

**THE EAST AFRICAN COMMUNITY CUSTOMS UNION: A CASE STUDY FOR THE
REVIEW OF ITS ENFORCEMENT MECHANISMS ON THE ECONOMIES OF
MEMBER STATES**

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Declaration

I, **Nagadya Hamidah**, do hereby declare that this thesis is my original work. It has not been submitted and it's also not being submitted for any award in this institution or any other institution.

Signed.....

Dated

This thesis has been submitted with my approval as the university of Nairobi supervisor

Dr: Jackson Bett

Signed.....

Dated.....

Acknowledgement

I would like to express my profound gratitude to the Almighty who gave me the capacity to do it, my father who substantially facilitated me financially and rendered me assistance where he could, my late mother, grandmother, brothers, and sister who motivated me in this journey.

I would also like to appreciate my supervisor who gave me invaluable assistance, guidance, support and insightful comments in writing this thesis.

May the Almighty bless you all.

Dedication

This thesis is dedicated to my father Mr. Ismael Muyise who is an icon in my life and who has greatly facilitated me to achieve my dreams and who inspired me to excel in everything I do, my late mother (May the good Lord rest your great soul in eternal peace) and my sister Mariam, my brother Ahmed, Musa, Ismail, Ibrahim and Rajab, my grandmother Christine and my mother Maureen and Rebecca who encouraged me. May the Almighty Bless you all abundantly.

Abstract

This study establishes the loopholes within the institutional legal framework of the East African Community Customs Union; in this case the focus was on the lack of the enforcement powers of the council or directorate of customs to enforce the customs law of the Community which leads to rampant dumping, smuggling of goods, tax evasion, tax avoidance, fraud, and corruption. In addition, the research examined the impact of the unlimited discretionary powers of the commissioners of customs in the enforcement of customs law, whereof the research revealed that it leads to tax evasion, corruption, dumping of goods and smuggling.

This study reviews the East African Community Customs Union enforcement mechanisms of Customs laws in the member states territories. Furthermore it advances the effects of the East African Community Customs Union enforcement mechanisms on the economies of member states that is to say it establishes the enforcement mechanisms used by the member states in the enforcement of customs law, their associated challenges, and positive effects plus also other impediments in the enforcement of customs law which are not the gist of this research.

It also investigates a comparison between the European Union Customs Union and the East African Community Customs Union in respect to their legal framework on enforcement of customs law, whereupon the Treaty on the Functioning of European Article 2(1) establishes the European Union's exclusive competence on matters concerning custom and the Treaty on the European Union Article 17(1) provides for the enforcement powers of the European Commission

which the Treaty on the Establishment of the East African Community doesn't provide to the Community, the Council or the Directorate of Customs.

Additionally, the study establishes operational principles used by the European Union in the enforcement of customs law that is the principle of Proportionality and Conferral which are provided for under Article 5 of the Treaty on the European Union. It also establishes the principle of Subsidiarity which provides authority to the Union to act where it has no exclusive competence in order to attain its objectives whereas the Treaty on the Establishment of the East African Community defines it only to mean multi-level participation of citizens of member states in the matters of the Community.

In brief the Treaty on the Establishment of the East African Community doesn't provide the community with power to act in circumstances where the member states fail to act as per their obligations; in this case enforcing the customs law and neither does it give authority to the council or the directorate of customs to enforce the customs law of the community nor does it have an equivalent principle that gives the Community authority to do so. This has a great negative impact on the administration, management, and enforcement of customs law which leads to rampant tax evasion among others which affect the development of member states economies.

Further, the study also addresses the strategies established by the European Union Customs Union to ensure compliance with customs laws and also the lessons that can be learned by the East African Community Customs Union from the European Union Customs Union in regards to enforcement of customs laws.

Lastly, it concludes and gives recommendations to the whole study on how the East African Community Customs Union can attain success on the enforcement of customs law therefore, reducing the high level of tax evasion, corruption, dumping of goods and smuggling which are destroying the East African Community member states economies.

List of abbreviations

AEO	Authorised Economic Operator
AU	African Union
COMESA	Common Market for Eastern and Central Africa
EAC	East African Community
EACDF	East African Community Development Fund
EAC CMA	East African Community Customs Management Act
EACN	EU Contact-point network Against Corruption
EAC CU	East African Community Customs Union
EC	European Commission
EU	European Union
EU CU	European Union Customs Union
EPZ	Export Processing Zone
GDP	Growth Domestic product
IE	That is to say
IGAD	Intergovernmental Authority on Development
KIFWA	Kenya International Freight and Warehousing Association
KRA	Kenya Revenue Authority

M&E	Monitoring and Enforcement
NTBs	Non-Tariff Barriers
OECD	Organization for Economic Co-operation and Development.
OLAF	European Anti-Fraud Office
PCA	Post Clearance Audit
PIN	Personal Identification Number
RTAS	Regional Trade Arrangements
TEEAC	Treaty on the Establishment of the East African Community
TEU	Treaty on the European Union
TFU	Treaty on the Functioning of the European Union
TIN	Tax Identification Number
UNDP	United Nations Development Programme
URA	Uganda Revenue Authority
VAT	Value Added Tax
WCO	World Customs Organization

Statutes and policies

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- Council Regulation 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax [12/10/2010] OJ L 268.
- Council Regulation (EC) No 515/97 of 13 March 1997 on Mutual Assistance between the Administrative Authorities of the Member states and Cooperation between the Latter and the Commission to ensure the Correct Application of the Law on Customs and Agricultural matters ([22/3/1997] OJ L 82/1.
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- The East African Community Customs Management Regulations, 2010.
- EAC, (2004) Protocol on Establishment of the East African Community Customs Union. Published by the EAC Secretariat, Arusha Tanzania.
- European Commission Brussels, Commission Staff Working Paper Action Plan to Fight Against Smuggling of Cigarettes and Alcohol along the EU Eastern Border Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy [24/6/2011] sec (2011) 791 Final {com (2011) 376 final.
- European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions for a European Industrial Renaissance, SWD(2014) 14 final, COM (2014)14.
- European Commission, Introduction to Trade Defence Policy.
- EUROPOL Strategy 2010-2014.
- The European Union Mutual Assistance Agreement Decision No 878/2007/EC

- G20 Anti –Corruption Action Plan 2013-2014.
- Hercule II programme [25/07/2007] OJ L 193/18).
- South African Development Community Protocol against Corruption.
- Southern Africa Development Community Protocol on Politics, Defence and Security Co- operation.
- The 2002 Southern African Customs Union Agreement.
- The Protocol on Mutual legal Assistance in Criminal Matters.
- The Revised Arusha Declaration of the Customs Co-operation Council Concerning Good Governance and Integrity in Customs.
- The World Customs Organization Integrity Development Guide.

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CHAPTER ONE

Introduces the loopholes in the institutional legal framework of the EAC CU with respect to enforcement of customs law in member states territories

1.0 Introduction

The East African Community is the regional intergovernmental organization of the Republics of Burundi, Kenya, Tanzania, Rwanda and Uganda with its headquarters in Arusha Tanzania.¹ A customs union is defined as the merging of two or more countries within a single customs area with a common external tariff ie the tariffs originally levied on goods between those countries is either dismantled or removed based on an agreed scheme and that common tariffs are charged on all goods coming from non-member states.²

The history of the customs union dates back to the 19th century when Uganda and Kenya agreed to form it in 1917 whereupon Tanzania joined in 1927.³ However numerous attempts to establish it in the past failed due to various reasons on each formulation; it's down fall in 1948-1961(East

¹ *Black's Law Dictionary* (West 2009), at p.443.

² Aileen Mallya, "EAC To Hold Regional Forum On Customs And Trade Facilitation This Week" (*Customs.eac.int*, 2015), at p. 1.
<http://www.customs.eac.int/index.php?option=com_content&view=article&id=122:eac-to-hold-regional-forum-on-customs-and-trade-facilitation-this-week&catid=1:latest-news&Itemid=163> accessed on 7 July 2015.

³ "Kamala Diodorus B, The Achievement And Challenges Of The New East African Community Co-Operation 2009" at p. 5.

(2015)<http://www.google.com/search?q=+history+of+the+east+african+Community+pdf&hl=en&gbv=2&oq=+history+of+the+east+african+Community+pdf&gs_l=heirloom-serp.3..0i22i30.184414.198436.0.198671.36.33.0.1.1.1.2674.13355.9j7j6j5-9j9-2.33.0...0...1ac.1.34.heirloom-serp..21.15.2599.jGXfk2XRjzo> <
<http://www2.hull.ac.uk/hubs/pdf/memorandum58.pdf> > accessed on 9 February 2015.

African High Commission) and East African Common Services Organisation in 1961-1967 was attributed to lack of a joint planning, a fiscal policy, separate political policies and Kenya's dominant economic status.⁴

In 1977 the EAC that had succeeded collapsed because of unequal distribution of costs, benefits and personal clashes between the heads of states. It was until 30th November 1999 that the Treaty for the Establishment of the EAC was signed and then come into force on 7th July 2000 following the ratification of the three member states.⁵ Rwanda and Burundi acceded to it on 18th June 2007 and became full members of the Community on 1st July 2007.⁶

Its historical failure in the past is also attributed to poor administration and management of it, lack of trust amongst each other, lack of participation from the private and civil society sector in the co-operation activities, inequality in sharing of benefits, the difference in the levels of development, lack of adequate policies and laws within the EAC, this is evidenced by divergent

⁴ Ibid.

⁵ < http://www.eac.int/index.php?option=com_content&id=1:welcome-to-eac&Itemid=53 > accessed on 9 August 2015.

⁶ Kiraso Beatrice, 'Brief Overview Of The East African Community' Paper Presented At The East African Community Sensitization Programme (May 2010), at p. 11.

Google.com

(2015)

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=6&ved=0CD8QFjAFahUKEwjTwfyWzN3GAhVvWtsKHWvqA5s&url=http%3A%2F%2Fmak.ac.ug%2Fdocuments%2Fecac%2FSensitizationWrkshps.ppt&ei=e4-mVZOYIu-07Qbr1I_YCQ&usg=AFQjCNFfF76PmOo7C3FeEpd1VTTUCFuBHQ&sig2=RLX4aphFFz3qZjDE6dx17g> accessed on 7 March 2015.

customs procedures, documents and laws in the past.⁷ It is of recent that the EAC member states harmonized the documents and procedures (EAC harmonized procedure manual) that operate within the EAC except those that come out of the Community (the certificate of conformity addressed to a specific partner state is inadmissible in the other member state).⁸ However there is still a loophole with the law governing the EAC CU as it does not provide either council or the directorate of customs with powers to enforce the customs law which obstructs the success of the EAC CU.

The lessons that can be learnt from the past in reference to the enforcement of the customs law of the Community requires amending either the Treaty for the Establishment of the EAC, the EAC CMA or the Protocol,⁹ to provide the council or the directorate of customs with powers to enforce the customs law of the Community in the member states territories. This will eradicate the problem of slow enforcement of customs law by member states as well as dealing with tax evaders, avoiders, corrupt officials, dumping and smuggling of goods. Further it will also deal with the issue of conflicting interests of partner states plus establishing regional institutions to deal with various inadequacies that led to the failure of the past regimes example creating a regional body to deal with the tax issues among others.

1.2 Statement of the problem

The Treaty for the Establishment of the EAC, the Protocol on the Establishment of the EAC Customs Union and the EAC Customs Management Act are inadequate in respect to the

⁷ (2015) <<http://eacgermany.org/wp-content/uploads/2014/05/GIZ-EAC-Factsheet-EAC-History.pdf> > accessed on 5 October 2015.

⁸ The Protocol for the Establishment of the East African Customs Union, art 13.

⁹ Ibid.

authority furnished to the council of ministers and the directorate of customs in terms of enforcing the customs law of the Community.

This is evidenced by **Article 75 (3)** of the Treaty which provides the council with powers to establish an institution and confer authority to it, whereof the powers to be furnished by the council to the authority is not specified and neither does it stipulate that the council has mandate to enforce the customs law of the Community nor the institution established by it.¹⁰

Further the Protocol on the Establishment of the EAC Customs Union doesn't either provide the council or directorate of customs with authority to enforce the customs law of the Community. What it provides is that the administration of the Community is to be governed by customs law, whether legal, administrative or institutional.¹¹

In addition the EAC Customs Management Act also doesn't provide the council or the directorate of customs with powers to enforce the customs law of the Community, although it establishes the directorate of customs and its mandate. The only authority it furnishes with the directorate of customs that links to the enforcement of customs law is under **section 3** which includes the responsibility to initiate policies on customs, trade related matters in the community and co-ordination of the same in the partner states.¹²

¹⁰ The Treaty for the Establishment of the East African Community.

¹¹ The Protocol on the Establishment of the East African Customs Union, art 34.

¹² The East African Community Customs Management Act.

Further **section 4** of the aforementioned Act renders more emphasis when it provides that without prejudice to the generality of section 3(b) the directorate shall in relation to the management and administration of customs co-ordinate and monitor the enforcement of customs law of the Community.¹³

It's clear from the foregoing provisions of the Treaty for the Establishment of the EAC, the Protocol on the Establishment of the EAC Customs Union and EAC Customs Management Act that neither the council nor the directorate of customs have mandate to enforce the customs law of the Community in partner states territories.

Apparently this is evidenced by the public notice issued by the Rwanda Revenue Authority Customs Service Department which stated pursuant to the Revised EAC Customs Union Rules of Origin 2015 that cooking oil manufactured in the EAC partner states no longer qualifies for a community tariff treatment whereupon Mr: Kenneth Bagamuhunda Director Customs for the secretary general EAC secretariat wrote to Mr. Innocent Safari Permanent Secretary Ministry of EAC Affairs Rwanda to reconsider the decision they passed in respect to the grounds and justification made in the letter.¹⁴ The letter clearly expressed that the directorate of customs and the council have no powers to enforce the Revised EAC Rules of Origin 2015 in member states territories. This is evidenced by the last paragraph where he stated that “please accept, permanent

¹³ Ibid.

¹⁴ The East African Business Council, Trade and Policy Advocacy, 19 April 2016.
<<http://www.eabc.info/resources/view/trade-and-policy-advocacy-updates-as-at-19th-april-2016>>
accessed on 22 August 2016.

secretary, the assurances of my highest consideration”.¹⁵ In other words directorate of customs letter was persuasive not authoritative/commanding.

The challenge generated by this is that it leaves the enforcement of customs law in the hands of member states customs administrations and revenue i.e. the commissioners of customs and revenue appointed in accordance with the partner states legislations. This leads to slow, poor and non-enforcement of customs law consequently causing tax evasion, dumping of goods, smuggling among others.

This is a loophole that exists in the legal framework of the EAC CU that needs to be addressed by an amendment of either the Treaty for the Establishment of the EAC or EAC Customs Management Act so as to provide enforcement powers to either the council or directorate of customs and other related matters as seen in chapter 5. The provision of it in either of them will eradicate the problem of tax evasion among others where the commissioners of customs fails to enforce the customs law, the directorate or the council can step in to enforce them. This will eventually lead to the achievement of the mandate of the EAC CU as enhanced under Article 3 of the protocol.¹⁶

¹⁵ Ibid.

¹⁶ The Protocol on the Establishment of the East African Customs Union.

1.3 Justification of the problem

This study is justified on the basis that although there exists a wealthy of literature on the impact of the EAC CU among partner states generally, there is an apparent scarcity regarding the treatment of the problem that this paper seeks to address.

Apart from the academic purpose, the study is important as it addresses a loophole within the institutional legal framework of the EAC CU which has a bearing on the economies of member states, its motivated by my passion for regional integration.

1.4 Significance of the study

This research has an overall significance in expanding on the existing knowledge on the effects of the EAC CU enforcement mechanisms on member states economies.

1.5 Hypothesis

The hypotheses of this study are as follows:

1. The current legal frame work of the EAC CU is inadequate in regulating the enforcement of customs law in member states territories in so far as it does not provide the council or the directorate of customs the authority to enforce it.
2. There is need to either amend the Treaty on the Establishment of the EAC or the EAC Customs Management Act to address the challenges posed by the lack of enforcement powers of the council or the directorate of customs.

1.6 Research question

Does the existing institutional legal framework of the EAC CU sufficient to enable compliance to customs law

What are the major current EAC CU enforcement mechanisms of customs law and their associated challenges in the enforcement of customs law

What is the impact of the EAC CU enforcement mechanisms of customs law on the economies of member states

What are the legislative and institutional reforms necessary to promote effective and efficient enforcement of the customs law of the Community

1.7 Statement of objectives

1.7.1 General objective

The overall objective of the study is to review the EAC CU enforcement mechanisms of customs law on the economies of member states.

1.7.2 Specific objective of the study

To study the legal regime of the EAC CU in respect to the enforcement of customs law of the Community.

To identify the major current EAC CU enforcement mechanisms of customs law and their inadequacies in the enforcement of customs law.

To identify specific effects posed by the EAC CU enforcement mechanisms on the economies of member states.

To compare the EAC CU and EU CU in terms of their legal frame work on matters relating to enforcement of customs law.

To suggest reforms which address the loopholes within the institutional legal framework of the EAC CU.

1.8 Theoretical framework

Among other theories of law, this research paper is centered on is the positivist approach as it is concerned with the reviewing of the EAC CU enforcement mechanisms of customs law, their associated challenges in the enforcement of customs law and their effects on the economies of member states. The reason for adopting the positivist approach to the exclusion of the natural law lies in the fact that the research paper is focused on the principles formulated under regional and national legislations in the enforcement of customs law.

This research is focused upon looking at written law and not the morality of the actions taken by the member states of the EAC. The research rotates on positive law due to the fact that it's a law that is procedural in character hence enforcement of customs law is procedural in character. Thus it is all about the EAC CMA inadequacies in respect to enforcement of the customs law of the Community that this paper is concerned with, specifically section 3 and 4 of the EAC CMA and Article 75 of the Treaty.¹⁷

In addition this paper also considers the realist approach as a method of looking at the existing laws on the EAC customs union. This approach facilitated in understanding the law relating to

¹⁷ The Treaty for the Establishment of the East African Community .

EAC CU from the economic perspective. It helped to explain why the EAC CU has not largely achieved its mandate as proclaimed under Article 3 of the Protocol.¹⁸

The historical approach is vital in this paper since it is useful in the understanding the background of the EAC CU enforcement mechanisms of customs law, though this school focus was on the challenges faced by the EAC CU in terms of enforcement of customs law.

It adheres to the structural functionalism theory by Emile Durkheim, (1858-1917) which proposes that a human society is like an organism and is made up of structures called social institutions. This theory helped in the understanding of the value/importance of the council or directorate of customs in the enforcement of customs law of the community in member states territories.

It accords to the utilitarianism theory which propounds that the best policy is that which does the greatest good for the largest number of people.¹⁹ This theory helped in the understanding of the rationale behind the council having the oversight power to enforce the customs law in member states territories as contrasted to the commissioners of customs of member states that is to say it would be for the greatest good of the community if it's provided with oversight powers to enforce the customs law in member states territories.

¹⁸ The Protocol on the Establishment of the East African Customs Union.

¹⁹ *Black's Law Dictionary* (West 2009), at p.1686.

It also helped to substantiate why the unlimited discretionary powers of the commissioner in certain respects as per the EAC CMA is disadvantageous to the EAC CU objectives as enshrined in article 3 of the Protocol.²⁰

In addition it also proved how advantageous it would be if the EAC had exclusive competence in matters of customs especially in the enforcement of customs law in member states territories.

Furthermore this theory helped to show how significant the treaty for the establishment of the EAC needs to be amended to include the principle of conferral and proportionality as provided in the Treaty of European Union.

1.9 Research Methodology

To achieve the objectives of the study I used a mixture of qualitative and quantitative research design. I used quantitative research design to describe the growth rates and income per capita of the EAC member states in respect to the impact enhanced by the EAC CU enforcement mechanisms of customs law on their economies in numbers. I applied qualitative research design to explain in detail the EAC CU enforcement mechanisms of customs law, their associated challenges and the effects imposed by them as far as enforcement of customs law is concerned on the economies of member states.

Secondly I used both primary and secondary data. That is to say I used individual Interviews, questionnaires whereupon I administered them to experts on issues concerning the EAC CU. I interviewed transporters, importers, exporters and customs agents who have practiced more than

²⁰The Protocol on the Establishment of the East African Customs Union.

10 years plus customs officials; by this I used purposive sampling whereupon I selected those people who are knowledgeable and experienced in EAC customs union affairs. I used my personal judgment to select those people because I thought they would be in best capacity to give me the information I need and relevant for my study.

Thirdly I used Treaties, Statutes, Policy documents and practicing notes issued by revenue authorities of EAC member states whereupon I gathered my primary information. Fourthly I visited various libraries in Nairobi, examined the available literature; trade reports, scholarly writing and studies which were conducted by the government/organizations.

Fifthly I also used legal opinions and commentaries written on the enforcement mechanisms of the EAC customs union. Finally I used internet to gather information relevant for my research.

1.10 Limitations

The study reviews the major current EAC CU enforcement mechanisms of customs law, the respective challenges associated with each enforcement mechanism in the enforcement of customs law and also the effects both positive and negative imposed by them on the economies of member states. It also outlines a comparison between the EAC CU and EU CU in terms of the legal framework on the enforcement of customs law only. The study does not discuss in detail the other factors affecting the economies of member states.

1.11 Literature review

Although there is a plenty of literature on the EAC in general, there is scarcity of it when it comes to the EAC CU in respect to the problem which this paper seeks to address. However,

many vital aspects of this research, relating to both form and substance, have been crafted with heavy reliance being placed on the existing literature.

Below is the review of the literature on the EAC CU enforcement mechanisms of customs law by the EAC member states, the challenges experienced by each enforcement mechanism in the implementation of customs law in member states territories and the effects imposed by them on the economies of partner states.

In the study of **Mugisha and Mugoya** on evaluating the implementation and the impact of the EAC CU covering the three original partner states, their general finding were that the EAC CU has led to increased cross border trade among partner states.²¹ It also establishes the absence of authority by the directorate of customs or the council to enforce the customs law of the Community as one of the gaps in the institutional legal framework of the EAC CU.

Although it identifies the lack of enforcement power by the council and the directorate of customs as one of the loopholes in the institutional legal framework of the EAC CU in reference to enforcement of customs law in member states territories, it does not establish the enforcement mechanisms used by member states customs administrations in the enforcement of customs law. It also doesn't establish the challenges experienced by each enforcement mechanism in the

²¹ Mugisha and Mugoya On Evaluating The Implementation And The Impact Of The EAC CU Covering The Three Original Partner States (2015) at p. 27-43.

Google.com, "Google" (2015).

https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1OPRB_enKE629KE629&ion=1&espv=2&ie=UTF-8#q=impact+of+the+EAC+CU+ppt
accessed on 20 April 2015.

implementation of customs law, the effects they impose on the economies of member states and the remedies this research establishes in chapter five.²²

In reference to the **report on options for strengthening EAC'S trade integration**,²³ the recommendation given in respect to the EAC CU includes among others elimination of the non tariff barriers herein after referred to as NTBs and member states phasing out the bilateral trade arrangements. However it doesn't stretch the lack of enforcement powers of directorate of customs/ council as a loophole in the institutional legal frame work of the EAC CU. It also doesn't discuss the enforcement mechanisms of customs law by the EAC member states and neither does it give a way forward to resolve the inadequacies when it comes to the enforcement of customs law of the Community which this research seeks to remedy in order to avoid dumping, smuggling and tax avoidance.

According to the book **the East African Community after Ten Years Deepening Integration**,²⁴ it expresses out obstacles facing the EAC CU to include NTBs and weak administrative capacity among others. Although the book entails the challenge of weak administrative capacity, it does not specifically establish the effect of lack of enforcement power of the directorate of customs/council as an impediment to the success of EAC CU on the

²² Ibid 45.

²³ World Bank, East African Community, Options For Strengthening The East African Community 'S Trade Integration: Report No. 40978-AFR, 2007 (2015) at p. 29-30.

World Bank, East African Community, Options for Strengthening the East African Community 's Trade Integration: Report No. 40978-AFR, 2007 at p. 29 -30. (2015)

<[\[wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/11/12/000333037_20081112013243/Rendered/PDF/409780SR0white1BOX0334059B01PUBLIC1.pdf\]\(http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/11/12/000333037_20081112013243/Rendered/PDF/409780SR0white1BOX0334059B01PUBLIC1.pdf\) > accessed on 21 March 2015.](http://www-</p></div><div data-bbox=)

²⁴ Davoodi Hamidi R, The East African Community after Ten Years Deepening Integration 2012 at p. 12 -13. <<https://www.imf.org/external/np/afr/2012/121712.pdf> > accessed on 22 May 2015.

economies member states which my research seeks to address. It also doesn't establish the enforcement mechanisms of customs law by the EAC member states and neither does it discuss the challenges experienced by each of them as far as enforcement of customs law is concerned.

According to the **Kenya Institute for Public Policy Research and Analysis** in their paper Kenya's trade within the East African Community ,²⁵ they expressed out the challenges facing it while trading with other partner states, these include; (a) Tedious customs clearance procedures. (b) Non conclusiveness in standard certification. (c) Variance in the procedure of obtaining licenses. (d) Absence of traveling document and (f) language barrier. I credit their work but I however introduce a challenge of lack of the enforcement powers of the council/ directorate of customs in the enforcement of the customs law of the Community. In addition I reviewed the enforcement mechanisms of customs law used by the EAC member states which the institution's research did not establish.

