Havana Charter. So after failing to adopt the ITO, the GATT not only became effectively the centre of multilateral trade regulation, but it also remained a *de facto* organisation until its replacement by the WTO in 1995.[45]

In the period between 1947 and 1994 eight multilateral trade negotiations (MTNs) sessions or *rounds* were concluded by the GATT Contracting Parties. These include:

1. The *Original GATT negotiations*, held in Geneva during the mid and late 1940s and in which the 23 original Contracting Parties participated;
2. The *Annecy Round*, 1948-1949, involving 33 countries;
3. The *Torquay Round*, 1950-1951, involving 34 countries;
4. The *Geneva Round*, 1955-1956, involving 22 countries;
5. The *Dillon Round*, 1960-1962, involving 45 countries;
6. The *Kennedy Round*, 1964-1967, involving 48 countries;
7. The *Tokyo Round*, 1964-1967, involving 102 countries; and
8. The *Uruguay Round*, 1986-1994, involving 118 countries.[46]

It is interesting to note that the early GATT MTN rounds mainly focused on the progressive reduction of tariffs – *a typical customs law*

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[44] For instance, Article XXIX of GATT 1947 clearly indicates GATT's provisional nature; For an analysis of the Protocol of Provision Application of GATT 1947, see WTO, *Analytical Index: Guide to GATT Law and Practice*, Geneva 1995, Vol. 2, pp. 1071-1084.

[45] For a detailed history of GATT, see J. H. JACKSON, *World Trade and the Law of GATT: A Legal Analysis of the General Agreement on Tariffs and Trade*, The Michie Company, Charlottesville 1969; R.E. HUDEC, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Butterworth Legal Publication, Salem 1993.

[46] See K. KENNEDY, "GATT 1994" in P.F.J. MACRORY et al. (Eds.), *The World Trade Organisation: Legal Economic and Political Analysis*, Springer Science+Business Media LLC, New York 2005, Vol. 1, p. 93.

topic – and the elimination of quantitative restrictions. By the time of the third round, for instance, 8,700 concessions were negotiated, resulting in tariff reductions of 25% compared to the 1848 levels. As the level of customs duties was reduced and resort to quotas eased, new obstacles to trade, namely 'non-tariff barriers to trade' (NTBs) emerged. [47] Consequently, while in the Kennedy, Tokyo and Uruguay GATT Contracting Parties continued to negotiate tariff reductions, they dedicated much time, among others, to developing legal disciplines on the use of NTBs.

It was in the Uruguay Round that the idea of creating of a World Trade Organisation emerged, for negotiators and observers increasingly realized that significant new agreements would require better institutional mechanisms and a better system for resolving disputes. The package of agreements that brought the WTO into existence was opened for signature at Marrakesh on 15th April 1994. When the WTO Agreement entered into force (on 1st January 1995) the GATT 1947 and the WTO coexisted under the *Decision on the Transition Co-existence of the GATT 1947 and the WTO Agreement*.[48] The Decision provided for the termination of GATT 1947 on 1st January 1996, on which date GATT 1947 would be absorbed in the WTO system as GATT 1994.

From this panoramic presentation one can clearly see that the WTO owes much of its trade-liberalising principles and – for the case of this study – its customs law to the GATT 1947. As BHALA suggests, another way to characterise the relationship of GATT to the WTO would be that of a parent to child. The child (in the best of worlds) exceeds beyond the hopes of the parent. But, the child could not have begun the

47 See *Ibid.*

48 This Decision was adopted on 8th December 1994. See GATT Document: PC/12-L/7583.

journey without the parent. And, the child always carries the teachings of the parent.[49]

2.2. THE FUNDAMENTAL PILLARS OF WTO LAW

In addition to knowing the economic-political circumstances which surround the evolution of the WTO system and the economic rationale that underlies that development, it is very important to know the key legal principles upon which the this system is based. This GATT-WTO system is built on five core principles[50] namely, the unconditional most-favoured-nation obligation, tariff bindings, the national treatment obligation, the elimination of quantitative restrictions, and transparency of government regulations affecting trade. And contemporary customs laws all over the world are greatly influenced by these principles.

2.2.1. The Most-Favoured-Nation (MFN) Treatment

This principle obliges a WTO Member to treat imports from a Member on an equal and non-discriminatory basis vis-à-vis all other Members' imports. It is a principle of *non-discrimination*. The MFN obligation is *unconditional* in the sense that MFN treatment must be accorded to all imports from WTO Members, regardless of country of origin and regardless of whether the exporting Member negotiated reciprocal trade concessions with the importing Member. The economic rationale underlying the MFN principle is the tenet that discrimination can lead to wasteful trade diversion[51], and the fact that the MFN principle promotes efficient allocation of resources thereby lowering costs of pro-

[49] R. BHALA, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade*, Sweet & Maxwell Ltd, London 2005, p. XV.
[50] K. KENNEDY, *op. cit.*, p. 99.
[51] See R. BHALA, K. KENNEDY, *World Trade Law*, Lexis Law Publishing, Charlottesville 1998, p. 59.

duction, increasing consumer choices and promoting world economic growth. Seen from a political point of view, the MFN principle also facilitates trade negotiations that would otherwise have been very difficult if reciprocity were demanded as a condition for receiving the benefits of a trade concession.[52]

The MFN principle "has long been a cornerstone of the GATT and it is one of the pillars of the WTO trading system."[53] It is well-articulated in GATT I, in which it is referred to as '*General Most-Favoured-Nation Treatment*'. And there are some other specific MFN-type clauses that apply, for instance, to transit of goods[54], marks of origin[55], and quantitative restrictions[56].

Strictly speaking, the MFN obligation would preclude bilateral or regional preferential agreements between or among WTO Members. In the WTO system, however, there are some exceptions to the MFN obligation. And the two outstanding exceptions are the GATT: XXIV exception for Free Trade Areas and Customs Unions, and the exception for special and differential treatment of developing countries.

2.2.2. Tariff Concessions

It has been stated in the introductory part of this chapter that by the birth of the GATT-WTO system tariff levels were generally very high mainly due to the desire to protect domestic industries from import competition. Despite the strong desire to liberalise trade it was practi-

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52 See *Ibid.*

53 WTO Document: WT/DS AB/R 139 and 142 paragraph 69, 31st May 2000, Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*.

54 GATT V: 2, 5, and 6.

55 GATT IX: 1.

56 GATT XIII: 1.

cally impossible to eliminate tariffs overnight and up to the present day it is perhaps impossible to completely eliminate tariffs in international trade. The best solution was therefore a gradual reduction of tariffs. Tariffs or customs duties are in fact a form of trade protection authorized by WTO law. Compared to other forms of trade protection such as import quotas and other non-tariff barriers to trade, tariffs are 'advantageous'[57] in the sense that the level of protection they afford can be readily and accurately determined, which in turn allows a foreign producer to know at which price he will have to sell his goods in order to be competitive in a foreign market.

In WTO parlance tariff bindings or tariff concessions may either be '*applied*' / '*actual*' or '*bound*'. An 'applied' tariff rate is that rate which a Member actually imposes on the category of imported merchandise, whereas a "bound" tariff is a level of protection a Member has agreed *not to exceed*.[58] In principle, if a WTO Member increases tariffs above the bound duty rate, other adversely affected Members have to be compensated for in the form of lowered tariffs on other items of interest to those Members. Failing compensation those Members will be entitled to retaliate by raising duties on goods of export interest to the Member raising its tariff.[59] As K. Kennedy observes, tariff bindings work hand-in-glove with the MFN clause. Through the operation of the unconditional MFN commitment, negotiated tariff concessions are generalized and multilateralized.[60]

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57 Tariffs are so to say, "transparent". For further explanation about the transparency feature of tariffs, see R. BHALA, K. KENNEDY, *op. cit.*, p. 60.

58 This quotation from GATT XXVIII *bis*: 2 gives an idea to what a bound tariff is: "…Such negotiations may be directed towards the reduction of duties, *the binding of duties* at then existing levels or undertaking that individual duties or the average duties on specified categories of products *shall not exceed specified levels*."

59 See GATT XXIII, on the right to seek a satisfactory adjustment by an 'afflicted' Member.

60 K. KENNEDY, *op. cit.*, p. 100

2.2.3. National Treatment

Would it really make sense if WTO Members negotiated the liberalisation of trade well knowing that the end-product of their negotiations will be undone through subsequent actions they cannot influence? The obvious answer is 'no'. So, it is precisely the reasoning embedded in the MFN principle that underlies the 'National Treatment' notion as well. Thus, the principle of 'National Treatment' obliges WTO Members to treat imports no less favourably than the domestic like products respecting internal measures, and not to tax imports in excess of the amount of indirect taxes imposed on the like-domestic products.[61]

There are quite a number of cases in the WTO dispute settlement system revolving around this principle. One of these cases is the *Japan – Taxes on Alcoholic Beverages* case, where the Appellate Body states, among other principles, that:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production'. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products.[62]

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61 See GATT III.

62 WTO Document: WT/DS/AB/R 8, 10 and 11, 4th October 1996, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*.

2.2.4. Non-Tariff Barriers to Trade

The elimination of quantitative restrictions (also referred to as quotas) on imports and exports is yet another core principle of the WTO system. GATT XI prohibits quantitative restrictions mainly for two reasons. First, quantitative restrictions lack the transparency of customs duties. Second, by creating an artificial short supply, quotas prevent the law of supply and demand from determining the price at which domestic and imported goods should be sold.[63]

The language used in GATT XI: 1 is '*peremptory*' and the quantitative restrictions it prohibits are broad.[64] Little wonder then that Article XI has been invoked in a number of dispute settlement proceedings. Some of these litigations include, for instance, the '*Japan – Semiconductors*' case, in which the Panel noted that Article XI: 1, unlike other GATT provisions, does not refer solely to laws, regulations or requirements (as does Article III: 4), but rather *more broadly* to 'measures'.[65]

However, the panel report in the '*Argentina – Hides and Leather'* case emphasizes that it is well-established in GATT-WTO jurisprudence that only government measures fall within the ambit of Article XI: 1. In addition, however, the panel recalls (*or endorses*) the following statement of the Panel in the '*Japan – Films*' case:

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63 See K. KENNEDY, *op. cit.*, p. 100.

64 It reads: "*No prohibitions* or restrictions other than duties, taxes or other charges, whether made effective through *quotas, import* or *export licences* or *other measures*, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party" [emphasis added].

65 See WTO Document: BISD 35S/116, 4th May 1998; Panel Report, *Japan – Trade in Semiconductors*; For further discussion on this case, see P. C. MAVROIDIS, *The General Agreement on Tariffs and Trade*, Oxford University Press, New York 2005, pp. 33-37.

> "Past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis."[66]

With its 'all-inclusive' language (see for example the term: '*other measures'*) Article XI strengthens the anti-protectionist regulations of the WTO system. It is thus an instrument to fight market segmentation[67] and it is (at least theoretically) a more effective instrument to integrate markets than GATT III.

2.2.5. Transparency of Government Regulations affecting Trade

The WTO system would hardly progress if there were lack of transparency in Member's trade related laws. And since transparency may not just be taken for granted, the GATT fathers thought it necessary to include Article X that obliges Members to ensure that all national laws and regulations *of general application* affecting trade are published and made readily available. The paramount importance of publication and administration of trade regulations in international trade is even demonstrated by the many disputes revolving around GATT X. These include, for instance, the *Japan – Film* case[68] where the Panel referred to the Panel Report on *US – Underwear* case[69] when it interpreted the term '*of general application*' as follows:

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[66] WTO Document: WT/DS155/R paragraph 11.18, 19th December 2000, Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Imports of Finished Leather*.
[67] See P. C. MAVROIDIS, *op. cit.*, p. 52.
[68] WTO Document: WT/DS44/R, 31st March 1998, Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*.
[69] WTO Document: WT/DS24/AB/R, 10th February 1997, Appellate Body Report, *United States – Restrictions on imports of cotton and man-made underwear.*

> "… inasmuch as the Article X: 1 requirement applies to all administrative rulings of general application, it should also extend to administrative rulings in individual cases where such rulings establish or revise principles of criteria applicable in future cases."[70]

Of course there are further transparency provisions contained in various multilateral trade agreements. One can cite, for instance, Article 2.9 of the Agreement on Technical Barriers to Trade (*TBT Agreement*) which obliges Members to publish advance notice of any proposed product standard so as to give other Members a reasonable opportunity to comment on the proposal before it takes effect.[71] But GATT X remains fundamental and acts as a shield (at least to some extent) against arbitrary government action.

2.3. EXCEPTIONS TO THE PRINCIPLE OF NON-DISCRIMINATION

Article I of the GATT entails the fundamental obligation to all WTO Members to extend *unconditionally* to all other Members any advantage, favour, privilege or immunity affecting customs duties, charges, rules and procedures that they give to products originating in or destined for any other country. As elaborate earlier in this chapter, this obligation (known as the Most-Favoured-Nation rule) expresses the prin-

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[70] For further commentary about the transparency obligation and its relevancy in Trade Facilitation within the EAC, see E. KAFEERO, "Customs and Trade Facilitation in the East African Community" in *World Customs Journal*, Vol. 2, Number 1, April 2008, (pp. 63-71).

[71] See also Annex 3 of the TBA Agreement titled *Code of Good Practice for the Preparation, Adoption and Application of Standards*, which provides guidelines that governmental and non-governmental standardising bodies are to follow in preparing standards, including notice and an opportunity to comment by interested persons.

ciple on non-discrimination, one of the key pillars of the GATT-WTO system.

Despite the centrality of the non-discrimination principle, there are a number of exceptions to it provided for in WTO law. These include:

- the expressly listed preferences between certain countries and regions (GATT Article I: 2-4);
- regional Trade Agreements such as Free Trade Areas or Customs Unions (GATT XXIV);
- the so-called *general exceptions* such as those listed in GATT XX; security exceptions (GATT XXI); and action on imports of particular products taken to overcome economic emergencies;
- unspecific exceptions that may be permitted through a *waiver* (by the GATT Contracting Parties, or currently WTO Members) pursuant to GATT XXIV: 10 and GATT XXV:5; as well as
- other *waivers* which were made permanent by the GATT Contracting Parties, Decision of November 28, 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.[72]

Among all these exceptions to the MFN rule, Regional Trade Agreements (RTAs) and unilateral preference programmes (such as the Generalized System of Preferences [GSP][73]) deserve particular attention.[74]

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[72] This Decision is known as the '*Enabling Clause*' – WTO Document: L/4903. For a general view on the Enabling Clause, see R. THEN DE LAMMERSKÖTTER, *WTO und Regional Trade Agreements (RTAs): Artikel XXIV und die Enabling Clause im Lichte eines idealen Regulierungssystems*, Lit, Münster 2004, pp. – 341.

[73] The Generalized System of Preferences was launched in the mid-1960s under the auspices of the United Nations Conference on Trade and Development. It was criticised for clashing with the GATT principles of reciprocity and non-discrimination. As a result of the inconsistencies, GATT Contracting Parties approved special waivers for the GSP, temporarily in 1971 and permanently in 1979 (as part of the Tokyo Round) through the Enabling Clause. See C. ÖZDEN, E. REINHARDT, "Unilateral

At the moment, however, suffice it to mention that since the mid-1960s, Special and Differential Treatment (SDT) of developing countries has been a dominant paradigm within the GATT-WTO system to frame policies and discussions on fostering integration of developing countries. And the focus has been mainly put on market access granted to selective imports from developing countries to developed country markets at tariffs lower than the Most Favoured Nation levels, without reciprocal concessions; exceptions from some GATT-WTO disciplines; and more latitude in using certain restrictive trade policies.[75]

Likewise, Regional Trade Agreements such as Free Trade Areas and Customs Unions are a big exception to the principle of non-discrimination. Yet they are provided for by GATT XIV and they have tremendously increased in number. This is a serious issue, for their proliferation does not necessarily make them WTO-compatible. In this connection, commenting on the Decision of WTO Appellate Body in the *Turkey – Textiles* case,[76] G. MARCEAU and C. REIMAN rightly note that while reinforcing the threat of dispute settlement, the Appellate Body almost introduces a reverse consensus rule suggesting that, unless otherwise proven, any RTAs and RTA preferences are contrary to the WTO multilateral rules. [77]

Preference Programs: The Evidence", in S. J. EVENETT, B. M. HOEKMAN (Eds), *Economic Development and Multilateral Trade Cooperation*, Palgrave Macmillan and the World Bank, Washington DC 2006, pp. 189-211.

74 A more detailed discussion of the exceptions to the non-discrimination principle (particularly *Regionalism* and *Special and Differential Treatment*) is found in PART III of this dissertation. In this chapter, this section is only a synthesis of major exceptions and it helps to have a full view of customs related aspects of WTO law.

75 See *Ibid*.

76 See WTO Document: WT/DS34/AB/R, paragraph 58, 22nd October 1999, Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products.*

77 G. MARCEAU, C. REIMAN, "When and How is a Regional Trade Agreement Compatible with the WTO?" in *Legal Issues of Economic Integration*, 28(3) 2001, (pp. 297-336), p. 297.

2.4. IMPLEMENTATION OF CUSTOMS LAW UNDER WTO LAW

2.4.1. Classification of Goods

The *Harmonized Commodity Description and Coding System* generally referred to as 'Harmonized System' or simply 'HS' is a multipurpose international product nomenclature developed by the World Customs Organisation. Over 98% of the merchandise in international trade is classified in terms of the Harmonized System.[78] The Harmonized System is a very important tool in the regulation and implementation of the WTO customs law. For example, states which agree with other states the levels of duties which they each will levy on specific goods require a means of identifying exactly which goods will be subject to which duty rates; and the Harmonized System assists in effecting this identification. Moreover, these rules specify which goods are eligible for particular treatment, which other goods should receive the same treatment on the ground that they are 'like' the specified goods, and which characteristics are to be regarded as conclusive when in doubt.[79]

Although the Harmonized System is not administered by the WTO (rather by the WCO), classification issues are very significant in matters that fall within the competence WTO. In fact, many GATT and WTO disputes have involved questions relating to classification. A very good example is the *EC – Computer Equipment*[80] case in which

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[78] http://www.wcoomd.org/valelearningoncustomsvaluation_hsharmonizedsystem.htm; accessed on 1st September 2008, 16:30 GMT + 01:00.

[79] See I. FORRESTER, T. KAUL., "Tariff Classification" in P.F.J. MACRORY, et al. (Eds.), *The World Trade Organisation: Legal Economic and Political Analysis*, Springer Science+Business Media LLC, New York 2005, Vol. 1, (pp. 1582-1599), p. 1582.

[80] See WTO Document: WT/DS/AB/R, 62, 67 and 68, 5th June 1998, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment.*

the Appellate Body maintained that the Harmonized System and its explanatory notes constituted a supplementary means for interpretation of classification decisions.

2.4.2. Rules of Origin

Given that there is still a wide use of contingent trade measures such as anti-dumping and countervailing duties; the use of import quotas especially on textiles as well as tariff rate quotas on agricultural imports; the existence the Generalized System of Preferences (GSP) and other positive discrimination regimes extended by developed to developing countries; the existence of preferential tariff arrangements[81] under various forms of trade arrangements[82] as well as other supplementary reasons such as government procurement and the compilation of trade statistics, there is no doubt that Rules of Origin are still relevant in international trade.

The fundamental WTO tenets of minimising discrimination and facilitating the flow of international trade are reiterated in the Preamble to the Agreement on Rules of Origin[83]. Thus, the gist of the legislation on Rules of Origin is to ensure that they are clear, predictable and prepared/applied in an impartial, transparent, consistent and neutral man-

[81] The existence of preferential trade agreements leads to the distinction between '*preferential*' and '*non-preferential'* Rules of Origin. Preferential Rules of Origin determine what products can benefit from a tariff concession or preference (in order to avoid transhipment), whereas non-preferential Rules of Origin are used to determine a product's country of origin (or 'nationality') for other purposes such as quotas, anti-dumping, statistics, origin labelling, etc.

[82] For a detailed study on Rules of Origin in Regional Trade Agreements, see O. CADOT et al., *The Origin of Goods: Rules of Origin in Regional Trade Agreements*, Oxford University Press, Oxford 2006, pp. 1-332.

[83] The *Agreement on Rules of Origin* is one of the Multilateral Trade Agreements on Trade in Goods, which (pursuant to Article XIV of the Marrakesh Agreement Establishing the World Trade Organisation) bind all WTO Members.

ner so as to avoid unnecessary obstacles to trade. This is in line with GATT IX which emphasizes, among others, the principle non-discrimination in designing and applying Rules of Origin.
In many countries, it is incumbent on Customs to classify goods (generally by use of the Harmonized System), verify their origin (usually through the certificate of origin), ascertain their customs value, and to carry out other customs procedures needed for the clearance. Even without delving into all technical and specialist issues concerning Rules of Origin (which would in fact go beyond the scope of this chapter), this panoramic view already shows how Rules of Origin are an important customs-related branch of WTO law.

2.4.3. Customs Valuation

2.4.3.1. Concept and Purpose of Customs Valuation

Customs valuation is the determination of the amount upon which duty is calculated. Customs valuation is a necessity when rates of duty are established on an *ad valorem*[84] basis.[85] Hence, it is necessary to establish the value of the goods in order to determine what duty to assess. It should be noted that the way value is defined is determinant of the customs valuation system applied. The two commonly used concepts of value are 'notional' and 'positive' values.

The '*notional*' concept of value relates to the price at which, under assumed conditions, the goods to be valued *would be* sold under certain

[84] *Ad valorem* is Latin for 'on the value' – for example, a duty of 5% on the value of the goods.

[85] When tariffs are based on specific duty rates, that is, a given amount of duty per unit of good, then the value of the goods in question does not have an impact on the duty. In this case, value determination is not needed for the assessment of duties, although it might be needed for other purposes such as keeping statistics.

conditions. A good example of such concept is the Brussels Definition of Value (BDV) which was based on the "'normal value', that is, the price which the imported goods *would* fetch at the time when the duty becomes payable on a sale in an open market between buyer and seller independent of each other."[86] The '*positive*' concept of value on the other hand is about the price at which the goods to be valued *are* sold, for instance, as agreed by the buyer and seller. The *'transaction value'* provided for in Article I of the Customs Valuation Agreement largely represents such concept of value.

2.4.3.2. Development of Customs Valuation within the WTO System

Right at the beginnings of the WTO system many believed that arbitrary valuation practices of certain customs administrations were actually a barrier to trade. That is why Article 35 of the *Havana Charter* contained an international policy on customs valuation.[87] The next important moment in the development of international cooperation in customs valuation was the establishment of the Study Group for a European Customs Union in 1947. The Study Group was assigned, among others, to draft a common definition of value for use in a Customs Union. It came up with the Brussels Definition of Value in 1950.[88] The BDV was adopted by the Customs Cooperation Council through its Convention on the Valuation of Goods for Customs Purposes; and it was the most popular international valuation system during the 1970s.[89]

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86 Convention on the Valuation of Goods for Customs Purposes, Article I (1).

87 A largely similar valuation provision appears as Article VII of the GATT 1947.

88 See *Zepf Wertverzollung Kommentar*, 4. Auflage, Teil I (Einleitung) Nr. 3.5, p.6.

89 See S. L. SHERMAN, H. GLASHOFF, *Customs Valuation: Commentary on the GATT Customs Valuation Code*, Kluwer Law and Taxation Publishers, Deventer 1988, pp. 52-54.

Dissatisfied with the customs valuation systems of the time, the Tokyo Round of MTNs addressed the issue of customs valuation. In fact, Article VII of the GATT 1947 was considered too generic – providing little guidance with regard to practical application. And the BDV was *essentially* criticised for giving too much discretion to customs officers in determining the customs value of imported goods. The fact that major trading partners such as the United States and Canada remained out of the BDV also fortified the view to revise the customs valuation system.[90] The Tokyo Round ended up in the signing of the Agreement on the Implementation of Article VII of the GATT (commonly referred to as the *GATT Customs Valuation Code*) in 1979.[91]

As it is the case with many other Tokyo Round Agreements dealing with non-tariff barriers to trade, the economic rationale behind the Customs Valuation Code is to avoid impairing the effect of tariff concessions through arbitrary customs valuation regimes.[92] Hence the Agreement set out to establish a precise set of rules which would be applied in a transparent, predictable and uniform manner by all Members. And this would be achieved mainly through the application of the *transaction value* method.[93]

The GATT Customs Valuation Code was not subject to negotiation during the Uruguay Round. Thus, the Uruguay Round's *Agreement on*

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90 See G. KOSCHEL, "Zollwert" in R. REGUL (Ed.) Gemeinschaftszollrecht, Nomos Verlagsgesellschaft, Baden-Baden 1982, pp. 692-693.

91 I. FORRESTER, O. ODARDA, "The Agreement on Customs Valuation" in P.F.J. MACRORY et al. (Eds.), *The World Trade Organisation: Legal Economic and Political Analysis*, Springer Science+Business Media LLC, New York 2005, Vol. 1, p. 536.

92 This reasoning comes out clearly in the *General Introductory Commentary* on the Customs Valuation Agreement.

93 Paragraph 1 of the *General Introductory Commentary* to the GATT Customs Valuation Code states: "*The primary basis for customs value is the 'transaction value' as defined in Article 1. Article 1 is to be read together with Article 8…* ".

Implementation of Article VII of General Agreement on Tariffs and Trade 1994[94] is practically identical to the GATT Customs Valuation Code but with stronger binding force due so-called 'single-package' undertaking.[95]

The Final Act of the Uruguay Round also includes two Ministerial Decisions relating to customs valuation: the Decision Regarding Cases Where Customs Administrations Have Reasons to Doubt the Truth or Accuracy of the Declared Value,[96] and the Decision on Texts Relating to Minimum Values and Imports by Sole Agents, Sole Distributors and Sole Concessionaires.

2.4.3.3. Overview of the WTO Customs Valuation Legislation

2.4.3.3.1. Article VII of the GATT 1994

Article VII gives the main principles of customs valuation to be followed by WTO Members with regard to all goods subject to import duties. These principles include: the prohibition of arbitrary, fictitious customs values and the basing of customs value on the value of merchandise of national origin (Article VII: 2 (a)); the obligation to take

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94 This Agreement is commonly referred to as '*Customs Valuation Agreement'* – and this is the title used hereinafter.

95 See P. WITTE & H.-M. WOLFFGANG, *op. cit.*, p. 404; The '*Single-Package'* principle is embodied in Article II : 2 of the *Marrakesh Agreement Establishing the World Trade Organisation*, which states: "The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members". It should also be noted that the current Partner States of the East African Community (Burundi, Kenya, Rwanda, Tanzania and Uganda) are also Members of the World Trade Organisation.

96 That *Decision* is based on Article 17 of the Customs Valuation Agreement and it is often referred to as '*Shifting the Burden of Proof*' or simply *SBP*.

'actual value'[97] as the basic rule of customs valuation; considering the nearest ascertainable equivalent of the 'actual value' as a substitute rule (Article VII: 2 (c)); the exclusion of certain internal taxes (Article VII: 3); and transparency (Article VII: 5).

Given the many variables which influence customs valuation as provided for in GATT VII, it is obvious that all the above-mentioned principles fall short of constituting a stringent legal system that would prevent customs officials from making an arbitrary use of valuation procedures, or WTO Members from using customs valuation for protectionist purposes.[98]

As briefly explained above,[99] it is clear that Article VII is rather generic and provides little guidance with regard to practical application. This is mainly due to its basing of customs valuation on the 'actual value' of the imported goods. This problem is alleviated by the second pillar of the WTO customs valuation legislation.

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97 GATT Article VII: 2 (b) defines *'actual value'* as the price at which, at the time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. It should be noted that paragraphs 2:1, 2:2, 2:3 and 2:4 continue to clarify how to understand the 'actual value' under various situations. Nevertheless, as BHALA and KENNEDY noted (see *op. cit.*, p. 317), the 'actual value' definition is not always easy to translate into practice in a uniform way and its terms create room for ambiguity and manipulation.

98 See I. FORRESTER, O. ODARDA, *op. cit.*, p. 538.

99 See also the sub-title: "*Development of Customs Valuation within the WTO System*" under this chapter.

2.4.3.3.2. The Customs Valuation Agreement

2.4.3.3.2.1. Objectives and Guiding Principles of the Customs Valuation Agreement

The *General Introductory Commentary*[100] gives the main objectives of the Customs Valuation Agreement. First on the list is the *promotion of the objectives of the GATT 1994*. The adoption of the Customs Valuation Agreement is thus in line with the GATT –WTO 'philosophy' of promoting international trade by reducing tariffs and other barriers to trade plus the elimination of discriminatory treatment in international commerce.[101] Concretely, the implementation of the Customs Valuation Agreement helps to avoid impairing the effect of tariff reductions by arbitrary customs valuation systems.

Securing additional benefits for the international trade of developing countries is also one of the main objectives. Article 20 and Annex III[102], which provide for '*Special and Differential Treatment*' for developing countries by giving them a delay period of application and reservation on certain specific rules, are the main legal steps to be taken to achieve that objective. Additionally, the two Ministerial Decisions adopted during the Uruguay Round further address the concerns of developing countries with regard to the truth or accuracy of the declared value as well as the retention of minimum values and sole agents, sole distributors and sole concessionaires.

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100 The part that contains the objectives used to be under the sub-heading 'Preamble' in the (Tokyo Round) GATT Customs Valuation Code.

101 See GATT, '*Chapeau*', paragraphs 2 and 3.

102 Both the Article cited and the Annex relate to the Customs Valuation Agreement.

However, despite the intention to secure benefits for developing countries it should be noted that there are still a number of problems connected with the implementation of the Customs Valuation Agreement by developing countries. Examples of such problems include:

- loss of revenue due to low taxpayer compliance and administrative inadequacies in customs which make it difficult to effectively check underinvoicing;
- less compliant trading environment since large shares of imports are accounted for by an informal sector that uses unreliable invoices, has poor bookkeeping standards, has no fixed business address, etc;
- the existence of relatively high tariff rates; as well as
- the many administrative limitations such as inadequate value data and poor means of information gathering and communication that result in customs having little or no access to price information and little means to verify declared values, lack of qualified personnel, limited and often ill-managed or underused computerisation, and inadequate organisation and poor management.[103]

Providing greater *uniformity* and *certainty* in the implementation of the provisions of GATT 1994 VII is also one of the objectives of the Customs Valuation Agreement. The inclusion of Article 18 which regulates the administration, consultations and settlement of customs valuation disputes as well as the establishment of the *Technical Committee on Customs Valuation*[104] is one of the outstanding steps taken to ensure certainty and uniformity – for instance, through the advisory opinions,

[103] See A. GOORMAN, L. DE WULF, "Customs Valuation in Developing Countries and the World Trade Organisation Valuation Rules" in L. DE WULF, J. B. SOKOL, *Customs Modernisation Handbook*, The World Bank, Washington DC 2005, pp. 161-163.

[104] See Annex II to the Customs Valuation Agreement.

commentaries or explanatory notes of the Technical Committee on Customs Valuation.[105]

Further objectives include the provision of a *fair*, *uniform* and *neutral* customs valuation system that precludes the use of arbitrary or fictitious customs values. The concept of 'fairness' implies respect for the principle of non-discrimination, one of the cornerstones of the WTO legal system. According to Article 21: 1 of the Customs Valuation Agreement each Member has to ensure that nationals laws, regulations and administrative procedures do conform to the provisions of the Customs Valuation Agreement – and that is a clear manifestation of the principle of uniformity announced in the General Introductory Commentary. The principle of neutrality is manifested in the insistence on the use of the transaction value method of customs valuation and the application of other methods in a strictly hierarchical order only in the cases where the transaction value method is not applicable. In fact, as C. L. GUARDA noted, the adoption of a 'positive' value (transaction value) instead of a 'notional' value (Brussels Definition of Value) was a major step towards an objective basis for customs valuation.[106]

It is stated in the General Introductory Commentary that customs value should be based on *simple* and *equitable* criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply. In fact, this is another way of restating the principle of non-discrimination. In other words, customs valuation procedures should not be used to discriminate against goods of a particular origin.

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105 See Annex II to the Customs Valuation Agreement, paragraph 2 (d).

106 C. L. GUARDA, *The Pivotal Role of Customs Valuation in Trade Facilitation*, Presentation during WCO Seminar on Capacity Building and the WTO Valuation Agreement, Brussels, 17th-18th October 2002.

Lastly, if a product is believed to have been dumped[107]into the importing country it is forbidden to use customs valuation procedures (such as uplifting the customs value) as a counter-measure to the effects of dumping. This means, dumping has to be dealt with according to dumping laws and procedures stipulated in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

2.4.3.3.2.2. Methods of Customs Valuation

Transaction value (as defined in Article 1 read together with Article 8) is the primary method of customs valuation.[108] There are five alternate methods provided for by the Agreement but they can be applied (in a sequential order[109]) only in cases where the transaction value method is not applicable. Pursuant to the General Introductory Commentary, if one valuation method is deemed inapplicable it is advisable to hold consultations between Customs and the importer before proceeding to the next possible valuation method. The transaction value method is currently the most important valuation method in application – used for over 90% of world trade.[110]

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[107] According to Article 2 (2.1) of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, "a product is to be considered dumped, i.e. *introduced into the commerce of another country at less than its normal value*, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

[108] See Paragraph 1 of the General Introductory Commentary, Articles 1 and 8 of the Customs Valuation Agreement.

[109] See The General Introductory Commentary, and Annex I: *General Note, Sequential Application of Valuation Methods.*

[110] WCO, Study on Legislation, Regulations and Administrative Practices of Contracting Parties to the GATT Valuation Agreement, Brussels 1995, p. 36.

Transaction value is *the price actually paid or payable* for the goods, subject to adjustments provided for in Article 8. The transaction value aims to put into practice the general rule under Article VII: 2 (a) of GATT that the customs valuation of imported goods should be based on 'actual value'. As such, customs value is calculated on the basis of the terms of each individual transaction, even if they are unusual for the type of contract in question.[111] In other words, what matters most is the price agreed between parties rather than a notional price.

True, the transaction value method is a big improvement of the customs valuation system used in international trade. Its successful application, however, must go hand in hand with the observation of the many conditions and adjustments as provided for mainly in Article 1 and 8 and their respective Interpretative Notes in Annexes I-III (which pursuant Article 14 form an integral part of the Agreement) as well as other relevant provisions.[112]

The second customs valuation method (where the customs value cannot be determined under the provisions of Article 1) is the *transaction value of identical goods* sold for export to the same country of importation and exported at or about the same time as the goods being valued.[113] Here it is important to bear in mind the concept of 'idendical goods' as described in Article 15 and other relevant conditions and adjustments contained in Article 8 of the Customs Valuation Agreement.

