NAIROBI UNIVERSITY
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TITLE: THE FEASIBILITY OF INCREASING KENYA’S EXPORTS TO THE EAST AFRICAN COMMUNITY THROUGH LEGAL AND INSTITUTIONAL REFORMS TO FACILITATE TRADE

STUDENT DETAILS

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<tr>
<td>EAC</td>
<td>East African Community</td>
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<td>EACSO</td>
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<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<td>TFEU</td>
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PROJECT PROPOSAL

1. Background

The main focus of this thesis shall be the legal and institutional reforms which Kenya needs to undertake and lobby for within the East Africa Community (EAC) to facilitate and in turn increase trade with fellow Partner States of the Community. The EAC is a regional organisation comprising six Partner States: Rwanda, Kenya, Burundi, Tanzania, South Sudan and Uganda.\(^1\) It is an integral trade partner of Kenya having accounted for 7.5% and 7.7% of Kenya’s global trade in 2014 and 2015 respectively.\(^2\)

Kenya has a domestic legal and institutional framework on trade. Regionally, the country also falls within the trade regime established under the EAC. To outline its domestic legal and institutional framework, the government developed the Vision 2030 development blueprint which among others, provides for an enhancement of wholesale and retail trade within the country.\(^3\) It also provides for the development of manufacturing to supply East and Central Africa with basic commodities and promotion of business process offshoring.\(^4\) To promote establishment of businesses, Kenya enacted the Investment Promotion Act establishing the Kenya Trade and Investment Authority tasked with incentivizing investment and facilitating licensing of businesses. Much pre-eminence is given to the establishment of businesses in both law and policy but little attention is given to trade facilitation between the country and other countries yet this can enhance participation of local businesses in export trade. There is need for development of a legal framework and domestic institution dedicated to facilitating trade in Kenya, as proposed in the Agreement developed at the World Trade Organization (WTO) Ministerial meeting that took place in Bali in 2013. This shall be expounded on in the study.

Trade facilitation has been defined as a comprehensive and integrated approach to reducing the complexity and cost of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent and predictable manner, based on internationally

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\(^1\) EAC, ‘Overview of EAC’ <http://http://www.eac.int/about/overview> accessed on 16 May 2016
\(^2\) EAC, ‘East African Community Trade and Investment Report’ (2015), 31
accepted norms, standards and best practices. This is in particular with regard to customs processes, import licensing, customs valuation, transit rules and pre-shipment inspection.\textsuperscript{5} It is posited in this study that if trade is facilitated between Partner States of the EAC, Kenya stands to enjoy larger trade volumes with other members of the Community.

Kenya, Uganda, Tanzania, Rwanda and Burundi which are all Partner States of the EAC collectively formed a trading bloc with a population of 145,500,000 as at 2014, to the exclusion of the population of South Sudan which had not joined the Community at the time.\textsuperscript{6} The figure should be higher with expected annual increases in population in the countries and South Sudan officially joining the Community on 16\textsuperscript{th} April 2016.\textsuperscript{7} Through trade facilitation, members of this trading bloc can significantly enhance regional trade, considering the relatively wider market provided by the EAC in comparison to markets within individual states.

Kenya’s leading exports to the EAC include tea, iron and steel articles, essential oils, perfumery, salt, cement, fabrics and glassware.\textsuperscript{8} The trade in these commodities can be significantly enhanced especially if it is conducted in an environment with minimal trade barriers. Minimizing the barriers is the essence of trade facilitation.

EAC’s original membership under the East African Community Treaty of 1967 consisted of the states of Kenya, Uganda and Tanzania.\textsuperscript{9} It collapsed in 1977 but was revived after the three countries entered into the 1999 East African Community Treaty.\textsuperscript{10} The Treaty came into force in 2001 and set a system to be followed towards regional integration, starting with the establishment of a customs union, then a common market, a monetary union and ultimately, a

\textsuperscript{8}Simon Ihiga, A survey of non-tariff barriers that affect Kenya’s imports and exports within EAC and Comesa Countries, 13 (Trade and Investment Consortium, Final Report, 2007)
\textsuperscript{9}World Bank, ‘Reshaping economic geography of East Africa: From regional to global integration’ W.B Report No. 65699-AFR, 22-23
\textsuperscript{10}Ibid
political federation. The role this integration systems play in trade facilitation shall be analysed at length.

The EAC Partner States ratified the East African Customs Union Protocol which established the East African Customs Union (EACU). The EACU came into force in Kenya, Tanzania and Uganda on 1st January 2005, while Rwanda and Burundi joined the Customs Union through accession to the EAC in 2007. South Sudan joined the EACU on 15th April 2016 when it officially acceded to the Community. The Customs Union purposed to abolish all existing intra-regional tariffs, eliminating all non-tariff barriers and introducing a common external tariff to facilitate trade in the EAC.

The EACU was formed and targets were set towards achieving some of its main objectives under Article 5 of the EACU Protocol: the progressive elimination (by asymmetry) of internal tariffs and non-tariff barriers within the EAC and establishment of a common external tariff. These are some of the main tenets of trade facilitation, as analysed by Kafeero.

Annex 11 of the EACU Protocol set a progressive elimination of internal tariffs within the EAC over a 5 year period from the date the Customs Union started (1st January 2005). This was to be realized in January 2010 although there have been issues raised by Kenya as late as 2013 over imposition of internal tariffs on Kenyan commodities by Uganda and Tanzania. There were also reports of Kenya’s exports to the Community declining due to among other factors, a reintroduction of tariffs on Kenyan exports by fellow Partner States. Further, although non-tariff barriers (NTBs) within the EAC were to be progressively eliminated in

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11 Refer to Article 5 of the 1999 East African Community Treaty
12 Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal, 63
13 See 7 above
15 Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal, 63-71
Partner States as expressly provided for in Article 2(5) the EACU Protocol, little progress has been made in addressing them.\(^{18}\) Several non-tariff barriers have negatively affected Kenya’s ability to trade within the EAC for instance non-recognition of certificates of origin for certain Kenyan goods by Ugandan Customs, resulting in the Customs imposing a 25% duty on Kenyan manufactures using glucose imported under EAC duty remission.\(^{19}\)

The second step to integration in the EAC under Article 5 of the 1999 EAC Treaty was the establishment of a common market. Under Article 104(2) of the 1999 EAC Treaty, Partner States agreed to take steps towards achieving the free movement of people and labour as well as guaranteeing the right of establishment and residence of citizens within the Community. To attain this, EAC States passed the East African Community Common Market Protocol in November 2009 and the Protocol was enforced in July 2010.\(^{20}\) Article 4 of the Common Market Protocol sets objectives of the EA Common Market to include free movement of goods, persons, capital, services and labour as well as rights to establishment and residence which would facilitate trade.

Despite the fact that the EAC Common Market Protocol entered force in 2010, the EAC has experienced challenges that go against the tenets it set for a common market, going by Partner States’ actions. Tanzania and Burundi did not take part at the launch of a single visa deal between Kenya, Uganda and Rwanda, which came into force on January 2014 to facilitate free movement of citizens and tourists alike.\(^{21}\) Tanzania was also absent at two meetings held in Uganda and Kenya (all in 2013) to discuss joint infrastructural projects and fast-tracking a political federation in the EAC.\(^{22}\)


\(^{19}\) EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 7-September 2014, 11-14


In 2015, Kenya and Tanzania got into a diplomatic spat over Tanzania barring Kenyan tour operators from accessing its national parks through the Tanzanian border point of Bologonja under the auspices of enforcing the provisions of a Treaty between Tanzania and Kenya entered in 1985 restricting cross border transfers of tourists. This is yet Kenya allowed Tanzanian tour operators free access including to the Jomo Kenyatta International Airport (JKIA) in Nairobi to pick Tanzania bound tourists. Kenya momentarily enforced a directive barring Tanzanian tour operators from picking tourists in transit to Tanzania from the JKIA.

The foregoing shows the EA Common Market has been beset by challenges that have prevented it from meeting its objectives, particularly of free trade in the EAC.

The third step to integration in the Community is establishment of a monetary union. To achieve this, the Heads of State of the EAC signed a Protocol on the Establishment of the East African Community Monetary Union on 30th November 2013. This is in accord with Articles 5(2), 82 and 151 of the 1999 EAC Treaty, whose goal is the eventual formation of a political federation. The Protocol contains a framework for adoption of a single currency and formation of an independent East African Central Bank, whose mandate is to ensure price stability, by 2024. Using a common currency to trade as envisaged under a monetary union eliminates the need for currency conversions which attract commissions for banks causing the cost of transactions to increase, which limits trade. Despite this, all Partner States of the EAC use their own currencies and it remains to be seen whether the ambitious targets set for the establishment of a monetary union will be attained by 2024.

Considering the steps taken to integrate and meant to facilitate trade as briefly discussed, a pertinent observation arising is that the adoption of attendant laws and formation of institutions does not guarantee the success of the process. The will to implement within the leadership of Partner States of the EAC is requisite and has been lacking.

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24 Ibid
25 Institute of Economic Affairs, ‘Memorandum on the Protocol for the establishment of the East African Community Monetary Union’ IEA
26 Ibid
Kenya’s exports to EAC States under the integration system established by the 1999 Treaty have undergone chequered growth. The value of the country’s exports grew at US Dollars 1,119,258,000, 1,171,820,000, 1,274,236,000, 1,544,967,000 respectively from 2008 to 2011.\(^2\) In 2012 and 2013, the value remained constant at 1,593,024,000.\(^3\) In 2014, the value dropped to 1,143,400,000 and there was a further drop to 1,070,200,000 in 2015, exhibiting a downward trend.\(^4\) The reduction in exports has been attributed to among others, tariff and non-tariff barriers; and influx of cheap exports from China and India.\(^5\) However, the main focus of the study will be legal steps that can be initiated to eliminate/reduce the barriers and in turn boost Kenya’s export trade in the EAC.

Concerted efforts need to be made to facilitate trade within the region due to the significant economy-wide benefit doing so has shown from economic research. A research projected that if sub-Saharan Africa lessened export time by 50% and other countries made no improvements, the sub-Saharan African GDP would increase by 2.2% due to the competitive edge gained over other countries in increasing the speed of delivery of goods.\(^6\)

Kenya and the rest of the EAC can only enhance trade within the Community if there is mutual commitment to eliminate trade barriers, including repeat inspection of goods by customs agencies, causing transit delays and imposition of tariffs on goods produced within the Community.\(^7\) The Country needs to be at the front row in fostering trade facilitation within the Community in order to grow its economy. This will need a re-evaluation of the regime governing trade within the EAC and the implementation of policies and programs to facilitate the same, considering the positive economic benefits trade facilitation has reported to have.


\(^{29}\) Ibid


\(^{33}\) EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 7-September 2014, 11-14
2. **Aims**

The study aims to investigate what has negatively affected trade within the EAC with respect to Kenya and propose legal and institutional reforms required to facilitate trade in order to boost the Country’s economy.

3. **Objectives**

The specific objectives were to:

a) Identify the factors constraining trade between Kenya and other members of the EAC.

b) Examine the role the Kenyan government can play in addressing the negative effects factors limiting trade have had on the Kenyan economy.

c) Examine the weaknesses of existing legal instruments meant to facilitate trade in the EAC.

d) Propose legal and institutional reforms to boost trade.

4. **Research hypothesis**

The following hypotheses were tested in the study:

i) Countries/regions with fewer limitations to trade have a competitive advantage over countries/regions with more trade limitations. Excessive trade limitations make a country less competitive in attracting investments that would otherwise boost trade.

ii) Cooperation between states to facilitate trade within the EAC is delicate due to conflicting interests and can only develop over a long time period. EAC States have partisan interests which make them slow to adopt policies and measures to boost trade within the region, particularly if the policies conflict with the States’ partisan interests.

5. **Research questions**

i) What are the factors negatively affecting trade within the EAC?
ii) What legal steps should Kenya and the rest of the EAC take to facilitate trade?

iii) How could trade facilitation lead to higher export trade?

iv) Which policies and best practices can the EAC adopt from regions such as the EU in order to facilitate trade?

v) Is the current establishment of the EAC including its legal framework conducive for trade facilitation?

6. **Significance of the study**

The study explores the barriers that have negatively impacted on Kenya’s trade with Partner States of the EAC. This shall be done to form a basis for legal and institutional reforms that can be undertaken to facilitate trade and in turn boost the Country’s exports to the Community.

7. **Scope of the study**

The study covers trade facilitation within the EAC and the primary focus shall be increasing Kenya’s export trade with Partner States of the Community. In analysing trade in the EAC, a comparative analysis of trade in the European Union (EU) shall be done to pick out best practice for trade facilitation.

8. **Conceptual framework**

The study purposes to draw a correlation between trade volumes and levels of trade barriers. This is in order to justify the need for legal and institutional reforms to facilitate trade between Kenya and other members of the EAC.

In drawing the correlation, trade regimes under the European Union (EU) and the EAC shall be outlined for comparison. It is argued that when policies are adopted that constrain trade within a region, the trade volumes reduce. This slows economic growth and welfare of the inhabitants is negatively affected. Amartya Sen states in this regard:

> The freedom to exchange words, or goods… does not need defensive justification … they are part of the way human beings in society live and interact with each other (unless
stopped by regulation or fiat). The contribution of the market mechanism to economic
growth is, of course, important, but this comes only after the direct significance of the
freedom to interchange- words, goods, and gifts- has been acknowledged.  

For Kenya and the rest of the EAC to meet their respective needs for economic progression,
they collectively need to evaluate and correct what bars trade. The non-tariff barriers to trade
under the Community’s trade regime include lack of harmonized documentation and clearing
procedures for trade between Partner States, numerous institutions involved in
testing/verifying goods moving within the Community, existence of multiple weighbridges in
the main transport corridors that disrupt the seamless flow of goods on transit in trucks,
systemic corruption and lack of harmonized port clearance procedures.