According to the **4th EAC Development Strategy**, the strategic interventions in regards to customs administration include; development and implementation of the EAC Customs Strategy, develop an appropriate model for administering customs in a fully-fledged customs Union, developing an appropriate border infrastructure and institutional framework, building institutional and staff capacity, harmonizing and spearheading of reform and modernization programmes, enhancing good governance and integrity in Customs management, enhancing

²⁵ Steven Buigut, 'An Assessment Of The Effects Of The East African Community Customs Union On Member Countries' (2012) 4 International Journal of Economics and Finance at p. 21-22.
<http://www.brookings.edu/~media/Research/Files/Reports/2012/1/intra%20african%20trade/01_kenya_trade.PDF> accessed on 2 March 2015.

awareness and communication on customs rules and procedures, developing and institutionalizing monitoring and enforcement framework within the region, reviewing of the EAC CMA and Regulations. However it doesn't specifically provide that the EAC CMA should be amended to provide either the council or the directorate of customs with powers to enforce the customs law of the Community which my research examines.²⁶

According to the Department for Business, Innovation and Skills **in its paper of regional integration and trade in sub Saharan Africa**²⁷, they came up with formal and informal tariff barriers which constrain intra-regional trade. However in their paper they did not consider lack of enforcement powers of the council to be a threat to the prosperity of trade among the partner states of the EAC CU which this paper seeks to address.

According to **Beatrice Memo** in her paper on **Single Customs Territory**,²⁸ she identified the challenges to the EAC CU to include; difference in the application of law and instruments, weak enforcement mechanisms, non-tariff barriers and complex clearing procedures. Although she stressed out the problem of weak enforcement mechanisms, her paper doesn't clearly specify

²⁶ 4Th East African Community Development Strategy, Deepening and Accelerating Integration (2011/12-2015/16) at p. 53-54.

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http://www.news.eac.int/index.php?option=com_docman&task=doc_view&gid=294&Itemid=73 >
accessed on 3 April 2015.

²⁷ A. Oyejjde, 'Trade Policy And Regional Integration In The Development Context: Emerging Patterns Issues And Lessons For Sub-Saharan Africa' (1998) 7 Journal of Africa Economies at p. 11.

< https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32466/11-978-regional-integration-and-trade-africa.pdf > accessed on 4 March 2015.

²⁸ Memo Beatrice, 'Single Customs Territory –the East African Community Model,' paper presented in Kenya (1 July 2014), at p. 5-6.

<https://www.eiseverywhere.com/file_uploads/e26c1737987db648d42027e2c9149ae1_D2RT2BeatriceMemo.pdf> accessed on 22 March 2015.

how the lack of the enforcement power by the council or the directorate of customs is a loophole within the institutional legal framework of the EAC CU and also how the unlimited discretionary powers of the commissioners of customs of partner states lead to dumping of goods and tax evasion which this research discusses. Further her paper doesn't discuss the enforcement mechanisms of customs law by the EAC member states, their associated challenges in the enforcement of customs law and the effects imposed by them on the economies of partner states which this research addresses.

According to **OECD Trade Policy by the trade directorate and trade committee**²⁹ this paper establishes the NTBs faced by developing countries while trading with developed countries. It examines various obstacles to the trade experienced by developing countries. It identifies weak customs administrations, inefficient procedures, excessive formalities and administrative bureaucracy among others as impediments to the success of trade between them and the developed countries. However it doesn't discuss in detail the EAC CU enforcement mechanisms of customs law and neither does it specify the lack of enforcement power by the council or the directorate of customs as a loophole within the institutional framework of the EAC CU which this research establishes.

²⁹ Fliess B, Lejarraga I, 'Analysis of non-tariff barriers of concern to developing countries', Organization for Economic Co-operation and Development Trade Policy paper Working Paper No. 16 at p. 14. <<http://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZACC/2009/6.html&query=Lufuno%20Mphaphuli>> accessed on 6 February 2015.

According to **Kilungya, S.M. in his paper to the stakeholders on the impact of the EAC CU**,³⁰ he identified a diversity of challenges faced by the directorate of customs to include the mandate being limited largely to co-ordination, lack of enforcement powers by it, slow implementation of decisions reached regionally, no institutional structure to deal with policy harmonisation and limited personnel. Although he stressed out a variety of challenges, he never discussed the impact of lack of enforcement powers by it towards the development of trade in the EAC neither did he provide a remedy that this research gives in chapter 5 nor does his paper substantively furnish the effects of the EAC CU enforcement mechanisms on the economies of member states. It also doesn't review the enforcement mechanisms of customs law used by the EAC member states which this research establishes.

According to **Masheti Masinjila** in his paper on **Gender Dimensions of Cross Border Trade in the East African Community**,³¹ in his research he found out that corruption was one of the leading challenges to the prosperity of trade among the partner states. However he did not come up with the solution to the problem which my research interrogates/examines.

³⁰ Kilungya, S.M, 'Impact of the EAC Customs Union' paper presented to the stake holders', Kenya Revenue Authority (9 April 2015) at p. 5.

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CB0QFjAAahUKEwiThuPc2t3GAhV0CdsKHUC0AKE&url=http%3A%2F%2Fwww.revenue.go.ke%2Fcustoms%2Fpdf%2FMoEAC_KRA_SENSITIZATION.ppt&ei=vJ6mVZO4AvSS7AbA6IKICg&usg=AFQjCNFyLyCLQDFtc9FFjQOArhijVuZBA&sig2=M4n2gWQHqHphc1yiEdKc1w> accessed on 7 March 2015.

³¹ Masinjila Masheti, 'Gender Dimensions of Cross Border Trade in the East African Community - Kenya/Uganda and Rwanda/Burundi Border', African Trade Policy Centre Work in Progress No. 78, Economic Commission for Africa, October 2009 at p. 3.

<<http://www1.uneca.org/Portals/atpc/CrossArticle/1/WorkinProgress/78.pdf>>accessed on 15 March 2015.

The **General Resource Centre** conducted a study on the NTBs in trading within the East African Community focusing on trade trends among the partner states before and after the introduction and implementation of the protocol. Their report showed that there has been a decreasing trend in the intra EAC trade among the partner states.³² However it does not either give the enforcement mechanisms of customs law used by the EAC member states and their challenges in the enforcement of the EAC customs law or the impact of EAC CU enforcement mechanisms on the economies of member states which my research looks at.

According to the **IMF Country Report**,³³ it establishes the benefits of trade liberalization and barriers to regional integration. It identifies overlapping membership of member states as a justification for the slow harmonization of standards and regulations. However it doesn't establish other challenges which this study discusses which include but not limited to the lack of exclusive competence by the community in respect to issues concerning customs which is one of the leading reasons for the failure of the EAC CU to achieve its objectives as enshrined in the protocol.³⁴

³² Hangi M A, *The Non Tariff Barriers in Trading within the East African Community* (2010), Economic and Social Research Foundation, CUTS international Geneva Resource Centre at p.7-11. <https://www.google.com/?gws_rd=ssl#q=General+Resource+Centre+%282010%29+conducted+a+study+on+the+non+tariff+barriers+in+trading+within+the+East+African+Community + > accessed on 10 February 2015.

³³ International Monetary Fund, *Kenya, Uganda, and United Republic of Tanzania Selected Issues: IMF Country Report No (08/353)*, (hereafter IMF country Report), at p. 58. <<https://www.imf.org/external/pubs/ft/scr/2008/cr08353.pdf> > accessed on 16 march 2015.

³⁴ The Protocol on the Establishment of the East African Customs Union, art 3.

In respect to **Tralac Working on tariff liberalization impacts of the EAC Customs Union in Perspective**,³⁵ the study establishes the following NTBs; duty and tax administration problems, corruption, tedious customs procedures, licensing procedures, police checks, road blocks, immigration procedures and transit difficulties. Although it discussed about the tax administration problems, it never looked at the lack of enforcement powers by the council to be a loophole within the institutional legal framework of the EAC CU, which is the objective of this research. It didn't also discuss the enforcement mechanisms of customs law used by the EAC member states which this study looks at.

In the paper written by **Evarist Mugisa on evaluation of the implementation and impact of the EAC Customs Union**,³⁶ he identified various challenges of the EAC CU in respect to the directorate of customs and others. This includes the fear to loss national sovereignty, structural rigidities, NTBs, language barriers, unrecorded cross-border trade, overlapping membership, mandates of the directorate of customs and trade being limited largely to coordination ie not much involvement in technical issues, lack of enforcement powers by the directorate of customs, slow response by partner states to proposals made, slow implementation of decisions reached regionally, existence of no institutional structure to deal with policy harmonization and Limited personnel.

³⁵ Stahl H M, 'Tariff Liberalization Impacts of the EAC Customs Union in Perspective,' (August 2005), Tralac Working Paper No 4/2005 at p. 30.
<http://paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/20050919_WP4_Stahl.pdf> accessed on 10 April 2015.

³⁶ Mugisa Evarist, 'Evaluation of the Implementation and Impact of the EAC Customs Union' at p. 15.
<https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1OPRB_enKE629KE629&ion=1&espv=2&ie=UTF-8#q=impact+of+the+EAC+CU+ppt> accessed on 15 April 2015.

Further although his paper revealed various challenges, it doesn't give a remedy to the problem of the lack of the enforcement power of customs law by the directorate of customs which is the main reason for my research. It also doesn't review the EAC CU enforcement mechanisms of customs law which this research does.

According to the **4th EAC development strategy**³⁷ the achievements registered in respect EAC CU includes; promotion of the EAC as a single investment area, improved market access, accessibility to cross-border resources, increase in government revenues and improvement in EAC intra-trade performance. Although the EAC Development Strategy cites all those benefits, there are also those that have not been mentioned that this research will establish among them is the promotion of international logistics.

According to **Schiff and Winters** in their research on **regional integration and development**, they expressed in their work that a customs union offers lower trading costs and greater regional integration provided they enforce the non-tariffs protection measures.³⁸ However their research did not provide an effective way to enforce the non-tariffs protection measures on member states economies which my study examines.

³⁷ 4th East African Community Development Strategy, *Deepening and Accelerating Integration* (2011/12-2015/16) at p. 32.

<http://www.news.eac.int/index.php?option=com_docman&task=doc_view&gid=294&Itemid=73 >
accessed on 3 April 2015.

³⁸ Richard N. Cooper, Maurice Schiff and L. Alan Winters, 'Regional Integration And Development' (2003) 82 *Foreign Affairs* at p. 81 -82.

<https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1OPRB_enKE629KE629&ion=1&espv=2&ie=UTF-8#q=Schiff+and+Winters+%282003%29+in+their+research+on+regional+integration+and+development >
accessed on 27 March 2015.

Considering **Otieno and Shinyekwa** in their paper **trade, revenue and welfare effects of the EAC customs union principle of asymmetry on Uganda**, according to them there was an increase in trade creation and welfare effects due to the reduction of NTBs.³⁹ However their paper does not provide for the impact of the EAC CU enforcement mechanisms of customs law on the economies of partner states which this research seeks to address.

According to **Odhiambo** in his article on **Regional integration** argues that NTBs in EAC results in delays and increased costs which hinder the free movement of goods and services.⁴⁰ However he doesn't discuss the effects of the EAC CU enforcement mechanisms of customs law on the economies member states which this research interrogates.

The final report of the **EABC on the impact of the EAC customs union on businesses**,⁴¹ establishes the benefits of the EAC CU on businesses to include faster movement of goods, increased competition among business people, expansion of businesses, increased turn over in

³⁹ Otieno, L and Shinyekwa I. (2011), Trade, Revenue and Welfare Effects of The East African Community Customs Union Principle of Asymmetry on Uganda: An application of Wits-Smart simulation Model, Economic Policy Research Centre at p. 1- 2.

See Semkunde M A, 'An assessment of the Impact of the East African Customs Union to the Performance of Tanzania's intra-East-African Trade,' 2011 at p. 11.

<https://www.google.com/webhp?sourceid=chrome-instant&rlz=1C1OPRB_enKE629KE629&ion=1&espv=2&ie=UTF-8#q=Otieno%2C+L+and+Shinyekwa+I.+%282011%29.+Trade%2C+Revenue+and+Welfare+Effects+of+The+East+African+Community+Customs+Union+Principle+of+Asymmetry+on+Uganda > accessed on 2 April 2015.

⁴⁰ Semkunde M A, above nl at 15.

⁴¹ East African Business Council, *EABC Study on Impact of the EAC Customs Union on Businesses: Regional Trade Facilitation Programme: Final Report* (EABC, August 2008) (herein after EABC report) at p. 28-29.

< http://www.eabc.info/uploads/EABC_Study_on_Impact_of_EAC_CU_on_Businesses.pdf > accessed on 20 April 2015.

form of exports and investment. Although the study revealed numerous effects of the EAC CU on business, it did not discuss the impact of lack of enforcement powers of the directorate of customs or the council on the growth of trade in the EAC region which this research examines. Further it did not also review the enforcement mechanisms of customs law used by the EAC member states and also the challenges experienced by each in the enforcement of customs law which this research establishes.

The World Bank paper on Regional Integration Concepts, Advantages, Disadvantages and Lessons of Experience,⁴² expressed various advantages of regional integration to include trade gains, increased returns, competition and investment. It also identified overlapping membership of member states and limited institutional capacity among others as challenges facing the development of regional integration in African countries. However the paper failed to establish the effects of lack of enforcement power of the directorate of customs of EAC CU or the council in the enforcement of customs law of the Community which this research seeks to address.

According to the article of **Africa practice on East Africa integration, state of play,**⁴³ the achievements of the EAC CU were cited to include among others increased intra EAC trade ie

⁴² Niekerk L K Van, 'Concepts, Advantages, Disadvantages and Lessons of Experience' paper presented in Mozambique, World Bank (SA Country Office, May 2005), at p. 2- 12.
< <http://siteresources.worldbank.org/EXTAFRREGINICOO/Resources/Kritzinger.pdf> > accessed on 20 March 2015.

⁴³ Africa in Depth, 'Africa practice on East African integration: State of play' (August 2014), at p. 2.
<<http://www.africappractice.com/wp-content/uploads/2014/08/Africa-InDepth-East-African-integration-State-of-play-August-2014.pdf>> accessed on 17 April 2015.

the EAC Secretariat stated that it doubled from US \$ 1617.1million in 2006 to US \$ 3800.7 million in 2010. However it doesn't provide for negative effects of the EAC CU enforcement mechanisms of customs law on the economies of the partner states which this research provides in chapter three.

1.12 Chapter breakdown

Chapter one

This introduces the study; it examines the background of the problem, theoretical framework, literature review, objectives of the study, research questions, hypotheses, methodology, justification, limitation and the chapter breakdown.

Chapter two

This chapter looks at the loopholes within legal and institutional framework of the EAC CU in respect to the enforcement of customs law of the Community.

Chapter three

This chapter provides a review of the enforcement mechanisms of customs law used by the EAC member states, the challenges/ weaknesses experienced by each in the enforcement of customs law and the effects/ impact of the enforcement mechanisms on the economies of member states.

Chapter four

This chapter looks at a comparison between the EAC CU and EU CU in respect to their legal framework on the enforcement of customs law. It also discusses the mechanisms used by the EU

CU to ensure that tax evasion, corruption, fraud, dumping and smuggling of goods are evaded from the union.

Chapter five

This chapter addresses the conclusion and recommendations of the research study.

CHAPTER TWO

The Legal and institutional framework of the EAC CU with respect to the enforcement of EAC customs law in the EAC

2.0 Introduction

This chapter discusses the loophole in the institutional legal frame work of the EAC CU in respect to the enforcement of EAC customs law. It evaluates the EAC CU laws on the issue of enforcement of customs law in member states territories. It specifically looks at how the EAC CU laws are inadequate when it comes to the provision of authority/powers to the council or the directorate of customs to enforce the EAC customs law in member states territories. Further, it also examines how the unlimited discretionary powers of the commissioners of customs negatively affect the enforcement of EAC customs law.

The aforementioned inadequacies in the law governing enforcement of EAC customs law cause smuggling, dumping of goods, tax evasion, tax avoidance, fraud and corruption that lead to unemployment, unfair competition, and poor infrastructure growth.

2.1 The Treaty for the Establishment of the EAC

This Treaty establishes the EAC, it also provides for the institutions to govern the Community under **Article 9**, this includes the Summit, Council, Co-ordination Committee, Sectoral Committees, East African Court of Justice, the East African Legislative Assembly, Secretariat and such other organs as may be established by the Summit.⁴⁴

In respect to my research study which is on enforcement of customs law, my focus is on the policy organ of the Community which is the Council. It's established under **Article 13 of the Treaty**.⁴⁵ It has numerous roles under **Article 14 of Treaty** which include but not limited to carrying out the decisions of the summit, developing, monitoring and updating the implementation programs of the Community.⁴⁶ Although it provides for a multiplicity of functions none of them expressly show that it has authority to enforce customs law in member states territories.

Furthermore, **Article 75(1)** of the Treaty provides that the partner states agree under that chapter in the Treaty to establish a customs union, details of which shall be found in the Protocol for the Establishment of the EAC customs Union. Whereupon among the things that shall be contained in that Protocol include the establishment of a common external tariff, elimination of nontariff barriers among others.

⁴⁴ The Treaty for the Establishment of the East African Community.

⁴⁵ Ibid.

⁴⁶ Ibid.

It also includes under **Article 75(2)** that the establishment of a customs union shall be progressive in the course of the transitional period as shall be determined by the council.

Additionally, **Article 75 (3)** of the **Treaty** provides powers to the council to establish an institution which shall be responsible for the administration of customs. It also includes that the council shall have the authority to give powers to that institution however it doesn't specify the powers the council is to provide to it nor does the provision give powers to the council itself to enforce the customs law which is the center of my research.

The presence of this escalates tax evasion, dumping of goods among others which obstruct the growth of member states economies. In other words, the member states revenue authorities each has a department that deals with customs and enforcement ie it's the member states customs administrations that enforce the customs law of the Community.

Apart from the Treaty not rendering powers to the council or directorate of customs established by the council, it neither provides the powers to any other institution of the Community nor establish any other institution to have authority to enforce the customs law which is a huge gap in the institutional legal framework of the EAC CU as partner states lack sufficient capacity to deal with all the inadequacies entailed in enforcement of customs law ie in terms of funds, gadgets among others which lead to delay and slow enforcement of it which makes the systems vulnerable to tax evasion among others.

2.2 The East African Community Customs Management Act

This is an Act of the Community that provides for the management and administration of Customs and other related matters.⁴⁷ It stipulates in **section 3 of the Act** that the Directorate of Customs as established by the Council under the Treaty shall be responsible for the initiation of policies on Customs and related trade matters in the Community and the coordination of such policies in the Partner States.⁴⁸

Further **section 4 (1) (b) of Act** includes that without prejudice to the generality of section 3, the Directorate shall in relation to management and administration of Customs, co-ordinate and monitor enforcement of the Customs law of the Community.⁴⁹ In other words, the EAC CMA doesn't provide powers to the directorate of customs to enforce the customs law of the Community which makes this research fundamental as member states economies retard in the development due to tax evasion among others.

According to the EAC CU website on the column of legal regime/regulations on the enforcement of customs laws in respect to coordinating and monitoring the enforcement of Customs law of the Community,⁵⁰ the Directorate is obligated to identify hindrances encountered in the

⁴⁷ The East African Community Customs Management Act.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ < http://www.customs.eac.int/index.php?option=com_content&view=article&id=123&Itemid=78# > accessed on 23 November 2015.

enforcement of the Customs law of the Community upon which he/she is responsible for reporting to the Committee and the Council for consideration.⁵¹

Further, he/she is also responsible for coordinating the development and monitoring the implementation of regulations on compliance and enforcement, compile and disseminate information on offenses under Customs laws of the Community in liaison with the Partner States and other relevant international bodies.⁵² Looking at the EAC CU website, it's clear that the directorate of customs and the council has no authority to enforce the customs law. It's a weakness that exists within the legal and institutional framework of the EAC CU that needs a remedy due to the divergent effects it causes like loss of revenue by member states.

In addition **section 5 (1) of the Act** provides for the appointment of a commissioner who is obligated to manage customs in that member state and other staff under the partner states' legislations as it may be coherent in the administration of the EAC CMA and the efficient working of the customs. Secondly, section 5(2) of the Act provides the commissioner with the obligation of managing and controlling of customs.⁵³

Thirdly **section 5 (3) of the Act** constitutes the powers of the commissioner to delegate his obligations to a proper officer subject to restrictions he/she may provide. The proper officer is

⁵¹ <http://www.customs.eac.int/index.php?option=com_content&view=article&id=123&Itemid=78#> accessed on 23 November 2015.

⁵² Ibid.

⁵³ The East African Community Customs Management Act.

defined by the EAC CMA to mean any officer whose right or duty it is to require the performance of or to perform, the acts referred to in this Act.⁵⁴

In reference to the sections discussed above, it's clear that that the current legal framework on the EAC CU is inadequate in regulating the enforcement of customs law in member states territories ie it doesn't provide either the council or the directorate of customs with powers to enforce the customs law of the Community but instead it's the commissioners of customs from member states that have authority to manage and control the enforcement of customs law. This is evidenced by the revenue authorities in the member states as they even have customs enforcement departments in their administrations.

It's a matter of law that we don't have a regional institution established or given authority by either the EAC CMA, the Treaty for the Establishment of the EAC or the Protocol on the Establishment of the EAC CU to enforce the customs law of the Community. It's therefore due to the insufficiency in the legal framework of the EAC CU that makes my research fundamental and significant as it examines the effects of the lack of enforcement powers by either the council or directorate of customs in the enforcement of customs of law, the negative impact it has on the development of member states economies and it also provides a remedy to the problem.

⁵⁴ Ibid.

Unlimited discretionary powers of the commissioners of customs

Apart from the lack of the regional institution to enforce the customs law of the Community, there is also a problem in respect to enforcement of customs law which is the unlimited discretionary powers of the commissioners and the proper officers as exemplified by the EAC CMA in various provisions. The problem with this is that it creates double standards, that is to say, traders find it antagonizing to estimate the decisions of the commissioners of customs as later discussed.

To substantiate on the foregoing, the provisions highlighted below provide undefined discretion to the commissioners of customs of member states, they, however, don't establish requirements or conditions in many instances what the commissioners of customs of member states ought to base on while executing their mandate. In other words, these provisions create too many opportunities for them to abuse their power in the course of executing their obligations which are actually harmful to the prosperity of the EAC CU as far as enforcement of customs law in member states territories is concerned. This evidenced by the workshop of the Uganda Revenue Authority I attained, where a substantial number of people highlighted it as one of the major challenges they face in the enforcement of customs law in member states.⁵⁵

Additionally the non-uniform application of the customs law is expressed in the circumstances where each member state commissioner makes different decisions on the same aspect for

⁵⁵ Uganda Revenue Authority, 'A Work Shop on the Single Customs Territory with the Clearing Agents in Uganda', Silver Springs Hostel, 16th September 2016.

example in one of the workshops I attended that was organized by the Uganda Revenue Authority for the clearing agents in Uganda, many clearing agents expressed their agony that the decisions sometimes made by proper officers or commissioners of customs on the same concept/aspect is normally different and that it creates trade advantage of some traders over others.⁵⁶

Below are some of the sections of the EAC CMA which shows that the commissioner has unlimited discretionary powers.

Section **31(3) of the Act** provides for arrival over land otherwise than vehicle, in respect to this the commissioner has discretionary powers to waive any person of any of all or all the conditions stipulated under the section, this includes but not limited to waving him/her from producing documents/ information required of him concerning the goods.⁵⁷

In addition **section 34 of the Act** provides for the entry of goods, the commissioner has discretion under subsection 3 to allow any goods to be entered before the arrival or such aircraft or vessel.⁵⁸

Further **section 33 of the Act** gives the proper officer authority to impose conditions as he or she may deem fit in respect to unloading and removal of cargo, it includes that unless with the written permission of him/her and subject to the limitations as he/she may prescribe, the goods

⁵⁶ Ibid.

⁵⁷ The East African Community Customs Management Act.

⁵⁸ Ibid.

shall not be unloaded from air craft or vessel arriving from a foreign port except if such goods have been duly entered among others.⁵⁹

Fourthly **section 29 of the Act** provides for vehicles arriving over land, with respect to this section, proper officers have unlimited discretion in allowing entry of a vehicle coming outside EAC to a place other than the port appointed under section 11, they also have them in regard to removing conditions under the section ie he/she can give permission for the goods to be removed from the customs warehouse without entry being made.⁶⁰

Section 115 of the Act furnishes the commissioner with undefined authority to exempt certain goods from import duty once the conditions set by the Act are met or once it proved to his satisfaction that the goods under bond where duly exported or used as such stores as the case may be. The problem with the section is that it does not prescribe the parameters upon which the commissioner will base his satisfaction which creates uncertainties to traders that in the end limits on the development of member states economies as traders are not in a position to predict the decision of the commissioners.⁶¹

Section 116 (1) (c) of the Act provides for exemption of import duty for certain re-import, the problem with this is that it gives the commissioner discretion not to consider subsection (c)

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

whereupon if he/she is satisfied that the owner of such goods before exportation gave notice in writing to the proper officer and also furnished the goods for inspection by him/her at the port or place where they were exported, such goods unless provided by the customs law be exempted from import duty.⁶²

The above sections clearly express out that the commissioners of customs from partner states and proper officers have unlimited discretionary powers that has a larger negative impact on the economies member states. The presence of this in the EAC CMA is a loophole within the legal framework of the EAC CU that has led to tax evasion, tax avoidance, corruption, fraud, dumping and smuggling of goods.