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111 See I. FORRESTER, O. ODARDA, *op. cit.*, p. 544.

112 Other helpful materials on the interpretation and application of the transaction value method include the Decisions of the Committee on Customs Valuation, the Studies, Advisory Opinions, Commentaries, and Explanatory Notes of the Technical Committee on Customs Valuation (which are all found in the *Compendium on Customs Valuation*, published by the World Customs Organisation).

113 See Article 2 of the Customs Valuation Agreement.

The third method is the *transaction value of similar goods* sold for export to the same country of importation and exported at or about the same time as the goods being valued. The conditions and adjustments considered under this method are the same as those in the previous method. The only difference between these two methods lies in the fact that 'identical goods' and 'similar goods' are defined differently by Article 15 of the Customs Valuation Agreement.

Article 4 of the Customs Valuation Agreement provides for a reversal of the sequence of the application of the *'deductive value'*[114] and *'computed value'*[115] methods on the importer's request. Normally, the deductive value method would be considered first and if it fails, the computed value method would be applied. This reversal of the order of the sequence may be considered as an expression of equity principle which is underlined in the Preamble to the Customs Valuation Agreement.

Under the deductive value method, the customs value is based on the unit price at which the imported goods or identical or similar goods are sold in the greatest aggregate quantity in an unrelated party transaction, subject to the deduction of profits and certain costs and expenses incurred after importation.

Under the computed value method, customs value is determined by adding the cost of production of the goods being valued, the usual profit and general expenses in sales of goods of the same class and kind made by producers in the country of exportation. If the country of im-

[114] See Article 5 of the Customs Valuation Agreement and the corresponding Interpretative Note in Annex I.

[115] See Article 6 of the Customs Valuation Agreement and the corresponding Interpretative Note in Annex I.

portation uses the *CIF*[116] basis of valuation, then transportation and related costs to the port of place of importation have to be part of the sum.

The last customs valuation method, commonly referred to as the *fall-back method*, is used only if the methods provided for in Articles 1 through 6 cannot be used in a strict or exact way. Thus under this method, the customs value is determined by applying any of the previous methods that is deemed most appropriate in a flexible manner. But this should be done using reasonable means consistent with the principles and general provisions of the Customs Valuation Agreement. In other words, despite the relative flexibility arbitrariness is forbidden. In addition, it is prohibited to determine customs value on the basis of:

a) the selling price of goods produced in the importing county;
b) a system based on acceptance of the higher of two alternative values;
c) the price of goods on the domestic market of the exporting country;
d) the cost of production other than the computed value as determined in accordance with Article 6 of the Customs Valuation Agreement;
e) the price of goods for export to a country other than the importing country in question; and of
f) arbitrary or fictitious values.[117]

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116 'CIF' stands for '*Cost, Insurance and Freight*'. It is a sales contract term which means that the seller must pay the costs and freight as well as procure and pay insurance to bring the goods to the named port of destination. Once the goods have crossed the ship's rail at the destination port the risk is then transferred to the buyer.

117 See Article 7 of the Customs Valuation Agreement and the corresponding Interpretative Note in Annex I.

2.4.3.4. Concluding Remarks on Customs Valuation

The WTO legislation on customs valuation remains crucial in terms of promoting international trade. Developing countries however still face a number of problems in implementing the Customs Valuation Agreement. In this study it is maintained that such problem are mainly administrative and infrastructural. As such, they should not be blamed on the WTO law. Taking for instance the problem of undervaluation, it should be incumbent upon customs administrations to develop the systems and procedures which are necessary to effectively control undervaluation, for example, by establishing a specialist staff that is well trained in post-clearance audit and control. The current customs modernisation undertakings in a number of developing countries should therefore seriously consider the implementation of the Customs Valuation Agreement.

2.4.4. Transit

One can hardly think of international trade without thinking of goods crossing national borders. And this automatically makes transit an important aspect of international trade. Article V of the GATT 1994 contains the principal provisions pertaining to transit. It should however be noted that the provisions of this article go beyond what one could call purely customs issues.[118] This is also evident from the definition of customs transit provided by the Revised Kyoto Convention (a so to say purely 'customs convention' dealing with the simplification and harmonisation of customs procedures).[119] In fact in normal customs par-

[118] See, for instance, the regulations imposed by GATT 1994 V: 2.

[119] "*Customs transit* means the Customs procedure under which goods are transported under Customs control from one customs office to another." See the RKC, Specific Annex E, Chapter 1, E4.

lance, the term custom transit may also be applied to purely domestic movement of goods such as from one inland customs office to another inland customs office (*interior transit*).[120] And as J. F. ARVIS puts it, customs transit refers to customs procedures under which goods are transported through countries from one customs office to the other without paying import duties, domestic consumption taxes or other charges normally due on imports.[121]

Just like in other areas of customs law within WTO law, the legislation on transit fundamentally aims removing discrimination through transit procedures. In other words, it aims at striking a balance between legitimate border controls and facilitating freer trade.

Paragraph 1 of Article V, GATT defines 'traffic transit', and thus lays out the scope of the whole Article.[122] Then paragraph 2 embodies the typical WTO principle of non-discrimination. It provides for freedom of transit and it stresses the MFN principle, thus no discrimination of any kind is permitted against traffic in transit. It should be noted that the right of freedom of transit inheres in WTO Members as to trade between Members, not between a Member and non-Member. If the country of origin or destination is a non-Member, the Article V is not applicable.[123]

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120 See the RKC, Guidelines to Specific Annex E, Chapter 1, 4.2. (d).

121 J. F. ARVIS, "Transit and the Special Case of Landlocked Countries" in L. DE WULF, J. B. SOKOL, *Customs Modernisation Handbook*, The World Bank, Washington DC 2005, p. 243.

122 GATT 1994 V: 1 "Goods (including baggage) and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party *when the passage across such territory*, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, *is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes.* Traffic of this nature is termed in this article 'traffic in transit'" [emphasis added].

123 See the wording: "… *through the territory of each contracting party*…" in Article

Whereas paragraph 3 remains faithful to the ideals of trade facilitation by prohibiting unnecessary delays of restrictions to traffic in transit, it counterbalances the trade liberation entailed in paragraph 2 by allowing customs officials in an intermediary WTO Member to make a kind of 'transit entry' record.[124] But it categorically prohibits the imposition of customs duties, all transit duties and charges except charges for transportation or those that *commensurate with*[125] administrative expenses entailed by transit or with the cost of services rendered.

Paragraphs 5 and 6 substantially reiterate the MFN principle; thus it is not permissible to discriminate against a product just because it transited through a particular WTO Member. It should however be noted that according to paragraph 6 the benefits of non-discrimination are owed only to WTO Members.[126]

2.4.5. Other WTO Provisions relevant to Customs Law

Apart from the classical customs regulations such as those that relate to classification, valuation, Rules of Origin and transit, there are several provisions of WTO law that are very important in the implementation of customs law.

The provisions on anti-dumping and countervailing duties as regulated by Article VI of GATT 19944 and its complementary 'Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994' are also generally relevant to customs law. The Article al-

V: 2. For a more detailed study of this aspect, see R. BHALA, *op. cit.*, p. 472.

124 This could be for security, statistical reasons and the like.

125 Article V: 4 obviously emphasizes this aspect by demanding '*reasonableness*' with regard to any charge, regulation or formality associated with traffic in transit.

126 See R. BHALA, *op. cit.*, p. 474.

lows Members to apply *anti-dumping duties on imports*[127] of a product so long as two conditions are met. The goods must be dumped, and the dumping must cause or threaten material injury to an established domestic industry or materially retard the establishment of a domestic industry.

Article VIII of GATT 1994 (which addresses fees and formalities connected with importation and exportation) includes some of such further provisions necessary in the implementation customs law. The Article expressly limits fees and charges connected with the importation and exportation of goods to the approximate cost of services rendered. This was Article central in the *Argentina – Textiles and Apparel* case in which the Appellate Body upheld the Panel's findings that the statistical tax on imports violated Argentina's obligations under Article VIII: 1(a) "to the extent it results in charges being levied in excess of the approximate costs of the services rendered as well as being a measure designated for fiscal purposes".[128]

International customs law is also influenced by the WTO's *Agreement on Import Licensing Procedures.*[129] This Agreement essentially prohibits discrimination through import licensing procedures. The Agreement favours automatic import licensing but it also has provisions on non-automatic import licensing as well relevant aspects of import licensing. And all this is geared towards facilitating trade and minimising non-discrimination through import licensing procedures.

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127 Obviously, these duties are generally levied by Customs.

128 WTO Document: WT/DS56/AB/R, 22nd April 1998, Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items.*

129 See N. HOGREBE, *Das südafrikanische Zollrecht vor dem Hintergrund des Weltzollrechts im Vergleich zum Recht der Europäischen Gemeinschaft*, Shaker Verlag, Aachen 2006, p. 20.

Last but not least is the field of Preshipment Inspection (PSI).[130] Preshipment Inspection programmes were originally performed for central banks to help them address the issue of capital flight resulting from overinvoicing of imports.[131] In 1985 the first PSI for customs purposes was introduced in Indonesia. It was designed to facilitate trade by improving the speed of and efficiency of customs clearance procedures, ensuring uniform application of import regulations and customs valuation and classification, encouraging foreign investment by guaranteeing transparency and predictability of import procedures, and facilitating the collection of import duties and taxes.[132]

The WTO Agreement on Preshipment Inspection, negotiated under the Uruguay Round, recognizes the need of developing countries to have recourse to PSI as long and so far as it is necessary to verify the quality, quantity or price of the imported goods. Mindful that PSI programmes must be carried out without giving rise to unnecessary delays or unequal treatment, the Agreement establishes the rights and obligations of both user Members and exporter Members to ensure that the principles and obligations of the GATT 1994 apply to the activities of PSI entities. Today, according to the information of the International Federation of Inspection Agencies (IFIA), there are 40 countries that use various PSI programmes subject to the WTO Agreement on PSI.[133]

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130 Preshipment Inspection refers to the practice whereby private companies under contract with, or mandate from, the government of the importing country inspects the goods in the exporting country before they are shipped to the importing country.

131 See A. GOORMAN, L. DE WULF, *op. cit.*, p. 168.

132 See R. M. JEKER, N. V. BALCHIN, "The Agreement on Preshipment Inspection" in P.F.J. MACRORY et al. (Eds.), *The World Trade Organisation: Legal Economic and Political Analysis*, Springer Science+Business Media LLC, New York 2005, Vol. 1, p. 574.

133 http://www.ifia-federation.org/PSIlist.pdf; accessed on 25th September 2008, 17:00 GMT + 01:00.

2.5. CONCLUSION

Although customs law (at both national and international levels) also deals with some other issues that (in a strict sense) go beyond the scope of WTO law,[134] the formation and implementation of customs law in the last 60 years has been particularly influenced by the formation and implementation of WTO law. Likewise, the formation and implementation of WTO law has had a lot – and still has a lot – to do with the formation and implementation of customs law. It is therefore not surprising that the WTO and the WCO are often referred to as 'sister organisations'.[135]

This chapter has shown how these two kinds of law are historically and systemically intertwined. Fundamental pillars of WTO law such as the *MFN principle* have been elaborated, and the exceptions to this principle highlighted. Typical WTO customs-related provisions concerning the classification of goods, Rules of Origin, customs valuation, transit, and many others have been expounded. These are the very provisions which are either directly or indirectly applied (or *supposed to be applied*) in the various customs territories of WTO Members – hence in the East African Community as well.

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134 Such issues include: country borders' security, smuggling, global supply chain security, money laundering, and so forth.

135 This 'sisterhood' is even articulated by the establishment of the *Technical Committee on Customs Valuation* (See Article 18 (2) Customs Valuation Agreement and Annex II thereto) and the *Technical Committee on Rules of Origin* (See Article 4 (2) of The WTO Agreement on Rules of Origin and Annex I thereto).

Chapter 3
CUSTOMS LAW AND THE REVISED KYOTO CONVENTION

3.1. THE ROAD TO THE REVISED KYOTO CONVENTION

3.1.1. Introduction

The Revised Kyoto Convention is widely recognized as the blueprint for modern and efficient customs procedures.[136] It is therefore inconceivable to discuss international customs law without dedicating some paragraphs to the Revised Kyoto Convention. And since the Revised Kyoto Convention was signed under the auspices of the Customs Cooperation Council (now called the '*World Customs Organisation*'),[137] the study of the Revised Kyoto Convention necessarily calls for some exposition of this organisation.

3.1.2. The World Customs Organisation

> "In a joint declaration made in Paris on 12th September 1947, thirteen governments represented on the Committee for Economic Co-

[136] See, generally, K. MIKURIYA, "Legal Framework for Customs Operations and Enforcement Issues" in *Customs Modernisation Handbook*, The World Bank, Washington DC 2005, pp. 51-66.

[137] In 1994, after years of membership growth, the Council adopted the informal name '*World Customs Organisation*' to more clearly reflect its status as a global institution. The official name was not changed in order to avoid the burden of re-ratification of the Convention establishing the Customs Cooperation Council/World Customs Organisation. (See T. WEISS, *Das Weltzollrecht der WTO und Kyoto-Übereinkommen am Beispiel der ASEAN und Indonesiens*, Verlag Dr. Kovač, Hamburg 2006, pp. 39- 46; See also: http://www.wcoomd.org/home_about_us_auhistory.htm, accessed on 7th October 2008, 18:55 GMT + 01:00). **N.B.**: **The name '*World Customs Organisation*' is preferred hereinafter**.

> operation agreed to give consideration to the possibility of establishing one or more European Customs Unions. With this end in view, it was decided to set up a Study Group in Brussels to examine the problems incidental to the project and the steps necessary for its materialisation…. In 1949 the Study Group decided that, irrespective of the progress which might be made with the Customs Union project, the achievements already attained in the field of Nomenclature and Valuation should be turned to advantage and similar endeavours should be made in other fields of customs technique. Following [this] decision, the Convention establishing a Customs Cooperation Council[138] was signed in Brussels on 15th December 1950, together with the Convention on Nomenclature for the Goods in Customs Tariffs (the Nomenclature Convention)[139] and the Convention on the Valuation of Goods for Customs Purposes (the Valuation Convention[140]).”[141]

In accordance with Article V of the Convention establishing the Customs Cooperation Council, this Council was to be assisted by the General Secretariat[142] and the Permanent Technical Committee. At the beginning, the Secretariat was headed by the Secretary General aided by two directors responsible for Valuation and Nomenclature. In 1960, the Customs Technique Directorate was established. The establishment of this directorate owed to the increase in the volume of work to be handled by the Council.[143] The Customs Technique Directorate thus took

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138 It entered into force on 4th November 1952.

139 It entered into force on 11th September 1959.

140 It entered into force on 28th July 1953.

141 H. ASAKURA, *op. cit.*, pp. 287-288.

142 The Secretariat and in fact the Headquarters of the Customs Cooperation Council (World Customs Organisation) are located in Brussels (see Article VII of the Convention establishing the Customs Cooperation Council).

143 See, for example, Article III of the Convention establishing the Customs Cooperation Council which lists the functions of the Council.

over all those customs issues that were out of the ambit of Nomenclature and Valuation.[144]

Apart from the Permanent Technical Committee, the World Customs Organisation is further supplied with the Enforcement Committee, the Technical Committee on Customs Valuation (established in accordance with Article 18 of the WTO 'Customs Valuation Agreement'), the Harmonized System Committee (representing the Contracting Parties to the HS Convention), the Technical Committee on Rules of Origin (established in accordance with Article 4 of the WTO 'Agreement on Rules of Origin'), the Finance Committee and the Policy Commission.[145]

Dedicated to ensuring the highest degree of harmony and uniformity in customs systems as well as developing/improving customs technique and customs legislation,[146] the World Customs Organisation has constantly attracted a number of countries[147] and it has steadily contributed to the effectiveness and efficiency of its Member Customs administrations across the globe. This has been achieved through the development and administration of various international instruments such as:

- the Harmonized Commodity Description and Coding System, which contributes to the facilitation of international trade by pro-

144 See, generally, E. DORSCH, "Der Brüsseler Zollrat" in *ZfZ*, 1985 Nr. 10, pp. 294-302.

145 For details on the structure of the World Customs Organisation, see *Ibid.*

146 See the *Preamble* to the Convention establishing the Customs Cooperation Council.

147 Currently (October 2008), the World Customs Organisation has 174 Members **plus** the European Communities which, since July 2007, has rights akin to those of a WCO Member for matters falling within its competency as an interim measure. (See http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Members_table_174_EN.pdf, accessed on 6th October 2008, 17:55 GMT + 01:00).

viding a common basis for the classification of goods and the collection of customs duties;

- the (Revised) Kyoto Convention, which provides customs administrations with a modern set of uniform principles for simple, effective and predictable customs procedures and effective customs control; and
- the Istanbul Convention, which deals with temporary admission of goods exempted from the payment of duties and taxes in a country or a Customs Union.

It should also be noted that the World Trade Organisation ensures the uniform application of the WTO 'Customs Valuation Agreement' and it has developed the 'Harmonized Rules of Origin'[148] and carries out other various responsibilities in matters relating to Rules of Origin in accordance with the provisions of Annex I to the WTO Agreement on Rules of Origin.

The World Customs Organisation continues to develop international standards in different sectors of international trade. For instance, at the annual Council Sessions in Brussels (in June 2005), Directors General of Customs representing the Members of the World Customs Organisation adopted the '*SAFE Framework of Standards'* which lists the minimum standards that Customs and economic operators should apply in order to secure the international trade supply chain. The document of the SAFE Framework of Standards was later improved by incorporating into its text detailed provisions concerning Authorized Economic Operators (AEO) which had been initially developed in a separate document.[149] The World Customs Organisation also assists its Mem-

[148] On general provisions about the harmonisation of Rules of Origin, see PART IV of the Agreement on Rules of Origin.

[149] See, generally, WCO, *WCO SAFE Framework of Standards*, Brussels 2007, pp. 1-62.

bers through Capacity-Building programmes, encouraging cooperation between customs administrations and the trading community, and through organising training sessions to the private sector.

As indicated above, many vital international conventions have been signed under the auspices of the World Customs Organisation. This is particularly true with regard to the *International Convention on the Simplification and Harmonisation of Customs Procedures* (the 'Revised' Kyoto Convention), whose development, content and influence is discussed below.

3.1.3. Kyoto Convention 1973

3.1.3.1. Historical Background

With the waning of the mercantilism and with the increase in international trade in goods, it became more and more accepted that facilitating international trade, among others, by reducing customs and tariff barriers benefits all involved countries.[150] Nevertheless, the end of the 19th Century and the beginning of the 20th Century were characterised by high tariffs and complex customs procedures. International traders obviously resented these customs and tariff barriers, thus they began to demand change. The first substantial proposals for simplification were sponsored by the international congresses of European traders and submitted by the International Chamber of Commerce for consideration by the League of Nations (formally launched in January 1920). Intergovernmental action taken under the aegis of the League culminated in the signing of the *International Convention for the Simplification of*

[150] See E. DORSCH, „Das Übereinkommen zur Vereinfachung und Harmonisierung der Zollverfahren", in *ZfZ*, 1973 Nr. 10, (pp. 289-292) p. 289.

Customs and other Procedures on 3rd November 1923 in Geneva. This convention is rightly regarded as the predecessor of the Kyoto Convention, for it had been the only independent international convention governing customs procedures before the adoption of the *International Convention on the Simplification and Harmonisation of Customs Procedures* (Kyoto Convention) on 18th May 1973 and which entered into force on 25th September 1974.[151]

It should be noted that membership to the Kyoto Convention *was not*[152] restricted to members of the World Customs Organisation. All members of the United Nations as well as UN-Special Organisations were free to become Contracting Parties to the Convention. In addition, Customs or Economic Unions were under certain conditions allowed to become contracting parties.[153] Among the current EAC Partner States, it was only Burundi, Kenya and Rwanda that signed the Kyoto Convention 1973.[154]

3.1.3.2. Structure and Content of the Convention

The Kyoto Convention 1973 was made up of the Preamble, the 19 Articles of the Convention and the Annexes. The Preamble contained the objectives and principles of the Convention, which were all intended for the harmonisation and simplification of customs procedures so as to facilitate international trade. Chapter I (Article 1) contained the main

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151 See H. ASAKURA, *op. cit.*, pp. 269-272; See also E. DORSCH, *Ibid.*

152 The use of the 'Past Tense' in this field owes to the fact that with the entering in force of the Revised Kyoto Convention (in the year 2006), there is no more possibility of accession to the Kyoto Convention 1973. (See H.-M. WOLFFGANG, O. FISCHER-ZACH, "Die revidierte Kyoto-Konvention von 1999" in *ZfZ*, 2003 Nr. 3, (pp. 84-87), p. 85.)

153 For details about membership, see Chapter V, Article 11 of the Kyoto Convention 1973; E. DORSCH, *op. cit.*, p. 290.

154 See WCO Document: SG0166E1b, Brussels 2008.

general definitions used in the Convention; Chapter II (Articles 2-5) dealt with both the scope and the structure of the Convention; Chapter III (Articles 6-7) treated the management of the Convention; Chapter IV contained miscellaneous provisions such as ratification of the Convention, implementation of the provisions, or amendments to the Convention; and Chapter V dealt with final provisions.

The first three Annexes which existed at the time of the adoption of the Convention were relating to customs warehouses, temporary admission and drawback. 27 more Annexes were adopted in the period between 1973 and 1980.[155] Each Annex contained an introduction which describes the objectives of the given Annex; definitions of the various terms used; *Standards*[156] which are deemed necessary for the simplification of customs procedures; *Recommended Practices*;[157] and Notes, which are not legally binding, but which show the different possibilities of implementing a particular Standard.[158]

It should be noted that the Annexes were independent of each other; and according to Article 8 of the Kyoto Convention 1973, each of them could be signed separately. In addition, these Annexes were never to be taken as an "international customs code", since that was not the objec-

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155 For details on the individual Annexes, See E. DORSCH, *ZfZ* 1974, pp. 298 ff.; *ZfZ* 1975, pp. 262 ff.; *ZfZ* 1977, pp. 27 ff. and 363 ff.; *ZfZ* 1978, pp. 292 ff.; *ZfZ* 1979, pp. 264 ff.; *ZfZ* 1980, pp. 290 ff.

156 '*Standard*' means a provision the implementation of which is recognized as necessary for the achievement of harmonisation and simplification of customs procedures and practices (See RKC, Body of the Convention, Article 1: C. * It should be noted that the Kyoto Convention 1973 never defined this term).

157 '*Recommended Practice'* means a provision which is recognized as constituting progress towards the harmonisation and simplification of customs procedures and practices, the widest application of which is considered to be desirable (See RKC, Body of the Convention, Article 1: C. * It should be noted that the Kyoto Convention 1973 never defined this term).

158 See E. DORSCH, „Der Brüsseler Zollrat" in *ZfZ* 1985 Nr. 11, (pp. 322-328) p. 325.

tive of the Kyoto Convention. The Convention was in effect calling on the Contracting Parties to harmonize their national customs laws with the Standards it entails so as to facilitate trade.[159]

3.2. THE REVISED KYOTO CONVENTION

3.2.1. Introduction

The few decades that followed the entering into force of the Kyoto Convention 1973 were characterized by globalisation, rapid transformation of international trade patterns, and advances in information technology. These developments compelled the Contracting Parties and the WCO at large to review and update the Kyoto Convention. The so-called 'total revision' of the Convention began in 1995.[160] After four years of detailed review the Revised Kyoto Convention, which reflected the economic and technological changes and incorporated best practices of member administrations, was adopted by 114 customs administrations attending the WCO's 94th Session on 26th June 1999.

As clearly indicated in the *Protocol of Amendment to the International Convention on the Simplification and Harmonisation of Customs Procedures*, the Revised Kyoto Convention aims at:

- eliminating divergence between customs procedures and practices of Contracting Parties that can hamper international and other international exchanges;

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159 See G.-D. GOTSCHLICH, "Internationales Kyoto-Übereinkommen zur Vereinfachung und Harmonisierung der Zollverfahren" in *Recht der Internationalen Wirtschaft*, 1984 (pp. 457-461), p. 457.

160 See H.-M. WOLFFGANG, O. FISCHER-ZACH, *op. cit.*, p. 85.

- meeting the needs of international trade and the Customs for facilitation, simplification and harmonisation of customs procedures and practices;
- ensuring appropriate standards of customs control;
- enabling the Customs to respond to major changes in business and administrative methods and techniques.

Thus, the Contracting Parties wanted to make sure that the core principles for such simplification and harmonisation are made obligatory on Contracting Parties; and that Customs is provided with efficient procedures supported by appropriate and effective control methods, which would ultimately lead to increased facilitation of international trade.

3.2.2. The major Changes made to Kyoto Convention

a) Change in Structure

The change in the structure of the Kyoto Convention was one of the major amendments. The Revised Kyoto Convention consists of the *Body of the Convention*, the *General Annex*, and the *Specific Annexes*. The Body of the Convention is the result of the amendment of the Preamble and the 19 Articles of the Kyoto Convention 1973. And the previous Annexes to the Convention were replaced by the General Annex (with 10 Chapters) and the Specific Annexes (A up to K, with their respective Chapters).[161]

b) Increased Legal Binding Force

It is interesting to note that all Contracting Parties to the Revised Kyoto Convention are, pursuant to Article 12 of the Body of the Convention, *bound by the General Annex*. In other words, the Body of the Conven-

[161] See Articles 1 and 2 of the *Protocol of Amendment to the International Convention on the Simplification and Harmonisation of Customs Procedures 1999.*

tion and the General Annex *are obligatory* for accession to the Revised Kyoto Convention. And no reservation against any provision of the General Annex is allowed. This actually indicates the increased legal binding force of the Revised Kyoto Convention.[162] The Specific Annexes are not obligatory.

c) The Guidelines

Further, the Revised Kyoto Convention contains detailed '*Guidelines*' appended to both the General Annex and the Specific Annexes. These are a set of explanations of the provisions of the General Annex, Specific Annexes and Chapters therein which indicate some of the possible courses of action to be followed in applying the Standards, Transitional Standards and Recommended Practices, and in particular describing best practices and recommending examples of greater facilities.[163] It should, however, be noted that these Guidelines are not part of the legal text of the Convention and entail no legal obligation. Guidelines are constantly updated to provide information on new and modern practices.[164]

d) The Management Committee

The establishment of the 'Management Committee' constitutes another major amendment to the Kyoto Convention. The Committee's main function is not only to see to it that the provisions of the Revised Kyoto

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[162] See H.-M. WOLFFGANG, "Zollrecht" in R. SCHULZE, M. ZULEEG (Eds.), *Europarecht: Handbuch für die deutsche Rechtspraxis*, Nomos Verlagsgesellschaft, Baden-Baden 2006, p. 1483, Rdnr. 30.

[163] See RKC, Body of the Convention, Article 1: G.

[164] For example, the Guidelines for Chapter 7 of the General Annex were revised in March 2003 to take into account the developments in the field of information and communication technology since 1999 (See K. MIKURIYA, "Legal Framework for Customs Operations and Enforcement Issues" in L. DE WULF, J. B. SOKOL, *Customs Modernization Handbook*, The World Bank, Washington DC 2005, (pp. 51-66) p. 57.

Convention are implemented by the Contracting Parties, but also to make sure that they are interpreted in a uniform manner.[165] In addition, it is incumbent on the Management Committee to recommend to the Contracting Parties any amendments to the Body of the Convention, the General Annex, the Specific Annexes, and to the Chapters therein. It is also charged with both the incorporation of new Chapters to the General Annex and the incorporation of new Specific Annexes and new Chapters to Specific Annexes. The Management Committee reviews and updates the Guidelines and it may also decide to amend Recommended Practices or to incorporate new Recommended Practices to Specific Annexes or Chapters therein in accordance with Article 16 of the 'Body' of the Revised Kyoto Convention. The centrality of the Management Committee is further evidenced by Article 13 paragraph 4 of the 'Body' of the Revised Kyoto Convention.[166] The Management Committee meets at least once a year and annually elects a Chairman and Vice-Chairman.

e) Use of Modern Techniques and Technologies

The use of modern techniques and technologies is another salient feature of the Revised Kyoto Convention. This is clearly presented in Chapter 6 (titled '*Customs Control'*) of the General Annex, which pro-

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[165] See RKC, Body of the Convention Article 6: 1.

[166] It reads: "(a) Where the periods provided for in paragraph 1 or 2 of this Article would, in practice, be insufficient for any Contracting Party to implement the provisions of the General Annex, *that Contracting Party may request the Management Committee, before the end of the period referred to in paragraph 1 or 2 of this Article, to provide an extension of the period.* In making the request, the Contracting Party shall state the provision(s) of the General Annex with regard to which an extension of the period is required and the reasons for such a request.

(b) In exceptional circumstances, *the Management Committee may decide to grant such an extension.* Any decision of the Management Committee granting such an extension shall state the exceptional circumstances justifying the decision and the extension shall in no case be more than one year. At the expiry of the period of extension, the Contracting Party shall notify the depository of implementation of the provisions with regard to which the extension was granted" [emphasis added].

vides for the enhancement of customs control basing on modern techniques and technologies such as risk analysis, risk management, audit-based controls, information technology and electronic commerce.[167]

In addition, Chapter 7 of the General Annex is dedicated solely to the application of information technology, which has undergone enormous developments in last few decades. This Chapter obliges customs administrations to apply information technology to support customs operations where it is cost-effective and efficient for the Customs and for the trade community.[168] It also mandates new or revised national legislation to provide for electronic alternatives to paper-based authentication methods, and the right of customs administrations to retain information for their own use and, as appropriate, to exchange such information with other customs administrations and all other legally approved parties through electronic means.[169] Moreover, the Guidelines for this Chapter give extra information that might help Customs determine how to improve the services it provides to its clients and trading partners through the use of information and communication technologies.

3.2.3. Chapters and Key Provisions of the General Annex

3.2.3.1. Core Principles

The General Annex stipulates the *core principles* for all customs procedures and practices to ensure that these are uniformly applied by customs administrations. These principles include: standardisation and simplification of goods declaration and supporting documents, mini-

[167] RKC, General Annex, Standards 6.3-8 and Transitional Standard 6.9.
[168] RKC, General Annex, Standard 7.1.
[169] RKC, General Annex, Standard 7.4.

mum necessary control, use of risk management techniques, moving from transaction-based to audit-based controls, fast track procedures for authorized persons and entities, coordinated interventions with other agencies, maximum use of information technology, transparency and predictability, and right of appeal in customs matters.

The provisions of the General Annex also apply to the procedures and practices set out in the Specific Annexes. It is noted that this method of application of the provisions of the General Annex ensures that all core provisions of a general nature are applied in all customs procedures and practices without it being necessary to repeat them in all those individual procedures and practices. This also prevents conflicting provisions concerning core provisions in the different Annexes or Chapters of the Convention [170]

3.2.3.2. Chapters of the General Annex

The General Annex is divided into 10 Chapters, which cover the principle customs functions in its Definitions, Standards, and Transitional Standards.[171]

a) Chapter 1

This Chapter has an introductory character in a sense that it does not only show the scope of application of the provisions of the General Annex, but it also expresses the two driving principles of the Conven-

[170] See H.-M. WOLFFGANG, O. FISCHER-ZACH, "Die revidierte Kyoto-Konvention von 1999" in *ZfZ*, 2003 Nr. 4, (pp. 114-123) p. 114.

[171] 'Transitional Standards' (like Standards) are provisions the implementation of which is recognized as necessary for the achievement of harmonisation and simplification of customs procedures and practices. The difference between the two lies in the fact that for 'Transitional Standards' a longer period of implementation is permitted – implemented within 5 years after entering into force of the General Annex; yet for 'Standards', only 3 years are permitted.

tion, which are the simplification and harmonisation of customs procedures. It stipulates that the provisions of the General Annex must be implemented in national legislation in the simplest possible form and that Customs should cooperate with the trade community.

b) Chapter 2

This Chapter contains definitions of 27 principle terms which are also validly used in other parts of the Convention. This means, terms which are particularly related to Specific Annexes are defined within their respective Annexes.[172]

c) Chapter 3

This Chapter deals with the clearance of goods and other *customs formalities*.[173] It contains various provisions aimed at simplifying clearance procedures. It is the most extensive Chapter prescribing: the obligation of Customs to establish customs offices and designate business hours; the qualification, rights and duties of declarants; the creation of simplified information requirements for goods' declarations; and the establishment of expeditious procedures for examination, assessment and collection of duties/taxes and release of goods. Coordination between Customs and other agencies is also provided for in this Chapter.[174]

d) Chapter 4

The fourth Chapter articulates provisions aimed at achieving transparency, predictability, and simplification of Customs' revenue collection procedures that require national legislation to specify conditions, tim-

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[172] For example, '*cargo declaration'* and '*carrier*' are defined within Specific Annex A, which deals with arrival of goods in a customs territory.

[173] 'Customs formalities' means all the operations which must be carried out by the persons concerned and by the Customs in order to comply with the Customs law (RKC, General Annex E9).

[174] Transitional Standards 3.4. and 3.5.

ing and methods of duty and tax payment.[175] It also has a number of provisions regulating deferred payment and repayment of duties and taxes.[176]

e) Chapter 5

Customs matters relating to securities such as pledges, guarantees and the like are regulated by this Chapter. It stipulates the basic principles necessary to achieve transparency, predictability and simplicity of customs practices pertaining to security. National legislation has to enumerate the cases in which security is required and must specify the forms in which security is to be provided, and the amount of security – which must not exceed the amount that is potentially chargeable for payment of duties and taxes.[177]

f) Chapter 6 and Chapter 7

Facilitation of international trade is a core objective of the Revised Kyoto Convention, and the use of modern customs procedures is indispensable for the realisation of this objective. As elaborated above [*see 3.2.2 (e)*],[178] the provisions of Chapters 6 and 7 are part of the key amendments made to the Kyoto Convention. The rationale is to make sure that customs control does not hinder legitimate international trade. And this is possible through the use of modern techniques and technologies such as risk management and audit-based controls as well as the maximum use of information technology.

