

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**TITLE: THE EAST AFRICAN COMMUNITY PARTICIPATING AS A BLOC IN
WORLD TRADE ORGANISATION NEGOTIATIONS: PROSPECTS AND
CHALLENGES.**

**RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE MASTER
OF LAWS (LLM) PROGRAMME.**

BY: JESSICA NJERI M'MBETSA

REG. NO: G62/67520/2013

SUPERVISOR: DR. KARIUKI MUIGUA

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DECLARATION

I, **JESSICA NJERI M'MBETSA** do hereby declare that this is my original work and has not been submitted elsewhere for examination, award of a degree or publication.

SIGNED: DATE:.....

JESSICA NJERI M'MBETSA

G62/67520/2013

I confirm that the work reported in this Project was carried out by the candidate under my supervision as University Supervisor. This project has been submitted for examination with my approval as University Supervisor.

SIGNED: DATE:.....

DR. KARIUKI MUIGUA

DEDICATION

To my mother, Saida Christine Mbugua for being my number one fan, my daily source of encouragement and her constant prayers. My grandmother, Irene Njeri Mbugua, for making me appreciate the value of a good education at a very tender age. May God reward you both abundantly.

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ABSTRACT

The East African legislative Assembly passed the East African Trade negotiations Act in the year 2008. The Act has its major objective as ensuring that the East African Partner states carry out their trade negotiations at a regional and multilateral level jointly. Moreover, all the East African Partner States are members of the World Trade Organisation. However, in spite of the objectives of the Act, the partner states of the East African Community still carry out their trade negotiations individually. This study is therefore an in depth analysis of the process of ensuring that the EAC partner states carry out trade negotiations at the WTO jointly as a regional bloc and the extent to which the East African Community through its customs union, can review its legal regime and reform its institutions to facilitate the same.

The methodology adopted into researching into this topic is based on analysis of the Act, rules, reports, books, articles, journals and online resources.

LIST OF ABBREVIATIONS

ADP	Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping)
DDA	Doha Development Agenda
DG	Director General
EAC	East African Community
EAC CU	East African Community Customs Union
EALA	East African Legislative Assembly
EATNA	East African Trade Negotiations Act, 2008
EAJTNC	East African Joint Trade Negotiations Commission
EU	European Union
EPA	Economic Partnership Agreement
FTA	Free Trade Area
GAT	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
PSI	Agreement on Pre-shipment Inspection
SADC	South African Development Community
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TRIMS	Agreement on Trade-Related Investment Measures
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
WTO	World Trade Organisation

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CHAPTER 1

1.1 Introduction

East African Community (EAC) member states being member states of the World Trade Organisation (WTO) still present their trade issues as individual states despite there being in place the East African Joint Trade Negotiations Act, 2008 (EAJTNA)¹ and the formation of both the East African Customs Union with a common external tariff and the East African Common Market². This paper argues that time has come for the EAC Customs Union to become a member of the WTO such that it will now ventilate all trade interests of its five partner states as one.³

The EAC Customs Union was formed vide the Protocol on the Establishment of the East African Community Customs Union⁴ with the objective of liberalising trade within the region by allowing free movement of goods and people within the partner states and through the elimination of internal tariffs thus promoting investment within the partner territories.⁵ The EAC Common market in turn compliments the Customs Union by providing a single regional market for goods and services from the partner territories⁶ making it a unified market with a combined domestic product worth USD 45 Billion.

All EAC partner states are also member states of the WTO. The WTO is an organisation for liberalizing trade. It deals with the rules of trade between nations at a global or near global level. Essentially, it is a forum for governments to negotiate trade agreements and operates as

¹ National Council for Law Reporting (Kenya Law), 'The East African Trade Negotiations Act, 2008' (2015) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/EALA_Legislation/EASTAFRICANTRADENEGOGIATIONSACT2008.PDF> accessed 7th October, 2015.

² Cuts International, 'Call for an EAC Bloc in WTO Negotiations' (2013) <<http://www.cuts-geneva.org/pactec/publications/77-action-alerts/236-call-for-an-eac-bloc-in-wto-negotiations.html>> accessed 6th September 2014.

³ Ibid.

⁴ The Protocol on the Establishment of the EAC Customs Union was signed by the heads of state of Kenya, Uganda and Tanzania on 2nd March 2004. Rwanda and Burundi joined the Customs Union in 2008 and started applying its instruments in July 2009. It came into effect on 1st January 2005 through a five year transitional period was given. The signing of the protocol and the subsequent establishment of the customs union was done pursuant to Article 75 of the Treaty. Mary Odongo, 'Towards an East African Community Common Market: Challenges and Prospects' (2011) *Institute of Economic Affairs Bulletin, Issue No. 33* <https://www.google.co.ke/?gws_rd=cr&ei=SemFUoq4CaiQ0AXX3YDgDQ#q=Towards+an+EAC+common+Market> accessed 15th November, 2013.

⁵ Ibid.

⁶ Odongo (n 4).

a system of trade rules.⁷ It is a negotiating forum and everything the WTO does is the result of negotiations.⁸

The WTO since its inception as the General Agreement on Tariffs and Trade (GATT) allows member countries to conclude customs unions and free-trade areas as an exception to the fundamental principle of non-discrimination set forth in the Most-Favoured Nation Provision covered under Article 1 of GATT.⁹ Article XXIV GATT 1994 allows for the formation of Regional Trade Agreements (RTAs) such as the EAC customs Union. It also gives the conditions that have to be met by such RTAs in order to participate as blocs in the WTO system such as the need to notify the Committee on Trade and Development on the formation of the Customs Union by developing countries¹⁰ which conditions the EAC Customs Union has already fulfilled.

Moreover, The EAC has even enacted the East African Trade Negotiation Act 2008¹¹ that has as one of its objectives the development of an East African Trade Regime in accordance with the Treaty and the Protocol establishing the East African Community Customs Union (EAC CU). The Act also establishes the East African Joint Trade Negotiation Commission (EAJTNC)¹² whose mandate includes conducting trade negotiations on behalf of the EAC partner states. Essentially, the Act provides the legal framework within which the EAC CU trade negotiation with respect to trade with multilateral organisations such as the WTO should be carried out on behalf of the EAC partner states.

However, in spite of the EAC CU being functional, the WTO recognising RTAs as members to it, and there being a legal framework establishing a joint trade negotiating body for the EAC partner states since the year 2008, the EAC member states continue to negotiate as individual partner states as opposed to carrying out joint trade negotiations as required to

⁷World Trade Organization, 'What is the World Trade Organization?' (2014) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm> accessed 26th September 2014.

⁸ Ibid.

⁹ Alan Matthews, *Regional Integration and Food Security in Developing Countries: Legal Aspects of Regional Integration* (FAO 2003) <<http://www.fao.org/3/a-y4793e/y4793e08.htm>> accessed 26th September 2014.

¹⁰ Ibid.

¹¹ It is an Act to make provision for an East African Trade Commission, the development of an East African Trade Regime, to provide for Joint Trade Negotiations and other related matters.

¹² East African Trade Negotiation Act 2008, s5.

under the Act¹³. Borrowing from the European Union experience which represents 28 member states¹⁴, if the EAC partner states were to negotiate as one under the auspices of a Committee appointed by the EAJTNC to handle WTO matters specifically, the EAJTNC would be significantly stronger in negotiations therefore increasing its chances of securing beneficial outcomes for the partner states in areas where increased bargaining power is necessary. These areas include: subsidies to the clothing and textile industry in developed countries; Duty Free Quota Free (DFQF) market access for products from least developed countries to developed countries; and removal of protectionist measures against products that can be considered to be sensitive in developed countries such as sugar, rice, leather, fisheries, and cotton.¹⁵

This paper thus seeks to identify the prospects of the EAC participating as a bloc through the EAC CU in WTO negotiations and explains the procedures that the EAC will have to go through in order to actualize such participation. It also identifies the challenges that the EAC might face in trying to actualize its participation as a bloc in WTO negotiations and suggests the measures that the EAC through the EAC CU as well as the partner states need to put in place to ensure that the prospect of the EAC negotiating jointly in WTO negotiations becomes a reality.

1.2 Problem Statement

In 2008, the East Africa Legislative Assembly passed the EAJTNA which under section 3 makes it mandatory for the partner states to negotiate as a bloc in all matters relating to regional and multilateral trade. Presently, all the East African Community partner states are members of the WTO individually but the EAC is not a member of the WTO in its own right. The partner states of the EAC conduct their trade negotiations as individual states despite the act requiring them to carry out all their trade negotiations jointly. Further, the Marrakesh Agreement under Article XII recognizes states and customs unions only as members of the WTO. Therefore for the EAC to become a member of the WTO, it can only do so through the EAC CU.

¹³ Section 3 (2).

¹⁴ World Trade Organization, 'Membership, alliances and bureaucracy' (2015) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm> accessed 7th October, 2015.

¹⁵ Cuts International (n 2).

The situation is further compounded by the fact that the Act makes it mandatory for the EAC partner states to conduct trade negotiations jointly. It therefore follows that all negotiations conducted by the partner states individually are a contravention of the provisions of the EAJTNA. This research therefore seeks to remedy this situation by proposing that the EAC through the EAC CU accedes to the WTO and conducts all its negotiations through a Committee appointed by the EAJTNC. The EAJTNC is the body vested with the mandate to carry out negotiations on behalf of the EAC under the EAJTNA.

The purpose of this study therefore is to understand the process of ensuring that the EAC partner states carry out trade negotiations at the WTO jointly as a regional bloc and the extent to which the EAC through the EAC CU can review its legal regime and reform its institutions to facilitate the same.

1.3 Objectives of the Study

This study has the following objectives:

- 1) To highlight the benefits derivable from the EAC negotiating as a regional bloc in WTO negotiations and the extent to which the EAC's legal regime has advanced this cause;
- 2) To discuss the current legal and institutional framework for joint negotiations in the EAC;
- 3) To identify the prospects and challenges that the EAC will have to surmount in its quest to carry out joint trade negotiations at the WTO; and
- 4) To make proposals for reform that can be implemented to ensure that henceforth negotiations at the WTO on behalf of the EAC partner states are carried out jointly.

1.4 Research Questions

This study seeks to answer the following questions:

- 1) Should the EAC partner states negotiate jointly as a regional bloc in WTO negotiations?

- 2) What are the prospects of the EAC partner states negotiating jointly as a regional bloc in WTO negotiations?
- 3) What challenges would the EAC partner states encounter in trying to negotiate as a regional bloc in WTO negotiations?
- 4) What reforms should be implemented to ensure that all negotiations undertaken at the WTO on behalf of the partner states are carried out jointly?

1.5 Hypotheses

The study will test the following hypotheses:

- 1) The current legal regime favours the EAC partner states carrying out joint trade negotiations before the WTO;
- 2) Factors such as not appointing members of the EAJTNC, reforming the EAC CU trade regime to conform to WTO requirements and mandatory timelines hinder the EAC partner states from carrying out joint trade negotiations at the WTO; and
- 3) There is a knowledge gap on the rigorous accession process and all key players in the WTO need to embark on mass sensitization programs on the process, what it entails and how it can be simplified to make the accession process less cumbersome.

1.6 Theoretical Framework

This paper will be based on a number of theories which will attempt to explain the essence of arguing that all the EAC partner states should come together and form the Commission which will undertake trade negotiations especially at the WTO on their behalf.

Firstly, this research will adopt the Neo-functionalism theory which has been used to explain the European integration process.¹⁶The theory challenges the state-centric view to the world and is more concerned with whether nation-states are the optimal form of organisations to fulfil human needs.¹⁷It postulates that if some needs transcend national borders, then the optimal way to fulfil those needs would be through an organisation that is transnational.

¹⁶Karl W Deutsch, *Political Community and The North Atlantic Area: International Organisation in the Light of Historical Experience* (Princeton University Press 1957) 46-57.

¹⁷ Ibid.

Further, that since human needs change over time and space, the design of institutional solutions also has to be an open-minded and flexible process that establishes flexible task-oriented organisations which could better fulfil human needs than nation states.¹⁸

This paper takes the view that the needs of the East African Community Partner states with respect to trade related aspects at the WTO negotiations, have changed with time and have now crossed national borders necessitating the formation of a transnational institution in the form of the Commission, that will undertake negotiations on behalf of all the partner states in WTO negotiations.

This research paper will also borrow heavily from the neo-functionalist definition of integration whereby political actors in several distinct national settings such as the partner states in the EAC, are persuaded to shift their loyalties, expectations and political activities such that they cease from negotiating individually in WTO rounds, towards a new centre, which in the case of this research, will be the Commission, that demands jurisdiction over all parties that used to undertake WTO negotiations on behalf of the individual partner states.¹⁹

Lastly, on the neo-functionalist theory, this research will also be heavily informed by the pre-conditions which the neo-functionalists argue must prevail before the process of integration could be launched successfully.²⁰ They identified the preconditions as follows: firstly that, central institutions and central policies should be established and developed because only they can give some form of assurance that a representative represents and promotes the regional view as well as solves disputes between member states. Secondly, that the tasks of such representatives and their capacity to implement those tasks should go well beyond the mandate of normal international institutions. Thirdly, that their tasks should be inherently expansive and lastly that there should be some link between the interests of the member states and the integration process. It is against the background of these pre-conditions that this research paper shall evaluate the process of ensuring that the EAC partner states negotiate jointly in WTO negotiations through the trans-boundary institution of the Commission.

¹⁸Deutsch (n 16).

¹⁹Ernst B Haas, *The Uniting of Europe* (Stanford University Press 1958)16.

²⁰Leon N Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press 1963)7-13.

Secondly, this paper will also borrow from the utilitarianism theory; which is a theory that is suitable in guiding the decisions of those who exercise public power, such as the members who will be appointed to the Commission through its two main virtues that are very essential in public decision making. It holds that all issues that come before the public body such as the Commission must be decided as a question of fact, basically it requires the members of the public body to ask themselves what decision if taken, will serve to maximise general welfare.²¹It requires decision makers to make decisions based upon hard evidence and criteria. With respect to this research paper, members of the Commission will be required to make decisions in WTO negotiations on behalf of all the partner states based on the general welfare as contradistinguished with the interests of the individual partner states that they represent. Consequently, they will be required to examine the trade issues before them and make decisions based on the facts prevailing in the EAC Customs Union.

Utilitarianism is also said to treat conflicting interests with absolute equality in that everyone's interests are taken into account and are given equal weight therefore the results simply reflect the neutral results of the calculus of gains and losses.²²The EAC Customs Union is made up of five partner states each at a different stage of development. Moreover, the WTO adopts the system of consensus to arrive at its decisions. This therefore means that since the members of the Commission come from the different partner states they will have similar but different standpoints in a number of issues that will be up for discussion. This theory then postulates and gives the members of the Commission some form of direction on how issues that affect their individual countries and in which they seem to be having different stand points should be handled; that is through ensuring that all the conflicting standpoints are given equal weight and weighed against the possible gains and losses that would come with taking each particular standpoint. Eventually according to utilitarianism, the members of the Commission having weighed all possible standpoints should take the one that will best represent the general welfare of the EAC Customs Union.