The aforementioned is witnessed by the workshop I went to that was organized by the Uganda Revenue Authority were among the most raised challenge clearing agents raised is the unfair exercise of the discretionary powers by some unjust commissioners which is to their detriment. To them, there was double standards and abuse of power by some unscrupulous commissioners of customs for example in respect to section 31 of the Act where the commissioner can waive the requirement of adducing documents from the trader,⁶³ some traders had sentiments that this was abused by the unscrupulous commissioners as some traders together with some unscrupulous commissioners conspired to evade taxes by not declaring to customs the goods thus leading to

⁶² Ibid

⁶³ Ibid.

trade inequality, loss of revenue by the member state, unfair competition and unemployment among others.⁶⁴

Its due to this that I, therefore, propose that the discretion of the commissioners be limited by amending the EAC CMA or introduction/enactment of an EAC practice note in respect of those provisions that give commissioners of customs unlimited discretionary powers. That is to say by providing parameters or requirements that member states commissioners ought to follow while executing their obligations in regards to those specific provisions of the EAC CMA as already discussed.

Additionally, the breach of their discretionary power should also be made actionable by a regional body like the council due to the nature of its functions as established under article 14 of the Treaty.⁶⁵ This will address the gap that exists in the institutional legal framework of the EAC CU thus leading to the attainment of the goals under article 3 of the Protocol.⁶⁶

Further in respect to the provisions aforementioned the commissioners are given authority in respect to certain aspects that the requirements be fulfilled in accordance to their satisfaction like on the exemption of import duty on re-imports. The problem with this is that it creates uncertainty in the business world as business people or companies cannot predict the decision of

⁶⁴Ibid.

⁶⁵ The Treaty for the Establishment of the East African Community, art 14.

⁶⁶ The Protocol for the Establishment of the East African Customs Union, art 3.

member states commissioners. This is observed by the interview I made with ten customs agents, five exporters and six importers whereupon they expressed their sentiments that the decisions made by commissioners of customs at times in respect to the same matter for different importers or exporters are most times divergent and to them this affects their business operations because it creates trade inequality among other challenges prevail and that's why they prefer to engage in trade malpractices like dumping and smuggling of goods among others. That is to say, taxes become too high and yet some traders who get those trade advantages sell cheaply thus creating unfair competition and unemployment.

Additionally, the unlimited discretionary powers of the commissioners also make abuse of power to be susceptible. Example in Uganda currently the former commissioner general of Uganda revenue authority Allen Kagina has a pending case in the courts of law where upon he is alleged to have misused her powers to issue exemptions to companies not approved by the council which led to the loss of tax 184 billion Uganda shillings, thus affecting the Uganda's economy.⁶⁷ I base on this to suggest that their discretion should be limited by amending the TEEAC or there should be an EAC practice guide in respect of those provisions to provide the parameters upon which member states commissioners ought to follow as they are exercising their mandate under those specific provisions.

Further I also suggest that the breach of those limitations set to be actionable by a regional institution. Adherence to that will address the challenge experienced in the enforcement of

⁶⁷ Kisekka Expedito and Another Vs Uganda Revenue Authority and 2 Others HCSS 56/2015.

customs law and it will also deal with the inadequacies it establishes like dumping, smuggling of goods among others.

However although I don't disregard the commissioners of member states from having discretion but I recommend that there should be a standard exercised by them when it comes to areas where the EAC CMA provides them with discretion or for certain requirements to be proved to their satisfaction. This will enable them to exercise their discretion judiciously/ justly/ fairly, in other words it will not absorb justice to any importer or exporter which will lead to the development of member states economies due to numerous benefits it comes with among them is fair competition, employment of people, increase in trade and revenue collected.

Furthermore it also fastens the procedures of trade as long as they accord to what the following cases establish; Bingham L.J. in *R. v Inland Revenue Commissioners Ex p. MKF Underwriting Agents Ltd*⁶⁸ held that the decision must be clear and unambiguous.

In *Inland Revenue Comrs v National Federation of Self-employed and Small Businesses Ltd*,⁶⁹ it was held that the Revenue officer is entitled to apply a cost-benefit analysis to his duty of management.⁷⁰ In the case of *Shidiack v Union Government*,⁷¹ it was held that when a matter is left to the discretion of an official, his decision is final provided that he has applied his mind,

⁶⁸ [1990] 1 W.L.R. 1545.

⁶⁹ [1979] 3 ALL E.R. 385.

⁷⁰ Judith Freedman and John Vella, "HMRC's Management Of The U.K. Tax System: The Boundaries Of Legitimate Discretion" SSRN Electronic Journal at p. 195.

< <http://www.law.ox.ac.uk/themes/tax/documents/13.04.12RevenueGuidance.pdf> > accessed on 9 August 2015.

⁷¹ (1912) AD 642.

exercised his discretion bona fide and has not disregarded statutory provisions or the decisions of a competent court of law.⁷² Additionally it also enables the commissioners to deal with minor cases as held by Lord Hoffmann in the case of *R. (on the application of Wilkinson) v Inland Revenue Commissioners*.⁷³

2.3 The Protocol on the Establishment of the EACU

Pursuant to **Article 75 (2) (2) of the Treaty** for the Establishment of the EAC, the Protocol on the Establishment of the EAC CU establishes the EAC CU under **Article 2 (1) and (2)**. It provides that the Customs Union shall be managed in accordance with the customs law of the Community which includes; the relevant provisions of the Treaty, the Regulations and Directives made by the Council, Acts of the Community enacted by the Assembly, the decisions made by the EAC CJ plus relevant provisions of the international law.⁷⁴

In reference to the problem of this study, it does not provide authority/power to any institution of the EAC CU to enforce the customs law of the Community in the partner states territories which this research study deals with as a gap in the law providing for the EAC CU.

⁷² L. van Schalkwyk, “The Discretionary Powers Of The Commissioner For The South African Revenue Service - Are They Constitutional?” (2004) 12 *Meditari Accountancy Research* at p. 173.
<http://c.ymcdn.com/sites/www.thesait.org.za/resource/resmgr/meditari/the_discretionary_powers_of_.pdf> accessed on 15 July 2015.

⁷³[2005] UKHL 30; [2006] S.T.C. 270.

⁷⁴ The Protocol on the Establishment of the East African Customs Union, art 39.

2.4 The EAC Customs Management Regulations

These Regulations also don't provide for the enforcement powers of the directorate of customs or the council. The only thing they address in respect to the administration of customs law is with limited connection to my research that is the delegation powers of the commissioner of customs under **Regulation 3**.⁷⁵ They also give the commissioner unlimited discretionary powers on some aspects for example;

Regulation 85, in respect to customs ware house, the Commissioner may waive the whole or any part of the rent charges.⁷⁶

Further **Regulation 56** also provides the commissioner with unlimited discretionary powers as seen when he/she has authority to impose any condition in respect of prohibiting, restricting, or controlling entry into or out of the member state any goods or means of transport subject to section 86 of the Act⁷⁷ and any other law in a member state.⁷⁸

⁷⁵ East African Community Customs Management Regulations;

reg 3 (1) It includes that the Commissioner may authorize a proper officer to exercise any of the powers conferred by the Act upon the Commissioner.

reg 3 (2) it includes that a function performed by a proper officer under these Regulations shall be deemed to have been performed by the Commissioner.

⁷⁶ Ibid.

⁷⁷ The East African Community Customs Management Act;

it includes that the commissioner may in public interest or in the protection of public morality, safety, health and hygiene or animal or plant health, restrict or otherwise control the entry of certain goods or means of transport from entering a partner state.

⁷⁸ East African Community Customs Management Regulations 2010.

In addition **Regulation 102** also provides the commissioner with undefined discretion in regards to goods entered under bond for exportation or use as stores or for transshipment. It stipulates that unless the requirements under the section are fulfilled or if the commissioner directs, the goods shall not be deemed to have been put on board the vessel or air craft. In other words the section gives the commissioner powers to wave the requirements which has a disadvantage in trade, the fact that the scope upon which he ought to act is not prescribed therefore it creates higher chances of tax evasion since abuse of power can be hid in the exercise of his/her discretion.⁷⁹

More to that **Regulation 131 (1)** also provides the commissioners undefined discretion in regards to the place of payment of duties ie they can direct payment of it at any place they deem fit. This creates higher chances for misappropriation of funds.⁸⁰

The above provisions show that the commissioners have unlimited discretionary powers. The disadvantage of this is that it's easy for them to abuse their powers since they don't have a practice guide to use while exercising their discretion. In fact even the provisions themselves and the EAC customs code of conduct don't give parameters which they ought to consider while

⁷⁹ Ibid, reg 102 includes that goods entered under bond for exportation or use as stores or for transshipment shall not, unless the Commissioner otherwise directs, be deemed to have been put on board such aircraft or vessel unless they are- (a) entered using Form C.17; (b) produced to a proper officer for examination immediately prior to loading; (c) loaded on the exporting aircraft or vessel immediately after examination; (d) produced to a proper officer, if he or she requires, after loading; (e) certified on the appropriate form by the master or other principal officer of the aircraft or vessel as having been received on board; and (f) except in the case of aircrafts or ships' stores, included in the outward manifest of the aircraft or vessel.

⁸⁰ Ibid.

exercising their discretion in respect to those provisions. This makes the economies of member states to lose customs revenue since it's easy for the commissioners to escape liability by virtue of law that they have undefined scope of discretion, which leads to tax evasion, tax avoidance, fraud, dumping of goods and smuggling.

The Code of Conduct for the Public Officers in those member states and EAC Customs and Tax Code of Ethics and Conduct are inadequate in respect to enforcement of customs law in member states territories as they don't sufficiently provide parameters upon which member states commissioners of customs ought to act in circumstances where the EAC CMA or EAC CMR provide them with unlimited discretionary powers in some aspects as already highlighted and discussed above.

The EAC Customs and Tax Code of Ethics and Conduct just highlights seventeen principles that are to be followed by the member states customs and tax administration employees/officers while executing their obligations. This includes but not limited to the following principles transparency, absence of conflict of interest, non existence of abuse of power, accountability, fair and equity among others.⁸¹

Apart from the principles it also provides nineteen general rules that member states customs and tax administration employees ought to subscribe to while executing their responsibilities, this

⁸¹ The EAC Customs and Tax Code of Ethics and Conduct, reg 5.

includes acting impartially and not giving preferential treatment to any private organization or individual, to put forth honest effort in the performance of their duties in compliance with all laws, policies, statutes, rules, regulations and in accordance with their Code of ethics and conduct, to perform duties with honesty, care, diligence, professionalism, impartiality and integrity.⁸²

However the EAC Customs and Tax Code of Ethics and Conduct doesn't expressly provide for the requirements or conditions which member states commissioners of customs ought to consider in those circumstances where the EAC CMA and the EAC CMR provide them with unlimited discretionary power which is a challenge in the enforcement of customs law in member states territories that needs to be addressed.

Additionally, this challenge necessitates tax evasion due to the fact that it creates higher chances of unscrupulous tax and commissioners of customs abusing their unlimited discretion by conspiring with importers to under value goods, un declare goods to customs or misclassify goods among others which eventually obstruct the success of the EAC CU objectives as enshrined in Article 3 of the Protocol.⁸³ This is evidenced in the workshop organized by the Uganda revenue authority that I attended, many clearing agents raised it as one of things causing harm to the importers as it brings un fairness that is to say such traders who engage in such

⁸² Ibid.

⁸³ The Protocol on the Establishment of the East African Customs Union.

activities sell goods at cheaper prices, in other words there is unfair competition and importers not involved in such malpractices run out of business due to it.⁸⁴

Additionally the code of conducts for member states too, they don't also provide parameters, conditions or requirements that the commissioners of customs ought to exercise while executing their unlimited discretionary powers in certain aspects provided under the EAC CMA and the EAC CMR as already aforementioned which this research establishes as an obstacle in the enforcement of customs law in member states territories.

Additionally, reference can be made to the Code of Conduct and Ethics for Uganda public service whereupon it provides fourteen principles which must be followed among them is financial credibility and abstinence from conflict of interest. Additionally the Code of Ethics and Conduct for the Public Service Tanzania provides among others discharging of duties by public officers with integrity, accountability and transparency among others. Despite of it being elaborative and providing for issues like respect of human rights and being courteous, it also doesn't provide for the parameters upon which member states commissioners of customs ought to exercise while executing their unlimited discretionary powers in circumstances where the EAC CMA or the EAC CMR provides them.

It's therefore prudent for them to have a practice guide to assist them while exercising their conduct specifically for matters concerning customs and in reference to the sections that give

⁸⁴ Uganda Revenue Authority, Workshop for Clearing Agents in Uganda on the Key Performance Indicators and the Challenges faced in the Customs Procedures and Processes, imperial Royale Hostel, Kampala, (17 April 2017).

them undefined discretion. This will limit on their discretion. It shall also enable traders to predict their decisions; this will boost trade and in turn increase revenue that member states shall use to provide services to its people hence the growth of the member states economies. The issue of delay in enforcing customs laws will be addressed to. I also suggest that upon limiting their breach, if the TEAC is not amended to expound on the definition of principle of subsidiarity to mean the context given to it in the treaty of European Union, then the EAC CMA should amended to include that the breach of the limits set, be actionable by a the regional institution.

In addition it's paramount to say that either the council or the directorate of customs should be provided with powers to enforce the customs law. This will bring about effectiveness and efficiency in the enforcement of customs law.

2.5 The EAC CU (Export Processing Zones) Regulations

The purpose of these Regulations is to implement the provisions of Article 29 of the Protocol and to ensure that there is uniformity among the Partner States in the implementation of the provisions on export processing zones and to ensure to the extent possible, that the process is transparent, accountable, fair and predictable.⁸⁵

⁸⁵ The East African Community Customs Union (Export Processing Zones) Regulations, reg 2.

Regulation 3 provides for a competent authority to mean an authority designated by a Partner State to develop, coordinate and oversee the operations of export processing zones pursuant to these Regulations.⁸⁶

On the other hand **Regulation 6(1)** provides that where a Partner State operates export processing zones, it may establish a competent authority to develop, coordinate and oversee operations within the export processing zones. (2) The competent authorities and in this case administer these Regulations as required to.⁸⁷

Just like other legislations already mentioned above, these regulations also don't provide for any powers to the directorate of customs or the council to enforce them. In other words it gives power to the authority established by the partner state.

2.6 The EAC CU (Free port Operations) Regulation

The purpose of these Regulations is to implement the provisions of Article 31 of the Protocol and to ensure that there is uniformity among Partner States in the implementation of free-port operations and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.⁸⁸

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ The East African Community Customs Free Port Operations Regulations, reg 2.

Regulation 3, defines a free port authority to mean an authority appointed by a Partner State under national legislation to establish, co-ordinate and operate free port related facilities in the Partner State, and it shall include all staff of the Freeport.⁸⁹

Just like other legislations it also doesn't provide the council or the directorate of customs with powers to enforce it. In other words there is no regional institution established by it to ensure compliance ie enforcement of it, it only gives powers to authorities established by partner states.

2.7 The EAC Anti-Dumping Regulations

The purpose of these Regulations is to implement the provisions of Article 16 of the Protocol and to ensure that there is uniformity among Partner States in the application of anti-dumping measures and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.⁹⁰ It defines an investigating authority to mean the authority charged with the responsibility of conducting anti-dumping investigations in a Partner State on behalf of the Committee for purposes of these Regulations.

Further **Article 24(1) (b)** provides for the EAC Committee on Trade Remedies, it includes that for purposes of this Protocol, there is hereby established an EAC Committee on Trade Remedies to handle any matters pertaining to anti-dumping measures provided for under the EAC CU (Anti-Dumping Measures) Regulations.⁹¹ Although it provides the EAC Committee on trade

⁸⁹ Ibid.

⁹⁰ The East African Community Anti-Dumping Regulations, reg 2.

⁹¹ The Protocol on the Establishment of the East African Community Customs Union.

remedies with powers to hear an appeal in case of dissatisfaction and also the council whereupon the party disagrees with the decision of the committee. It doesn't provide the council or the directorate of customs powers to enforce it.

2.8 The Committee of Customs

The committee is established by the council as provided in **section 4 (4) of the Act**. The mandate of the committee includes but not limited to facilitation of the directorate in formulation of policies. However, the Act does not provide the committee with powers to enforce the customs law of the Community which my research establishes.⁹²

2.9 The EAC Customs Union Rules of Origin

They are significant in the implementation of article 14 of the Protocol.⁹³ They contain the standards that member states can use in order to classify the origin of the goods. The rationale for the rules is to foster uniformity.⁹⁴

However apparently it's not case as Rwanda Revenue Authority Customs Service Department pursuant to them passed a public notice stating that cooking oil is no longer subject to a preferential treatment whereof Mr. Kenneth Bagamuhunda Director of Customs for secretary general EAC secretariat wrote to Mr. Innocent Safari the Permanent Secretary Ministry of

⁹² The East African Community Customs Management Act.

⁹³ The Protocol on the Establishment of the East African Customs Union.

⁹⁴ The East African Community Customs Union Rules of Origin 2015, rule 2.

Foreign Affairs East African, Regional and International Co-operation to reconsider the decision basing on the rationale made in the letter.⁹⁵ The content in the letter expressly show that the directorate of customs and the council have no authority to enforce the Rules, reference can be made to the following paragraphs (1) “that in view of the above it is advisable that Rwanda Revenue Authority treats the transfer of cooking oil from partner states on a case by case basis”, (2) “please accept, permanent secretary, the assurances of my highest consideration”.⁹⁶

Additionally the Rules provide powers to institutions established by partner states to be the ones to issue a certificate of origin.⁹⁷ They don’t provide the council or the directorate of customs or any other EAC institution with authority to ensure their enforcement. This is a loophole in the institutional legal framework of the EAC CU that needs to be addressed if we are to achieve objectives enshrined in the Protocol on the Establishment of the EAC CU.⁹⁸

From the foregoing discussion it’s clear that the TEEAC, Protocol on the Establishment of the EA customs union, the EAC CMA, EAC CMR and all other aforementioned Regulations do not provide the council or the directorate of customs with authority to enforce the customs law of the community and neither does the community have exclusive competence or facilitative operational principles like subsidiarity in the context of the meaning subscribed to it by the

⁹⁵ The East African Business Council, Trade and Policy Advocacy, 19 April 2016. <<http://www.eabc.info/resources/view/trade-and-policy-advocacy-updates-as-at-19th-april-2016> > accessed on 22 August 2016.

⁹⁶ Ibid.

⁹⁷ The East African Community Customs Union Rules of Origin 2015, rule 3.

⁹⁸ The Protocol on the Establishment of the East African Customs Union, art 3.

Treaty on European Union herein after referred to as TEU, to make it be incapacity to enforce the customs law of the community.⁹⁹

The lack of the enforcement powers by the council or the directorate of customs has great negative impact in the enforcement of customs law on the economies of member states and in achieving the objectives under the protocol.¹⁰⁰ This includes the following;

(1) Disparity in the enforcement of customs law

The lack of enforcement powers by the council or the directorate of customs causes poor and disparity in the enforcement of the customs law of the Community. Each member state enforces the customs law using its own procedure, laws and agencies. Each partner state uses its own tax laws, standard regulations for certifying the quality of goods and agencies; this causes divergence in the enforcement of customs law as it creates unequal treatment of traders thus leading to tax evasion among others. This would be different if the council or the directorate of customs had the oversight role in enforcement of customs law; the procedure used would be the same since it would have the supreme authority to ensure compliancy to customs law. This would have evaded traders from involving themselves in trade illegalities.

⁹⁹ The Treaty on the European Union, art 5(2).

¹⁰⁰ The Protocol on the Establishment of the East African Customs Union.

(2) Slow enforcement of customs law

Each member state uses its own policies and procedures before enforcing the customs law that has not been in place ie the commissioner of customs before adjusting to the law there are certain procedures they have to follow like in Uganda, getting necessary approval, coming up with strategies for its compliancy and then the necessary funds. This actually may lead to the delay in the enforcement of customs law as if they don't get the necessary finances from the respective government institution that law may not be complied with until such a time when the necessary funds are released. This delays the enforcement of customs law and therefore obstructs the goals of the EAC CU as set out in the Protocol.¹⁰¹ Ie if the council or the directorate of customs had authority to enforce the customs law or the community had exclusive competence as defined in the Treaty on the Functioning of European union, this challenge would have not been available as the council or the directorate of customs would have had the capacity to enforce the customs law in member states territories therefore in certain instances where the member states don't have sufficient funds to facilitate the law to be enforced it would provide them.

Furthermore if they also had the facilitative operational principles like subsidiarity which in the context of the Treaty on European Union gives authority to the union to have competence to do all necessary acts that are reasonable to achieve its objectives where it has no exclusive competence. I am therefore of the view that the Treaty on the Establishment of the EAC be amended to provide either the council or the directorate of customs with power to enforce the customs law so as to remedy the inadequacies they establish.

¹⁰¹ The Protocol on the Establishment of the East African Customs Union, art 3.

(3) Abuse of power

It makes abuse of authority very susceptible since proper officers and commissioners of customs of member states have undefined discretion in certain cases as already discussed but they don't have a regional institution to which they are subject to in case of failure to execute their mandate as per the law. Their being subject to the institutions only in their respective territories in case of any irregularity in the execution of their obligations is not sufficient as even the institutions to which they are to account or which are supposed to preside over the case in circumstances of disputes are also invaded with corruption. So far there is an ongoing case about the former commissioner of General of Uganda Revenue Authority Allen Kagina whereupon she is alleged to have misused her powers to issue exemptions to companies not approved by the council which led to the loss of tax 184 billion Uganda shillings, thus affecting the Uganda's economy.¹⁰²

(4) Tax Evasion and Avoidance

It makes tax evasion and avoidance vulnerable and rampant ie customs officers are not subject to account to any regional institution apart from the member states respective institutions to which the law of member state give mandate to do so. This makes it easy for the customs officers to commit them since even the institutions that are responsible to ensure compliance of customs law are also invaded with corruption. Reference can be made to the report made by the Transparency International where they cited the levels of corruption in each EAC member states; Uganda having 82%, Kenya 64%, Burundi 60%, Tanzania 67% and Rwanda described to be lowest among

¹⁰² Kisekka Expedito and Another Vs Uganda Revenue Authority and 2 Others HCSS 56/2015.

them.¹⁰³ The lack of the enforcement power by the council or the directorate of customs is a loop hole within the institutional legal framework of the EAC CU that needs to be addressed.

The negative effect of tax avoidance and evasion on the economies of member states can be seen as pointed out by Reynolds that tax is a principle source of government revenue and if persons are able to escape by legal or illegal means the tax to which they should be subject under the general scope of the tax, the theoretical equity of tax to a larger extent is lost.¹⁰⁴

Furthermore Kiabel and Nwokah state that tax evasion and avoidance have adverse effect on government revenue whereby tax avoidance generates investment distortion in the form of the purchase of assets exempted from tax or under-valued for tax purposes.¹⁰⁵

¹⁰³ Transparency International, The Global Coalition Against Corruption, The East African Bribery Index 2013.

http://www.transparency.org/news/pressrelease/bribery_remains_high_in_east_africa_but_90_of_citizens_will_not_report > accessed on 4 August 2015.

¹⁰⁴ Tatenda Dalu, and others, 'The Impact Of Tax Evasion And Avoidance On The Economy: A Case Of Harare, Zimbabwe' (2012) 1 African J. of Economic and Sustainable Development at p. 286.

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDAQFjAB&url=http%3A%2F%2Fwww.researchgate.net%2Fprofile%2FTatenda_Dalu%2Fpublication%2F225033355_Impact_of_tax_evasion_and_avoidance_on_the_economy_A_case_of_Harare_Zimbabwe%2Flinks%2F546c80e50cf2c4819f20ad19.pdf&ei=DXRIVZDwIsfQ7Ab18YD4AQ&usg=AFQjCNHppq31kfIVPvkJ45zeEC5ThWyrUQ&sig2=IZDwl_ayX_F3BpYrG036Uw&bvm=bv.93990622,d.ZGU> accessed on 8 June 2015.

¹⁰⁵ Ibid 289.

According to the interview I made with ten customs officers, five traders and ten customs agents they expressed that it's done by way of misclassification of goods thereby leading to undervaluation of goods, using of wrong codes and submitting of wrong information.

(5) Corruption

It necessitates corruption as there is no regional institutional apparently established to deal with corruption in respect to the enforcement of customs law and yet commissioners of customs and proper officers are in certain instances under the EAC CMA given unlimited discretion as already discussed above which in most of the times they exercise unjustly whereof the partner states institution to which they are subject to be accountable to are also suffering from the corruption. Reference can be made to the Corruption perceptions index 2015 by Transparency International were out of the 168 countries and territories, the perceived level of public sector corruption on the scale of 0 (high corrupt) to 100 (very clean), Uganda and Kenya were ranked in the 139 position, Rwanda (44) and Tanzania (117).¹⁰⁶

It's significant that the council or the directorate of customs be given supreme authority in respect to enforcement of customs law. This will make them to be incapacity to charge, prosecute and make the commissioners of customs or proper officers to account to them. This will facilitate compliancy and proper enforcement of customs law.