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175 Standards 4.1-3, 5-11, and 13.
176 Standards 4.15-24.
177 Standards 5.1-7.
178 See this very chapter, **3.2.2. (e)**.

g) Chapter 8

This Chapter regulates the relationship between the Customs and third parties.[179] It articulates the right of persons transacting business with the Customs to designate a third party to act on their behalf.[180] And the use of third parties is not a kind of "third-class option", for a person designated as a third party has the same rights as the person who designated him in matters related to transacting business with the Customs.[181]

h) Chapter 9

Like Article X of GATT 1994, this Chapter contains vital principles aimed at achieving transparency and predictability of customs procedures and practices through the publication of laws, regulations, judicial decisions and administrative rulings. Customs administrations are obliged to provide *as quickly and as accurately as possible* specific information pertaining to customs law requested by an interested party as well as any information they consider pertinent to that party without sacrificing confidentiality.[182] Moreover, adverse customs decisions must provide reasons and must advise of the right of appeal.[183] The Guidelines to this Chapter provide further detailed information that may help customs administrations in setting up their procedures for publications of information.

All these provisions are based on the fact that the availability of information on customs matters to interested persons is one of the key elements of trade facilitation.

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179 Example: An agent of the importer transacting business with the Customs.
180 Standard 8.1.
181 Standard 8.4.
182 Standards 9.4-6.
183 Standard 9.8.

i) Chapter 10

This Chapter requires national legislation to provide for a right of appeal in customs matters and to give anyone affected by a customs decision such a right.[184] The right of appeal also ensures transparency and predictability of customs procedures and practices. And compliance with the Standards of Chapter 10 is critical for meeting the requirements of Article IX: 3 (b) of GATT 1994 which obliges each Member to maintain or institute judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.

3.2.4. The Specific Annexes

The Specific Annexes and Chapters deal with the *particular* customs procedures such as transit, warehousing and processing or customs practices such as treatment of travellers and customs offences. Currently, there are 10 Specific Annexes annexed to the Revised Kyoto Convention.[185] However, on recommendation of the Management Committee, new Specific Annexes and new Chapters to specific Annexes may be incorporated to the Convention.[186] A Contracting Party is free to accept all or only a number of Specific Annexes or only Chapters thereof. However, it is recommended that at least the Specific Annexes on home use and export are accepted, as well as those concerning the formalities prior to the lodgement of the goods declaration and those for warehouses, transit and processing.

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184 Standards 10.1-2.

185 *Annex A* deals with: Arrival of goods in a customs territory; *Annex B:* Importation; *Annex C:* Exportation; *Annex D:* Customs warehouses and free zones; *Annex E*: Transit; *Annex F*: Processing; *Annex G*: Temporary admission; *Annex H*: Offences; *Annex J*: Special procedures; and *Annex K*: Origin.

186 RKC, Body of the Convention, Article 6: 5 (A) III.

3.3. CONCLUSION

From the above exposé one cannot but affirm the popular view that the Revised Kyoto Convention is a blueprint for modern and efficient customs procedures in the 21st Century. National economies, customs administrations, and the trading community benefit a lot from acceding to and implementing the provisions of the Revised Kyoto Convention.

To national economies, the implementation of the principles of the Revised Kyoto Convention is beneficial, for it lowers the cost of imported goods, the cost of production, and the price of goods for consumers. It increases economic competitiveness of national goods in the world market, attracts international trade and investment, and it increases national revenue. Customs administrations also gain a lot from implementing the Revised Kyoto Convention, for this leads to more efficient use of customs resources, faster predictable and efficient customs clearance, enhanced customs control, and increased trade facilitation. And the business community enjoys transparent procedures, better facilities for compliant traders, lower costs of doing business, and enhanced competitiveness.

This diversity of benefits has attracted a number of countries to accede to the Revised Kyoto Convention; and there are many more aspiring countries.[187] Among the Partner States of the East African Community, Uganda is currently the only Contracting Party to the Revised Kyoto Convention.[188] Nevertheless, the Revised Kyoto Convention had a big influence in the formation of both the EAC Customs Management Act, 2004 and the EAC Customs Management Regulations, 2006 and it is

[187] With the accession of Mauritius on 24th September 2008, the Revised Kyoto Convention currently (October 2008) boasts of 59 Contracting Parties.

[188] See WCO Document: SG0166E1b, Brussels 2008.

certainly influencing the day-to-day implementation of customs laws of the East African Community.[189]

[189] Details about this influence are discussed in PART III of this work.

PART II

CUSTOMS LAW OF THE EAST AFRICAN COMMUNITY

Chapter 4
OVERVIEW OF THE EAST AFRICAN COMMUNITY

4.1. HISTORICAL OVERVIEW OF INTEGRATION IN EAST AFRICA

4.1.1. Integration during the Pre-Colonial Period

It is generally observed that the existing country boundaries in East Africa, like elsewhere in Africa, have their roots in the colonial era. During pre-colonial times people intermingled freely without inhibition and restrictions of artificial boundaries of country specific laws, trading among themselves within the region and beyond. Kingdoms and chiefdoms were spread all over but their borders were not strictly demarcated.

Moreover, people intermarried and related variously, including participating in political affairs of the communities within which they resided. As *P. T. Zeleza* writes, family and ethnic associations, both real and affected, played an important role in the provision of trading skills, capital and credit, and information. Traders formed alliances in foreign regions through marriage and blood brotherhood. The careers of famous *Swahili* and *Nyamwezi* traders, such as *Tippu Tip* and *Msiri* who created commercial empires in *Kasongo* and *Katanga* respectively,

were built on shrewd alliances with local rulers or people based on either marriage or fictional kinship ties.[190]

Through trade people could get essential products that were not available in the areas where they came from. Moreover, they needed to purchase goods for exchange in the vibrant export and import trade of the nineteenth century. Some areas in present day Uganda, such as *Kibero* on *Lake Kyoga* and *Bunyoro*, specialized in salt and iron respectively.[191] Traders also sought to exchange goods from the Far East such as cloth, utensils, and beads with copper, skins and ivory.[192]

There existed a great deal of trade among peoples of the region. People moved freely and co-residing was possible. In some cases, however, local leaders would levy taxes and tariffs, as was the case in the 19th Century kingdoms of *Mirambo* of *Wanyamwezi* and *Kabaka Mutesa* of *Buganda*.[193]

History, therefore, shows that one can hardly apply the term regional integration to pre-colonial East Africa in the same sense it is used today. East African integration as we know it today has its roots in the colonial era.

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190 See P. T. ZELEZA, *A Modern Economic History of Africa: The Nineteenth Century*, Codesria Book Series Vol. 1, Dakar 1993, p. 303.

191 E. GIMODE, "Attempts at Economic Integration in East Africa: Memories, Problems and Prospects", *Paper presented at the 4th Historical Association of Kenya Symposium* at Kenya University, Nairobi, 6th-8th December 1996, p. 3.

192 See M. HORTON, J. MIDDLETON, *The Swahili: The Social Landscape of Mercantile Society*, Blackwell Publishers, Oxford 2000, p. 27.

193 See H. OCHWADA, "Rethinking East African Integration: From Economic to Political and from State to Civil Society" in *Africa Development*, Vol. XXIX, No. 2, 2004, (pp. 53-79), p. 56.

4.1.2. Integration during the Colonial Period

4.1.2.1. Introduction

The late nineteenth century was characterized by merchant capitalism, which established trading networks throughout East Africa. The twentieth century was then overwhelmed by the spirit of industrial capital for which East Africa was both a market for European manufactures and a source for raw materials and human resources whose aim was to create wealth to alleviate the economic problems of metropolitan Europe.[194] Consequently the European colonists in East Africa embarked on the programme of systematic integration of the region.

Colonial interests in East Africa were mainly British and German. British interests in East Africa were initially focused on Uganda. For this reason, British administration was established in Uganda in the 1890s.[195] The British interests in Uganda were the biggest factor behind the construction of the Kenya-Uganda Railway 1897 – 1901. The construction of this railway provided an important incentive for the European settlers to start settling in Kenya because the transportation of goods had been made easier. With the growth of the settler community, Kenya began to acquire a dominant position in East African affairs. Tanzania, by that time known as Tanganyika, was still under German administration. With the defeat of the Germans in the First World War, however, Tanganyika also came under the British administration.

194 *Id.*, p. 58.
195 A. HAZLEWOOD, *Economic Integration: The East African Experience*, Heinemann Educational Publishers, London 1975, p. 2.

The fact that from 1919 to 1961, the three territories were all under British administration was a fundamental factor in the establishment of common institutions and common arrangements for cooperation in East Africa.

It should, however, be noted that the economic development of the three countries did not conform to a single pattern. In Uganda the pattern was predominantly a peasant economy. In Tanganyika it was a mixture of peasant and plantation economy, while in Kenya it was predominantly a settler plantation economy.[196] Moreover, unlike Tanganyika and Uganda whose economies were export-oriented, Kenya's economy was not much export-oriented, and thus its money economy became more developed. This was due to the fact that for Kenya (unlike Tanganyika and Uganda) exports were a less important determinant of money income. Kenya's monetary economy developed more also because of a large capital inflow brought in by settlers. This enabled Kenya to better develop her manufacturing and services sectors. Consequently, Kenya became the major supplier of manufactured goods to the whole of East Africa.

4.1.2.2. Early Forms of Integration

During the colonial era integration within East Africa took various forms. First, a *Customs Collection Centre* was established in this region in 1900. And in 1905 the *East African Currency Board* was set up to issue bank notes for the territories of Kenya and Uganda. In the same year a *Postal Union* within these territories was established. Later, a *Court of Appeal for Eastern Africa* was instituted in 1909; and by 1919 a *Customs Union* had been formed. The *East African Gover-*

[196] *Id.*, p. 3.

nors Conference which was formed in 1926 was also another form of integration. In 1940, the *East African Income Tax Board* and the *Joint Economic Council* were established.[197]

4.1.2.3. The East African High Commission

The *East African High Commission* (1948 – 1961) marks the second important period in the evolution of integration in East Africa. This commission was previously structured as a *Governors' Conference*, bringing together the governors of Kenya, Uganda and Tanganyika.

Among other tasks, the East African High Commission dealt with finance and economic services. The finance sector dealt with income tax, customs and excise. With regard to income tax, the *East African Income Tax Department* was established and was responsible for the administration and collection of income tax in Kenya, Uganda, Tanganyika and Zanzibar.[198]

A unified *East African Customs and Excise Department* was then established in 1949. It was responsible for the collection of customs and excise duties and similar levies in the three East African countries – following identical schedules and rates of customs and excise duties.[199]

With respect to economic services, four institutions were established, namely: the East African Production and Supply Council, the East African Industrial Council, the East African Office in London and the East African Tourist Association.

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197 See The Preamble of the *EAC Treaty-1999*.

198 See I. D. DELUPIS, *The East African Community and Common Market*, Longman, London 1970, p. 34.

199 *Ibid*.

The *East African Production and Supply Council* dealt with the investigation of the supply of certain commodities and made recommendations to the three East African Governors on the control of prices. It was also a forum for the coordination of import control policies. Instead, the *East African Industrial Council* was concerned with the review of parallel legislation in three countries on industrial licences.[200] The East African Office in London coordinated the producing organisations in East Africa plus the East African governments and the East African High Commission with the British government in matters pertaining to long-term contracts, bulk purchases and other trade related matters.[201] Finally, the *East African Tourist Association* was run as a joint undertaking by the three territories under the High Commission.[202]

4.1.3. Integration during the Early Post-colonial Period

4.1.3.1. Introduction

Tanganyika became independent in 1961. It was followed by Uganda in 1962 and Kenya in 1963. Despite the independence, the integration process that began during the colonial period was not abandoned.

It has just been said that the East African High Commission was instituted during the colonial rule and it was being run under colonial power. As its independence was drawing near, Tanganyika was not willing to continue being yoked to entities constituted and controlled

200 *Ibid*.
201 *Id.*, p. 39.
202 *Id.*, p. 42.

by the British colonial office.[203] The alternatives, short of pulling out of integration were two; either to delay Tanganyika's independence till Kenya and Uganda were independent or adopt a new form of association that contemplated the new circumstances. Tanganyika chose the second option.

4.1.3.2. The East African Common Services Organisation

The new form of association which immediately followed Tanganyika's independence was the East African Common Services Organisation (EACSO). It was launched in December 1961. It inherited the structures of the High Commission and carried on the integration of East Africa with a reformed administration. And the future efforts in the process of integration largely drew on the EACSO statutes. In this respect, Jane Banfield considered it as a more realistic organisation in terms of its ability to meet the East African needs.[204]

In the economic sector the East African Common Services Organisation established the Finance Committee and the Commercial and Industrial Committee. The Finance Committee was responsible for financial questions, particularly income tax and customs and excise administra-

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[203] See A. KIAPI, *Legal Accommodation of National Interests in Regional Economic Integration: Some Observations of the East African Community*, MISR, Kampala 1972, p. 3.

[204] "The East African Common Services Organisation came into being as a result of local demands, to meet a local situation, and is a creation of the East African Governments; it is not 'colonial' in the sense of being the creature of the colonizing power. As such, EACSO is more 'realistic' as an organisation in terms of its ability to meet changed and changing political situations and needs, [and it] provides a forum for various experiments in inter-territorial, intergovernmental, even inter-political arrangements". J. BANFIELD, "The Structure of the East African Common Services Organisation" in D. ROTHCHILD, ed., *Politics of Integration: An East African Documentary*, East African Publishing House, Nairobi 1968, p. 261.

tion, and for the non-self-contained services of the organisation.[205] It was composed of the ministers of finance in each of the three countries. The Commercial and Industrial Coordination Committee was responsible for coordinating commercial and industrial activities in East Africa. It was composed of the three ministers responsible for commerce and industry in each country.

An early setback in the East African integration during the post-colonial period was Tanzania's withdrawal from the *East African Currency Board* in to establish its own Central Bank in 1965. Uganda and Kenya also dissolved what had remained of the Currency Board and each set up its Central Bank. Further, Tanzania unilaterally imposed sharp restrictions on imports from Kenya.

It could therefore be said that the initiatives undertaken throughout this period were based on administering services together rather than creating a functioning Common Market. There were still a number of problems concerning trade and development that needed to be addressed.

4.1.3.3. The Former East African Community

Just before the establishment of the former East African Community there was a feeling that the East African Common Services Organisation was still deeply rooted in the colonial past. EACSO policies echoed dominant colonial views. The East African leaders of the post-colonial period still wanted to create a stronger economic entity grounded in a federation. However, the constitution and institutional arrangements, which they inherited at independence, hampered the realisation of their goals.

[205] I. D. DELUPIS, *op. cit.*, p. 45.

In order to solve these problems the East African leaders set up a commission in September of 1965 that recommended a Common Market and common services for Kenya, Uganda and Tanzania. They appointed Kleid Philip, a leading United Nations economist, to look into ways of harvesting success within the East African integration. He transformed legal and institutional structures that would suit the region. And this culminated in the *Treaty for East African Cooperation* in Kampala on 6th June 1967. This cooperation became effective on 1st December 1967, establishing the former East African Community, whose headquarters were in Arusha, Tanzania.

From *Article 2 (1)* of the *Treaty for East African Cooperation*[206] one can deduce that the former East African Community was established to save long-standing, but problematic cooperation between the three states, to legalize and regularize economic cooperation and to encourage further cooperation in developing economic union to its furthest limits possible for the mutual benefit of the three countries.

With the new Treaty, however, *merely* new elements were added to structures inherited from colonialism so as to remove the economic disequilibria in trade between the Partner States. The Partner States hoped to promote a more viable development strategy through the harmonisation of fiscal incentives offered by each country. These included the transfer of tax system and the establishment of the East African Development Bank. At that time, they argued that a more equita-

[206] "It shall be the aim of the Community to strengthen and regulate the industrial, commercial and other relations of Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefits whereof shall be equitably shared".

ble distribution system of industrial benefits would diversify wealth and bring about economic equilibrium.[207]

The former East African Community consisted in a *Common Market* with corporations and common services. The East African Common Market collapsed eventually largely due to lack of strong political will and the continued disproportionate sharing of benefits of the community.[208]

4.1.4. The Current East African Integration

Upon the dissolution of the former East African Community the former Partner States signed on 14th May 1984 at Arusha in Tanzania the *Mediation Agreement* for the division of assets and liabilities of the former East African Community. And according to Article 14 (2) of the Mediation Agreement Kenya, Uganda and Tanzania agreed to explore and identify the areas for future cooperation and to make arrangements for such cooperation.

On 30th November 1993 the three states signed an agreement for the establishment of a *Permanent Tripartite Commission for Cooperation* to be responsible for the coordination of economic, social, cultural, security and political issues of the three East African States and a declaration was made by the respective heads of state for closer cooperation.

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[207] See H. OCHWADA, *op. cit.*, p. 67.

[208] *EAC Treaty-1999*, Preamble: "… in 1977 the Treaty for East African Cooperation establishing the (former) East African Community was officially dissolved, the main reasons contributing to the collapse of the East African Community being lack of strong political will, lack of strong participation of the private sector and civil society in the cooperation activities, the continued disproportionate sharing of benefits of the community among the Partner States due to their differences in their levels of development and lack of adequate policies to address this situation."

On 14th March 1995, the Secretariat of the *Commission for East African Cooperation* was launched in Arusha, Tanzania. This was followed by signing an agreement for establishment of the *East African Business Council* on 19th November 1996.

On 29th April 1997 the three East African States approved the East African Cooperation Development Strategy for the period 1997 – 2000, and directed the Tripartite Commission to embark on negotiations for the upgrading of the agreement establishing the Tripartite Commission into a Treaty.

On 30th April 1998 the Permanent Tripartite Commission launched a Draft Treaty for the Establishment of the East African Community. And finally, on 30th November 1999 the East African Heads of State signed the *Treaty for the Establishment of the East African Community* in Arusha, Tanzania. The Treaty entered into force on 7th July 2000 following the conclusion of the processes of its ratification and deposit of the instruments of ratification with the Secretary General by all the three Partner States. The Community was formally launched on 15th January 2001 in Arusha, Tanzania.

4.1.5. Conclusion

This panoramic presentation shows that despite the various obstacles to integration in East Africa which include lack of strong political will, lack of strong participation of the private sector and civil society as well as the imbalance in the levels of development of Partner States, the attempts to establish well functioning regional trade agreements have not ceased.

This continued striving is rooted in the search for larger markets; the reaping of the economies of scale; the improvement of investment, competition, environment and labour standards; the increase of regional security and the cementing of political ties. In a word, the striving is based on the conviction that a well functioning regional integration can lead to the increase of economic, political and social welfare of the East Africans.

4.2. THE CONSTITUTION AND FUNCTIONING OF THE EAST AFRICAN COMMUNITY

4.2.1. Introduction

The objectives of the East African Community pursuant to *Article 5* of the EAC Treaty-1999[209] are various. They are not limited to economic or trade aspects. In this study, however, the emphasis is laid on trade or customs-related aspects of the East African Community. And a systematic study of the East African Community's customs law obviously calls for a prior examination of the constitutional framework and functioning of the East African Community.

The EAC Treaty-1999, which is one of the primary sources of the Community's customs law[210], shows the constitutional framework of the East African Community.

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[209] *EAC Treaty-1999*, Article 5 (1) "The objectives of the Community shall be to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit".

[210] *Id*., Article 75.

4.2.2. Legal Personality of the East African Community

Three Articles of the EAC Treaty provide the basis for the affirmation of the legal personality of the Community. They are: *Article 2* which establishes the East African Community; *Article 4* which defines the legal capacity of the Community; and *Article 138 (1)* which affirms the international legal personality of the Community. The East African Community is thus a juridical person that has the capacity, within each of the Partner States, of a body corporate with perpetual succession and has power to acquire, hold, manage and dispose of land and other property, and to sue and to be sued in its own name.

According to M. N. Shaw, one of the criteria to ascertain whether an entity is a subject to international law is to examine whether that entity has power to enter into agreements, and whether it has privileges and immunities in the international sphere.[211] With regard to this criterion the EAC Treaty gives the Community the power to foster cooperative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community.[212] As Article 73 of the EAC Treaty states, persons employed by the Community enjoy diplomatic immunities. Hence the international legal personality of the East African Community is also affirmed.

According to Article 102 of the Charter of the United Nations[213] and Article 80 of the Vienna Convention on the Law of Treaties,[214] a treaty

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211 See M. N. SHAW, *International Law*, Cambridge University Press, Cambridge 1997, p. 191.

212 See *EAC Treaty-1999*, Article 130.

213 It reads: "1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter enters into force shall as soon as possible be registered with the Secretariat and published by it.

is recognized in the international system through deposition and registration by the Secretariat of the United Nations Organisation. And only treaties that have been registered may be relied upon before the International Court of Justice.[215] The Treaty for the Establishment of the East African Community was registered with the United Nations Secretariat with registration number 37437.

4.2.3. Sources of Law of the East African Community

Sources of law are the materials and procedures out of which law, whether substantive or procedural is developed. In general terms, the sources of law of the East African Community may be categorized under internal law, municipal law of the Partner States and international law.

The internal law of the East African Community consists of the EAC Treaty (which may be taken as the constitution), the Acts of the East African Legislative Assembly, regulations, directives, decisions, resolutions of such organs as the Summit or the Council, as well as judgements and rulings of the East African Court of Justice. It is generally accepted that the established practice of an organisation may also form

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2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations". UNITED NATIONS ORGANISATION, *Charter of the United Nations*, Article 102.

214 It reads: "1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filling and recording, as the case may be, and for publication.
2. The designation of a depository shall constitute authorization for it to perform the acts specified in the preceding paragraph". UNITED NATIONS ORGANISATION, *Vienna Convention on the Law of Treaties*, Article 80.

215 See J. O'BRIEN, *International Law*, Cavendish Publishing Ltd., London 2001, p. 356.

part of the rules of an organisation.[216] And that means that some practices of the East African Community may also in the long run be considered part of its sources of law.

The existence of the East African Community does not necessarily render national legislations of the Partner States meaningless. This means, municipal law of the Partner States is also a source of law of the East African Community. *Article 33* of the EAC Treaty-1999 can serve as a good example for this view, for it makes clear that national courts of the Partner States are not necessarily excluded from the disputes to which the Community is a party.

According to the Statute of the *International Court of Justice* the main sources of international law include international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and teachings of the most highly qualified publicists of the various nations. These sources are also obviously relevant to the East African Community, for it is an international organisation. This is further substantiated by *Article 39 (1) (f)* of the *Protocol on the Establishment of the East African Customs Union*, which states that relevant principles of international law are part of customs law of the East African Community.

4.2.4. Structure of the East African Community

Just like any other institution, the East African Community has a definite organisational structure which is fundamental for the proper functioning and realisation of the Community's objectives.

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[216] See P. SANDS, P. KLEIN (eds.), *Bowett's Law of International Institutions*, Sweet & Maxwell, London, 2001, pp. 51-53.

4.2.4.1. Membership

The EAC Treaty-1999 provides for different categories of membership. Apart from full membership to the East African Community, any foreign country may, upon agreement, be granted a participatory or associate membership. In addition, an '*Observer Status'* may be granted to a country, an inter-governmental organisation or a civil society organisation that applies for it.[217]

At present, East African Community comprises five countries with full membership. These are: The Republic of Kenya, The Republic of Uganda and The United Republic of Tanzania, The Republic of Burundi and The Republic of Rwanda.[218]

4.2.4.2. Organs and Institutions of the Community: *Separation of Powers*

When one examines the EAC Treaty-1999 one clearly observes an inherent separation of government functions into the executive, legislative and judiciary. This separation of powers, a characteristic of many modern democratic governments, is a means of ensuring that no one branch can exert unlimited power thereby avoiding tyranny.

The *East African Legislative Assembly* is the legislative organ of the East African Community. It discusses and passes Bills into law. The Bills duly passed by the Assembly must, however, be assented to by the Heads of the East African Partner States in order to qualify as Acts

[217] See *EAC Treaty-1999*, Article 3.

[218] Kenya, Uganda and Tanzania are the founder members of the East African Community. Rwanda and Burundi acceded to the EAC Treaty on 18th June 2007 and became full members of the East African Community with effect from 1st July 2007.

of the Community.[219] In addition, the Assembly is charged with liaising with the national assemblies of Partner States on matters relating to the Community; debates and approves the budget for the Community; receives and debates annual reports on the activities of the Community such as the annual audit reports of the Audit Commission; and it may perform any other functions as are conferred on it by the EAC Treaty.[220]

The *East African Court of Justice (EACJ)* is the judicial organ of the East African Community. It ensures the adherence to law in the interpretation and application of and in compliance with the EAC Treaty.[221] The EAC Treaty-1999 provides for the extension of the jurisdiction of the EACJ to such other original, appellate, human rights and other jurisdiction as may be determined by the Council of Ministers and operationalized through a protocol.[222] It should be noted that in disputes to which the East African Community is party, the EACJ operates complementarily with regard to its jurisdiction vis-à-vis the jurisdictions of national courts. However, the decisions of the East African Court of Justice on the interpretation and application of the Treaty have precedence over decisions of national courts on similar matters.[223]
In its determinations the Court may either give a judgement,[224] an advisory opinion,[225] or it may issue interim orders.[226] To date, some of the outstanding judgements delivered include:

- the judgement of the East African Legislative Assembly representatives from Kenya, delivered on 30th March 2007;

[219] See. *EAC Treaty-1999,* Articles: 49 and 62.
[220] *Id.,* Article 49.
[221] *Id.,* Article 23.
[222] *Id.,* Article 27.
[223] *Id.,* Article 33.
[224] *Id.,* Article 35.
[225] *Id.,* Article 36.
[226] *Id.,* Article 39.

- the judgement of the East African Legislative Assembly representatives from Kenya, delivered on 22nd June 2007; and
- James Katabazi and 21 others versus the Secretary General of the East African Community (1st Respondent) and the Attorney General of the Republic of Uganda (2nd Respondent), delivered on 1st November 2007.

The Executive is made up of five organs namely the Summit, the Council, the Coordination Committee, Sectoral Committees, and the Secretariat.[227]

The Summit consists of the Heads of State or Government of Partner States. It is the highest executive organ of the Community and it gives the general direction and impetus as to the development and achievement of the objectives of the Community.[228]

The Council consists of the ministers responsible for regional cooperation from each of the Partner States and such other ministers as each Partner State may determine.[229] Its function is to promote, monitor, and keep under constant review the implementation of the programmes of the Community, and to ensure proper functioning and development of the Community in accordance with the Treaty.[230]

The Coordination Committee consists of the permanent secretaries responsible for regional cooperation from each of the Partner States and such other permanent secretaries of Partner States as each Partner State

227 *Id.*, Article 9.
228 *Id.*, Article 11.
229 *Id.*, Article 13.
230 *Id.*, Article 14.

may determine.[231] It is responsible for monitoring the implementation of the Treaty, implementing the decisions of the Council, and to coordinate activities of the Sectoral Committees.[232]

Sectoral Committees, if deemed necessary for the achievement of the objective of the EAC Treaty, are formed on the recommendation of the Coordination Committee.[233] The functions of the Sectoral Committees are to prepare comprehensive implementation programmes in the various sectors. They make recommendations on implementation and may have such other functions as may be conferred on them by or under the EAC Treaty.[234]

The Secretariat, which is the executive organ of the Community, consists of the Secretary General, the Deputy Secretaries General, Counsel to the Community, and other unclassified offices as may be deemed necessary by the Council.[235] It submits to and receives from the Council recommendations; it forwards Bills to the Assembly through the Coordination Committee; it is entrusted with all planning, management and monitoring of programmes of the Community; and it is, in a nutshell, charged with the overall administrative functions of the Community.[236]

According to Article 9 (1) (h) of the EAC Treaty-1999, the Summit may establish other organs deemed necessary. Some institutions such as the *East African Development Bank* (EADB), the *Lake Victoria Fisheries Organisation* (LVFO) and some surviving institutions of the

231 *Id.*, Article 17.
232 *Id.*, Article 18.
233 *Id.*, Article 20.
234 *Id.*, Article 21.
235 *Id.*, Article 66.
236 *Id.*, Article 71.

*forme*r East African Community were straight away recognized by the EAC Treaty-1999 as fully-fledged institutions of the East African Community.

In collaboration with the Secretariat, these various organs and institutions undertake various functions relating to the development of the East African Community. For instance, by December 2007 the capital structure of the East African Development Bank had been raised from US $ 69 million to US $ 150 million. Moreover, the East African Development Bank Equity Fund was created and funded up to US $ 500 million.

4.2.5. Major Areas of Cooperation in the East African Community

The East African Integration may be said to include three major areas of cooperation, which are all found in the EAC Treaty-1999. The first category includes economic cooperation, trade and natural resources. Customs law falls in this category. The second involves cooperation in services, standards and social issues, whereas the third comprises political cooperation and international relations.

4.2.5.1. Economic Cooperation, Trade and Natural Resources

Cooperation in economic matters, trade and natural resources involves a number of mechanisms which include trade liberalisation and development,[237] investment and industrial development,[238] monetary and financial cooperation,[239] tourism[240] and agriculture and food security.[241]

[237] *Id.*, Articles 74-78.
[238] *Id.*, Articles 78-80.
[239] *Id.*, Articles 82-88.
[240] *Id.*, Articles 115-116.

4.2.5.1.1. Trade Liberalisation and Development

This area involves the establishment of an East African Trade Regime.[242] The trade regime aims at turning the Partner States into a single investment and trade area so as to increase the volume of trade among them and with the rest of the world. The ultimate goal is to promote rapid economic growth and development, to generate employment and to uplift the standard of living of the East African people. Eventually, goods, labour, and capital will move freely among the Partner States of the East African Community.

4.2.5.1.1.1. The EAC Customs Union[243]

One of the first outstanding steps towards trade liberalisation was the establishment of the EAC Customs Union.[244] This lead to a gradual removal of internal tariffs, the establishment of a common external tariff (CET), the introduction of common Rules of Origin, the EAC Customs Management Act – 2004, the EAC Customs Management Regulations, and a variety of administrative arrangements such as the guidelines for entering into preferential trading arrangements with third parties.

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241 *Id.*, Articles 105-110.

242 *Id.*, Article 74.

243 See *Part II, chapters 5 and 6* for the substantive law and other relevant expositions of the EAC Customs Union.

244 The *Protocol on the Establishment of the East African Customs Union* was signed by the Presidents of the Partner States on 2nd March 2004 in Arusha, Tanzania. This was followed by the launching of the East African Community Customs Union on 1st January 2005.

4.2.5.1.1.2. The Common Market

Apart from the establishment of an East African Customs Union, the EAC Treaty - 1999 provides for the establishment of a Common Market as a further step within the process of trade liberalisation and development. The main difference between the two is that a Customs Union allows free movement of goods within the region with a common external tariff, while a Common Market goes further and encompasses free movement of labour and capital, as well as the right of establishment.[245]

Given that a Common Market entails free movement of labour and capital, the following measures are envisaged: easing border crossing by citizens of Partner States, maintaining common standard travel documents for the citizens, effecting reciprocal opening of borders, maintaining common employment policies, harmonizing labour policies, programmes and legislation including those on occupational health and safety, establishing a regional centre for productivity and employment promotion and exchange, sharing of training facilities, and enhancing activities of employers' and workers' organisations.[246]

The East African Common Market will be established through the conclusion of a Protocol on the Common Market.[247] Negotiations for this between the Partner States are going on and according to the EAC Development Plan 2006 – 2010, the Protocol on the Common Market is envisaged to be concluded in December 2008.

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245 See *EAC Treaty -1999,* Article 76 (1).
246 *Id*., Article 104.
247 *Id.*, Article 76 (4).

4.2.5.1.2. Investment and Industrial Development

This is a mechanism within the economic sector aimed at promoting a self-sustaining and balanced industrial growth, improving the competitiveness of the industrial sector as well as encouraging the development of indigenous entrepreneurs.

In order to realize the above objectives various measures have to be put in place: establishing an East African Industrial Development Strategy; promoting linkages among industries within the community through diversification, specialisation and complementarity; rationalizing investments; using fully and efficiently the established industries; promoting industrial research; development, transfer, acquisition and adaptation of modern technology; harmonizing and rationalizing investment incentives; disseminating and exchanging industrial and technological information; avoiding double taxation; and maintaining the standardisation and quality assurance are some of the measures to be employed in view of realizing development within the industrial sector.[248]

4.2.5.1.3. Monetary and Financial Cooperation

Cooperation in monetary and financial matters has to be in accordance with the approved macro-economic policy harmonisation programmes and the convergence framework of the Community. The aim is to establish monetary stability within the Community which in turn is aimed at facilitating economic integration efforts and the attainment of sustainable economic development of the community.[249]

[248] *Id*., Article 80.
[249] *Id.*, Article 82 (1).

Cooperation in monetary and financial matters as well as maintaining the convertibility of currencies is seen as a basis for the eventual establishment of a monetary union. Partner States are also expected to harmonize their macro-economic policies especially in exchange rate policy, interest rate policy, monetary and fiscal policies. They are also expected to remove obstacles to the free movement of goods and services and capital within the community.[250]

To implement the above areas of cooperation the following mechanisms are envisaged: to maintain the existing convertibility of currencies; to take measures that would facilitate trade and capital movement within the Community; to develop, harmonize and eventually integrate the financial systems of the Partner States; and to implement the provisions of the Treaty relating to monetary and financial cooperation.[251]

In order to harmonize monetary and fiscal policies the Treaty provides for the removal of all exchange restrictions on imports and exports within the Community; maintenance of free-market determined exchange rates and enhancing the levels of international reserves; adjustment of fiscal policies and net domestic credit to the governments so as to ensure monetary stability and the achievement of sustained economic growth; liberalisation of financial sectors by freeing and deregulating interest rates; and the harmonisation of tax policies.[252]

It should be noted that a Monetary Union is one of the integration stages provided for by the EAC Treaty-1999.[253] A foundation is al-

250 *Ibid.*
251 *Id.*, Article 82 (2).
252 *Id.*, Article 83.
253 *Id.*, Article 5 (2).

ready being laid for which the East African Community Monetary Union could be fully implemented and a single currency in use by 2011-2015. Some of the success indicators which are already in place include the removal of all capital controls, the research on an appropriate EAC exchange rate mechanism, harmonisation of statistical frameworks used in convergence criteria as well as the integration of payment systems.[254]

4.2.5.1.4. Tourism

With regard to tourism, the intention is to develop a collective and coordinated approach to the promotion and marketing of quality tourism into and within the Community. This is to be arrived at through the coordination of policies in the tourism industry, the establishment of a framework that ensures an equitable distribution of benefits; the establishment of a common code of conduct public and private tour operators; standardisation of hotel classifications and professional standards of the agents; and through the development strategies for tourism promotion.[255]

Success indicators of the East African cooperation in tourism include the implementation of a framework for marketing and promoting East Africa as a single tourist destination, adoption of a regional approach in the protection of wild life resources from illegal use and practices and the operation of the East African Tourism and Wildlife Conservation Agency.[256]

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254 See *EAC Development Strategy 2006-2010* – Final Draft, p. 65.
255 See *EAC Treaty-1999*, Article 115.
256 See *EAC Development Strategy 2006-2010* – Final Draft, p. 71.