²¹Nigel E. Simmonds, *Central Issues In Jurisprudence* (3edn, Sweet & Maxwell 2008) 13.

²² Ibid.

Thirdly, the positivist school of thought will also apply to this research. Positivists claim that the legal validity of a rule is a matter of that rule's derivability from some basic conventional criterion of legal validity accepted in the legal system in question.²³ Generally, that if the rule was established in some recognised source such as a statute or a binding precedent, the fact that the rule is just or reasonable will neither make it law nor does the injustice of a law demonstrate that it is not law.²⁴ This theory is very relevant to this research paper because part of it will be an inquiry into the reasons why the provisions of the East African Trade Negotiations Act 2008 (the Act) which establishes the Commission have not been complied with. The Act was passed by the East African Legislative Assembly in accordance with the requirements of the EAC treaty and is therefore law for all intents and purposes. It therefore follows that the continued disregard of its provisions is actually an illegality.

The Act vests the Commission with the mandate to conduct trade on behalf of all EAC partner states²⁵ and requires the partner states to negotiate as a bloc in all matters relating to regional and multilateral trade²⁶. WTO negotiations are negotiations of a multilateral nature and as such it is a legal requirement for all the EAC member states to abide by that requirement according to the positivist school of thought. This research paper therefore borrowing from positivism argues that the prevailing situation whereby the partner states of the EAC continue to negotiate individually in WTO negotiations is an illegality and a total disregard of the law. As such, the EAC partner states should as a matter of urgency constitute the Commission which is mandated by law to negotiate on behalf of the member states.

Positivists also argue that laws which are considered to be immoral should be obeyed so long as they have been established in some form recognised by the basic criteria of the legal system unless they are repealed or amended in accordance with the criteria set out in that system²⁷. This paper therefore argues that unless the Act is amended then the EAC partner states have no other option but to negotiate jointly under the Commission and that their continued state as individual partner states is a flagrant disregard of the existing law.

²³Simmonds (n.21) 147-48.

²⁴ Ibid.

²⁵East African Trade Negotiation Act 2008, s5 (C).

²⁶East African Trade Negotiation Act 2008, s3(2).

²⁷ Simmonds (n21)

Legal positivism is therefore based on an express or implied acceptance of moral relativism which says that people understand and justify beliefs and behaviour, resulting from among other things the passage of time and their stage of social and political development²⁸. In the case of the EAC Customs Union and trade negotiations at the WTO, there has been a trend of multilateralizing regionalism²⁹ world over and the EAC which is already a regional bloc did not want to be left out and therefore passed the Act. It is therefore incumbent upon it to implement the same to ensure that it maximises the benefits that come with the current trend.

Lastly and briefly, this research will also borrow from the theory on the Economic Analysis of Law, which is a modern form of utilitarianism that has as its core, the proposition that rational man or woman always chooses to do what will maximise their satisfaction and if they want something badly enough they will be required to pay for it. This research is on the prospects and challenges of the EAC trading jointly in WTO negotiations and it will follow this school of thought in that securing maximum gains for the EAC Customs Union in WTO negotiations requires them to negotiate as a bloc. This would therefore justify the enactment of the Act to provide the legal and institutional framework necessary to help them achieve that goal. It then postulates that there are challenges to achieving that goal but since it is something that the EAC partner states really want, then they should do all they can to overcome those challenges to ensure that they speak with one recognised voice through the Commission and secure maximum benefits for the Union during WTO negotiation rounds.

1.7 Conceptual Framework

This paper is centred upon two major concepts; firstly regionalisation in that it deals with a specific regional bloc that is the EAC and secondly multilateralization in that it seeks to establish how the Commission being an EAC institution will navigate through the murky waters of the WTO; which is a multilateral trade organisation. It is in light of this, that the concept of multilateralization of regionalism with specific reference to the EAC Customs Union as a regional bloc in the WTO is used severally in this research paper.

²⁸Peter Halstead, *Key Facts Jurisprudence* (2005)57.

²⁹ Carpenter (n 15).

In defining “Multilateralization” the dictionary meaning³⁰ which is given as involving or participated in, by more than two nations, is going to be adopted. Therefore, in this research paper, multilateralization will refer to participation in the WTO which is a multilateral trade organisation including almost all the main trading nations of the world.³¹

“Regionalism” will be defined using the WTO’s working definition which is generally any trade agreement that involves two or more countries but fewer members.³²This research will be specific to the agreement on the formation of the Commission which will undertake trade negotiations on behalf of the EAC Customs Union and the EAC partner states by extension.

Therefore as a concept multilateralization of regionalism in this research paper will refer to the process through which a regional bloc, that is to say the EAC Customs Union, seeks to carry out its negotiations in a multilateral trade organisation, that is to say the WTO, through the institution of the Commission; which is vested with the mandate to do so, by the Act. Generally, that then forms the conceptual framework of this research paper.

1.8 Literature Review

The formation of regional trading blocs also known as regionalisation and their compatibility or otherwise within the WTO regime, is a topic that has been widely written on, therefore there is broad literature on the topic. The author of this paper has identified a gap in the existing literature in that most of the existing literature is focused on the prospects and challenges facing the process of multilateralization of regionalism. Very few authors have managed to contribute to this area of research, the few who have come close to doing so, have either discussed other regional trading blocs or only done an overview as a cursory glance at the prospect and not an in-depth analysis of the prospects and challenges of the individual partner states engaging in WTO negotiations jointly through the Commission.

³⁰Merriam-WebstarInc, ‘*MerriamWebstar Online Dictionary*’ <www.merriam-webstar.com> accessed 26th September, 2014.

³¹World Trade Organization, *Understanding the WTO* (5thedn, World Trade Organization 2015)10 <www.wto.org/english/thewto_e/whatis_e/understanding_e.pdf> accessed 3rd October 2014.

³²Theresa Carpenter, 'A Historical Perspective on Regionalism', *Multilateralizing Regionalism: Challenges for the Global Trading System* (1st edn, Cambridge University Press 2009)<http://https://wwto.org/ENGLISH/res_e/booksp_e/multila_region_e.pdf>accessed 27 May 2015.

This research paper has drawn heavily from ideas espoused in existing literature. It however seeks to fill the knowledge gap identified above by narrowing down the analysis of the process of multilateralization to a specific regional bloc, specifically the EAC and specifically one of its organs that is the EAC CU.

On the authors that discuss, the process of multilateralisation or regionalism; Firstly, Theresa Carpenter (2009)³³ takes a historical perspective to regionalism with a view to trying to understand how there are numerous regional trade agreements in the world today with varying degrees of coverage, complexity and efficiency. She argues that understanding regionalism may give a hint on how regionalism should be multilateralized and further that having an understanding of the factors that led nations to conclude trade agreements outside the multilateral trading systems such as seeking enhanced market access, furthering foreign policy objectives and influencing the domestic policies of trading partners for instance in the field of intellectual property or migration, might help give some insight on how to deal with the increased proliferation of Regional Trade Agreements (RTAs).³⁴ She concludes the paper by stating that growth in regionalism and development in multilateralism seem to go hand in hand and have tended to expand simultaneously. Further that since the new agreements that were negotiated and concluded during the Uruguay Round did not prevent the successful conclusion of the Round, then it is highly unlikely that the current developments in regionalism will disrupt the conclusion of the Doha Round.³⁵

This research paper will borrow highly from Theresa Carpenter's work, in that it will have as its main standpoint, the argument that joint trade negotiation carried out by the EAC partner states through the Commission should begin immediately which will be during the Doha round that is on-going, since just like she concludes, it is highly unlikely that the same will disrupt negotiations³⁶ and will on the contrary, tend to boost the same, since the partner states from the East African region will finally speak with one voice.

³³Carpenter (n 15) 13-37

³⁴ Ibid

³⁵ Carpenter (n 15)

³⁶ Ibid

Secondly, Roberto V. Fiorentino et al³⁷ have trends in the establishment and development of RTAs as the subject matter of their research.³⁸ They start by arguing that in the recent years, RTAs have become so prominent that they have dominated much of the discourse on international trade and that the new agreements have a widespread range of geographical configuration and varying policy content.³⁹ Further that the embracing of RTAs by most trading nations has far-reaching implications for multilateral trading relations; most importantly by undermining the transparency and predictability of trading relations.⁴⁰ They then examine the changing global landscape of RTAs with the aim of providing an update of RTA development and establishing the main trends that are characteristics of RTA proliferation as well as the role and functions of the WTO in respect of RTAs.⁴¹ They take the view that the relationship between RTAs and the WTO is ill-defined having examined the relationship between the two with particular reference to the Doha Development Agenda (DDA) Negotiations on WTO Rules and Procedures.⁴² They conclude their research by analysing the new transparency model of WTO surveillance and opine that in the long term, efforts need to be made to accommodate the mechanism on a more permanent basis.⁴³

This research paper will borrow from the research carried out by Roberto V. Fiorentino et al, to the extent that it provides a detailed analysis of the legal framework of the WTO governing RTAs but narrows down the scope to a particular RTA, that is, the EAC Customs Union and even further to the workings of a single institution of the RTA, that is the Commission.

Thirdly, Joost Pauwelyn⁴⁴ analyses how regional dispute settlement systems of RTAs and the legal disciplines they enforce interact with the multilateral dispute settlement system of the WTO.⁴⁵ The author argues that even though most of the literature on WTO and regionalism

³⁷ Roberto V. Fiorentino, Jo-Ann Crawford and Christelle Toqueboeuf, *The Landscape of Regional Trade Agreements and WTO Surveillance*, Multilateralizing Regionalism: Challenges For The Global Trading System (1st edn, Cambridge University Press 2009) 28-76

³⁸ Ibid

³⁹ Roberto V. Fiorentino, Jo-Ann Crawford and Christelle Toqueboeuf (n37)

⁴⁰ Ibid

⁴¹ Roberto V. Fiorentino, Jo-Ann Crawford and Christelle Toqueboeuf (n37)

⁴² Ibid

⁴³ Ibid

⁴⁴ Joost Pauwelyn, *Legal Avenues to 'multilateralizing regionalism': beyond Article XXIV*, Multilateralizing Regionalism: Challenges for the Global Trading System (1st edn, Cambridge University Press 2009) 368-399.

⁴⁵ Ibid

presumes that the WTO effectively decides on how regional agreements are concluded, that is actually not the case and further that article XXIV is inoperative resulting in continued proliferation of RTAs whether or not they comply with article XXIV.

The paper takes the standpoint that in the interaction between regional agreements and WTO rules there is usually an overlap and conflict which has been identified as one of the major drawbacks of regionalism.⁴⁶ The author advocates for a shift of focus from the WTO's claim to hierarchy and supremacy over RTAs to a situation of mutual recognition, respect and accommodation as one legal avenue for multilateralizing regionalism.⁴⁷

The author examines and shows Free Trading Areas (FTAs) recently concluded by the United States (US) and European Union (EU) and how they regulate the situation of overlap and conflicting rules⁴⁸ as a case study and recommends that the WTO must embrace regional agreements in its research and negotiating activities especially in WTO dispute settlement through for instance expanding the applicable or relevant law before the WTO and Free Trade Areas (FTA) panels to all relevant international law consented to by the parties.⁴⁹ Further that, negotiators of RTAs must explicitly regulate questions of overlap and conflict through for instance including forum exclusion clauses to the effect that once a matter is brought before the WTO or an FTA panel, the same cannot and should not be litigated in the other forum.

This paper will be guided by the research done by Joost Pauwelyn to the extent that the research gives an amicable solution to one of the major challenges of regional integration, that is overlap and conflict of RTA rules with those of the WTO but will differ with it because, this research paper will focus specifically on the EAC Customs Union and not a Free Trading Area. It will also consider the legal framework from a broader perspective and not just situations of overlap and conflict between the legal regimes of the EAC Customs Union with the rules of the WTO.

⁴⁶JoostPauwelyn (n44) 369

⁴⁷ Ibid

⁴⁸JoostPauwelyn (n44) 369-370

⁴⁹ Ibid

Lastly, according to Peter Draper and Mzukisi Qobo⁵⁰ who approach multilateralization of regionalism from an African perspective, the positioning of developing countries in the global economy has led them generally to resist at a political level the regulatory convergence imperatives or “standards harmonisation” agenda from the industrialized world. Ironically and according to Peter and Qobo, African countries with the exception of South Africa, are largely takers rather than shapers of international economic institutions including regulations.⁵¹ Further that the resultant sense of vulnerability is actually being played out in the Doha Round and in Economic Partnership Agreements (EPA) negotiations with the EU, which in their opinion, results in a situation in which African countries cannot contribute constructively to the multilateralizing regionalism agenda.⁵²

They point to the facts that based on the enormous development challenges that confront African countries; Africa is required to engage more deeply with the developed world by adopting their standards as far as possible.⁵³ In addition, poorly conceived economic integration in Africa together with the inextricable fact that economic integration is often externally driven and characterised by donor dependence which channels are reproduced in EPA negotiations, the EU is likely to insist on the implementation of EU standards and convergence to its regulatory frameworks. They illustrate their points using the South African Development Community (SADC) and its distressed EPA negotiations with the EU as a case study.⁵⁴

They conclude the paper by recommending that an appropriate balance should be found between African countries’ legitimate needs for policy space, the pressing needs for them to upgrade their regulatory capacities and the needs of the multilateral trading system. This paper will build on the research Peter Draper and Mzukisi Qobo by narrowing down the concept of multilateralizing regionalism to one RTA that is the EAC Customs Union and exploring the channels that the EAC can follow in order to ensure that an appropriate balance is found between its need for policy space, upgrading its regulatory framework as enshrined

⁵⁰ Peter Draper and Mzukisi Qobo, *Multilateralizing regionalism: case study of African regionalism*, *Multilateralizing Regionalism: Challenges for the Global Trading System* (1st edn, Cambridge University Press 2009) 403-425.

⁵¹ Ibid

⁵² Peter Draper and Mzukisi Qobo (n50) 403

⁵³ Ibid

⁵⁴ Peter Draper and Mzukisi Qobo (n50) 404

in the objectives and requirements with respect to regulation of RTAs. Further, the paper identifies the requirement of the EAC CU to reform its trade regime to comply with the requirements of the Uruguay Round Agreements as one of the challenges to the accession of the EAC CU to the WTO and proposes that the WTO considers adopting a gradual scheme for reform of the trade regime and not peg accession to a complete reform of the regime, which process is quite rigorous costly and time consuming.⁵⁵

The author of this research paper also identified a knowledge gap on the accession process. Generally there is very scanty literature on the process of accession to the WTO. Moreover, none of the authors has written on the process of accession to the WTO by a customs union. This paper then seeks to fill this knowledge gap by building on the research done by Igor Kavass by analysing the process a customs union, that is to say the EAC CU will have to embark on, in order to accede to the WTO.