Tariff barriers are the taxes EAC Partner States impose on goods traded between the States
which were to be eliminated by January 2010 as provided in the 11th annex of the East
African Customs Union Protocol. This was to be realized in January 2010 although there
were issues raised by Kenya as late as 2013 over imposition of internal tariffs on Kenyan
commodities by Uganda and Tanzania. There were also reports of reintroduction of tariffs
on Kenyan goods exported to Partner States of the EAC as one of the factors leading to a
decline of the exports.

Albeit Kenya’s trade with the EAC has been beset by the outlined barriers, the value of its
exports to the Community grew from a low of 1,119,258,000 US Dollars in 2008 to a high of
1,593,024,000, both in 2012 and 2013. The value dropped to 1,143,400,000 in 2014 and a

34 Amartya Sen, Development as freedom (Anchor Books 2012) 6
35 East African Community, Status of elimination of non-tariff barriers in the EAC (EAC Vol. No. 2-
March 2012) 16-48
36 “Kenya in talks over import tariff standoff” Standard Digital (24 June 2013)
<http://www.standardmedia.co.ke/business/article/2000086660/kenya-in-talks-over-import-tariff-
standoff> accessed on 7 November 2013
37 “Kenya’s exports to the EAC likely to dip further” Trademark East Africa (25 February 2015)
October 2016
38 EAC, ‘KE: Total exports to East African Community 2008-2013, (US $ Thousands)
<http://tradehelpdesk.eac.int/Reports/Table2a.php> accessed on 27 September 2016
further dropped to 1,070,200,000 in 2015,\textsuperscript{39} which has been attributed to the trade barriers as outlined previously.

The trade regime under the EA Customs Union shall be compared with other customs unions in order to assess ease of exporting between the EAC and other regions. This will give an indication of the possibility of higher trade volumes for the country using practices adopted in other jurisdictions. The Customs Union established in the EU is appropriate for comparison in this study as it has had ample time to develop.

The European Union (EU) formed its customs union on 1\textsuperscript{st} July 1968 and Part 3, Title III of the Treaty on the Functioning of the EU prohibits imposition of tariffs on goods traded among EU Member States. It also stipulates that once a customs tariff has been applied at EU’s external borders, goods should move freely. This should essentially eliminate tariff and non-tariff barriers.

In the EU, particularly in 1993, customs controls at all internal borders that traverse Member States were abolished.\textsuperscript{40} Regardless of where goods are declared in the EU, provided they have cleared through customs in any Member State with a port that forms part of EU’s external border, the goods can freely circulate/be sold within the region.\textsuperscript{41} On the other hand, in the EAC, apart from Tanzania and Uganda which are Partner States of the EAC together with Kenya imposing tariffs on Kenyan products as late as 2013,\textsuperscript{42} there are non-tariff barriers that impede trade, especially repetitious inspections of products already certified by accredited laboratories and non-standardized testing procedures across countries by customs authorities.\textsuperscript{43}

\textsuperscript{40} ‘The European Commission explained: customs’ The European Union (November 2014) 3-4< http://europa.eu/pol/index_en.htm> accessed on 9 November 2015
\textsuperscript{41} Ibid at Page 26
\textsuperscript{42} ‘Kenya’s exports to the EAC likely to dip further’ Trademark East Africa (25 February 2015) <https://www.trademarkea.com/news/kenya-exports-to-eac-likely-to-dip-further> accessed on 20\textsuperscript{th} October 2016
\textsuperscript{43} ‘Trade Facilitation in the East African Community: recent developments and potential benefits’ US International Trade Commission (Investigation No. 332-530 July 2012)2-4
The EU also has an elaborate framework to minimise non-tariff barriers that emphasises on cooperation between Member States and between Member States and the European Commission—the executive arm of the EU.\textsuperscript{44} In the EU, the European Commission and national customs authorities of Member States collaborate to propose revisions to the Union Customs Code that governs customs procedures in the region. The proposals have time to time been adopted by the EU Parliament working in conjunction with the EU Council of Ministers. Much has been achieved through the cooperation, going by the fact that regardless of which Member State goods are cleared by customs in the EU, the goods can freely circulate or be sold within the EU Custom Union’s territory.\textsuperscript{45} This is so because unlike the EAC, the EU has developed common and streamlined customs clearance procedures that minimise repetitious goods inspections and clearances.\textsuperscript{46}

A comparison of the trade regimes in the EU and the EAC reveal EAC has relatively higher trade restrictions. Using the EAC’s vital organs including the East African Legislative Assembly, Council of Ministers and Customs Authorities of individual Partner States, the Community can foster cooperation akin to that in the EU to rid itself of policies and practices that are barriers to trade such as repeat and non-standardized inspection and testing procedures which greatly hamper free movement of goods. Freedom to exchange goods in a market promotes economic development, as Amartya Sen observed.\textsuperscript{47} The probability of the country’s exports to the EAC being relatively higher than has been reported could increase with lesser trade restrictions. Higher exports should boost the country’s economy.

9. **Theoretical framework**

This section presents theories that guide the logic in this study as regards trade facilitation to promote cross-border trade between Kenya and other Partner States of the EAC. Integration systems such as the EAC require a robust transnational judicial mechanism to enforce laws and regulations, and in this context, particularly those meant to facilitate trade. The theory of

\textsuperscript{45} Ibid
\textsuperscript{47} Amartya Sen, *Development as freedom* (Anchor Books 2012) 6
supra-nationality shall be analysed with regard to the formation of a regional court whose jurisdiction transcends to every Partner State of the Community.

Further, theories that justify international trade such as Adam’s Smith’s theory of international trade and David Ricardo’s theory of comparative advantage shall be analysed with key focus on their relation to trade facilitation within the EAC.

Due to varied nationalistic interests, states tend to diverge in trade policy and practice which hampers trade within the Community. For instance, as mentioned in the last section, lack of harmonized documentation and clearing procedures for trade among Partner States in the EAC has been one of the main non-tariff barriers to trade. The study therefore analyses the liberal theory of international relations and what role it can hypothetically play in bridging divergence in order to facilitate trade.

A brief analysis of the outlined theories shall be done.

i. The theory of supra-nationality

The theory of supra-nationality has been closely linked to integration. In the arena of public international law, integration refers to the processes by which sovereign states unite and surrender some of their powers and competencies in order to form a new international unit. The participating states delegate some of their sovereignty to the newly created entity, in order to protect their interests and benefit their nationals.

Supra-nationality was conceptualised to give legitimacy to political organs of European integration. The entities/institutions created during integration form an institutional complex that acquires distinct authority and autonomous decision-making capacity from that of the underlying national units. Integration may advance to a high point where there is a central government in the complex but when this is not achieved, the institutions are characterised as

48 Katrin Metacalf and Ionannis Papageorgiou, Regional integration and courts of justice (Intersentia 2005) 5
49 Ibid
50 Katrin Metacalf and Ionannis Papageorgiou, Regional integration and courts of justice (Intersentia 2005) 6
51 Ibid
supra-national because they go beyond the national framework without advancing to the level of a central authority/federal government co-existing with federal units.\textsuperscript{52} Some scholars have described it as a system of negotiation among national governments and institutionalisation of problem-solving that is unavailable to the nation-states acting unilaterally, unavailable because the problems are of a transnational scope and can therefore not be resolved in isolation but through cooperation.\textsuperscript{53} A perfect example of problems that need to be resolved through interstate cooperation is the barriers limiting trade among Partner States of the EAC.

The term supra-nationality was not originally legal but was created to distinguish the source of legitimacy of different integration processes, on the one hand from traditional bodies under international law and on the other hand from federal states. Traditional bodies such as the United Nations depend on Member States for their existence, operations and composition and independent of powers donated by the States, they do not have legitimacy.\textsuperscript{54} On the other hand, federal states have accepted different levels of institutional legitimacy: relations between different governing levels are regulated in constitutions/founding charters and the legitimacy of the institutions is not in question as long as separation of powers is observed.\textsuperscript{55} Supra-nationality describes the initial stages of integration merely involving international cooperation but not attaining the level of cooperation in a federal state.\textsuperscript{56}

Pressure groups within the EAC’s Partner States can influence the States to adopt policies or take steps that run contrary to the decisions made on a supra-national level, such as the Treaties establishing the Common Market and the Customs Union. The trade barriers within the Community are a manifestation of this weakness which can only be tackled if there is sufficient political will among the ruling class. One of the proposals made to facilitate trade in the study is to strengthen the legal capacity of the East African Court of Justice established under Article 27 of the 1999 Treaty establishing the EAC to enforce laws on trade-facilitation within the Community. This proposal is as good as the political will it may get among the elite.

\textsuperscript{52} Ibid
\textsuperscript{53} Alexander Somek, ‘On Supranationality’ (2001) European Integration online Papers (ELoP) Vol. 5, 5
\textsuperscript{54} Katrin Metcal etal (n 50) 7
\textsuperscript{55} Ibid
\textsuperscript{56} Ibid
ii. Adam Smith’s theory of international trade

In this theory, Adam Smith (1723-90) views international trade as a vent (market) for surplus production and an avenue to widen the market and therefore increase the division of labour.\(^{57}\) To elaborate on improving division of labour, Smith sees international trade as fostering the improvement of productive powers of labour where advancements in industry lead to higher productivity with lesser labour.\(^ {58}\) This is viewed as leading to an increase in national wealth, which essentially is economic development.\(^ {59}\) Below is an excerpt from Smith’s book (An inquiry into the nature and causes of the wealth of nations) reproduced by Thirwall dwelling on the importance of foreign (international) trade in wealth creation:

> It carries the surplus part of the produce of their land and labour for which there is no demand among them, and brings back in return something else for which there is a demand. It gives value to their superfluities, by exchanging them for something else, which may satisfy part of their wants and increase their enjoyments... By opening a more extensive market for whatever part of the produce of their labour may exceed the home consumption, it encourages them to improve its productive powers and to augment its annual produce to the utmost, and thereby to increase the real revenue of wealth and society.\(^ {60}\)

Smith connects international trade to his ideas of division of labour. To him, if trade is carried out between different nations, this will bring forth an extension of the division of labour because an international market is relatively larger than a domestic one. He sees this enhanced division of labour leading to an increase of the exchangeable value of the annual produce of the land and labour of the country.\(^ {61}\)

\(^ {59}\) Ibid
\(^ {60}\) Anthony P. Thirlwall, ‘Trade liberalisation and economic growth: theory and evidence’ (n 57) 6
\(^ {61}\) Adam Smith, An inquiry into the nature and causes of the wealth of nations IV.iii.c.3
iii. **Theory of comparative advantage**

Following up on Smith’s theory of international trade, David Ricardo developed the theory of comparative advantage. He postulated that on the assumptions of perfect competition and maximum resource employment, states can reap welfare gains by specialising in the production of goods with the lowest opportunity cost and trading the surplus of production over domestic demand, provided that the international rate of exchange between commodities lies between the domestic opportunity cost ratio (in his Principles of Political Economy and Taxation (1817)).

Discussing the concept of reaping welfare gains from specialization in goods production and trading of surplus production over domestic demand (international trade) in Ricardo’s theory, Thirwall states these are gains that come about within customs unions or free trade areas as trade barriers are eliminated between members, but the gains are once-for-all.

iv. **Liberal theory of international relations**

Various connotations can be given to the term ‘liberal theory’ in international relations. Within the context of this study, liberal theory focuses on the role varied social interests and values of states play, and their significance in global politics.

According to Moravcsik, different individuals and groups define material and ideational goals independently from politics, and thereafter seek to advance those goals through political means. Social actors favour some economic, social, cultural and domestic cultural arrangements- that is, the changing economic opportunities and incentives to engage in transnational economic, social and cultural activities-which changes the prospect for realizing domestic objectives.

States often have divergent preferences on how to engage in cross-border trade and their preferences are highly influenced by entrenched national interests. The nexus between state

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62 Anthony P. Thirlwall, ‘Trade liberalisation and economic growth: theory and evidence’ (n 57) 6
63 Ibid
64 Andrew Moravcsik, ‘The new liberalism’ The Oxford handbook on international relations (Oxford University Press 2008)236
65 Ibid
66 Ibid
preferences, on the one hand, and state behaviour, on the other hand, is the concept of policy interdependence. Moravcsik defines policy interdependence as the interaction of preferences- that is, the extent to which the pursuit of state preferences necessarily imposes costs and benefits upon other states, independent of the costs imposed by the strategic means chosen to obtain them.

In instances where policy alignment (by a state) can generate mutual gains with low distributive consequences, international policy coordination/convergence is incentivized. The lower the net gains, and the greater the distribution conflict whereby the realization of interests by a dominant grouping/country necessarily imposes costs on dominant social groups in other countries, the greater the potential for interstate tension and conflict.

Complex interstate behaviour is not only shaped by coercive capabilities but also information and beliefs about appropriate means to achieve objectives also play a role. State(s) can coerce other state(s) to adopt certain positions in international trade. These capabilities shall be reviewed within the context of the EAC.

10. Literature Review

This study is predominantly about trade facilitation within the EAC, in order to boost Kenya’s exports to the Community. Various authors have defined trade facilitation. For Koopman and Laney, their working definition of trade facilitation is the simplification of customs procedures affecting the movement of goods across borders, as well as improvements to transport infrastructure. On the other hand, the Institute of Economic Affairs (IEA) defines trade facilitation as a comprehensive and integrated approach to reducing the complexity and cost of trade transaction process, and ensuring that all these

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68 Ibid
69 Ibid
70 Ibid
activities can take place in an efficient, transparent and predictable manner, based on internationally accepted norms, standards and best practices.  

The definition of trade facilitation adopted by the IEA is similar to that adopted by the United Nations Commission for Europe (UN/ECE). The International Chamber of Commerce defines trade facilitation as relating to improvements in the efficiency of administrative and logistic steps associated with the international trade of goods.