4.2.5.1.5. Agriculture and Food Security

The overall objectives of cooperation in the agricultural sector are the achievement of food security and rational agricultural production within the Community.[257] To achieve these objectives a common agricultural policy is supposed to be made, there should be an increase in the production of crops, livestock and fisheries as well as the improvement of conservation and processing.

The EAC Development Strategy 2006-2010[258] shows that there are already some strategic interventions made in the field of agriculture and food security which include the implementation of the East African Agricultural and Rural Development Strategy, the establishment of the East African System of Early Warning, the application of sanitary and phytosanitary measures, as well as the implementations of the EAC SQMT Act, 2006[259].

4.2.5.2. Cooperation in Social Services and Infrastructure

This second major dimension of East African integration deals with services, standards and social issues. It deals with infrastructure and services development, human resources, science and technology, enhancing free movement of labour and services, promoting environmental conservation and working out common policies on natural resources, promoting the role of the private sector and civil society,

[257] See *EAC Treaty-1999*, Article 105.
[258] Refer to pages 69-70.
[259] "EAC SQMT Act, 2006" stands for the East African Community Standardisation, Quality *Assurance, Metrology and Testing Act, 2006.*

health, social and cultural activities, women development,[260] and cooperation in legal and judicial affairs.[261]

There are already a number of achievements in some sectors. Some few examples include the harmonisation of pharmaceutical standards in the health sector, the implementation Tripartite Agreement on Road Transport and the harmonisation of traffic laws as well as the implementation of the Inland Waterways Transport Agreement in the transport sector.

4.2.5.3. Cooperation in Political and International Relations Issues

This is the third area of integration and it involves the following subareas: cooperation in political matters,[262] regional peace, defence and security,[263] and fostering relations with other regional and international organisations.[264]
With respect to the eventual establishment of a political federation the Partner States have to establish common foreign and security policies.[265] The objectives of establishing common foreign and security policies are: to safeguard the common values, fundamental interests and independence of the Community; to strengthen the security of the Community and its Partner States in all ways; to develop and consolidate democracy and the rule of law and the respect of human rights and fundamental freedoms; to reserve peace and strengthen international security among the Partner States and within the Community; to pro-

260 See *EAC Treaty-1999*, Articles 121-122.
261 *Id.*, Article 126.
262 *Id.*, Article 123.
263 *Id.*, Articles 124-125.
264 *Id.*, Article 130.
265 *Id.*, Article 123 (1) and (2).

mote cooperation at international fora; and to enhance the eventual establishment of a political federation of the Partner States.

In pursuance of the above objectives some measures have been contemplated. They include: defining a common policy among Partner States on foreign affairs and security issues; coordinating the actions of the Partner States in international organisations and conferences; refraining from doing actions which are contrary to the interests of the Community or which will impair the effectiveness of their cohesive policies in international relations; peaceful settlement of internal disputes; coordination of defence policies; and enhancing cooperation among the national assemblies of the Partner States.[266]

4.2.6. Conclusion

The East African Community may therefore be referred to as an "ambitious and multidimensional project".[267] It is clear that the economic pillar of the integration process is very crucial. Nevertheless, a successful economic integration, particularly in the East African context, certainly requires success in other fields of integration. And political cooperation is one of those fields that need to be emphasized.

The EAC Customs Union is one of the outstanding forms in which the East African integration is manifested. And it is a necessary step towards translating provisions of the EAC Treaty into economic opportunities for the East Africans. For example, in view of the current global trend where trade negotiations are increasingly being carried out

[266] *Id.*, Article 123 (3).

[267] 'Ambitious' because it involves a variety of dimensions – economic , social, political and so forth – yet history and current developments indicate difficulties in the struggle to 'complete' this project.

under regional blocs, the formation of a Customs Union in East Africa was a necessity since it would be difficult for Partner States to negotiate a Free Trade Area with other regional blocs unless they have liberalized trade amongst themselves.

It should, however, be noted that customs law exists regardless of the existence of a Customs Union. So in examining the EAC customs law, this work goes beyond the fact that the EAC is currently a Customs Union. In other words, this work fundamentally examines the current customs law per se, which law is later viewed in light of the WTO law and of the Revised Kyoto Convention. And this examination of EAC customs law is extensively carried out in the following two chapters.

Chapter 5
SUBSTANTIVE CUSTOMS LAW OF THE EAST AFRICAN COMMUNITY

5.1. INTRODUCTION

Law is classified, *inter alia*, into substantive and adjectival or procedural law. Substantive law refers to the actual law (normally codified in constitutions, treaties, statutes, etc.) that governs the rights and obligations of those who subject to it. Procedural law deals with the method and means by which substantive law is made and administered; in other words, it relates to practice and procedure.[268]

Customs is widely known for implementing a wide range of laws concerning for instance: tariffs, duties, taxes, the various customs procedures, and even some laws for criminal and administrative procedure. Also in the East African Community, customs law is multifaceted. It consists of relevant provisions of the EAC Treaty-1999, the Protocol on the Establishment of the EAC Customs Union and its Annexes, regulations and directives made by the Council of Ministers of the EAC, applicable decisions made by the East African Court of Justice, Acts enacted by the East African Legislative Assembly, and relevant principles of international law.[269]

This chapter describes the substantive customs law of the East African Community. This substantive customs law essentially deals with the accrual, assessment, collection, payment, deferred payment and repay-

[268] See S. BONE (Ed.), *Osborn's Concise Law Dictionary (9th Ed.)*, Sweet & Maxwell, London 2001.

[269] See Article 39 (1) of the Protocol on the Establishment of the East African Community.

ment of import and export duties.[270] Thus, it also deals with matters concerning security on property for unpaid duty, tariff rates (preferential and non-preferential), Rules of Origin, and Customs Valuation.

5.2. LIABILITY TO DUTY

Liability to duty is regulated under Sections 110 to 119 of the East African Community Customs Management Act, 2004. These Sections essentially contain provisions relating to rates of duties, the EAC tariff treatment, and various exemption regimes.

5.2.1. Tariff Rates

Laws concerning tariff rates are very crucial in any customs territory all over the world. In the East African Community, laws relating to tariff rates have their base Articles 10, 11 and 12 of the Protocol on the Establishment of the Establishment of the EAC Customs Union. The gist of these Articles is the (gradual) elimination of all internal tariffs and all other charges of equivalent effect on trade as well as the establishment of a three band common external tariff.

5.2.1.1. Community Tariff Treatment

The EAC Treaty[271] recognizes '*asymmetry*' as a key principle in the formation of the EAC Customs Union. This principle is reiterated in the Protocol of the Establishment of the East African Community Cus-

[270] See H.-M. WOLFFGANG, "Zollrecht" in R. SCHULZE, M. ZULEEG (Eds.), *Europarecht: Handbuch für die deutsche Rechtspraxis*, Nomos Verlagsgesellschaft, Baden-Baden 2006, p. 1495, Rdnr. 97.

[271] See *EAC Treaty-1999*, Article 75 (1) (a).

toms Union.[272] Its inclusion is based on the reality that at the time of the establishment of the Customs Union the EAC Partner States were[273] at different levels of economic development. Moreover, the newly acceded countries Rwanda and Burundi are also at slightly different levels of economic development in relation with each other and with Kenya, Tanzania and Uganda. Hence, the existing imbalances, which could be aggravated by the Customs Union, needed to be addressed through *gradual elimination of internal tariffs*.

Consequently, tariffs were abolished completely on trade between Uganda and Tanzania, and on exports from these two countries to Kenya. However, various goods (the so-called Category B goods) exported from Kenya to Uganda or Tanzania are subject to a gradual tariff reduction; [274] and they will be phased out by 2010. The transition period was meant to enable Tanzania and Uganda (and the subsequently acceding States) to adjust to the effects of the removal of internal tariffs and to recover some losses in revenue. However, A. MULERI cautions that this arrangement can be effective only if the tariffs on the earmarked items are protective enough of the affected sectors in the concerned countries and can generate the expected revenue.[275]

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272 See *Protocol on the Establishment of the East African Community Customs Union*, Article 2 (5) (a).

273 Currently (in 2008) they are still at different levels of economic development.

274 Phasing out as follows: 10% during the first year after the entering into force of the Protocol; 8% during the second year; 6% during the third year; 4% during the fourth year; 2% during the fifth year; and 0% thereafter (See *Protocol on the Establishment of the East African Community Customs Union*, Article 11; also see WTO, *Trade Policy Review – East African Community*, WTO Document: WT/TPR/S/171, 20th September 2006.

275 See A. MULERI, *Integration Experience of East African Countries*, A paper presented at the symposium marking the 30th Anniversary of the Banco de Moçambique, Maputo 17th May 2005, p. 4.

5.2.1.2. The EAC Rules of Origin Rules

Rules of Origin perform a wide range of functions.[276] The above-explained 'community tariff treatment' is surely one of the reasons for the existence of the EAC Rules of Origin, for one needs to ascertain the nationality of a product before applying the right tariff. Against this background, Section 111 of the EAC Customs Management Act, 2004 stipulates that goods originating from the Partner States shall be accorded Community tariff treatment in accordance with the Rules of Origin provided for under the Protocol on the Establishment of the East African Community Customs Union. Obviously, there is a need to produce a Certificate of Origin (and any other documents if necessary) before Customs to prove the origin of a product and ultimately to make use of the community tariff treatment.

Annex III to the *Protocol on the Establishment of the East African Customs Union* contains the *EAC Rules of Origin Rules* which aim at implementing the community tariff treatment and to ensure that there is uniformity among Partner States in the application of Rules of Origin. These rules essentially contain: the origin criteria; ('wholly produced' and 'substantial transformation'); the methodologies of measuring substantial transformation; processes that do not confer origin; treatment of mixtures; treatment of packing; documentary evidence; and the provision on the cessation of the EAC Rules of Origin upon verification that the objectives of the Customs Union have been fully achieved.

[276] See *Part I, number 2.4.2.* for a synthesis about Rules of Origin in the context of customs law.

5.2.1.3. The EAC Common External Tariff

The common external tariff is one of the most important elements of the East African Community Customs Union. It is a three band common external tariff with a minimum rate of 0%, a middle rate of 10% and a maximum rate of 25% in respect of all products imported into the East African Community.[277] These rates are meant to apply to primary and capital goods, intermediate goods and final goods, respectively. The maximum rate of 25 percent is to be reviewed towards 20 percent after five years.

Primary goods and capital goods have a 0% tariff rate because they are considered essential for production. This provision therefore helps to boost the manufacturing sector in the East African Community. Intermediate goods are those which have been processed and require some other processing before they are ready for consumption. Final goods are those which have been fully processed and are ready for consumption.

In January 2005, the EAC common external tariff entered into force. There were a few provisional exceptions for Kenya on its rice imports from Pakistan; and for Tanzania on its wheat and barley imports. The move from national tariffs to the common external tariff reduced average tariff average tariff protection in Kenya and Tanzania, and increased it in Uganda.[278] Rwanda also experiences a reduction in tariff

[277] See *Protocol on the Establishment of the East African Community Customs Union*, Article 12 (1).

[278] See WTO, *Trade Policy Review – East African Community*, WTO Document: WT/TPR/S/171, 20th September 2006.

protection, that is, from 15% to 10% on intermediate goods and from 30% to 25% on finished goods.[279]

5.2.1.4. Tariff Rates and the 'Harmonized System' in the EAC

The EAC Partner States agreed to harmonize their customs nomenclature and standardize their foreign trade statistics to ensure comparability and reliability of relevant information. To this end, they adopted the Harmonized Commodity Description and Coding System.[280] The tariffs were first based on the 2002 Version of the Harmonized System. On 18th June 2007, the EAC CET was reviewed and modified to conform to the 2007 Version of the Harmonized System. The EAC CET 2007 Version came into force on 1st July 2007.[281] It should also be noted that tariffs are applied on the CIF value of imports at the point of entry to the Customs Union.

5.2.2. Exemptions from Duty

There are various kinds of exception from duty. Some of these exemptions, for instance those that relate to inward/outward processing, are elaborated under the procedural customs law in chapter 6 below. Under the substantive customs law of the EAC, it suffices to highlight that goods remaining on board and exported and exported in the aircraft or vessel in which they were imported, whether as store or otherwise, are exempt from liability to import or export duties. In addition, goods

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279 See http://www.rra.gov.rw/rra_article199.html; accessed on 11th November 2008, 11:00 GMT + 01:00.

280 See *Protocol on the Establishment of the East African Community Customs Union*, Article 8; for general information about the Harmonized System, see *Part I, number 2.4.1* of this work.

281 See *East African Community Gazette*, 18th June 2007 (Legal Notice No. EAC/12/2007).

which are entered under bond for exportation, re-exportation, transhipment, or in transit are exempt from liability to import duties.[282]

There are also '*specific exemptions*'[283] which relate to goods imported or purchased before clearance through the Customs for use by or on behalf of privileged persons or institutions.[284] These privileged persons and institutions include: the presidents of the EAC Partner States, Armed Forces of the Partner States, Commonwealth governments, diplomats, donor agencies with bilateral or multilateral agreements with the Partner States, international and regional organisations with diplomatic accreditation or bilateral or multilateral agreements with a Partner State, the Commonwealth War Graves Commission, disabled, blind, physically handicapped persons, and rally drivers.[285]

Part B of the *Fifth Schedule* contains the so-called *general exemptions*. These exemptions relate to a wide range of products such as fish, crustaceans and molluscs caught and landed by canoes or vessels registered and based in a Partner State; mosquito nets and materials for manufacture of mosquito nets; seeds for sowing; chemically defined compounds used as fertilisers; specimens and scientific equipment for public museums; urine bags and hygienic bags for medical or hygienic use; diagnostic reagents for use in hospitals and clinics; and many others.[286]

Section 114 (3) of the EAC Customs Management Act, 2004 empowers the Council of Ministers of the EAC to amend the Fifth Schedule

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282 See *EAC Customs Management Act, 2004,* Sections 113 and 115.

283 They are listed in the *Fifth Schedule, Part A* which is annexed to the *EAC Customs Management Act, 2004*.

284 See *EAC Customs Management Act, 2004,* Section 114 (1).

285 See the *Fifth Schedule, Part A* for details about the conditions that (in some cases) need to be fulfilled before an exemption is granted.

286 See the '*Fifth Schedule, Part B*' of the *EAC Customs Management Act, 2004* and the respective amendments thereof for details about the general exemptions.

by publication of legal notice in the *East African Community Gazette*. Since the Act came into force, several amendments have been made. For example, on 18th June 2007 paragraph 28 was added to Part B of the Fifth Schedule. It concerns eleven items (such as blood freezers, laundry equipment, etc.) *imported for use in licensed hospitals*, which on recommendation from the director of medical services and subject to such conditions and limitations as the *Commissioner*[287] may impose, are exempt from duty.[288]

5.3. COMPUTATION OF DUTY

Computation of duty is a very important aspect of any customs legislation. There are two options available for fixing the amount of duty to be paid. Either the duty is levied on the basis of criteria relating to the properties of the product such as its weight, volume or surface (*specific duties*), or it is calculated as a percentage of the value of the product (*ad valorem duties*).[289]

Although computation of duty fundamentally falls under substantive law, it also contains some aspects which can best be treated under procedural law. Hence, the following exposition relates only to the core aspects of substantive customs law of the East African Community concerning computation of duties.

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287 'Commissioner' means Commissioner of Customs (appointed in accordance with Partner States' legislation) responsible for the management of customs in each of the Partner States (See *EAC Customs Management Act, 2004*, Section 2 (1)).

288 See *East African Community Gazette*, Legal Notice No EAC/8/2007. The Notice came into force on 1st July 2007.

289 See M. LUX, *Guide to Community Customs Legislation*, Bruylant, Brussels 2002, p. 187.

5.3.1. *Ad valorem* Duties

Because of the various advantages such as equity, freedom of competition, easy consultation on foreign customs tariffs, collection of trade statistics, etc.,[290] most duties in the East African Community (and in many other countries) are based on the value of the goods. Section 122 (1) of the EAC Customs Management Act, 2004 states:

> Where imported goods are liable to import duty *ad valorem*, then the value of such goods shall be determined in accordance with the *Fourth Schedule* and import duty shall be paid on that value.

Thus, the *Fourth Schedule* constitutes the core of substantive customs law relating to the computation of duty in the East African Community.[291]

5.3.2. Additions with regard to Export Duty

Duties are not only levied on imports but also on exports. In order to compute the export duty *ad valorem* there is need to establish the value of goods for export. According to the EAC customs law, the value of goods for export includes the cost of goods plus transport and other charges up to the time of delivery of the goods on board the exporting aircraft or vessel or at the place of exit from the Partner State. And if the cost of the goods cannot be determined, the cost of identical or similar goods exported from the Partner State at about or the same time does apply. [292]

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290 See *Id*., pp. 188-189 for the advantages and disadvantages of *ad valorem* duties.

291 See a detailed analysis of the *Fourth Schedule* vis-à-vis WTO customs valuation rules in *number 8.3.1* below.

292 See *EAC Customs Management Act, 2004*, Section 123.

5.3.3. Specific Duties in the EAC Customs Law

Despite the many advantages of ad valorem duties and the fact that most customs duties in the EAC are calculated ad valorem, there are also a few provisions relating to specific duties. Thus, in certain cases customs duty may be computed on gross weight of package,[293] and on quantity.[294]

5.4. PAYMENT AND REPAYMENT OF DUTY

5.4.1. General Matters

The provisions regarding payment and repayment of duty are a crucial part of substantive customs law. The EAC customs law relating to payment of duty rests on the fundamental concept that liability to duty constitutes a civil debt due to a Partner State.[295] In other words, a customs debt is a civil debt which has to be taken seriously. Consequently, it regulates how duties should be paid; and if necessary, how duties should be recovered by distress.[296]

There are basically three ways of paying duties: direct payment at the Customs office or at such other place as the Commissioner may direct; payment into a bank to the credit of the Customs; or electronic transfer of funds (to the Customs) subject to the authorisation of the Commissioner.[297]

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293 *Id.*, Section 125.
294 *Id.*, Section 126.
295 *Id.*, Section 130.
296 *Distress* is the act of seizing movable property of a wrongdoer, to compel the performance of an obligation, or to procure satisfaction for a wrong committed (See *Osborn's Concise Law Dictionary*).
297 See *EAC Customs Management Regulations, 2006*, Regulation 131.

However, in the case of a failure to pay (in time, and through the normal way), a Partner State may recover the duties by legal proceedings. Moreover, if duty payable by a person is not paid one month after the due date of payment, the Commissioner may authorize distress to be levied upon: goods; materials for manufacturing or plant of a factory; premises, vehicles or other property in the possession or custody of that person or his/her agent.[298]

5.4.2. Security on Property for Unpaid Duty

The provision of security,[299] whether by way of guarantee or otherwise, is often of great importance in relation to the operation of many customs procedures in a number of countries.[300] Specific provisions relating to particular procedures, such as transit, are treated under procedural law. It is only the general provision on security that is treated here – and it essentially concerns the mandate given to the Commissioner under particular circumstances to demand security (of land or buildings) from a customs debtor.[301]

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298 See *EAC Customs Management Act, 2004*, Section 130; The *Warrant of Distress* is set out in the '*Sixth Schedule*'.

299 Security is a possession such that the grantee (holder of the security) holds as against the grantor a right to resort to some property or some fund for the satisfaction of some demand, after which satisfaction the balance of the property or fund belongs to the grantor. (See *Osborn's Concise Law Dictionary*).

300 Chapter 5 of the General Annex to the Revised Kyoto Convention contains a number of provisions on the security; See also: T. LYONS, *EC Customs Law*, Oxford University Press, New York 2008, p. 434.

301 Section 132 (1) of the *EAC Customs Management Act, 2004* reads: "Where a person, being the owner of land or buildings situated in any Partner State, fails to pay any duty or other sum of money due and payable under this Act, the Commissioner may by notice in writing inform that person of his her intention to apply to the Registrar of Lands for the Land or buildings to be the subject of security for the duty or other sum of an amount specified in the notice." Note that Sub-sections 2 and 3 contain further provisions on the procedural aspects concerning security; but these are beyond the scope of this chapter.

5.4.3. Remission of Duty

Remission refers to the decision to waive all or part of the customs debt. It is the *forgiveness*[302] of a customs debt. In other words, it is a decision to render void an entry in the accounts of all or part of an amount of customs duty which has *not been paid*.

Remission of customs duty is dealt with in Sections 140 and 141 of the EAC Customs Management Act, 2004 as well as Regulations 143 and 144 of the EAC Customs Management Regulations, 2006.

In the first instance, the Council of Ministers of the EAC may grant remission of duty on goods *imported for the manufacture of goods* in a Partner State. It is clear that the objective of this provision is to facilitate the manufacturing industries in the EAC. The manufacturers and the particulars concerning the goods with respect to which remission is granted have to be published in the East African Community Gazette.[303]

Remission of duty is also granted in cases where goods are *lost* or *destroyed by accident* either on board any aircraft or vessel; or in removing, loading, unloading or receiving them into, or delivering them from a customs area or warehouse; or in a customs area or warehouse before they are delivered out of customs control to the owner. In such cases, the Commissioner may remit the duty payable.[304]

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302 See *Osborn's Concise Law Dictionary*.

303 For example, on 18th June 2007 four companies were allowed to import sugar for industrial use at a remitted duty rate of 10% into Uganda; the firm "Trans-paper" was granted additional quantities of paper to be imported at a remitted duty rate of 0% for the manufacture of exercise books into Uganda (See *East African Community Gazette*, Legal Notice No EAC/9/2007).

304 See *EAC Customs Management Act, 2004*, Section 141.

5.4.4. Rebate of Duty

Rebate of duty refers to a reduction of the amount of duty payable. Such a reduction is permissible under the EAC customs law if the imported goods are damaged before they are delivered out of customs control. The decision on whether a rebate should be granted and on the amount to be reduced can be taken by the *proper officer*.[305] However, before granting any rebate the claiming importer must submit to the proper officer an application for the rebate using *Form C. 38* together with any evidence the proper officer may require.[306]

5.4.5. Repayment of Duty

Repayment means the total or partial refund of import or export duties which have been paid.[307] The power to refund the duties is, according to the EAC customs law, vested in the Commissioner. Moreover, the Commissioner's discretion is particularly evident in the Sections dealing with refund of duty; this is demonstrated in the wording of the following Sub-sections:

> Subject to any regulations, the Commissioner *may* grant a refund… Subject to Section 144 *and to such conditions as the Commissioner may impose*, where it is shown *to the satisfaction of the Commissioner*… [Emphasis added].[308]

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[305] 'Proper officer' means any officer whose right or duty is to require the performance of, or to perform, the acts referred to in the *EAC Customs Management Act, 2004* (See *EAC Customs Management Act, 2004* Section 2 (1)); and "Every person employed on any duty or service relating to the Customs by order, or with the concurrence, of the Commissioner shall be deemed to be the proper officer for that duty or service." (*Id*., Section 2 (2) (i)).

[306] See *EAC Customs Management Regulations, 2006*, Regulation 145.

[307] This definition is *derived* from Sections 143 and 144 of the *EAC Customs Management Act, 2004*.

[308] See *EAC Customs Management Act, 2004*, Sections 143 (1) and 144 (1).

Despite this high degree of the Commissioner's discretion, the EAC Customs Management Act contains some straightforward criteria upon which the decision to refund the duty should (normally) be based. These include cases where:

- import duty has been paid in respect of goods which have been damaged or pillaged during voyage or destroyed while subject to customs control;
- import or export duty has been paid in error;
- the description, quality, state or condition of the goods is not in accordance with the sales contract;
- the imported goods were damaged before they were delivered out to customs control;
- (in consent with the seller) goods were returned unused to the seller; and where,
- (in consent with the seller) the goods were destroyed unused.

There are a couple of procedural aspects relating to duty refund. For instance, a person claiming such refund must present the claim within a period of twelve months from the date he/she paid the duty.[309] These will be examined in the next chapter.

5.5. CONCLUSION

It is widely known that the most extensive part of customs law is procedural. Nevertheless, substantive law occupies central place. Most of the customs procedures are meaningful insofar as they contribute, for instance, to the correct application of tariffs, the right and fast computation of customs duty, or to the smooth payment and repayment of customs duties.

[309] See *Ibid*.

In the East African Community and in most of the developing and less-developed countries, substantive customs law is of particular importance because of the fact that the national budgets of these countries heavily depend on customs revenue. This chapter has expounded the EAC's legislation on such core customs aspects as tariffication, Rules of Origin, customs valuation and customs debt. It can therefore be considered as a one of the fundamental pillars on which the analytical part of this whole work rests.

Chapter 6
PROCEDURAL CUSTOMS LAW OF THE EAST AFRICAN COMMUNITY

6.1. INTRODUCTION

Procedural customs law deals with customs procedures. But it should be noted that the word 'procedure' has a particular meaning in customs law. 'Customs procedure' specifically refers to *the treatment applied by the Customs to goods*[310] *which are subject to customs control*.

Oftentimes, the term 'customs procedures' is combined with 'customs practices' to get '*customs procedures and practices'* – this is often the case in the Revised Kyoto Convention and in much of the literature concerning customs. It should, however, be noted that 'customs practices' (unlike customs procedure) relates to *rules that are not necessarily applicable to goods* but are required to *regulate other matters* such as the application of information technology, appeals, offences or relations with the business community.[311]

There are a number of customs procedures applied by different customs administrations all over the world. In the European Community, for instance, there are currently (in 2008) eight customs procedures namely:

a) release for free circulation;
b) transit;
c) customs warehousing;
d) inward processing;

[310] The reference to "goods" includes means of transport (see WCO, *Glossary of International Customs Terms*, Brussels 2006, p. 10).
[311] See RKC, Guidelines to the General Annex, Chapter 1, Standard 1.1.

e) processing under customs control;
f) temporary admission/importation;
g) outward processing; and
h) exportation.[312]

The Revised Kyoto Convention, which was developed to standardize customs policies and procedures, contains the procedures just mentioned above and other procedures such as those that relate to travellers, postal traffic, and means of transport.[313]

This chapter fundamentally deals with the description and interpretation of customs procedures in the EAC customs law. Additionally, customs practices as well as various customs formalities of the EAC customs law are investigated.

6.2. CLEARANCE OF GOODS AND OTHER CUSTOMS FORMALITIES

Clearance[314] of goods and other customs formalities place customs administrations in the centre of world commerce since the manner in which they clear goods and carry out other related tasks, such as enforcing the law and collecting duties and taxes, has a great impact on national and international economy.[315] However, although many of the customs formalities concern various customs procedures such as im-

[312] *Community Customs Code,* Article 4(16). These procedures, however, are to be reduced to three by the Modernized Customs Code. (For details on this issue, see http://www.consilium.europa.eu . Document No. 10911/07. Inter-institutional file: 2005/0246 (COD).

[313] See the Specific Annexes to the Revised Kyoto Convention.

[314] *Clearance* is the accomplishment of the customs formalities to allow goods enter home use, to be exported or to be placed under another customs procedure (see RKC, General Annex, Chapter 2, E5).

[315] See RKC, Guidelines to the General Annex, Chapter 3, Introduction.

portation, warehousing or customs transit, there are also other formalities that relate to phytosanitary, veterinary, immigration, currency and licensing regulations.

6.2.1. Customs Offices, Customs Areas and Working Hours

Formalities for clearance of goods normally have to be completed at a customs office and the hours of doing business should be publicized.[316] This issue is catered for in the EAC customs law in that the Commissioner is given the power to prescribe the working days and the hours of general attendance of officers. The law also regulates cases where working outside the hours of general attendance is permissible.[317] In addition, the Commissioner has the power to appoint customs areas such as boarding stations, places for the examination of goods, or sufferance of customs airports.[318]

Common border posts, where activities such as customs controls are carried out jointly, can lead to faster clearance of goods and ultimately to trade facilitation. Section 10 of the EAC Customs Management Act, 2004 regulates the co-operation issues of neighbouring customs administrations.[319]

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316 See RKC, General Annex, Standard 3.1.

317 See *EAC Customs Management Act, 2004*, Section 8; *EAC Customs Management Regulations, 2006*, Regulations: 4, 5 and 6.

318 See *Id.*, Sections 11-14.

319 Within the EAC Partner States a few common border posts (for example, at Malaba on the border between Uganda and Kenya) have been established – and more are envisaged. A similar path is being trod with regard to external borders (See E. KAFEERO, "Customs and Trade Facilitation in the East African Society, in *World Customs Journal*, vol. 2, no. 1, (pp. 63-71), p. 70.

6.2.2. Goods Declaration

When goods are brought into a customs territory, the Customs has to be informed of the purpose of bringing the goods. This information is conveyed by means of a declaration; and the person responsible for the contents of a declaration is generally referred to as a declarant.[320] An analysis of Sections 21-31 of the EAC Customs Management Act, 2006 portrays a fundamental principle that any person having the right to dispose of the goods can be entitled to act as a declarant. Hence, it is the owner of the goods or any third party acting on behalf of the owner that is entitled to declare the goods. By lodging the goods declaration, a declarant simultaneously indicates the particular customs procedure under which the goods have to be placed.[321] The EAC Customs Management Regulations, 2006 (Regulations 11-22) mention the various Forms used for goods declaration. In addition to lodging a goods declaration, the declarant is also supposed to produce all supporting documents such as consignment notes demanded of him or her by the proper officer.[322]

Clearance of goods obviously involves further procedural provisions, for example those which relate to the examination of goods, the treatment of abandoned goods or the release of goods. Such provisions are clarified in the course of examining the various customs procedures below.

320 See RKC, Guidelines to the General Annex, Chapter 3, Part 2.
321 See, for example, Section 34 of the *EAC Customs Management Act, 2004*.
322 See, for instance, Section 31 (1) (e) of the *EAC Customs Management Act, 2004*.

6.3. IMPORTATION

Importation involves a number of customs procedures, practices and formalities. The EAC importation-related regulations focus on: prohibited and restricted imports; arrival and report of aircraft, vessels, trains and vehicles; clearance by pipeline, formalities relating to loading and removal of cargo; entry, examination and delivery of goods, as well as passenger clearance.

6.3.1. Prohibited and Restricted Imports

Protection of consumers against dangerous goods is of the main functions of customs. Such goods may include foodstuffs, toys, clothing, or technical equipment. In the USA, for instance, Customs Service (in cooperation with the Food and Drug Administration) enforces certain import restrictions on adulterated foods, milk and cream.[323]

Sections 18, 19 and 20 of the EAC Customs Management Act, 2004 regulate the prohibitions of imports. The *Second Schedule* contains both the list of prohibited goods (in Part A)[324] and the list of restricted goods (in Part B).[325] It is important to note that the Council has the power to amend the Second Schedule by publishing an order in the EAC Gazette.[326] Such an order may specify goods either generally or in

[323] L. A. GLICK, *Guide to United States Customs and Trade Law: After the Customs Modernization Act*, Kluwer Law International, Alphen aan den Rijn 2008, p. 175.

[324] Such goods include some agricultural chemicals such as caplafol; industrial chemicals such as crocidolite; narcotic drugs under international control; counterfeit goods of all kinds; etc.

[325] These include natural sponges of animal origin; worked ivory and articles of ivory; unwrought precious metals and precious stones; etc.

[326] For example, on 18th June 2007 the Council amended the Second Schedule by in-

a particular manner and may prohibit or restrict the importation of the specified goods either from all places or from any particular country or place.

6.3.2. Arrival and Report of Aircraft, Vessels, Trains and Vehicles

This part concerns the formalities that have to be completed by the carrier before goods are placed under a relevant customs procedure. It is crucial under the EAC customs law that the arrival takes place *only* at designated places (port, airport, train station, etc.)[327] and that the *master*[328] should furnish the necessary information to the Customs. For instance, in the case of aircraft and vessel, the master is supposed to make report of such aircraft or vessel, and of its cargo and stores, and of any other package for which there is no bill of lading within twenty four hours after arrival.[329]

Sections 21-30 of the EAC Customs Management Act, 2004 contain a few other provisions which give details in connection with furnishing the necessary information to the Customs, and which clarify the fate of a person who contravenes the rules.[330]

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serting a paragraph which prohibits the importation of plastic articles of less than 30 microns for the conveyance or packing of goods (See *East African Community Gazette*, 18th June 2007 (Legal Notice No. EAC/7/2007).

327 Save where an aircraft or vessel is lost or wrecked or is compelled to land in a Partner State owing to accident, stress of whether or other unavoidable causes (*EAC Customs Management Act, 2004*, Section 28).

328 *Master* includes any person for the time being having or taking charge or command of any aircraft or vessel (*EAC Customs Management Act, 2004*, Section 2).

329 See *Id.*, Section 24.

330 See, for instance, Section 23 (2) which reads: "A person who contravenes this Section commits an offence and shall be liable to a fine note exceeding two hundred and fifty dollars".

6.3.3. Entry, Examination and Delivery of Goods

Sections 34-41 of the EAC Customs Management Act, 2004 essentially relate to the customs formalities concerning the declaration (entry) of imported goods. Normally, goods are supposed to be entered within twenty one days after discharge or on arrival in the case of vehicles. But exceptions to this rule may be allowed by the proper officer. The entry is made either for home consumption, warehousing, transhipment, transit, or export processing zones.[331] All supporting documents that furnish full particulars of the goods are supposed to be produced.