Igor I. Kavass⁵⁶ writes in detail on the WTO Accession Process; the procedure, requirements and the costs. He describes the accession process in detail and argues that becoming a member of the WTO is not easy.⁵⁷ Further that such admission is a rigorous and complicated process which involves a thorough review of documents and other documents and other evidence, lasting for many years in which an applicant must establish to the satisfaction of all WTO members, the existence of a system that at least on paper, if not in fact, complies with all WTO norms and procedures.⁵⁸

This paper is heavily guided by Kavass⁵⁹ when describing the process through which the EAC CU will have to embark on in order to become a member of the WTO and the challenges it might undergo in doing so. It however narrows down the scope to just one applicant, the EAC CU. It also makes recommendations on how such challenges can be overcome.

⁵⁵Parenti, Antonio, 'Accession to the World Trade Organization: A Legal Analysis, 27Legal Issues of Economic Integration, (2000) 141-157.

⁵⁶Igor I. Kavass, 'WTO Accession: Procedure, Requirements and Costs' (2007) 41 J. World Trade 453

⁵⁷ Ibid

⁵⁸Igor I. Kavass (n56)

⁵⁹ Ibid

Lastly, this paper also identified a knowledge gap on the process of joint trade negotiations at the WTO. It only identified the paper by Tindyebwa Amos,⁶⁰ writing in the year 2011, who discusses the participation of the EAC in WTO meetings and highlights the capacity challenges that the EAC partner states encounter when carrying out trade negotiations at the WTO and recommends that the region should have a highly qualified and informed team to carry out trade negotiations on its behalf.

Curiously enough, the paper is written tentatively three years after the passing of the EAJTNA but does not mention it. To fill that knowledge gap, this research will be a critical analysis of the EAJTNA as an Act that establishes the EAJTNC charged with employing the highly qualified technical staff that Tindyebwa Amos⁶¹ mentions. It shall also analyse the challenges that he has highlighted together with other challenges that the region is undergoing since the passing of the EAJTNA and propose measures that can be effected to ensure that the dream of the EAC partner states conduct their trade negotiations at the WTO jointly, sees the light of day; sooner rather than later.

Cuts International also highlight the need for joint trade negotiations being carried out by the EAC at the WTO in its paper argues that in spite of the establishment of both a customs union and a common market, the EAC member states are still represented individually in WTO negotiations.⁶² Further that there is momentum for the EAC as a customs territory to become a member of the WTO on its own motion and become a representative of its five member states, which would substantially increase their bargaining power.⁶³ They conclude by arguing that in order to do so, there is an urgent need for the partner states to adopt at the national level, the East African Trade Negotiation Act.

The authors describe the aim of the journal as drawing attention and calling for action on key trade and development related issues. Consequently, the article can be described as a highlight or a skeletal framework on the topic. This paper will therefore be a response to the call for action and will give an in-depth analysis of what needs to be done in actualizing the

⁶⁰Tindyebwa Amos, 'Capacity Building for International Negotiations and Trade Facilitation in the East African Community' [2011], No. 84 ATPC <<http://www1.uneca.org/Portals/atpc/CrossArticle/1/WorkinProgress/84.pdf>> accessed 10th October, 2015.

⁶¹ Ibid

⁶² Cuts International, *Call for an "EAC Bloc" in WTO Negotiations*, Action Alert (2013) 1-2

⁶³ Ibid

prospect of the EAC member states trading jointly before the WTO. It will seek to add some flesh to the research done by Cuts International and even propose a way forward to ensure that the dream of a joint trade negotiating body for the EAC Customs Union before the WTO sees the light of day.

In conclusion, this paper will seek to fill the knowledge gaps identified in this section by firstly narrowing down the analysis of the process of multilateralization to a specific regional bloc, specifically the EAC and specifically one of its organs that is the EAC CU. Secondly, it will also analyse the process of accession to the WTO to be undertaken by a customs union, that is to say the EAC CU and lastly by analysing the processes of conducting joint trade negotiations at the WTO on behalf of a customs union.

1.9 Justification of the Study

This study is justified on the following grounds:

- 1) The EAJTNA makes it mandatory for the EAC partner states to carry out trade negotiations at the multilateral level jointly through the EAJTNC, the fact that the EAC partner states continue to carry out trade negotiations at the WTO without the formation of the EAJTNC is a flagrant disregard of the law and indeed an illegality. This paper aimed at remedying that illegality by highlighting the fact that the acts of the EAC partner states are illegal and recommending the formation of the EAJTNC as a matter of urgency.
- 2) There is very little literature on the WTO accession process, more so on an application by a customs union seeking to accede to the WTO. The study will highlight how complicated, costly and rigorous the process is for such applicants despite there being very little guidance in existing literature on the same. This paper will therefore fill in that knowledge gap and it is the hope of the author of this research paper that, that this research is going to spark more debate on the issue and even lead to proposals being made at the WTO rounds for reform of the system to allow schemes for gradual reform of the applicant's trade regime for future applicants who seek to accede to the WTO.

1.10 Scope of the Research/Limitations

This research paper will be restricted to the EAC Customs Union comprising of the five EAC partner states that is Kenya, Uganda, Tanzania, Rwanda and Burundi. It will narrow down the scope further to the Joint Trade Negotiation Commission to be composed of members appointed from the respective partner states.

In terms of subject matter, The Act requires the Commission to handle all matters relating to regional and multilateral trade with respect to the EAC. The scope of this paper will be limited to one multilateral trade organisation; that is the WTO. In terms of the dealings of the WTO it will only handle the negotiations aspect and no other.

Moreover, this paper is also limited in the sense that it proposes that the EAC CU seeks membership of the WTO through submitting an accession request. The only other customs union that is a member of the WTO is the EU and the EU did not go through the accession process since it was one of the founder members of the WTO. This has made it difficult for the author of this research carry out a comparative study on the process, costs and requirements for accession to the WTO by a customs union.

1.11 Research Methodology

This paper will adopt the qualitative method to gather information. It is a desk, internet and library based research. It relies on published and unpublished materials and considers primary and secondary sources on the topic under research. The primary sources relied on are WTO legal texts and agreements, EAC statutes and regulations and general regulations on the WTO and EAC. The secondary sources include journal and newspaper articles. Lastly, the study will also rely heavily on internet based sources.

1.12 Chapter Breakdown

This research paper will be organised into four chapters as follows:

1) Chapter 1: Introduction

This chapter will give an overview of the research topic in the introductory section and a synopsis of how the research shall be carried out, the objectives of the research and the hypotheses that the research will seek to prove or disapprove through the research proposal.

2) Chapter 2: The Legal Framework

This chapter will address the legal framework that is necessary to actualize the prospect of the East Africa Community (EAC) through the East African Community Customs Union (EAC CU), participating in the World Trade Organisation (WTO) negotiations as a bloc as opposed to the EAC partner states negotiating individually as they do currently. It will specifically address the legal requirements of accession⁶⁴ to the WTO as embodied in Article XII of the Marrakesh Agreement⁶⁵ by the EAC CU. Then conclude by analysing the provisions of the East African Joint Trade Negotiations Act⁶⁶ (EAJTNA) which is the Act that establishes the EAJTNC and gives it powers to appoint the Committee which this paper, proposes should be tasked with carrying out negotiations on behalf of the EAC CU.

3) Chapter 3: Prospects of and Challenges to the East African Community negotiating as a bloc in World Trade Organisation Negotiations

This chapter will cover the prospects of the EAC having a joint trade negotiation committee handling its negotiations at the WTO. Essentially it will be an analysis of the factors that can be jointly taken to be an indication that the EAC will and is able to have the joint committee handling its negotiations at the multilateral institution and the second part will cover the challenges the EAC will encounter in the process of actualizing the prospect of having a joint trade negotiating committee handling its negotiation before the WTO. It concludes by giving possible ways and means of overcoming those challenges.

4) Chapter 4: Conclusion and Recommendations

This Chapter will mark the end point of the research. It seeks to combine the finding in chapter 2 and 3 to come up with specific proposals for reform to ensure that the EAC Customs Union has a Committee that is well constituted and sufficiently endowed and experienced in trade negotiation aspects in place, to carry out negotiations on its behalf in the next sitting of the Doha Round of negotiations as well as future WTO negotiations.

⁶⁴ Oxford Learner's Dictionaries defines accession (to something) as the act of becoming part of an international organization. Oxford University Press 'Oxford Learner's Dictionaries' <http://www.oxfordlearnersdictionaries.com/definition/english/accesion?q=Accession> accessed 1st August, 2015.

⁶⁵ World Trade Organization, 'Marrakesh Agreement Establishing the World Trade Organisation' https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_e.htm accessed 1st August, 2015.

⁶⁶ 2008, which is an Act to make provision for an East African Trade Commission, the development of an East African Trade Regime, to provide for Joint Trade Negotiations and other related matters.

CHAPTER 2: THE LEGAL FRAMEWORK

2.1 Introduction

This chapter addresses the legal framework that is necessary to actualize the prospect of the East Africa Community (EAC) through the East African Community Customs Union (EAC CU), participating in the World Trade Organisation (WTO) negotiations as a bloc as opposed to the EAC partner states negotiating individually as they do currently. It is proposed that the EAC CU participates in the negotiations through a Committee of the East African Joint Trade Negotiations Commission (EAJTNC)¹ established under the East African Community Trade Negotiations Act² (EATNA) specifically mandated to handle WTO negotiations.

This Chapter will address the legal requirements of accession³ to the WTO as embodied in Article XII of the Marrakesh Agreement⁴ by the EAC CU. Firstly; this chapter will give an overview of the EAC CU as a customs territory. It will then cover in detail, the process the EAC CU will have to embark on, in order to accede to the WTO as a bloc. It will then analyse the provisions of the East African Community Trade Negotiations Act⁵ (EATNA) that put in place the mechanism necessary for having an East African Trade Regime and establishes the EAJTNC. Finally, the EAJTNC will be discussed in detail as it is the mechanism through which multilateral trade negotiations with the EAC and by extension EAC CU are meant to be carried out.

2.2. The Legal Requirements with respect to Accession to the WTO

As noted earlier, in order for the members of the EAC to be able to trade as a bloc, the bloc must first become a member of the WTO. This would involve the process of accession to the WTO. Article XII of the Marrakesh Agreement states as follows:

¹ East African Trade Negotiation Act 2008, s5 (2) (c)

² 2008, which is an Act to make provision for an East African Trade Commission, the development of an East African Trade Regime, to provide for Joint Trade Negotiations and other related matters.

³ Oxford Learner's Dictionaries defines accession (to something) as the act of becoming part of an international organization. Oxford University Press 'Oxford Learner's Dictionaries' <http://www.oxfordlearnersdictionaries.com/definition/english/accesion?q=Accession> accessed 1st August, 2015.

⁴ World Trade Organization, 'Marrakesh Agreement Establishing the World Trade Organisation' https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_e.htm accessed 1st August, 2015.

⁵ 2008, which is an Act to make provision for an East African Trade Commission, the development of an East African Trade Regime, to provide for Joint Trade Negotiations and other related matters.

Any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to the WTO on terms to be agreed between such state or separate customs territory and the members of the WTO.⁶

Customs Unions possessing full autonomy in the conduct of their external commercial relations and of other matters such as the EAC CU can therefore become members of the WTO. They can become members on their own right and negotiate on behalf of their membership.

According to the Marrakesh Agreement, accession to the WTO is subject to the Agreement of the applicant state or customs territory, as the case may be, the existing members of the WTO. This is fundamentally different with most international organizations such as the United Nations (UN) and International Monetary Fund (IMF) in which acquisition of membership is automatic upon submission of a request to join the organization.⁷ Moreover, the phrase ‘on terms to be agreed’ in Article XII of the Marrakesh Agreement indicates that there is no set procedure for accession and the same is subject to negotiation between the applicants and the members of the WTO⁸.

However, the norms and procedures an applicant to the WTO must comply with are contained in a set of agreements all WTO members have either signed or acceded to that are collectively referred to as the Results of the Uruguay Round of Multilateral Trade Negotiations commonly known as Uruguay Round Agreements.⁹ The Uruguay Round Agreements are said to establish a fairly comprehensive body of international rules for the national regulation of trade bringing with them the expectation of uniformity and clearness globally. This is taunted to be the most outstanding achievement of the WTO so far.¹⁰

In addition, the Uruguay Agreements also contain a number of Understandings and decisions with more details on specific issues. It therefore follows that with the exception of a few developing countries, all applicants must prior to their accession to WTO membership, show that

⁶ World Trade Organisation (n. 2)

⁷ World Trade Organisation, ‘How to become a member of the WTO’, (World Trade Organisation, 2015) < https://www.wto.org/english/thewto_e/acc_e/acces_e.htm> accessed 3rd August, 2015

⁸ Steven M. Suranovic, ‘WTO Accession’ in *International Trade: Theory and Policy* (The International Economics Study Centre, 1997-2012) < <http://internationalecon.com/downloads.php>> accessed 3rd August, 2015

⁹ Igor I. Kavas, ‘WTO Accession: Procedure, Requirements and Costs’ (2007) 41 J. World Trade 453

¹⁰ Ibid

they are already in a position to adhere to the terms of all Uruguay Round Agreements, Understandings and decisions.

The full list of the Uruguay Agreements¹¹ is as provided below:

1. Marrakesh Agreement establishing the World Trade Organisation
2. Multilateral Agreements
 - a) General Agreement on Tariffs and Trade (GATT 1994)
Associate Agreements
 - i. Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation)
 - ii. Agreement on Pre-shipment Inspection (PSI)
 - iii. Agreement on Technical Barriers to Trade (TBT)
 - iv. Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)
 - v. Agreement on Import Licensing Procedures
 - vi. Agreement on Safeguards
 - vii. Agreement on Subsidies and Countervailing Measures
 - viii. Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping) (ADP)
 - ix. Agreement on Trade-Related Investment Measures (TRIMS)
 - x. Agreement on Agriculture
 - xi. Agreement on Textiles and Clothing
 - xii. Agreement on Rules of Origin
 - b) Trade in Services
General Agreement on Trade in Services (GATS)
 - c) Intellectual Property
Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)
 - d) Understanding on rules and Procedures governing the Settlement of Disputes
 - e) Trade Policy Review Mechanism
3. Plurilateral Agreements¹²

¹¹ World Trade Organisation, 'Introduction to the Agreements' (2015)
< https://www.wto.org/english/docs_e/legal_e/legal_e.htm> accessed 5th August, 2015

- a) Agreement on Trade in Civil Aircrafts
- b) Agreement on Government Procurement
- c) International Dairy Agreement (terminated end 1997)
- d) International Bovine Meat Agreement (terminated end 1997)

Due to the fact that the Marrakesh Agreement did not expound on the process of accession, the WTO Secretariat in consultation with the WTO members, developed a document known as accession to the World Trade Organisation: Procedures for Negotiation under Article XII (Document WT/ACC/1) which was published on 24th March, 1995. Though it was never formally approved, the document is what is used as the procedural basis for WTO Accession.¹³ Later on in December, 2002, WTO secretariat approved and formally adopted guidelines for accession of Less-Developed Countries (LDCs) in which members decided that negotiations for accession of LDCs to the WTO should be facilitated and accelerated through simplified and streamlined accession procedures.¹⁴

Having discussed the basic legal requirement, the next section gives an overview of the EAC CU generally, before discussing in detail the procedure the EAC CU will have to go through in order to accede to the WTO.