¹⁰⁶ Transparency International, The Global coalition Against Corruption, Corruption Perception Index 2015.

< <http://www.transparency.org/> > accessed on 9 July 2016.

Additionally corruption has a negative effect on the economies of member states as pointed out by Rose-Ackerman, Shleifer and Vishny, Mauro that corruption perpetrated and executed by revenue officials is a prevalent phenomenon that seriously hampers investment, economic growth and stability of socio-economic institutions. In tax administration it affects the level of tax revenue that can be collected in developing countries.¹⁰⁷

Furthermore Alm et al also expressed that if tax collectors or tax administration officials engage in corrupt practices, then corruption on the revenue side will result in direct decrease in overall revenue collection.¹⁰⁸ In other words it lowers the investment levels, hampers the fair operation of the internal market and decreases public finance.

Additionally in respect to the enforcement of customs law according to the interviews I had with some customs agents and traders, they expressed that they normally bribe customs officers if the taxes are too high; they do this by putting wrong amounts of goods imported.

¹⁰⁷ Dalu, T., Maposa, V.G., Pabwaungana, S. and Dalu, T. (2012) 'The impact of tax evasion and avoidance on the economy: a case of Harare, Zimbabwe', African J. Economic and Sustainable Development, Vol. 1, No. 3, p.284-296.

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDAQFjAB&url=http%3A%2F%2Fwww.researchgate.net%2Fprofile%2FTatenda_Dalu%2Fpublication%2F225033355_Impact_of_tax_evasion_and_avoidance_on_the_economy_A_case_of_Harare_Zimbabwe%2Flinks%2F546c80e50cf2c4819f20ad19.pdf&ei=DXRIVZDwIsfQ7Ab18YD4AQ&usg=AFQjCNHppq31kfIVPvkJ45zeEC5ThWyrUQ&sig2=IZDwl_ayX_F3BpYrG036Uw&bvm=bv.93990622,d.ZGU accessed on 9 June 2015.

¹⁰⁸ Ibid.

(6) Fraud

It also makes fraud to be susceptible as it involves various agencies that do not have a regional institution to be accountable to. In the partner states institutions responsible for ensuring compliance of customs are themselves not effective and efficient as they are invaded with corruption. Reference can be made by the Africa survey 2015 made by Afrobarometer in conjunction with Transparency International which revealed that the police and the officials collecting taxes in Uganda are the most corrupt public servants.¹⁰⁹

Additionally fraud is defined to mean knowing misrepresentation of the truth or concealment of material facts to induce the victim to act to their detriment.¹¹⁰ In reference to the interview I made with some customs agents, they expressed that they normally commit procurement fraud which in respect to the compliancy of customs law refers to the over invoicing, fabricated invoices, bribery, inaccuracy and non-declaration in customs and excise duty.¹¹¹ The negative effect of it is that it leads to revenue loss of partner states, thus this leads to under development of member states economies. The lack of the enforcement powers of the customs law by the council or the directorate of customs is a loophole within the institutional legal framework of the EAC CU that needs to be addressed.

¹⁰⁹ < http://www.newvision.co.ug/new_vision/news/1413659/police-corrupt-institution-report > accessed on 6 July 2016.

¹¹⁰ Rodgers Anyanga Musamali, "Factors Determining Consumer Fraud Reporting In Kenya" (2014) 6 RAE at p. 77.

<<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=0CGAQFjAJ&url=http%3A%2F%2Fwww.macrothink.org%2Fjournal%2Findex.php%2Frae%2Farticle%2FviewFile%2F5945%2F5054&ei=Y7BmVbXnJaW07ga9x4PYAw&usq=AFQjCNEGBHG59SI0jCRTu3UTJUt3TJfPpw&vm=bv.93990622.d.bGg>> accessed on 14 May 2015. See URL: <<http://dx.doi.org/10.5296/rae.v6i3.5945>>.

¹¹¹ Ibid.

(7) Dumping

It precipitates dumping as corruption is inevitable as partner states customs administrations are not effective and efficient enough to ensure that its officials accord themselves to the codes of conduct necessary to ensure coherence in the enforcement of customs law ie the institutions are themselves corrupt. They don't also have sufficient capacity in terms of finances to recruit enough employees and also to acquire advanced technological gadgets or machines to monitor compliancy to customs laws.

Additionally dumping has a divergent effect on the economies of partner states. It leads to loss of revenue for the countries and also poverty. It makes foreign competitors to be out of the market as prices of the same product are low.

Dumping is defined by T. E. Gregory; (1) Sale at prices below foreign market prices, (2) Sale at prices with which foreign competitors cannot cope, (3) Sale at prices abroad which are lower than current home prices, (4) Sale at prices unprofitable to the sellers.¹¹² The General Agreement on Tariffs and Trade defines it as the price of a product exported from one country to another in less than the comparable price for the like product when destined for consumption in the exporting country.¹¹³

¹¹² Sawakami S, 'A Critical Evaluation of Dumping in International Trade' (2001) at p. 134.
< <http://www2.sozo.ac.jp/pdf/kiyou18/11sawa.pdf> > accessed on 9 August 2015.

¹¹³ Ibid.

Further Grey Mastel described dumping in to four categories in American Trade Laws after the Uruguay Round: first over-capacity dumping, this happens when a company continues producing and selling at a price lower than the average cost of production. Second is government-support dumping, is defined to mean when the government supports a particular industry by providing subsidies. Third tactical dumping (discriminatory pricing), it refers to a practice of selling the same product in different markets at different prices and finally predatory dumping; it aims at eliminating the competition with the objective of gaining exclusive control of the market, it results in to monopolization of the market.¹¹⁴

Dumping establishes monopolization which has divergent effects like it enhances poor quality products to be sold or supplied to consumers; it increases in prices of the goods and decrease in supply of goods. It also causes a reduction in the satisfaction of the consumers as seen where in most times it occurs, manufactures or suppliers don't normally offer good services.

Although the Partner States recognized the challenges it imposes on the domestic market and introduced Anti-dumping measures regulations form Annex IV to the Protocol, its enforcement has not been a success to a larger extent due to lack of enforcement powers of the directorate of customs/council.¹¹⁵

¹¹⁴ Ibid 135.

¹¹⁵ <http://www.customs.eac.int/index.php?option=com_content&view=article&id=22:brief-on-the-eac-customs-union&catid=29:why-a-cu&Itemid=29> accessed on 3 May 2015.

(8) Smuggling

The lack of the enforcement powers by the council or the directorate of customs is that it enhances smuggling as the member states customs administrations do not have sufficient capacity to deal with all the inadequacies that lead to smuggling ie according to Abel Kagumire, the Uganda Revenue Authority eastern region acting manager in 2012 expressed in an article written in the New Vision Newspaper of Uganda entitled ‘Smuggling thrives at the Kenya – Uganda border’; that its due to lack of resources by the URA to patrol all major routes used by smugglers, connivance of customs officers with customs agents to make false documentation, misclassification, wrong description, non-declaration, under valuation of quantities and removal seals on goods.¹¹⁶

Additionally it was revealed that Uganda loses over 2.5 billion Ugandan shillings in cross border smuggling. Furthermore in an article entitled ‘Smugglers limit on tax revenue in Uganda 2015’, it was revealed that Uganda loses over \$ 4 million due to illicit trade of tobacco products.¹¹⁷

According to Norton, Deardorff and Stolper smuggling absorbs domestic resources and it shrinks productive sectors.¹¹⁸ The EAC CMA defines it to mean the importation, exportation, carriage coastwise or the transfer into or out of the partner states of goods with intent to defraud the

¹¹⁶ < http://www.newvision.co.ug/new_vision/news/1303139/smuggling-thrives-kenya-uganda-border> accessed on 10 may 2016.

¹¹⁷ <<http://www.busiweek.com/index1.php?Ctp=2&pI=3314&pLv=3&srI=68&spI=107>> accessed on 9 April 2016.

¹¹⁸ Mary E. Lovely and Douglas Nelson, “Smuggling And Welfare In A Ricardo-Viner Economy” (1995) 22 Journal of Economic Studies at p. 26.

<<http://www.tulane.edu/~dnelson/NelsonArticles/LovelyNelsonJES.pdf>> accessed on 25 June 2015.

customs revenue or with intent to evade any prohibition of or restriction on regulation or condition as to such importation or exportation or coastwise, transfer or removal of any goods.¹¹⁹

In respect to Martin and Panagariya, Norton, Pitt and Thursby *et al* suggest that smuggling is caused by untaxed imports in shipments of legal imports.¹²⁰

In addition smuggling reduces the domestic relative price of the imports by reducing the production and consumption distortions associated with the tariff. Further it may repudiate the possibilities for production of final goods which hold the domestic relative prices fixed or it may raise the value of domestic output at world prices.¹²¹ According to Bhagwati and Hansen it costs the home country because smugglers obtain inferior terms of trade.¹²²

According to the interview I made with ten customs agents there are two kinds of smuggling; physical smuggling, it includes importation of goods that evade inspection of customs services, payment of duties and taxes by importation of goods through the illegal entries and technical smuggling involves fraud through the use of incorrect information in bringing the goods through the legal points of entry ie undervaluation, understatement of import values, declaration of false origin, poor/incorrect product description, misclassification or the use of another tariff line within the same heading.¹²³ In respect to the Global Financial Integrity report, fraudulent trade

¹¹⁹ East African Community Customs Management Act, s. 2.

¹²⁰ Mary E. Lovely and Douglas Nelson, “Smuggling And Welfare In A Ricardo-Viner Economy” (n 87) , at p.28.

¹²¹ Ibid 31.

¹²² Ibid.

¹²³ < <http://misdeclared.blogspot.co.ke/2011/02/technical-smuggling-as-form-of.html>> accessed on 12 August 2015.

mis-invoicing was the major component of illicit financial flows from developing countries accounting to 83.4 percent.¹²⁴

I, therefore, conclude that there is no legislation that provides for the enforcement powers of customs law to the directorate of customs, council or any other institution of the Community. Sadly there is no practice guide to be used by the commissioners in the exercise of their discretionary powers in cases where the EAC CMA provides them. The presence of this does not only obstruct the development of the EAC CU generally but it also hinders the development of member states economies due to dumping of goods, smuggling, fraud, corruption, tax evasion and avoidance, these vices lead to slow infrastructure development, unfair competition and unemployment among others. This gap in the institutional legal framework of the EAC CU needs to be addressed by either amending the Treaty for the Establishment of the EAC, the Protocol¹²⁵ or EAC CMA to provide powers to the council or the directorate of customs to enforce the customs law.

Further, it's also relevant to develop a practice guide for commissioners to be used by them in circumstances where the EAC CMA confers them unlimited discretion. The presence of these will address the inadequacies they establish like delay in the enforcement of customs law, dumping of goods, smuggling, tax evasion, corruption and fraud.

¹²⁴ Global Financial Integrity, *Illicit Financial Flows from Developing Countries: 2004-2013*, December 2015 Report.

<<http://www.gfintegrity.org/report/illicit-financial-flows-from-developing-countries-2004-2013/>>
accessed on 15 June 2015.

¹²⁵ The Protocol on the establishment of the East African Community Customs Union.

CHAPTER THREE

The review of the EAC CU enforcement mechanisms of customs law on the economies of member states

3.0 Introduction

This chapter reviews the major current EAC CU enforcement mechanisms of customs law, the challenges associated with each enforcement mechanism in the enforcement of customs law and the impact of those problems on the economies of member states.

It also establishes the positive effects of the major current EAC CU enforcement mechanisms of customs law to the economies of member states and also other gaps in the institutional legal framework of the EAC CU that need to be addressed.

3.1 The major enforcement mechanisms of customs law in the EAC CU

There are numerous EAC CU enforcement mechanisms that the EAC partner states use to enforce the customs law of the community, this includes protection of whistle blowers,¹²⁶ prosecution of smugglers and tax evaders,¹²⁷ training of customs officers and stakeholders, inquiring of permits by authorized officers, tax investigation by revenue offices of respective member states, post parcel, short collection of import duties, load control system, mutual corporation, reconciliation of income, control of company email address, auctioning of goods,

¹²⁶ Mike Odeng and Edward Anyol, Smuggling, Newvision Uganda (Kampala, 18 March 2015) at p. 8.

East African, Pay Taxes Or Face Stern Action Magufuli Tells Business People, East African News (5-11 December) at p.2.

¹²⁷ < <http://www.ugandaconomy.com/invest-uganda/ura> > accessed on 12 December 2015.

alert email messages, blacklisting of non-compliant companies, publishing of the shame list of tax defaulters, banning of goods suspected to be imports yet they come as exports,¹²⁸ advertisement, raiding of companies suspected to be with smuggled good, stay of requirement where a partner state stays a specific requirement in order for another partner state to be able to trade and issuing of huge penalties to non-compliant companies among others.

For the purpose of this study, I focused on the following EAC CU enforcement mechanisms used by the partner states to enforce the customs law of the community. My rationale for this is that they have a great impact in the enforcement of customs law. According to me if the council or the directorate of customs is given authority either in the Treaty on the Establishment of the EAC, EAC CMA or the Protocol on the Establishment of the EAC CU, the challenges or the effects prevailing as far as the enforcement of customs law is concerned will be addressed to the larger extent thereby achieving the mandate prescribed under Article 3 of the Protocol.¹²⁹

The following are major enforcement mechanisms;

3.1.1 Post clearance audit

It ensures enforcement of customs law because it is a systematic customs control measure that ensures the accuracy and authenticity of declarations through the examination of relevant books, records, business systems and commercial data kept by persons/companies directly or indirectly involved in international trade.¹³⁰

¹²⁸ < <http://www.ugandaeconomy.com/invest-uganda/ura> > accessed on 15 March 2015.

¹²⁹ The Protocol on the Establishment of the East African Customs Union.

¹³⁰ East African Community Customs Post Clearance Audit Manual at p. 8.

In particular, PCA is regarded as one of the most effective measures for compliance verification with customs law, regulations, procedures and trade facilitation through the fast clearance procedures.¹³¹

Its objectives include and not limited to evaluating the level of compliance in each customs transaction and identifying areas of potential weaknesses for which corrective actions may be required.¹³²

It's enforced and implemented by the revenue and customs administrations of the partner states, the disadvantage this provides in the enforcement of customs law is that it's not as effective as it would have been, had the Treaty,¹³³ EAC CMA,¹³⁴ or Protocol¹³⁵ provided oversight authority to the directorate of customs or the council to enforce it. Apparently, it is subject to the control and direction of member states commissioners of customs. This has a consequential impact as the rationale for its presence is not achieved to a larger extent. This is because the auditable transactions are done at the country of entry, transit, and destination of goods.

Apparently, there are numerous auditable transactions that take place in multiple countries; country of entry, transit and destination which the destination customs administrations have no power to conduct an audit. Currently, each partner state has its independent PCA.

¹³¹ Ibid.

¹³² Ibid 9.

¹³³ The Treaty for the Establishment of the East African Community.

¹³⁴ The East African Community Customs Management Act.

¹³⁵ The Protocol on the Establishment of the East African Customs Union.

Even then the Revised Kyoto Convention Guidelines on the Content of an Audit has a larger breadth and depth which member states customs administrations cannot be in capacity to provide on a state basis, namely a pre-planning, planning, execution, pre-audit survey, audit conference, audit questionnaire, internal corporate review, audit co-ordination, exit conference, final report and follow-up visit.¹³⁶

The extensivity of work done/involved in the PCA as aforementioned requires a regional institution to have authority in its enforcement. The provision of powers to the council or the directorate of customs will ensure that the cross-border auditable transactions that ought to be carried out in the country of entry or transit are observed. This will make the objective of PCA to be achieved.

3.1.2 Electronic cargo tracking system

It's an enforcement mechanism of customs law as it is the principle system for monitoring movement of cargo under customs control within a single customs territory. The current ECTS provides two monitoring solutions; relevant time monitoring system, this monitors dry cargo and motor unit and real-time monitoring system, this monitors wet cargo and high-risk goods. Its enforced by the partner states customs and revenue administrations, not the council or the directorate of customs,¹³⁷ they implement it by not giving a cargo movement document (C2) which permit importers and exporters to move the cargo from the country of origin/entry to the

¹³⁶ Revised Kyoto Convention Guidelines-Chapter 6 Customs Control.
<http://siteresources.worldbank.org/INTRANETTRADE/Resources/239054-1305664393028/PostClearanceAudit_web.pdf > accessed on 12 May 2015.
http://www.eac.int/sites/default/files/docs/eac_pca_manual_2_.pdf

¹³⁷ <https://www.ura.go.ug/openFile.do?path=//webupload//upload//download//staticContent//RGTMENU//307//9348_ECTS_.pdf > accessed on 17 August 2015.

intended destination. The partner states customs administrations contract private companies in their respective territories to implement them, importers and exporters are responsible for paying it.

There is no provision in the EAC CMA or the Protocol on the Establishment of the EAC CU that provides the council or the directorate of customs with authority to oversee it. The impact of it being solely enforced by them is that they can only monitor diversion of goods in transit within their jurisdiction than when if we had a regional body to oversee its enforcement in all partner states customs administrations and then be assisted by them,¹³⁸ there would have been efficiency, effectiveness, economy and transparency if a regional body was responsible as resources would be sufficient and it would also be in the capacity to monitor it across all borders thereby limiting the chances of dumping and smuggling of goods among others.¹³⁹

Further, there is also an inability to detect transit malpractices by partner states customs administration since they are only in the capacity to deal with those within their jurisdiction than if the council or the directorate of customs had authority to do so.¹⁴⁰ The remove and put system of the ECTS creates a crack in the system as it allows malpractices like dumping and smuggling as seen sometimes the clearing agents can conspire with the KRA customs officers to under-

¹³⁸ < https://www.wto.org/english/tratop_e/tradfa_e/wks_tradfajune14_e/kamajugo.pdf > accessed on 18 August 2016.

¹³⁹ < http://www.bsmart-solutions.com/news/cargo_final.pdf> accessed n 5 June 2016.

¹⁴⁰ < https://www.wto.org/english/tratop_e/tradfa_e/wks_tradfajune14_e/kamajugo.pdf > accessed on October 2015.

declare loose goods ie submit to it a wrong entry whereof during the course of movement the excess loose goods are dumped in Kenya.

In addition, there is inefficiency in the management of it ie apparently, according to the post community meeting of September 2016, the URA and KIFWA representatives pointed out that there are delays and ineffectiveness by the Kenya service providers of ECTS which is negatively affecting the transit country port customers and other traders at large.¹⁴¹ They also experience information and communication technology integration challenges, hard ware failures, systems integration difficulty, resistance by stake-holders and high Maintenance costs of it. ¹⁴² For example, the system might be experiencing one of those challenges and by the time the system is restored, goods might have already been dumped, smuggled and taxes evaded.

It's procured by the transporters from the private companies. The problem with this is that many times according to the interviews I made with some transporters, it's abused thereby leading to rampant smuggling of goods and the revenue authorities have no control over it since they are not the ones that monitor it. The provision of the ECTS by the third parties indicates that the

¹⁴¹ Minutes of the Port Community Meeting of 2nd September 2016 held at Kenya port authority conference room at 07:45 hours.

¹⁴² Kenya Revenue Authority, Implementation of Electronic Cargo Tracking System (ECTS), Presentation to WCO Technology & Innovation Forum, Smart Borders, Enabling Technologies. Cairo, Egypt 2 – 4 November, 2010.

<http://www.wcoomd.org/en/events/event-history/2010/~/~~/media/WCO/Public/Global/PDF/Events/2010/Technology%20Forum/Presentations/Julius_Musyoki.ashx > accessed on 3 August 2015.

independent customs administrations forfeited its mandate of monitoring and safeguarding tax revenue.

This means that as independent customs administrations they couldn't manage the mandate and therefore a regional body either the council or the directorate of customs should be the one to be given the mandate to enforce it since the member states failed in its implementation from inception. Formerly the customs administrations used to place seals on goods and they could use this as a mechanism to control smuggling, dumping of goods and tax evasion i.e whereof if any seal was tampered with, it could be an indication that there was a trade irregularity. Apparently, it's the tax payer and his agent that safe guard taxes as the responsibility of monitoring the ECTS is dependent on them.

3.1.3 Regional customs transit guarantee bond

It's an enforcement mechanism administered on goods under customs control while in transit or storage. It ensures payment of customs duty and apprehension of customs requirements where they had not been fulfilled before goods are released for home consumption thereby enforcing customs law. It also facilitates re-exportation of goods.

It's a facility executed by licensed customs agents with authorized insurance companies as sureties to cover tax liability for goods in transit or in storage upon approval by the respective partner states customs department. It is operational and admissible throughout the EAC region despite being executed and approved by one partner state customs department. The disadvantage of this is that in the case of breach of it the aggrieved customs administration cannot deal directly

with the non-compliant clearing customs agent. It has to work with the parent customs administration in order to recover the taxes lost which makes the recovery process longer and complex than it would have been. Had this mechanism been enforced by the directorate of customs or the council, this will not have been the case. They would have been in the capacity to deal with the breaching clearing customs agent directly other-than having to go through the parent customs administration.

In other words, there is no legislation giving the mandate to the council or directorate of customs to give, implement or oversee its enforcement which is a loophole within the legal frame work of the EAC CU that needs to be addressed.¹⁴³

Since it's a regional bond facility it should be approved by the regional body so as to take into consideration the interests of all other partner states. Apparently it is issued by the customs administrations of partner states and it can only be enforced by the partner state customs administrations that granted it yet it operates throughout the region, this puts the interests of other partner states at stake since they cannot enforce it unless they pass through the member state customs administration that granted it. In respect to this, the customs administrations of member states should act as agents of the directorate of customs or the council. Depending on the institution that would have been granted with authority to ensure its management and enforcement, i.e in the event of dumping of goods which are under the RCGTB, the customs administration where the breach has occurred shall act on behalf of the directorate of customs or

¹⁴³ <<https://www.trademarka.com/news/eac-to-have-regional-bond-for-goods-in-transit/>> accessed on 6 June 2015.

the council to prosecute the case in liaison with the member state custom administration where the goods were destined to go.

The lack of power by the council or the directorate of customs in respect RCGTB creates a clash in terms of leadership ie who is to determine the cases in event of any trade irregularity in regards to instances where the breach has occurred in the country that didn't approve it. It also leads to delays in the collection of taxes due to the procedure technicalities that have to be followed by the partner state that did not grant it.

3.1.4 One Stop Border Post

It's an enforcement mechanism in such a way that it enhances expeditious and effective control of border activities, ie it reduces the chances of corruption, fraud and costs that would have occurred if there were many border posts as it reduces the number of people to be dealt with while clearing goods and it also makes compliance with customs law easily done as various activities concerning customs are done at one location, it reduces the risks of such vices to occur. In other words, it's a border facility that combines two border stops for national border control processing into one and consolidates border control functions in a shared space for exiting one country and entering another.¹⁴⁴

These border posts are not controlled or monitored by the council or directorate of customs. It's the member states revenue and customs officers that preside over them. The lack of the regional body to oversee the enforcement of customs law at those border posts is a loophole in the

¹⁴⁴ < <http://www.newtimes.co.rw/section/article/2015-01-12/184873/> > accessed on 4 May 2015. Gashaija Nathan, Importance of One Stop Border Post facilities in EAC Integration, New Times Rwanda (12 January 2015) at p. 1.

institutional legal framework of the EAC CU as it creates inefficiency in the enforcement of customs law as partner states customs/ government agencies don't have a regional institution to which they are accountable to and this makes custom laws not to be enforced as expected as per article 3 of the protocol¹⁴⁵ since even the authorities to which they are accountable to in their territories are not effective and efficient as they are also encompassed with corruption, this can be indicated by the Kenya National Ethics and Corruption Report 2015 survey were out of 1, 93.7 percent of the respondents, 23% cited that the major reason for corruption was the bribery demands by the public officers.¹⁴⁶

Further the lack of power by the council or the directorate of customs in respect to one stop border post creates a challenge of who makes a decision in the event of problems like insufficient documentation to clear the goods and the request by the importer to divert goods from its original destination to another destination ie where the problem arises, there is suspense on who will take a decision that is equitable and justly. In other words the decision that can be accepted by either side.

3.1.5 Authorized economic operators

It is a reward given to the traders and companies that generally and regularly comply with the customs law and have good management systems. It's defined to mean an economic operator who is reliable in the context of their customs related operations, and therefore is entitled to enjoy benefits throughout the Community.¹⁴⁷ It's an enforcement mechanism of customs law as

¹⁴⁵ The Protocol on the Establishment of the East African Customs Union.

¹⁴⁶ The Ethics and Anti- Corruption Commission, National Ethics and Corruption Survey, 2015 Report. <<http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf>> accessed on 8 August 2016.

¹⁴⁷ Instruction Manual on Authorized Economic Operators 2014 at p. 6

it attracts importers and exporters to comply with customs law ie it's only accorded to compliant companies, its objective is to remove trade obstacles to the most compliant tax payers. Its origin can be traced from the World Customs Organization.¹⁴⁸

It involves electronic submission of declaration without supporting documents, pre-arrival clearance of cargo, self-management of bonded warehouses, priority treatment when cargo is selected for control, choosing the place for examination, automatic renewal of licenses and withholding tax exemption status.¹⁴⁹ This supports the international trade supply chains.