The World Trade Organization (WTO) defines trade facilitation as the simplification and harmonisation of international trade procedures; where trade procedures are the activities, practices, and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade. The working definition for trade facilitation in this study shall be the definition adopted by the IEA and UN/ECE because the author holds the view it is broad enough to encompass every practice, policy and requirement of trade facilitation discussed throughout.

Some of the steps that need to be taken to facilitate trade in Kenya have been discussed by Koopman and Laney such as the improvement of roads, rails and ports. The authors also discuss the need to simplify documentation and inspection requirements at the port, introduce risk-based inspections, adopt electronic customs data interchange systems between members of the EAC and joint one-stop border operations.

While discussing trade facilitation in the EAC where Kenya is a member, Kafeero focuses on the concepts developed by the World Trade Organization (WTO) under the auspices of the General Agreement on Tariffs and Trade 1994 (GATT 1994). These include publication of trade-related laws, regulations, rulings and agreements in an accessible manner; desisting

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74 Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Vol 2, No.1 World Customs Journal, 63
75 WTO July 2007, Discussion Paper: Updated International Chamber of Commerce recommendations for an agreement on trade facilitation
76 Kafeero (n 74)
77 Robert Koopman and Karen Laney (n 72) 3-11
enforcing measures of general application prior to their publication; and administration of the 
above-mentioned laws, regulations, rulings and agreements in a uniform, impartial and 
reasonable manner under Article X, GATT 1994. These also include reduction of non-tariff 
fees and charges such as those relating to consulates under Article III, GATT 1994 and 
minimisation of goods inspection and analysis procedures by customs authorities under 
Article VIII, GATT 1994 –especially when the fees and customs procedures are applied by 
trading states in a protectionist manner.

Just as Koopman and Laney, Kafeero proposes the use and maximisation of information and 
communication technology to enhance the speed and efficiency with which goods are cleared 
by customs. Likewise, Kafeero proposes the simplification of customs clearing procedures 
by the introduction of risk based assessment of goods as some of the steps that would 
facilitate trade. The foremost difference between Kafeero on the one hand and Koopman 
and Laney on the other is that Koopman and Laney propose transport infrastructure 
development to ease movement of goods as one of the ways of trade facilitation.

Links have been drawn between trade facilitation and higher economic growth. The 
Organization for Economic Cooperation and Development (OECD) opines states can benefit 
from custom modernization programmes that enhance predictability and transparency of 
clearance procedures. These are seen as having the potential to increase government 
revenue. Increased revenues can be used to initiate projects that could boost economic 
growth. 

Not much emphasis is given by scholars on establishing legal regimes that enable states to 
freely trade and not only boost GDP per capita, but also spread income equitably among the 
nationals and therefore boost the nationals’ welfare. It is argued that for equitable distribution 
of income, trade facilitation should expand focus to preventing restrictive trade practices 
amongst both state and non-state actors, across borders in the EAC.

79 Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Vol 2, No.1 
World Customs Journal, 64 
80 Ibid from page 64-67 
81 Kafeero (n 73) 68 
82 Ibid 
No. 21 OECD 18
12 Research methodology

The main concepts of research in this study are to analyse the trade barriers Kenya faces that negatively affect its ability to export goods and services to the rest of the EAC and to come up with recommendations on how to lessen the effects of the barriers. Both primary and secondary sources of information shall be utilised to conduct the research and the primary sources mainly include raw data collected from interviews, questionnaires and official trade documents while the secondary sources shall include books and journals.

The study will adopt both qualitative and quantitative methods of research. The qualitative methods adopted shall be exploratory and shall seek to inductively test the theories inherent in the study. On the other hand, the quantitative methods used will follow a deductive approach where theory shall be derived from measurable data collected in the course of the study.

The quantitative research design methods to be used include field surveys and secondary data analysis. For field surveys, data will be collected by standardized questionnaires and structured interviews. The questionnaires shall predominantly be issued to persons involved in cross-border trade and transportation of goods across the EAC. Structured interviews shall mostly be focused on persons involved in customs and clearance of goods and people across the Community. The clusters of people mentioned are best placed to give data on trade barriers and their impacts on cross border trade. Secondary data particularly on trade barriers and trade volumes shall be analysed and obtained from the internet, journals, working papers and books.

The qualitative design method used is participatory observation where what negatively affects Kenya’s trade within the EAC shall be investigated over the period of the study. The investigation shall be carried out by visiting ports and border posts to observe customs processes for clearance of goods across Partner States. Some of the processes reportedly present trade barriers whose impacts can best be analysed by observation. Data for the study will not only be collected from personal observation but also from interviews and documents utilized for customs clearances. This will be done in order to build a case for legal and institutional reforms aimed at boosting trade.
CHAPTER 1

STEPS TO INTEGRATION, THEIR ROLE IN TRADE FACILITATION AND EMERGING CHALLENGES

1.1 Introduction

The theory of supra-nationality provides a basic justification for integration among the Partner States of the East African Community (EAC). Supra-nationality has been explained as a negotiation system among national governments and institutionalisation of a mode of problem-solving that is unavailable to nations acting alone, unavailable because the problems concerned transcend national borders and can therefore not be resolved in isolation but through cooperation.\(^{84}\) The tariff and non-tariff barriers outlined at the beginning of this study that have negatively affected Kenya’s export volumes to the Community’s Partner States are a perfect example of problems that are of a transnational scope. They can only be resolved through cooperation among the States. The 1999 Treaty on the Establishment of the East African Community (1999 TEAC) provides a blueprint for cooperation in the EAC.

The EAC aims to achieve integration through a gradual process involving all the major economic integration systems known and these are-excluding a free trade area- a customs union, common market, monetary union and a political federation.\(^{85}\) This chapter shall examine the progress made and challenges that have arisen during the process. As the examination is done, a comparative analysis of integration between the EAC and the European Union which has evolved over a relatively longer time period shall be done to pick out what could best suit the EAC particularly with regard to trade. The role of the integration systems in trade facilitation in the Community and what they portend economically for Kenya as a Partner State of the Community shall also be analysed.

The 1999 TEAC came into effect on 6\(^{th}\) July 2000.\(^{86}\) Article 5(2) of the 1999 TEAC provides for a roadmap towards integration starting with the establishment of customs union, common

\(^{84}\) Alexander Somek, ‘On Supranationality’ (2001) European Integration online Papers (ELoP) Vol. 5, 5

\(^{85}\) Khoti Kamanga, ‘Some constitutional dimensions of East African Cooperation’ 12

\(^{86}\) Stefan Reith & Moritz Boltz, ‘The East African Community: Regional integration between myth and reality’ (2011) KAS International Reports 93
market, monetary union and finally, a political federation. There is marked caution in the approach to integration under the 1999 TEAC going by the fact that the Treaty provides that every step is to be initiated separately. The need to avoid disintegration as happened under 1967 EAC Treaty informs the guarded approach.

Each step to integration within the Community is to be guided by a protocol to be passed by Partner States. Article 75 of the 1999 TEAC provides for the setting up of a customs union, whose objectives include elimination of non-tariff barriers to trade and the adoption of a common external tariff. On the other hand, Article 76 provides for the creation of a common market to enable the free movement of labour, goods, services and capital within the Community. Both Articles 75 and 76 of the 1999 TEAC provide for the adoption of a protocol to govern the steps. What role each step plays in trade facilitation shall be analysed at length but before the analysis is done, the significance of trade for Kenya in the context of this study shall be explored.

1.2 Importance of international trade for Kenya

International trade plays a critical role for the Kenyan economy, particularly the trade between Kenya and other Partner States of the EAC. It is important to illustrate why trade with the Community is given pre-eminence in this study. In 2010 for instance, the EAC accounted for 53% of Kenya’s total exports to the rest of Africa and 24 percent of its total exports to the world. Scholars have analysed what role international trade plays in building the country’s economy which shall be briefly discussed.

Adam Smith (1723-90) emphasised the importance of international trade as a vent (market) for surplus production and means for widening the market in order to improve division of labour. Smith sees international trade as fostering the improvement of productive powers of

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87 Ibid
88 Khoti Kamanga, ‘Some constitutional dimensions of East African Cooperation’ 17
89 August Muluvi, Paul Kamau & Simon Githuku, ‘Kenya’s trade within the East African Community: Institutional and regulatory barriers’ (KIPRA)
labour where advancements in industry lead to higher productivity with lesser labour. To him, the expanded market international trade provides takes up more produce and encourages innovations to boost productivity in order to satisfy the market demand. He views increased productivity and expanded markets for produce as leading to an increase in national wealth-connoting economic growth.

Smith made a theoretical justification for international trade in his book: An inquiry into the nature and causes of the wealth of nations. Thirlwall reproduced an excerpt of the book dwelling on its importance, which also applies to trade facilitation between different states:

It carries the surplus part of the produce of their land and labour for which there is no demand among them, and brings back in return something else for which there is a demand. It gives value to their superfluities, by exchanging them for something else, which may satisfy part of their wants and increase their enjoyments... By opening a more extensive market for whatever part of the produce of their labour may exceed the home consumption, it encourages them to improve its productive powers and to augment its annual produce to the utmost, and thereby to increase the real revenue of wealth and society.

To put Smith’s views to context in this study, Kenya had a market population of 47,620,226 in 2016. The EAC had a corresponding market population of approximately 146,000,000. The relatively bigger market the EAC collectively has can take up more Kenyan goods beyond the country’s domestic market. This can foster industrial advancements to boost productivity in order to meet increased demand which can boost revenues and improve the country’s economy and its inhabitant’s incomes.

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92 Ibid
95 EAC, ‘Overview of EAC’ (EAC) <http://www.eac.int/about/overview> accessed on 18th October 2016
Following up on the theory of international trade, David Ricardo developed the theory of comparative advantage to support international trade. He postulated that on the assumptions of perfect competition and the full resource employment, countries can realize welfare gains by focusing on the production of goods with the lowest opportunity cost and trading the surplus of production over domestic demand, provided that the international rate of exchange between commodities lies between the domestic opportunity cost ratio (in his Principles of Political Economy and Taxation (1817)).

With regard to the EAC, Kenya and the rest of the Community can promote trade by specialising in production of goods with the least opportunity cost and trading these goods with each other to promote welfare gains amongst the populace. The right environment needs to be created to facilitate the trade.

Thirwall discussed the concept of reaping welfare gains from specialization in production of goods and trading of surplus production over domestic demand in Ricardo’s theory. He stated these trade-creation gains can arise within customs unions or free trade areas as the barriers to trade are removed between members, but the gains are once-for-all. The EAC has institutionalised a Customs Union and gone ahead and established a Common Market. Formation of a Monetary Union is at its infancy and not much can be said for certain about its success. The last step to integration is the formation of a Federation, whose feasibility also remains uncertain. The progressive nature of integration under the 1999 TEAC, its comparison with integration in the EU and correlation with trade facilitation shall be analysed in the next sections of this chapter.

To cap the discussions in this chapter, an analysis will be done on the effects of integration in the EAC as regards Kenya’s trade with the Community’s Partner States.

1.3 Supra-nationality

The first section in this chapter started with a brief outline of supra-nationality and what role the concept plays in the integration process. Integration has been described as the processes by which sovereign states unite and surrender some of their powers and competencies in

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96 Thirwall (n 93) 6
97 Ibid
order to form a new international unit.\textsuperscript{98} States participating in the process delegate some of their sovereignty to the newly created entity, in order to protect their interests and benefit their nationals.\textsuperscript{99} Article 5 of the 1999 TEAC, for instance, outlines the objectives of the EAC as among others, developing policies and programmes to deepen and widen cooperation among Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for the States’ mutual benefit.

Normally, entities/institutions created during integration form an institutional complex that acquires distinct authority and autonomous decision-making capacity from that of the underlying national units.\textsuperscript{100} Integration may advance to a high point where there is a central government in the complex but when this is not achieved, the institutions are characterised as supra-national because they go beyond the national framework without advancing to the level of a central authority/federal government co-existing with federal units.\textsuperscript{101} Article 5 (2) of the 1999 TEAC sets the ultimate goal of integration at establishment of a political federation but the Treaty does not spell out the institutional formation of this federation, leaving it for Partner States to craft.

One limitation with the concept of supra-nationality is that it is dependent on the political will of the ruling elite in Partner States, which has been lacking particularly in the EAC. To illustrate, the Community established under the 1967 EAC Treaty collapsed in 1967 majorly because political was lacking within the leadership of Member States.\textsuperscript{102}

The kind of supra-nationality envisaged by the EAC shall be put to context by examining the integration process set out under the 1999 TEAC next. The discussions shall however be limited to the aspects that concern trade facilitation within the Community.

\textsuperscript{98} Katrin Metacalf and Ionannis Papageorgiou, \textit{Regional integration and courts of justice} (Intersentia 2005) 5

\textsuperscript{99} Ibid

\textsuperscript{100} Katrin Metacalf and Ionannis Papageorgiou, \textit{Regional integration and courts of justice} (Intersentia 2005) 6

\textsuperscript{101} Ibid

\textsuperscript{102} Khoti Kamanga, ‘Some constitutional dimensions of East African Cooperation’ 10
1.4 Establishment of the East African Customs Union and its challenges

Setting up of a Customs Union is the first step to integration under Article 5(2) of the 1999 TEAC. Article 75(1) of the Treaty provides for the passing of a Protocol establishing a Customs Union in which internal tariffs on goods traded amongst Partner States are eliminated by asymmetry. The internal tariffs present tariff barriers to trade. Article 75(1) also provides for the elimination of non-tariff barriers. The elimination of tariff and non-tariff barriers is essentially meant to facilitate trade.

The Protocol establishing the East African Customs Union (EACU) was signed in March 2004 and came into force on 1st March 2005.103 This was approximately six years after the EAC was revived by the 1999 TEAC. One salient feature of the EACU Protocol is the provision in Article 5 for the progressive elimination of internal tariffs by asymmetry for goods traded amongst Partner States.