2.2.1 The East African Community Customs Union (EAC CU)

The East African Community (EAC) is generally described as the regional intergovernmental organisation of the Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, and the Republic of Uganda, with its headquarters in Arusha, Tanzania.¹⁵

Article 5 (2) of the Treaty establishing the East African Community¹⁶ on the objectives of the EAC, provides that formation of a Customs Union shall be the first stage of the process of

¹² Not all members are signatories to these Agreements. See Pradeep S. Mehta and Purnima Purohit, *ABC of WTO: Monographs on Globalisation and India, #2* (Mukesh Tyagi CUTS Jaipur, CUTS 2002)

¹³ Kavas (n9)

¹⁴ World Trade Organisation, 'Guidelines on the Accession of Least-Developed Countries' (2015) https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c2s4p1_e.htm accessed 5th August, 2015

¹⁵ East African Community, 'About EAC' (2015) http://www.eac.int/index.php?option=com_content&view=article&id=1:welcoming-to-eac&catid=34:body-text-area&Itemid=53 accessed 3rd August, 2015

¹⁶ Corporate and Communication Affairs, 'Treaty Establishing the East African Community' (2010)

integration for the EAC partner states followed by a Common Market, Monetary Union and ultimately a Political Federation.¹⁷

Pursuant to Article 75 of the EAC Treaty¹⁸ the Protocol for the Establishment of the East African Community Customs Union (the Protocol) was signed by three East African heads of state on 2nd March, 2004. The Republics of Rwanda and Burundi consequently joined the Customs Union in 2008 and started applying the EAC CU instruments in July, 2009.¹⁹ Under Article 3 of the Protocol the main objective of the EAC CU can be summarized as the formation of a single customs territory²⁰.

In ensuring that the EAC CU works as a single customs territory, the Protocol under Article 5 makes provision for the areas in which cooperation by the partner states with respect to customs management and trade shall be necessary, the two main ones being: matters concerning trade liberalisation and trade related aspects including the simplification and harmonisation of trade documentation, customs regulations and procedures with particular reference to such matters as the valuation of goods, tariff classification, the collection of customs duties, temporary admission, warehousing, cross-border trade and export drawbacks.²¹

Notably, in the Preamble to the Protocol, the Partner states, restate their recognition that the customs union would enhance economic growth and the development of the Community and further note and restate that they are conscious of their obligations, as contracting parties to the Marrakesh Agreement Establishing the World Trade Organisation, 1994 (the WTO Agreement),

< http://www.eac.int/treaty/index.php?option=com_content&view=article&id=70:article-5-objectives-of-the-community&catid=38:chapter-2&Itemid=163> accessed 3rd August, 2015

¹⁷ EAC Secretariat, 'East African Community Customs Union' (2004)

http://www.rra.gov.rw/IMG/pdf/Benefits_of_EAC_Customs_Union.pdf accessed 3rd August, 2015

¹⁸ Corporate and Communication Affairs (n6)

¹⁹ East African Community, 'EAC Customs Union Overview' (2014)

< http://www.customs.eac.int/index.php?option=com_content&view=article&id=123&Itemid=78> accessed 3rd August, 2015

²⁰ The Objectives under Article 3 are as follows:

- a) further liberalise intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the Partner States;
- b) promote efficiency in production within the Community;
- c) enhance domestic, cross border and foreign investment in the Community; and
- d) promote economic development and diversification in industrialisation in the Community.

UiO: The Faculty of Law, 'Protocol on the Establishment of the East African Customs Union'

< http://www.jus.uio.no/english/services/library/treaties/09/9-04/eac_establishment_protocol.xml#treaty-header1-2> accessed 3rd August, 2015

²¹ Ibid

and to the Convention Establishing a Customs Co-operation Council, 1950 to contribute, in the common interest, to the harmonious development of world trade.²²

Following the creation of the EAC CU, the EAC has created a single market with a population of roughly 143.5 Million people and a combined GDP of \$110.3 Billion.²³The Customs Union is hailed to have promoted cross-border investment and attracted investment into the region as the enlarged market with minimal customs clearance formalities is more attractive to investors than the individual partner states' markets²⁴. Moreover, due to a regionally administered Common External Tariff (CET) and trade policy, the EAC CU is more attractive to investors as it provides a more predictatable economic environment for investment.

In conclusion, the EAC CU is a customs territory, in its own right and is on course in ensuring that it has full autonomy in the conduct of its external commercial relations and other matters in terms of Article XII of the Marrakesh Agreement. The next section gives an analysis of the East African Trade Negotiations Act, 2008 which is the legal instrument that establishes the east African Joint Trade Negotiations Commission as the body that should conduct trade negotiations at the multilateral level with bodies such as the WTO on behalf of the EAC CU.

2.2.2 The East African Trade Negotiations Act, 2008²⁵(EATNA)

The Preamble describes the Act, as one to make provision for an East African Trade Commission, the development of an East African Trade Regime, to provide Joint trade negotiations and other related matters. This Act will be at the core of this paper for several reasons: firstly because it establishes the EAJTNC which is the body that has been mandated to carry out negotiations with multilateral organizations such as the WTO and secondly, because it introduces the concept of development of an East African Trade Regime which is key when it

²² Article 5 of the Protocol, UiO: The Faculty of Law, 'Protocol on the Establishment of the East African Customs Union' <http://www.jus.uio.no/english/services/library/treaties/09/9-04/eac_establishment_protocol.xml#treaty-header1-2> accessed 3rd August, 2015

²³ EAC Secretariat, 'East African Community Facts and Figures-2014' (Arusha, 2014) <[file:///C:/Users/user/Downloads/EAC%20Facts%20and%20Figures%202014%20\(1\).pdf](file:///C:/Users/user/Downloads/EAC%20Facts%20and%20Figures%202014%20(1).pdf)> accessed 3rd August, 2015

²⁴ East African community, 'Benefits of a Customs Union' (East African community eac.int) <http://www.customs.eac.int/index.php?option=com_content&view=article&id=21&Itemid=91> accessed 3rd August, 2015

²⁵ Kenya Law Reports, 'East African Trade Negotiation Act, 2008' (2008) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/EALA_Legislation/EASTAFRICANTRADENEGOGIATIONSACT2008.PDF> accessed 6th August, 2015

comes to preparation of the foreign trade memorandum during the process of accession to the WTO.

The objectives of the Act are given as facilitating the promotion of regional and international trade for the sustainable development of partner states, establishing a mechanism for joint negotiations of the Partner states in bilateral, regional and multilateral trade and developing and East African Trade regime in accordance with the Treaty and the Protocol establishing the East African Community Customs Union.²⁶ The objectives encompass the intentions of the members of the EAC and EAC CU since the Act is promulgated on their behalf.

From the objectives it can be deduced quite clearly and emphatically that the members of the EAC and EAC CU by extension believe that trade at the regional and international level will have the effect of sustainably developing the individual partner states²⁷. Secondly that in order to capitalize from that sustainable development brought about by trade, negotiations on behalf of the community and union, be they bilateral, regional or multilateral, should be done jointly by partner states and not individually²⁸. Moreover the community and the union should have a common stand with respect to regional and international trade as encompassed in the EAC Treaty and the Protocol establishing the EAC CU, thus the need to develop the East African Trade Regime.²⁹

The intention to have a common stand is restated in Section 3 of the Act requires the partner states to cooperate when it comes to establishing trade policies.³⁰ The Act makes it mandatory for the partner states to negotiate as a bloc in all matters relating to regional and multilateral trade by using the word ‘must’. This means that upon the Act coming into force, the partner states should cease carrying out negotiations individually and start doing so as a bloc which is exactly what this paper recommends with respect to negotiations at the WTO³¹. For the sake of convenience, the Act also gives the partner states an option to establish national trade

²⁶ Section 2

²⁷ Section 2 (a)

²⁸ Section 2 (b)

²⁹ Section 2 (c)

³⁰ Section 3 (1)

³¹ Section 3 (2)

committees which are tasked with preparing national positions on matters to be negotiated at regional and multilateral level but the same is not a mandatory requirement³².

Section 5 establishes the East African Joint Trade Negotiation Commission whose functions are:

to harmonise trade policies³³, develop and East African Trade Regime³⁴, conduct trade on behalf of the EAC partner states³⁵, harmonise negotiating positions for individual Partner states where other partner states are not present³⁶, conduct research and studies to produce strategic papers³⁷, maintain a databank on trade matters³⁸ and to perform such other functions in accordance with the laws of the Community.³⁹

Generally, the Act vests in the Commission the mandate to come up with the trade regime of the EAC and being well versed with the regime to then negotiate with parties who might be interested in getting to know the same. Further since the community is made of different partner states, the Commission is given the power to examine and harmonise the negotiating partner positions where they seem to have different stand point on negotiating positions. In addition, the commission has been given power to conduct research and produce papers since the community does not exist in a vacuum and it has to keep in touch with emerging trends in the trade and investment industry globally.

Section 6, ⁴⁰deals with composition as well as the qualifications of persons eligible to become members of the Commission. It shall be composed of two members qualified in matters of trade⁴¹, one of each gender nominated by the partner states. This ensures that there will be some form of gender parity on the commission, the secretary general or his/her delegate who shall be an *ex-officio* member of the commission⁴², other *ex-officio* members, one each nominated by

³² Section 3 (3)

³³ Section 5 (2) (a)

³⁴ Section 5 (2) (b)

³⁵ Section 5 (2) (c)

³⁶ Section 5 (2) (d)

³⁷ Section 5 (2) (e)

³⁸ Section 5 (2) (f)

³⁹ Section 5 (2) (g)

⁴⁰ Kenya Law Reports (n25)

⁴¹ Section 6 (1) (a)

⁴² Section 6 (1) (b)

each of the partner states from the relevant Ministry⁴³ and the director general who shall also be an *ex-officio* member of the Commission⁴⁴.

Consequently, the next section of this chapter describes the procedure the EAC CU has to undertake in order to accede to the WTO as a member. It is noteworthy that nomination of a single member from each of the partner states from the relevant ministry might be an uphill task since some partner states have several ministries handling trade issues which issue will BE discussed in detail in the next chapter. Further this paper suggests that the partner states should ensure that at least one member from the partner states appointed to the commission is a non-governmental stakeholder. Such persons whose input would have a substantial influence on the community's trade position from a practical stand point were previously locked out of WTO negotiations since negotiations at the WTO level take place between governments.⁴⁵

Section 8⁴⁶ states that decisions of the Commission on matters of trade policy shall be made by consensus while section 9⁴⁷ gives the power to appoint such Committees as it may deem fit to assist it in carrying out its functions and may assign to any committee such functions as it may consider necessary. It is one the basis of this section that this paper forms a committee specifically meant to handle negotiations at the WTO as shall be discussed further in this chapter. Further section 12, in a bid to ensure that the working of the commission to not go unchecked requires that the negotiating mandate of the Commission shall be given in writing by the Summit acting through the Council from time to time⁴⁸. In addition to this, the section requires the Commission to consult with the Council of Ministers before concluding any agreement, whose task is to approve the final text of the agreement⁴⁹ and that the Chairperson of the Council of Ministers signs all negotiated agreements⁵⁰. This will help to ensure that situations in which the Commission would have acted *ultra vires* are avoided. Furthermore, in order to ensure inclusivity and that all partner states air their voices on all issues, the Act requires that the EAC

⁴³ Section 6 (1) (c)

⁴⁴ Section 6 (1) (d)

⁴⁵ Tindyebwa Amos, 'Capacity Building for International Negotiations and Trade Facilitation in the East African Community' [2011], No. 84 ATPC < <http://www1.uneca.org/Portals/atpc/CrossArticle/1/WorkinProgress/84.pdf> > accessed 13th August, 2015

⁴⁶ Kenya Law Reports (n25)

⁴⁷ Ibid

⁴⁸ Section 12 (1)

⁴⁹ Section 12 (2)

⁵⁰ Section 12 (3)

position on any issue for negotiation, be developed by the Commission from the national positions of partner states⁵¹.

Lastly, the Act gives several timelines within which certain roles should be performed under it. Section 15 requires the partner states to integrate their respective delegations to regional and multilateral trade negotiations into a single East African delegation within six months from the commencement of the Act⁵². Further section 18⁵³ states that on coming into force of the Act, the Summit shall within ninety days appoint the first members of the Commission. Notably however, despite the Act pegging both dates on the commencement date, it does not give the commencement date which might be the reason why the members of the Commission have never been appointed an issue that will be discussed in detail in Chapter 3.

Having discussed Accession to the WTO generally, the EAC CU and the EATNA, the next section of this chapter discusses in detail the processes the EAC CU will have to undertake in order to become a full member of the WTO.

2.2.3 The Process of Accession to the WTO by the EAC CU

Membership of the WTO is open to both states and customs union. All individual partner states are members of the WTO as governments and are thus familiar with the workings and procedures of the WTO. The EAC member states have even been undergoing the Trade Policy Review Mechanism⁵⁴ jointly and therefore there cannot be such an opportune moment for the customs union to invoke membership to the WTO.

The process has several stages which are as hereunder:

2.2.3.1 The Request for Accession

The first step would be for the EAC CU to submit a formal written application seeking to accede to the WTO to the Director General of the WTO. The formal request would then be circulated to

⁵¹ Section 12 (4)

⁵² Section 15 (2)

⁵³ Kenya Law Reports (n25)

⁵⁴ The Trade Policy Review took place on 21 & 23 November, 2012. See World Trade Organisation, 'Trade Policy Review: East African Community (EAC)' (2015) < https://www.wto.org/english/tratop_e/tpr_e/tp371_e.htm > accessed 5th August, 2015

all WTO members awaiting approval at the next General Council Meeting.⁵⁵ The chairperson of the General Council will then invite the representatives of the EAC CU during the next Council meeting to introduce the main features of the trade and economic regime of the EAC CU and to give a summary of the reasons that has prompted the members of the EAC CU to make the application to accede to the WTO.⁵⁶ This stage has generally been described as the ‘tell us about yourself stage’⁵⁷ since the applicant has to describe all aspects of its trade and economic policies that have a bearing on WTO agreements.