In the absence of sufficient information or in order to determine the accuracy of the entry made, goods may be examined in the presence of the proper officer. EAC customs law also provides for the examination of goods at private premises. This is possible if examining the goods in a transit shed or a customs area is made difficult because of the goods' value, size, packing or any other reason. In this case, the importer has to make a written application to the proper officer, who has the discretion either to accept or reject it.[332]

After the examination, the goods may be entered either for home consumption or for warehousing. Thereafter, duties may be paid; or under certain conditions,[333] the proper officer may permit the goods to be returned from the transit shed or customs area without payment of duty.

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331 See *EAC Customs Management Act, 2004*, Section 34.

332 See *EAC Customs Management Regulations, 2006*, Regulation 53.

333 Normally, the importer has to give a security. In addition, the proper officer has the mandate to impose other conditions as he/she may deem appropriate (See *EAC Customs Management Act, 2004*, Section 39).

6.3.4. Passenger Clearance

Three key issues concerning passenger clearance are dealt with in the EAC customs law, namely the disembarking of persons, the dual-channel system, and the baggage declaration. Disembarkation of persons from an aircraft or vessel is allowed only in those places appointed by the Council.[334]

The Revised Kyoto Convention describes the 'dual-channel system' as a simplified customs control system allowing travellers on arrival to make a declaration by choosing between two types of channel. One, identified by green symbols, is for the use of travellers carrying goods in quantities or values not exceeding those admissible duty-free and which are not subject to import prohibitions or restrictions. The other, identified by red symbols, is for other travellers.[335] The EAC customs law provides for the establishment of a dual-channel system at every place of arrival and within the baggage room at every major port. The dual-channel system is very vital in ensuring first clearance of passengers.

Baggage declaration is the third key customs formality concerning the clearance of passengers. As a rule, a person other than a member of the crew or vessel is, on entering the EAC, supposed to make a declaration to the proper officer of his or her baggage and the articles contained therein or carried with him or her.[336] This declaration may be made orally or in writing, as the Commissioner may describe.

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334 See *Id*., Sections 11 and 44.
335 RKC, Specific Annex J, Chapter 1, E1.
336 See *EAC Customs Management Act, 2004*, Section 46; *EAC Customs Management Regulations, 2006*, Regulation 45.

Baggage declaration is connected with the dual-channel system in such a way that taking a baggage through the red channel signifies that one has goods to declare and consequently a customs duty to pay. On the other hand, taking a baggage through the green channel shows that the person concerned has nothing to declare and his or her baggage is not subject to examination unless the proper officer so requires. Therefore, where a person who passed through the green channel is upon examination found with dutiable goods, such person is deemed to have made a false declaration – and as such commits an offence. Consequently, the uncustomed goods are subject to forfeiture.[337]

The EAC customs law also provides for unaccompanied baggage declaration. In this case, the owner of the unaccompanied baggage makes a declaration of the baggage and the articles it contains by using Form C. 17.[338]

Another aspect of passenger clearance which has gained currency in an attempt to increase security (and to fight terrorism) is the provision of advance passenger information prior to the arrival of an aircraft or vessel. Currently, the EAC customs law leaves it to the discretion of the Commissioner to require the owner or agent of an aircraft or vessel conveying passengers to provide advance passenger information.[339]

6.4. CUSTOMS WAREHOUSING

In the Revised Kyoto Convention, customs warehouses are dealt with in Specific Annex D. And '*customs warehousing procedure*' is defined as the customs procedure under which imported goods are stored under

[337] See *Id*., Section 46 (4).
[338] See *EAC Customs Management Regulations, 2006,* Regulation 48.
[339] See *EAC Customs Management Act, 2004,* Section 44 (3).

customs control in a designated place (a customs warehouse) without payment of import duties and taxes.[340] Despite this definition which covers only the warehousing of imported goods, it is important to note that the storage of goods of national origin is recommended as an additional case of the use of customs warehouses.[341]

The EAC legislation on customs warehousing is contained in the EAC Customs Management Act, 2004, Sections: 42, 43, and 47 to 69; as well as the EAC Customs Management Regulations, 2006, Regulations 64 to 87. Some of these provisions are general in nature while others treat specific issues, such as private bonded warehouses, or customs warehouse rent.

6.4.1. General Provisions

The main purpose of customs warehousing procedure is to facilitate trade. The EAC customs law meets this objective, for goods liable to import duty on first importation may be warehoused without payment of duty in a government warehouse or bonded warehouse.[342] However, it is important to note that not all goods can be warehoused. Some goods such as acids, explosives, dried fish, or any other goods which the Commissioner may gazette must not be warehoused.[343]

One of the indispensable formalities concerning warehousing is that once the goods declared for warehousing are delivered into the custody of the warehouse keeper, the proper officer has to take account of such goods and certify at the foot of that account that the entry and ware-

340 RKC, Specific Annex D, Chapter 1, E1.
341 See RKC, Specific Annex D, Recommended Practice 9.
342 See *EAC Customs Management Act, 2004*, Section 47 (1).
343 See the *EAC Customs Management Regulations, 2006*, Regulation 64 for the list of forbidden goods.

housing of goods is complete; and from that time such goods are considered duly warehoused.[344]

Goods which have been warehoused may be declared for home consumption; exportation; removal to another warehouse; use as stores for aircraft or vessels; re-warehousing; removal to an export processing zone[345]; or removal to a free port.[346]

EAC customs law also allows some operations to be carried out (either by the Customs or by the owner of the goods) on the warehoused goods. The Commissioner may, for instance, permit the owner of the goods to take samples of such goods, or to carry out such other normal handling operations as are necessary to improve the packaging or marketable quality or to prepare them for shipment, such as breaking bulk, grouping packages, and repacking.[347]

The law also makes some precisions with regard to time allowed for the storage of goods in customs warehouses. For instance, all goods entered to be warehoused are supposed to be deposited in the warehouse *within fourteen days*[348]; and all warehoused goods should normally be removed from the warehouses within a period of three

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344 See *EAC Customs Management Act, 2004*, Section 48; and *EAC Customs Management Regulations, 2006*, Regulation 67, which stipulates, *inter alia*, that Form C. 17 may be used for such an entry.

345 *Export processing zone* means a designated part of customs territory where any goods generally introduced are regarded, insofar as import duties and taxes are concerned, as being outside customs territory but are restricted by controlled access (*EAC Customs Management Act, 2004*, Section 2 (1)).

346 See *Id*., Section 50.

347 See *Id*., Section 51.

348 See *EAC Customs Management Act, 2004*, Section 48 (4).

months. Elapsed the three months, the Commissioner may give the permission (in writing) to be re-warehoused.[349]

In principle, the wilful violation of customs warehousing-related rules constitutes an offence. The EAC Customs Management Act, 2004 contains a number of provisions which indicate the conditions under which a person is considered to have committed an offence. Section 61 is a good example. It states:

> Any person who:
>
> a) takes, or causes or permits to be taken, any goods from any warehouse otherwise in accordance with this Act; or
>
> b) fails to carry into and deposit in the warehouse, any goods entered for warehousing; or
>
> c) wilfully destroys or damages any warehoused goods otherwise than in circumstances specifically provided for in this Act,
>
> commits an offence and shall be liable on conviction to imprisonment for a term not exceeding two years or a fine equal to 25% of the dutiable value of the goods.

6.4.2. Bonded Warehouses

A bonded warehouse is any warehouse or other place licensed by the Commissioner for the deposit of dutiable goods on which import duty has not been paid and which have been entered to be warehoused.[350] It can either be a *general* or a *private*. General warehouses are available

[349] See *EAC Customs Management Act, 2004,* Section 57.
[350] *EAC Customs Management Act, 2004,* Section 2 (1).

for use by any person. Private warehouses are reserved for the warehousing of goods which are property of the warehousekeeper.[351]

It is the license from the Commissioner that legally establishes a bonded warehouse. A person applying for a license may be required to furnish security as a condition to get the license. The license is granted for one year – with a possibility of renewal, and it is subject to an annual fee. This license is supposed to be in Form C 23.[352] However, the Commissioner may revoke the licence, which obviously leads to the removal of the warehoused goods. [353]

The warehousekeeper is supposed to provide facilities such as office accommodation, weights, or scales; keep a record of all the goods warehoused; arrange the goods in order; provide all necessary labour and materials for storing, examining, packing, marking, weighing, and taking stock, of all the warehoused goods whenever the proper officer so requires; and maintain such records and accounts relating to the goods.[354]

6.4.3. Government Warehouses

A government warehouse is any place provided by the Government of a Partner State, and approved by the Commissioner for the deposit of dutiable goods on which duty has not been paid and which have been entered to be warehoused.[355] Goods which are warehoused in government warehouses are subject to rent and other charges. The rent is

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351 See *Id.*, Section 62.
352 See *EAC Customs Management Regulations, 2006*, Regulation 74 (4)
353 See *Id*., Sections 62-63.
354 See *Id*., Section 64.
355 *Id.*, Section 2 (1).

charged at such a rate as the Commissioner may determine.[356]The failure to pay the due rent and other charges may result in selling the concerned goods. When the goods are sold, the proceeds thereof are applied in accordance with Section 42 of the EAC Customs Management Act, 2004.[357]

6.5. EXPORTATION

Export means to take or cause to be taken out of the Partner States.[358] The first provisions under the title exportation relate to the prohibited and restricted goods. Prohibited goods are specified in Part A, and restricted goods in Part B of the *Third Schedule* annexed to the East African Community Management, Act 2004.[359] Currently, for instance, the exportation of fresh unprocessed fish (Nile Perch and Tilapia) is restricted. The Council, however, has the power to amend the Third Schedule by publishing an order in the *East African Community Gazette*.[360]

The exportation procedure necessitates the declaration of the goods to be exported. This involves the furnishing of full particulars of those goods supported by documentary evidence to the proper officer. Goods for exportation (other than goods which were imported for temporary

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[356] See *Id.*, Section 68; *EAC Customs Management Regulations, 2006*, Regulation 82 (1).

[357] Sub-section (4) reads: "Where any goods are sold under this Section, then the proceeds thereof shall be applied in the order set out below in the discharge of:
a) the duties, if any;
b) the expenses of removal and sale;
c) the rent and charges due to the Customs;
d) the port charges; and
e) the freight and any other charges.

[358] *Id.*, Section 2 (1).

[359] *Id.*, Section 70.

[360] *Id.*, Sections 71 and 72.

use) are supposed to be entered using Form C. 17.[361] The proper officer, however, may permit exportation prior to the entry of goods, whether liable to or free of duty – but a prior application from the importer using Form C. 26 is necessary.[362]

A person departing overland from a Partner State by vehicle is obliged to report his or her intended departure to the officer stationed at the customs house nearest to the point at which he or she proposes to cross the frontier and to furnish full particulars of the vehicle and the goods, if any, in Form C. 12.[363]

6.6. TRANSIT

When entering a customs territory, goods are normally liable to import duties and taxes, and subsequent re-exportation does not necessarily give entitlement to a repayment. For this reason the legislation of most administrations contains provisions under which such movements may take place without payment of the import or export duties and taxes, the goods being transported under customs control to ensure compliance with the requirements laid down. The procedure under which such movements are made is termed customs transit.[364]

When the goods are required to move from one customs office to another for control purposes within one customs territory, this is referred to as national transit. When the customs offices are in more than one

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361 See *Id*., Sections 73 – 76; *EAC Customs Management Regulations, 2006*, Regulation 89.

362 See *Id*., Regulation 94.

363 See *EAC Customs Management Act, 2004*, Sections 83 and 84; *EAC Customs Management Regulations, 2006*, Regulation 103.

364 See RKC, Guidelines to Specific Annex E, Introduction to Chapter 1.

customs territory, this is international transit. [365] In the EAC customs law, transit is understood as the movement of goods imported from a foreign place through the territory of one or more of the Partner States to a foreign destination.[366] Thus, it is only the international transit which is considered.

The Commissioner has the power to allow imported goods that are entered for transit or *transhipment*[367] to be removed under customs control without payment of import duties – subject to such conditions as he/she may describe.[368] The Commissioner may, for instance, require the owner of the transit goods to furnish a bond (using Form CB. 8) or any other security in such amounts as he/she may require.[369]

Customs is widely known for its 'protective' function. This includes, for instance, the protection of consumers against dangerous goods, the protection of the environment, or the protection of public morality, safety, health or hygiene. It is in this context that the EAC customs law empowers the Commissioner to restrict or control certain goods or means of transport from entering a Partner State.[370]

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365 *Ibid*.

366 *EAC Customs Management Act, 2004*, Section 2 (1).

367 *Transhipment* means the customs procedure under which goods are transferred under customs control from the importing means of transport to the exporting means of transport within the area of one customs office which is the office of both importation and exportation (RKC, Specific Annex E, Chapter 2, E1).

368 *Id*., Section 85 (2).

369 See *EAC Customs Management Regulations, 2006*, Regulation 104 (3).

370 See *EAC Customs Management Act, 2004*, Section 86.

6.7. CARRIAGE OF GOODS COASTWISE AND TRANSFER GOODS

Carriage of goods coastwise is another customs procedure available in the East African Community. It is defined as:

> [t]he customs procedure under which goods in free circulation, and imported goods that have not been declared under the condition that they must be transported in a vessel other than the importing vessel in which they arrived in the customs territory are loaded on board a vessel at a place in the customs territory and are transported to another place in the same customs territory where they are then unloaded.[371]

Section 100 (1) is the focal point of the law on carriage of goods coastwise. It basically stipulates that a *coasting* aircraft[372] or a coasting vessel which is carrying goods coastwise shall not depart from any port or place within a Partner State unless *transire* has been granted by the proper officer. Transire means a *certificate of clearance* issued to any person to carry goods coastwise or to transfer goods.[373]

This core rule is the supplemented by regulations, for instance, relating to: unloading and examination of coastwise cargo; the conditions under

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371 RKC, Specific Annex E, Chapter 3, E1; On the meaning of carriage coastwise, Section 97 (1) of the *EAC Customs Management Act, 2004* states: "Subject to Section 98, all goods conveyed *by sea or air, from any part of the Partner State to another part thereof* shall be deemed to be carried coastwise, and any aircraft or vessel conveying such goods by air or by sea shall be deemed to be a *coasting aircraft* or *coasting vessel*, as the case may be"; and,
"All goods, including *locally grown* or locally *produced goods*, conveyed by any means from any place in a Partner State *to any place in another Partner State* shall be deemed to be *goods transferred* and such goods shall be subject to the regulations made under this Act" [emphasis added].

372 See the previous footnote for the meaning of 'coasting' aircraft/vessel.

373 See *Id*., Section 2 (1).

which a transire is to be granted; the types of forms to be filled; or to the amendment of a transire.[374]

6.8. PROCESSING

6.8.1. Inward Processing

In the EAC customs law inward processing is defined as the customs procedure under which certain goods can be brought in a Partner State conditionally exempted from duty on the basis that such goods are intended for manufacturing, processing or repair and subsequent exportation.[375]

According to the EAC customs law, both goods imported directly from a foreign country and goods transferred from another Partner State can be entered in the inward processing procedure. It is the Commissioner who decides on this issue, and he/she prescribes the conditions under which such entry is made.[376] An application for the authorisation of inward processing is made to the Commissioner in a Partner State where the processing operation is to be carried out, using Form C. 16.[377]

The time limit for inward processing is one year from the date on which goods were imported. Thus as a general rule, *compensating products*[378] are supposed to be exported within a period one year. But

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374 See *EAC Customs Management Regulations, 2006*, Regulations 123-130; See also, *EAC Customs Management Act, 2004,* Sections 101-105.

375 *EAC Customs Management Act, 2004,* Section 2 (1).

376 See *Id*., Section 172.

377 See *EAC Customs Management Regulations, 2006*, Regulation 185.

378 *Compensating products* are the products resulting from the manufacturing, process-

the Commissioner may prescribe specific time limits.[379] Moreover, compensating products may under certain conditions be permitted to enter home consumption.[380]

6.8.2. Outward Processing

The main purpose of the outward processing procedure is to make it possible for national enterprises to reduce their production costs thereby making products available at more competitive prices. The availability of this customs procedure may be made subject to the condition that the processing operations envisaged are not detrimental to national interests.[381] In fact, it is categorically stated in the EAC Customs Management Act, 2004 that the authorisation shall be granted by the Commissioner *where the outward processing procedure does not prejudice the interests of the Partner State.*[382]

Like in the case of inward processing, the time limit for outward processing is one year. That means, the compensating products are supposed to be imported into a Partner State within a period of one year from the date on which the goods were exported. However, the Commissioner may prescribe specific time limits for outward processing.[383]

Goods for outward processing are entered in Form 17 on production of an original outward processing authorisation and any other supporting documents. And the goods entered for outward processing must be ex-

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ing or repair of goods for which the use of the inward or outward processing procedure is authorized (RKC, Specific Annex F, Chapter 1, E1); See also, *EAC Customs Management Act, 2004*, Section 171.

379 See *EAC Customs Management Act, 2004*, Section 173.

380 See *Id*., Section 174.

381 See RKC, Guidelines to Specific Annex F, Introduction to Chapter 2.

382 *EAC Customs Management Act, 2004*, Section 178 (2) (b).

383 See *Id*., Section 179.

amined. It should be noted that a person authorized for outward processing is obliged to keep all records that indicate the description and quantities of goods entered; the date of exportation; details of the processing; the compensating products obtainable; and the *rate of yield*.[384]

6.8.3. Drawback

Drawback is defined as the amount of import duties and taxes repaid under the drawback procedure; whereby *drawback procedure* refers to the customs procedure which, when goods are exported, provides for a repayment (total or partial) to be made in respect of the import duties and taxes charged on the goods, or on materials contained in them or consumed in their production.[385]

The imported goods are used to process or manufacture goods for export by domestic industries. This adds value to the finished goods and creates jobs for the domestic population. And the repayment of duties paid on the imported goods enables domestic industries to offer the goods at competitive prices on international markets.[386]

The drawback procedure is applicable in the East African Community in respect of goods which are exported, transferred to a free port, or transferred to an export processing zone. This requires that the owner of such goods obtains an authorisation from the Commissioner prior to their manufacture. Moreover, the Commissioner has to fix or to agree

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[384] *Rate of yield* means the quantity or percentage of compensating products obtained from the processing of a given quantity of temporary imported or exported goods (*Id*., Section 171); See also, *EAC Customs Management Regulations, 2006*, Regulations 194 and 195.

[385] RKC, Specific Annex F, Chapter 3, E1 and E2 respectively.

[386] See RKC, Guidelines to Specific Annex F, Introduction to Chapter 3.

on the rate of yield of the operations, and to prescribe the duty drawback coefficient.[387]

6.8.4. Export Processing Zones

An *export processing zone* (EPZ) is a designated part of customs territory where any goods generally introduced are regarded, insofar as import duties and taxes are concerned, as being outside customs territory but are restricted by controlled access.

The establishment of export processing zones in the East African Community is mainly an economic policy that encourages the flow of investment into the territory for manufacturing and other commercial activities. These export processing zones promote external trade and international commerce by granting relief from duties and taxes on goods imported to the East African Community.[388]

Although goods manufactured in export processing zones are often exported, the Commissioner may permit the removal of goods from an export processing zone (including waste from the manufacturing process) to be entered for home consumption –and he/she may impose duties on those goods.[389]

The EAC customs legislation contains a number of procedural rules relating, for instance, to how the designated export processing zones are to be managed, how goods entering export processing zones are to

[387] See *EAC Customs Management Act, 2004*, Sections 138 and 139.
[388] See *Id*., Section 167.
[389] See *Id*., Section 168.

be controlled, or how exportation of goods from export processing zones is to be carried out.[390]

6.9. TEMPORARY ADMISSION

Temporary admission is described as a customs procedure under which certain goods can be brought into a customs territory conditionally relieved totally or partially from payment of import duties and taxes; such goods must be imported for a specific purpose and must be intended for re-exportation within a specific period and without having undergone any change except normal depreciation due to the use made of them.[391]

The EAC Customs Management Act, 2004 (Section 117) and the EAC Customs Management Regulations, 2006 (Regulations 134 to 138) entail the basic regulations. "Temporary admission is both a customs procedure with economic impact and a suspensive customs arrangement."[392] This is, to a great extent, also true for the EAC customs law. Thus, an entry for temporary admission requires: an authorisation,[393] a customs declaration,[394] and the provision of a security.[395]

Concerning the time limits, the general rule is that goods which are entered for temporary admission must be exported within such period, not

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390 See *EAC Customs Management Regulations, 2006,* Regulations 169 to 178.

391 RKC, Specific Annex G, Chapter 1, E1.

392 See M. LUX, *op. cit.*, pp. 402-403 – commenting on temporary admission in the European Community.

393 See *EAC Customs Management Act, 2004,* Section 117 (2) and (3); *EAC Customs Management Regulations, 2006,* Regulation 133 (which contains an obligation to apply to the proper officer using Form C. 17).

394 See *EAC Customs Management Regulations, 2006,* Regulation 135 (2) (b) (which provides for the submission of Form C. 17 to the proper officer).

395 See *EAC Customs Management Act, 2004,* Section 117 (2) (b).

exceeding twelve months from the date of importation, as is consistent with the purpose for which the goods are imported.[396]

6.10. CUSTOMS PRACTICES

Customs law involves, *inter alia*, rules which are not necessarily applicable to goods but which are very essential in regulating other matters such as customs control, the application of information technology, appeals, offences or relations with the business community.[397] Strictly speaking, such are the rules which are referred to as customs practices. Those rules generally make part of procedural customs law – and they also make part of the EAC customs law as explained below.

6.10.1. Application of Information Technology

Provisions about the application of modern techniques and technologies belong to the major amendments to Kyoto Convention. Chapter 7 of the General Annex to the Revised Kyoto Convention deals with the application of information technology. And it stipulates, among others, that Customs shall apply information technology to support customs operations, where it is cost-effective and efficient.[398]

EAC customs law fundamentally allows the use of information technology in carrying out customs procedures or formalities. Any person is free to apply for registration as a user of a customs computerized system. It is also important to note that without registration, one is not allowed to access, transmit to, or receive information from a customs

396 See Id., Section 117 (3).
397 See RKC, Guidelines to the General Annex, Chapter 1, Standard 1.1.

398 See RKC, General Annex, Chapter 7, Standard 7.1.

computerized system. However, the registration may be cancelled in case one misuses the computerized system or if one has been convicted of an offence relating to improper access to or interference with a customs computerized system. Moreover, conviction may under certain conditions, lead to imprisonment of the convict.[399]

Two computerized systems are currently in use within the East African Community, and they are contributing a lot to trade facilitation as the following excerpt elaborates:

> In July 2005, Kenya introduced the new Customs Reform Modernisation program (also known as SIMBA 2005). Tanzania and Uganda use ASYCUDA++. In the ICT sector, the Rwandan Revenue Authority is also performing well. These ICT systems have contributed a lot, for instance, by reducing the time for clearance and release. Electronic filing of customs documents has been introduced, document processing (in Kenya) has been centralised, and the level of transparency has generally increased.[400]

6. 10.2. Customs Offences

Customs offence means a breach or attempted breach of customs law.[401] The primary task of Customs is to ensure compliance with customs law. To assist in dealing with customs offences or suspected offences, it is necessary that Customs has powers to investigate and, where appropriate, to impose sanctions against those who are not in compliance.[402]

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399 See *EAC Customs Management Act, 2004*, Sections 187 to 192.

400 E. KAFEERO, "Customs and Trade Facilitation in the East African Community" in *World Customs Journal*, Vol. 2, Number 1, April 2008, (pp. 63-71) p. 68.

401 RKC, Specific Annex H, Chapter 1, E3.

402 RKC, Guidelines to Specific Annex H, Introduction to Chapter 1.

Whilst some customs legal frameworks (for example, the European Community' customs law) contain no sanctions,[403] the EAC customs law contains a number of provisions on customs offence and on the resultant penalties, forfeitures and Seizures, as well as legal proceedings and appeals.

Sections 193 to 218 of EAC Customs Management Act, 2004 contain the various customs offences committable and the corresponding penalties, forfeitures, or seizures. In the first place, contravening (or even conspiracy to contravene) *any* of the provisions of the EAC Customs Management Act, 2004 constitutes an offence. [404] And many other sanctions follow. These relate, among others, to: committing offences with violence;[405] removing or defacing customs seals;[406] inducing another person to commit an offence;[407] pretending to be a customs officer;[408] smuggling;[409] importing or exporting concealed goods;[410] or using false documents.[411]

Depending on the gravity of an offence and other factors in accordance with the EAC customs law and other relevant laws, different offences attract different penalties. For example, whilst a person convicted of maliciously shoots at, maims or wounds a customs officer while in execution of his or her duty is liable to imprisonment for a term not ex-

403 "Das Zollrecht der EG beinhaltet keinerlei Straf- oder Ordnungswidrigkeitsbestimmungen". N. HOGREBE, *op. cit.*, p. 217.
404 See *EAC Customs Management Act, 2004,* Section 193.
405 See *Id*., Section 194.
406 See *Id*., Section 195.
407 See *Id*., Section 196.
408 See *Id*., Section 198.
409 See *Id*., Section 199.
410 See *Id*., Section 202.
411 See *Id*., Section 203.

ceeding *twenty years*,[412] a person who is convicted of assisting in the commission of a customs offence is liable to imprisonment for a term not exceeding *one year*.[413]

Settlement of Cases by the Commissioner

Customs offences in the East African Community can either be settled by the Commissioner (i.e., administratively) or through legal proceedings. However, the customs offences which the Commissioner can settle are limited. These are offences in respect of which a fine is provided or in respect of which any thing is liable to forfeiture. In such cases, the Commissioner has the power to compound the offence and may order the person who committed the offence to pay the sum of money, not exceeding the amount of the fine to which that person would have been liable if he or she had been prosecuted and convicted for the offence. But it is very important to note that the Commissioner can exercise this kind of power *only if* the person admits in a prescribed form that he or she committed the offence and *requests* the Commissioner to settle the offence administratively.[414]

Legal proceedings

Legal proceedings may be considered as the usual way of dealing with customs offences. Sections 220 to 228 of EAC Customs Management Act, 2004 contain a wide range provisions relating to customs offences-related legal proceedings. These provisions, for in stance, deal

412 See *Id*., Section 194.

413 See *Id*., Section 196.

414 See *Id*., Section 219 (1) and (2); In this case, the Commissioner makes an *order* in writing to which the person's request to the Commissioner to deal with the matter is attached. The order has to specify the offence which the person committed and the penalty imposed by the Commissioner. Consequently, the person is not liable to further prosecution in respect of that same offence. And it should be noted that this order is final; that is to say, it is not subject to appeal and may be enforced in the same manner as a decree or order of the High Court (See *Id*., Section 219 (3)).

with issues pertaining to: jurisdictions of courts;[415] actions by or against the Commissioner;[416] limitation of proceedings;[417] or power of proper officers to prosecute.[418]

Appeals

Another fundamental issue connected with customs offences is the *right of appeal*.[419] The right of appeal in customs matters is guaranteed by the EAC customs law (both in the administrative and judicial proceedings). On the administrative way, for instance, Section 229 (1) of the EAC Customs Management Act, 2004 stipulates that a person who is directly affected by the decision or omission of the Commissioner or any other officer on customs matters has a right within thirty days of the date of the decision or omission to lodge an application for review of that decision or omission. The procedure for the application of a review to the Commissioner is well elaborated. And in this connection, the law also provides for the establishment of *tax appeals tribunals* in each Partner State.[420]

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[415] The gist of these rules is that prosecution for the customs offences contained in the EAC Customs Management Act, 2004 may be heard and determined before subordinate courts in the EAC Partner States. Thus, these courts also have the jurisdiction to impose any fine or any sentence of imprisonment in accordance with the EAC Customs Management Act, 2004. But it is important to note that all proceedings of civil nature have to be filed and determined in accordance with the provisions of the relevant procedural legislation in a Partner State in which the court is situated. Likewise, unless otherwise provided in the EAC Customs Management Act, 2004, the laws relating to criminal procedure of a Partner State in which the court is situated are the ones to be followed (See *Id*., Section 220).

[416] *Id*., Section 221.

[417] Proceedings for an offence are limited within five years of the date of the offence (See *Id*., Section 222).

[418] See *Id*., Section 228.

[419] See, for instance, RKC, Specific Annex H, Chapter 1, Standard 27.

[420] See *EAC Customs Management Act, 2004*, Section 231.

6.11. CONCLUSION

This chapter concludes *Part II* of this work, whose focus was to expound the EAC customs law. The chapter has elaborated the procedural customs law as it is contained in the EAC Customs Management Act, 2004; the EAC Customs Management Regulations, 2006; and other related laws.

All regulations concerning the various customs procedures and practices applicable in the East African Community have not only been described but also explained and interpreted. These customs procedures and practices, generally, relate to importation, warehousing, exportation, transit, carriage of goods coastwise, inward and outward processing, drawback, export processing zones, temporary admission, passenger clearance, customs offences, as well as the application of information technology. Hence, this exposition (directly or indirectly) already shows how the EAC customs law is largely aligned with the provisions of the Revised Kyoto Convention.

PART III
COMPARATIVE ANALYSIS OF THE *EAC* CUSTOMS LAW VIS-À-VIS *WTO* AND *RKC* RULES

Chapter 7
SYSTEMIC ISSUES CONCERNING WTO RULES ON REGIONAL TRADE AGREEMENTS

7.1. INTRODUCTION

The exposition of international customs law on the one hand, and the EAC customs law on the other, may not be enough to enable a thorough analysis of the EAC customs law vis-à-vis WTO rules. Hence, it is also very important to know the systemic issues that relate to *Regional Trade Agreements* (like the East African Community) vis-à-vis WTO rules. Obviously, the first step in this exposition must be to clarify the term Regional Trade Agreement.

7.2. CONCEPT OF REGIONAL TRADE AGREEMENTS

Regional Trade Agreements always have something to do with the both economic and political *integration*.[421] In the ordinary language the word integration denotes the bringing together of parts into a whole. It, however, acquires different connotations depending on the context in which it is used. In law and economics the noun integration is often

[421] The economist VINER, for instance, maintained that strong countries would not voluntarily enter into the union except as part of a political union and for predominantly political reasons. He further argues that small countries mainly want to form regional arrangements for economic reasons while more powerful states tend to do it for political reasons (See J. VINER, *The Customs Union Issue*, Carnegie Endowment for International Peace, New York 1950, p. 69 and pp. 91-92.).

combined with the adjective 'regional' to form the term 'regional integration'. This term is in turn described differently depending on what one wants to emphasize.

Some authors emphasize the aspect of geographical proximity. Thus, they refer to regional integration as the disproportionate concentration of economic flows or the coordination of foreign economic policies among a group of countries in a close geographical proximity to one another.[422] Apart from the articulation of geographical proximity, the economic aspect of integration and the element of internationality are evident in this definition. This portrays regional integration as an institutional combination of separate national economies into large economic blocs or communities.

Though the economic aspect is very central in most definitions of regional integration, this term is not restricted to economics. It rather encompasses all relevant social, political and other sundry elements. That is why some authors prefer to broadly define regional integration as a voluntary linking in the economic domain of two or more formerly independent states to the extent that authority over key areas of domestic regulation and policy is shifted to a supranational level.[423]

7.2.1. Regional Political Integration

The word 'politics' is generally applied to governments, to states, or to public affairs in general. In any case, it points to the process and method of making decisions for groups; and this implies the existence

[422] M. F. MUSONDA, *Regional Integration in Africa: A closer Look at the East African Community*, Helbing & Lichtenhan, Basel 2004, p. 15.

[423] W. MATTLI, *The Logic of Economic Integration*, Cambridge Univ. Press, Cambridge 1999, p. 7.

of political power. The exercise of undisputed political power of an independent state can be referred to as sovereignty. Sovereignty is exercised over territory; which extends over land, the sea appurtenant to the land, and the seabed and subsoil over the sea. Sovereignty also goes with jurisdiction; which extends to the government and population within frontiers as well as the physical and social manifestations of the state.

It may, therefore, be said that political integration refers to cooperation between two or more states in the exercise of sovereignty so as to achieve given objectives such as security and welfare. The cooperation may take various forms such as a federation, a supranational institution or even a loose cooperation which may entail just a harmonisation of a few economic-political policies within the concerned states.

Deeper forms of political integration entail the constitution of new political entities, which have a certain degree of independency in regard to the individual states. This, however, does not mean that supranational institutions or federations are necessarily the best forms of political integration.

Besides the institutional aspect of integration there is also the normative dimension of creating a political community – which may be referred to as 'legal integration'. It involves the establishment of common regulations, common laws, and in some cases even a common legal system for the citizens of the different states of the region. Of course, the type of legal system is very much determined by the level of integration. A common legal system would, for instance, be used in a political federation; whereas in a loose political integration, there would be just a few coordinated laws within the member states.

In a nutshell, it may be asserted that politics can never be divorced from regional integration. And one can view the whole idea of regionalism from the perspective of the fundamental need of states for security and related trade relations.[424] Thus, this study cannot overlook the political dimension of regional trade agreements.

7.2.2. Regional Economic Integration/Regional Trade Agreements

As a term, the integration of economies of different states was not found anywhere in the old, chiefly historical literature on the economic interrelationships between states, nor in the literature about Customs Unions (including the German *Zollverein* 1834 – 71), nor in the literature about international trade prior to the 1940s. It was VINER[425] who was the first to lay the foundation for the theory of Customs Unions which represented the core of the traditional theory of regional economic integration.[426]

At this point it is important to note that the term *Regional Trade Agreements* as used in the WTO context is essentially connected with economic integration. In a strict sense, however, 'Regional Trade Agreements' refers to any international agreements to form a Free Trade Area or a Customs Union pursuant to GATT: XXIV, or regional arrangements under the *Enabling Clause*[427] other than the unilateral ar-

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424 See G. MARCEAU, C. REIMAN, "When and How is a Regional Trade Agreement Compatible with the WTO?" in *Legal Issues of Economic Integration*, 28(3) 2001, (pp. 297-336), p. 299.

425 See J. VINER, *op. cit.*, New York, 1950.

426 See N. J. MIROSLAV, *International Economic Integration: Limits and Prospects*, Routledge, London 1992, p. 5.

427 The '*Enabling Clause'* refers to the decision on *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries* of 28th November 1979 (L/4903).

rangement under the Generalized System of Preferences. With regard to trade (as regulated by the General Agreement on Trade in Services – GATS), the term 'Economic Integration Agreements' is normally used.