On the other hand, the European Economic Community (EEC) succeeded by the European Union (EU) formed its customs union on 1st July 1968 at which point all customs on intra-Community trade were abolished at once and a common customs tariff was introduced to replace national customs duties in trade with the rest of the world.104 This was eight years after the EEC came into being under the Treaty of Rome signed by six European countries in 1957.105 One distinction that stands out between the EU and EAC is that the Customs Union in the EAC set to progressively reduce internal tariffs by asymmetry unlike the EEC (now EU) which did it at once. The justification for this shall be analysed.

The inclusion of asymmetry in the Treaty and attendant Protocol for the EACU has been justified on the basis that the Community’s members are at different levels of economic development and that the imbalances, which a Customs Union could worsen, need to be dealt with to protect the Community’s existence.106 Note should be taken that the main reasons the EAC disintegrated under the 1967 TEAC were among others, the inequitable fiscal gains

105 Ibid
redistribution and inter-territorial trade imbalances among Partner States, exacerbated by the colonial administration’s skewed policies. Further justification for gradual integration is found in the Community’s history where economic imbalances, which need considerable time to be addressed, led to disintegration.

Annex 11 of the EACU Protocol provided for a progressive elimination of internal tariffs within the Community over a 5 year period from 1\textsuperscript{st} January 2005 when the Customs Union (CU) came into force. This was to be realized in January 2010. Kenya, Uganda and Tanzania negotiated the removal of internal tariffs under the CU while Rwanda and Burundi joined the CU as it is in 2007 upon acceding to the 1999 TEAC.\textsuperscript{108} South Sudan joined the EACU on 15\textsuperscript{th} April 2016 when it officially acceded to the Treaty.\textsuperscript{109}

The EACU Protocol was meant to liberalize inter and intra-regional trade within the EAC. Products originating in third countries were to be subjected to a common external tariff (CET) whose implementation was to be in two phases: the first phase was divided into three bands, each having its own tariff rate. There was a zero rate for raw materials, a 10\% rate for intermediate products and a 25\% rate for finished goods.\textsuperscript{110} The second phase of CET implementation came into effect in 2010 when the 25\% rate was to be reduced to 20\% subject to consultation and approval by Partner States.\textsuperscript{111}

For intra-Community trade, the Protocol divided products into category A and B goods. Tariffs were completely eliminated on category A goods when the EACU Protocol was effected in 1\textsuperscript{st} January 2005. Category B goods on the other hand were subject to tariff reduction over a transition period of five years from 2005 up to 2010. There was a common tariff of 10\% which was to be annually reduced by 2\% over five years from 2005 so that the

\textsuperscript{107}Khoti Kamanga, ‘Some constitutional dimensions of East African Cooperation’ 10
\textsuperscript{108}Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal 63
\textsuperscript{111}Ibid
tariff on the products produced and traded between Partner States were eliminated in 2010.\textsuperscript{112} The products that appeared on category B list are agricultural products, building materials, plastics, wood, paper, textiles, iron and steel and other manufactures.\textsuperscript{113} These products were perceived as not being able to withstand immediate competition from Kenyan producers.\textsuperscript{114} A transition was provided to allow Partner States to bring their economic productivity to par, in line with the asymmetry policy, before elimination of tariffs to facilitate trade as a Customs Union requires.\textsuperscript{115}

Despite the fact that tariffs were to be eliminated in the EAC by 2010, reports have emerged of Partner States subjecting goods originating from the Community to tariffs. Kenya reported imposition of tariffs on a number of its goods by Tanzania and Uganda in 2013.\textsuperscript{116} This trend continued in 2015 when reports were made of Kenya’s exports to the EAC declining because of the re-introduction of tariffs on Kenyan goods by the Community’s Partner States and non-tariff barriers.\textsuperscript{117}

Several non-tariff trade barriers have been reported as currently existing within the Community for example non-recognition of certificates of origin for certain Kenyan goods by Ugandan Customs, resulting in the Customs imposing a 25% duty on Kenyan manufactures using glucose imported under EAC duty remission.\textsuperscript{118} Uganda reported multiple inspections of goods destined for Uganda from Kenya, including inspection by the Kenyan Anti Counterfeit Agency which reportedly at times retains the goods, causing delays in delivery.\textsuperscript{119} Tanzania reported delays by the Kenyan Customs in posting online clearances of goods resulting in delays of trucks transiting goods along the Kenyan-Tanzanian border towns of Lunga Lunga and Horoboro.\textsuperscript{120} Kenyan customs authorities can be significantly blamed for

\textsuperscript{112} Ibid
\textsuperscript{113} Ibid
\textsuperscript{114} Ibid
\textsuperscript{115} Ibid
\textsuperscript{118} EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 7-September 2014, 11-14
\textsuperscript{119} Ibid
\textsuperscript{120} Ibid
the creation of non-tariff barriers that have negatively affected movement of goods across borders in the Community.

Article 4(b) of the EACU Protocol imposes an obligation on Partner States to eliminate non-tariff barriers (NTBs). Partner States, particularly Kenya in this case, should be committed to eliminating reported trade barriers to ensure the EACU succeeds. The elimination of tariff and non-tariff barriers should decrease the time and cost of trade in the Community. Minimising the time and cost required to move goods from their point of production to the consumer can potentially increase the volume and variety of traded goods which can in turn fuel new economic growth.  

1.5 Formation of the East African Common Market and its challenges

The second step to integration, which is also meant to facilitate trade within the EAC, under Article 5(2) of the 1999 TEAC is the formation of a Common Market. Article 76 of the Treaty stipulates the passing of a Protocol establishing a Common Market among Partner States allowing for the free movement of goods, services, labour, capital and the right to establishment. To achieve this, the EAC Partner States entered into the East African Community Common Market Protocol (EACCMP) in 20th November 2009, which subsequently came into force in 1st July 2010.  

The EAC Common Market was established in 2010 which is slightly above 10 years from when the 1999 TEAC was ratified. The Common/Single Market in the EU was formed in 1993 which is up to 36 years since the formation of the EEC which the EU succeeded. Formation of the EAC’s Common Market was relatively more ambitious but how effective it has been in meeting the purpose of its formation shall be debated.

The EACCMP together with its Annexes containing Partner States’ commitments are meant to facilitate unhindered movement of persons, labour, goods, services and capital as well as guaranteeing the right of establishment and residence of citizens within the EAC. However,

the Annexes still require applications which place restrictions on the freedoms the Common Market envisages. The Annex on the Free Movement of Persons still requires nationals of Partner States to be granted passes at set border points in its Regulation 5. The Annexe on Free Movement of Workers requires citizens of Partner States of the EAC to apply for a work permit under Regulation 6. The Annex on the Right of Establishment requires people/entities which are nationals of Partner States to apply for work permits and/or special passes before being allowed to set up any business or occupation under its Regulation 6. Regulation 6 on the Annex on the Right to Residence requires an application by citizens of Partner States before being granted.

On the other hand, the EU passed the Treaty on the Functioning of the EU which assures that every citizen of the EU has the right to move and reside freely within the Union subject to the limitations laid down in treaties and measures taken to effect them. This is set out in Article 21 of the Treaty. The EU adopted Directive 2004/34/EC which basically guarantees the right to movement and residence in the Union. Essentially, under the Directive, if you want to cross borders or shift residence in the EU and are an EU citizen, you are exempted from applying for visas, obtaining passes or getting work/special permits unlike in the EAC. You cross the borders freely without being subjected to identity checks, unless sufficient reasons arise for the need for verification. Verification of identities may be needed for security purposes. While the EU’s single market model has relatively less barriers for movement, residence and establishment, it cannot be easily transplanted in the EAC as the two regions have different prevailing socio-economic and political realities.

What should be of concern for the EAC Common Market when discussing trade facilitation is free movement of persons, goods, services and capital as well as guaranteeing the right of establishment and residence of citizens within the EAC. Two conflicting interests affect the existence of the Common Market.

On the one hand, Partner States aspire to promote economic growth by creating an environment where trade is facilitated through free movement of persons, goods, services,

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123 EU citizen means national of any Member State of the EU
capital, labour and guaranteeing the right to establishment, in accordance with Article 2(4) of Common Market Protocol. Amartya Seng buttresses this point by stating the market mechanism can promote economic growth if the freedom to exchange words, goods and gifts is guaranteed.\textsuperscript{125}

On the other hand, Partner States desire to maintain control over their borders and decide who can live within their territory.\textsuperscript{126} They also want to protect their national economies by implementing policies that restrict imports and promote exports to protect domestic industry.\textsuperscript{127} Examples of these policies include imposition of tariffs, exchange controls limiting free flow of currency/capital or granting subsidies to domestic producers.\textsuperscript{128} The policies have evolved to non-tariff measures including sanitary and phytosanitary measures, technical barriers to trade and export-related measures which Partner States may implement to restrict trade of certain goods.\textsuperscript{129} In Kenya for instance, government agencies that take part in regulating trade of goods including the Kenya Bureau of Standards (KEBS) and Kenya Plant and Health Inspectorate Service (KEPHIS) reportedly at times prevent the free movement of goods and services in the Community. These hindrances occur because of the setting of product standards, technical regulations and conformity assessment procedures that constitute technical barriers to trade.\textsuperscript{130}

At the outset of this study, incidences were given indicating the challenges the EAC Common Market has faced. Tanzania and Burundi did not take part at the launch of a single visa deal between Kenya, Uganda and Rwanda came into force on January 2014 to facilitate free movement of citizens and tourists alike.\textsuperscript{131} In 2015, Kenya and Tanzania got into a diplomatic spat over Tanzania barring Kenyan tour operators from accessing its national parks through the Tanzanian border point of Bologonja under the auspices of enforcing the provisions of a treaty between Tanzania and Kenya entered in 1985 restricting cross border transfers of

\begin{itemize}
\item[\textsuperscript{125}] Amartya Sen, \textit{Development as freedom}(Anchor Books 2012) 6
\item[\textsuperscript{127}] Olayinka Kareem ‘Trade restrictions and Africa’s exports’ (Centre for studies of African economies conference, Oxford University,2009), 11
\item[\textsuperscript{128}] Ibid
\item[\textsuperscript{129}] Tabitha Kiriti Nganga, ‘Barriers to trade: the case of Kenya’ (WCP Annual Conference, 2013) 57
\item[\textsuperscript{130}] Kenya’s trade within the East African Community: Institution and regulatory barriers, KIPPRA
\end{itemize}
tourists. Kenyan tour operators were barred from crossing to Tanzania yet Kenya allowed
Tanzanian tour operators free access, including to the Jomo Kenyatta International Airport
(JKIA) in Nairobi to pick Tanzania bound tourists. Kenya momentarily enforced a directive
barring Tanzanian tour operators from picking tourists in transit to Tanzania from the
JKIA.\textsuperscript{133}

With assistance from the World Bank, the EAC Secretariat conducted a review of the
operations of the Common Market. It noted all Partner States of the Community as at 2013
had restrictions that affect inward investments from Community Members.\textsuperscript{134} The most
severe were capital controls affecting all transactions covered by the Protocol from direct
investments, securities to lending, with Tanzania and Burundi observed as restricting lending
abroad by their residents.\textsuperscript{135}

On freedom of movement of services, a review of relevant laws and regulations revealed 63
measures inconsistent with liberalizing services, particularly for professional services (legal,
accounting, architectural and engineering).\textsuperscript{136} Three fourths of the identified measures are
national treatment related and discriminate against services and suppliers of EAC Partner
States.\textsuperscript{137}

Albeit members of the EAC undertook to eliminate tariff and non-tariff barriers to trade
under Article 5(2) (a) of the EA Common Market Protocol, several non-tariff barriers that
hamper free movement of goods have been observed. These include multiple repeat
inspections by government agencies such as the KRA and KEPHIS causing delays in
delivery.\textsuperscript{138}

\textsuperscript{132} Adam Ihucha, ‘Dar petitions Kenya after tour operators barred from airports’ \textit{The East African} (10
January 2015) <http://www.theeastafrican.co.ke/business/Dar-petitions-Kenya-after-tour-operators-
barred-from-airports-/> accessed on 16\textsuperscript{th} May 2015
\textsuperscript{133} Ibid
\textsuperscript{134} EAC Secretariat and World Bank (2014), ‘East African Common Market Score Card: Tracking
EAC compliance in movement of capital, goods and services’, 9-10
\textsuperscript{135} Ibid
\textsuperscript{136} EAC Secretariat and World Bank (2014), ‘East African Common Market Score Card: Tracking
EAC compliance in movement of capital, goods and services’, 18-19
\textsuperscript{137} Ibid
\textsuperscript{138} Tabitha Nganga (n 196)
Concerning freedom of movement of persons, strides have been made to guarantee it. Kenya, Rwanda, Uganda and Burundi agreed on use of national identity cards by their nationals for travel between the Partner States, while Tanzania and South Sudan still require passports.\textsuperscript{139} Kenya also repealed laws that restricted free movement of persons including the Alien Restriction Act\textsuperscript{140} and Immigration Act\textsuperscript{141} which were replaced by the Kenya Citizenship and Migration Act\textsuperscript{142} and Kenyan Citizens and Foreign Nationals Management Act.\textsuperscript{143}

The right of establishment guaranteed by the EAC Common Market Protocol is critical in trade facilitation. Kenya should be at the forefront in guaranteeing it to promote investments from nationals of fellow Partner States, to spur economic growth. The capital brought in should boost the country’s economy. There is the nationalistic urge to control foreign participation in investments by passing enactments and regulations that only promote domestic investments or tie investment to domestic/local participation.\textsuperscript{144} At this time of globalization signified by economic integration and interdependence of national, regional, and local economies across the world through increase of cross-border movement of goods, services, technologies and capital, Kenya should guarantee residency and avoid the tendency to be nationalistic when relating to nationals of Partner States of the Community.

1.6 The East African Monetary Union

The third step to integration under Article 5(2) of the 1999 TEAC is the setting up of a Monetary Union. Under Article 81 of the Treaty, Members undertake to cooperate in monetary and fiscal matters and maintain convertibility of currencies as a basis for formation of a Monetary Union. To achieve this end, Partner States undertake to adopt measures that would facilitate trade and movement of capital and also develop, harmonize and eventually integrate the financial systems of the States.