To be accorded it, one should be involved in international trade, have a good compliance history, be financially sound, install and use customs automated systems like e-tax and should implement the AEO compliance program, after which one applies to the commissioner customs of the respective partner states.¹⁵⁰ At the EAC level, the customs administrations of member states adopted in 2010 an AEO policy framework on the gauge of implementing trade facilitation initiatives that aim at economic development, so far 13 companies have been given a regional AEO certificate.¹⁵¹ In other words, this is one of the mechanisms used by the EAC customs administrations of member states to entice tax payers to comply with customs law.

<https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=define%20autorised%20economic%20operators%20pdf> > accessed on 12 August 2015.

¹⁴⁸ East Africa, Authorized Economic Operators, East African Newspaper (November 21-27) at p. 21.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

These are issued by the commissioner of customs of the partner states, not the council or the directorate of customs. Although the requirements for assessment as to whether a company gets it is the same, the vetting procedures don't seem to be transparent ie in Uganda many companies complained that they don't know what the Uganda Revenue Authority Customs department considers in vetting as they were satisfied that they had fulfilled the requirements as expected but they were not issued with them.¹⁵² This is a huge gap within the institutional legal framework of the EAC CU as it obstructs trade ie some traders get trade benefits over others. The provision of powers to issue it by either the council or directorate of customs will address the loophole as it shall reduce the levels partiality while issuing it thereby enabling all the stake-holders have an opportunity of obtaining it thus facilitating trade.

3.1.6 Transit monitoring unit

Its role is to ensure that goods on transit comply with the customs law; they are moving within the customs gazetted routes and goods on transit are sealed very well thereby ensuring compliance with customs law ie preventing dumping and smuggling of goods.¹⁵³ It's monitored and supervised by the customs officers of the partner states, not the council or the directorate of customs. The disadvantage of this is that apparently, it's costly when individual partner states customs administrations are handling it separately compared to when one regional body was the one enforcing the mechanism, this is because of the benefits of operating at a large scale.

¹⁵²<<https://www.trademarka.com/news/uganda-revenue-authority-certifies-12-companies-authorized-economic-operators/>> accessed on 8 August 2016.

¹⁵³<<http://www.busiweek.com/index1.php?Ctp=2&pI=1696&pLv=3&srI=%2069&spI=&cI=11>> accessed on 4 July 2015.

This is a gap in the enforcement of customs law and the provision of the council or the directorate of customs with the over role power to oversee and ensure its enforcement in the EAC CMA will help to deal with the inadequacy it establishes.

3.1.7 Mobile examination team

It's an enforcement mechanism used to perform physical verification of imports and exports against the customs declaration to confirm compliance with customs laws. In other words, the rationale behind its use is that it confirms that the goods on the declarations are the goods on the ground.¹⁵⁴

It's monitored, supervised and enforced by the customs officers of partner states where goods are destined to go. Apparently, the member states customs administrations incur costs to operate officers in other member states territories to handle this mechanism among other things. If this mechanism was handled by a regional institution there would not be any need for the customs administrations to incur costs in operating officers in other respective member states territories. This will bring about uniformity in its enforcement, transparency, efficiency and cost effectiveness in the enforcement of it as there would be one mobile examination team under the direction and control of the council or directorate of customs other than numerous ones from member states customs administrations.

¹⁵⁴ Uganda Bureau of Standards, Guidelines for Clearance of Imports. <http://www.unbs.go.ug/attachments/article/48/GUIDELINES%20FOR%20CLEARANCE%20OF%20IMPORTS%20BY%20UNBS.pdf> > accessed on 12 May 2015.

3.1.18 Pre-clearance

It enforces customs law as declarations are processed before the arrival of the consignment and quick documentary verification is conducted upon the arrival of the goods.¹⁵⁵ It's an enforcement mechanism because it ensures registration of imports and confirmation of documents in respect of the goods upon their arrival, it also constitutes of inspection of them in order to proof that there has been proper valuation and identification of the goods. The rationale is to curb down on the levels of dumping, smuggling of goods and tax evasion although it's not extensively achieved.

It's done by the customs officers of the respective government agencies of partner states. The council or the directorate of customs plays no role in its compliancy. The disadvantage of a regional body lacking authority to enforce it is that there is no adequate effectiveness, efficiency, and transparency while it is done as compared to if one of the regional institutions had authority to oversee its enforcement. In other words, in many instances, as reported by traders during the interview, they tend to conspire with unscrupulous customs officers to evade taxes by misdescription and misclassification of goods. The customs officer does it by first lodging a wrong entry and then when goods arrive, he then bribes the customs officers to accept the wrong description that was submitted online.

3.1.9 Numerous Registrations

It's an enforcement mechanism as it ensures that the only registered parties are the ones dealt with by the respective government agencies. It involves registration of importers, exporters and

¹⁵⁵ World Customs Organization/East African Community, 2rd Regional Project Managers Meeting, (Kampala, 23 January 2009), at p. 9.

clearing agents with the respective government agencies of member states this includes Kenya Bureau of Standards, Kenya Port Authority, Uganda National Bureau of Standards, Entebbe Airport among others. These numerous registrations by the member states government agencies make the trade to be so tedious and time-consuming. In other words, they are NTBs. It also stops people from operating in gazetted places even if they are licensed customs clearing agents thus obstructing trade ie for a customs clearing agent to get the Entebbe airport pass is required to be a tenant with the institution or he pays 800,000 Ugandan shillings.

This necessitates corruption, dumping, smuggling and tax evasion as it makes trade costly thereby making importers prefer trade illegalities. I, therefore, advocate that the council or the directorate of customs is given authority to register them, instead of having numerous partner states institutions register them. This is a loophole within the institutional legal framework of the EAC CU which needs to be addressed as it enhances the inadequacies aforementioned.

3.1.10 Destination inspection scheme

It includes pre-arrival lodgement of cargo, import documents, computerized risk management System, non-intrusive X-ray scanning and transaction price database.¹⁵⁶ It constitutes of container scanning, this mechanism was put in place for scanning and storage of images for

¹⁵⁶ World Customs Organization/East African Community, 2nd Regional Project Managers Meeting, (Kampala, 23rd January 2009), at p. 35.

https://www.google.com/search?q=Destination+inspection+scheme+It+includes+pre-arrival+lodgement+of+cargo+import+documents%2C+computerised+risk+management+System%2C+non-intrusive+X-ray+scanning+and+transaction+price+database&aq=Destination+inspection+scheme+It+includes+pre-arrival+lodgement+of+cargo+import+documents%2C+computerised+risk+management+System%2C+non-intrusive+X-ray+scanning+and+transaction+price+database&aqs=chrome..69i57.1364j0j8&sourceid=chrome&es_sm=93&ie=UTF-8 > accessed 9 October 2014.

postponed analysis in respect of containers transferred to inland container depot.¹⁵⁷ It ensures right taxes are collected, that there is no misdeclaration of goods and illegal goods don't enter a member state economy. It also deals with smuggling and dumping of goods.

This is done by the customs officers or government agencies of the respective partner states, not the council or the directorate of customs. The problem of them lacking oversight role to ensure its implementation in the partner states territories is that it makes dumping and smuggling of goods vulnerable as proper offices conspire with importers and traders not to properly describe goods/remove the seals and this leads to under-declaration and valuation thus making wrong taxes to be collected. There is need to amend the EAC CMA to provide either the council or directorate of customs with authority to have over sight authority towards its enforcement so as to achieve trade prosperity in the region.

3.1.11 Issuance of practicing notes and customs procedure manual

These are issued by individual member states customs and revenue administrations, not the council or directorate of customs. They contain guide lines which must be followed by the customs officers and clearing agents while administering the customs law of the community. This is a loop hole within the institutional legal framework of the EAC CU that need to be addressed as it brings about the divergence in the administration and management of the customs law of the community since each partner state issues its own.

In other words it would be appropriate if either the council or the directorate of customs was the one responsible for providing them as it would have enhanced transparency and efficiency in the

¹⁵⁷ Ibid.

enforcement of customs law as all member states would have had the same practicing notes and customs procedure manual to guide them in the administration of customs matters.

3.1.12 Revenue authority's digital data Exchange

This mechanism enforces customs laws as it is used as the means of exchange of information. Like Uganda and Rwanda uses Asycuda world¹⁵⁸ and Kenya uses Simba.¹⁵⁹ These systems are generated by the member states customs and revenue administrations. The council or the directorate of customs has no role it plays to ensure their compliancy in the member states customs administration. The problem with this, is that it makes access to information difficult. There is actually a need for the EAC to formulate or come up with one system that will be used across all the EAC partner states and also the council to have the over role power to enforce it apart from the member states revenue and customs administrations implementing it and enforcing it to. Ie there is a delay to transfer data from one platform to another which reduces the level of efficiency in the enforcement of customs law and procedures.

3.1.13 Single customs territory

It's a consolidation stage of a customs union. It involves a destination model which ensures that the goods are cleared once by the destination country when they are still at the entry point. However, this has not yet been attained by the EAC CU as goods are still subject to multiple jurisdictions. This is evidenced by the statement made by the Secretary-General of the EAC Secretariat whereupon he stated: "that we hope by 2017 all goods to the region are cleared once

¹⁵⁸ < <http://www.rra.gov.rw/spip.php?article927> > accessed on 8 August 2016.

¹⁵⁹ < http://www.kra.go.ke/portal/customs/about_customs.html > accessed on 5 October 2015.

at the port of entry”.¹⁶⁰ Its enforcement is procured by the member states customs administration, not the council or the directorate of customs.

The problem with this is that goods are still subject to multiple jurisdictions whereof the country of destination is not the country of entry. It's not only a NTB but it also obstructs the attainment of the objectives of a single customs territory which include among others prosperity in trade and having a single investment area, ie it increases the costs and time taken in clearance of goods as the importer has to obtain other necessary documents necessary to permit him/her to freely move the goods in the country of entry notwithstanding that the goods have been cleared with the respective member state country of destination. An example is a motor vehicle whose country of destination is Uganda and the country of entry is Kenya however much it's fully cleared by the URA customs officers it cannot freely move through Kenya to Uganda unless KRA has furnished a movement document C2, foreign permit fees, road user fees and it has also obtained insurance from the insurance company in Kenya not Uganda.

This weakness enshrined in the institutional legal frame work of the EAC CU can be addressed by amending either the TEEAC or the EAC CMA to provide powers to the council or the directorate of customs to have authority to oversee its enforcement. This will deal away with certain procedure technicalities that exist like ascertaining of the cargo movement documents from the country of entry where it's not the country of destination and the time spent on the clearing of goods. This will support the current proposal by the Secretary General to impose a

¹⁶⁰ Pamela Sittoni, East Africans to Pay More for Goods, Interview with the Liberator Mfumukeyo Secretary General of the East African secretariat, The East African Newspaper September 3-9 2016 at 9.

certain amount of import duty on all goods coming outside the EAC region.¹⁶¹ If they will use some of the import duty imposed in order to oversee the enforcement of the single customs territory among other obligations it has in the community.

In conclusion, the above has reviewed the major current EAC CU enforcement mechanisms used by the EAC partner states in the enforcement of customs law. It has not only established the challenges associated with each enforcement mechanism in the enforcement of customs law but it has also expressed the impact the challenges bring to the development of member states economies.

3.2 Positive effects of the current EAC CU enforcement mechanisms

However much there are various challenges associated with each enforcement mechanism used in the enforcement or implementation of customs law as aforementioned, there are also some benefits that have accrued by their use although not as compared to if the council or directorate of customs had authority to enforce it. Below are some of the advantages they have established.

3.2.1 Promotion of trade

They facilitate trade by use of simplified customs procedures and also sales are made much faster, example authorized economic operator enables faster clearance and release of goods by applying simplified procedures.¹⁶² This leads to the government being in the capacity to develop infrastructure and also to provide the nation with other services. In other words, intra-regional trade has increased among member states; this is evidenced by the EAC Trade Report 2013 by

¹⁶¹ Ibid.

¹⁶² East African Community Post Clearance Audit Manual at p. 8.

the EAC Secretariat which stated that the intra-EAC trade increased by 6.1 percent in 2013 compared to trade recorded in 2012.¹⁶³

The report also explains that the EAC total trade with the rest of the world maintained an upward trend by posting a growth rate of 8.3 percent in 2013 compared to what was recorded in 2012 and the foreign direct investment to EAC increased by 6.6 percent to US\$ 3.7 billion in 2013 compared to what was recorded in 2012.¹⁶⁴ Further Kenya reported an increase in imports to \$ 15.8 billion in 2013 from \$ 14.8 billion in 2011; Uganda's imports grew from \$ 5.6 billion to \$ 5.8 billion while exports expanded from \$ 2.2 billion to 2.7 billion in the same period.¹⁶⁵

Trade has also been facilitated to a certain extent by reduction of the costs of doing business. ie the one stop border post reduces business and administrative costs as all clearance activities are done at one border point. This is witnessed by the growth of GDP of member states example Kenya GDP growth forecast for 2015 is 6.9 PC, hence it has made Kenya enter into a lower income economy.¹⁶⁶

3.2.2 Increase in tax

They increase the taxes collected due to the transparency they establish example post clearance audit and electronic cargo trucking system assists in the collection of income tax ie where it has

¹⁶³ East African Community Secretariat, East African Community: Trade Report (2013), at p. 12-13. <http://www.eac.int/trade/index.php?option=com_docman&task=cat_view&gid=49&Itemid=49> accessed on 11 March 2015.

¹⁶⁴ Ibid.

¹⁶⁵ East Africa, Authorised Economic Operators, East African Newspaper (21-27 November), at p. 21.

¹⁶⁶ <<http://www.theeastafican.co.ke/news/EAC-States-to-rebase-their-economic-data-by-2015-end/-/2558/2475240/-/nhwvrg/-/index.html> > accessed on 4 November 2015.

been lost; compensation is got which contributes to the national treasury of member states. This has in turn to a certain extent reduced poverty in the EAC member states economies ie Uganda's Poverty Status Report 2014 shows that poverty in the country fell to 19.7% in 2012/2013 financial year from 24.5% in 2009/2010. It was also noted that poverty in rural areas fell by almost two-thirds to 22.3% in 2012/2013 from 60.4 in 1992/93. Further, the report which was launched on 5th December shows that the middle class increased to 37% in 2012 from 10.2% in 1992.¹⁶⁷

3.2.3 Promotion of trade liberalization

They have enhanced trade liberalization among member states; it refers to the removal of obstacles to trade.¹⁶⁸ Their presence has led to the development of the economies of member states as the elimination of some obstacles to trade have enhanced free movement of goods among the member states example electronic cargo trucking system whereupon road blocks have reduced due to them. This is also witnessed by the EAC Elimination of Non-Tariff Barriers Act 2015 that was passed by the EAC Legislative Assembly in the venture to reduce on the NTBs within the region.¹⁶⁹

3.2.4 Promotion of investment

They have to a certain extent created a conducive environment for investors thereby boosting foreign, domestic and cross-border investment which has created employment opportunities to

¹⁶⁷ UNDP, Structural Change and Poverty Reduction in Uganda, Poverty Status Report 2014 at p. 1. <<http://www.ug.undp.org/content/uganda/en/home/presscenter/articles/2014/12/08/uganda-poverty-status-report-2014-launched.html>> accessed on 20 November 2015.

¹⁶⁸ <http://www.customs.eac.int/index.php?option=com_content&view=article&id=123&Itemid=78> accessed on 18 March 2015.

¹⁶⁹ <http://www.customs.eac.int/index.php?option=com_content&view=article&id=11&Itemid=107> accessed on 13 March 2015.

people as compared to before their emergence as they guarantee security example the electronic cargo trucking system that enhances efficiency in revenue collection by monitoring movement of cargo within a single customs territory thereby reducing chances of tax evasion and human contact which in turn lowers the levels of corruption that would have been committed.¹⁷⁰

This is evidenced by the report of the EAC facts and figures 2014, where the contribution registered from the manufacturing sector was 8.3 percent GDP in 2013. Burundi reported the highest contribution of 10.5 per cent and Rwanda the lowest of 5.1 per cent.¹⁷¹ Further the EAC Trade Report 2013 state that the revenue from all EAC Partner States increased by 6.9 percent to US\$ 6,993.2 million in 2013.¹⁷²

3.2.5 Increase in market access

They have increased market access as they facilitate trade by establishing efficiency, transparency and effectiveness example the adoption of common international standards and laws has enlarged the markets of the member states as this attracts foreign investor's thereby boosting and expanding businesses. This is witnessed by the Protocol which was adopted and signed by the EAC Heads of State on 20th November 2009 at Arusha in Tanzania; thereafter it was ratified by the member states and then come into force on 20th May 2010.¹⁷³

¹⁷⁰ East African Community Secretariat, East African Community: Single Customs Territory at p. 2.

¹⁷¹ <http://www.eac.int/statistics/index.php?option=com_docman&task=cat_view&gid=48&Itemid=153> accessed on 11 May 2015.

¹⁷² East African Community Secretariat, East African Community: Trade Report (2013), at p. 15. <http://www.eac.int/trade/index.php?option=com_docman&task=cat_view&gid=49&Itemid=49> accessed on 20 May 2015.

¹⁷³ East African Community Common Market Protocol.

< http://www.commonmarket.eac.int/index.php?option=com_content&view=article&id=94&Itemid=117 > accessed on 10 July 2015.

Further, the study on the impact of the EAC CU on businesses reports that, since the launch of it in 2005, the business entities expanded about 86% in Kenya, Tanzania 78% and Uganda 60%.¹⁷⁴

The above mentioned discusses the positive effects of the current EAC CU enforcement mechanisms on the economies of member states.

3.4 Other legal and institution gaps in the enforcement of customs law

Although the objective of my study was specifically to find out the impact of the lack of the enforcement powers by the council or directorate of customs in the enforcement of customs law, there were also other legal and institutional gaps that I found out during my research that I cannot ignore since their impact on the enforcement of customs law is also great these include but not limited to the following;

3.4.1 Different total import taxes

The total import duty in the respective partner states is different despite the existence of EAC Common External Tariff. In Kenya VAT at import rates is 16% while in Uganda its 18%. In other words, the import duty in Uganda is greater than that of Kenya. This creates trade inequality as prices of similar goods are higher in Uganda than in Kenya. The existence of different total import taxes is a loophole within the institutional legal framework of the EAC CU which although it's not the gist of this research should be addressed by harmonization as seen in chapter 5 of this research.

¹⁷⁴ East African Business Council, Study on the Impact of the East African Community Customs Union On Businesses. Final Report August 2008, Submitted by Integrated Development Consultants at p. 29. <http://www.eabc.info/uploads/EABC_Study_on_Impact_of_EAC_CU_on_Businesses.pdf> accessed on 7 August 2015.

3.4.2 Inconclusiveness of certain documents

PVoC issued by the internationally accredited companies on behalf of Uganda Bureau of Standards addressed to Uganda are not conclusive in Kenya. This is another gap that needs to be addressed by the EAC CU as it obstructs trade since Kenya Bureau of Standards doesn't recognize it. I, therefore, urge the EAC CU to address it by emphasizing that partner states should recognize documents relying on the mutual recognition principle or harmonization of standards.

3.4.3 Low publicity

However much the member state have tried to create awareness to customs agents in respect to issues concerning enforcement of customs law as even seen at times when they base the issuance of customs clearance license on the attendance of awareness conferences, there is still a lot of efforts that need to be put to create awareness to customs agents and traders which cannot be achieved by member states revenue and customs authorities only. In fact, during my interview I made with some customs agents, importers and exporters I found out that most of them are so ignorant on numerous issues concerning enforcement of customs law.

Further also in respect to the three conferences I attended which were organized by the Uganda Revenue Authority on the single customs territory, many customs agents expressed negative sentiments towards it. Some of their major reasons included that they have lost business as big companies are the only ones that have accumulated the market, taxes are very high and also that the use of technological electronic submission of the declaration is so slow thereby delaying clearing and obstructing trade.

In one of the conferences organized by the Uganda Bureau of Standards which I attended, many exporters and customs agents expressed their dissatisfaction about the procedures used by UBS while checking whether goods confirm with the standards. In that conference, I learned that most goods that come to Uganda don't satisfy the standards established by the UBS and one of the major reasons for this is corruption by officers concerned.¹⁷⁵ This a huge gap that exists in the legal frame work of the EAC CU that needs to be addressed as it does not only affect the trade success but also the quality of goods received in the member states economies as this causes dumping of goods, smuggling and tax evasion to be rampant.

The aforementioned discusses the other gaps in the law on enforcement of customs law that is not the core of this research that affect the operation, management, implementation and administration of customs law that need to be addressed in order to have the objectives enshrined in Article 3 of the Protocol achieved.¹⁷⁶

In a conclusive remark therefore this chapter discusses the current EAC CU enforcement mechanisms, the challenges associated with each enforcement mechanisms in the implementation and enforcement of customs law, their positive effects on the economies of member states and other gaps that exist in the law on the enforcement of customs law that need to be addressed in order to have Article 3 of the protocol achieved.¹⁷⁷

¹⁷⁵ Uganda National Bureau of Standards, Conference on Enforcement of Compulsory Standards, September 2016 at UMA Show Grounds Lugogo Kampala at 9.00-1.00pm.

¹⁷⁶ The Protocol on the Establishment of the East African Customs Union.

¹⁷⁷ Ibid.

I, therefore, conclude that the current EAC CU enforcement mechanisms cannot achieve its objectives as intended due to the challenges associated with them. This includes but not limited to corruption, dumping of goods among others which are extensively caused by the lack of the enforcement power by the council or the directorate of customs to enforce the customs law of the community. There are also positive effects established by EAC CU enforcement mechanisms among them is trade liberalization and also other challenges that have obstructed the development of member states economies in respect to the enforcement of customs of law although I have not discussed them comprehensively example divergent tax regimes of member states.

CHAPTER FOUR

The distinction between EU CU and EAC CU in terms of their legal framework

4.0 Introduction

This chapter discusses the distinction of EU CU and the EAC CU in respect to their legal framework on the enforcement of customs law. It also provides some of the mechanisms that EU CU has used to deal with the dumping of goods, smuggling, tax evasion, tax avoidance and corruption by customs officers. Lastly, it concludes by discussing some of the lessons that the EAC CU can learn from the EU CU in order to have Article 3 of the Protocol achieved.¹⁷⁸

The choice of the EU CU comparison with the EAC CU is based on the fact that it is developed, ie there has been a successful implementation and enforcement of the CU albeit the shortfalls. In other words, its development is due to the favorable legal framework that is the Treaty on the EU and the Treaty on the Functioning of the EU together with strategies developed at the Union level.

4.1 A comparison of the EU CU and EAC CU legal framework on the enforcement of customs law

4.1.1 The exclusive competence of the EU CU on issues concerning customs

The Treaty on the Functioning of European Union herein after called TFEU provides for various categories of competence which are to be exercised by either the member states, EU or both in

¹⁷⁸ The Protocol on the Establishment of the East African Customs Union.

order to achieve the objectives enshrined in the Treaty.¹⁷⁹ In matters relating to customs the TFEU provides that the EU shall have exclusive competence,¹⁸⁰ this means that in respect to customs matters the EU has the sole mandate to legislate and adopt legally binding Acts unless it gives permission to the member states to do so.¹⁸¹

However, TEEAC doesn't provide the community with exclusive competence/authority with matters concerning customs, although it provides it with authority to make laws relating to customs.¹⁸² In other words what the TEEAC establish is the shared competence ie where the member states legislate until the community makes a law.¹⁸³

This is a gap that exists within the legal framework of the EAC CU that needs to be addressed as it causes various inadequacies in the enforcement of customs law. This includes the following;

(1) States make legislations that best suit them

The disadvantage of the community lacking exclusive competence is that member states make legislations that best suit their own interests and not the region, for example, some tax legislations of member states offer trade advantages in form of charging low taxes to importers unlike other legislations providing for the same in other jurisdictions. For instance, in Uganda

¹⁷⁹ The Treaty on the Functioning of European Union, art 2 (1) and (2).

¹⁸⁰ The Treaty on the Functioning of European Union, art 3 (1) (a).

¹⁸¹ The Treaty on the Functioning of European Union, art 2(1).

¹⁸² The Treaty for the Establishment of the East African Community, art 49.

¹⁸³ The Treaty for the Establishment of the East African Community, art 8 (4, 5 and 2(b)).

and Kenya where importers prefer to import to Uganda than Kenya due to high excise duty taxes charged in Kenya on smaller vehicles than on luxury vehicles.¹⁸⁴ This causes unfair tax competition and unequal treatment of tax payers that lead to tax evasion among others.¹⁸⁵

(2) Complexity to traders and customs agents

It also causes inconsistencies due to the overlap of laws and complexity as it becomes hard for clearing agents and traders to understand numerous legislations dealing with the same issue. All these lead to inefficiency and ineffectiveness in the enforcement of customs law and instead foster dumping, smuggling of goods among others.

The benefit of the exclusive competence to the union is that it brings about uniformity, coherence, transparency, efficiency and effectiveness in the enforcement of customs law as there is only one law to be enforced across the region therefore easy to be understood by the customs agents and traders. It also helps to deal with the dumping of goods, smuggling, tax evasion and avoidance as it creates trade equality among traders ie they find it just, therefore, no need to

¹⁸⁴ Anita Chepkoech, 'Business Daily Africa, Kenyan dealers Cry foul over Influx of cheaper Ugandan cars' Business Daily Africa (Nairobi, 12 January 2016) at p.6.