In the event that accession requests are made by separate customs territories as is the case with the EAC CU, the General Council seeks to verify that the territory in question does in fact possess “full autonomy in the conduct of its external commercial relations and of the other matters provided for in the WTO Agreement and the Multilateral Trade Agreements” as required by Article XII of the WTO Agreement and that it intends to undertake all the obligations associated with WTO membership and to be responsible to WTO Members for fulfillment of its obligations.⁵⁸

The General Council will then establish a working party to examine the accession request. All members of the WTO can become members of the working party although only those members that are particularly interested in the accession of a given government will participate.⁵⁹ The EAC CU can deduce the standards that will be applicable to it as a customs union from those given in by the general council in considering the application by the Republic of Montenegro that the Republic:

- i. maintained a customs and trade regime separate from that of the Republic of Serbia;
- ii. possessed full autonomy in the conduct of its external commercial relations; and

⁵⁵ Suranovic (n8)

⁵⁶ World Trade Organization, ‘Application for membership and establishment of Working Party’ (2015) <https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s2p2_e.htm> accessed 5th August, 2015

⁵⁷ World Trade Organization, ‘Understanding the WTO: The Organisation’ (2015) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm> accessed 5th August, 2015

⁵⁸ World Trade Organization, ‘The accession process-the procedures and how they have been applied’ (2015) <https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s2p2_e.htm> accessed 8th August, 2015

⁵⁹ World Trade Organization (n7)

- iii. Intended to undertake all the obligations associated with WTO membership and to be responsible to the WTO Members for its fulfilment of these obligations.⁶⁰

Once the accession request is been submitted to the Director General, the EAC CU will be granted observer status. As an observer, the EAC CU members will have a chance to familiarize themselves with the WTO requirements. Usually a member is allowed to be an observer for a period of five years during which period the observer is expected to make the decision to accede to the WTO or otherwise. As observers, representatives of the EAC CU may be allowed to speak

⁶⁰See Montenegro, WTO Document WT/ACC/1 accessible at https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s2p2_e.htm accessed 8th August, 2015. See World Trade Organisation, 'Minutes of the meeting held in the Centre William Rappard on 15 February, 2005 (General Council 15th February 2005, World Trade Organisation 2005) paragraph 27-29 which are as hereinunder:

Montenegro – Request for accession (WT/ACC/CGR/1)

The Chairman drew attention to the communication from the Republic of Montenegro in document WT/ACC/CGR/1, requesting accession to the WTO Agreement pursuant to Article XII. He recalled that under Article XII of the WTO Agreement, accession to the WTO was open to "any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements." The communications from the State Union Serbia and Montenegro in document WT/ACC/SCG/3 and Add.1 – which had been considered under the previous Agenda item – confirmed that the Republic of Montenegro: (i) maintained a customs and trade regime separate from that of the Republic of Serbia; (ii) possessed full autonomy in the conduct of its external commercial relations; and (iii) intended to undertake all the obligations associated with WTO membership and to be responsible to the WTO Members for its fulfilment of these obligations. Consultations carried out by the Secretariat on his behalf indicated broad acceptance among the membership of the decision of the Government of Montenegro to apply for accession pursuant to Article XII of the WTO Agreement. The support for Montenegro's application was based on the understanding that the conditions stipulated in Article XII would be adhered to during the accession process, and that the Republic of Montenegro would be fully responsible for the implementation of obligations arising from accession to the WTO.

As the current constitutional structure of Serbia and Montenegro granted international personality to the State Union Serbia and Montenegro, it was also understood that for the purposes of accession to the WTO, the Republic of Montenegro would be considered a separate customs territory. Accordingly, he proposed for Members' consideration that the General Council agree to establish a working party to examine the request with the following standard terms of reference and composition:

Terms of Reference:

"To examine the application of the Government of Montenegro to accede to the WTO Agreement under Article XII, and to submit to the General Council recommendations which may include a draft Protocol of Accession."

Membership:

Membership would be open to all Members indicating their wish to serve on the Working Party.

Chairmanship:

In keeping with customary practice, the General Council would authorize its Chairman to designate the Chairperson of the Working Party in consultation with representatives of Members and with the representative of Montenegro.

during meetings of the bodies of the WTO to which they are observers but such right can only be exercised after members of that body have spoken. However, they will not be allowed to participate in decision-making.⁶¹

Essentially, this paper proposes that the representatives of the EAC CU to the WTO should be members of the East African Joint Trade Negotiation Commission (EAJTNC) since one of the objectives under section 2(b) of the Act⁶² is to establish a mechanism for joint negotiations of the Partner states in bilateral, regional and multilateral trade. Trade at the WTO level falls under the multilateral category and it therefore follows that it is the members of the Commission who are meant to conduct negotiations at the WTO on behalf of the EAC CU. Further under section 3 (3)⁶³, the partners are required to negotiate all matters relating to regional and multilateral trade as a bloc and not as individual partners states. The section uses the phrase ‘must’ which makes the requirement mandatory. Moreover, one of the functions of the EAJTNC is to conduct trade negotiations on behalf of the EAC Partner states.⁶⁴

Moreover, the Commission has the power to appoint such Committees as it may deem appropriate to assist in carrying out its functions and may assign to any Committee such functions as it may consider necessary⁶⁵. This paper proposes that the EAJTNC should appoint a Committee specifically meant to handle negotiations at the WTO level with one of the members of the Commission as a chairperson. This would be necessitated by the fact that the mandate of the Commission is quite broad seeing that it is meant to handle bilateral, regional and multilateral trade negotiations. It therefore follows that there will be a need for the Commission to have its members have designated areas of specialization to ensure consistency and continuity.

In addition, the members of the Commission should be persons who are well versed with the on-goings at the WTO, preferably persons who handle WTO negotiations at the national level of each of the partner states and are experts in the field. To further buttress this point, the Act provides that the partner states may establish a national trade negotiations committee which shall prepare a national position on each and every issue or item for negotiation at the regional and

⁶¹ Ibid

⁶² Kenya Law Reports (n25)

⁶³ Ibid

⁶⁴ Section 5 (1) (C)

⁶⁵ Section 9

multilateral level⁶⁶. Consequently, this paper proposes that the EAJTNC should appoint a Committee to handle negotiations at the WTO level consisting of members who are experts in matters to deal with the WTO and were or should be part of the national trade negotiation committees of the partner states therefore well versed with their countries foreign trade regime.

However, the Act⁶⁷ requires that the negotiating mandate of the Commission be in writing having been issued by the Summit acting through the Council. It therefore follows that before submitting the request for accession, the Committee of the EAJTNC must first write to the Summit which consists of heads of state of the partner states⁶⁸, through the Council of the EAC, seeking written consent of to conduct negotiations on behalf of the EAC CU in the accession process and eventually at the WTO.

2.2.3.2 Submission of a Memorandum on the Foreign Trade Regime

The first document that the EAC CU will have to submit is a Memorandum on Foreign Trade Regime. The memorandum covers a wide variety of foreign trade policies, from general economic indicators, to policies affecting trade in goods, such as import and export regulations, agricultural and industrial policies, policies regarding intellectual property rights to policies affecting trade in services, customs valuation and licensing requirements.⁶⁹

It has been argued⁷⁰ that preparation of this Memorandum is an uphill task for many applicants and the EAC CU should anticipate that the same is not going to be easy, since the EAC CU is a conglomerate of five individual partner states at different stages of economic development. The document is meant to describe fully and convincingly how the EAC CU administers, regulates and controls its foreign trade. This exercise will require a considerable amount of research and attention from the EAC CU representatives. Further, since the document is required to be drafted in one of the official languages of the WTO, that is, English, French or Spanish. The EAC CU

⁶⁶ Section 3 (3)

⁶⁷ Section (12) (1)

⁶⁸ Article 10 of the Treaty establishing the East African Community

⁶⁹ See WTO Documents WT/ACC/1, WT/ACC/4 and WT/ACC/5 available at <http://www.wto.org> which provide more information on what is included in the Memorandum. The documents can also be accessed at <https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm> accessed 5th August, 2015

⁷⁰ Kavas (n9)

representatives preparing the document should be well versed with one of the languages despite coming from states that have different languages as national languages.⁷¹

The process of drafting and submitting memoranda has been the stumbling block for many applicants due to issuance of sketchy information that is not satisfactory. For instance Uzbekistan required four years to complete the process and the EAC neighboring state Sudan spent five years at this stage.⁷² It therefore follows that the EAC CU will require an expert team to draft this memorandum to ensure that it is satisfactory, providing all the relevant information required under Document WT/ACC/1.

The foreign trade regime of the EAC CU would have to be drawn from the trade regime of the EAC and the EAC CU. Various legal instruments of the EAC and EAC CU by extension touch on the trade regime of the community and the union. Firstly, Article 74 of the EAC Treaty⁷³ requires the partner states to develop and adopt an East African Trade Regime and co-operate in trade liberalisation and development in accordance with the Treaty in order to promote the achievement of the objectives of the Community.

Further, Article 7 of the Protocol on the establishment of the East African Community Customs Union⁷⁴ requires that the Partner states agree to simplify their trade documentation and procedures in order to facilitate trade in goods within the Community. With reference to the WTO, this requirement would actually ensure that the trade documentation comply with GATT (1994) together with the agreements associated with it. This would help when coming up with the foreign trade memorandum as the trade regime of the EAC CU would actually have a positive bearing on the WTO agreements.

In addition, Article 7 (2)⁷⁵ provides that subject to the provisions of Article 6⁷⁶ on trade facilitation, the partner states agree to design and standardize their trade information and documentation in accordance with internationally accepted standards taking into account the use of electronic data processing systems in order to ensure the efficient and effective application of

⁷¹ Ibid.

⁷² Ibid.

⁷³ East African Community (n17).

⁷⁴ Article 7 (1) UiO: Faculty of Law (n20)

⁷⁵ UiO: Faculty of Law (n20)

⁷⁶ Ibid

the provisions of the Protocol. Complying with the requirements of this sub-article would have ensured that the information and documentation necessary to come up with the foreign trade memorandum are easily accessible in electronic form and conform to international standards which would include language and therefore simplifying the process of preparing the memorandum.

The Act⁷⁷ also has several provisions on an East African Trade Regime which regime would form the backbone of the foreign trade policy of the EAC CU and thus by extension the memorandum.

Firstly, the preamble to the Act⁷⁸ describes the Act as an Act to make provision, inter alia for the development of an East African Trade Regime. Secondly, developing an East African Trade regime in accordance with the Treaty and Protocol establishing the East African Community Customs Union is one of the objectives of the Act⁷⁹. Lastly, when the EAJTNC is established under the Act,⁸⁰ its core mandate is to harmonise trade policies and develop an East African Trade Regime among others. Basically, the Act gives the mandate of establishing an East African Trade Regime to the EAJTNC.

It therefore follows that since it is actually the EAJTNC that is vested with the mandate to come up with an East African Trade Regime the Committee that this paper proposed to handle negotiations at the WTO level should just customize and stream line the East African Trade Regime that should be developed by the EAJTNC to be in conformity with the WTO Agreements. This would be beneficial to the EAC CU since the persons handling the drafting of the memorandum would have easy access to the information necessary to draft the foreign trade memorandum and might have even been part of the team that actually drafted the East African Trade regime or have easy access to such persons.

⁷⁷ Kenya Law Reports (n25)

⁷⁸ Ibid

⁷⁹ Section 2 (c)

⁸⁰ Section 5

As such complying with the provisions of the Act⁸¹ and forming the Committee to specifically handle WTO negotiations would enable the EAC CU avoid some of the problems associated with drafting the foreign trade memorandum since the role would be performed by experts.

2.2.3.3 Establishment of a Working Party

Once the accession request by the EAC CU is submitted to the Director General (DG) of the WTO, the DG will verify the request and circulate it. The DG would then verify the request and circulate it to the General Council and all membership of the WTO for consideration at the next General Council meeting.⁸² If the request is accepted, a working party will then be established to review the EAC CU application. With standard terms of reference as hereunder:

to examine the application of the Government of the East African Community Customs Union to accede to the World Trade Organization under Article XII and to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession.⁸³

The Terms of Reference are standard and modelled on those previously used for GATT accession working parties. Membership of the working parties is open to all interested WTO members which ensures that the accession process is conducted in a transparent manner⁸⁴. The membership of Working Parties is not necessarily representative of the WTO membership as a whole, but tends to be commensurate with the Members' economic weight in the system and with their interest in a given accession.⁸⁵

Once the working party is established, the chairperson of the General Council will then consult the EAC CU on its choice with respect to the chairperson of its working party depending on the members of the WTO who would have applied to become members of the Working party. The appointed chairperson will then be confirmed at the next General Council meeting.

⁸¹ Kenya Law Reports (n31)

⁸² UiO: Faculty of Law (n20)

⁸³ World Trade Organisation, 'WT/ACC/10/Rev.-Technical Note on the Accession Process' (Note by the Secretariat, Revision, 2010)

⁸⁴ Ibid

⁸⁵ World Trade Organization (n27)

2.2.3.4 Examination of the Foreign Trade Regime

At this stage the Working Parties follow the procedures set out in WTO document WT/ACC/1 entitled “Accession to the WTO — Procedures for Negotiations under Article XII” of 24th March, 1995. The document was issued by the WTO Secretariat in close consultation with Members as a practical, non-binding guide.⁸⁶

The work of the Working party at this stage is handled in phases. The first phase will generally be a fact finding mission on the EAC CU foreign trade regime. Essentially, once the memorandum on foreign trade regime (Memorandum) has been circulated, members of the working party will then submit questions in writing to the EAC CU. The EAC CU will then reply to those questions in writing through the Secretariat.⁸⁷ The Secretariat will then consolidate and arrange the questions by topics depending on the headings in the Memorandum.

Kavas⁸⁸ argues that the questioning by the working party members should be confined to matters falling within the scope of the Uruguay Round Agreements. However, that practically, the members of the working party ask all information they consider necessary for them to understand the applicant’s foreign trade regime and the applicant’s ability to bring that regime in harmony with WTO requirements⁸⁹. This according to him has the effect of making the process quite time consuming and frustrating. The proposed Committee of the EAJTNC that will be charged with the responsibility of handling the accession process of the EAC CU, should therefore ensure that all the necessary information required in the memorandum is provided to avoid falling prey to this time consuming procedure that would be necessitated by lack of sufficient information on the EAC CU foreign trade regime.

Once the working party is convinced that it has adequate factual information based on the questions and replies, it will then convene the first working party meeting. The meeting is essentially a continuation of the fact-finding process aimed at arriving at a clearer identification of areas of possible inconsistency of the applicant’s (EAC CU) foreign trade regime with the

⁸⁶ World Trade Organisation, ‘Handbook on Accession to the WTO’ (Chapter : The Working Party process 2015) https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s3p1_e.htm accessed 8th August, 2015

⁸⁷ Ibid.

⁸⁸ Igor I. Kavas (n9)

⁸⁹ Ibid.

WTO agreements.⁹⁰The proposed committee of the EAJTNC and the members of the working party will examine the Memorandum and questions and replies with a view to seeking further clarifications that may be required in light of the various provisions of the WTO Agreements⁹¹. After the meeting, members of the Working Party will submit their comments and questions raised during the meeting, as well as any additional points that they may want to raise, in writing.

The proposed committee of the EAJTNC will then be expected to provide appropriate responses to the Members' questions and forward them to the Secretariat, which will consolidate them into a single "Questions and Replies" document prior to formal circulation.

During the 'Questions and Replies' stage, the members of the proposed Committee of the EAJTNC will have to meet with the working party on a formal basis at the WTO headquarters in Geneva in order to review the progress made and decide on the way forward with respect to the memorandum and the Questions and Replies asked. The members of the proposed Committee of the EAJTNC will also be allowed to have informal meetings with WTO officials during such visits⁹².

In a bid to ensure transparency throughout the information-gathering process, the Secretariat will be required to circulate a document known as Factual Summary of Points Raised. It is basically an informal document summarizing discussions in the Working Party⁹³. Its purpose is to facilitate the work of the Working Party by summarizing the discussions contained in the written exchanges and identifying the points that require further clarification⁹⁴.