\textsuperscript{139} EAC, ‘Movement of persons’ <http://www.commonmarket.eac.int/index.php?option=com_content&view=article&id=87&Itemid=137> accessed on 29\textsuperscript{th} June 2016
\textsuperscript{140} Cap 173 Laws of Kenya
\textsuperscript{141} Cap 172 Laws of Kenya
\textsuperscript{142} Act No.12 of 2011 Laws of Kenya
\textsuperscript{143} EAC, ‘Movement of persons’ <http://www.commonmarket.eac.int/index.php?option=com_content&view=article&id=87&Itemid=137> accessed on 29\textsuperscript{th} June 2016
\textsuperscript{144} Henry Landau, ‘Economic and political nationalism and private foreign investments’ (1972) Journal of international law and policy Vol. 2, 173-174
Partner States started the third step to integration by signing the Protocol on the establishment of the East African Community Monetary Union on 30th November 2013.\textsuperscript{145} The Protocol largely commits Partner States to their undertakings under Article 81 of the TEAC discussed in the previous paragraph. Of particular interest in this study is Article 15(2) of the Protocol providing for the development of payment and settlement systems to enable the efficient flow of financial transactions within the Customs Union. Of further particular interest is Articles 18 and 20 of the Protocol committing Partner States to adopt a single currency and establish an East African Central Bank which will integrate with domestic central banks in the States to regulate financial systems, respectively.

Before discussing the importance of the Monetary Union, it is necessary to recap the definition of trade facilitation given by Miriam Omolo from the Institute of Economic Affairs (IEA). Omolo defines trade facilitation as a comprehensive and integrated approach to reducing the complexity and cost of trade transaction process, and ensuring that all these activities can take place in an efficient, transparent and predictable manner, based on internationally accepted norms, standards and best practices.\textsuperscript{146} Using a common currency to trade as envisaged under a monetary union eliminates the need for currency conversions which attract commissions for banks causing the cost of transactions to increase.\textsuperscript{147} This is enough incentive for the Community to adopt a common currency.

Arguments have risen dissuading the formation of monetary union including the fact that any currency change and the resulting loss of sovereignty in setting fiscal policy in the country would require amendments to the Kenyan Constitution particularly Article 231 that establishes the Central Bank of Kenya as the monetary policy institution.\textsuperscript{148} There are also perceived economic shocks associated with a monetary union beyond the scope of this study that would make Partner States reluctant to adopt a single currency.\textsuperscript{149}

\textsuperscript{145} EAC, ‘Monetary Union’ <http://www.eac.int/integration-pillars/monetary-union> accessed on 20th June 2016
\textsuperscript{148} Institute of Economic Affairs, ‘Memorandum on the Protocol for the establishment of the East African Community Monetary Union’ IEA
In the long run, it is important that Partner States adopt a common currency to cut costs associated with currency exchanges when conducting business in order to facilitate trade.

1.7 The East African Federation

The ultimate goal for the EAC under the 1999 TEAC is the formation of the East African Federation under Article 5(2) of the Treaty. Federalism has been defined as a political organisation in which states agree to establish a one government with central authority, while retaining local autonomy.\textsuperscript{150} For regional integration, political federation is a mean between political cooperation and political union.\textsuperscript{151} Political cooperation entails common policy arrangements among member states aimed at achieving common interests and objectives.\textsuperscript{152} It does not as a matter of necessity require the surrendering of one’s jurisdiction to a central unit.\textsuperscript{153} A political union is the ultimate goal of cooperating parties, and entails a shared political jurisdiction in which the parties to the union agree to surrender either all or part of their sovereignty to a central political unit.\textsuperscript{154}

One of the core objectives of Partner States under Article 5(1) of the 1999 TEAC is to develop policies and programmes aimed at widening and deepening co-operation among the States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for mutual benefit. Article 5(2) of the Treaty provides a road map to integration and involves the formation of a customs union, common market, monetary union and finally a political federation to assist Partner States in their cooperation.

From the point of view of regional integration, a political federation also involves a political union where states agree to cede some of their sovereignty to a central body. The 1999 TEAC does not spell out a time frame and give definite parameters of the political union Partner States desire, bringing to doubt the commitment to form a political union.

\textsuperscript{151} Ibid
\textsuperscript{152} Ibid
\textsuperscript{153} Ibid
\textsuperscript{154} Ibid
The fact that the Customs Union and the Common Market have been established but are beset by the challenges discussed in this chapter cast doubt on the viability of a political federation. Free movement of goods, capital, persons and labour and the right to establishment are still far from being achieved within the Community in spite the fact they should facilitate trade.

### 1.8 Trade effects of integration in the East African Community for Kenya

Having discussed the steps and state of integration in the EAC as relates to trade facilitation, this chapter will cap with an analysis of the trade effects of integration for Kenya, focusing on the country’s trade volumes in the EAC. Integration under the EAC has seen Kenya’s exports to the EAC significantly grow, albeit in a chequered manner. The value of the country’s exports grew at US Dollars 1,119,258,000, 1,171,820,000, 1,274,236,000, 1,544,967,000 respectively from 2008 to 2011.\(^{155}\) In 2012 and 2013, the value remained constant at 1,593,024,000.\(^{156}\) The value dropped to 1,143,400,000 in 2014 and a further dropped to 1,070,200,000 in 2015,\(^{157}\) which has been attributed to among other factors, reintroduction of tariffs on Kenya’s goods by fellow Partner States, non-tariff barriers and competition from relatively cheaper Indian and Chinese exports.\(^{158}\) If the EAC can eliminate/reduce its restrictive trade barriers, this can create the right environment for Kenya to innovate and reverse the decline in its productivity and exports to the Community. This could positively impact the country’s economy.

### 1.9 Conclusion

Integration under the 1999 TEAC has been beset by challenges that restrict trade within the Community. There are tariff and several non-tariff barriers that hamper free trade within the Community, some of which have been mentioned in this chapter including multiple and unstandardized inspection of goods that cause delays in delivery.

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156 Ibid


There is sufficient justification for free trade within the Community, particularly in the theory of comparative advantage developed by Ricardo. He believes that States can produce goods with the least opportunity cost to them and trade the goods amongst themselves to secure a bigger market and higher incomes which should promote economic development.\textsuperscript{159}

The barriers to trade in the EAC are not unique and have been experienced in other regional integration arrangements. Laws, regulations and policies have been innovated and implemented to facilitate trade globally, which Kenya and her fellow Partner States can consider and adopt to boost trade within the region. The next chapter shall analyse barriers that affected Kenya’s trade with Partner States of the EAC and this shall lay ground for recommendations that can be implemented to facilitate the trade.

CHAPTER 2

TRADE BARRIERS IN THE EAST AFRICAN COMMUNITY

2.1 Introduction

The previous chapter gave an overview of integration in the EAC as set out in the 1999 Treaty establishing the East African Community (1999 TEAC) and what role integration plays in trade facilitation. The Community has taken encouraging steps to economically integrate by formation of a customs union and common market. Partner States have even gone ahead and signed a Protocol providing for the formation of a monetary union, which is yet to be established. Despite the encouraging steps, trade in the EAC has been beset by restrictions which were outlined and broadly categorised as tariff and non-tariff barriers in chapter 1. These restrictions have negatively impacted Kenya’s trade with the rest of the Community.

This part of the study aims to critically analyse and outline the trade barriers commonly faced by business people in the Community, particularly those in Kenya. It shall form the basis for proposals on legal and institutional reform to facilitate trade.

2.2 Survey on trade barriers within the East African Community

Plenty has been written concerning tariff and non-tariff barriers (NTBs) and their restrictive effects on trade within the EAC. A survey was carried out to assess the impact of NTBs using available literature on trade restrictions in the Community as a basis for research. A conference paper titled ‘Barriers to trade: a case for Kenya’ provided vital background information with respect to non-tariff barriers. The survey focused on persons involved in movement of goods within the Community and entailed carrying out interviews and issuance of questionnaires to collate data on the impact of NTBs. The following table summarizes the findings of the survey:

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Table 1  Non-tariff barriers (NTBs) and their impact on business

<table>
<thead>
<tr>
<th>NTB</th>
<th>Percentage(%) of affected respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Corrupt practices</td>
<td>90%</td>
</tr>
<tr>
<td>2. Non acceptance of certificates of origin</td>
<td>55%</td>
</tr>
<tr>
<td>3. Arbitrary classification of goods</td>
<td>72%</td>
</tr>
<tr>
<td>4. Discriminatory sourcing</td>
<td>82%</td>
</tr>
<tr>
<td>5. Import/export bans</td>
<td>100%</td>
</tr>
<tr>
<td>6. Trade monopolies</td>
<td>67%</td>
</tr>
<tr>
<td>7. Sanitary and phytosanitary measures</td>
<td>53%</td>
</tr>
<tr>
<td>8. Technical quality standards</td>
<td>85%</td>
</tr>
<tr>
<td>9. Import and export licenses/permits</td>
<td>68%</td>
</tr>
<tr>
<td>10. Arbitrary and multiple documentation</td>
<td>85%</td>
</tr>
<tr>
<td>11. Excessive port entry charges and taxes</td>
<td>100%</td>
</tr>
<tr>
<td>12. Inefficient port operations</td>
<td>70%</td>
</tr>
<tr>
<td>13. Multiple and variable weighbridges</td>
<td>85%</td>
</tr>
<tr>
<td>14. Variable border opening times</td>
<td>85%</td>
</tr>
<tr>
<td>15. Multiple police road blocks</td>
<td>100%</td>
</tr>
<tr>
<td>16. Unsuitable/inadequate transport infrastructure</td>
<td>90%</td>
</tr>
<tr>
<td>17. Difficulty in obtaining permits for movement across borders</td>
<td>60%</td>
</tr>
</tbody>
</table>

The tabulated NTBs shall be categorised and analysed in detail next.

2.2.1 Institutional barriers affecting customs clearance

Various government agencies, departments and parastatals that regulate trade within the Community sometimes prevent unhindered movement of goods in the EAC. In Kenya, these include the Kenya Revenue Authority (KRA), Kenya Anti-counterfeit Agency, Kenya Bureau
of Standards (KEBS) and Kenya Health and Plant Inspectorate (KEPHIS) among others.\textsuperscript{161} The bodies inspect goods for various reasons including verifying duty and certifying compliance with set standards.\textsuperscript{162} They also take part in issuing import declaration forms (IDFs) for goods to a large extent, operate independently of each other without synchrony which causes delays in clearance of goods.\textsuperscript{163} Further, most of them do not have 24 hours daily operations which means goods cannot be cleared in a timely sequence.\textsuperscript{164} In its 2014 update on NTBs, the EAC’s Secretariat stated Partner States’ border management institutions lacked harmonized working hours, leading to delays in clearance of goods where one institution is operational while the other is not.\textsuperscript{165} Table 1 reveals 85\% of respondents interviewed in this study reported being negatively affected by variable working hours of border management institutions of Partner States.

2.2.2 Regulatory barriers

In exercising their duties, agencies involved in inspecting goods subject traders in the Community to non-tariff measures (NTMs) that are restrictive, repetitive and uncoordinated, leading to administrative and bureaucratic inefficiencies in clearance of goods.\textsuperscript{166} The EAC Secretariat sighted all Partner States’ statutory agencies for carrying out uncoordinated and unwinding inspection of goods in December 2014.\textsuperscript{167} The classification of NTMs includes import measures such as sanitary and phytosanitary (SPS) tests, technical barriers to trade (TBTs) and export-related measures.\textsuperscript{168} Research in Kenya revealed restrictive trade practices such as discriminatory sourcing and import/export bans; imposition of technical quality standards on goods by agencies such as KEBS and requirement of licenses to import/export as having severe impact on businesses.\textsuperscript{169} The impacts of regulatory barriers was assessed during field surveys and revealed in Table 1. The most severe regulatory barriers are

\begin{thebibliography}{99}
\bibitem{161} A Muluvi, P Kamau, S Gituku & M.Ikiara, ‘Kenya’s trade within the East African Community: Institutional and regulatory barriers’ KiPPRA, 1-4
\bibitem{162} Ibid
\bibitem{163} Ibid
\bibitem{164} Ibid
\bibitem{165} EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 8-December 2014, 29
\bibitem{166} Tabitha Kiriti Nganga, ‘Barriers to trade: the case of Kenya’ (WCP Annual Conference, 2013) 59
\bibitem{167} EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 8-December 2014, 29-30
\bibitem{168} Tabitha Kiriti Nganga, ‘Barriers to trade: the case of Kenya’ (WCP Annual Conference, 2013) 57
\bibitem{169} Tabitha Kiriti Nganga, ‘Barriers to trade: the case of Kenya’ (WCP Annual Conference, 2013) 62
\end{thebibliography}
import/export bans and imposition of technical standards whose impact on respondents is reported at 100% and 85% respectively.

### 2.2.3 Non-publication of the EAC’s customs laws

Law on customs for the Community is contained in relevant provisions of the 1999 TEAC; the Protocol on the Establishment of the East African Customs Union together with its annexes; regulations and directives issued by the Community’s Council of Ministers; and the East African Community Customs Management Act and its attendant regulations.

Most customs regulations are published as Article X of the General Agreement on Tariffs and Trade of 1994 (GATT 1994) requires. They can even be obtained in the Kenya Law Reports Online. Notwithstanding, Kafeero notes certain regulations such as directives by the Community’s Council of Ministers are mainly published by gazette notice in the East African Gazette whose circulation is limited. The foregoing needs to be improved so that law on customs is readily available to everyone in the Community.

### 2.2.4 Non-technical barriers to trade

Nganga divides NTMs into technical and non-technical trade barriers. She classifies sanitary and phytosanitary tests on goods as technical measures while she classifies the following measures as non-technical trade barriers: preshipment inspection, price controls, anti-competitive measures; finance measures; licenses, quotas, prohibitions and other quantity control measures; procurement restrictions by government; rules of origin; trade related investment measures, among others.