<<http://www.businessdailyafrica.com/Kenyan-dealers-cry-foul-over-influx-of-cheaper-Ugandan-cars/1248928-3030606-ifvu3i/index.html>> 'accessed on 9 August 2016'.

¹⁸⁵ Mutsotso, Clyde (2008), *Harmonisation of EAC Tax Policies and Laws Proposals for Taxation Regime for Fostering Small Business Development and Regional Economic Growth*, CUTS International at p. 2.

< http://www.cuts-geneva.org/pdf/BIEAC-RP10-Harmonisation_of_EAC_Tax_Policies_and_Laws.pdf > accessed on 13 May 2015.

dump goods and also no double taxation thus no need to conspire with customs officers to evade taxes.

In addition to the aforementioned, the TEU provides that the union shall attain its objectives by suitable methods corresponding with the competences which are bestowed in the Treaties.¹⁸⁶ In reference to the enforcement of customs law, this shows that the EU has powers to enforce the customs law of the union where member states fail to do so as it has exclusive competence in matters relating to customs, whereof the EC does it on its behalf.

However, the TEEAC provides for the shared competence not exclusive.¹⁸⁷ It doesn't also provide any regional institution with authority to enforce customs law of the community and neither does the EAC CMA nor the Protocol on the Establishment of the East African customs union establish such mandate to the council or the directorate of customs.

4.1.2 The facilitative operational principles in the EU CU

Treaty on European Union hereinafter referred to as TEU provides for the operational principles governing the use of competence which is not established by the TEEAC.¹⁸⁸ These principles facilitate the EU in the attainment of its goals generally unlike in the TEEAC which doesn't. It includes the following;¹⁸⁹

¹⁸⁶ The Treaty on European Union, art 3 (6).

¹⁸⁷ The Treaty for the Establishment of the East African Community, art 8 (4, 5 and 2(b)).

¹⁸⁸ The Treaty on European Union, art 5.

¹⁸⁹ The Treaty on European Union, art 5 (1).

The principle of conferral

This includes that the union shall only act in accordance with the competence given to it by member states in the Treaties in order to achieve its mandate and therefore that which is not provided to it remains with the member states.¹⁹⁰

The principle of proportionality

This includes that the union's action in both content and the form should not be greater than what is essential to attain its objectives under the Treaties.¹⁹¹

The principle of subsidiarity

This is used in cases where the union has no exclusive competence whereof in such a situation the Union shall only act to the extent that objectives of the proposed action cannot be effectively attained by the member states either at regional, local or central level but however due to the scale or effects of the proposed action they can well be accomplished at the union level.¹⁹²

Each of the aforementioned principle facilitates the EU in fulfilling its mandate in a different context. In circumstances where the EU has exclusive competence, it will use the principle of conferral which is to the view that it ought to act only within the authority rendered to it by the Treaty and instances where it has no exclusive competence, it will use the principle of subsidiarity in order to be able to attain its goal in respect to the issue in question together with the principle of proportionality. However, with respect to customs matters, the EU has exclusive

¹⁹⁰ The Treaty on European Union, art 5 (2).

¹⁹¹ The Treaty on European Union, art 5 (4).

¹⁹² The Treaty on European Union, art 5 (3).

competence, which means that in this case it uses the principle of conferral in order to enforce the customs law.

However, when it comes to the EAC, the TEEAC doesn't either provide for the principle of conferral nor proportionality and although it provides for the principle of subsidiarity, the meaning it is given is not the same as that of the TFEU. TEEAC defines it to mean the principle which emphasizes a multi-level participation of a large number of participants in the process of economic integration.¹⁹³ This definition doesn't confer powers to the community to have jurisdiction to enforce customs law where member states fail to enforce them. This is a loophole in the law on the enforcement of customs law that the EAC CU needs to address in order to be in the capacity to achieve Article 3 of the protocol.¹⁹⁴ So much failure in the customs enforcement is associated with lack of exclusive competence by the community in matters concerning customs ie dumping of goods, tax evasion among others.

In addition, if at all the community is not given exclusive competence then they should at least have the principle of subsidiarity definition expounded in a way that will make the community have authority to act where the member states fail to do so.

¹⁹³ The Treaty for the Establishment of the East African Community, art 1.

¹⁹⁴ The Protocol on the Establishment of the East African Customs Union.

The Disadvantage of the lack of exclusive competence in TEEAC

Complexity in the enforcement of customs law

The lack of exclusive competence by the community is one of the leading reasons why member states have not extensively attained success as far as enforcement of customs law is concerned in member states territories. There is a lot of difficulty in the enforcement of customs law due to the fact that importers or exporters find it complex to interpret and apply all those various legislations in member states territories concerning customs matters. For example VAT at import for Kenya is 18%,¹⁹⁵ Uganda 16%,¹⁹⁶ and Burundi 18%.¹⁹⁷

The fact that the community doesn't have exclusive competence means that it doesn't have exclusive mandate to be the only one to legislate and make legally binding Acts. In other words, in the context of the EU CU, the member states can only legislate or make legally binding Acts if they are empowered by the Union or for implementation of the Acts only. The challenge is that enforcement of customs law is hard due to the many laws of each partner state relating to the same matter, example the existence of different standards from the member state. This is evidenced by an article of Elizabeth Murungi Nderitu and Sarah, Trade mark East Africa where she proclaimed that Trade Mark East Africa concentrated on harmonizing standards of only 20 most traded goods on its program standard harmonization 2011 and that apparently it has through

¹⁹⁵ < <http://www.revenue.go.ke/customs/faqcustoms.html> > accessed on 16 August 2016.

¹⁹⁶ < <https://www.google.com/search?q=inport+duty+VAT+rate+at+import+in+UGANDA+REVENUE+AUTHORITY&oq=inport+duty+VAT+rate+at+imp> > accessed on 16 August 2016

¹⁹⁷ < https://www.google.com/search?q=IMPORT+DUTY+AT+VAT+BURUNDI&oq=IMPORT+DUTY+AT+VAT+BURUNDI&gs_l=serp.3...25181.25181.0.26139.1.1.0.0.0.163.163.0j1.1.0....0...1.1.64.serp..0.0.0.B3Za355lwrM > accessed on 16 August 2016.

its program harmonized 170 standards. Many members' states standards are not yet harmonized yet they are enforced by the partner states customs administrations. This gap can be addressed if the community is given exclusive competence in the context of the TEU whereupon it shall have the exclusive mandate to legislate and make legally binding legislations.¹⁹⁸

The Disadvantage of the lack of the principle of proportionality, conferral and also subsidiarity in the perception/ interpretation of the TEU

(1) Slow and inefficient enforcement of customs law in member states territories

The TEEAC limits the definition of the principle of subsidiarity to a multi-level participation of the people in the process of economic integration.¹⁹⁹ Whereas the TEU defines it to mean in circumstances where the union has no exclusive competence, then it shall have authority to act only if the objectives of the proposed action by virtue of their scale and effects, they can only be sufficiently achieved by the union level.²⁰⁰ This is a challenge that doesn't aid the enforcement of customs law in member states territories as it doesn't give authority to the community to enforce the customs law where member states fail to enforce them or where the objective that is to be attained by the member states cannot be achieved extensively if each partner state was to enforce.

¹⁹⁸ Elizabeth Murungi Nderitu & Mary Odongo, Trademark East Africa, A Win For Private Sector Harmonizing Standards in the East African Community Partner States, February 2017 at 3. < <http://documents.worldbank.org/curated/en/532611488781884173/text/113169-BRI-IFC-SMART-LESSONS-BRIEF-PUBLIC-20170302T161744-2017-East-Africa-Standards-A.txt> >accessed on 9 June 2016.

¹⁹⁹ The Treaty for the Establishment of the East African Community, art 1.

²⁰⁰ The Treaty on European Union, art 5(3).

In other words, the absence of such a principle that gives power to the community to have authority to take charge in circumstances where the member states fail to enforce or where the enforcement of that specific law can be extensively achieved by the community that is to say, the council or the directorate of customs as the case may be is a gap in the institutional legal framework of the EAC CU that can be addressed by either the amendment of the TEEAC or the EAC CMA by redefining the principle to mean the perception or interpretation given to it by the TEU. This will, therefore, provide authority to the council or the directorate of customs to enforce the customs law in member states territories where the partner states fail or due to the scope of the scale or effects of the proposed action, the objectives can only be better achieved at the community level not individual state level.

The non-existence of the principle of subsidiarity as per the interpretation given to it under the TEU is evidenced by the fact that each member state enforces the customs law of the community at its own rate for example in reference to the implementation of the single customs territory, apart from the delay in its commencement due to the lack of strong institutional and mutual commitment from all the five East African Countries as stressed out by the Ministry of Trade, Industry and East African Community Affairs Rwanda website.²⁰¹

The member states even after its commencement each state implements it at its own rate for example between Tanzania and Rwanda all goods destined and from Rwanda are subjected to the system. Between Tanzania and Burundi, the system is applied only to some selected imports and

²⁰¹ <[http://www.mineac.gov.rw/index.php?id=71&tx_ttnews\[tt_news\]=643&cHash=6ec7396894cb66ee3860307ef74759f](http://www.mineac.gov.rw/index.php?id=71&tx_ttnews[tt_news]=643&cHash=6ec7396894cb66ee3860307ef74759f) > accessed on 15 October 2016.

selected importers. The goods subject to the system are empty glass bottles, cement, cosmetics, fertilizers, cooking oil and steel products. Between Tanzania and Kenya, all imports from Kenya to Tanzania are subjected to the system including imports from outside EAC passing through Kenya. Goods from Tanzania to Kenya have not yet been included in the system. Between Tanzania and Uganda, the system is used for maritime petroleum products (fuel), self-driven motor vehicles, wheat flour and vegetable cooking oil to Uganda. In the case of intra-trade, all goods to and from Uganda are subjected to the system.²⁰²

Additionally, although Burundi and Tanzania embraced the single customs territory later after Kenya, Uganda and Rwanda implementing it, still their implementation of it is still very slow as stressed out by an article of Trademark East Africa.²⁰³

(2) It causes disparity in the enforcement of customs law in member states territories

The absence of the principle of subsidiarity in the context of the TEU is one of the justifications for the imbalance or variance in the enforcement of customs law as it doesn't give authority to community to enforce the customs law where member states fail to enforce them by virtue of the reason of the scale or effects of the proposed action. That is to say if the objectives with respect to the enforcement of that customs law can be better achieved at the community level.²⁰⁴ An

²⁰² < <http://www.tra.go.tz/index.php/customs-licenses-for-2014> > accessed on 20 June 2016.

²⁰³ Trade Mark East Africa, East African News, Tanzania, Burundi hold back Single Customs Zone Bid, (Dare salaam, 24th July 2014) 9.

< <https://www.trademarka.com/news/tanzania-burundi-hold-back-single-customs-zone-bid/> > accessed on 11th March 2015.

²⁰⁴ The Treaty on European Union, art 5(3).

example is in reference to the implementation of the EAC electronic single window system whereupon its observed that there has been a system interface between Rwanda electronic single window, Uganda revenue authority Asycuda world and Kenya revenue authority Simba system plus the Kenya port authority. In other words, Tanzania and Burundi have not yet joined/interfaced with aforementioned member states with respect to the EAC Electronic single window; this would have been different if the TEEAC had the principle of subsidiarity defined in the context of the TEU. This is because the council or the directorate of customs would have had the authority to enforce the customs law in those member states territories by virtue of the community having authority.²⁰⁵

(3) Presence of no principle guiding the directorate of customs while executing its mandate

The challenge experienced by the absence of the principle of conferral in the TEEAC is that there is no principle guiding the directorate of customs while exercising its role in coordination and monitoring of the enforcement of customs law in member states territories.²⁰⁶

This principle in the context of the TEU limits the union from acting ultra vires that is to say it only has to act within the competence given to it by the member states in the treaties to attain the goals set out therein.²⁰⁷

²⁰⁵ < <http://sw.gov.rw/?cat=8> > accessed on 12 August 2016.

²⁰⁶ The East African Community Customs Management, sect 4.

²⁰⁷ The Treaty on European Union, art 5(2).

The inclusion of this principle of conferral in the TEEAC will facilitate the directorate of customs or the council while coordinating and monitoring the enforcement of customs law in member states territories in the context of acting within its authority. That is to say and if the TEEAC is amended to provide the council or the directorate of customs with powers to enforce the customs law, it will still be significant for it while executing its role of enforcing customs law in member states territories to use its authority only to achieve the objective promulgated and not to act beyond its powers.

(4) Lacks a principle to guide the directorate of customs or any other EAC CU institution on how it should balance its power while executing its obligations

The problem experienced by the absence of the principle of proportionality in the TEEAC is that the directorate of customs lacks guidance while executing its mandate of coordinating and monitoring the enforcement of customs law in member states territories on how it should act in both form and content that is to say not to go beyond what is required or essential for it to attain the objectives promulgated in the EAC CMA or East African Community Customs Management (Compliance and Enforcement) Regulations, 2012.

The provision of this in the TEEAC will address the gap that exists as far as enforcement of customs law is concerned that is to say whereupon the TEEAC is amended to provide powers to the council or the directorate of customs to enforce the customs law of the community in member states territory, the principle will help to facilitate or enable the aforementioned institutions not to act beyond the powers given to it while enforcing the customs law in member states territories

and also to come up with form and content with respect to its action that will only be aimed at attaining the objectives as stressed in the treaties.

The advantages of having such principles in the TEU include the following;

(1) Providing authority to the EU where TFEU doesn't provide it with exclusive competence

The principle of subsidiarity confers authority to the EU in circumstances where it doesn't have exclusive competence. This makes the EU to be in the capacity to fulfill its mandate even where it had no power to do so usually in circumstances where the objectives of the proposed action cannot be sufficiently and effectively be attained by member states only.

In respect to enforcement of customs law if the TEEAC provided for it or defined it to mean that of the TFEU, the community would have had capacity to enforce the customs law in member states territories thereby dealing with the problem of dumping, smuggling of goods or tax evasion which are the resultant effects of its lack of exclusive competence over customs matters in the region.

Additionally, the principle of subsidiarity also seeks to safeguard the ability of the Member States to take decisions and action. It also authorizes intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States but can be better achieved at Union level, 'by reason of the scale and effects of the proposed action'.

Further, it ensures that powers are exercised as close to the citizen as possible, in accordance with the proximity principle referred to in Article 10(3) of the TEU.²⁰⁸ In this case of the EAC where the community doesn't have exclusive competence if the TEEAC is amended to include it, it will enable the community to assume full responsibility in respect to enforcing the customs law in member states territories where the partner states fail or where the objectives of enforcing that specific law would be better achieved at the community level. It will also reduce the possibility of a rigidity of the enforcement of customs law by member states.²⁰⁹

More to that is that the principle of subsidiarity enhances sharing/distribution of power that is to say in this circumstances the member states will share the power to enforce the customs law with the community. It also creates a degree of independence for member state in relation to the EAC institutions as far as enforcement is concerned.²¹⁰

The introduction of this principle in the TEEAC will necessitate proper management, enforcement and administration of customs that is to say this principle precipitates good governance as it regulates the conduct of institutions not having powers under the law to take up certain tasks like for this case the council or the directorate of customs if its included in the TEEAC it will facilitate it to act where it has no authority to do so but by virtue of the objectives that is aimed to be achieved it can only be better achieved at the community level.

²⁰⁸ Treaty on European Union, art 10(3).

²⁰⁹ Rosa Raffaelli, Facts Sheets on European Union, March 2017 at 5.

<https://www.google.com/search?site=&source=hp&q=benefits+of+the+principle+subsidiarity&oq=bene fits+of+the+principle+subsi&gs_l=hp.1.1.33i21k112j33i160k114.647156.664523.0.667590.49.44.5.0.0.0.257.5923.0j22j8.30.0...0...1.1.64.hp..15.34.5773...0j0i10k1j0i131k1j0i22i30k1.OHmZ7Xj5aN4>
accessed on 6 May 2017.

²¹⁰ Ibid.

According to Aurdlian Portuese in his article of the principle of subsidiarity as a principle of economic efficiency, he stressed out that this principle facilitates economic prosperity as it widens the scope of the exercise of power by the European Union in circumstances it doesn't have jurisdiction for purposes of achieving economic benefits. In this case trade prosperity, increase of revenue of the member states if at all the law is enforced and trade malpractices are wiped out or reduced.²¹¹ To note this principle was first introduced in Maastricht.²¹²

According to Olivia Barton, the principle of subsidiarity aim is honorable and the concept is theoretically justifiable and important.²¹³ In this case of the customs law enforcement it will necessitate the community to come in and enforce the customs law where member states are incapable due to financial restraints among other factors to enforce the customs law and whereupon the implementation of that specific law, it can be better achieved at a regional level Reference can be made to the Directive Case, the European court of justice stated that whenever

²¹¹ Portuese, A., 2010. The Principle of subsidiarity as a principle of economic efficiency. *Colum. J. Eur. L.*, 17, p.231.

²¹² Consolidated Version of the Treaty Establishing the European Community, art. 3b, Dec. 29, 2006, 2006 O.J. (C 321E) 37 [hereinafter EC Treaty]; Protocol No. 30 on the Application of the Principles of Subsidiarity and Proportionality of the Consolidated Version of the Treaty Establishing the European Community, pmb1, 2006 O.J. (C 321E) 308. After being defined in Article 3b of the 1992 Treaty of Maastricht, the subsidiarity principle was then incorporated in Protocol No. 30 of the European Community Treaty by the signing of the Amsterdam Treaty of 1996.

²¹³ Barton, O., 2014. An analysis of the principle of subsidiarity in European Union Law. *NEL Rev.*, 2, p.83.

the Council seeks to fulfill an obligation through harmonization this ‘necessarily presupposes [EU]-wide action.’²¹⁴

In otherwise for there to be effective and efficient enforcement of customs law in member states territories, this principle of subsidiarity should be redefined to mean the context of that of the TEU. Enforcement of customs law can be effectively achieved if it’s a regional body either having the oversight authority in its enforcement or the aforementioned principle is redefined. Individual member state customs and revenue administrations can only do little due to their capacities. This is also evidenced by the numerous regional agreements some member states have entered in order to enforce customs laws due to their weak border control mechanisms reference can be made to the Zanzibar Declaration on Illegal Trade in Timber and Forest Products signed at the XIV World Forestry Congress in Durban, South Africa on 9th September 2016, whereupon the national forest agencies from Republics of Kenya, Madagascar, Mozambique, Uganda, and United Republic of Tanzania agreed to it and they are making all possible mechanisms to ensure its implementation.²¹⁵

(2) Creating balance of power while executing its mandate

The principle of proportionality, this facilitates the European Commission while executing its competence with respect to both form and content not to exceed what is sufficient for it to

²¹⁴ Case C-84/94 *United Kingdom v Council*[1996] ECR I- 5755.

²¹⁵ < <http://www.kenyaforestservice.org/index.php/2016-04-25-20-08-29/news/526-statement-from-the-steering-committee-under-the-zanzibar-declaration-on-illegal-trade-in-timber-and-other-forest-products> > accessed on 20 May 2017.

achieve the objectives of the Treaties.²¹⁶ Reference can be made to the Protocol on the application of the principles of subsidiarity and proportionality, this provides how the principle should be applied. This is not the case with the EAC CU as we don't have such a principle facilitating the directorate of customs in its role of coordinating and monitoring the enforcement of customs law in member states territories or any other EAC institution while executing its obligations on how it should balance its power. The inclusion of this principle in the TEEAC will ensure proper, effective, efficient and transparent enforcement of customs law because it will guide the EAC institutions on how to perform their obligations with respect to enforcement of customs law without infringing on the rights of member states, it will also necessitate them to act reasonably and fairly while executing its obligations.

Additionally in respect to enforcement of customs law the European Commission applies it in order to attain its oversight role of the application of the union law, particularly the customs law of the union.²¹⁷ The provision of this in the TEEAC will actually give the same benefits they provide to the European Union as aforementioned.

This principle of proportionality as stressed out in the case of Tecmed Vs Mexico will enable either the council or the directorate of customs which ever will be provided with powers to

²¹⁶ The Treaty of European Union, art 5(4).

²¹⁷ The Treaty on European Union, art 17.

enforce the customs law, to apply fairness, equitable measures and reasonableness while enforcing the customs law of the community in member states territories.²¹⁸

It provides an overarching boundary to the exercise of powers by the European Union, by making them employ means and pursue intermediate ends that are in line with the ultimate objectives of the Union as envisaged in the Treaties, in this case, enforcement of customs law.

(3) Guiding the EU to act within its authority

The Principle of conferral, it guides the EU institutions while executing or performing the obligations provided for them in the Treaty to act within the authority granted to it under any legislation.²¹⁹ That is to say, the authority not granted to it remains with the member states.

Additionally, in respect to the enforcement of customs law, the European Commission which is statutorily mandated to oversee the enforcement of the Union law particularly in reference to the topic of study which is customs law applies it to accord its self with only what it ought to do to attain the objectives it ought to achieve.²²⁰

Further, if the TEEAC is amended to provide powers to the council or the directorate of customs to enforce the customs law of the community in member states territories, this principle shall

²¹⁸ Xiuli, H. (2007). The Application of the Principle of Proportionality in *Tecmed v. Mexico*. *Chinese Journal of International Law* 6(3), at p.635-652.

²¹⁹ The Treaty on the European Union, art 5(2).

²²⁰ The Treaty of European Union, art 17(1).

make either of the institution provided with powers to be in a capacity to exercise its mandate judiciously without acting ultra vires.

4.1.3 European Commission authority to enforce the customs law

The TEU provides the EC with authority to enforce the customs law ie it includes that it shall have authority to oversee the application of the Union law under the control of the institutions pursuant to them;²²¹ however, TEEAC doesn't provide the same. As already discussed the lack of a regional body to enforce ie oversee the application of the customs law in the member states territories is a loophole that the EAC needs to address as it causes numerous vices in the development of the trade in EAC, ie dumping of goods, tax avoidance among others. The provision of the council with authority to oversee enforcement of the custom's law in the member states territories will bring about efficiency, effectiveness and proper management of the

²²¹ The Treaty on the European Union;

art 17 (1), it includes that the Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving inter institutional agreements.

Art 17 (8), provides that the Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 267 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion on censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he or she carries out in the Commission.

The Treaty for the Establishment of the East African Community, art 75.

The East African Community Customs Management Act, s 3 and 4.

The Treaty on the Functioning of the European Union, art 249 (2) it provides that the Commission shall publish annually, not later than one month before the opening of the session of the European Parliament, a general report on the activities of the Union.

customs law as partner states customs officers and commissioners will also be accountable to the council thereby bring about transparency in the enforcement of customs law and also this will help in dealing with corruption and other illegal trade activities that obstruct the prosperity of trade.

The aforementioned, discusses the distinction between the EU CU and EAC CU in terms of their legal framework on matters concerning enforcement of customs law.

4.3 How the EU has dealt with Dumping, Smuggling, Tax Evasion, Fraud and Corruption

Introduction

Although the EU CU still faces some challenges in respect to dealing with Tax evasion, corruption, smuggling of goods, dumping and tax avoidance, it has to a large extent endeavored to curb them down by using the following measures;

4.3.1 It established a periodic assessment of the EU member states efforts on corruption

The Commission introduced this as a device to reduce on corruption ie it helps to improve performance in the enforcement of customs law as the report identifies areas in the enforcement of customs law that needs to be improved, the mechanisms to be developed at a regional level to ensure that there exists accountability and transparency by customs officers or commissioners of customs.²²² Whereas in the EAC apparently all the efforts rest on the member states to curb and prevent corruption, not much has been done by the directorate of customs.

²²² <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/index_en.htm > ‘accessed on 14 October 2015’.

4.3.2 The presence of numerous legislations

They have enacted numerous policies, rules and laws ie member states have also ratified various international conventions, for example, the United Nations Convention against Corruption. These guide officers when enforcing customs law on how to go about those vices, they also give them the authority to prosecute, investigate and adjudicate over the same. However, although the EAC member states have also ratified numerous conventions fighting against those vices and also have laws and institutions to deal with them too, they are still rampant due to the gaps within those legislations example the EAC CMA in several cases provides the commissioner of customs with unlimited discretionary powers whereupon it doesn't provide the parameters upon which they ought to exercise their powers which make corruption among other illegal trade activities to be vulnerable, example section 31(3) of the Act where the commissioner has authority to waive either all or any of the requirements in regards to that section in respect to the arrival of goods over land other than by vehicle.²²³

I, therefore, propose that the discretion of the commissioners of customs be limited by either amendment of the EAC CMA or an EAC practice note be enacted in reference to the provisions providing discretionary powers of the commissioners to provide parameters or requirements upon which they ought to follow while executing their mandate and the breach of the limit be actionable by a regional body, in this case, I would suggest the council as it's the most suiting due to the nature of its functions as established under Article 14 of the Treaty.²²⁴

²²³ The East African Community Customs Management Act.

²²⁴ The Treaty for the Establishment of the East African Community, art 14.

4.3.3 Anti-dumping investigation

Unlike in the EAC CU where investigations are done by the authorities established by the member states,²²⁵ in the EU the EC conducts them²²⁶ and also gives provisional measures.²²⁷ This creates proper dispensation of justice as there is no bias and vulnerabilities to vices like corruption and fraud as they are mitigated. Thus this leads to proper enforcement of customs law as the system used is impartial.

