



**The WTO Consistency of Inclusion of Trade Remedy provisions within the East Africa
Community Customs Union.**

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By

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DECLARATION

I, WAMALWA NEKESA STEPHANIE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 

Date: **31st January, 2020.**

This Research Proposal has been submitted for examination with my approval as University Supervisor.

Signed:

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I. List of Agreements and Disputes

i. Conventions and Treaties

Agreement	Full Citation
Agreement on Safeguards	1869 U.N.T.S. 154
Agreement on Subsidies and Countervailing Measures (SCM Agreement)	1869 U.N.T.S. 14
Agreement on the Implementation of Article VI of GATT 1994	1868 U.N.T.S. 201
General Agreement on Tariffs and Trade 1994 (GATT 1994)	867 U.N.T.S 190 33 I.L.M 1153(1994).
Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.	BISD 26S/203 ,1979
Protocol on the Establishment of the East African Customs Union.	[2005]

ii. Disputes & Cases

1. Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, [WT/DS34/AB/R](#), adopted 19 November 1999, DSR 1999:VI.
2. Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, [WT/DS217/AB/R](#), [WT/DS234/AB/R](#), adopted 27 January 2003, DSR 2003:I.
3. Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, [WT/DS189/R](#), adopted 5 November 2001, DSR 2001:XII.
4. Panel Report, *Brazil – Taxation, Brazil – Certain Measures Concerning Taxation and Charges*, [WT/DS472/R](#), Add.1 and Corr.1 / [WT/DS497/R](#), Add.1 and Corr.1, circulated to WTO Members 30 August 2017 [appealed; adoption pending].
5. Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, [WT/DS400/AB/R](#) / [WT/DS401/AB/R](#), adopted 18 June 2014, DSR 2014:I.
6. East African Center for Trade Policy and Law v Secretary General, EACJ Ref. No. 9 of 2012.

7. Appellate Body Report, United States- Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R , adopted 6 November 1998.

II. List of Abbreviations

AD Agreement	Anti-Dumping Agreement
DSB	Dispute Settlement Body
CU	Customs Union
EAC	East African Community
EACJ	East African Court of Justice
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries.
FTAs	Free Trade Areas
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
MFN	Most Favored Nation
NTBs	Non-Tariff Barriers
ORCs	Other Regulations of Commerce
PTA	Preferential Trade Agreement
RTA	Regional Trade Agreement
SCM Agreement	Subsidies and Countervailing Measures Agreement
TWAIL	Third World Approach to International Law
UNTS	United Nations Treaty Series
WTO	World Trade Organization

III. Abstract

Recent Developments on Trade Remedy Regimes have sought to challenge the consistency of Customs Unions and Free Trade Areas establishing trade remedy laws of their own. Various Scholars both, economist and legal have produced literature claiming that trade remedies under Customs Unions established in Article XXIV of the GATT 1994 is inconsistent with the object and purpose of the GATT on trade remedies in general. Recently very few customs unions in Africa have developed various trade remedy laws to govern and regulate trade within their territories. One of these customs union is the East African Community (EAC). In this study, we will seek to prove the consistency of the trade remedy provisions within the Protocol Establishing the EAC Customs Union through studying the effects of the execution of the laws amongst the Member States of the EAC. The study will concentrate on studying the compliance of the EAC Customs Union trade remedy provisions with the WTO.

CHAPTER 1: INTRODUCTION

I. Background

The World Trade Organization (WTO) upholds and sticks to a core WTO principle of the Most Favored Nation (MFN) principle.¹ The MFN treatment obligation is found in Article I: I of GATT 1994. For a measure to be consistent with the MFN principle then it must meet the criteria set out by the four tier test under Article 1:1 GATT.² This criteria is : 1) the measure must fall under the scope of application of Article 1:1 GATT; 2) the measure must confer and advantage; 3) the products concerned must be like products; 4) the advantage must be conferred immediately and unconditionally.³

Nevertheless, measures that are inconsistent with the MFN principle may be justified through trade remedies.⁴ Trade remedies are laws implemented by WTO members in attempt to mitigate the adverse impact of various trade practices on domestic industries and workers within their territories.⁵ They include: a) Action against dumping under the *Anti-Dumping Agreement* (later known as the AD Agreement).⁶ b) Subsidies and Countervailing measures to offset subsidies under the *Subsidies and Countervailing Measures Agreement* (SCM Agreement).⁷ c) Emergency measures to limit imports temporarily, designed to "safeguard" domestic industries under the *Safeguards Agreement*.⁸

Consequently, trade remedy provisions may be implemented within Free Trade Areas (FTAs) or customs unions (CUs) collectively established through Regional Trade Agreements (RTAs) or

¹ Bossche V and Zdouc W, *The law and policy of the World Trade Organization*, Cambridge, Cambridge University Press, 2013, 307.

² Bossche V and Zdouc W, *The law and policy of the World Trade Organization*, Cambridge, Cambridge University Press, 2013, 311.

³ Appellate Body Reports. *EC- Seal Products* (2014), [5.57].

⁴ Bossche V and Zdouc W, *The law and policy of the World Trade Organization*, Cambridge, Cambridge University Press, 2013, 671-687.

⁵ Dunn A M, "Antidumping," in *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, ed, American Bar Association, Washington, 1996, 246.

⁶ Agreement on the Implementation of Article VI of GATT 1994, 1868 U.N.T.S. 201.