Application of rules of origin (ROO) presents a procedural obstacle to trade amongst Partner States. Non acceptance of certificates of origin was reported as late as December 2014, where Uganda was cited for refusing to accept certificates of origin for glucose products.

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170 Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal 64

manufactured in Kenya imported under the EAC duty remission.\textsuperscript{172} Uganda went ahead and imposed 25\% duty on the product.\textsuperscript{173} 55\% of respondents interviewed in this study reported being negatively affected by non-acceptance of certificates of origin among Partner States, the bulk being Kenyan traders.

\textbf{2.2.5 Transit within the East African Community}

In 2008, the Community put in place regulations intended to harmonize transportation regulations and standards including maximum axle mass loads, gross vehicle mass limits, tolerance factors for overloads, and a ban on quadrem axles.\textsuperscript{174} Harmonizing transportation regulations and standards promotes safety and reduces wearing on roads, facilitating the unhindered flow of goods.\textsuperscript{175} Maximum gross weights allowed on the road still vary widely among Partner States with Kenya allowing a maximum vehicle weight of 48 metric tons (mt), Burundi and Rwanda allowing a weight of 53 metric tonnes, and Tanzania and Uganda permitting loads of 56 mt.\textsuperscript{176} This has resulted in a situation in which Tanzanian trucks transiting through Kenya on their way to Uganda have had to reduce excess cargo to avoid penalties for overloading which is costly in terms of time and money.\textsuperscript{177}

Poor infrastructure also hampers free movement of goods and is seen as a barrier to trade.\textsuperscript{178} 90\% of the respondents who took part in the study identified poor transport infrastructure as negatively affecting their ability to move goods and trade. Closely related, 70\% of the respondents revealed inefficient port operation exacerbated by poor/inadequate port equipment as some of the factors limiting trade.

Numerous police road blocks and weighbridges where transport operators are forced to stop for inspections have been reported to cause delays in transportation of goods in the

\textsuperscript{172} EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 8-December 2014, 32
\textsuperscript{173} Ibid
\textsuperscript{175} Ibid
\textsuperscript{176} Ibid
\textsuperscript{177} Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal 69
\textsuperscript{178} Ibid
Community. Those who transport goods are routinely forced to part with bribes at police road blocks and weigh bridges to avoid being detained, which increases the cost of freight. One of the respondents interviewed in the course of the study quipped that everyone who transports goods budgets to bribe the authorities, so as to avoid the delays that come with detainment. Uganda and Rwanda raised issue with Kenya for its numerous weighbridges: Kenya had four weighbridges yet Partner States had capped them at two. It does not come as a surprise that 85% of the Respondents interviewed identified multiple and variable weighbridges as a trade barrier and a corresponding 100% identified police road blocks.

2.2.6 Procedural obstacles in relation to documentation and clearance of goods

Interviews with several respondents revealed arbitrary and voluminous requirements for documentation; lengthy goods classifications and valuation of export processes; and corruption in clearance of goods. The Community’s members require huge numbers of trade documents and inspections. Requirements also vary among countries, raising the costs of transactions and lengthening import/export processing times. Traders face repeat inspections of products already certified by accredited laboratories; inspections of products originating from within the EAC and bearing the certification mark issued by a national standards bureau; and non-standardized testing procedures across states. 85% of the respondents who took part in the study identified requirements for voluminous and varying documentation at customs authorities in the Partner States as a trade barrier. The survey also revealed corruption is systemic and has pervaded not only from the ports of entry in the EAC, particularly Mombasa, but also inland along the roads as discussed previously. Customs officials reportedly demand bribes to clear goods and 90% of the respondents who took part in this study flag corruption as a major hindrance to trade in the Community.

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179 Koopman and Laney (n 174)  
180 Ibid  
181 Ibid  
184 Ibid
2.3 Conclusion

The nature and impact of trade barriers elaborated in this chapter create urgent need for reforms to resolve them and therefore create the right environment for trade within the Community. This shall be covered in the next chapter.
CHAPTER 3

RECOMMENDATIONS ON REFORMS NEEDED TO RESOLVE BARRIERS TO TRADE

3.1 Introduction

The last chapter discussing trade barriers laid justification for reforms to facilitate trade within the EAC. Before proceeding to recommend what should be done to facilitate trade, it is noteworthy that the EAC has already adopted several of the principles the WTO and World Customs Organizations (WCO) recommends for trade facilitation. For instance, Article 6 of the EACCU Protocol enlists reducing documentation required to trade, adopting common documentation standards, regularly reviewing procedures adopted for international trade and adopting common solutions to facilitate trade as some of the steps Partner States are duty bound to do to facilitate trade.

The East African Customs Management Act has heavily borrowed principles and practices spelt out in the Revised Kyoto Convention on Trade Facilitation which was developed by the WCO and came into force on 3rd February 2006. These include transit (Sections 85-87), inward and outward processing (Sections 167-170), adoption of information technology (Sections 187-192) and export processing zones (Sections 167-170), among others.\(^\text{185}\)

There are practical steps to trade facilitation that Partner States in the EAC can take. How each fits within the law shall be accessed.

3.2 Information and communication technology

Sections 187 to 189 of the EA Customs Management Act which Kenya has adopted provides for the use of information technology (IT) in customs. Chapter 7 of the Kyoto Convention on Trade Facilitation also provides for the use of IT in customs using internationally accepted standards and upon consultation with those affected. Kenya adopted the Simba System in

\(^{185}\)Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal 68
2005 to automate customs.\textsuperscript{186} However, the Automated System for Customs Data (ASYCYUDA) is in use in over 90 countries for customs,\textsuperscript{187} including Tanzania and Uganda that use ASYCYUDA++.\textsuperscript{188}

United Nations Conference on Trade and Development (UNCTAD) favours use of ASYCYUDA in customs management. UNCTAD justifies use of ASYCUDA arguing it helps in publication of customs regulations, facilitates advanced rulings on tariff classification and evaluation and instant alerts can be exchanged between government agencies involved in customs. This should enable swiftness in customs management. The Simba system used in Kenya is interoperable with ASYCUDA.\textsuperscript{189}

It is beyond the scope of this study to recommend the best IT system to adopt to manage customs in Kenya. The country should strive to operate and maintain a system that quickens clearance of goods to facilitate trade. It is noteworthy Tanzania reported delays by the Kenyan Customs in posting online clearances of goods resulting to delays of trucks transiting goods along the Kenyan-Tanzanian border towns of Lunga Lunga and Horoboro.\textsuperscript{190} This does not portend well for the IT system Kenya has currently adopted for its customs.

### 3.3 Freedom of transit

Article V of the 1994 GATT provides for transit free from unnecessary delay/restriction, regulation of traffic in transit, setting reasonable charges and regulations for traffic in transit and non-discrimination – with regard to like products as well as air transit of goods.\textsuperscript{191}

Transit procedures within the Community are one of the foremost non-tariff barriers. In Kenya’s case, multiple police road blocks and weighbridges have repeatedly been reported as

\textsuperscript{186} Ibid
\textsuperscript{187} The new frontier of competitiveness in developing countries: implementation of trade facilitation, UNCTAD, 48
\textsuperscript{188} Kafeero (n 185)
\textsuperscript{189} Ibid
\textsuperscript{190} EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 7-September 2014, 11-14
\textsuperscript{191} Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal 69
leading to delays in transit of goods.\textsuperscript{192} Uganda and Rwanda raised issue with Kenya for having four weighbridges along its northern corridor at which trucks transporting goods stop yet Partner States had agreed to cap them at two.\textsuperscript{193}

It is understandable Kenya would want to retain ideal weights on its highways to protect its roads. However, the country should reduce its weighbridges to two and gazette the two it retains as the official weighbridges, to facilitate trade and meet its commitment. The number of police roadblocks should also be cut down and rules should be formulated and gazetted to avoid arbitrary setups of police roadblocks and arbitrary stoppage of goods and persons in transit.

Poor/inadequate infrastructure-in this case roads, rail and ports- has been considered an NTB in this study. Infrastructure for transportation of goods both on the northern corridor from the Mombasa port in Kenya and the central corridor starting from the Dar es Salaam port in Tanzania have been found inadequate for purposes of transporting goods into the Community’s hinterland.\textsuperscript{194}

Partner States have entered into agreements for development of infrastructure such as the Northern Corridor Transit Treaty entered in the mid-1980s by Rwanda, Burundi, Uganda, Kenya and Congo for development of the Northern Corridor connecting the countries by building roads, rails, ports, ones-stop border posts.\textsuperscript{195} A one-stop border post was developed in Malaba at the boundary between Kenya and Uganda which should ease customs clearance at the border.\textsuperscript{196}

\begin{flushright}
\textsuperscript{192} Ibid
\textsuperscript{193} EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 8-December 2014, 31
\textsuperscript{195} Regional programme of action for economic development and regional integration ‘Northern Corridor: programme for improving transport infrastructure and facilities’ (International Conference on the great Lakes Region, March 2006), 7-9 <https://www.lse.ac.uk/collections/law/projects/greatlakes/3.%20Economic%20Development%20and%20Regional%20Integration/3b.%20Projects/3.3.1.%20NCorridor%20Aug06%20%20En%20%20Cleaned.pdf> accessed on 10\textsuperscript{th} July 2016
\textsuperscript{196} Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal 70
\end{flushright}
The Treaty on the Northern-Corridor development culminated in infrastructural projects such as the standard gauge railway (SGR) project meant to connect Kenya to Uganda, Rwanda, Burundi and South Sudan. Kenya commenced building the Mombasa-Nairobi section of the standard gauge railway in 2014 after entering a financial agreement with and securing funds from the China Export Import Bank (China Exim Bank). It was noted at the 13th summit for the Northern Corridor Integration Projects held in 2015 that this section is 75% complete.

The 13th Summit also noted that the Nairobi-Naivasha section of SGR in Kenya would commence after funding had been secured from the China Exim Bank through a financial agreement. China, Uganda, Kenya, South Sudan and Rwanda signed an agreement for a joint finance mechanism for the SGR in which the Republic of China committed to help fund railway construction to connect the Partner States. The Japan International Corporation Agency (JICA) entered into loan agreements with the Kenya Ports Authority in 2007 and 2015 respectively to develop infrastructure at the Mombasa Port including a container terminal, cargo handling machinery and additional berths with the primary aim of facilitating efficient movement of goods through the Northern Corridor.

Bilateral and multi-lateral agreements that will help Kenya develop infrastructure connecting it to EAC Partner States are highly recommended, considering the high capital outlay required for infrastructural projects which the country may ill-afford. It is instructive that one of the terms reportedly set by China to finance development of SGR in Uganda is that Uganda should get guarantees that Kenya is ready to develop the railway up to the border.

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197 Kenya Ministry of Transport and Infrastructure, ‘Standard gauge railway: forging new frontier in railway development in Kenya and the region’ *Uchukazi* (Issue No. 1 June 2014), 6-7
198 Rwanda Ministry of East African Community, ‘13th Summit of the Northern Corridor infrastructure projects’ (Media Centre, Ministry of EAC-Rwanda, 23rd April 2016),<http://www.mineac.gov.rw/index.php?id=71&tx_ttnews%5Btt_news%5D=940&cHash=c9158a9a499354584422e374e6261e60> accessed on 10th July 2016
199 Ibid
200 Joseph Elunya, ‘EAC sign joint regional finance mechanism for the standard gauge railway project’ *The continental observer* (Uganda, 12May 2014)
town of Malaba connecting Uganda and Kenya. This underscores the need for cooperation among Partner States to secure funding for infrastructure.

Tanzania has not played the most active role in cooperating to develop infrastructure connecting the country to the rest of the EAC. Tanzania was absent at two meetings held in Uganda and Kenya in 2013 to discuss joint infrastructural projects and fast-tracking a political federation in the EAC. There has been a shift in policy in Tanzania going by the latest on goings. Tanzania entered into an agreement with Rwanda and Burundi in 2016 to develop an SGR line from the Dar-es-Salaam port in Tanzania to Burundi and Rwanda. This railway line makes part of central corridor and is included in the EAC railway master plan.

The EAC Partner States of Kenya, Uganda and South Sudan had agreed to build a crude oil pipeline to evacuate their oil reserves through Lamu in Kenya where a new port is under construction. However, Uganda made a shift after it negotiated and agreed with Tanzania to route its crude oil from Hoima where Uganda’s main oil reserves are through to the Tanga port in Tanzania instead of Lamu in Kenya, while Kenya opted to develop its own crude oil pipeline.

One may infer Tanzania took the joint oil pipeline deal from Kenya and undermined Kenya’s interest in the process but that is not a cause for concern in this study. The cooperation witnessed from Partner States involved in the Northern Corridor Integration Projects (NCIP) has helped shape Tanzania’s shift in policy from passivity to deeper engagement with the

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205 Ibid


EAC. The liberal theory in international relations advanced by Moravcsik is enlightening in regard to Tanzania’s policy shift. Moravcsik contends that different individuals and groups define material and ideational objectives independently from politics and thereafter seek to advance those ends through political means.208

States often have divergent preferences on engaging in cross-border trade and their preferences are highly influenced by entrenched national interests. The important link between state preferences, on the one hand, and state conduct, on the other, is the concept of policy interdependence.209 Moravcsik defines policy interdependence as the interaction of preferences—that is, the extent to which the pursuit of state preferences necessarily imposes costs and benefits upon other states, independent of the costs imposed by the strategic means chosen to obtain them.210 Where policy alignment by a state can generate mutual gains with low distributive consequences, it incentivizes international policy convergence.211

Complex interstate behaviour is hardly shaped by one factor. Coercive capabilities, information and beliefs about suitable means also play a role.212 State(s) can coerce other state(s) to adopt certain positions in international trade. Tanzania witnessed Partner States of the NCIP, most of which it shares borders with and which double up EAC members, cooperate to develop infrastructure in order to facilitate trade. While Tanzania is not a contracting state of NCIP, it took active participation in NCIP’s activities and was represented in the 13th Summit of the NCIP.213 Tanzania and Kenya opened a one-stop border post in February 2016 at the border towns of Holili/Taveta that can ease movement of people and goods through the two Partner States, which is a further pointer to Tanzania’s shift in policy.214

208 Andrew Moravcsik, ‘The new liberalism’ The Oxford handbook on international relations (Oxford University Press 2008)236
209 Ibid
210 Andrew Moravcsik, ‘The new liberalism’ The Oxford handbook on international relations (Oxford University Press 2008)239
211 Ibid
212 Andrew Moravcsik, ‘The new liberalism’ The Oxford handbook on international relations (Oxford University Press 2008)249
Kenya should therefore continue entering into multilateral and bilateral agreements that assist it develop its infrastructure, considering the benefits such engagements have proven to have.