4.3.4 Greater collaboration with member states and numerous institutions

The EC under the shared competence has greatly collaborated with member states to ensure eradication of corruption, tax evasion among others. It has supported and ensured the enforcement of G-20 Anti-corruption action plan²²⁸ endorsed at the Seoul Summit in November 2010.²²⁹ Further it has also co-operated with other authorities and institutions like OLAF and

²²⁵ The East African Community Customs Union (Anti-dumping measures) regulations, reg 3.

²²⁶ Commission Of The European Communities Communication From The Commission Global Europe's Trade Defence Instruments in a Changing Global Economy, A Green paper for public consultation Brussels, 6/12/2006 COM(2006) 763 final at p. 4.

<http://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_6_raporlar/1_2_green_papers/com2006_green_paper_europe_s_trade_defence_instruments.pdf> accessed on 15 June 2015.

²²⁷ European Commission (n 132).

²²⁸ G20 Anti –Corruption Action Plan 2013 – 2014 at p. 1-4.

The G20 renews its pledge to implement fully the commitments found in the Seoul Anti-Corruption Action Plan, the Cannes Monitoring Report and subsequent Leaders' declarations adopted at the Summits in Cannes and Los Cabos, noting in particular the commitment in the Los Cabos communiqué to “closing the implementation and enforcement gap.

It's based on the fact that Corruption threatens the integrity of markets, undermines fair competition, distorts resource allocation, destroys public trust, and undermines the rule of law. Corruption is a severe impediment to economic growth, and a significant challenge for developed, emerging and developing countries.

²²⁹ Annex III, G-20 Seoul Summit Leaders Declaration, 2010 November at p.21.

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0308:FIN:EN:PDF>>accessed on 14 March 2014.

This includes recognizing a special responsibility to prevent and tackle corruption and commit to supporting a common approach to building an effective global anti-corruption regime, promoting a

Europol.²³⁰ It has also made numerous proposals to the council whereof the council has adopted in respect to those vices example Council Directive 2011/16/EU in regards to administrative co-operation in the field tax administration which provides for the essential procedures relevant to improve co-operation in tax administration.²³¹

In addition, it has enhanced cooperation in the investigation, exchange of information, intelligence, financial and technical assistance to member states which has promoted transparency within the sector of customs union thereby reducing on corruption, tax evasion, smuggling among others.²³² Unlike in the EAC CU where not much has been done by the Directorate of customs or the Council to enhance it as even witnessed by the failure of the community to establish a single system of data exchange and also a uniform system of

transparent and inclusive review process; adopting and enforcing laws against the bribery of foreign public officials; preventing access of corrupt officials to the global financial system; considering a cooperative framework for the denial of entry to corrupt officials, extradition, and asset recovery; protecting whistleblowers; safeguarding anticorruption bodies, a dedicating effort to encourage public-private partnerships to tackle corruption and to engage the private sector in the fight against corruption, with a view to promoting propriety, integrity and transparency in the conduct of business affairs, as well as in the public sector.

²³⁰ European Commission, Communication from the Commission to the European parliament, the council and the European Economic and Social Committee Fighting Corruption in the European Union, Brussels [6/6/2011] COM (2011)308 final at p. 11.

<<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0308:FIN:EN:PDF>> accessed on 9 May 2015.

²³¹<http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/index_en.htm> accessed on 9 October 2015.

²³² European Commission, Final Commission Anti-fraud Strategy, Commission Staff Working Paper Action Plan to Fight Against Smuggling Of Cigarettes and Alcohol along the EU Eastern Border Accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy, Brussels [24/6/2011] sec (2011) 791 COM (2011) 376 final), at p.13-17.

<http://ec.europa.eu/anti_fraud/documents/preventing-fraud-documents/eastern_border_action_plan_en.pdf> accessed on 17 March 2015.

registration of importers and exporters. In other words, these have made co-operation difficult as access and exchange of information is hard at times because it's limited to only tax payers of those revenue authorities. It also increases the costs of doing business thereby making compliancy to customs law hard and instead it paves way for trade illegalities that itch up the economies of member states.

4.3.5 It has conducted numerous conferences

Unlike the EAC CU where conferences are not frequently used due to financial constraints, the EC however uses this strategy as a way of assessing whether the mechanisms used to control or prevent tax evasion, dumping of goods among others are effective ie where the methods used to establish and prevent these offences are found inefficient, other mechanisms are established example the Annual Group conference on Cigarettes brings together people of various categories; investigators, analysts and policy makers to enhance controls to deal with the inadequacies that necessitate numerous obstacles to the success of trade on cigarettes.²³³

4.3.6 It has established numerous bodies/agencies

Unlike the EAC, the EU has various authorities in respect to each vice which is obliged to perform specific functions in regards to those vices in order to ensure customs law is enforced and complied with. Example the commission Anti- Fraud Office investigates fraud, corruption and other illegal activities,²³⁴ Frontex helps in the EU border management like in facilitating co-operation, research and joint operations among others.²³⁵

²³³ < http://ec.europa.eu/anti_fraud/index_en.htm > accessed on 9 August 2015.

²³⁴ < <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=the%20commission%20anti%20fraud%20office> > accessed on 12 August 2015.

²³⁵ < <http://frontex.europa.eu/about-frontex/mission-and-tasks/> > accessed on 10 July 2015.

4.3.7 It has established a uniform electronic customs system

Apparently, the EC is implementing and enforcing a uniform electronic customs system; this is facilitating easy exchange of information and also has reduced the costs of doing business thereby making compliancy to customs law easy and simplified, in return which has reduced on tax evasion among other vices. Unlike in the EAC where the same has not been established although we have a single customs territory.²³⁶

The aforementioned discusses some of the mechanisms the EU CU has used to deal with tax evasion, dumping of goods, smuggling, corruption, and tax avoidance.

4.5 Lessons learned from the EU CU

Below are the lessons that the EAC CU can learn from the EU CU to be able to achieve its mandate;

4.5.1 Favorable legal framework

(1) Providing the union with exclusive competence

Unlike in the EAC CU where the community has no exclusive competence on matters concerning customs union, in the EU CU the union has, this means that the member states cannot legislate unless the union gives them permission.²³⁷ The benefits of this are that it avoids multiplicity of laws torching on the same matter thus making compliancy to customs law easy as

²³⁶<http://ec.europa.eu/taxation_customs/customs/policy_issues/e-customs_initiative/index_en.htm> accessed on 12 November 2015.

²³⁷ The Treaty on the Functioning Of European Union, art 3.

traders and clearing agents are in the capacity to understand one law other than numerous laws from each partner state. It also evades unjust laws as the union makes laws putting into consideration the interests of all member states. I therefore urge the community to amend the TEEAC to include it due to the advantages it confers like faster and efficient enforcement of customs law as I observed during my study that at times traders evade taxes, dump goods, smuggle goods or corrupt customs officials due to failure of them to understand each member state customs law and also due to finding some laws of member states unjust to them.

(2) Providing facilitative operational principles

Unlike in the EAC CU where they don't have principles like conferral which help the union not abuse its powers provided to it by the Treaty, proportionality which help the union to exercise due diligence while performing its obligations and the principle of subsidiarity that facilitate the EC and the council to have authority to take action where they don't have exclusive competence although in this case of customs union matters the union has,²³⁸ in this circumstance, it would be used by the directorate of customs or the council to enforce the customs law.

I therefore propose the community to copy the same whereof the Treaty is not amended to provide exclusive competence to the community, by amending the TEEAC to provide such operational principles in order to facilitate the council to be incapacity to enforce the customs law where the member states negligently fail or where due to the proposed action scope and effects the objectives can be well achieved at the community level. They will also guide them while enforcing customs law to act within the limits necessary to achieve the objectives

²³⁸ The Treaty on European Union, art 5 (3).

enshrined in the Treaty. This will eradicate the problem of delay to enforce customs law by member states and it will also deal with tax evasion, dumping of goods among others which partner states are incapable of dealing with at a country level.

4.5.2 The ongoing implementation of the uniform electronic customs system

The EC has an ongoing initiative to modernize the EU customs code and to establish an electronic paper-free customs environment. So far it has adopted two proposals whereof the first is to simplify and streamline customs processes and procedures and the second one is to make the member states electronic customs procedures compatible with each other,²³⁹ ie it's aimed at establishing a comprehensive EU electronic risk analysis, upgrade information swapping among member states, make electronic declarations to rule and also establish a centralized customs clearance arrangement. The basis of this is to promote competition among companies in the union, decrease on the costs incurred on compliance to customs laws and finally boost the EU security.²⁴⁰ It constitutes of having a single, shared computer portal.

I, therefore, propose that the EAC CU should also copy the same due to the advantages it establishes. Apparently, each member state of the EAC uses its own system of technological data exchange ie the Kenya uses Simba and Uganda uses Asycuda world. There is also no uniform

²³⁹ Commission of the European Communities, Proposal for a Regulation of the European Parliament and of the Council laying down the Community Customs Code (Modernized Customs Code), (presented by the Commission) {sec (2005)1543}, Brussels, 30.11.2005 com(2005) 608 final 2005/0246 (cod).

Commission of the European Communities, Proposal for a decision of the European Parliament and of the Council on a Paperless Environment for Customs and Trade, (presented by the Commission) {sec(2005) 1543}, Brussels, 30.11.2005 com(2005) 609 final 2005/0247 (cod).

²⁴⁰ <http://ec.europa.eu/taxation_customs/customs/policy_issues/e-customs_initiative/index_en.htm > accessed on 12 November 2015.

registration of importers and exporters ie Kenya uses PIN and Uganda uses TIN. The presence of this in the community has limited access to information as certain information can only be accessed by an importer if he/she is a tax payer of that respective partner state. It also makes communication difficult; it leads to numerous registrations of importers thus making the costs of doing business very high thereby enhancing tax evasion among others.

4.5.3 Greater EC assistance

According to the EC website, Tax evasion and fraud are complex issues that pose global challenge and that member states can't deal with them alone and that they need assistance from the EC to combat them.²⁴¹ In other words the EC greatly offers financial and technical support to the customs administrations.

Although directorate of customs is obligated to render it as per the provisions of the EAC CMA,²⁴² not much has been done by it to ensure that the tax evasion, avoidance, corruption, dumping of goods and smuggling are dealt with. I therefore suggest that they should do so expansively.

4.5.4 Presence of numerous policies

The EU has developed numerous policies/ strategies to deal with numerous vices example EU tax policy, EU anti-corruption policy²⁴³ among others.

²⁴¹ Ibid.

²⁴² The East African Community Customs Management Act, s 4.

²⁴³ <<http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/snac/pdf/tp/2524-EaP-AC%20Handbook%2011%2003%2013%20plus%20footnote%20EN.pdf> > accessed on 14 November 2015.

Policies are used in management and administration of those vices ie dumping, tax evasion, avoidance, smuggling of goods, corruption and fraud. Example the EU tax policy helps to deal with issues of tax evasion and how the law enforcers ought to operate. The EAC has very few policies which are not enough to cater for the gaps that are constituted in the law governing the EAC CU. I advocate for numerous policies to be made in respect of those vices that impede on the success of the EAC CU or for harmonization of tax policies of different member states so as to ensure faster, transparency, efficiency, accountability and effectiveness in the administration and enforcement of customs law.

In a conclusive remark, therefore, the EU CU has a facilitative law on matters of enforcement of customs law ie the TFEU provides for exclusive competence of the Union on customs matters,²⁴⁴ this means that the Union has a full mandate on issues to do with customs which include among them enforcement of customs law. It doesn't only provide for that but it also provides for operational principles like conferral, proportionality which help the union to exercise due diligence while carrying out its obligations as per the Treaty. It also provides the principle of subsidiarity which it defines in another perspective from that of the EAC to give the union authority to act in areas where it has no exclusive competence although in this case, the union has. Further, the EU CU has numerous policies and strategies as already discussed above to deal with tax evasion, dumping of goods among others, it greatly offers assistance to the member states, and it's also implementing a uniform electronic customs system that is aimed at reducing compliance costs on the side of traders and also strengthening security to deal with tax evasion among other vices.

²⁴⁴ The Treaty on the Functioning of European Union, art 3(1) (a).

I, therefore, urge that the TEEAC should be amended to provide for exclusive competence of the community whereof it doesn't expound on the definition of the principle of subsidiarity. It should also adopt the strategies used by the EC and the Council to enhance proper enforcement of the customs law. In other words, the EAC law on enforcement of customs union is inadequate to ensure faster and efficient enforcement of customs law.

CHAPTER FIVE

Conclusion and Recommendations

5.0 Introduction

This chapter contains a brief summary of the research by chapter; findings, recommendations, and conclusion in respect to the effects EAC CU enforcement mechanisms on the economies of member states. It establishes whether the objectives of the study have been met if the research questions have been answered and whether the hypothesis has been proved right or wrong.

5.1 Research Summary

This research sought to review the enforcement mechanisms of the EAC customs law used by member states and the effects of the enforcement mechanisms of the EAC customs law on the economies of member states.

It also sought to find out whether the lack of the enforcement power/authority by the council or directorate of customs in the enforcement of customs law is a loophole in the institutional legal framework of the EAC CU that needs to be addressed so as to have effective and efficient enforcement of customs.

It was prompted by the slow and poor enforcement of customs law of the community which causes numerous vices that are dumping, smuggling, corruption, fraud, tax evasion and avoidance that leads to retardation in the development of EAC generally. It emphasized that for the EAC CU to achieve its objectives as enshrined in the Protocol for the Establishment of the

EAC CU,²⁴⁵ there is need to amend the Treaty for the Establishment of the EAC to provide for the enforcement powers of the council, facilitative operational principles and the exclusive competence to the community as per the Treaty on the Functioning of European Union and the Treaty on European Union. It also highlighted the significance of the council to have the power to enforce the customs laws of the community.

Chapter 1, it sets out the background to the research, the problem under investigation, the objectives, hypothesis, theoretical framework, literature review together with the gaps in it, research questions and the significance of the study.

Chapter 2, it provides for the loophole within the institutional legal frame work of the EAC CU in respect to the enforcement of customs law of the community. The finding in regards to this is that the laws are inadequate in terms of enforcing customs laws in the member states territories. It concludes by finding out that the lack of the enforcement powers by the council or the directorate of customs is a loophole within its institutional legal framework of the EAC CU that obstructs its success, thus affecting the economies of member states negatively.

Chapter 3, it reviews the major current EAC enforcement mechanisms which includes and not limited to the electronic cargo trucking system, the challenges experienced by each in the

²⁴⁵ The Protocol on the Establishment of the East African Customs Union, art 3.

enforcement of customs law, the negative effects of those challenges in the enforcement of customs law and also the apparent positive impact of them on the economies of member states.

It also discusses although not substantively the other loopholes in the institutional legal framework of the EAC CU that affect the enforcement of customs law, this includes but not limited to the presence of different tax regimes whereupon this doesn't only cause tax evasion but also elevate corruption, dumping of goods, smuggling among others.

It concludes by emphasizing that the current major EAC enforcement mechanisms do not substantively give the benefits that ought to have been gained because of the loophole in the institutional legal framework on the enforcement of customs law ie the council or the directorate of customs need be provided with the oversight authority with respect to enforcement of customs law as this will remedy the challenges associated with them example dumping, tax avoidance among others.

Chapter 4, it gives a comparison in terms of the legal framework in respect to the enforcement of the customs laws as between the EAC CU and EU CU. It also provides some of the ways on how the EU CU has dealt with corruption, fraud, smuggling, dumping, tax evasion and avoidance in reference to enforcement of customs laws. It also contains the lessons that can be learned by the EAC member states from the EU CU in order to ensure effective and faster enforcement of customs law.

5.2 Findings

Observations made in the research raise serious concerns in respect to enforcement of customs law of the community. What has emerged from the research is that member states are slow to enforce them. They also poorly implement them, hence causing dumping, smuggling, fraud, tax evasion and avoidance.

The literature analyzed demonstrates that the directorate of trade and customs through some trade reports has established the problem of slow implementation of customs laws and in the 2009 report identified the obstacle of lack of the enforcement powers of the directorate of customs although it did not give a sufficient remedy of amendment of the Treaty for the Establishment of the EAC to include provision of powers of it or the council which I have extensively established in this research.²⁴⁶

Further the literature also shows the commitment of the council, the directorate of customs and trade in respect to reforming the sector, however the institutional legal framework established by the Treaty for the Establishment of the EAC, the Protocol on the Establishment of the EAC CU and the EAC CMA is inadequate to ensure enforcement of the customs law of the Community

²⁴⁶ Mugoya P, Onyango C and Evarist Mugisa E, An Evaluation of the Implementation and Impact of the East African Community Customs Union: EAC Final Report March 2009 at p. 15.

< <https://www.google.com/#q=2009+report+of+the+impact+of+the+EAC+CU> > accessed on 29 July 2015.

which make the objectives of the EAC CU as enshrined in Article 3 of the protocol not to be extensively achieved as intended.²⁴⁷

The research concluded by asserting that the efficient and faster enforcement of customs laws is possible. That it is attainable when the Treaty for the Establishment of the EAC is amended to include the exclusive competence of the community on issues relating to customs and granting powers to the council to enforce the customs laws of the community among others as I have discussed in the recommendations.

The presence of that in the Treaty for the Establishment of the EAC will facilitate proper administration in the enforcement of customs law and management in the sector. It will also enhance accountability, transparency, efficiency, effectiveness and faster enforcement of the customs laws. It will wipe out the vices that are associated with the lack of the enforcement powers of the council. This will ensure enforcement of the customs laws of the community, therefore, remedying the problem of slow and poor enforcement by the member states where they fail to enforce it.

Considering the discussion from chapter one up to four, I therefore conclude by stating that the current legal framework of the EAC CU is inadequate in regulating the enforcement of customs law in member states territories in so far as it doesn't provide the council or the directorate of

²⁴⁷ The Protocol on the Establishment of the East African Customs Union.

customs with authority to enforce the customs laws of the Community and neither does it furnish the Community with exclusive competence with matters concerning customs nor have facilitative operational principles like subsidiarity in the context of the EU CU where the Union can perform an obligation even if it has no authority for as long as its execution is aimed at achieving the Union's objectives.

5.3 Conclusion

This study has highlighted some of the proposed recommendations in respect to the enforcement of the customs law of the community. The Treaty for the Establishment of the East African Community, the Protocol on the Establishment of the EAC CU and the EAC CMA are inadequate in terms of providing authority/power to the council to enforce it where member states take long or refuse to enforce it which leads to rampant smuggling, tax evasion, dumping of goods, corruption, and fraud. So far Uganda is reported to have lost 13% of its revenue in fraudulent trade transactions ie \$ 2.443 billion due to trade misinvoicing.²⁴⁸ Kenya is estimated to be losing KShs. 7.5 billion annually due to tax evasion.²⁴⁹ Further, the Uganda Revenue Authority assistant commissioner on enforcement expressed that Uganda loses revenue on smuggling worthy Ugsh 3.1 billion, misdeclaration 8.3 billion, other tax offenses 3.4 billion and

²⁴⁸ Global Financial Integrity, *Illicit Financial Flows from Developing Countries 2004-2013*, 9 December 2015 at p.4 - 21.
< http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final.pdf > accessed on 16 December 2015.

²⁴⁹ *Ibid.*

concealment 470 million.²⁵⁰ The research has stressed the areas of law of relevance to the policy makers that need to be re-examined.

5.4 Recommendations

This research sought to investigate whether the Treaty on the Establishment of the EAC, the Protocol on the Establishment of the EAC CU and the EAC CMA are adequate in providing for the enforcement of the customs law of the community. The research questions have been answered and the hypothesis confirmed that indeed they are insufficient, hence putting the success of the EAC CU prosperity at a stake.

To address the inadequacies within the legal framework, I recommend the following;

5.4.1 Develop an EAC CU policy on enforcement of customs law

According to the findings of my research, there is no EAC policy on the enforcement of customs law. The disadvantage of this is that member states customs officers and commissioners of customs find it hard to enforce customs law since they don't have what to use to guide them; its absence also brings about inconsistencies in the enforcement of customs law which in turn obstructs the success of EAC CU and also makes corruption among others dominant. It's due to this that I suggest an EAC CU policy be developed so as to address the broad policy issues on enforcement of customs union laws. This will help in the management and administration of customs related matters. It shall result in transparency, efficiency, and effectiveness in the

²⁵⁰ < <http://www.ugandaeconomy.com/invest-uganda/ura> > accessed on 16 December 2015.

clearing of goods, thus reducing chances of tax evasion, avoidance, corruption, fraud, smuggling and dumping of goods.

5.4.2 Mutual Recognition of Documents

My research found that member states don't recognize re-exports documents, ie a certificate of conformity issued by an Internationally Accredited Standard Inspection Organization on behalf of the Uganda National Bureau of Standards to Uganda is not valid and enforceable in Kenya in the event that the goods are re-exported to Kenya. I stand on this to suggest that member states should recognize the documents which are issued on behalf of the member states agencies responsible for standards certification which are not addressed to them, they should do this under the mutual recognition principle. This shall establish uniformity and also reduce the costs of doing business. It also making corruption and fraud not to be rampant as traders find it convenient to use them as the costs involved became too high.

5.4.3 Amendment of the Treaty Establishing the EAC

The Treaty doesn't provide the community with exclusive competence on issues concerning customs. It also doesn't either provide the council or the directorate of customs with powers to enforce the customs law and neither does it give any other regional institution authority to do so nor does it provide for facilitative operational principles like TEU.²⁵¹ Apart from the Treaty not providing the aforementioned, there is also no other legislation on the EAC CU that does so yet there are numerous problems that are associated with it like slow enforcement of customs law by the member states which causes dumping of goods and smuggling among others. It's due to this that I suggest that it should be amended so as to enhance faster, effective and efficient

²⁵¹ The Treaty for the Establishment of the East African Community.

enforcement of customs law which in the end will benefit the member states by increasing taxes and preventing dumping among others. The following include;

5.4.4 Conferring the council with powers to enforce the customs law

The Treaty on the Establishment of the EAC should be amended to provide the council with enforcement powers, ie my research reveals that there is no legislation providing the council with powers to enforce the customs law of the community. The absence of it has not only led to the slow enforcement of customs law but it has also led to the EAC CU not to be in the capacity to achieve its objectives as enshrined in the protocol.²⁵²

Further, it has also affected the development of member states economies as slow enforcement of them leads to little taxes collected thus making the member states not being in the capacity to provide sufficient services like good roads to its citizens. Therefore it's vital that the Treaty is amended to provide the council with powers to enforce customs law in order to remedy all vices associated with its lack, this includes dumping, smuggling of goods among others. Its provision will enhance faster and efficient enforcement of customs law hence facilitates the EAC CU achieving its mandate.

5.4.5 Providing the Community with exclusive competence

None of the legislations providing for the legal and institutional framework of the EAC CU provides for the exclusive mandate to the community to legislate on issues concerning customs, the absence of it leads to rampant dumping of goods, smuggling, tax evasion among others as

²⁵² The Protocol on the Establishment of the East African Customs Union, art 3.

member states may delay enacting a law obstructing the enforcement of customs law. It may be due to financial constraints or other interests, learning from EU CU whereof the Treaty on the functioning of EU provides so,²⁵³ the presence of which has led to faster and effective enforcement of customs law that has led to the growth of member states economies. I, therefore, recommend that EAC CU should also do the same in order to have faster enforcement of customs law.

5.4.6 Redefining the principle of subsidiarity

The Treaty on the Establishment of the EAC defines this principle but however, it limits it to a multi-level participation of citizens of member states in the matters of the community.²⁵⁴ Its limitation disadvantages the community while operating on its mandate as it doesn't specifically provide the community with authority to take responsibility on issues which the member states are incapable of performing; in this case enforcement of customs law. I, recommend that in case the Treaty is not amended to provide for the exclusive competence of the community in matters of customs, then this principle should be expanded to give power to the community to act in case the member states have failed or they are incapable of executing their obligations in this respect its enforcing customs law.

²⁵³ Treaty on the Functioning of the European Union (TFEU);

art 1(1), this Treaty organizes the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.

art 2(1), when the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

art 3 (1), the Union shall have exclusive competence in the following areas: (a) Customs Union among others.

²⁵⁴ The Treaty for the Establishment of the East African Community, art 1.

5.4.7 Providing for the principle of Conferral and Proportionality

The findings of my research revealed that the Treaty for the Establishment of the EAC doesn't provide for these principles yet they can play a significant role in the success of the EAC generally. In respect to the enforcement of customs law, they will help the council while exercising its power if provided to avoid abuse of power, thereby facilitating proper administration, management and enforcement of customs law.²⁵⁵

5.4.8 Institutional reforms

5.4.8.1 Developing a Regulation on the enforcement of customs law

My research reveals that there is no regional institution to enforce customs law and therefore member states enforce customs law depending on their legislations. I suggest that upon the inclusion of a provision giving the power to the council to enforce customs law, the community should also put in place a regulation to be used by the officers of the council and the commissioners of customs while enforcing customs law. It will facilitate uniformity in the enforcement of customs law and guidance to officers while executing their obligations.

²⁵⁵ The Treaty on European Union, art 5;

(2) Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

(4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

5.4.8.2 Develop an EAC practice guide for commissioners

Although the EAC Customs Code of Conduct provides for the fundamental principles including but not limited to avoid misuse of discretionary powers in their professional judgment, being accountable and transparent for all the decisions they make and actions while performing their obligations among others.²⁵⁶ It doesn't provide for the parameters upon which the commissioners of customs ought to exercise their discretion where the EAC CMA or EAC CMR provides them.