7.2.3. Definitions Regional Economic Integration/Regional Trade Agreements

Defining regional economic integration is not an easy task, for the term does not have a clear-cut meaning for all scholars. TINBERGEN, for instance, writes of both *negative* and *positive* integration. *Negative* integration is the removal of discriminatory and restrictive institutions so as to introduce freedom for economic transactions; and *positive* integration is the adjustment of the existing and the establishment of new policies and institutions endowed with coercive powers.[428] Commenting on this, MIROSLAV asserts that it is easier to advance in the direction of 'negative' integration (removal of tariffs and quotas) than towards 'positive' integration (introduction of common economic policies) because the 'positive' approach deals with sensitive issues of national sovereignty.[429]

To integrate, according to the *Oxford Dictionary*, is to combine two things in such a way that one becomes fully part of the other. In other words, union is the outcome of integration. Basing on this, PINDER looks at integration as a process towards union. Thus, economic integration is the removal of discrimination between economic agents of member countries as well as the creation and implementation of common policies.[430]

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428 See J. TINBERGEN, *International Economic Integration*, Elsevier, Amsterdam 1954, p. 122.

429 N. J. MIROSLAV, o*p. cit.*, p. 5.

430 See J. PINDER, "Problems of European Integration" in G. DENTON (Ed.), *Eco-*

Another definition worth mentioning dates back to BALASSA[431] where economic integration is defined both as a process and as a state of affairs. Considered as a process, integration refers to the abolition of discrimination between economic units belonging to different national states; viewed as a state of affairs, it means the absence of various forms of discriminations between national economies. The fact that this definition only concentrates on the process and state of affairs among the countries that integrate makes it so much broad that even a mere agreement among states about adjustment or coordination of some economic area could easily be referred to as integration. There arises, with this definition, a sort of ambiguity as to whether economic integration was a final goal or a point on the way towards some target.[432] This ambiguity can, however, be avoided by making a distinction between complete and partial integration.

MARER and MONTIAS[433] maintain that economic integration consists of the internationalisation of markets for capital, labour, technology and entrepreneurship in addition to markets for goods and services. They also argue that the necessary and sufficient condition for complete integration is the equality of prices of goods in every member country. The same line of thought is found in DRYSDALE and GARNAUT[434] who look at integration only as a movement towards one single price for a good, service, or factor of production.

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nomic Integration in Europe, Weidenfel and Nicolson, London 1969, (pp. 143 – 170), pp. 143-145.

431 B. BALASSA, *The Theory of Economic Integration*, George Allen & Unwin Ltd., London 1961, p. 1.

432 N. J. MIROSLAV, *op. cit.*, p. 6.

433 P. MARER, J. MONTIAS, "The Council for Economic Mutual Assistance", in A. EL-AGRAA (Ed.) *International Economic Integration*, Macmillan, London 1988, (pp. 128-161), p. 156.

434 See P. DRYSDALE, R. GARNAUT, "The Pacific: An Application of a General

Other scholars, including PELKMANS[435], argue that the removal of economic frontiers is a key factor in the economic integration. An economic frontier is a demarcation line across which the mobility of goods, services and factors of production are relatively low. These scholars define economic integration as the elimination of economic frontiers between two or more economies.

While all these definitions evidence the important characteristics of economic integration, they also reveal the fact that economic integration is a complex term which is not easy to define. In fact, integration means different things in different countries and different times.[436] Nevertheless, in this study it is considered plausible to refer to regional economic integration as a process and means by which a group of countries strives to increase its welfare.[437]

Theory of Economic Integration" in F. BERGSTEN and M. NOLAND (Eds.), *Pacific Dynamism and International Economic System*, Institute of International Economics, Washington 1993, (pp. 183-223), p. 189.

435 See J. PELKMANS, *Market Integration in the European Community*, Martinus Nijhoff, Hague 1984, p. 3.

436 "In the developed market economies integration is taken to be a way of introducing the most profitable technologies, allocate them in the most efficient way and foster free and fair competition; during the period of central planning in central and eastern Europe it meant the planning of the development of certain industrial activities; while in the developing countries it was one of the tools of economic development. At the time of the German *Zollverein* the grouping of countries meant the development of economic interdependence and self-reliance. Today, international economic integration refers to an increase in the level of welfare". N. J. MIROSLAV, *op. cit.*, p. 8.

437 See *Id.*, p. 9.

7.2.4. Typology of Regional Economic Integration/Regional Trade Agreements

Regional Trade Agreements have different types that represent varying degrees of integration. The higher the type of integration the higher the institutional demands to be fulfilled and the lower the type of integration the lower the institutional demands to be fulfilled. In an ascending order, the current Regional Trade Agreements may be categorized as follows:

a) Preferential Tariff Agreement

This is an agreement which establishes that the tariffs on trade among signatory countries are lower in relation to tariffs charged on trade with third countries. The original legal mandate to preferential tariff agreements is found in Article XXVIII bis of the General Agreement on Tariffs and Trade 1947.[438]

Tariff negotiations were further endorsed by the *Doha Ministerial Declaration***,** November 2001. According to paragraph 16 of this declaration, negotiations which aim at reducing or, as appropriate, eliminating tariffs, including the reduction or elimination of tariff peaks, high tar-

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[438] *GATT 1947*, Article XXVIII bis 1. "The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The CONTRACTING PARTIES may therefore sponsor such negotiations from time to time".

iffs, and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries, are endorsed.[439]

b) Partial Customs Union

In this kind of Regional Trade Agreement, the participating countries retain their initial tariffs on their mutual trade and introduce a common external tariff on trade with the third countries.[440]

c) ***Free Trade Area***

Under the GATT definition,[441] a Free Trade Area is a simpler arrangement compared to a Customs Union. In this kind of Regional Trade Agreement, tariffs and other restrictions on '*substantially all the trade*' between the participating countries are abolished, but the external tariffs and regulations on trade of non-members need not be uniform. Thus, there are two salient criteria for a permissible Free Trade Area, namely: (1) that the duties and other restrictive regulations of commerce, with the same exceptions for Articles XI through XV and XX must be eliminated on substantially all the trade between the constituent territories in products originating from such territories; and (2) there is no requirement of a common external tariff at the formation of a Free-Trade Area.

To avoid trade deflection (i.e., the entry of goods in Free Trade Area through the country with the lowest external tariff) internationally traded goods must be accompanied by *certificates of origin* indicating

439 See The *Doha Ministerial Declaration***,** November 2001, Paragraph 50.

440 See N. J. MIROSLAV, *op. cit.*, p. 10.

441 *GATT 1994*: XXIV 8 (b), "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories".

in which country the good has been manufactured. This enables customs officers at frontiers between member countries with different outer tariffs to determine whether duties or levies are still due (on goods originating from the third country), or whether the merchandize originates from another member state and can therefore be imported duty-free.

d) Customs Union

A Customs Union, under the description of GATT,[442] is one in which duties and other restrictive regulations of commerce are eliminated with respect to substantially all trade between constituent territories and in which substantially the same duties and other regulations of commerce are applied by each member of the union to trade with outside countries.[443]

Since in a Customs Union one common external tariff is agreed upon, certificates of origin at internal borders are dealt away with. Thus, once a good has been admitted anywhere to the Customs Union, it may circulate freely.

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[442] *GATT 1994*, Art. XXIV: 8. "For the purpose of this Agreement:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
(i) duties and other restrictive regulations of commerce (except where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) 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) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of the territories not included in the union.

[443] See K. H. HYDER, *Equality of Treatment and Trade Discrimination in International Law*, The Hague 1968, p. 101.

e) Common Market

A Common Market has all the features of a Customs Union. In addition, production factors (labour and capital) are allowed to move freely; and common regulations on the movement of production factors vis-à-vis third countries are introduced.

f) Economic Union

An Economic Union assumes not only a Common Market but also a harmonisation of the most important areas of economic policy, market regulations, macro-economic and monetary policies as well as income redistribution policies. There is a common trade policy towards third countries and external policies concerning factors of production are also developed.[444]

g) Full Economic Union

A full Economic Union among countries implies a complete unification of the economies involved, and a common policy for important matters. In such integration there are no barriers to the movement of goods and services. Given that many areas are integrated, political integration such as a confederation is often implied.[445]

In conclusion to this discussion on types of Regional Trade Agreements it is worth mentioning that the last three types referred to above may be considered as different versions of a Customs Union with increased depth of integration, but where trade rules with third countries are similar to those of a Customs Union.[446] And that might be the reason why they are not mentioned in Article XXIV of GATT 1994.

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444 See W. MOLLE, *The Economics of the European Integration*, Dartmouth Publishing Company, Brookfield 1990, p. 13.

445 *Ibid*.

446 G. MARCEAU, C. REIMAN, "When and How is a Regional Trade Agreement

7.2.5. Motivations for the Formation of Regional Trade Agreements

The formation of Regional Trade Agreements is a result of a variety of factors which generally include economic, political and security considerations. In the economic sphere, the formation of Regional Trade Agreements may be driven by the search for access to larger markets which might be easier to engineer at a regional or bilateral level, particularly when WTO members are unwilling to liberalize further on a multilateral basis. This is one of reasons why the setback in the negotiations at Cancun (2003) is considered accountable for the forging of more regional partnerships in the last two years.[447]

Regional Trade Agreements are also used by some countries as a means of promoting deeper integration in their economies than is presently available through the WTO particularly for issues which are not fully dealt with multilaterally, such as investment, competition, environment and labour standards. Moreover, with regard to trade in services, preferential access is very likely to confer long-term advantages.

Since small economies often find it difficult to compete favourably at an international level, they resort to forming Regional Trade Agreements so that they may reap gains from trade in product areas where they cannot compete internationally. In this case, countries, particularly smaller ones, would see Regional Trade Agreements as a defensive necessity.

Compatible with the WTO?" in *Legal Issues of Economic Integration*, 28(3) 2001, (pp. 297-336), p. 303.

447 See J. A. CRAWFORD, R. V. FIORENTINO (Staff of the WTO Secretariat), *The Changing Landscape of Regional Trade Agreements*, WTO Publications, Geneva 2005, p. 16.

Regional Trade Agreements may also act as an incentive for foreign direct investment. This concerns particularly developing countries. In this move, a developing country may decide to forgo the benefits conferred by GSP programmes and instead commit itself to signing reciprocal Regional Trade Agreements with developed countries in order to secure access to their markets. Mexico's Financial Institutions Duty inflows in the wake of its membership in the NAFTA, exemplifies the strategy.[448] Thus, Regional Trade Agreements may perform a sort of dual function of locking out competition and locking in investment.

Political and security considerations are also increasingly playing a vital role in the formation of Regional Trade Agreements. Governments often seek to consolidate peace and increase regional security with their partners in a Regional Trade Agreement. Securing commitment first on a regional basis also increases their bargaining power in multilateral negotiations.

Regional Trade Agreements could also be used by larger countries to form new geopolitical alliances and cement diplomatic ties, thus rewarding political support by providing increased discriminatory access to a larger market.

One can therefore understand why scholars such as EL-AGRAA assert that almost all existing schemes of economic integration were either proposed or formed for political reasons even though the arguments popularly put forward in their favour were expressed in terms of possible economic gains.[449] In fact, it may happen that political motives

[448] *Ibid.*

[449] See A. EL-AGRAA, *International Economic Integration*, McMillan Press, London 1988, p. 126.

prompt the first steps towards the formation of a Regional Trade Agreement. Similarly, if the initial motives are economic, the need for political unity may arise at a later stage.

7.3. LEGAL STANDING OF REGIONAL TRADE AGREEMENTS IN WTO LAW

This work has highlighted the centrality of the non-discrimination principle in WTO law has.[450] It has also been observed that the WTO law provides for some exceptions to this principle, particularly by allowing the establishment of Regional Trade Agreements.[451] GATT 1994 XXIV (as shown in the discussion below) constitutes the core provision on Regional Trade Agreements in WTO law. Other provisions relevant to Regional Trade Agreements include the Enabling Clause, and Article V of the General Agreement on Trade in Services (GATS).

7.3.1. GATT XXIV and its Rules on RTAs

The main purpose of GATT XXIV is to regulate the tension between regionalism and multilateralism, that is to ensure Contracting Parties to GATT, and now WTO Members, do not enter into Regional Trade Agreements in a way that blocks progress toward multilateral trade liberalisation.[452] However, there are views that GATT XXIV as such is not an entirely effective regulator.[453] Consequently, Regional Trade

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450 See the sub-title "The Fundamental Pillars of WTO (*number 2.2.*), particularly the Most-Favoured-Nation treatment (*number 2.2.1.*), and National Treatment (*number 2.2.3*).

451 See the sub-title "Exceptions to the Principle of Non-discrimination" (*number 2.3 of this work*).

452 See R. BHALA, *Modern GATT Law: A Treatise on the General Agreement on Tariffs and Trade*, Sweet & Maxwell Ltd, London 2005, p. 590.

453 K. W. DAM, for example, maintains: "The effort to attain precision and to force

Agreements have proliferated.[454] And some scholars actually maintain that the 'mercantilist' nature of RTA negotiations and the resulting RTAs do not bode well with the multilateral trading system. For a trading nation that participates in a number, the multilateral GATT negotiations would be seen as undermining the benefits of preferential and exclusionary access to RTA partners' markets. And for that matter, countries fully benefiting from existing RTAs would see less merit in negotiating a multilateral tariff elimination agreement.[455]

However, there are also scholars who maintain that Regional Trade Agreements have proliferated precisely because of the benefits that accrue from them, one of the arguments being that RTAs are in fact stepping stones to broad-scale liberalisation.[456] HYDER, for instance, asserts that all discriminations are not necessarily bad or evil; in economic terms, exceptions to the pure concept of non-discriminations do not always endanger the fabric of world cooperation if they are confined to recognized and well-defined limits.[457] In fact, the formation of Regional Trade Agreements is justified under WTO law provided certain conditions (particularly those contained in the rules of GATT XXIV, as elaborated below) are fulfilled.

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future agreements into Article XXIV's mold proved to be … a *failure*, if not a *fiasco*. *Ambiguity rather than precision reigned*. The regional agreements that came before the GATT did not conform to the tests of Article XXIV, and in the face of conflict, *the GATT and not the regional groupings yielded* (K. W. DAM, as quoted by R. BHALA, *op. cit*., p. 590).

454 A recent report of the Committee on Regional Trade Agreements states: "As of 1st November 2008, **418** Regional Trade Agreements have been notified to the GATT/WTO, **227** of which are currently in force. Of the agreements in force, **143** were notified under GATT Article XXIV; **27** under the Enabling Clause, and **57** under GATS Article V."

455 See JONG BUM KIM, "A Legal Review of RTA Tariff Negotiations" in *Legal Issues of Economic Integration*, 35(2) 2008, (pp. 157-181), p. 181.

456 See R. NEWFARMER (Ed.), *Trade, Doha, and Development*, The World Bank, Washington D.C. 2006, p. 247 (But he also asserts that RTAs are *not a good alternative* to multilateral liberalisation (p. 251)).

457 See K. H. HYDER, *op. cit*. p. 97.

7.3.1.1. The *Purpose* Test (GATT XXIV: 4)

The essence of GATT XXIV: 4 lies in the fact that WTO Members *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; and that the purpose of a Custom Union or of a Free Trade Area should be to facilitate trade between the constituent territories and *not to raise barriers to the trade of third Members* with such territories.

Moreover, the preamble of the *Understanding on the Interpretation of Article XXIV of the GATT 1994* – which was added to the GATT 1994 as a result of the Uruguay Round – recognizes that the contribution to the expansion of world trade that may be made by closer integration between the economies of parties to such agreements.[458]
The purpose presented in paragraph 4, is very important in the interpretation of the conditions laid down in GATT XXIV. This is emphasized in the Appellate Body Report concerning the *Turkey – Textiles* case, which states:
…This objective demands that a balance be struck by the constituent members of a Customs Union….Thus, the purpose set forth in paragraph 4 informs other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5. For this reason, the chapeau of paragraph 5 and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of Customs Unions set forth in paragraph 4. The chapeau cannot be interpreted correctly without constant reference to this purpose.[459]

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458 WTO Document: WT/MIN(96)/DEC.

459 See WTO Document: WT/DS34/AB/R, paragraph 57, 22nd October 1999, Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*.

In a way, paragraph 4 can also be seen as an encapsulation of the overall assessment of trade diversion and trade creation that are associated with Regional Trade Agreements.

7.3.1.2. The *Substantially All* Test (GATT 1994 XXIV: 8)

Article XXIV: 8 (a) (ii) provides that Members forming the Customs Union must have '*substantially the same duties and other regulations of commerce*' with regard to the trade with the territories not included in the Customs Union. This rule in effect concerns extent or scope of the trade liberalisation. The RTA is supposed to cover '*substantially all*' the trade among the constituent members.

Consequently, there is debate about what percentage of trade may constitute a 'substantial' amount. So far, three solutions have been proposed:

a) 'Substantial' is less than 'all', as portrayed in the work of the Preparatory Conferences;[460]
b) 'Substantial' is more than 'zero'; and
c) 'Substantial' is nearer to 'all' than to 'zero'. Opinions on this suggest percentages from 51% through 80% to 99%.[461]

The report of the working party on EFTA – Stockholm Convention contains classic propositions about the term *substantially all the trade.* It is therein stated that substantially all the trade has both '*qualitative*' and '*quantitative*' aspects and that since 90 percent of trade was covered, such a Free-Trade Area would be considered to cover substantially all the trade even if agriculture was excluded.[462] In the *Turkey* –

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460 See J. H. JACKSON, *World Trade and the Law of GATT*, Bobbs and Merill Company, Inc., New York 1969, p. 608.
461 See T. WEISS, *op. cit.*, p. 29.
462 See *Working Party Report on EFTA – Examination of the Stockholm Convention*, L/1235, adopted on 4th June 1960, BISD 9S/70.

Textiles dispute the Appellate Body reemphasized these aspects. It agreed with the Panel that:
The Appellate Body stated it agreed with the Panel that:

> [t]he ordinary meaning of the term 'substantially' in the context of subparagraph 8 (a) appears to provide for both qualitative and quantitative components. The expression 'substantially the same duties and other regulations of commerce are applied by each of the members of the [Customs] Union' would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.[463]

Despite these interpretations, there remains some ambiguity with regard to the term 'substantially all'. This ambiguity, however, offers some degree of flexibility to the members of a Customs Union in the creation of a common commercial policy.[464]

7.3.1.3. The *Economic* Test (GATT 1994 XXIV: 5)

GATT XXIV further provides that an RTA being created must not to impose trade barriers against non-members that, on the whole, are higher than those applicable to non-members before the RTA was formed. This may be referred to as the *economic test* for compatibility.[465]

It should be noted that there is a direct connection between paragraphs 5 and 8 of Article XXIV in a sense that the type and level of harmoni-

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[463] See WTO Document: WT/DS34/AB/R, paragraph 49, 22nd October 1999, Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*.
[464] See R. BHALA, *op. cit.*, p. 594.
[465] "… we also agree [with the panel] that this is an economic test for assessing whether a specific Customs Union is compatible with Article XXIV" (WT/DS34/AB/R, paragraph 55).

zation chosen by a Customs Union pursuant to paragraph 8 must, in the light of paragraph 5, take into account the impact of such choices.

Trade creation or trade diversion assessment of the incidence of a Customs Union is obviously difficult to perform in a prospective manner especially when more products are traded in. And that is the main problem concerning the 'economic test' of compatibility. However, the *Understanding on the Interpretation of Article XXIV of the GATT 1994* makes some clarification. It states:

> The evaluation under paragraph 5 (a) of Article XXIV of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a Customs Union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the Customs Union, on a tariff-line basis and in values and quantities, broken down by WTO country of origin. The Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round of Multilateral Trade Negotiations. For this purpose, the duties and charges to be taken into consideration shall be the *applied rates* of duty.[466]

While the incidence of duties may be somewhat easily quantifiable, the incidence of other rules of commerce will most often not be so. However, import restrictions in form of quotas or regulations can, at least conceptually, be translated into tariff levels.[467]

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[466] '*Applied rates of duty*' refers to all duty rates, not just bound duty rates (See WTO, *Analytical Index: Guide to GATT Law and Practice*, Vol. 2, Geneva 1995, pp. 824-825).

[467] See G. MARCEAU, C. REIMAN, "When and How is a Regional Trade Agreement Compatible with the WTO?" in *Legal Issues of Economic Integration*, 28 (3): 297 – 336, Kluwer Law International, Hague 2001, pp. 319-320.

This *economic test* may imply that the legality of the measures assessed is not necessarily relevant to the assessment of paragraph 5. For example, it is legal to raise tariff duties above their applied level (but below their bound level), yet this could make them 'higher or more restrictive' within the meaning of paragraph 5 of the Understanding on Article XXIV and would be included in the calculation mandated by the Understanding. The same reasoning might be used with respect to other regulations of commerce. One can conclude that the regulations introduced upon the formation of a Regional Trade Agreement could be legal, but lead to a situation more restrictive after the Customs Union than before and, thus, could be seen as inconsistent with the requirements of GATT XXIV: 5.

One may therefore argue that the Committee on Regional Trade Agreements, with the support of economists and statisticians, would be better able to make this economic assessment than the Dispute Settlement Body. The Appellate Body has, however, clearly rejected this division of functions between the Committee on Regional Trade Agreements and the Dispute Settlement Body by stating that any matter can be taken to dispute.[468]

[468] See The Appellate Body Report: "… The Panel maintained that 'it is arguable' that panels do not have jurisdiction to assess the overall compatibility of a Customs Union within the requirements of Article XXIV. We are not called upon in this appeal to address this issue, but we note in this respect our ruling in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* on the jurisdiction of panels to review the justification of balance of payments restrictions under Article XVIII:B of the GATT 1994.

7.3.1.4. Compensatory Adjustments (GATT 1994 XXIV: 6)

Simply put, the purpose of this rule is to make sure that a WTO Member who upon joining a Regional Trade Agreement increases the bound tariffs has to pay for that increase. In other words, WTO Members proposing to increase tariffs as a result of the formation of a Regional Trade Agreement must provide compensatory adjustment in their tariff schedule to any country claiming a substantial trade interest in the products concerned. And GATT XXVIII, which deals with tariff negotiations, lays out the procedure for making a compensatory adjustment.

7.3.1.5. Notification (GATT 1994 XXIV: 7)

All Regional Trade Agreements concluded must be notified to the WTO. This is clearly stated in Article XXIV: 7 (a) of the GATT ;[469] in paragraph 4 (a) of the Enabling Clause;[470] and in Article V: 7 (a) of the GATS[471].

GATT Contracting Parties have always been required to monitor the formation of Regional Trade Agreements. Article XXIV: 7 (b) provides that the parties shall make available any information regarding a proposed Customs Union or Free-Trade Area that will enable the Members to make such reports and recommendations to the parties as they deem appropriate. Such an examination by the entire membership was done by working parties established to review specific Regional trade Agreements. It should, however, be noted that the GATT Con-

469 "Any [Member] deciding to enter into a Customs Union or a Free Trade Area, or an Interim Agreement … shall promptly *notify*".

470 "Any [Member] taking action to introduce an arrangement … shall: *notify* the [Members] and furnish them with all the information they may deem appropriate …"

471 "Members which are parties to the agreement referred to paragraph 1 shall promptly *notify* …"

tracting Parties (and today, the WTO Members) do not need to authorize such Regional Trade Agreements; but they may tell the parties involved not to proceed with the Regional Agreement.

The reason behind this rule on notification is best understood in the context of the very beginnings of the GATT. On the one hand, the drafters of GATT knew that in many instances, a Regional Trade Agreement could not be created and becomes operational instantly. They appreciated the practical political and economic needs for a transitional period. On the other hand, they did not want the period to be abused.[472]

In 1996 the WTO General Council established the Committee on Regional Trade Agreements,[473] with the mandate of, among others, examining all Regional Trade Agreements notified to the Council for Trade in Goods under GATT Article XXIV. The Committee on Regional Trade Agreements is also entrusted with the examination of those Regional Trade Agreements notified under the Enabling Clause and under the GATS Article V, and those referred to it by the Committee on Trade and Development and the Council for Trade in Services.

Moreover the Committee on Regional Trade Agreements considers the systemic implications of Regional Trade Agreements and regional initiatives for the multinational trading system and the relationship between them.[474] The WTO body, thus, has the function of examining Regional Trade Agreements of its Members.

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472 See R. BHALA, op. cit., p. 603.
473 WTO Document: WT/L/127 (Decision of 7th February 1996).
474 See WTO Document: WT/L/127 (Decision of 7th February 1996).

7.3.1.6. Weakness of GATT XXIV

Although GATT XXIV's key objective was to ensure, so to say, smooth formation of Regional Trade Agreements without abusing the principle of non-discrimination, there are a number of weaknesses related to its implementation. According to J. H. JACKSON, its fundamental problem consists in the fact that it contains criteria that are so *ambiguous* or so unrelated to the goals and policies of the GATT Contracting Parties (now WTO Members) that the international community was not prepared to make compliances with the technicalities of GATT XXIV the *sine qua non* of eligibility for the exception from the GATT obligations.[475] Moreover, the Understanding on the Interpretation of GATT XXIV 1994 which is seen as an attempt to increase the rigor and consistency of the legal disciplines that govern Regional Trade Agreements is widely considered to have failed to address some of the most contentious issues.[476]

The language used in GATT XXIV creates interpretative ambiguity. Paragraph 4, for instance, talks of "*…not to raise barriers to trade of other contracting parties with such territories.*" This has been interpreted differently. Whereas some Members argue that it informs other provisions of GATT XXIV, rendering them more rigorous than they would otherwise be,[477] others argue that the provision is merely giving advice and entirely self-contained, thus, it does not modify any other provision of GATT XXIV.[478]

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475 J. H. JACKSON, *op. cit.*, p. 588.

476 For example, no consensus was arrived at with regard to the proposals to clarify the 'substantially all trade' requirement.

477 See WTO Document: WT/DS34/AB/R, paragraph 57, 22nd October 1999, Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products.*

478 See *Working Party Report*, Accession of Portugal and Spain to the European Com-

The method provided for by GATT XXIV with regard compensation to third parties affected by the formation of an RTA has also been found wanting as it is based on the average tariff reduction. The calculation ignores the fact that exports of third parties might be concentrated in a few sectors, in which case average tariff reduction would be rather irrelevant. Moreover, the impact of measures other than tariffs such as preferential rules of origin, technical standards, subsidies and countervailing measures is even more difficult to quantify.[479] All this shows that a quantitative assessment that fully captures the adverse economic impact on third countries is almost impossible.

The notification requirement is also seen as unclear with regard to the time-frame for notification and the amount of information to be supplied. The phrase '*shall promptly notify*' (in GATT XXIV: 7 (a)) could be interpreted to mean notifying the WTO before an RTA is concluded, or months or even years after one is concluded. There is also a view that a case-by-case approach is more appropriate to take in account the complexity of issues surrounding RTAs, in particular the political and legal difficulties related to notifying an RTA prior to its ratification. This ambiguity concerning notification no doubt contributes to the fact that a number of Regional Trade Agreements currently in force have not been notified to the WTO.[480]

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munities (where it was argued that RTA signatories can introduce new barriers if the net impact is less than what had prevailed before the RTA's inception); See also, G. MARCEAU, C. REIMAN, *op. cit.*, p. 320.

479 See the views from the representative of Pakistan during the Fourth Session of the Committee on Regional Trade Agreement, held on 28th November 1996 (WTO Document: WT/REG/M/4, paragraph 60).

480 See WTO, *Compendium of Issues Related to Regional Trade Agreements*, 1st August 2002 (Document: TN/RL/W/8/Rev.1.

7.3.2. Regional Trade Agreements and other WTO Rules

Apart from the provisions of GATT XXIV there also other WTO rules that make part of the systemic issues concerning Regional Trade Agreements. These include some provisions on *Special and Differential Treatment*; rules on safeguard, anti-dumping measures, and export subsidies; rules of origin; and rules on integration agreements which focus on liberalizing trade in services.

7.3.2.1. The Enabling Clause

On 28th November 1979 the GATT Contracting Parties adopted a decision entitled "*The Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries*", which is also known as "The Enabling Clause". This decision allows a deviation from the Most-Favoured-Nation principle in favour of imports from developing countries. In this context, paragraph 2 (c) [481] allows a reduction of tariffs in less drastic terms than those of Article XXIV of GATT; and tariffs on internal trade need not be completely eliminated. Consequently, many Regional Trade Agreements among developing and less-developed countries have been formed and notified under the Enabling Clause.

As regards non-tariff barriers, paragraph 2 (c) of the Enabling Clause refers to "criteria or conditions which may be prescribed by the Contracting Parties". To date, no such criteria or conditions have ever been

[481] "Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the by the Contracting Parties, for the mutual reduction or elimination of non tariff measures, on products imported from one another" (Document: L/4903).

prescribed. And in their absence one may conclude that a simple reduction of non-tariff barriers would comply with the Enabling Clause.

7.3.2.2. Anti-dumping Measures and Safeguards

GATT XXIV: 8 uses the expression '*other restrictive regulations of commerce*' (ORRC); and paragraph 5 uses '*other* [than duties] *regulations of commerce*'. It is plausible that these 'other regulations of commerce' generally refer to application of Anti-dumping Measures and, in particular, of Safeguards.

There has been a wide range of conflicting views in relation to Safeguards under Article XIX of GATT. Some Members maintain that the application of Safeguard Measures is *forbidden* in trade among parties to a Regional Trade Agreement.[482] Others maintain that Safeguard Measures are applied on a Most-Favoured-Nation basis.[483] And the last view is that the application of Safeguard Measures is *permitted* in trade among parties to a Regional Trade Agreement. In this context it is noted that flexibility should be applied in some cases, as supported by international law on multilateral treaties whereby Regional Trade Agreement parties are entitled to vary their rights and obligations between themselves, provided they do so in a manner that does not abridge the rights of third parties.[484]

7.3.2.3. Article V of the General Agreement on Trade in Services

> As barriers to merchandize trade have come down and trade has expanded, policymakers and trade negotiators have turned their atten-

[482] See Australia, WTO Document: WT/REG/M/15, paragraph 40.
[483] See Japan, WTO Document: WT/REG/M/14, paragraph 7.
[484] See EC, WTO Document: WT/REG/M/14, paragraph 13.

> tion to services and trade-related regulatory issues. Of these, services, investment, intellectual property, and temporary movement of labour have arguably the greatest potential for affecting incomes and trade in developing countries. Agreements on these four issues are now becoming common in bilateral and some preferential Regional Trade Agreements.[485]

Article V of the General Agreement on Trade in Services is the provision in WTO Law which authorizes Regional Trade Agreements. In fact, the language of Article V: 1 (a) and (b) resembles that of Article XXIV: 8 of GATT.

Subparagraph (a) provides that GATS Regional Trade Agreements shall have 'substantial sectoral coverage'. A footnote to this provision makes clear that Regional Trade Agreements should not provide for a priori exclusion of any mode of supply. Subparagraph (b), like Article XXIV: 8 of GATT, obliges Members 'to eliminate substantially all discrimination' between or among the parties through elimination of existing discriminatory measures and/or by prohibiting new or more discriminatory measures either at the entry into force of that agreement or on the basis of reasonable time frame.

Similar to paragraphs 4 and 5 or Article XXIV of GATT, paragraph 4 of GATS prohibits that a Regional Trade Agreement raises the overall level of barriers to trade in services within the respective sectors or sub-sectors compared to the level applicable prior to such an agreement.

With regard to developing countries, paragraph 3 of GATS rather encourages *flexibility* regarding the conditions set out in paragraph 1, par-

[485] WORLD BANK, *Global Economic Prospects: Trade, Regionalism and Development*, Washington DC 2005, p. 97.

ticularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub-sectors. Consequently, in case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to judicial persons owned or controlled by natural persons of the parties to such an agreement.[486] And this implies putting some limits to the Most-Favoured-Nation clause, for instance, by reserving more favourable treatment to enterprises that are not globally competitive.

7.3.3. Conflicts of Jurisdiction between the WTO and Regional Trade Agreements

WTO Law has a particular dispute settlement mechanism which is outlined in the *Understanding on the Rules and Procedures Governing the Settlement of Disputes,* abbreviated as DSU. On the other hand, many Regional Trade Agreements (including the East African Community[487]) have their particular dispute settlement provisions. The peculiarities of the two systems may result in overlaps or conflicts of jurisdiction and of hierarchy of norms in international law.

Jurisdiction can either be legislative or judicial, that is, the authority to legislate on a matter or to adjudicate on the matter. Overlap or conflict of jurisdiction can be defined as a situation where the same dispute or related aspects of the same dispute could be brought to two distinct institutions or two different dispute settlement systems. This may lead to difficulties whereby entities would have a choice between two adjudi-

[486] See GATS: V 3 (b).

[487] See Chapter eight of the *EAC Treaty - 1999*, which is entitled "The East African Court of Justice".

cating bodies or between two different jurisdictions for the same facts.[488]

Article 23 of the DSU mandates exclusive jurisdiction in favour of the WTO Dispute Settlement Body for WTO violations. However, there are many Regional Trade Agreements with their particular dispute settlement mechanisms. Moreover, many of these particular dispute settlement provisions claim a compulsory jurisdiction with a binding effect. In the COMESA,[489] for instance, the Court of Justice (established under Article 7 of the Treaty Establishing the Common Market for Eastern and Southern Africa) has jurisdiction to hear:

- disputes between Member States;
- disputes between Member States and COMESA institutions;
- claims from Member States, the Secretary General, legal and natural persons;
- claims against COMESA or its institutions by COMESA employees and third parties; as well as
- claims arising from arbitration clauses and special arrangements.[490]

Article 23 of the COMESA Treaty, in particular, portrays the compulsory jurisdiction of the Court of Justice. It states:

> The Court shall have jurisdiction to adjudicate upon *all matters* which may be referred to it pursuant to the Treaty.

In this example, it is evident that the decisions of the Court of Justice have a binding effect. Hence the possibility of overlaps and conflicts of jurisdiction between the WTO and COMESA is very high.

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488 K. KWAK and G. MARCEAU, *Overlaps and Conflicts of Jurisdiction between the WTO and RTAs*, (WTO Committee on Regional Trade Agreements) 26th April 2002, p. 2.

489 COMESA stands for the Common Market for Eastern and Southern Africa.

490 See COMESA Treaty, Articles 23-28.

7.4. CONCLUSION

Despite the fundamental principle of non-discrimination that characterizes the multilateral trading system of the World Trade Organisation, this system itself allows a few exceptions. And the most outstanding exception relates to Regional Trade Agreements as (essentially) regulated by GATT XXIV, The Enabling Clause and GATS V.