3.4 Institutionalising trade facilitation

There are practical steps to facilitate trade which need a dedicated institution to manage. Article 74 of the 1999 TEAC binds Partner States to cooperate in trade liberalization and adopt and develop an East African Trade Regime. An ideal trade regime should be free from tariff and non-tariff barriers that restrict trade. This study proposes the establishment of a regional body/institution working under the auspices of the EAC and dedicated to trade facilitation. This body should be the avenue through which Partner States of the EAC cooperate to eliminate trade barriers.

The study also proposes the establishment of a Kenyan state body specialised in trade facilitation. The World Trade Organization (WTO) adopted an Agreement on Trade Facilitation, a critical outcome of a WTO Ministerial Conference held in Bali in December 2013. This agreement is meant to simplify customs and other border procedures for the efficient clearance of goods for import and export and shall be binding on all Member States including Kenya, upon its entry into force. Article 23.2 of the Agreement stipulates that each Member shall establish a national committee on trade facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of provisions of the Agreement.

Even though this study is concerned with legal mechanisms Kenya and EAC Partner States should adopt to facilitate trade, some of the steps research reveals should be taken to eliminate trade barriers are practical and go beyond the purview of law, in the strict sense. However, the data collected on eliminating NTBs could form a good agenda for the institutions proposed/supposed to manage trade facilitation. Table 2 summarizes steps to eliminate/minimize NTBs not covered in sections 3.2 to 3.4 of the study. A number of these shall be elaborated on briefly.

215 International Trade Centre, ‘National Trade Facilitation Committees: moving towards implementation’ ITC Technical Paper XII/2015, 1
216 Ibid
### Table 2: Non-tariff barriers and proposed solutions

<table>
<thead>
<tr>
<th>Non-tariff barrier (NTB)</th>
<th>Proposed solution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Corrupt practices</td>
<td>Automation of customs clearance processes to lessen personal contact that can encourage corrupt practices</td>
</tr>
<tr>
<td>2. Non acceptance of certificates of origin</td>
<td>Adoption of common rules of origin</td>
</tr>
<tr>
<td>3. Multiple inspection of goods</td>
<td>Use of the single window concept, mutual recognition agreements for authorities involved in inspecting goods such as the Kenya Bureau of Standards and adoption of risk based checks</td>
</tr>
<tr>
<td>4. Import and export licenses/permits</td>
<td>Elimination of the licenses</td>
</tr>
<tr>
<td>5. Arbitrary and multiple documentation requirements at customs</td>
<td>Reduction and harmonization of documentation requirements by customs</td>
</tr>
<tr>
<td>6. Excessive port entry charges and taxes</td>
<td>Reduction and harmonization of port entry charges</td>
</tr>
<tr>
<td>7. Variable border opening times</td>
<td>Synchronization of working hours</td>
</tr>
<tr>
<td>8. Difficulty in obtaining permits for movement across borders</td>
<td>Elimination of the need for permits for citizens of East African Partner States to travel in the Community</td>
</tr>
<tr>
<td>9. Varying axel load restrictions for trucks transporting goods across borders in the EAC</td>
<td>Adoption of uniform standards for axel load restrictions</td>
</tr>
</tbody>
</table>

Kafeero proposes the enforcement of the concept of a single window where a trader submits required information/documentation and goods once to a single designated state entity (preferably Customs-KRA) for multiple purposes, including inspection by all agencies.
involved in the exercise such as KEBS and the Kenya Plant Health Inspectorate (KEPHIS).\textsuperscript{217} This needs coordination amongst the agencies.\textsuperscript{218}

Partner States of the EAC have different bodies that assess standards of goods. In Kenya’s case, the foremost body involved in setting and assessing standards is KEBS. It is important that the country enters mutual recognition agreements and accreditation processes for different regulators in different Partner States, to avoid a scenario where goods inspected by KEBS in Kenya are also inspected by the Ugandan Standards Bureau.\textsuperscript{219}

Chapter 3 (Transitional Standard 3.32) of the Kyoto Convention on the Simplification and Harmonization of Customs procedures provides for risk based inspections. These include clearance of goods at the declarant’s premises, periodic goods declaration, self-assessment of goods and attendant taxes and lodgement by entry into the corporate records as some of the risk-based simplified customs procedures that can be adopted.

Article 2(5) (M) of the East African Community Customs Union Protocol (EACCUP) provides for easing the complexity and harmonization of trade documentation and procedures. 85% of the respondents in this study raised issue with the arbitrary and heavy documentation required to clear goods through customs. There is pressing need to review and harmonize the amount of documents required to clear goods, to comply with the Customs Union Protocol.

Closely related to the harmonization is the streamlining of rules of origin applicable in the Community. Currently, the EAC does not have its own set of rules of origin but relies on the ones adopted by the Common Market for Eastern and Southern Africa which stipulate a good must be wholly produced or contain imported content of not more than 40 percent of the cost, insurance and freight value of the materials used in production.\textsuperscript{220} The need to streamline rules of origin is seen from incidences where certificates of origin for certain Kenyan goods

\textsuperscript{217} Edward Kafeero, ‘Customs and trade facilitation in the East African Community’ Volume 2 No. 1 World Customs Journal, 69
\textsuperscript{218} Ibid
\textsuperscript{219} Tabitha Kiriti Nganga, ‘Barriers to trade: the case of Kenya’ (WCP Annual Conference, 2013) 67
\textsuperscript{220} August Muluvi, Paul Kamau& Simon Githuku, ‘Kenya’s trade within the East African Community: Institutional and regulatory barriers’ (KIPPRA) 22
have not been recognized by the Ugandan Customs, resulting in the Customs imposing a 25% duty on Kenyan manufactures using glucose imported under EAC duty remission.\textsuperscript{221}

It is necessary to adopt uniform axel load standards for trucks transporting goods through the borders of different Partner States of the EAC. Kenya has been noted to use varying application of axel load specifications for trucks transiting through it.\textsuperscript{222} This should be harmonized to enable trucks transporting goods through Kenya and fellow Partner States to move seamlessly without the need to offload/unload which causes delays in transit.

There is pressing need for agencies operating at border points within EAC to have harmonized inspection processes to hasten goods clearance processes and reduce delays at the borders.\textsuperscript{223} A good starting point would be to synchronize the working hours at border points in order to avoid stoppage of goods while in transit at the border points, particularly when the points are closed.

### 3.5 Willingness to facilitate trade

The recommendations discussed in this chapter should facilitate trade between Kenya and other EAC States. There is nothing new about the recommendations as different scholars have repeatedly prescribed them for increased trade but they remain largely unimplemented and if implemented, carried out ineffectively.

Lack of political will has been blamed for the lethargy observed in facilitating trade in integration systems such as the EAC. This is despite the immense opportunity it presents in terms of expanded trade markets. Mangeni aptly describes lack of political will as follows:

There could be several ways to account for this. First, the leaders who conclude the relevant treaties (on trade/integration) do not do so as a manifestation of popular opinion, and invariably the conclusion is not endorsed by parliament where there is one. The treaties remain the individual acts of political leaders. In this case, the

\textsuperscript{221} EAC, ‘Status of elimination of non-tariff barriers within the East African Community’ (2014) EAC Vol. 7-September 2014, 11-14
\textsuperscript{222} Tabitha Kiriti Nganga, ‘Barriers to trade: the case of Kenya’ (WCP Annual Conference, 2013) 60
\textsuperscript{223} August Muluvi, Paul Kamau& Simon Githuku, ‘Kenya’s trade within the East African Community: Institutional and regulatory barriers’ (KIPPRA) 22
conclusion of a treaty does not attract follow-up action from the people, who, moreover, may not even know of the treaty. The ratification process might never take off, or may drag due to lack of support by the relevant national institutions. In some cases, the treaties may be ratified, and incorporated into municipal law, but remain on the statute books without being disseminated and inculcated into the activities of relevant actors such as the business community and other service providers who would have been interested in expanded markets. Where this is the case, the leaders do not have to account to electorates for their performance on the treaties, and do not have the incentive to proceed with implementing the treaties, especially where even the government bureaucracy does not have the treaties on the priority list.\textsuperscript{224}

The EAC has established a customs union and common market which should facilitate trade but trade has been beset by the barriers described in this study. Despite the formal commitments to facilitate trade contained in the protocols establishing these bodies, trade has been limited by measures deliberately taken by Partner States’ municipal bodies particularly those involved in customs clearance. This shows cooperation among states is dependent on political good-will and is only as good as the will it can attract especially from the ruling elite.

The pressing need for Kenya to be at the fore-front in fostering cooperation among Partner States to facilitate trade in the Community can be justified in the reduction in value of its exports to the Community. The value dropped to US $1,143,400,000 in 2014 and a further dropped to $1,070,200,000 in 2015.\textsuperscript{225} The value needs to be increased and this can be achieved if trade is facilitated.

Enough impetus exists for promotion of trade within the EAC. While discussing supranationality, it was observed that during the process of integration, states delegate some of their sovereignty to the entity created as a result, in order to protect their interests and benefit

\textsuperscript{224} Francis Mangeni, ‘Obstacles to economic integration in Africa’ 14
their nationals. \textsuperscript{226} The EAC was established by the 1999 TEAC and Article 5(2) of the Treaty provides for the establishment of a customs union, common market and monetary union which facilitate trade. Despite the occurrence of the trade barriers and occasional diplomatic tensions between Partner States - particularly Kenya and Tanzania, trade within the EAC is happening and all States are benefitting from the expanded market provided by the Community. Kenya should therefore fully support and participate in initiatives to grow trade with the rest of the EAC.

Certain positive steps have been taken to facilitate trade in the Community including the drafting of a Trade Facilitation Bill which shall be discussed at length in the final chapter. However, the foremost factor that shall affect the success of trade facilitation within the EAC is the political will it gets.

3.6 Conclusion

All the tariff and non-tariff trade barriers mentioned in this and the previous chapter should properly be resolved by formation of institutions- both nationally and regionally-to coordinate trade facilitation. Specialised bodies with requisite expertise and membership that cuts across all sectors involved in trade are necessary to mainstream trade facilitation. This shall be discussed in the chapter that follows.

As has been discussed, one of the foremost factors that shall affect the success of trade facilitation in the EAC is the political will to implement it. This has been illustrated from the set-up of the Community’s customs union and common market which have been beset by trade barriers mainly caused by the leadership of Partner States. Despite the fact that the integration systems have been established and the protocols establishing them forbid the Partner States from engaging in what would limit trade, the States, particularly through their customs agencies, have taken deliberate steps to limit trade in the region.

\textsuperscript{226} Katrin Metacalf and Ionannis Papageorgiou, \textit{Regional integration and courts of justice} (Intersentia 2005) 5
CHAPTER 4

INSTITUTIONAL REFORMS REQUIRED FOR TRADE FACILITATION

4.1 Introduction

Much emphasis was made in the previous chapter on the need to institutionalize trade facilitation. This chapter will delve into institutional reforms required to facilitate trade.

Article 23.2 of the WTO Agreement on Trade Facilitation entered after a WTO Member States’ meeting in Bali in 2013 requires Member States to commit to establishing national committees/mechanisms on trade facilitation. During negotiation of the Agreement, it was recognized that interests of different government agencies in controlling cross border movement of goods and interests among business persons in minimizing transactional costs in trade require effective coordination mechanisms. All these interests can be coordinated by the establishment of national committees/mechanisms to facilitate trade.

The national committees/mechanisms can converge under the auspices of regional bodies such as the EAC to establish cross-border trade facilitation coordination bodies. Some of the non-tariff barriers experienced in the EAC that can be addressed by well-coordinated trade facilitation mechanisms include the lack of uniform rules of origin for goods moving across borders within the region that can see goods produced by one Member State attract duties for goods produced outside the Community. This should not be the case under the East African Customs Union (EACU).

The previous chapter covered protectionist practices by state agencies meant to restrict the flow of goods among Partner States. These include import bans and imposition of quotas on the quantities of goods that can be imported into a Partner State. Protective measures by Partner States can also be addressed by a regional body working under the EAC’s governance structure.

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227 International Trade Centre, ‘National Trade Facilitation Committees: moving towards implementation’ ITC Technical Paper XII/2015, 1
228 Ibid
Private parties/nationals can also engage in restrictive trade practices to beat competition and protect their market shares and this may affect free movement of goods traded across borders within the Community. Indeed, the Community recognized this and enacted the EAC Competition Act in 2008. The Act lists and prohibits restrictive trade practices such as price fixing, bid rigging, customer allocation, barring competitors from access to the market among others in Section 5(2) of the Act. Part IX of the Act establishes the EAC Competition Authority to deal with restrictive trade practices albeit the body has not been instituted to date.

The Community has established a dualist system where both national courts and courts under the East African Court of Justice (EACJ) can interpret community law and determine disputes that arise but the EACJ is substantially limited in its enforcement powers. Article 23 of the 1999 TEAC as amended in 2006 limits the court to interpreting and not explicitly enforcing the provisions of the Treaty. This weakness has substantially reduced the significance of the Court. If EAC members cannot cede enough of their sovereignty to the EACJ to enable it effectively uphold and enforce Community law, then their will to uphold commitments to the Community especially on easing trade is cast in doubt.