In addition, the Revised Arusha Declaration of the Customs Co-operation Council Concerning Good Governance and Integrity in customs also declares that an effective national customs integrity program must address among other significant aspects commitment in leadership.²⁵⁷

Although it provides so, not much has been achieved as customs officers are seen engaging themselves in custom corruption. Reference can be seen when URA fired nine of its top customs officers because of engaging themselves in corruption.²⁵⁸

This is a gap in the legal framework of the EAC CU that leads to improper enforcement of customs law as this research has established. I, therefore, propose that a practice guide is developed to extensively deal with all those provisions that provide commissioners of customs with unlimited discretionary powers ie it should give parameters or requirements that should be considered while exercising their discretion in regards to those specific provisions. This will

²⁵⁶ The East African Community Customs Code of Conduct 2013 at p. 3, 7 and 8.

²⁵⁷ Revised Arusha Declaration of the Customs Co-operation Council Concerning Good Governance and Integrity in customs, art 1.

²⁵⁸ Peter Nyanzi, Nine URA Officers Fired Over Corruption, The monitor. Kampala/Uganda, 7 July 2006.

evade a problem of abuse of power that leads to improper enforcement of customs law that in return obstruct the development of the EAC CU and member states economies.

Further the WCO Integrity Development Guide provides numerous key aspects that the customs administration should address in order to deal with corruption, this includes the presence of monopoly powers to Customs officers, the provision of discretionary powers to customs officers in respect to goods/services, low levels of accountability and control, poor supervision on border posts, existence of complex laws among others.²⁵⁹ I therefore urge that an EAC practice guide for commissioners should be enacted to address the inadequacies that exist in respect to the specific provisions in the EAC CMA which provides commissioners with unlimited discretion in some circumstances.

5.4.8.3 Establishing Regional institutions

The research study revealed that there was no regional institution established by any legislation to specifically deal with tax evasion and fraud among others. The presence of which has led to member states being overloaded with work, therefore, making it vulnerable for the vices to occur and enforcement of customs law difficult. I base on this to suggest that apart from the council being given the power to enforce the customs law, the EAC CMA should be amended to establish those institutions example EAC Anti- Fraud, EAC Anti-Smuggling among others so as to ensure proper management, administration, strict leadership and commitment in the enforcement of customs law.

²⁵⁹ The World Customs Organization, Revised Integrity Development Guide, at p.3.

5.4.8.4 Financial assistance

According to what I found out during research is that the secretariat doesn't get enough funds from the member states customs administrations. Currently, the secretary general suggested that they should get a certain percentage of imports duty on all imports entering the EAC. Following the proposal of this study that the Council is provided with the powers to enforce the customs law, I strongly agree with the secretary general's proposal as this will facilitate the Council in pursuing its mandate of enforcing the customs law if provided with it. Additionally, the customs officers that are to be employed by the council should be properly remunerated so as to enable them to execute their obligations as they may be obliged to do so.

5.4.8.5 Capacity building

I found out during the study that although there have been numerous training by customs departments of member states and the directorate of customs to customs agents and officers, there is still much that needs to be done to ensure that most customs agents and officers are well knowledgeable in the issues concerning customs. I, therefore, recommend that more training should be done both at a regional and local level to ensure awareness on issues concerning customs law. This will in return facilitate compliance to customs law as both traders and customs agents will be conversant with issues concerning customs.

5.4.8.6 Harmonization of domestic tax systems

During my research study, I found out that member states have different domestic tax regimes despite the Revised Arusha Declaration of the Customs Co-operation Council Concerning Good

Governance and Integrity in customs providing that in order to have efficiency and also to maintain high levels of integrity customs administrations should have a harmonized system of the legal framework.²⁶⁰

This does not only obstruct access to information as the domestic tax registration systems are distinct but it also creates a business environment which is not uniform. For example, the Kenya standard VAT rate is 16%²⁶¹ while that of Uganda, Tanzania, and Rwanda is 18%.²⁶² I, therefore, base on this to recommend for harmonization of domestic tax regimes of member states so as to make compliance with customs laws easy and understandable to importers and exporters. This will facilitate efficiency and transparency in tax administration. It will reduce the costs of doing business which will eventually decrease tax evasion among others.

5.4.8.7 Infrastructure Development

My research study reveals that there is poor infrastructure although there is an ongoing construction of the northern corridor and the standard gauge railway. I, therefore, suggest that member states should develop this so as to facilitate trade thereby making compliancy with customs laws easy as importers won't evade taxes, dump goods due to the loss caused by poor roads and also develop their economies as its growth avails so many benefits to member states example attraction of foreign investors among others.

²⁶⁰ Revised Arusha Declaration of the Customs Co-operation Council Concerning Good Governance and Integrity in customs, art 2.

²⁶¹ Value Added Tax No.35 of 2013, Sect 5(2) (b).

²⁶² <http://www.eac.int/customs/index.php?option=com_content&view=article&id=142&Itemid=173> accessed on June 2016.

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APPENDIX 2

QUESTIONNAIRE BACKGROUND

STUDY TITLE: The East African Community Customs Union: A case Study for the review of its enforcement mechanisms on the economies of member states.

APPENDIX A: STUDENT INTRODUCTION LETTER

RESEARCHER: NAGADYA HAMIDAH

SUPERVISOR: DR.JACKSON BETT

Dear Sir/Madam,

RE: INTERVIEW FOR ACADEMIC RESEARCH PURPOSE

I am a student of the University Of Nairobi School Of Law, pursuing a Master's Degree in International trade and investment law. As part of my course complement, I am required to write, carry out and present a research thesis in an area of interest.

As indicated above, my topic of study is about "The East African Community Customs Union: A case study for the review of its enforcement mechanisms on the economies of member states."

The study is intended to look at the loophole within the institutional legal framework of the East African Community Customs Union in as far as enforcement of customs laws is concerned in member states territories. The numerous major enforcement mechanisms used by the East African Community member states in the enforcement of customs laws. The challenges experienced by each of them in as far as enforcement of customs laws is concerned and what proposals can be made in order to cure the challenges that exist in as far as enforcement of

customs laws is concerned. It will also compare the legal framework of the East African Community Customs Union with the European Union, and what lessons can be learned by the East African Community Customs Union in order to have transparency, efficiency, and effective enforcement of customs laws in member states territories.

To attain the objective of this research, I am humbly requesting you to take a few minutes of your time to answer the interview questions. Should the findings of this research thesis be of interest to you or your organization, a copy will be available at the University Of Nairobi School Of Law Library.

As a participant in this interview, please note the following:

- Your participation is entirely voluntary. You may at any time withdraw from the interview.
- The interview is intended to take approximately 1 hour.
- The interview shall be conducted at the time and location convenient for you.
- In event that any question administered during the interview is not clear, feel free to ask for clarification.
- Your response will be recorded on the questionnaires.
- And your identity as a participant in this interview will be protected by identifying number known only to the researcher. You will not be named in any study reports, presentations or publications.
- Do you agree to participate

Yes:

No:

Please if you agree, sign below to confirm your decision:

Signature:

(Accept/ decline)

Your kind support/ assistance is highly appreciated.

Yours sincerely

Nagadya Hamidah

QUESTIONNAIRE

SECTION 1: BACKGROUND INFORMATION

Name:

(The name shall remain confidential if provided)

Age:

Sex:

Occupation:

Date of employment/engagement:

Date of the interview: Start

End

Language of the interview, If not English:

Education background:

Organization:

Export/Import []

Both: []

Others: []

Customs Administration:

Department:

SECTION 2: GENERAL QUESTIONS ON CUSTOMS PROCEDURES AND PROCESSES

1. What are the customs procedures used by member states while clearing imports, exports, re-exports, re-imports, transfer of goods, transit goods, temporary imports, and exports?
2. What are the processes and documents involved in the clearance of goods?

3. Do all East African Community member states use the same documents if no why? And what are its effects in regards to the prosperity of East African Community Customs Union?
4. Do all the East African Community member states mutually recognize all documents coming outside the East African Community? If not what are some of those documents?
- 5.
6. Are the customs procedures and processes used by member states to clear goods the same? If not what are those distinctions? And do they have negative effects in the enforcement of customs law?
7. How is the single customs territory procedure implemented? And are all member states on the same level when it comes to its enforcement? If not why?
8. Do you think the processes and procedures in the clearing of goods under the East Africa Community Customs Management Act by member states are adequate to enhance proper enforcement of customs law?
9. Are you aware of the single customs territory, if so, do you think its implementation by the East African Community member states has added value to their economies? Between are the member states on the same level when it comes to its enforcement? If not why?
10. Comparing the time before the introduction of the single customs territory and after, which period do you think member states economies have developed? And why?
11. Are you aware of the single window system, if so please explain?
12. If question 8 is yes then do you think it will address the challenges of technological transfer of information by member states?

SECTION 3: ENFORCEMENT MECHANISMS OF CUSTOMS LAWS APPLIED BY THE EAST AFRICAN COMMUNITY CUSTOMS ADMINISTRATIONS

1. What are the major East African Community Customs Union enforcement mechanisms used by the member states in enforcing the customs laws of the community in their territories?
2. What are the challenges experienced by each of the enforcement mechanism you have mentioned and why?
3. If the answer to question 2 above is negative, then what is the negative impact of those challenges experienced by those enforcement mechanisms used by the East African Community member states to enforce the customs law on their economies?
4. Are there any positive effects that the member states enforcement mechanisms have established to their economies? And why?
5. Suggest any other enforcement mechanisms that can be established by the East African Community Customs Union to facilitate coherence in the enforcement of customs law in member states territories?
6. What other challenges do member states customs and revenue administrations face while enforcing the customs laws in their territories?
7. What challenges in your view is faced by the East African Community member states in the enforcement of customs laws?
8. What proposals would you make to address those challenges faced by the East African Community member states in the enforcement of customs laws in their territories?

9. What other enforcement mechanisms do you think the East African Community Customs Union can establish in order to facilitate member states with respect to enforcement of customs laws in their territories?
10. Do you think the East African Community member states have adequate enforcement mechanisms to ensure effective and efficient enforcement of customs laws in their territories?

SECTION 4: ENFORCEMENT OF CUSTOMS LAWS IN MEMBER STATES TERRITORIES

1. In your view, do you think providing oversight authority to a council or the directorate of customs to enforce the customs laws will reduce the challenges experienced in the enforcement of customs laws in member states territories, if so why and if not why?
2. Do you think the unlimited discretionary powers of the commissioners of customs of member states as provided in the East African Community Customs Management Act is a loophole within the institutional legal framework of the East African Community Customs Union in the enforcement of customs laws in member states territories? If yes why? And if no why?
3. If it's true that the unlimited discretionary powers of the commissioners of customs of member states in the East African Community Customs Management Act are disadvantageous in the enforcement of customs laws, then what negative effects do they bring on the economies of member states in as far as enforcement of customs laws is concerned?

4. In your opinion do you think the commissioners of customs of member states have exercised their unlimited discretionary powers fairly? If yes why? And if no why?
5. In your view do you think there is corruption, fraud, tax evasion, tax avoidance, dumping and smuggling in as far as enforcement of customs law is concerned?
6. If question 5 is yes, then what are leading causes of tax evasion, dumping, smuggling, tax avoidance, corruption and fraud in as far as enforcement of customs law is concerned?
7. What proposals would you make towards addressing the tax evasion, tax avoidance, dumping, smuggling, corruption and fraud malpractices in as far as enforcement of customs law is concerned?
8. How does tax evasion, tax avoidance, dumping, smuggling, fraud, and corruption affect the economies of member states?
9. Do you think the East African Community Customs laws available with respect to the enforcement of customs laws are adequate to facilitate effective and efficient enforcement of the East African Community Customs Union laws in member states territories?
10. Do you think there is a loophole in the law in as far as the enforcement of customs laws in member states is concerned?
11. If question 5 is yes, then what proposals would you come up with to address the loophole that exists in the law on enforcement of customs laws?
12. Are the East African Community Customs Union laws member states tax regimes in regards to importing duty rates and standards certification requirements of imports the same? If not then what are its effects on the enforcement of customs laws?

13. What reform measures would you suggest in the legal framework governing the enforcement of customs law in member states territories?
14. How effective and strategic is the council or the directorate of customs in facilitating the enforcement of customs laws in member states territories?
15. In your opinion do the operational principles provided for in the Treaty for the Establishment of the East African Community sufficient to facilitate the effective and efficient enforcement of customs laws in member states territories? Please explain?
16. Do you think the provision of exclusive competence to the community in the Treaty for the Establishment of the East African Community will deal with the inadequacies like delay in the enforcement of customs if yes, please explain?
17. Do you think the redefinition of the principle of subsidiarity to include giving the community powers to act even where it has not been provided with authority in this respect the enforcement of customs union laws will deal with tax evasion, dumping, and smuggling of goods? if yes please explain?
18. Do you think the inclusion of the principle of conferral and proportionality as per the Treaty on European Union will address the loopholes in the law relating to the enforcement of customs laws in member states territories, if yes, please explain?
19. Do you think the implementation of a single uniform electronic customs system will address the challenge of information transfer? If yes, Will it reduce the costs of complying with the customs laws?
20. In your opinion will the harmonization of tax regimes and standards certification requirements of member states facilitate trade?

21. Do you think developing a regulation on the enforcement of the East African Community Customs Union will address the challenges experienced by member state commissioners of customs in the enforcement of customs laws?
22. In your opinion is it relevant for the East African Community Customs Union to establish a practice guide for commissioners of customs of the East African Community to use while exercising their discretion in respect to specific provisions of the East African Community Customs Management Act?
23. In your opinion is there a need to establish specific East African Community Customs Union Institution to deal with trade irregularities like dumping, smuggling, tax evasion, tax avoidance, if yes please explain your answer?

SECTION 4: PERCEPTION OF THE EAST AFRICAN COMMUNITY CUSTOMS UNION

1. In your view what do you understand by the term customs law and customs union?
2. Do you think the East African Community Customs Union has facilitated trade? If so why?
3. What are the challenges experienced by the East African Community Customs Union generally in as far as enforcement of customs laws is concerned?
4. What proposals would you make towards addressing those challenges?

5. Do you think the directorate of customs has fulfilled its obligations of coordinating and monitoring the enforcement of customs laws in member states territories as per the East African Community Customs Management Act? If so why?
6. In your view, how is the East African Community Customs Union perceived by member states citizens especially by the importers, clearing agents and exporters?
7. Do you think importers, exporters, clearing agents and customs officers are well conversant with the East African Community Customs Union laws? If not why and if yes why?
8. If question 6 answer is no, then propose a sufficient solution that will make the customs officers, customs agents, importers and exporters to be conversant, aware and knowledgeable with customs laws?
9. Do you think the customs officers, customs agents, importers and exporters being unaware of the East African Community Customs Union laws, are a challenge in the enforcement of customs laws? If yes why? and what are its effects on the enforcement of customs law and economies of the member states?
10. Are the East African Community member states enforcing the East African Community Customs Union laws uniformly? If not what are the causes of disparity?
11. Do you think member states are on the same level when it comes to enforcement of customs laws? If not why?

12. Is there a policy framework on the enforcement of customs union laws at the East African Community Customs Union level? If not do you think this affects enforcement of customs union laws negatively?
13. What are the policy suggestions in your view that may contribute to an effective enforcement of the East African Community Customs Union laws?
14. How would you describe the working relation between the Kenya Revenue Authority Customs Administration, Uganda Revenue Authority Customs Administration, Burundi Revenue Authority Customs Administration, Tanzania Revenue Authority Customs Administration, and Rwanda Revenue Authority Customs Administration in as far as enforcement of customs laws is concerned?
15. In your opinion do you think there is good will and East African Community member states commitment in fighting against corruption, fraud, tax evasion, dumping, tax avoidance and smuggling? If yes, please explain?

SECTION 4: EFFORTS OF REFORMS

1. Are you aware of any previous efforts made by the customs administrations of member states to fight against tax evasion, dumping, smuggling, tax avoidance, fraud, and corruption? Please explain?
2. Are you aware of any reforms that the council or the directorate of customs has done towards facilitating effective or effective enforcement of customs laws?

3. What do you think the council or the directorate of customs should do in order to facilitate the member states customs administrations in as far as enforcement of customs law is concerned?
4. Do you think the authority provided to the council or the directorate of customs in the East African Community Customs Management Act is sufficient in as far as enforcement of customs laws is concerned?
5. What do you think can be done in order to have effective and efficient enforcement of customs laws in member states territories?
6. Will the limiting of the discretionary powers of the commissioners of customs of member states in the East African Community Customs Management Act in as far as enforcement of customs law is concerned to reduce the level at which trade malpractices like the dumping of goods, smuggling, tax evasion, fraud, corruption and tax avoidance?
7. What systems do you think can be put in place in order to deal with the trade inadequacies like smuggling, dumping and tax evasion in as far as enforcement of customs law is concerned?
8. What else do you think should be addressed in order to achieve proper management, administration, efficiency, effectiveness and transparency in the enforcement of customs law in member states territories?
9. Do you think the European Union Customs Union is doing well in as far as enforcement of customs law is concerned? If yes, what do you think should the East African Community Customs Union learn or copy from them in order to extensively achieve its objectives in regards to enforcement of customs law?
10. Is there anything else you wish to add?

That concludes our interview. I wish to thank you very much for sparing your time to participate in this interview. Good day/evening.

APPENDIX B: LIST OF CATEGORISED INTERVIEWEES

- (1) Ten Customs officers/legal officers of member states customs administration
- (2) Ten Clearing agents/Shipping line employees
- (3) Five Importers/Exporters
- (4) Five Intelligence officers of member states customs administrations
- (5) Five Kenya Port Authority officers
- (6) Six Cross-border transporters
- (7) Five Tax agents
- (8) Five Experts in trade issues
- (9) Seven officers in the Enforcement member states customs administrations

APPENDIX 3: CONSENT FORM

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

CONSENT FORM

NAME: NAGADYA HAMIDAH

REGISTRATION NUMBER: G62/75521/2017

DESIGNATION: MASTERS OF LAW STUDENT, SCHOOL OF LAW

CONTACT ADDRESS: NAIROBI

STUDY TITLE: The East African Community Customs Union: A case Study for the review of its enforcement mechanisms on the economies of member states.

Please Tick

1. I confirm that I have read and understood the information in the
Above and have the opportunity to ask questions.
2. I understand that my participation is voluntary and that I am free
to withdraw at any time, without giving reasons.
3. I agree to take part in the above study.
4. I agree to use of anonymized quotes in publications.

Name of the participant

Date

Signature

Name of the researcher

Date

Signature

APPENDIX 4:



OFFICE RWANDAIS DES RECETTES

Our Ref

017/RRM/CS/16

01 AVR 2016

Your Ref

PUBLIC NOTICE

APPLICATION OF NEW RULES OF ORIGIN 2015

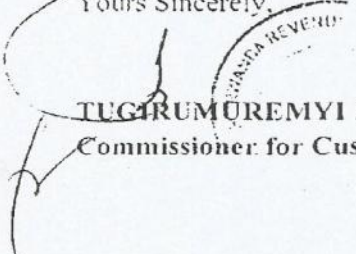
Following the revision of the East African Community Customs Union (Rules of Origin) Rules 2015.

Customs Administration wishes to inform all importers, clearing agents and the general public that cooking oil manufactured from East African Community Partner States no longer qualify for preferential tariff treatment.

Therefore, effective 1st April 2016 this product will attract 25% import duty on importation.

For any information or clarification you may need, you can contact Rwanda Revenue Authority, Customs Services Department –Gikondo for clarification.

Yours Sincerely,


TUGIRUMUREMYI Raphael
Commissioner for Customs Services


William
Commissioner
Services



East African Business Council

REGIONAL APEX BODY OF BUSINESS ASSOCIATIONS AND CORPORATIONS
IN BURUNDI, KENYA, RWANDA, TANZANIA AND UGANDA

Ukuzi House, Kijenge
P.O. Box 2617
Arusha, Tanzania

Tel: +255 27 2543047
Fax +255-27-2543047
Email: info@eabc.org
Web: www.eabc.org

5th April 2016

Mr. Kenneth Bagamuhunda
Director of Customs
East African Community Secretariat
Arusha, Tanzania

Dear Mr. Bagamuhunda,

**RE: URGENT REQUEST FOR CLARIFICATION ON APPLICATION OF NEW EAC RULES
OF ORIGIN ON COOKING OIL BY RWANDA REVENUE AUTHORITY**

Receive warm greetings from East African Business Council (EABC) Secretariat.

On behalf of EABC, I take this opportunity to thank you for the continued support your office has accorded to the private sector in the region, and to also underscore the role you and the EAC Secretariat have played in promoting private sector participation in the EAC integration process.

Nonetheless, there are still some challenges that are adversely affecting business in the EAC region and EABC wishes to highlight to you one of the recent concerns of the business community in the region. Of recent Rwanda Revenue Authority (RRA) has issued a Public Notice dated 11th March 2016 regarding the application of the EAC new Rules of Origin 2015. According to this *Public Notice* the RRA is informing all importers, clearing and forwarding agents and the general public that cooking oil manufactured from East Africa Partner States no longer qualifies for preferential tariff treatment following the revision of the East Africa Customs Union Rules of Origin 2015. Hence effective 1st April 2015, this product will attract 25% import duty on importation into Rwanda.

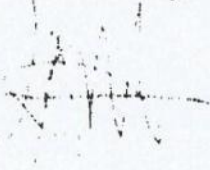
As result of this Notice, all cooking oil manufactured in EAC Partner States attracts 25% import duty regardless to whether the consignment is accompanied by an EAC Rules of Origin Certificate issued by a competent authority from the exporting country. Some of our members have been negatively affected by this Notice as they are charged 25% import duty.

We therefore request your office to clarify on this matter in order for EABC to advise our members on this new development. Of particular concern are those

edible oil products (Vegetable Oils) produced from Soybean, Sunflower, Corn germ and other local raw materials which should naturally qualify for preferential treatment as wholly produced in the region. We also request your office to kindly raise this matter with the relevant EAC policy organs or with Rwanda Revenue Authority for urgent action as this is affecting the flow of goods in the region with adverse effects to the business community.

We look forward to your quickest response.

Yours Sincerely,



LILIAN AWINJA

Ag. EXECUTIVE DIRECTOR

cc. Commissioner of Customs Services –RRA
Commissioner of Customs-KRA
Commissioner of Customs –TRA
Commissioner of Customs –URA
Commissioner of Customs-OBR
Director of Trade- EAC Secretariat

**EAST AFRICAN COMMUNITY
SECRETARIAT**

P.O. Box 1096
ARUSHA, TANZANIA



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Fax: +255 27 2162190
E-mail: eac@eachq.org
Web: <http://www.eac.int>

Our Ref: C&T/1/1/4
Date: 8th April, 2016

Mr. Innocent Safari
Permanent Secretary,
Ministry of East African Community Affairs,
P.O. Box 179
Kigali, RWANDA
E-mail: ps@mineac.gov.rw

Dear Permanent Secretary

**RE: PUBLIC NOTICE TO IMPOSE DUTY ON COOKING OIL MANUFACTURED IN
EAC COUNTRIES**

The East African Business Council has brought to our attention that the Rwanda Revenue Authority has issued a public notice dated 11th March, 2016 informing importers, clearing agents and general public, that cooking oil manufactured in East African countries no longer qualifies for community tariff treatment effective 1st April, 2015, hence will attract 25% duty when transferred between Partner States.

This Public Notice is premised on the revised Rules of Origin where animal and vegetable oils and fats have to be manufactured from materials from any heading except that of the product provided under the 1st Schedule.

We however, wish to make the following observation and provide technical interpretation and guidance as provided in the Customs Management Act:

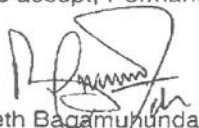
1. Some of the cooking oil manufactured in the region is produced from wholly produced raw materials such as sunflower, simsim, soya beans, maize, cotton seeds, groundnuts and castor seed. These raw materials fall in Chapter 12 while the finished product fall in Chapter 15 of the CET hence do not fall under the same 4 digit heading.

Some firms have started extracting palm oil from palm kernels in the region enabling them to meet the origin criteria.

2. The origin criteria on the working and processing operation under the 1st schedule of the Rules of Origin should be read together with Rule 6(10) in relation to tolerance levels. In regard to cooking oil, where the net weight of imported product does not exceed 15% the weight of the product then such goods qualify for Rules of Origin irrespective of the criteria specified in the schedule.
3. Rules of Origin and its Manual specifies the procedure of raising queries if a Partner State is not satisfied with the origin status of the product. Accordingly, such queries should be applied on a case by case basis and the necessary verifications undertaken.
4. Issuance of a Public Notice generalizing withdrawal of Community Tariff Treatment to a product is inconsistent with the EAC Rules of Origin procedures and it may unfairly discriminate some product without due analysis.
5. The Secretariat has noted that the criteria on cooking oil in EAC manufactured from imported crude oil requires further review to establish the level of transformation undertaken in relation to the capital investment of the firms, the level of employment and economic benefit to the region. This matter will be presented for consideration in the upcoming technical and policy meetings.

In view of the above it is advisable that Rwanda Revenue Authority treats transfer of cooking oil from other Partner States on a case by case basis and where necessary further analysis and verification should be undertaken to establish the material content.

Please accept, Permanent Secretary, the assurances of my highest consideration.



Kenneth Bagamuhunda
Director Customs
For: SECRETARY GENERAL

C.C.

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