2.2.3.5 Factual Summary and Final Report

With respect to the multilateral negotiations, once the fact-finding process has progressed to an extent to which the foreign trade regime of the EAC CU is clear to the working party, the working party will now embark on coming up with the factual summary. It is the report that will help determine the terms and conditions of entry for the EAC CU. Such conditions should include commitments to observe WTO rules and disciplines upon accession; and transitional periods required to make any legislative or structural changes where necessary to implement

⁹⁰ World Trade Organization (n57)

⁹¹ World Trade Organization (n54)

⁹² Igor I. Kavas (n9)

⁹³ World Trade Organization (n57)

⁹⁴ World Trade Organization (n54)

those commitments.⁹⁵ Eventually when the summary is drafted, questioning will then focus purely on issues identified in the report. Consequently, if and when the working party becomes convinced that it has received enough factual information, it will then direct the WTO Secretariat to draft a final report.

Once drafted, the draft report will then be submitted to it by the secretariat for discussion in detail with the EAC CU. During the deliberations between the Working Party and the Committee of the EAJTNC, procedure allows for revision and amendment of the report until such a time that both parties will be satisfied with the contents of the draft and will be ready to accept it as a final report.

Concurrently, the Committee of the EAJTNC will be required to engage in bilateral negotiations with interested Working Party members on concessions and commitments on market access for goods and services. The conclusions of such negotiations will then be incorporated into a schedule of concessions and commitments on goods and in a schedule of specific commitments on services. The schedules would eventually form part of the final accession documents⁹⁶.

The next step would be for the working party to direct the WTO secretariat to prepare a draft decision and protocol of accession. The schedule with the results of the bilateral negotiations will also be annexed. Essentially, the decision, protocol and the schedules will be attached to the report and will then form the final accession package. The working party will then agree on the draft Report as a whole and forward it to the General Council or Ministerial Conference for adoption⁹⁷. Lastly, the General Council will then invite the EAC CU to accede to the WTO on the terms in the protocol and schedules annexed to the report.⁹⁸

⁹⁵ World Trade Organization (n7)

⁹⁶ Ibid

⁹⁷ Igor I. Kavas (n9)

⁹⁸ Kavas argues that the Marrakesh Agreement requires that the accession decision be made by the ministerial conference but in practice the decisions are actually made by the general council. He states as follows:

Formally, according to Article XII of the Marrakesh Agreement establishing the World Trade Organization, “decisions on accessions shall be taken by the ministerial conference “as the highest decision making organ in the WTO system, but as a matter of practice the ministerial conference relegates this function to the General Council, all that remains to be done by the applicant country is to ratify the accession in accordance with its national laws and then deposit the document with the WTO. Ibid

Upon approval by the General Council, the EAC CU will be free to sign the Protocol of Accession. The acceptance will involve stating that it will accept the approved accessions package subject to ratification by the EAC legislative assembly. The acceptance should be done within a period of three months from the date of signing the Protocol of Accession. The EAC CU will then become a full member of the WTO after thirty days of notifying the WTO Secretariat that it has completed its ratification procedures⁹⁹

That then marks the end of this chapter. The next chapter shall tackle the prospects and challenges of the EACJTNC through one of its committees handling trade negotiations on behalf of the EAC CU and by extension the EAC at the WTO.

⁹⁹ World Trade Organization (n7)

CHAPTER 3

3.0 PROSPECTS OF AND CHALLENGES TO THE EAST AFRICAN COMMUNITY NEGOTIATING AS A BLOC IN WORLD TRADE ORGANISATION NEGOTIATIONS

3.1 Introduction

This chapter is an acknowledgement that the process of getting the EAC to speak with one voice in WTO matters, though achievable, is not going to be an easy task. Further, that though the process is in motion, there will be hurdles that the EAC through the EAC CU will have to surmount. The previous chapter discussed the legal framework necessary to ensure that the EAC through the EAC CU carries out trade negotiations before the WTO as a bloc and not through the heads of state of the individual member states as is currently being done.

This Chapter is an in-depth analysis of the progress the EAC has made with respect to ensuring that it carries out its trade negotiations at the WTO as a bloc; which requirements it has complied with and those it has not been able to comply with. In the event that there are certain requirements that have not been complied with, this chapter will try and establish the reasons behind such non-compliance, through identifying the challenges to ensuring such compliance with a view to recommending solutions to the same in the next chapter.

The chapter will be divided in to two parts; the first part will cover the prospects of the EAC having a joint trade negotiation committee handling its negotiations at the WTO. Essentially it will be an analysis of the factors that can be jointly taken to be an indication that the EAC will and is able to have the joint committee handling its negotiations at the multilateral institution and the second part will cover the challenges the EAC will encounter in the process of actualizing the prospect of having a joint trade negotiating committee handling its negotiation before the WTO.

The EAC is a conglomerate of five countries namely, Kenya, Uganda, Tanzania, Rwanda and Burundi. Each partner state is at a different development stage and some of the states have different official languages such as Tanzania which has Kiswahili as its national language and Rwanda and Burundi having French as their official language. Those differences aside the EAC partner states have several issues in common. Tindyebwa Amos argues that the EAC partner states trade negotiations are usually aimed at obtaining the cooperation of trading partners on

technical and financial assistance required to meet market preferences and to comply with health and technical standards.¹ Consequently, the EAC partner states have taken major steps to advance their common goals in the multilateral trading system by forming the EAC CU whose main objectives are to further liberalize intra-regional trade in goods on the basis of mutually beneficial trade arrangements among Partner States, promote efficiency in production within the Community, enhance domestic, cross-border and foreign investment in the Community and promote economic development and diversification in industrialization in the Community.² This paper proposes that the EAC should then seek membership to the WTO through the Customs Union and ventilate its issues related to trading within that multilateral organisation as a bloc despite the small differences existing among them as the partner states.

This chapter is a further acknowledgement that the process of seeking membership to finally having the EAC CU participating as a bloc in WTO is not going to be smooth sailing but there is impetus to do so. Further there can never be a better time to do so than now. This chapter will take stock of what mechanisms are already in place to ensure that the EAC CU can become a member of the WTO and what needs to be done or beefed up to realize that goal.

3.2 Prospects

3.2.1 Development of a Sound Legal Foundation and Structures

According to the Marrakesh Agreement only states or separate customs territories possessing full autonomy in the conduct of their external commercial relations and of other matters provided for in the Agreement and the multilateral trade agreements may accede to the WTO.³

As discussed in the previous chapter, the EAC CU is the first stage of the process of integration for the EAC partner states. The Customs Union was formed pursuant to Article 75 of the EAC

¹Tindyebwa Amos, 'Capacity Building for International Negotiations and Trade Facilitation in the East African Community' [2011], No. 84 ATPC < <http://www1.uneca.org/Portals/atpc/CrossArticle/1/WorkinProgress/84.pdf>> accessed 30th September, 2015.

² East African Community, 'EAC Customs Union Overview' (2014) < http://www.customs.eac.int/index.php?option=com_content&view=article&id=123&Itemid=78> accessed 30th September, 2015.

³ World Trade Organization, 'Marrakesh Agreement Establishing the World Trade Organisation' https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_e.htm accessed 30th September, 2015.

Treaty.⁴ On 2nd March, 2004 the Protocol for the Establishment of the East African Community Customs Union (the Protocol) was signed by the heads of state of Kenya, Uganda and Tanzania. In the year 2008, the Republics of Rwanda and Burundi consequently joined the Customs Union and started applying the EAC CU instruments in July, 2009.⁵ The Protocol then formed the legal and foundation of the EAC CU.

Article 2 of the Protocol⁶ establishes the East African Community Customs Union with a view to promoting the objectives of the EAC set out in Article 5 of the Treaty establishing the EAC.⁷ In this paper, the EAC CU is an important structure because it is the mechanism through which, the EAC should use to accede to the WTO as discussed in the previous chapter. As it stands currently, the EAC CU is yet to make an accession request. However, there is impetus for recognition of the EAC bloc at the WTO. This can be inferred from the fact that the last Trade Policy Review of the EAC partner states which is an exercise mandated in the WTO agreements, whereby member countries' trade and related policies are examined and evaluated at regular intervals, conducted in December, 2012 was done for the states jointly as members of the EAC.⁸

It therefore follows that, subject to the EAC CU making the accession request when it has all most of the necessary documents in order, the WTO would not have issues recognizing it as a member, seeing that their records already indicate some form of *de facto* recognition of the bloc.

Article 4 of the Protocol⁹ gives the Customs Union mandate to eliminate customs duties and other charges of equivalent effect imposed on imports subject to the provisions of the Protocol, remove non-tariff barriers to trade among partner states and to establish and maintain a common

⁴Corporate and Communication Affairs, 'Treaty Establishing the East African Community' (2010) < http://www.eac.int/treaty/index.php?option=com_content&view=article&id=70:article-5-objectives-of-the-community&catid=38:chapter-2&Itemid=163> accessed 30th September, 2015.

⁵ East African Community, 'EAC Customs Union Overview' (2014) < http://www.customs.eac.int/index.php?option=com_content&view=article&id=123&Itemid=78> accessed 30th September, 2015.

⁶UiO: The Faculty of Law, 'Protocol on the Establishment of the East African Customs Union' <http://www.jus.uio.no/english/services/library/treaties/09/9-04/eac_establishment_protocol.xml#treaty-header1-2> accessed 30th September, 2015.

⁷Article 5 of the Protocol, UiO (n5).

⁸ World Trade Organisation, 'Trade Policy Review: East African Community (EAC)', (World Trade Organisation, 2015) < https://www.wto.org/english/tratop_e/tp_r_e/tp371_e.htm> accessed 30th September, 2015.

⁹UiO (n5).

external tariff in respect of all goods from foreign countries.¹⁰ Pursuant to this article, partner states of the EAC CU have eliminated all internal tariffs and now apply a common external tariff.¹¹

In the course of the accession process, the applicants are usually required to submit a market access offer and a trade in services offer.¹² These two offers then form the basis for the bilateral negotiations that will eventually be incorporated into the applicant's schedule of concessions and commitments on goods and schedule of specific commitments in services respectively once an agreement on them is arrived at between the applicant and the existing members of the WTO. By Article 4, of the Protocol giving the EAC CU mandate to establish and maintain a common external tariff, the ball has already been set rolling with respect to the initial offers because all the Committee tasked with handling the EAC CU accession request is meant to do is submit the same to the working party and negotiations on same can begin.

Another facet of establishment of a sound legal foundation is the enactment of the East African Trade Negotiations Act, 2012.¹³ The Act is enacted with a view to making provision for the East African Trade Commission, development of an East African Trade regime and to provide for joint trade negotiations.¹⁴ The Act makes it compulsory for the EAC partner states to negotiate as a bloc in all matters relating to regional and multilateral trade.¹⁵ By extension, the act requires that all negotiations done for and on behalf of the EAC member states at the WTO should as at the enactment date, be done jointly through the institutions that it establishes. It therefore follows that as at the commencement date of the Act, the EAC CU should have invoked its membership at the WTO such that it is recognized formally as a bloc among all WTO members. If the same is not done and the partner states continue negotiating as individual states, then they continue to

¹⁰ Ibid.

¹¹ The latest was issued in 2012. See East African Community, 'East African Community Customs :Tariffs Overview'(2015). <http://www.eac.int/customs/index.php?option=com_content&view=article&id=137&Itemid=169> accessed 30th September, 2015.

¹² Igor I. Kavas, 'WTO Accession: Procedure, Requirements and Costs' (2007) 41 J. World Trade 453.

¹³ National Council for Law Reporting (Kenya Law), 'The East African Trade Negotiations Act, 2008' (2015) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/EALA_Legislation/EASTAFRICANTRADENEGOGIATIONSACT2008.PDF> accessed 30th September, 2015.

¹⁴ Ibid.

¹⁵ Section 3 (2).

contravene the provisions of the very law they enacted to facilitate the promotion of regional international trade for the sustainable development of the partner states.¹⁶

With respect to structures, the Act established the East African Joint Trade Negotiation Commission (EAJTNC) whose major roles are to harmonize trade policies, develop an East African Trade Regime and to conduct trade negotiations on behalf of the EAC Partner states.¹⁷ The Act gives the Commission mandate to establish its own rules of procedure for the conduct of its business.¹⁸ It has been reported that a draft of the guidelines has been circulated to the individual partner states for national consultations before the legislative assembly can come up with a harmonized framework.¹⁹ The Commission is also mandated to appoint such Committees as it may deem appropriate to assist it in carrying out its functions.²⁰

The EAJTNC is very fundamental if the dream of the EAC partner states carrying out joint trade negotiations at the WTO is to ever come to fruition. This is because it is the body that is legally mandated to harmonize trade policies of the partner states and come up with the East African Trade Regime. The trade regime through the memorandum of foreign trade regime as discussed previously is the fundamental document upon which the accession request to the WTO is to be considered by both the existing members of the WTO as well as the working party. Further, this paper proposed in the previous chapter that since the EAC partner states are members of numerous regional and multilateral trade organizations, the EAJTNC should appoint a specific Committee to handle negotiations before the WTO. The Act should be lauded therefore for giving those two fundamental roles to a body that is legally mandated to carry out such functions.

It is noteworthy however, and unfortunately so, that the members of the EAJTNC have never been appointed. Consequently, the harmonization of trade policies of the individual partner states that form the basis for the East African Trade Regime has never been done formally and therefore, the East African Trade Regime has never been developed. This issue will be tackled

¹⁶ Section 2 (a).

¹⁷ Section 5.

¹⁸ Section 8 (1).

¹⁹ Agencies, 'EAC Guidelines for Joint Trade Negotiations with Global Partners in the Offing' *The New Times* (Rwanda, 9th July, 2015) < <http://www.newtimes.co.rw/section/article/2015-07-09/190435/>> accessed 30th September, 2015.

²⁰ Section 9 (2).

under the challenges shortly but the fact that the EAC CU is legally in place with a common external tariff, there is a sound legal basis for establishment of the EAJTNC and the East African Trade Regime under the EATNA, a draft for the EAC Guidelines for Joint Trade Negotiations has already been circulated to the partner states shows that the prospects of the EAC partner states trading jointly under the EAC CU at the WTO are very high.

3.2.2 Capacity to front a Harmonized and Consistent Negotiating Position

The EAC is a union of five individual sovereign states. The EATNA requires the five individual states to speak with one voice when it comes to regional and multilateral trade policies. Consequently, the five states have to ensure that they harmonize all their trade policies into one policy that represents their interests jointly. This is considered a step in the right direction because the states will not have some of them takings standpoints that are against the interest of the other partner states.

The act has several positions that ensure that the stand points that are going to be taken on behalf of the EAJTNC are harmonized and consistent. Firstly the preamble to the act states that it is an act to make provision for the development of an East African Trade regime.²¹ Essentially the EAC should do away will the national trade regimes and come up with one regime for the entire bloc. This will help do away with inconsistencies that would have arisen had the national trade regimes which might sometimes be in conflict with each other, been maintained.