Regional Trade Agreements should actually be building-blocks rather than stumbling blocks to the multilateral trading system. That is the ideal. And, *to some extent*, some positive effects of Regional Trade Agreements (for instance) in the integration of developing countries in the world economy are noted.[491]

However, the striving towards the ideal has been negatively affected mostly by the ambiguities surrounding the key Articles dealing with RTAs;[492] the overlapping RTA-membership;[493] and the lack of effective administration and implementation of GATT XXIV, the Enabling Clause, and GATS V.

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491 See WTO, *Compendium of Issues Related to Regional Trade Agreements*, 1st August 2002 (Document: TN/RL/W/8/Rev.1, p. 27).

492 See sub-title *number 7.3.1.6* above.

493 … a phenomenon usually referred to as a *Spaghetti Bowl of RTAs*, and which impacts on trade and investment patterns; increases the complexity of RTAs, and increases negative effects on trade due to (for example) complex Rules of Origin.

Chapter 8
EAC CUSTOMS LAW VIS-À-VIS WTO LAW

8.1. INTRODUCTION

This is an evaluative chapter. And as such, it draws on the preceding exposition contained especially in chapters 2, 5, 6 and 7. The first part of the evaluation concerns the general systemic issues that relate to the East African Community (as a Regional Trade Agreement) in light of the WTO system of law. The second part deals with the rest of WTO customs-related provisions as they are reflected – or not reflected – in both the substantive and procedural customs laws of the East African Community.

8.2. COMPATIBILITY OF THE EAC WITH WTO LAW

Regional Trade Agreements notified to the WTO are subject to surveillance (or compatibility review process),[494] and the subsequent decision on the status of a reviewed Regional Trade Agreement is supposed to be taken on the basis of consensus.[495] This examination of a Regional Trade Agreement by WTO Members is viewed as both promoting transparency and setting the ground for conclusions on the RTA's *consistency*[496]with the relevant rules, which might lead to 'appropriate' recommendations to members of the an RTA in question.[497]

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494 See for instance paragraph 7 of the *Understanding on the Interpretation of Article XXIV of the GATT 1994*.

495 "The WTO shall continue the practice of decision-making by consensus followed under GATT 1947". WTO, *Marrakesh Agreement Establishing the World Trade Organization*, Article IX: 1.

496 According to paragraph 7 of the *Understanding on the Interpretation of Article XXIV of the GATT 1994* consistency with GATT XXIV means *satisfying the*, inter alia*, the provisions of paragraphs 5, 6, 7 and 8 of that Article* (emphasis added).

497 See Committee on Regional Trade Agreements, WTO Document: WT/REG/W/37,

However, due to the many weaknesses in the WTO rules concerning Regional Trade Agreements,[498] and caught in the meandering of consensus decision-making, there are just a few Regional Trading Agreements that are recognized as compatible with WTO rules.[499] Thus, the legal status of almost all Regional Trade Agreements within WTO rules, particularly the ones notified under GATT XXIV and GATS V, is controversial. *Nevertheless*, and despite the fact that the East African Community was notified under the Enabling Clause (*which does not foresee any examination of RTAs*) this work includes some brief observations pertinent to the compatibility or incompatibility of the East African Community with WTO rules.

8.2.1. The *Notification* Requirement

All Regional Trade Agreements concluded by WTO Members require notification.[500] The East African Community was duly notified to the WTO on 11th October 2000 under the Enabling Clause.[501]

In the notification document, the objectives of the Community are spelled out as to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, se-

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paragraph 20.

498 See for instance the weaknesses mentioned in *number 7.3.1.6* above.

499 For example the Czech Republic-Slovak Republic Customs Union (See, Committee on Regional Trade Agreements, WTO Document: WT/REG/W/37, paragraph 21).

500 For further details on notification, see number *7.3.1.5* above.

501 "Following the completion of the ratification procedures in June 2000, the delegations of Kenya, Tanzania and Uganda hereby notify the Treaty to WTO, under the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (the Enabling Clause)" WTO Document: WT/COMTD/N/14.

curity and legal and judicial affairs for the mutual benefit. And those objectives are to be pursued through the establishment of a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation. Emphasis is put on chapter 11 of the Treaty, which contains trade provisions for the progressive establishment of the East African Trade Regime, Customs Union and Common Market. Therefore, the East African Community is deemed consistent with WTO law insofar as it fulfils the notification requirement.

Moreover, given that East African Community was under the Enabling Clause[502] whose conditions compatibility are less strict than those of GATT XXIV and GATS V the East African Community is certainly considered compatible with WTO law.

8.2.2. The *Neutrality of Trade Restrictiveness* Requirement

With regard to the so-called *economic test* of compatibility[503], one needs to compare the MFN tariffs in the EAC Partner States with the Common External Tariff. In this connection, the study conducted by the World Bank in 2003, estimated that the common external tariff will *on the whole* tend to reduce to the simple average MFN tariff rates of the Member States.

For example, Kenya has preferential tariff discount of 90% on intra-EAC imports; statutory tariffs on her most important imports were much lower than its MFN tariffs. The average 2003 tariff was 3.05%; the 2003 trade weighted average intra-EAC tariff for those important imports was 2.6%. As from 1st January, 2005, Kenya eliminated tariffs

[502] See WTO Documents: WT/COMTD/N/14 and WT/COMTD/25; for details about the Enabling Clause, see *number: 7.3.2.1* above.

[503] See the elaboration in *number 7.3.1.3* above.

on all intra-EAC imports, so that the trade weighted tariff on these most important 2003 imports was reduced to zero.[504]

Tanzania's most important intra-EAC imports were also subjected to low 2003 tariffs. With regard to some of Tanzania's most important third country imports, the EAC CET is lower than the 2003 MFN tariff. The introduction of CET has led to the reduction of tariffs on third country imports, amounting to 3.2 percentage points or 35%. The decline in Tanzania's total trade weighted average tariff is expected to reduce the tariff average by 2.6 percentage points, or 32% in 2010.

And in Uganda, the situation is a bit different due to the fact that her most important intra-EAC imports had low tariffs and did not exceed 6%. The CET has raised her simple average MFN tariffs on most of her imports from third countries. For the simple average tariff, the rise amounts to 44% and for the trade weighted average to 46%. The decline in Uganda's intra-EAC tariffs is strongly overcompensated for by the rise in the tariff on third country imports.

It is, therefore, evident that the CET has triggered a very pronounced reduction in average tariffs within the East African Community with the exception of Uganda where it has led to a rise of average tariff by 0.8 percentage points or 14%.

8.2.3. The *Substantial Coverage* Requirement

Concerning the *substantial coverage* requirement,[505] the available data show an actual gradual elimination of tariffs on *substantially all* the

[504] See H. M. STAHL, *East African Community Customs Union Tariff Liberalisation Impacts in Perspective*, Printcare Tanzania Ltd., Moshi 2005, p. 16.

[505] See the details in *number 7.3.1.2* above.

trade between the Partner States. Goods from Kenya, Tanzania and Uganda are pursuant to Article 11 (3) of the *Protocol on the Establishment of the East African Customs Union* grouped into two categories. Category A includes goods which are eligible for immediate duty free treatment; while Category B includes those which eligible for gradual tariff reduction (as the principle of *asymmetry* requires) – and they will be phased out by 2010.[506] The newly acceded Partner States Rwanda and Burundi also negotiated tariff reductions.[507]

GATT XXIV 8 also prohibits the use of *other restrictive regulations of commerce* such as Safeguards, Anti-dumping duties and all sorts of non-tariff barriers. The *Protocol on the Establishment of the East African Customs Union* provides that such barriers (except as permitted by the Protocol) shall be removed with immediate effect and no new non-tariff barriers shall be imposed.[508]

Article 19 of the *Protocol on the Establishment of the East African Customs Union* provides the Partner States shall apply Safeguard Measures to situations whereby there is a sudden surge of a product imported into a Partner State, under conditions which cause or threaten to cause serious injury to domestic producers in the territory of like or directly competing products within the territory. It should be noted that Safeguard Measures are applicable for one year, renewable annually, but may not be used for more than three years.

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506 See WTO, *Trade Policy Review – East African Community*, WTO Document: WT/TPR/S/171, 20th September 2006.

507 In Rwanda, for example, there is a reduction in tariff, from 15% to 10% on intermediate goods and from 30% to 25% on finished goods (See http://www.rra.gov.rw/rra_article199.html; accessed on 11th November 2008, 11:00 GMT + 01:00).

508 See EAC, *Protocol on the Establishment of the East African Community Customs Union*, Article 13 (1).

Given that a Partner State proposing to impose Safeguard Measures must first inform the Council and the other Partner States on the Measures it proposes to take; and given that the Council is supposed to examine the merits of the case and the proposed Measures and take appropriate decisions; and given that the application of Safeguard Measures in the EAC is permitted as long as it is supported by international law on multilateral treaties, the East African Community's legislation on Safeguard Measures would be judged as consistent with WTO Law. There are, however, some other non-tariff barriers, such as fees and charges (*official and non-official*) that restrict trade.[509]

8.2.4. The *Reasonable Time* Requirement

GATT XXIV: 5(c) provides that any plan to form a Customs Union or Free Trade Area must show that it will be completed within a *reasonable length of time*. In the *Understanding on the Interpretation of the GATT 1994*, this is defined as not exceeding 10 years except in exceptional cases. The EAC Customs Union is in line with this rule, for it is clearly stated in Article 11 (1) of the *Protocol on the Establishment of the East African Customs Union*, that its establishment is a progressive one in a course of a transitional period of five years from coming into force of the Protocol.

8.2.5. Possible Conflicts of Jurisdiction between the WTO and the EAC

The East African Court of Justice, established under Article 9 of the EAC Treaty-1999 can hear claims from the Partner States, Secretary

[509] For details about the main non-tariff barriers to trade in the EAC, see E. KAFEERO, "Customs and Trade Facilitation in the East African Community" in *World Customs Journal*, Vol. 2, Number 1, April 2008, (pp. 63-71).

General, natural and juridical persons, claims against the Community or its institutions by EAC employees and third parties, as well as claims arising from arbitration clause and special agreement.[510] Above all, Article 27 of the EAC Treaty-1999 contains what may be referred to as a 'compulsory jurisdiction clause'. It states:

> 1. The Court shall initially have jurisdiction over the interpretation and application of the Treaty.
> 2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the Partner States shall conclude a protocol to operationalize the extended jurisdiction.

Given that Article 23 of the Dispute Settlement Understanding mandates exclusive jurisdiction in favour of the WTO Dispute Settlement Body for WTO violations and given that the East African Court of Justice claims a compulsory jurisdiction with a binding effect, it is therefore clear that the possibility of overlaps and conflicts of jurisdiction between the WTO and the East African Community is very high.

8.3. OTHER *WTO* CUSTOMS-RELATED RULES AS REFLECTED IN THE *EAC* CUSTOMS LAW

8.3.1. The '*Fourth Schedule*' vis-à-vis WTO Customs Valuation Rules

The *Fourth Schedule* which is annexed to the EAC Customs Management Act, 2004 constitutes the fundamental law upon which valuation of goods for customs purposes is based.[511] A close examination of this

[510] See *EAC Treaty-1999*, Articles 31 and 32.
[511] *EAC Customs Management Act, 2004*, Section 122 (1).

Fourth Schedule demonstrates that it perfectly corresponds to *Articles 1* to *8* (and their respective *Interpretative Notes*) of the WTO *Customs Valuation Agreement.* That means, it essentially stipulates that the primary basis for customs value of imported goods is the *transaction value* of those goods.[512] And if the customs value of the imported goods cannot be determined by the first method, then other methods (provided for in paragraphs 3 to 8 of the Fourth Schedule) can be applied in a sequential order. These methods include: transaction value of identical goods, transaction value of similar goods, deductive value, computed value and the fall-back value.[513]

It is important to note that Section 122 (4) of the EAC Management Act, 2004 (like Article 17 of the Customs Valuation Agreement) emphasizes the rights of the proper customs officer to satisfy himself or herself as to the truth and accuracy of any statement, document or declaration presented for customs valuation purposes. The inclusion of this provision in the EAC customs law is very important, for there are many cases of forgery of documents (which may lead to undervaluation) yet customs duties still make a very big contribution to the budgets of the Partner States.

Further, it is categorically asserted that in applying or interpreting both Section 122 and the Fourth Schedule, due regard shall be taken of the decisions, rulings, opinions, guidelines, and interpretations given by EAC Customs Directorate, the World Trade Organisation and the World Customs Organisation.[514] Obviously, this further indicates the compatibility of the EAC customs law with international customs law.

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512 See *EAC Customs Management Act, 2004, Fourth Schedule*, paragraph 2.

513 All these methods have been elaborated in *chapter 2, number 2.4.3.3.2.2* of this work.

514 See *EAC Customs Management Act, 2004*, Section 122 (6).

In conclusion, however, it should be remembered that there are still a number of implementation problems of the customs valuation rules within the East African Community. These problems are mainly administrative and infrastructural. For instance, the problems of undervaluation are usually a result of poor customs control systems. The lack of well-organized valuation databases; well-trained staff (for example in risk management and post-clearance audit); or adequate use of information technology; and the existence of many informal businesses still hampers an effective implementation of the customs valuation rules.

8.3.2. Transit

Transit is a very important aspect of international trade and, obviously, it is a central issue in customs law. Trade facilitation is the main reason behind the inclusion of transit provisions in WTO.[515] Transit is one of the customs procedures available in the East African Community.[516]

Unfortunately, transit procedures are some of the troubling non-tariff barriers to the intra-EAC trade. The fact, for instance, that there are differences in axle load and Gross Vehicle Mass amongst EAC Partner States leads to a situation whereby Tanzanian trucks transiting through Kenya, en route to Uganda, have to strip off excess cargo to avoid financial penalties for overloading. Of course, this is costly in terms of time and money. Moreover, Kenyan demand for a customs insurance bond (about US$200 per 20-foot container) on transit goods destined to

[515] For details about WTO transit provisions, see *number 2.4.4* above.
[516] For details about the EAC transit provisions, see *number 6.6* above.

Uganda, Rwanda and Burundi affects traders. Such a high amount may be considered as an infringement of GATT V: 4.

Delays at roadblocks are also a reality in the EAC. This is largely due to corruption. Many traders report that police officers stop vehicles with goods in transit at various roadblocks, yet officially, they are only supposed to stop vehicles based on proof that goods being transported are suspicious. Additionally, although this is an infrastructural problem and hence, out of the scope of the concept of trade facilitation followed in this article, it is noted that transit is very much affected by the poor transport systems in the region.

However, there are some positive developments in the region which are related to transit. The establishment of the Malaba joint border post (on the Kenya/Uganda border) is a good example of improved coordination and cooperation amongst authorities in the EAC. Moreover, with the credits from the World Bank (approved on 24 January 2006), there is progressive improvement in transit matters in the EAC through, inter alia, the setting up of more joint border posts.

8.3.3. Fees and Charges connected with Importation and Exportation

Article III of GATT 1994 limits all fees and charges of whatever character (other than export duties and other than taxes within the purview of Article III) to the approximate cost of services rendered. Such fees charges relate, for instance, to licensing; statistical services; documentation and certification; analysis and inspection, etc.

The existence of some of these charges is justifiable. For example, the second interpretative note to Article VIII, GATT 1994 recognizes that requiring the production of certificates of origin is not *as such* inconsistent with the Article in question. However, 'the production of certificates of origin *should only* be required to the extent that is *strictly indispensable*'. The rationale of Article VIII is therefore to facilitate trade by reducing non-tariff fees and charges – especially when they are applied in a protectionist manner.

There are provisions on fees and charges in the EAC customs law. These are, for instance, overtime fees;[517] fees for cautionary visits;[518] fees for Customs revenue;[519] licence fees;[520] and fees for services to the public (*Regulation 216*) as indicated in the table below.

Table 1. *Fees for services to the public*

Service or Certificate	**Fees**
(a) Certification of a copy of any document	US$5.00
(b) Insurance of a landing certificate, for each original entry in which goods are entered	US$10.00
(c) Transhipment	US$10.00
(d) Transfer of ownership	US$10.00
(e) Issuance of certificate of weight for a consignment	US$5.00
(f) Approval of alterations in the marks, numbers or other particulars in any document submit-	

[517] See *EAC Customs Management Regulations, 2006*, Regulation 6.
[518] See *Id*., Regulation 8.
[519] See *Id*., Regulation 9.
[520] See *Id*., Regulation 217.

ted to Customs, other than an inward manifest	US$5.00
(g) Cancellation of entries	US$10.00
(h) Issuance or certification of any other certificate or document issued by Customs	US$5.00
(i) Amendment of an inward report	US$10.00

Source: EAC Customs Management Regulations 2006

These fees and charges do not contravene Article VIII, GATT 1994 as long such charges are limited to the approximate cost of the services rendered.

However, the problem in the EAC relates to the so-called *non-official* fees and charges. Despite the fact that some EAC Partner States signed the World Customs Organization (WCO) *Arusha Declaration*, which is a fundamental tool of a global approach to preventing corruption and increasing the level of integrity in Customs, corruption is still rampant within EAC Customs. And non-official fees and charges are some of the indicators of corruption. Bribes are paid by traders at various levels of the trade transactions. Bribes may be paid to Customs officials to shorten the process of clearance so as to have a quicker release of goods. Some officials in charge of licensing (which is part of EAC customs law) may ignore some cumbersome processes if they are offered a bribe, and so forth. Such fees do not only contravene WTO rules but also undermine the very spirit of genuine East African cooperation.

Recently, however, there have been some attempts to improve integrity in Customs within the EAC. In this connection, some integrity seminars, workshops and other initiatives are being conducted. For example, the *Kenya Anti-Corruption Commission*, the *Inspectorate of Gov-*

ernment of Uganda and the *Prevention and Combating of Corruption Bureau of Tanzania* launched the East African Association of Anti-Corruption Authorities (EAAACA) on 9 November 2007. The Anti-Corruption agencies of Rwanda and Burundi are also expected to join shortly. The main aim of the association is to cooperate in preventing and combating corruption in the East African Community.[521]

8.3.4. Transparency of Government Regulations affecting Trade

Article X, GATT 1994 provides for publication of trade-related laws, regulations, rulings and agreements in a *prompt and accessible* manner; restraint from enforcing measures of general application prior to their publication; and administration of the above-mentioned laws, regulations, rulings and agreements in a uniform, impartial and reasonable manner. The purpose of this provision is to enhance *transparency*[522] (which is one of the fundamental pillars of the WTO system) and ultimately to facilitate trade.

Many of East African Community's customs laws, regulations, judicial decisions and administrative rulings are published. For example, the EAC Customs Union itself is established by Article 2 (1) of the *Protocol on the Establishment of the East African Customs Union*. And this Protocol is founded on the provisions of Articles 2, 5 and 75 of the EAC Treaty-1999. Moreover, the East African Community Customs Management Act, 2004 and the East African Community Customs Management Regulations, 2006 have been published.

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521 http://www.kacc.go.ke/WHATSNWE:ASP?ID=97, accessed on 29th August 2008, 11:30 GMT + 01:00.

522 For further explanation about transparency in the WTO context, see *number 2.2.5* above.

Although many of the relevant customs laws have been published, the provisions of Article X, of the GATT 1994 are still far from being thoroughly observed within the East African Community. There are inadequacies with regard to prompt publication of customs laws. For example, while the EAC customs law officially came into force on 1 January 2005, it was actually a month later that this law became applicable in Uganda. Commenting on this issue, the Commissioner General of the Uganda Revenue Authority said that Uganda would wait for a month, and the intermediate period would be used for publicity and distribution of the new law to customs staff, clearing agents and importers.[523]

There is also a problem with the mode of publication and distribution of customs laws. The East African Community Gazette in which the amendments to customs laws are officially published is not promptly accessible to stakeholders. There is, therefore, a need for prompt publication of all trade-related laws, regulations and rulings both in paper and in electronic form.

The institution of judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters is another indispensable aspect of transparency which is necessary for trade facilitation. This issue is n treated in Article X: 3 of the GATT 1994. This issue is well regulated in the EAC customs law, for cases may not only be settled administratively but also through competent courts within the Partner States.[524] Moreover, there is a possibility of releasing goods pending the outcome of the appeal procedures '*upon payment of duty as deter-*

[523] See *The Daily Monitor*, 6th January 2005.
[524] See *EAC Customs Management Act, 2004,* Sections 219-228.

mined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner.'[525] This is compatible with the provisions of GATT X: 3.

8.4. CONCLUSION

Strictly, the East African Community does not need to undergo consistency examination which is provided for in GATT XXIV. This is because the Enabling Clause under whose provisions the East African Community was notified does not foresee any such examination. However, for the sake of a better exposition of the WTO systemic issues relevant to Region Trade Agreements (like the EAC), it was necessary that the 'compatibility or consistency issue' is included in this study.

Result: With exception of one case, i.e., the fact that Uganda's tariff rates prior to the formation of the EAC Customs Union were generally lower than EAC common external tariff rates, the African Community can 'on the whole' be regarded as consistent with the provisions of GATT XXIV and GATS V. Further, many other WTO customs-related rules, such as those that relate to customs valuation, transit, or even transparency, have been transposed into the EAC's substantial or procedural customs law.

[525] See *EAC Customs Management Act, 2004*, Section 229 (6).

Chapter 9
EAC CUSTOMS LAW VIS-À-VIS THE REVISED KYOTO CONVENTION

9.1. INTRODUCTION

Whilst the preceding chapter evaluates the EAC customs law in light of WTO law, this one does so in light of the Revised Kyoto Convention. It is clear that the core objective of the Revised Kyoto Convention is to enable the achievement of a high degree of simplification and harmonisation of customs procedures and practices, which ultimately leads to greater facilitation of international trade.[526]

From the exposition in chapters 3, 5 and 6 of this work, one can deduce the Revised Kyoto Convention largely encompasses matters that are regulated by the EAC Customs Management Act, 2004 and its complimentary EAC Customs Management Regulations, 2006.

The rather "cumbersome" structure[527] of the Revised Kyoto Convention and the fact that the Convention often allows a large margin of choice even with regard to the texts adopted by a contracting party[528] makes its comparison with any other law rather difficult.

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526 See the *Preamble* to the Revised Kyoto Convention.

527 See chapter 3 (especially *number 3.1.3.2*) above; See also, M. LUX, "EU Customs Law in International Law" in W. CZYYOWICZ, *Customs Law in the System of Law*, Warsaw 2005, (pp. 89-120).

528 See, for instance, RKC, General Annex, Chapter 4, Standard 4.6, which reads: "National legislation shall specify the methods that may be used to pay the duties and taxes".

Consequently, there are *differing degrees of conformity* between the EAC customs law and the Revised Kyoto Convention. In certain cases the degree of conformity is:

- *High* (for example with regard to the customs warehousing[529] and processing procedures[530], or customs offences[531]);
- *Conceptually high*, though different terminology is used (for example 'passenger clearance'[532] as opposed to 'travellers'[533]); or
- *non-existent* because the East African Community did not adopt the procedure concerned (for example the 'relief consignments' procedure.)

It should be noted that a substantial comparison between the EAC customs law and provisions of the Revised Kyoto Convention is made in chapters 5 and 6 of this work. This means that those two chapters also indicate to what extent the provisions of the Revised Kyoto Convention are reflected in the EAC customs law.

For that reason, the following evaluation is divided into two parts: The first part concerns those few but very important provisions of the Revised Kyoto Convention which **are not** well-reflected in the EAC customs law. The second part **summarizes** the EAC customs provisions with a *high degree* (and/or *conceptually high degree*) of conformity with the Revised Kyoto Convention.

529 See *number 6.4* above.
530 See *number 6.8* above.
531 See *number 6.10.2* above.
532 See *number 6.3.4* above.
533 See RKC, Specific Annex J, Chapter 1.

9.2. *LOW DEGREE* OR *NON EXISTENCE* OF CONFORMITY

9.2.1. Special Procedures for Authorized Persons

> In an effort to achieve an appropriate balance between trade facilitation and regulatory control, customs administrations are generally abandoning their traditional, routine "gateway" checks and are now applying the principles of risk management with varying degrees of degrees … Effective risk management is central to modern customs operations and provides the means to achieve an appropriate balance between trade facilitation and regulatory control.[534]

The use of risk management programmes enables Customs to determine which goods and which traders are generally in compliance with customs law and thus pose a low risk for control purposes. These traders can then be approved for special procedures that require little intervention by Customs for the release and clearance of goods. Such traders are referred to as 'authorized persons'. And the special procedures that are granted to authorized persons may include:

- the provision of minimal information at the time of release of the goods;
- clearance at the declarant's premises or another place authorized by the Customs;
- lodgement of a goods declaration that covers multiple transactions over a certain period;
- self-assessment and accounting of duties and taxes by the authorized person; and

[534] D. WIDDOWSON, "Managing Risk in the Customs Context" DE WULF, J. B. SOKOL, *Customs Modernisation Handbook*, The World Bank, Washington DC 2005, p. 91-99.

- lodgement of the goods declaration by an entry in the commercial records of the authorized person. [535]

Although some EAC Partner States have some programmes that grant special clearance procedures to selected traders,[536] there are no precise regulations at the East African Community level which deal with the issue of special procedures for authorized persons. Further, it is noted that there are no clear rules and guidelines that govern the application of risk management at a regional level. This is indeed one of the issues that need to be addressed by the EAC legislators.

9.2.2. Relief Consignments

Relief consignments means:

- goods, including vehicles and other means of transport, foodstuffs, medicaments, clothing, blankets, tents, prefabricated houses, water purifying and water storage items, or other goods of prime necessity, forwarded as aid to those affected by disaster; and
- all equipment, vehicles and other means of transport, specially trained animals, provisions, supplies, personal effects and other goods for disaster relief personnel in order to perform their duties and to support them in living and working in the territory of the disaster throughout the duration of their mission.[537]

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[535] See RKC, General Annex, Chapter 3, Standard 3.32.

[536] For example, Tanzania implements the so-called '*Compliant Traders Scheme'* which offers preferential treatment to certain traders (mainly oil, mineral, automotive, services, food and beverage industries), its criteria being based on the volume and the amount of taxes paid by those companies (WCO, Report on the World Customs Forum 2007: *WCO Safe Framework of Standards*, Brussels, 11th-12th December 2007.

[537] RKC, Specific Annex J, Chapter 5, E1.

The inclusion of this special procedure in the Revised Kyoto Convention is a result the negotiations between the World Customs Organization and the United Nations Department of Humanitarian Affairs (UNDHA) aimed at enabling expedited delivery of relief goods in connection with humanitarian assistance and emergency relief. The Convention stipulates, for instance, that in the case of relief consignments the Customs shall provide for:

- lodging of a simplified Goods declaration or of a provisional or incomplete goods declaration subject to completion of the declaration within a specified period;
- lodging and registering or checking of the Goods declaration and supporting documents prior to the arrival of the goods, and their release upon arrival;
- clearance outside the designated hours of business or away from Customs offices and the waiver of any charges in this respect; and
- examination and/or sampling of goods only in exceptional circumstances.[538]

Despite the fact that clearance of relief consignments is an important matter (particularly for EAC Partner States[539]) the EAC customs law contains no explicit regulation on this issue. And this is a regrettable omission.

9.3. *HIGH DEGREE* OF CONFORMITY

Since chapters 5 and 6 expound the EAC customs law and relate it to the Revised Kyoto Convention, this part is meant to give only a brief assessment of the *level of conformity* between the EAC customs law

[538] See RKC, Specific Annex J, Chapter 5, Standard 3.

[539] For example, in 2007 Uganda received relief consignments due to the heavy floods that hit Teso area.

and the provisions of the Revised Kyoto Convention. In other words, it *essentially* articulates the conclusions drawn from the premises contained in the preceding chapters.

9.3.1. Duties and Taxes

> The role of Customs has changed significantly as a result of both evolutionary factors, including the increasing globalisation of trade, and revolutionary factors such as the terrorist attacks of 9/11. … Indeed while the tusk, trunk and tail of customs regulation remain, the organism known as 'Customs' appears destined for extinction. The World Trade Organisation and other international bodies are responding through the development of global standards that recognize the changing nature of border management.[540]

Consequently, customs administrations are becoming more and more responsive to the needs of the business community; and the release of goods before all the duties have been paid is one of the ways of responding to the needs of the business community.

Chapter 4 of the General Annex to the Revised Kyoto Convention contains a number of Standards that regulate the assessment, collection, payment, repayment and deferred payment of duties. These provisions are very much reflected in the EAC customs law. Hence there is a high level of compatibility.[541]

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[540] D. WIDDOWSON, "The Changing Role of Customs: Evolution or Revolution?" in *World Customs Journal* Vol. 1, Number 1, March 2007, (pp. 31-37), p. 36.

[541] See the elaborations in *numbers 5.3 and 5.4* above.

9.3.2. Customs warehousing

Customs warehousing serves a number of functions in international trade. For instance, in the case of clearance for home use, customs warehousing enables the importer to delay payment of the import duties and taxes until the goods are actually taken into home use. It also affords the person warehousing the goods sufficient time to negotiate their sale, either on the home market or abroad, or to arrange for the goods to be processed or manufactured, transferred to another customs procedure or otherwise disposed of an authorized manner. The importer may also choose to place the goods in a warehouse until they can meet the conditions relating to restrictions or prohibitions.[542] In fact, customs warehousing can serve many more other purposes depending on a particular legislation.[543]

The EAC customs law has a number of rules which relate to customs warehousing. They regulate a variety of issues such as the entry of warehoused goods, operations in a warehouse, removal of goods from a warehouse, and so forth.[544] These rules are so reflective of the Standards found in Annex D of the Revised Kyoto Convention that one can definitely talk of a high degree of compatibility.

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542 See RKC, Guidelines to Specific Annex D, Introduction to Chapter 1.

543 In the European Community, for instance, it allows the storage of Community goods in order to allow already the application of measures requiring export, notably export refunds (For this and other uses of customs warehousing, see M. LUX, *Guide to Community Customs Legislation*, Bruylant, Brussels 2002, pp. 347-350).

544 See *number 6.4* above.

9.3.3. Processing

- ***Inward Processing***

The main purpose of the inward processing procedure is to enable national enterprises to offer their products or services on foreign markets at competitive prices, thereby promoting economic growth and increasing employment opportunities for national labour.[545] As a general rule, inward processing allows total conditional relief from import duties and taxes – including internal taxes such as Value Added Tax. However, import duties and taxes may be charged on waste deriving from the processing or manufacturing of the goods.[546]

The EAC customs law specifies the conditions to be fulfilled and the formalities to be accomplished for inward processing – and it does so in a simple way as required by Standard 1.2 of the General Annex to the Revised Kyoto Convention. For example, Specific Annex F, Standard 12 states:

> Where goods admitted for inward processing are to undergo manufacturing or processing, the competent authorities *shall fix or agree to the rate of yield of the operation by reference to the actual conditions under which it is effected*. The description, quality and quantity of the various compensating products shall be specified upon fixing or agreeing to that rate.

And Section 177 of the EAC Customs Management Act, 2004 states:

> (1) The Commissioner *shall, where goods are for inward processing, fix or agree to the rate of yield of the operation by reference to the actual conditions under which it is effected.*

[545] See, M. LUX, *op. cit.*, pp. 365-367; T. LYONS, *op. cit.*, pp. 404-406.
[546] See RKC, Guidelines to Specific Annex F, Introduction to Chapter 1.

(2) Upon fixing or agreeing to that rate, the description, *quality and quantity of the various compensating products shall be specified*.

(3) In fixing the rate of yield account may be taken of the losses resulting from the nature of the goods used such as evaporation or drying out of the goods.[547]

As the above example demonstrates the EAC customs rules relation to inward processing are in great conformity with the Revised Kyoto Convention.

- ***Outward Processing***

The outward processing procedure reflects the inward processing procedure. Whilst under inward processing certain goods (particularly raw materials or semi-finished goods) are imported in order to be processed in a customs territory (in this case, in the EAC) and subsequently be re-exported, outward processing allows the export of goods which are in free circulation so that they can be processed outside the EAC and subsequently be re-imported. The compensating products are re-imported and released for home consumption with total or partial relief of duties.[548] The EAC legislation on outward processing is also very much aligned to the provisions of the Revised Kyoto Convention.

In all, it is evident that the whole EAC customs law that deals with "processing procedures", i.e. including drawback and export processing zones is highly compatible with the Revised Kyoto Convention. There are, in fact, many cases in which the provisions of the Revised Kyoto Convention were *directly transposed* into the EAC customs law.

[547] * Emphasis added throughout.
[548] See *Id*., Section 178.

9.2. CONCLUSION

Currently, it is only Uganda (among the five EAC Partner States) that is a Contracting Party to the Revised Kyoto Convention. Nevertheless, the EAC customs law has been considerably designed according to the provisions of the Revised Kyoto Convention. In some cases, the concepts and the terminology used in the Revised Kyoto Convention are the same or identical with those used in the EAC Customs Management Act, 2004 or the EAC Customs Management Regulations, 2006. It is, so to say, a quasi direct transposition of the provisions of the Revised Kyoto Convention into the EAC customs law, as a number of examples in this work have demonstrated.

In some areas, however, there is little conformity. But this is not necessarily negative. As it has been observed, the Revised Kyoto Convention embodies best practices of national legislation around the world, but at the same time, it enables each country (or customs territory) to tailor its policies and procedures to meet its unique legal, political, cultural, and societal requirements.[549] That said, it is noted that the East African Community still requires better regulations with regard to the use of modern administrative methods and techniques such as risk management and the use of information and communication technology for further simplification of customs procedures and practices.

[549] See K. MIKURIYA, *op. cit.*, p. 52.

GENERAL CONCLUSION

"Partner States shall *honour their commitments* in respect of other *multinational and international organisations* of which they are members."[550]
It is often said that African states have the best written laws. Despite the obvious exaggeration, this assertion contains 'a lot of' truth – as many of the findings of this study reveal.

The study has fundamentally examined the consistency issue between EAC customs law and international customs law as contained in various WTO rules and in the provisions of the Revised Kyoto Convention. The results of the assessment are found in all the chapters of this work, but more especially in chapters 8 and 9. The core of these results is that *there is a high degree of consistency between the written customs laws* of the East African Community and the rules of both the World Trade Organisation and the Revised Kyoto Convention.