The need to establish trade facilitation committees/mechanisms will be the first institutional reform proposed in the study.

4.2 Trade facilitation committees/mechanisms

Aside from requiring the formation of trade facilitation mechanisms (bodies) at national levels, the 2013 WTO Bali Agreement sets out broad requirements for the mechanisms throughout its text. These requirements borrow considerably from Recommendation 4 of the United Nations Commission for Europe (UNECE) first developed in 1964. They include proactive participation of the private and public sectors, recognition of elements that affect the cost and efficiency of the country’s international trade, collaborative development of plans to reduce the cost and complexity of international trade, provision of sufficient funds and human resource to carry out the mandate and participation in international efforts.²²⁹

²²⁹ United Nations Centre for Trade Facilitation and Electronic Trade (UN/CEFACT), ‘UNECE Recommendation No. 4: National Trade Facilitation Bodies:’ ECE/TRADE/425/2015, 5
Some of the requirements for trade facilitation bodies need elaboration. On public and private sector participation, the International Trade Centre (ITC) which is joint agency of the WTO and the United Nations (UN) recommends a balance in composition between private players involved in trade and public agencies tasked with regulating trade of goods.\textsuperscript{230} Public agencies include ministries and agencies established by governments such as tax authorities while private players include traders involved in importation and exportation of goods together with their associations.\textsuperscript{231}

The ITC also recommends a well-defined mandate for the committees/mechanisms which can be achieved by making trade facilitation an integral part of trade policy and sustainable economic development, identification of factors affecting the efficiency and cost of trade, development of measures to lessen the cost and upgrade efficiency of international trade, development of focal points to collect and disseminate data on trade facilitation and assistance in implementation of the measures.\textsuperscript{232} As has been stated before in the study, the non-tariff barriers and the measures proposed to deal with them described in chapter 3 make a good agenda for national bodies in the EAC to coordinate trade facilitation.

Currently, Kenya and the rest of the EAC have not formally established national mechanisms to support trade facilitation. However, the East African Legislative Assembly (EALA) which is the legislative body of the EAC drafted a bill referred to as the East African Community Elimination of Non-Tariff Barriers Bill, 2015. Section 7 of the Bill proposes that Partner States establish national monitoring committees to outline NTBs, come up with reports on their elimination for the Council of Ministers’ consideration and recommend remedial measures to government agencies responsible for the NTBs. This is set out in Section 7 of the Bill.

Section 8 of the Bill on the other hand proposes the designation of a ministry in Partner States to act as a national focal point. The national focal point is tasked with coordinating the national monitoring committee, implementing time bound programs for elimination of non-tariff barriers, collaborating with national monitoring committees and national focal points of

\textsuperscript{230} International Trade Centre, ‘National Trade Facilitation Committees: moving towards implementation’ ITC Technical Paper XII/2015, 19
\textsuperscript{231} Ibid
\textsuperscript{232} International Trade Centre, ‘National Trade Facilitation Committees: moving towards implementation’ ITC Technical Paper XII/2015, 15
other Partner States to facilitate time bound elimination of the trade barriers and reporting complaints of parties affected by NTBs to the national focal point of other Partner States, among others.

The Elimination of Non-Tariff Barriers Bill if approved by the EAC’s Summit shall become a binding Act. The Summit constitutes presidents of Partner States and is the top most organ of the Community. If enacted, the Bill will achieve the objective of establishing national and regional mechanisms of trade facilitation as the 2013 WTO Bali Agreement recommends. However, the pre-eminence given to the national focal point which the Bill envisages to be a government ministry at the expense of private parties is a cause for concern.

It is best that both the public and private sectors are equally represented at the focal point of every Partner States, as the WTO Bali Agreement recommends, considering the focal point is envisaged to set the agenda for trade facilitation. Setting the agenda needs to be done in a manner that establishes equilibrium and optimizes participation by public and private interests. The bill should be amended to achieve this objective, before being passed.

Some of the countries that have established national trade facilitation committees include Sweden, Japan, the United Kingdom and Croatia. Kenya and the rest of the EAC should follow cue and establish their own trade facilitation mechanisms. This needs political will from Partner States’ leadership.

4.3 Checking anticompetitive behaviour from state and non-state actors

At the outset of the study, a short analysis of the theory of comparative advantage developed by David Ricardo in support of international trade was done. He postulated that on the assumptions of perfect competition and full resource employment, states can reap welfare gains by specialisation in production of goods with the lowest opportunity cost and trading the surplus of production over domestic demand, provided that the international rate of

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233 International Trade Centre, ‘National Trade Facilitation Committees: moving towards implementation’ ITC Technical Paper XII/2015, 6
exchange between commodities lies between the domestic opportunity cost ratio (in his Principles of Political Economy and Taxation (1817)).

The theory of comparative advantage was a follow up of Adam Smith’s theory of international trade that views trade as a vent (market) for surplus production and as a means for widening the market thereby improving the division of labour. The following is an excerpt from Smith’s book (An inquiry into the nature and causes of the wealth of nations) reproduced by Thirwall dwelling on the importance of foreign (international) trade in wealth creation:

It carries the surplus part of the produce of their land and labour for which there is no demand among them, and brings back in return something else for which there is a demand. It gives value to their superfluities, by exchanging them for something else, which may satisfy part of their wants and increase their enjoyments... By opening a more extensive market for whatever part of the produce of their labour may exceed the home consumption, it encourages them to improve its productive powers and to augment its annual produce to the utmost, and thereby to increase the real revenue of wealth and society.

David Ricardo believes that boosted productivity, increased market for goods and increase in societal wealth and revenue as envisaged by Adam Smith can be achieved in an environment where among other requisites, competition is perfect. In the context of this study, perfect competition is a market structure where goods can freely enter and exit and no market player monopolises the market in terms of market share and prices.

The state of perfect competition does not exist in the EAC considering the protectionist policies adopted by Partner States to protect their manufactures and the lack of an institution to deal with restrictive trade practices by non-state parties. The EAC passed its Competition Act in 2008 and is yet to institutionalize the East African Competition Authority established

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235 Ibid
236 Ibid
in Part IX of the Act to deal with restrictive trade practices. The introduction to this chapter listed a number of restrictive trade practices the Competition Act recognizes such as price fixing, bid rigging, customer allocation, barring competitors from access to the market among others in Section 5(2) of the Act.

Section 42 of the EAC Competition Act gives the EA Competition Authority far reaching powers to deal with anti-competitive conduct such as powers to impose sanctions and remedies, investigate and require information, refer matters to court for adjudication and to cooperate with regional and international competition authorities. This should be sufficient to curb anticompetitive conduct by business persons across the Community but the Authority is yet to be institutionalized to date. It is important that the Authority be institutionalized by the establishment of its secretariat and the appointment of its commissioners to enable it function. This requires political will among Partner States.

Chapter 4 of the study listed protectionist policies adopted by EAC Partner States to protect goods manufactured in their countries. Bans, setting of quotas and subjecting goods to sanitary and phytosanitary measures are some of the non-tariff measures Partner States take to protect goods manufactured in their countries from competition of goods being imported. Section 5 read together with 6 of the EAC Elimination of Non-Tariff Barriers Bill, 2015 prohibits protectionist policies and measures that seek to limit market access for goods manufactured within the Community. The Bill may only be enacted upon assent by presidents of Partner States and Kenya’s leadership should forge for the ascension of the Bill, considering the country’s goods have been subject to the protectionist measures by fellow Partner States.

Should the Community’s Elimination of Non-Tariff Bill be enacted in its current form by Partner States, its provisions against protectionist policies can be enforced in national courts but not in the EACJ. The much the Bill provides for in enforcement is referral of unresolved NTBs to the Community’s Council of Ministers for recommendations or directives to resolve them.

If any national laws go against the provisions prohibiting protectionist acts, national courts have shown the inclination to favour national laws. This inclination was exhibited in the Kenyan cases of *R. v. Charles Okunda Mushiyi* and *R. v. Donald Meshack Ombisi* in which
conflict arose as to the provisions of EAC law in the form of the Official Secrets Act vis-a-vis the Kenyan Constitution. In both cases, it was held the Constitution prevailed over Community law, in case and as far as any inconsistency arose between the two. This shows turning to national courts to enforce community law has its limits especially where national laws are at cross purposes with community law.

1.3 Strengthening the East African Court of Justice

The East African Court of Justice (EACJ) is established under Article 27 of the 1999 TEAC. Its role is limited to ensuring adherence to the law in interpretation, application and compliance with the Treaty. Article 28 of the Treaty allows Partner States to refer disputes involving infringement of Treaty provisions against other Partner States to the EACJ for determination of legality but no express provision is made allowing the court to order and enforce remedial measures. Article 30 also grants private persons the right to refer infringements to the EACJ for adjudication but the court is not granted the authority to issue and enforce remedies. Further, any referral by private persons is subject to the provisions of Article 27 limiting the court to merely ensuring adherence to the law in interpretation, application and compliance with the Treaty. Article 29 allows the Community’s Secretary General to refer treaty infringements to the EACJ for determination with the approval of the Council of Ministers.

On the other hand, the European Court of Justice (ECJ) is established by the Treaty for the Functioning of the European Union (TFEU) and has elaborate provisions that give the court extensive jurisdiction within the European Union. Article 258 of the TFEU gives the ECJ the powers to adjudicate disputes forwarded to it by the European Commission involving infringements on Community law by Member States. Article 259 of the TFEU gives the ECJ the powers to determine disputes brought by a Member State against another Member State. However, any Member State aggrieved by the acts of another Member State has to first raise the dispute before the European Commission. Article 263 of the TFEU grants the ECJ the powers to review legislative acts of the European Parliament, acts of the EU Council of Ministers, of the Commission and the European Central Bank. Natural/legal persons are allowed to institute suits under Article 263. Article 260 gives the ECJ the jurisdiction to

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238 Khoti Kamanga, ‘Some constitutional dimensions of East African Cooperation’ 12
require Member States to correct infringements and prescribe measures to correct the infringements and issue penalties in cases of infringement.

Any integration system needs an effective judicial arm to enforce compliance. A comparison of the legal provisions establishing the EACJ and the ECJ reveals that the EACJ has comparatively limited jurisdiction. While the EACJ’s jurisdiction is only limited to ensuring adherence to community law in interpretation, application and compliance, the ECJ’s jurisdiction extends to determining disputes and enforcing provisions of EU law, whether suits are instituted by state parties, non-states parties or the European Commission. The preceding paragraph outlined the powers of the ECJ under Article 260 of the TFEU to prescribe measures to correct treaty infringements and enforce their orders by levying penalties in the event of default by Member States.

A judicial system akin to the ECJ allows enforcement of laws enacted to facilitate trade, including those barring the imposition of NTBs by Partner States. Kenya together with fellow Partner States of the EAC should spearhead reform of the EACJ to enhance its jurisdiction to enforce all laws meant to facilitate trade. This needs political will which still seems to be lacking going by some of the provisions of the 1999 TEAC ratified by Partner States, particularly Article 27 limiting the EACJ to merely ensuring adherence to the law in compliance, application and interpretation of the Treaty.

4.4 Conclusion

The present chapter aims to achieve the study’s objectives of increasing Kenya’s exports to the EAC by proposing institutional reforms, first being the establishment of trade facilitation mechanisms/bodies to make trade facilitation a specialised agenda. The second reform is the implementation of competition law to prevent restrictive trade practices particularly by non-state parties and adoption of policies and laws that bar Partner States from implementing protectionist policies which tend to restrict market access for traders. The essence is to create an open market within the EAC that enables every trader to participate in an environment free of unnecessary restrictions.

An effective judicial mechanism for remedying infringements on community law particularly on trade facilitation is necessary and that is why reforms are proposed for the EACJ to
expand its jurisdiction and enable it to enforce laws and policies that should facilitate trade and thus enhance integration in the Community.

Like every other proposal made in the study, institutional reforms can only be effective if there is political will to implement them. The proposals have been made and discussed several times before but they merely remain proposals until the leadership in the EAC take them up and committedly adopt them to boost trade within the Community.
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APPENDIX: QUESTIONNAIRE

1. **Background information**

Name: __________________________
Address: ________________________
Town: __________________________
Occupation: ______________________

2. **Trade in the East African Community (EAC)**

a) Are you involved in trade within the East African Community? *(tick one)*
   - □ Yes
   - □ No

b) Kindly outline any challenges you have experienced that pose barriers to export/regional trade within the Community.

   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________

   c) Which challenges in (b) above present the greatest impact to your line of business?

   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________
   __________________________________________________
d) Have you experienced any of the following trade barriers? *(tick)*

<table>
<thead>
<tr>
<th>Barrier</th>
<th>Yes</th>
<th>No</th>
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<tbody>
<tr>
<td>1. Corrupt practices</td>
<td></td>
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<td>2. Non acceptance of certificates of origin</td>
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<td>3. Arbitrary classification of goods</td>
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<td>4. Discriminatory sourcing</td>
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<td>5. Import/export bans</td>
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<td>6. Trade monopolies</td>
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<td>7. Sanitary and phytosanitary measures by standards bureaus and other</td>
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<td>such like regulatory bodies</td>
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<td>8. Technical quality standards</td>
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<td>9. Import and export licenses/permits</td>
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<td>10. Arbitrary and multiple documentation</td>
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<td>11. Excessive port entry charges and taxes</td>
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<td>12. Inefficient port operations</td>
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<td>13. Multiple and variable weighbridges</td>
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<td>14. Variable border opening times</td>
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<td></td>
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<tr>
<td>15. Multiple police road blocks</td>
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<td>16. Unsuitable/inadequate transport infrastructure</td>
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<tr>
<td>17. Difficulty in obtaining permits for movement across borders</td>
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