The Act also provides that every partner state may establish a national trade negotiations committee which shall prepare a national position on each and every issue or item for negotiation at the regional or multilateral level.²² This ensures that there is consistency in the decisions that are taken with respect to negotiations because they are drawn from the national positions of the member states as opposed to a situation whereby the decision making powers are fragmented. In Kenya for instance there is limited coordination and harmonization of decisions taken due to the fact that there are multiple ministries and committees involved in trade negotiations.²³ For instance the Ministry of Foreign Affairs and International Trade handles the management of

²¹National Council for Law Reporting (Kenya Law) (n13).

²² Section 3(3).

²³Tindyebwa Amos (n1).

bilateral and multilateral relations²⁴ such as negotiations at the WTO while the Ministry of East Africa Affairs Commerce and Tourism²⁵ handles EAC matters.²⁶ Consequently for a decision touching on the EAC CU and the WTO, it would mean that approvals will have to be sought from the two ministries as opposed to having a single committee appointed by the commission specifically mandated to handle WTO negotiations on behalf of the EAC CU.

In addition the act requires that all decisions of the Commission on matters of policy be made by consensus and where consensus cannot be obtained, such matters be referred to Council for a decision.²⁷ It therefore follows that the EAC CU and EAC by extension will have one decision with respect to all matters being handled by the EAJTNC. Moreover with respect to the negotiating mandate of the EAJTNC, its mandate has to be in writing issued by the summit acting through the Council.²⁸ This ensures harmony because the EAJTNC will be prevented from going on frolics of its own and negotiating issues that it has not been authorized to negotiate on. Moreover, the act requires the EAJTNC to consult the Council of Ministers before concluding any negotiated agreement.²⁹ The Council has to approve the final text of any agreement negotiated by the EAJTNC. This ensures further that there is a system of checks and balances whereby the summit acting through the council monitors the work of the EAJTNC and eventually ensuring the entire EAC CU and EAC by extension has one harmonized and consistent position in all matters negotiated by the EAJTNC.

Lastly, the Act requires that the East African Common position on any issue for negotiation shall be developed by the Commission from the national positions of the partners states.³⁰ This can also be linked to the requirement that partner states should establish national trade negotiations committees to prepare national positions on issues for discussion. This ensures that there is a consistent flow from the national negotiation committees to the EAJTNC as well as a harmonized decision since the national committees will have to synchronize the different

²⁴MoFA&IT, 'Ministry of Foreign Affairs and International Trade (2015), < <http://www.mfa.go.ke/aboutus.html>> accessed 30th September, 2015.

²⁵ Min. of E.A Affairs Commerce & Tourism, 'Ministry of East Africa Affairs Commerce and Tourism' (2015), <http://www.commerce.go.ke/index.html>> accessed 30th September, 2015.

²⁶Tindyebwa Amos (n1).

²⁷ Sections 8 (1) & (2).

²⁸ Section 12 (1).

²⁹ Section 12 (2).

³⁰ Section 12 (4).

positions in the partner states into one then the EAJTNC is then tasked with synchronizing the different national positions into one joint negotiating position for the EAC CU and EAC by extension. More over the EAJTNC is mandated to maintain a data bank³¹ on trade matters and conduct research and studies and produce strategic papers.³² This means that in arriving at a harmonized position the EAJTNC will have the benefit of having conducted research on the same and records can be stored over a long period of time.

The harmonized and consistent decisions are particularly relevant in the case of WTO negotiations because WTO rounds of negotiation can be quite lengthy. The Uruguay Round for instance was concluded after seven and a half years³³. The Doha Round is now on its 14th year and is yet to be concluded³⁴ with the WTO Tenth Ministerial Conference to be held in Kenya,³⁵ one of the EAC CU partner states. With such lengthy negotiations and the need to have a joint position on all negotiated agreements the need to have a harmonized and consistent stance cannot be over-emphasized. The prospect of the EAC CU and EAC by extension of securing favourable outcomes for the partner states becomes quite high when they consistently speak with one voice on all the issues over negotiated at the WTO.

3.2.3 Capacity to Employ and Maintain Adequate Technically Trained Negotiators

In a study carried out by the African Trade Policy Centre it was found out that the major impediments to current negotiation abilities in the EAC were:

Inadequate financial capacity to cover the high cost of participation from the region and delegations of Partner states, inadequate funds to facilitate studies to inform the negotiation process...]³⁶

³¹ Section 5 (1) (f).

³² Section (5) (1) (e).

³³ World Trade Organisation, 'The Uruguay Round', (World Trade Organisation, 2015) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm> accessed 1st October, 2015.

³⁴ World Trade Organisation, 'The Doha Round', (World Trade Organisation, 2015) <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed 1st October, 2015.

³⁵World Trade Organisation, 'The Tenth Ministerial Conference,' (World Trade Organisation, 2015) <https://www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_e.htm> accessed 1st October, 2015

³⁶Tindyebwa Amos (n1).

This section deals with the prospect of ensuring the EAJTNC has adequately trained negotiators who are well informed on the issues to be negotiated and the entire negotiation process.

Firstly, the Act when discussing the qualifications of members of the EAJTNC requires that such a person should have proven experience in relevant areas of trade.³⁷ This ensures that the issue of the delegation being sent to carry out negotiations on behalf of the EAJTNC and EAC CU has the technical expertise to negotiate on behalf of the partner states. Secondly the Act requires that such a person should not be a government Minister.³⁸ This can be presumed to be necessary to ensure that the members of the EAJTNC are independent and are not subject to manipulation and interference by the executive arms of government of the respective partner states. Further members of the EAJTNC should not be officers in the service of the Act unless the Act prescribes so.³⁹ This provision is very necessary because it ensures that the members of the EAJTNC dedicate all their time to matters of the Commission. It also helps to avoid a situation in which the members of the Commission would find themselves in conflict of interest situations bearing in mind that their partner states are members of multiple multilateral and regional organizations in which their individual interests might be conflicting.

Moreover, the members of the Commission should have an interest and proven experience in the affairs of the Community.⁴⁰ In all the negotiations to be handled by the Commission, the Community will be at the centre stage since it is its interests that the Commissioners should be securing. It therefore follows that such a person should know every necessary detail about the community and more so the history of the EAC. The history of the Community is especially important because with such knowledge the Commissioners will be able to guard against the factors that led to the failure of the erstwhile EAC.

In order to ensure that the negotiators are adequate, the EAJTNC has been given the power to appoint such Committees as it may deem appropriate to assist it in carrying out its functions and may assign to any Committees such functions as it may consider necessary.⁴¹ This is very relevant to this paper, because this paper proposes that the EAJTNC appoints one such

³⁷ Section 6 (5) (b).

³⁸ Section 6 (5) (c).

³⁹ Section 6 (5) (d).

⁴⁰ Section 6 (5) (e).

⁴¹ Section 9 (1).

Committee whose mandate will be to handle WTO matters of the EAC. This will ensure that there is some form of specialization and therefore the appointees of the Commission can dedicate all their time and resources as well as research to handling one matter, that is the WTO. Moreover seeing how long the WTO rounds take, it is very necessary that the negotiators be in a position to carry out specific research on the areas of discussion, which they can effectively do, only if they specialize in that area. The benefit of specialization is that even when it comes to sending the EAC delegation to Geneva or Brussels for training⁴², the delegation will be well defined and structured capable of maximizing all the resources provided for such training for the benefit of the Community as opposed to the current situation where most of the delegations sent by the individual partner states are fragmented. Moreover, in Kenya most of the delegations sent for such training are members of the public service who are subject to job transfers in the public service⁴³, therefore interfering with the very necessary element of continuity in negotiations and negotiators negotiating on behalf of the EAC.

The Act also provides that the EAJTNC shall have a Directorate which shall be responsible for the day to day operations of the Commission.⁴⁴ Further that the Directorate shall have such departments as may be necessary to discharge the functions of the Commission.⁴⁵ This essentially means that the EAJTNC shall function like a corporate body with different departments to help it carry out its mandate. The mandate of the EAJTNC is varied and includes, harmonizing trade policies, developing an East African trade regime which regime is very necessary when it comes to accession to the WTO, conducting trade negotiations, conducting research, maintaining a databank on trade matters and other functions as outlined by the laws of the Community. This provision is necessary and very prospective because it gives the Commission powers to have all the necessary departments with adequate and professional manpower.

⁴²Tindyebwa Amos (n1).

⁴³ Ibid.

⁴⁴ Section 10 (1).

⁴⁵ Section 10 (2).

Lastly, another prospect is seen in the fact that the EAJTNC is empowered to maintain an adequate and professional workforce due to the fact that it is an independent Commission, The Commission is declared to be independent⁴⁶ and will not be subject to interference in carrying out its mandate by any person or government unless the directive for such interference comes from the Council of Ministers which is the body given the authority to check on the excesses of the Commission by the Act.⁴⁷ This means that the members of the Commission will be free to make decisions at the WTO on behalf of the Community without fear of repercussions from the individual partner states especially where the joint interest of the EAC CU contravene the interests of a specific individual partner state. Further payment of the members of the Commission in form or remuneration shall be determined by the Council⁴⁸ and terms and conditions of members of the Commission shall not be varied to the disadvantage of the member⁴⁹. This ensures that the Commissioners are financially independent in carrying out their overall mandate and avoids a situation whereby the Commissioners having come from different partner states and being paid by their employers in those states would have to dance to the tunes of their employer failure of which it would be taken that their falling prey to the common adage of biting the hand that feeds them.

Summarily, by the act enabling the EAJTNC to employ and maintain technically trained negotiations, it is considered a prospect because it ensures that the negotiators can take consistent, harmonized and well informed positions on behalf of the EAC CU and EAC by extension during WTO negotiations without fear or favour of being subjected to harsh negative repercussions in their respective countries since they are considered employees of the Commission and not their respective partner states.

In conclusion, enactment of the Protocol and Act respectively, has numerous benefits and prospects of ensuring that negotiations that are carried out at the WTO on behalf of the individual members of the EAC CU are carried out by an adequate number of professionals, secondly the decisions taken in such negotiations are well informed and consistent and lastly that the same have a sound basis in law.

⁴⁶ Section 12 (2).

⁴⁷ Ibid.

⁴⁸ Section 14 (1).

⁴⁹ Section 14 (2).

The next section of this paper shall be a detailed discussion that members of the EAC CU might encounter in the hopes of actualizing the dream of ensuring that negotiations carried out before the WTO on behalf of the partner states of the EAC CU are carried out jointly and not individually.

3.3 Challenges

3.3.1 Appointment of Members of the East African Joint Trade Negotiation Commission

Despite the Act having been signed into law in the year 2008, the Commissioners of the EAJTNC have not yet been appointed. In an article in the EastAfrican, the EAC Director-General in Charge of Trade and Customs is quoted as saying “The fact that the Act has not been operationalized does not mean we are not doing joint negotiations”.⁵⁰

This paper differs with this position because there being an Act in force, anything done contrary to what the act provides is and should be considered illegal. Firstly the Act makes it mandatory for the partner states to negotiate as a bloc in all matters relating to regional and multilateral trade.⁵¹ Moreover, the act vests the mandate of conducting trade negotiations on behalf of the EAC partner states in the Commission. It therefore means that anybody that carries out negotiation on behalf of the EAJTNC that is not the EAJTNC does so in contravention of the Act. Such a body is acting ultra-vires and the actions that flow from such ultra-vires acts should be considered to be illegal.

In addition, the Act makes it mandatory for the summit to appoint the first members of the Commission within Ninety days of coming into force of the Act.⁵² It is now seven years since the Act was signed into law and the members of the Commission have never been appointed yet the partner states continue to conclude agreements as a bloc, for instance the Economic Partnership Agreement concluded with the European Union on 16th October, 2014.⁵³

⁵⁰Francis Ayieko, ‘EAC still negotiate trade pacts as one despite 2008 law’ *The East African* (Nairobi, 4th October, 2010) <<http://www.theeastafrican.co.ke/news/EAC%20states%20still%20to%20negotiate%20trade%20pacts/-/2558/1024814/-/9f3mip/-/index.htm>> accessed 3rd October, 2015.

⁵¹National Council for Law Reporting (Kenya Law) (n13); Section 3 (3).

⁵² Section 18.

⁵³ International Centre for Trade and Sustainable Development, ‘EU and EAC seal EPA deal’ (International Centre for Trade and Sustainable Development ICTSD Switzerland, 2014) < <http://www.ictsd.org/bridges-news/bridges-africa/news/eu-and-eac-seal-epa-deal>> accessed 3rd October, 2015.

This paper recommends that the members of the Commission be appointed as a matter of urgency so as to enable the EAJTNC to carry out its all-important mandate as sanctioned by the act and enable it appoint the Committee that this paper proposes should be appointed to handle WTO matters. This would have the trickle effect of ensuring the EAJTNC and the directorate are in place and functional therefore work on drafting the trade regime of the EAC can begin on a legally sanctioned note. Moreover harmonization of the negotiating positions on the individual partner states on the matters concerning the EAC CU and the WTO and other regional and multilateral organizations also needs to be done so as to ensure all the EAC partner states speak with one authoritative voice through the legally sanctioned body that is the EAJTNC.

3.3.2 Reforming the Trade Regime of the East African Customs Union to comply with the WTO requirements

In the previous Chapter, this paper proposed that the partner states of the EAC should jointly make a request for accession to the WTO through the organ of the EAC CU. The EAC CU is a regional bloc composed of five individual partner states at different stages of development. According to Igor Kavas:

Countries seeking to become Members of the WTO must be prepared to perform a hefty volume of highly demanding work. Not only do they need to submit a voluminous amount of documents and attend meetings to answer questions; they also may need to make extensive and substantial changes to their tariffs and taxes, as well as revise many of their existing laws and regulations in order to bring them into conformity with the WTO norms and standards.⁵⁴

The EAC CU is in the process of harmonizing laws of the individual partner states and coming up with laws for the governance of the customs union. If it is to submit a request for accession, the laws of the EAC CU will have to be submitted to the WTO for scrutiny to determine their level of compliance with the requirements of the Uruguay Round Agreements.⁵⁵ Further there may be a further need to revise such laws or amend them to comply with WTO requirements. Further administrative systems and structures which are in the process of being set up may also need to be re-organized. The EAC CU will have to bring its trading regimes which are currently

⁵⁴Igor I. Kavas, 'WTO Accession: Procedure, Requirements and Costs' (2007) 41 J. World Trade 453.

⁵⁵ Ibid.

under revision in the individual partner states into conformity with the WTO norms. These changes may require institutional reform and the process of bringing about such changes in the individual partner states is quite complex and immense as it involves proposals for amendment being made in the respective legislatures of the partner states and might require authorization at different levels of the national legislatures as in the case of Kenya. These changes can become a serious obstacle to accession.