Despite the above-mentioned consistency, there are a number of problems with regard to the implementation of the international customs laws/standards in the day-to-day customs administration within the East African Community. As indicated in the study, these problems are mainly *infrastructural* and *managerial* in character. They particularly relate to information dissemination and information management; the use of modern techniques and technologies; as well as integrity.

Any legal amendments to the EAC customs law will therefore be meaningful insofar as they ameliorate the implementation of customs

[550] EAC Treaty-1999, Article 130 (1) [emphasis added].

laws especially in the areas indicated above. And the amendment of the EAC customs law in such a way that the *private sector* is highly involved in customs management (put colloquially, '*not just obeying the orders of the Customs*') is one of such legal reforms that the East African Community badly needs.

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APPENDIX II

PROTOCOL ON THE ESTABLISHMENT OF THE EAST AFRICAN CUSTOMS UNION

PURSUANT TO THE PROVISIONS OF ARTICLE 75 OF THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY, THE PROVISIONS FOR THE ESTABLISHMENT OF THE EAST AFRICAN CUSTOMS UNION ARE HEREBY SET FORTH:

PREAMBLE

WHEREAS the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania (hereinafter referred to as "the Partner States") signed the Treaty for the Establishment of the East African Community (hereinafter referred to as "the Treaty") on the 30th day of November, 1999;

AND WHEREAS:

under the provisions of Articles 2 and 5 of the Treaty, the Partner States undertake to, inter alia, establish among themselves a customs

union, as a transitional stage to, and an integral part of the Community; and

under the provisions of paragraph 2 of Article 75 of the Treaty, the Partner States have determined that the establishment of a customs union shall be progressive in the course of a transitional period;

AND WHEREAS by the provisions of paragraph 7 of Article 75 of the Treaty, the Partner States agreed to conclude the Protocol on the Establishment of a Customs Union within a period of four years;

AND WHEREAS by the provisions of paragraph 1 of Article 151 of the Treaty, the Partner States undertook to conclude such Protocols as may be necessary in each area of co-operation, which shall spell out the objectives and scope of, and institutional mechanisms for co-operation and integration;

AND WHEREAS the Partner States, while aware that they have reached different stages of development with each Partner State having a comparative advantage on trade in some commodities, are resolved and determined to reduce existing imbalances and to foster and encourage the accelerated and sustained development of the Community;

AND WHEREAS the Partner States are desirous to deepen and strengthen trade among themselves and are resolved to abolish tariff and non-tariff barriers to create the most favourable environment for the development of regional trade;

RECOGNIZING that a customs union would enhance economic growth and the development of the Community;

CONSCIOUS of their obligations, as contracting parties to the Marrakesh Agreement Establishing the World Trade Organisation, 1994 (the WTO Agreement), and to the Convention Establishing a Customs Co-operation Council, 1950 to contribute, in the common interest, to the harmonious development of world trade;

CONSCIOUS of their other individual obligations and commitments under other regional economic partnerships;

RESOLVING to act in concert for the establishment of a Customs Union;

AGREE AS FOLLOWS:

PART A
INTERPRETATION

ARTICLE 1
Interpretation

1. In this Protocol, except where the context otherwise requires:

"Acts of the Community" means Acts of the Community enacted in accordance with the Treaty;

"anti-dumping measures" means measures taken by the investigating authority of the importing Partner State after conducting an investiga-

tion and determining dumping and material injury resulting from the dumping;

"common external tariff" means an identical rate of tariff imposed on goods imported from foreign countries;

"Community" means the East African Community established by Article 2 of the Treaty;

"community goods" means goods originating from the Community;

"community tariff" means a five year interim tariff imposed on specific goods originating from the Republic of Uganda to the Republic of Kenya, and from the Republic of Uganda to the United Republic of Tanzania under the principle of asymmetry;

"compensating product" means a product resulting from the manufacturing, processing or repair of goods for which the use of the inward processing procedure is authorised;

"competent authority" means a body or organisation designated by the Community to administer the customs law of the Community;

"co-operation" includes any undertaking by the Partner States, jointly or in concert, of activities undertaken in furtherance of the objectives of the Community, as provided for under the Treaty or under any contract or agreement made under the Treaty or in relation to the objectives of the Community;

"Council" means the Council of Ministers of the Community established by Article 9 of the Treaty;

"countervailing duty" means a specific duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of a product;

"countervailing measures" means measures taken to counteract the effect of injurious subsidies;

"Court" means the East African Court of Justice established by Article 9 of the Treaty;

"customs area" means that area licenced by a competent authority for purposes of specific customs operations;

"customs and excise authority" means a body or an institution designated as such by a Government of a Partner State;

"customs data bank" means a depository of customs and trade data and information;

"customs duties" means import or export duties and other charges of equivalent effect levied on goods by reason of their importation or exportation, respectively, on the basis of legislation in the Partner States and includes fiscal duties or taxes where such duties or taxes affect the importation or exportation of goods but does not include internal duties and taxes such as sales, turnover or consumption taxes, imposed otherwise than in respect of the importation or exportation of goods;

"customs law of the Community" means the customs law of the Community as provided under Article 39 of this Protocol;

"customs offence" means any breach or attempted breach of customs law;

"customs territory" means the geographical area of the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania and any other country granted membership of the Community under Article 3 of the Treaty;

"Customs Union" means the East African Community Customs Union established by Article 2 of this Protocol;

"days" means working days in any calendar month;

"dumping" in relation to goods means the situation where the export price of goods imported or intended to be imported into the Community is less than the normal value of like goods in the market of a country of origin as determined in accordance with the provisions of this Protocol, and "dumped product" has the corresponding meaning;

"duty" means any duty leviable under any customs law and includes surtax;

"duty drawback" means a refund of all or part of any excise or import duty paid in respect of goods confirmed to have been exported or used in a manner or for a purpose prescribed as a condition for granting duty drawback;

"excise duty" means a non-discriminative duty imposed by a Partner State on locally produced or similar imported goods;

“export” with its grammatical variations and cognate expressions means to take or cause goods to be taken out of the customs territory;

"export duties" means customs duties and other charges of equivalent effect levied on goods by reason of their exportation;

"export processing zone" means a designated area or region in which firms can import duty free as long as the imports are used as inputs into the production of exports;

"export promotion" means an undertaking in the facilitation of production or manufacturing for purposes of export;

"freeport" means a customs controlled area within a Partner State where imported duty free goods are stored for the purpose of trade;

"freeport authority" means an authority appointed by a Partner State under national legislation to establish, co-ordinate and operate freeport related facilities in a Partner State and it shall include all the staff thereof;

"freeport zone" means a designated area placed at the disposal of the freeport authority where goods introduced into the designated area are generally regarded, in so far as import duties are concerned, as being outside the customs territory;

"foreign country" means a country other than a Partner State;

"goods" includes all wares, articles, merchandise, animals, matter, baggage, stores, materials, currency and includes postal items other than personal correspondence, and where any such goods are sold under the auspices of this Protocol, the proceeds of sale;
"goods in transit" means goods being conveyed through the customs territory to a foreign country;

"import" with its grammatical variations and cognate expressions means to bring or cause goods to be brought into the customs territory;

"import duties" means customs duties and other charges of equivalent effect levied on goods by reason of their importation;

"imported goods" means goods other than Community goods;

"importing Partner State" means a Partner State into which goods are imported;

"international standards" means standards that are adopted by international standardising or standards organisations made available to the public;

"inward processing" means the customs procedure under which certain goods can be brought into a customs territory conditionally relieved from payment of import duties and taxes, on the basis that such goods are intended for manufacturing, processing or repair and subsequent exportation;

"Legislative Assembly" means the East African Legislative Assembly established by Article 9 of the Treaty;

"manufacturing under bond" means a facility extended to manufacturers to import plant, machinery, equipment and raw materials tax free, exclusively for use in the manufacture of goods for export;

"non-tariff barriers" means laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State whose effect is to impede trade;

"other charges of equivalent effect" means any tax, surtax, levy or charge imposed on imports and not on like locally produced products and does not include fees and similar charges commensurate with the cost of services rendered;

"Partner States" means the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania and any other country granted membership to the Community under Article 3 of the Treaty;

"person" means a natural or legal person;

"primary production" means initial or basic production of goods using raw materials or original inputs which have not undergone processing;

"principle of asymmetry" means the principle which addresses variances in the implementation of measures in an economic integration process for purposes of achieving a common objective;
"Protocol" means this Protocol establishing the East African Community Customs Union and any annexes to the Protocol;

"publications" means printed material in hard or soft form;

"refund" means the return or repayment of duties and taxes already collected;

"re-exports" means goods which are imported and re-exported from the customs territory;

"remission" means the waiver of duty or refrainment from exacting of duty;

"safeguard measures" means protective measures taken by a Partner State to prevent serious injury to her economy as provided under this Protocol;

"Secretariat" means the Secretariat of the Community established by Article 9 of the Treaty;

"Secretary General" means the Secretary General of the Community appointed under Article 67 of the Treaty;

"subsidy" means assistance by a government of a Partner State or a public body to the production, manufacture, or export of specific goods, taking the form of either direct payments, such as grants or loans, or of measures with equivalent effect, such as guarantees, operational or support services or facilities, and fiscal incentives;

"tariff" means any customs duty on imports or exports;

"trade data" means trade related information and statistics on trade;

"trade facilitation" means the co-ordination and rationalisation of trade procedures and documents relating to the movement of goods from their place of origin to their destination;

"trade procedures" means activities related to the collection, presentation, processing and dissemination of data and information concerning all activities constituting trade;

"Treaty" means the Treaty for the Establishment of the East African Community.

2. In this Protocol, a reference to a law or protocol shall be construed as reference to the law or protocol as from time to time amended.

PART B
ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY CUSTOMS UNION

ARTICLE 2
Establishment of the East African Community Customs Union

1. In order to promote the objectives of the Community provided under Article 5 of the Treaty and in accordance with the provisions of this Protocol, the Partner States hereby establish a customs union as an integral part of the Community.

2. The Customs Union established under Paragraph 1 of this Article, shall be called the East African Community Customs Union (hereinafter referred to as "the Customs Union").

3. The Customs Union shall be managed in accordance with the customs law of the Community.

4. Within the Customs Union:

customs duties and other charges of equivalent effect imposed on imports shall be eliminated save as is provided for in this Protocol;

non-tariff barriers to trade among the Partner States shall be removed; and

a common external tariff in respect of all goods imported into the Partner States from foreign countries shall be established and maintained.

5. In accordance with the provisions of Article 75 of the Treaty, this Protocol, inter alia, provides for the following:

the application of the principle of asymmetry;

the elimination of internal tariffs and other charges of equivalent effect;

the elimination of non-tariff barriers;

establishment of a common external tariff;

rules of origin;

anti-dumping measures;

subsidies and countervailing duties;

security and other restrictions to trade;

competition;

duty drawback, refund and remission of duties and taxes;

customs co-operation;

re-exportation of goods;

simplification and harmonisation of trade documentation and procedures;

exemption regimes;

harmonised commodity description and coding system; and

freeports.

ARTICLE 3
Objectives of the Customs Union

The objectives of the Customs Union shall be to:

further liberalise intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the Partner States;

promote efficiency in production within the Community;

enhance domestic, cross border and foreign investment in the Community; and

promote economic development and diversification in industrialisation in the Community.

ARTICLE 4
Scope of Co-operation in the Customs Union

1. The provisions of this Part of the Protocol shall apply to any activity undertaken in co-operation by the Partner States in the field of customs management and trade and shall include:

matters concerning trade liberalisation;

trade related aspects including the simplification and harmonisation of trade documentation, customs regulations and procedures with particular reference to such matters as the valuation of goods, tariff classification,

the collection of customs duties, temporary admission, warehousing, cross-border trade and export drawbacks;

trade remedies and the prevention, investigation and suppression of customs offences;

national and joint institutional arrangements;

training facilities and programmes on customs and trade;

production and exchange of customs and trade statistics and information; and

the promotion of exports.

2. For purposes of sub-paragraph 1(a) of this Article, the Partner States shall co-operate in:

adopting uniform, comprehensive and systematic tariff classification of goods with a specific description and interpretation in accordance with internationally accepted standards;

adopting a standard system of valuation of goods based on principles of equity, uniformity and simplicity of application in accordance with internationally accepted standards and guidelines;

establishing common terms and conditions governing temporary importation procedures including the list or range of goods to be covered and the nature of manufacturing or processing to be authorised;

implementing the customs requirements for re-exportation of goods;

implementing the customs requirements for the transit of goods;

harmonising and simplifying customs and trade formalities and documentation and dissemination of information;

harmonising the customs requirements for the control of warehoused goods; and

adopting common procedures for the establishment and operation of export promotion schemes and freeports.

PART C
CUSTOMS ADMINISTRATION

ARTICLE 5
Communication of Customs and Trade Information

The Partner States shall exchange information on matters relating to customs and trade and in particular:

(a) the prevention, investigation and suppression of customs offences; and

(b) the operation of a harmonised information system to facilitate the sharing of customs and trade information.

ARTICLE 6
Trade Facilitation

The Partner States shall initiate trade facilitation by:

(a) reducing the number and volume of documentation required in respect of trade among the Partner States;

(b) adopting common standards of trade documentation and procedures within the Community where international requirements do not suit the conditions prevailing among the Partner States;

(c) ensuring adequate co-ordination and facilitation of trade and transport activities within the Community;

(d) regularly reviewing the procedures adopted in international trade and transport facilitation with a view to simplifying and adopting them for use by the Partner States;

(e) collecting and disseminating information on trade and trade documentation;

(f) promoting the development and adoption of common solutions to problems in trade facilitation among the Partner States; and

(g) establishing joint training programmes on trade.

ARTICLE 7
Simplification, Standardisation and Harmonisation of Trade Information and Documentation

1. The Partner States agree to simplify their trade documentation and procedures in order to facilitate trade in goods within the Community.

2. Subject to the provisions of Article 6 of this Protocol, the Partner States agree to design and standardise their trade information and documentation in accordance with internationally accepted standards, taking into account the use of electronic data processing systems in order to ensure the efficient and effective application of the provisions of this Protocol.

3. For purposes of this Article:

a customs data bank shall be established at the Secretariat; and

the Partner States hereby agree to adopt the Harmonised Customs Documentation to be specified in the customs law of the Community.

ARTICLE 8
Commodity Description and Coding System

1. The Partner States agree to harmonise their customs nomenclature and standardise their foreign trade statistics to ensure comparability and reliability of the relevant information.

2. The Partner States hereby adopt the Harmonised Commodity Description and Coding System specified in Annex I to this Protocol.

ARTICLE 9
Prevention, Investigation and Suppression of Customs Offences

1. The Partner States agree to co-operate in the prevention, investigation and suppression of customs offences within their territories.

2. For purposes of paragraph 1 of this Article, the Partner States shall:

afford each other mutual assistance with a view to preventing, repressing and investigating customs offences;

exchange information on goods and publications known to be the subject of illicit traffic and maintain special surveillance over the movement of such goods and publications; and

consult each other on the establishment of common border posts and take steps as may be deemed appropriate to ensure that goods exported or imported through common frontiers pass through the competent and recognised customs offices and along approved routes.

3. The implementation of this Part of the Protocol shall be in accordance with the provisions of the customs law of the Community.

PART D
TRADE LIBERALISATION

ARTICLE 10
Internal Tariff

1. Save as is provided in Article 11 of this Protocol, the Partner States shall, upon the coming into force of this Protocol, eliminate all internal tariffs and other charges of equivalent effect on trade among them, in accordance with the provisions of Article 14 of this Protocol.

2. The Council may, at any time, decide that any tariff rate shall be reduced more rapidly or eliminated earlier than is provided for in accordance with paragraph 1 of this Article.

ARTICLE 11
Transitional Provisions on the Elimination of Internal Tariffs

1. The establishment of the Customs Union shall be progressive in the course of a transitional period of five years from the coming into force of this Protocol.

2. The Partner States agree that upon the coming into force of this Protocol and for the purpose of the transition into a Customs Union:

goods to and from the Republic of Uganda and the United Republic of Tanzania shall be duty free; and

goods from the Republic of Uganda and the United Republic of Tanzania into the Republic of Kenya shall be duty free.

3. Goods from the Republic of Kenya into the Republic of Uganda and the United Republic of Tanzania shall be categorised as follows:

Category A goods, which shall be eligible for immediate duty free treatment; and

Category B goods, which shall be eligible for gradual tariff reduction.

4. Category B goods from the Republic of Kenya into the Republic of Uganda shall have a phase out tariff reduction period of five years for all products as follows:

10 per centum during the first year;

8 per centum during the second year;

6 per centum during the third year;

4 per centum during the fourth year;

2 per centum during the fifth year; and

0 per centum thereafter,

as specified in Annex II to this Protocol.

5. Category B goods from the Republic of Kenya into the United Republic of Tanzania shall have a phase out tariff reduction period as specified in Annex II to this Protocol.

6. Internal tariffs specified under the provisions of this Article shall not exceed the Common External Tariff with regard to any of the specified products.

ARTICLE 12
Common External Tariff

1. The Partner States hereby establish a three band common external tariff with a minimum rate of 0 per centum, a middle rate of 10 per centum and a maximum rate of 25 per centum in respect of all products imported into the Community.

2. The Partner States hereby undertake to review the maximum rate of the common external tariff after a period of five years from the coming into force of the Customs Union.

3. The Council may review the common external tariff structure and approve measures designed to remedy any adverse effects which any of the Partner States may experience by reason of the implementation of this part of the Protocol or, in exceptional circumstances, to safeguard Community interests.

4. For purposes of this Article, the Partner States shall use the Harmonised Customs Commodity Description and Coding System referred to in Article 8 of this Protocol.

ARTICLE 13
Non-tariff Barriers

1. Except as may be provided for or permitted by this Protocol, each of the Partner States agrees to remove, with immediate effect, all the existing non-tariff barriers to the importation into their respective territories of goods originating in the other Partner States and, thereafter, not to impose any new non-tariff barriers.

2. The Partner States shall formulate a mechanism for identifying and monitoring the removal of non-tariff barriers.

PART E
TRADE RELATED ASPECTS

ARTICLE 14
Rules of Origin

1. For purposes of this Protocol, goods shall be accepted as eligible for Community tariff treatment if they originate in the Partner States.

2. Goods shall be considered to originate in the Partner States if they meet the criteria set out in the Rules of Origin adopted under this Article.

3. The Partner States hereby adopt the East African Community Rules of Origin specified in Annex III to this Protocol.

ARTICLE 15
National Treatment

1. The Partner States shall not:

enact legislation or apply administrative measures which directly or indirectly discriminate against the same or like products of other Partner States; or

impose on each other's products any internal taxation of such a nature as to afford indirect protection to other products.

2. 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.

3. Where products are exported to the territory of any Partner State, any repayment of internal taxation shall not exceed the internal taxation imposed on them, whether directly or indirectly.

ARTICLE 16
Anti-dumping Measures

1. The Partner States recognise that dumping is prohibited if it causes or threatens material injury to an established industry in any of the Partner 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.

2. The Secretariat shall notify the World Trade Organisation on the anti-dumping measures taken by the Partner States.

3. The implementation of this Part of the Protocol shall be in accordance with the East African Community Customs Union (Anti Dumping Measures) Regulations, specified in Annex IV to this Protocol.

4. For purposes of this Article, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:

when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;

in exceptional circumstances, the territory of the Partner States may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry where:

the producers within that market sell all or most of their production of the product in question in that market; and

the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory.

In the circumstances referred to in sub-paragraph (b) of this Article, industry is not injured, except where there is concentration of dumped

imports into such an isolated market and provided the dumped imports are causing injury to the producers of all or most of the production within such market.

ARTICLE 17
Subsidies

1. If a Partner State grants or maintains any subsidy, including any form of income or price support which operates directly or indirectly to distort competition by favouring certain undertakings or the production of certain goods in the Partner State, it shall notify the other Partner States in writing.

2. The notification in paragraph 1 of this Article shall contain the extent and nature of the subsidisation, the estimated effect of the subsidisation, the quantity of the affected product or products exported to the Partner States and the circumstances making the subsidisation necessary.

ARTICLE 18
Countervailing Measures

1. (a) The Community may, for the purposes of offsetting the effects of subsidies and subject to regulations made under this Article, levy a countervailing duty on any product of any foreign country imported into the Customs Union.
The countervailing duty shall be equal to the amount of the estimated subsidy determined to have been granted directly or indirectly, on the

manufacture, production or export of that product in the country of origin or exportation.

2. The implementation of Articles 17 and 18 of this Protocol shall be in accordance with the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol.

ARTICLE 19
Safeguard Measures

1. The Partner States agree to apply safeguard measures to situations where there is a sudden surge of a product imported into a Partner State, under conditions which cause or threaten to cause serious injury to domestic producers in the territory of like or directly competing products within the territory.

2. (a) During a transitional period of five years, after the coming into force of the Protocol, where a Partner State demonstrates that its economy will suffer serious injury as a result of the imposition of the common external tariff on industrial inputs and raw materials, the Partner State concerned shall, inform the Council and the other Partner States through the Secretary General on the measures it proposes to take.

(b) The Council shall examine the merits of the case and the proposed measures and take appropriate decisions.

3. The implementation of this Article shall be in accordance with the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol.

ARTICLE 20
Co-operation in the Investigation of Dumping, Subsidies and Application of Safeguard Measures

1. 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.

2. Where there is evidence of any sudden surge in imports, or dumping, or export of subsidised goods by a foreign country into any of the Partner States that threatens or distorts competition within the Community, the affected Partner State may request the Partner State in whose territory there is a sudden surge in imports, or goods are dumped or subsidised, to impose anti-dumping duties or countervailing duties or safeguard measures on such goods.

3. If the Partner State to which the request is made does not act within thirty days of notification of the request, the requesting Partner State shall report to the appropriate customs union authority which shall take the necessary action.

ARTICLE 21
Competition

1 The Partner States shall prohibit any practice that adversely affects free trade including any agreement, undertaking or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Community.

2. The provision of paragraph 1 of this Article shall not apply in the case of:

any agreement or category of agreements between undertakings;

any decision by association of undertakings; or

any concerted practice or category of concerted practises,

which improves production or distribution of goods, promotes technical or economic development or which has the effect of promoting consumer welfare and does not impose restrictions inconsistent with the attainment of the objectives of the Customs Union or has the effect of eliminating competition.

3. The implementation of this Article shall be in accordance with the East African Community competition policy and law.

ARTICLE 22
Restrictions and Prohibitions to Trade

1. A Partner State may, after giving notice to the Secretary General of her intention to do so, 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.

2. A Partner State shall not exercise the right to introduce or continue to execute the restrictions or prohibitions conferred by this Article in order to restrict the free movement of goods within the Community.

3. Notwithstanding the provisions of Article 10(1) of this Protocol, the Partner States agree to specify in the customs law of the Community goods to be restricted and prohibited from trade.

ARTICLE 23
Re-exportation of Goods

1. The Partner States shall ensure that re-exports shall be exempt from payment of import or export duties in accordance with the customs law of the Community.

2. Paragraph (1) of this Article shall not preclude the levying of normal administrative and service charges applicable to the import or export of similar goods in accordance with the national laws and regulations of the Partner States.

ARTICLE 24
East African Community Committee on Trade Remedies

1. For purposes of this Protocol, there is hereby established an East African Community Committee on Trade Remedies (hereinafter referred to as "the Committee") to handle any matters pertaining to:

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

anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to this Protocol;

subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol;

safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol;

dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to this Protocol; and

any other matter referred to the Committee by the Council.

2. (a) The Committee shall be composed of nine members, qualified

and competent in matters of trade, customs and law.

(b) Each Partner State shall nominate three members to the Committee.

3. Each Partner State shall notify the Committee, of the investigating authority within its territory designated to initiate and conduct investigations on behalf of the Committee.

4. The functions of the Committee shall be to:

initiate, through the investigating authorities of the Partner States, investigation on disputes under the Regulations in paragraph 1 of this Article;

make affirmative or negative determinations on investigation arising from sub-paragraph (a) of this paragraph;

recommend provisional measures to prevent injury to a domestic industry where preliminary affirmative determination has been made under any matter in paragraph 1 of this Article;

undertake consultations with Partner States and other countries on matters before it;

report to the Council on all determinations in relations to matters that are submitted to it and decisions made by it;

provide advisory opinions to the Partner States in relation to matters under paragraph 1 of this Article;

review annually the implementation and operation of the matters in paragraph 1 of this Article;

issue public notices under the matters in paragraph 1 of this Article;

facilitate consultations by Partner States and parties to the dispute before it, to ensure timely fulfilment of all requirements by parties to the dispute and provide advice as may be appropriate;

administer and manage the dispute settlement mechanism; and

undertake any function that may be assigned to it by any regulation under this Protocol or by the Council.

5. Except as otherwise provided under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, or under any other regulation under this Protocol, the decisions of the Committee with respect to the settlement of disputes shall be final.

6. The Committee shall determine its own procedure.

PART F
EXPORT PROMOTION SCHEMES

ARTICLE 25
Principles of Export Promotion Schemes

1. The Partner States agree to support export promotion schemes 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.

2. (a) The Partner States agree that goods benefiting from export promotion schemes shall primarily be for export.

(b) In the event that such goods are sold in the customs territory such goods shall attract full duties, levies and other charges provided in the Common External Tariff.

3. The sale of goods in the customs territory shall be subject to authorisation by a competent authority and such sale shall be limited to 20 per centum of the annual production of a company.

ARTICLE 26
Duty Drawback Schemes

1. The Partner States agree that, upon exportation to a foreign country, drawback of import duties may be allowed in such amounts and on such conditions as may be prescribed by the competent authority.

2. Duty drawback shall be paid:

upon submission of an application to the competent authority within such a period from the date of exportation or performance of the conditions on which drawback may be allowed as the competent authority may prescribe; and

on goods or any material used in the manufacture or processing of such goods may be granted in accordance with and subject to such limitations and conditions as may be prescribed by the competent authority.

3. The implementation of this Article shall be in accordance with the duty drawback schemes specified in the customs law of the Community.

ARTICLE 27
Duty and Value Added Tax Remission Schemes

1. The Partner States agree to support export promotion by facilitating duty and value added tax remission schemes.

2. For purposes of this Article the Partner States may establish duty and value added tax remission schemes.

3. The implementation of this Article shall be in accordance with the duty and value added tax remission schemes specified in the customs law of the Community.

ARTICLE 28
Manufacturing under Bond Schemes

1. The Partner States agree to support export promotion by facilitating manufacturing under bond schemes within their respective territories.

2. The procedure for manufacturing under bond shall allow imported goods to be used in a customs territory for processing or manufacture.

3. Duty and taxes shall be payable on compensating products at the rate of import duty appropriate to them.

4. The implementation of this Article shall be in accordance with the manufacturing under bond schemes specified in the customs law of the Community.

ARTICLE 29
Export Processing Zones

1. The Partner States agree to support the establishment of export processing zones.

2. Entry into an export processing zone shall allow total relief from payment of duty on imported goods used directly in the production of goods for export by a person authorised to carry out that activity in the zone.

3. The implementation of the provisions of this Article shall be in accordance with the East African Community Customs Union (Export Processing Zones) Regulations, specified in Annex VII to this Protocol and the customs law of the Community.

ARTICLE 30
Other Export Promotion Schemes

The Council may, from time to time, approve the establishment of such other export promotion schemes, as may be deemed necessary.

PART G
SPECIAL ECONOMIC ZONES

ARTICLE 31
Freeports

1. The Partner States may provide for the establishment of freeports for the purpose of facilitating and promoting international trade and accelerating development within the Customs Union.

2. The functions of the freeports shall include the following:

promotion and facilitation of trade in goods imported into freeports;

provision of facilities relating to freeports including storage, warehouses and simplified customs procedures; and

provision for the establishment of international trade supply chain centres, where persons from within and outside the Community access and harness market opportunities and enhance competitiveness in import and export trade within the global setting.

3. Goods entering into a freeport shall be granted total relief from payment of duty and any other import levies except where the goods are removed from the freeport for home use.

4. For purposes of this Article, the Partner States may establish an authority to manage the freeports.

5. The implementation of this Article shall be in accordance with the East African Community Customs Union (Freeport Operations) Regulations, specified in Annex VIII to this Protocol.

ARTICLE 32
Other Arrangements

1. The Council may, from time to time, approve the establishment of other special economic arrangements for purposes of the development of the economies of the Partner States.

2. Freeport zones may be established at seaports, riverports, airports and places with similar geographic or economic advantage.

PART H
EXEMPTION REGIMES

Article 33
Exemption Regimes

1. The Partner States agree to harmonise their exemption regimes in respect of goods that are excluded from payment of import duties.

2. The Partner States hereby agree to adopt a harmonised list on exemption regimes which shall be specified in the customs law of the Community.

PART I
GENERAL PROVISIONS

ARTICLE 34
Administration of the Customs Union

The administration of the Customs Union, including legal, administrative and institutional matters, shall be governed by the customs law of the Community.

ARTICLE 35
Measures to Address Imbalances arising from the Establishment of the Customs Union

For purposes of this Protocol, the Council shall approve measures to address imbalances that may arise from the establishment of the Customs Union.

ARTICLE 36
Safeguard Clause

1. In the event of serious injury or threat of serious injury occurring to the economy of a Partner State following the application of the provisions of this Protocol, the Partner State concerned shall, after informing the Council through the Secretary General and the other Partner States, take necessary safeguard measures.

2. The Council shall examine the method and effect of the application of existing safeguard measures and take appropriate decisions.

ARTICLE 37
Trade Arrangements with Countries and Organisations Outside the Customs Union

1. The Partner States shall honour their commitments in respect of other multilateral and international organisations to which they belong.
2. The Community shall co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade.

3. (a) Upon the signing of this Protocol and before its coming into force, and taking into account, inter alia, the provisions of paragraphs 1 and 2 of this Article, the Partner States shall identify the issues arising out of their current relationships with other integration blocs and multilateral and international organisations of which they are members in order to establish convergence on those matters for the purposes of the Customs Union.

(b) For purposes of this paragraph, the Partner States shall, upon the signing of this Protocol formulate a mechanism to guide the relationships between the Customs Union and other integration blocs, multilateral and international organisations.

4. (a) A Partner State may separately conclude or amend a trade agreement with a foreign country provided that the terms of such an agreement or amendments are not in conflict with the provisions of this Protocol.

(b) Where a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of this Article, with a foreign country the

Partner State shall send its proposed agreement or amendment by registered mail to the Secretary General, who shall communicate the proposed agreement by registered mail to the other Partner States within a period of thirty days, for their consideration.

(c) Where a Partner State notifies the other Partner States of its intention under paragraph 4(b) of this Article, the other Partner States shall make comments and proposals as they may deem appropriate, within ninety days from the receipt of the Secretary General's notification, before the conclusion or amendment of the agreement.

(d) Following the receipt of the comments and proposals as specified in paragraph 4(c) of this Article, the Secretary General shall convene a meeting of the Council within a period of sixty days to consider the comments and proposals.

(e) Where the Partner States do not submit comments and proposals within the period specified under paragraph 4(c) of this Article, the concerned Partner State may conclude or amend the said agreement.

ARTICLE 38
Inter-linkages with Other Areas of Co-operation

1. The application of this Protocol shall take cognisance of the provisions of the Treaty on other areas of co-operation including co-operation in:

environment and natural resources management;

standardisation, quality assurance, metrology and testing;

sanitary and phyto-sanitary measures;

intellectual property rights; and

standards and technical regulations on trade.

2. The Partner States shall conclude protocols on the areas of co-operation specified in paragraph 1 of this Article, which shall spell out the objectives, scope of co-operation and institutional mechanisms for co-operation.

ARTICLE 39
Customs Law of the Community

1. The customs law of the Community shall consist of:

(a) relevant provisions of the Treaty;

(b) this Protocol and its annexes;

(c) regulations and directives made by the Council;

(d) applicable decisions made by the Court;

(e) Acts of the Community enacted by the Legislative Assembly; and

(f) relevant principles of international law.

2. The customs law of the Community shall apply uniformly in the Customs Union except as otherwise provided for in this Protocol.

3. The Partner States shall conclude such annexes to this Protocol as shall be deemed necessary.

ARTICLE 40
Annexes to the Protocol

Without prejudice to the provisions of Articles 39(3) and 43 of this Protocol, the Partner States agree to conclude, before the Protocol comes into force, the annexes specified in this Protocol and such annexes shall form an integral part of this Protocol.

ARTICLE 41
Dispute Settlement

1. Each Partner State affirms her adherence to the principles for the administration and management of disputes and shall in particular:

accord due consideration to the other Partner States' presentation or complaints;

accord adequate opportunity for consultation on representations made by other Partner States; and
implement in good faith any decisions made pursuant to the Community's dispute settlement mechanisms.

2. The implementation of this Article shall be in accordance with the East African Community Customs Union (Dispute Settlement Mechanism) Regulations specified in Annex IX to this Protocol.

ARTICLE 42
Amendment of the Protocol

1. This Protocol may be amended by the Partner States in accordance with the provisions of Article 150 of the Treaty.

2. Subject to the provisions of paragraph 1 of this Article, the Council may:

(1) with the approval of the Summit, review the annexes to this Protocol and make such modifications as it deems necessary;

(2) submit to the Partner States proposals for the amendment of the provisions of this Protocol.

ARTICLE 43
Entry into Force

This Protocol shall enter into force upon ratification and deposit of instruments of ratification with the Secretary General by all the Partner States.

ARTICLE 44
Depository and Registration

1. This Protocol and all instruments of ratification shall be deposited with the Secretary General who shall transmit certified true copies of the Protocol and instruments of ratification to all the Partner States.

2. The Secretary General shall register this Protocol with the African Union, the United Nations, the World Trade Organisation, the World Customs Organisation and such other organisations as the Council may determine.

DONE at Arusha, Tanzania, on the 2nd day of March in the year Two Thousand and Four.

IN FAITH WHEREOF the undersigned have appended their signatures hereto:

FOR THE REPUBLIC OF UGANDA	FOR THE REPUBLIC OF KENYA	FOR THE UNITED REPUBLIC OF TANZANIA
……		……....
YOWERI KAGUTA MUSEVENI PRESIDENT	MWAI KIBAKI PRESIDENT	BENJAMIN WILLIAM MKAPA PRESIDENT

APPENDIX II

POLITICAL MAP OF EAST AFRICA