In addition the WTO does not have leeway for a gradual system for reform of the existing systems making such requirements a non-negotiable pre-requisite for joining the WTO. These problems have been faced by a number of applicant states seeking to accede to the WTO such as the Russian Federation⁵⁶ and Azerbaijan.⁵⁷

Most applicant states seeking accession to the WTO have had problems acceding to the WTO due to the work involved in the process of reforming the trade regime. For the EAC CU it seems that the problem will be compounded by the fact that; first, the trade regimes of the five countries have to be harmonized into a single draft that is acceptable to all the partner states. This can also be problematic because of the language barriers that hitherto existed between the EAC partner states. For instance Burundi adopted a draft law to make English one of its official languages as it has always been a francophone country.⁵⁸ The next step would now involve harmonizing the trade regime with the requirements of the Uruguay Round Agreements. The situation is made even worse by the fact that there is no provision for gradual reform. Further even the EU formerly European Communities that the EAC seeks to emulate in running negotiations on behalf of a regional bloc did not go through the rigorous accession process since it was one of the founder members that acceded to the WTO upon its formation as former members of GATT on 1st January, 1995.⁵⁹ The EAC CU will therefore not have the benefit of learning from the

⁵⁶Dyker David A, 'Russian Accession to the WTO - Why Such a Long and Difficult Road?' 16 *Post-Communist Economies* (2004), 3-20.

⁵⁷Parenti, Antonio, 'Accession to the World Trade Organization: A Legal Analysis', 27 *Legal Issues of Economic Integration*, (2000) 141-157.

⁵⁸Group de Presse, 'English is now official language of Burundi' *IWACU English News* (Burundi, 17th September, 2014) < <http://www.iwacu-burundi.org/blogs/english/english-is-now-official-language-of-burundi/> > accessed 4th October, 2015.

⁵⁹World Trade Organisation, 'Members and Observers', (World Trade Organisation, 2015) < https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm > accessed 3rd October, 2015.

experience of the EU not to mention that the accession process is different for each applicant because the laws and intuitions of each applicant are different.

In order to try and deal with this challenge, this paper propose that prior to submission of the accession request and once the Committee to handle WTO matters has been appointed, the Committee should come up with a detailed plan on how the accession process should be undertaken and an approximate within which each stage of the accession process should be undertaken. They should detail what the accession process would entail for both the individual partner states as well as the EAC CU. They should have in place a timetable for the performance of accession work. Essentially this challenge can be tackled if the Committee of the EAJTNC charged with handling WTO work as proposed approaches the accession process in a systematic manner.⁶⁰

3.3.3 Mandatory Timelines

The Act was enacted with strict deadlines phrased in mandatory language; some of which have not been complied with. This presents challenge in the sense that, having not complied with the strict deadlines provided for in the Act; do the acts done after the expiry of such times become illegal?

Section 15 (2)⁶¹ for instance provides that the Partner states shall integrate their respective delegations to the regional and multilateral trade negotiations into a single East African Delegation within six months from commencement of the Act. As discussed in the previous chapter, the EAC CU is yet to accede to the WTO and therefore it is not legally recognized at the WTO. It therefore follows that the EAC cannot have a joint delegation to represent its interests because, the EAC CU is not recognized by the WTO. As proposed the EAJTNC should appoint a Committee to handle the negotiations on behalf of the EAC CU and EAC by extension at the WTO. Would the acts performed by the Committee with respect to submitting the accession request be considered illegal as the Committee was not appointed within six months from the commencement of the Act?

⁶⁰ Igor Kavas (n54).

⁶¹National Council for Law Reporting (Kenya Law) (n13).

Further and as previously discussed under section 18,⁶² the Summit should within ninety days of the coming into force of the Act, appoint the first members of the Act. As established before, the Commissioners have never been established and this begs the question, when they are eventually appointed would such appointments be considered legal?

The Act⁶³ also makes it mandatory for the regulations to be made under section 19 (1) of the Act to be laid before the Assembly for approval within six months of its commencement. Again as discussed previously, the draft regulations are reported to have just been circulated to the partner states for consultation at the national level and are yet to be placed before the Assembly yet it is approximately seven years since the Act was enacted.⁶⁴ Would the passing of those regulations, when they are passed be considered illegal?

Furthermore and curiously enough, the Act pegs all the deadlines on a commencement date which the Act itself does not prescribe. There is no commencement date under the Act. It therefore follows that all the deadlines prescribed under the Act are ambiguous and therefore implementation of the Act is thrown into disarray.

This paper thus proposes that the Legislative Assembly of the EAC should prescribe a commencement date of the East African Joint Trade Negotiations Act as matter of urgency bearing in mind the deadlines set under the Act so that the implementation of the Act which seems to demand a lot of time is not caught up within the deadlines already prescribed under the Act.

This then marks the end of this Chapter; having discussed in detail both the prospects and the challenges that should be anticipated, if the dream of the EAC conducting trade negotiations as bloc at the WTO through a Committee appointed by the EAJTNC is to come to fruition. The next chapter will be the conclusion of this paper and recommendation on how to fast track the process of ensuring that the EAC carries out its negotiations before the WTO jointly through a Committee of the EAJTNC.

⁶² Ibid

⁶³ Section 19 (2)

⁶⁴ Agencies (n19)

CHAPTER 4

4.0 CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

In the year 2008, the East African Legislative Assembly enacted the EATNA which made it mandatory for the partner states of the EAC to negotiate as a bloc in all matters relating to regional and multilateral trade. All the partner states of the EAC are members of the WTO in their individual capacities. This paper has been written with a view to understanding the process of ensuring that the EAC partner states carry out trade negotiations at the WTO jointly as a regional bloc and the extent to which it can review its legal regime and reform its institutions to facilitate the same.

This paper sought to test the following hypotheses in chapters one, two and three; that the current legal regime of the EAC favours the EAC partner states carrying out joint trade negotiations before the WTO, secondly that factors such as not appointing members of the EAJTNC, reforming the EAC CU trade regime to conform to WTO requirements and mandatory timelines hinder the EAC partner states from carrying out joint trade negotiations at the WTO; and lastly that a knowledge gap exists on the rigorous accession process and all key players in the WTO need to embark on mass sensitization programs on the process, what it entails and how it can be simplified to make accession process less cumbersome. All the hypotheses have been proved in the positive.

This paper has also been written at a time when one of the EAC partner states; Kenya, is gearing up to host the WTO Ministerial Conference in December.¹ It is the hope of the author that the EAC partner states will strike when the iron is hot and when the political goodwill in the organisation lies in its favour, to embark on the process of acceding to the WTO through the EAC CU. The rigorous process of accession might just be relaxed in its favour and the dream and legal requirement of the EAC carrying out its trade negotiations at the WTO as a block will see the light of day sooner than expected. This chapter therefore makes recommendation of what

¹ World Trade Organisation, 'The Tenth Ministerial Conference', (World Trade Organisation, 2015) <https://www.wto.org/english/thewto_e/minist_e/mc10_e/mc10_e.htm> accessed 10th October, 2015

should be done to make the dream a reality and ensure that the EAJTNC becomes significantly stronger in negotiations therefore increasing its chances of securing beneficial outcomes for the partner states in areas where increased bargaining power is necessary. The specific areas include: subsidies to the clothing and textile industry in developed countries; Duty Free Quota Free (DFQF) market access for products from least developed countries to developed countries; and removal of protectionist measures against products that can be considered to be sensitive in developed countries such as sugar, rice, leather, fisheries, and cotton.²

4.2 Recommendations

Chapter three analysed the prospects and challenges of the EAC through the EAJTNC carrying out joint trade negotiations at the WTO. This section therefore makes recommendations on how the EAC can surmount the challenges identified in chapter three to ensure that the dream and aspiration of the EAC of carrying out joint trade negotiations sees the light of day as herein under:

4.2.1 Appointment of Members of the EAJTNC

For the EAC CU to seek to accede to the WTO, it must submit a memorandum of its foreign trade regime as has been highlighted in chapter 2. The EATNA vests the mandate of developing an East African Trade Regime in the EAJTNC³. Further the EATNA makes it mandatory for the EAC partner states to negotiate as a bloc. The act gives the mandate of conducting trade negotiations on behalf of the EAC partner states in the EAC. It therefore means that any body that comes up with an East Trade Regime or conducts trade negotiations on behalf of the EAC partner states that is not the EAJTNC, is doing so illegally.

²Cuts International, 'Call for an EAC Bloc in WTO Negotiations' (2013) <<http://www.cuts-geneva.org/pactec/publications/77-action-alerts/236-call-for-an-eac-bloc-in-wto-negotiations.html>> accessed 10th October, 2015.

³ Section 5 (1) (c)

Therefore, this paper recommends that the Council of Ministers of the Community should as a matter of urgency appoint the members of the EAJTNC in accordance with the provisions of section 6 (2) of the Act⁴ since the absence of a fully functional EAJTNC is holding back the entire accession process of the EAC CU and perpetrating an illegality whereby the EAC partner states continue to present their interests individually in WTO negotiations in contravention of the EATNA.

4.2.2 Need to set a Commencement Date for the EATNA

As has been discussed in chapter 3, the Act pegs several mandatory deadlines on the Commencement act such as the making of the regulations under the Act, the appointment of members of the EAJTNC and the integration of the respective delegations of the EAC to regional and multilateral trade negotiations into a single East African delegation on the commencement. Curiously, the Act does not have a commencement date.

It is therefore recommended that the East African Legislative Assembly should as a matter of urgency prescribe a commencement date for the Act in a manner prescribed by the law and seek to extend the deadlines that will have expired under the Act.

4.2.3 Development of an EAC CU WTO Accession Plan

In Chapter 2, the accession process was discussed in detail and this paper established that for the EAC CU it will entail the EAC CU first harmonizing the laws of its partner states before harmonizing those laws with the requirements of the Uruguay Round Agreements. This paper has also established that the accession process is very rigorous, costly and time consuming.

This paper therefore recommends that the Committee of the EAJTNC which it proposes should be charged with handling negotiations before the WTO should come up with an accession plan that will take into account the reforms that need to be done to both the national laws and the laws of the customs union as well as the finances that will be required for such reform; such that when the time becomes rife for the EAC CU to submit an accession request, the accession will be done

⁴ National Council for Law Reporting (Kenya Law), ‘The East African Trade Negotiations Act, 2008’ (2015) <http://kenyalaw.org/kl/fileadmin/pdfdownloads/EALA_Legislation/EASTAFRICANTRADENEGOGIATIONSACT2008.PDF> accessed 11th October, 2015

in an organized manner and not as haphazard as has been the experience of many of the applicants to the WTO.

The committee should also ensure that it establishes consistent programs for performance of the anticipated accession work and a tentative plan of which body or institutions should perform that work.

4.2.4 Submission of a Formal Accession Request to accede to the WTO

As has been discussed, the Marrakesh agreements recognize membership only states and customs union possessing full autonomy in the conduct of their matters. Acquisition of membership of the WTO unlike other international organizations like the United Nations (UN) is not automatic and therefore requires the applicant to submit a request for accession as was discussed in detail in chapter 2. All the members of the EAC are individual members of the WTO but this paper proposes that the EAC seeks to join the WTO through the EAC CU.

This paper therefore recommends that once the EAJTNC is functional, the Committee that it proposes handles WTO negotiations is in place and the accession plan discussed above has been formulated, then, the Committee should submit a formal written application seeking to accede to the WTO to the Director General of the WTO.

4.2.5 Encourage Participation of the EAC regional stakeholders in WTO matters

Negotiations at the WTO take place between governments and non-government stakeholders do not have an opportunity to ventilate their issues in such negotiations. Non-government stakeholders should be given an opportunity to beef up the negotiating teams negotiating position through stakeholders' forums.⁵

This paper therefore recommends that the national trade negotiating committees of partner states should organize for stakeholders' forums with respect to the on goings at the WTO so that the views expressed by those stakeholders can inform the negotiating positions of the national

⁵Tindyebwa Amos, 'Capacity Building for International Negotiations and Trade Facilitation in the East African Community' [2011], No. 84 ATPC < <http://www1.uneca.org/Portals/atpc/CrossArticle/1/WorkinProgress/84.pdf>> accessed 30th September, 2015.

negotiating committees and eventually the EAC CU negotiation positions which are to be harmonized from the national positions.

4.2.6 Development of Joint Training Programs

This paper has identified the need for training on two limbs; firstly on the technical aspects of the accession process and secondly on the implications of the proposals that are usually floated at the WTO negotiations.

With respect to the technical aspects of the accession process, the WTO Secretariat has established extensive educational programs about the contents of the Uruguay Round agreements⁶. However its instructors are usually unable to explain adequately to the applicants how the Uruguay Round agreements are going to affect the applicant's local trading regime and impact its administrative systems since most of the instructors have limited knowledge on the laws and institutions of the applicants. Furthermore a number of WTO observers have noted that most of the training is usually theoretical on the Uruguay Round Agreements and not practical on how the accession work should be performed⁷.

This paper therefore recommends that the WTO should provide technical courses on how the accession work should be performed; informed by the experience of the states that have been successful in acceding to the WTO or those who are in the process of acceding to it. Existing WTO members should also offer assistance to applicants on how to navigate through the murky waters of the accession process.

Secondly, the members of the Committee that is proposed should handle WTO negotiations should also be trained in the development issues that are at the core of the multilateral trading system that is the WTO. This paper recommends that Donors and development agencies should assist in technical studies and training of the Committee of the EAJTNC on the possible implications of the proposals that are floated at the WTO rounds of negotiations such as the

⁶ Raymond Saner and Lichia Yiu, *Does it Pay to Train?: ISO 10015 Assures the Quality and Return of Investment of Training*, ISO Focus (April 2005) 7-11.

⁷ Igor I. Kavas, 'WTO Accession: Procedure, Requirements and Costs' (2007) 41 J. World Trade 45

ongoing Doha Round⁸. Essentially helping the EAJTNC; through its Committee, to benefit in protecting and developing those areas that are sensitive to the EAC partner states⁹.

4.2.7 Need to make the EAJTNC Financially Independent

The EATNA provides that the budget of the Commission shall be prepared by the Secretary General of the Community for Consideration by the Council and approval by the Assembly. This therefore means that the EAJTNC does not have independence over its financial affairs. This is against the backdrop of the finding in this research that the accession is a very costly affair.

This paper therefore recommends that provision be made for the Commission to establish and maintain a fund. This fund should be controlled by the Commission and not the Council in which the Community as well as Donors and Development Agencies can make deposits and donations to enable it perform its mandate. The funds can then be utilized in training of its personnel as well as maintaining its personnel at the various regional and multilateral trade fora. This will then ensure that the EAJTNC is not subject to manipulation when making its decisions flowing from the common adage that he who pays the piper calls the tune.

4.2.8 Need for the WTO to recognize Schemes for Gradual Accession to the WTO

The WTO does not allow parties who are not members to participate in its negotiations. Such applicants are only allowed to be observers. Moreover it does not make provision for parties to participate in WTO negotiations as they embark on reforming their trade regimes to comply with WTO requirements.

Borrowing from the experience of the Russian Federation which took 18years for it to become a member of the WTO and having noted that the accession process is very rigorous, complicated and time consuming, this paper recommends that the WTO should relax its accession requirements such that it recognizes schemes of gradual accession to it so long as certain identified requirements are fulfilled within certain reasonable timelines that it sets, then such members should be allowed to participate in WTO negotiations pending successful completion of their respective accession processes.

⁸ Tindyebwa Amos (n5)

⁹ Ibid

If the recommendations proposed above are implemented, then, the author of this research believes that the EAC through a Committee of the EAJTNC should be able to carrying out its trade negotiations at the WTO jointly for the betterment of the Community and benefit of the members of its partner states. That then marks the end of this research paper.

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