⁷ Agreement on Subsidies and Countervailing Measures, 1869 U.N.T.S. 14.

⁸ Agreement on Safeguards, 1869 U.N.T.S. 154.

Preferential trade Agreements under Article XXIV of the GATT 1994.⁹ To begin with, RTAs are economic integration efforts between adjacent countries or countries in the same region.¹⁰

Nevertheless, before delving into the definition of a CUs, one must first understand what a customs territory is. A customs territory is a geographic territory with uniform customs regulations.¹¹ CUs as defined under Article XXIV 8(a) of GATT 1994 are the substitution of single customs territory for two or more customs territory.¹² RTAs and CUs may be established through Article XXIV GATT 1994, the Enabling Clause¹³ and under Article V GATS. RTAs under the enabling clause are governed by conditions as prescribed by the contracting parties while those under Article XXIV are governed by standard external and internal requirements.¹⁴

For a Customs Union to be established then they must be consistent with requirements under Article XXIV:8(a)¹⁵ and Article XXIV:5(a)¹⁶ of GATT 1994. Article XXIV:8(a) of the GATT 1994 establishes the standard for internal trade for constituent members within the CUs. It requires members to eliminate other restrictive regulations of commerce (ORCs) and duties with respect to substantially all the trade between them.¹⁷ Article XXIV:5(a) requires that, duties and ORCs in CUs shall not be higher or more restrictive to trade with third countries.¹⁸ The AB noted in *Turkey – Textiles*, that it is necessary to establish that both conditions are fulfilled.¹⁹ Additionally, parties must also ensure that they notify their CUs according to the Transparency Mechanism for RTAs as laid out under Article XXIV:7(a) GATT 1994.²⁰

The Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries is also known as the Enabling Clause. It enables members to accord more

⁹ Bossche V and Zdouc W, *The law and policy of the World Trade Organization*, Cambridge, Cambridge University Press, 2013,673.

¹⁰ Bossche V and Zdouc W, *The law and policy of the World Trade Organization*, Cambridge, Cambridge University Press, 2013, 671.

¹¹ Article XXIV:5, *General Agreement on Tariffs and Trade 1994*, 867 U.N.T.S 190 33 I.L.M 1153(1994).

¹² Article XXIV:8(a), *General Agreement on Tariffs and Trade 1994*, 867 U.N.T.S 190 33 I.L.M 1153(1994).

¹³ Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, BISD 26S/203 ,1979.

¹⁴ Paragraph 3, Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, BISD 26S/203 ,1979.

¹⁵ Article XXIV:8(a), *General Agreement on Tariffs and Trade 1994*, 867 U.N.T.S 190 33 I.L.M 1153(1994).

¹⁶ Article XXIV:5(a), *General Agreement on Tariffs and Trade 1994*, 867 U.N.T.S 190 33 I.L.M 1153(1994).

¹⁷ Appellate Body Report, *Turkey - Textiles*,[59].

¹⁸ Article XXIV:5(a), *General Agreement on Tariffs and Trade 1994*, 867 U.N.T.S 190 33 I.L.M 1153(1994).

¹⁹ Bossche V and Zdouc W, *The law and policy of the World Trade Organization*, Cambridge, Cambridge University Press, 2013, 680.

²⁰ Article XXIV:7(a), *General Agreement on Tariffs and Trade 1994*.

favorable treatment to developing countries without according such treatment to other countries.²¹ The Enabling Clause enables RTAs between developing countries, to be more flexible than Article XXIV of GATT.²² The EAC is one of the CUs notified under the enabling clause.

II. Statement of the Problem

This study involves the WTO consistency of trade remedy provisions within CUs notified in the enabling clause and Article XXIV GATT. It is unclear whether trade remedy provisions should be eliminated within CUs. Arguably, the inclusion of trade remedy provisions in CUs seems unfair to the members who are party to the CUs. This is because it goes against the objective of creating CUs which is to eliminate customs duties within a specified region. Trade remedy provisions would have no purpose within CUs who have no restrictions on custom duties among their parties. This is due to the fact that there would be no need for remedies without restrictions. This leads to the lack of clarity as to whether trade remedy provisions should be eliminated as other restrictions of commerce within CUs. This problem extends to both CUs notified under the enabling clause and Article XXIV GATT. The East African Community CU is an example of one facing this problem. It will be the focus of this study.

III. Statement of Objectives

The primary objective of this study is to investigate whether the trade remedy regime in the EAC Custom Union is WTO consistent. The secondary objectives of this study are:

- a. To investigate the WTO consistency of EAC trade remedy provisions under the Protocol Establishing the East Africa Customs Union.
- b. To determine the different effects of notifications of customs unions under the enabling clause and Article XXIV GATT.
- c. To determine whether trade remedy provisions within EAC customs union should be eliminated.

²¹ UNCTAD, 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods', *United Nations Office*, New York, 2016, 5.

²² UNCTAD, 'African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods', *United Nations Office*, New York, 2016, 5.

IV. Hypotheses

This study will test the following hypothesis:

- a. WTO consistency within the EAC trade remedies provisions is significant to the success of trade within the EAC region.
- b. Inclusion of trade remedy provisions under customs unions notified under Article XXIV GATT and the enabling clause are WTO consistent.

V. Research Question(s)

The study will focus on the following research questions:

- a. Are the EAC trade remedy provisions under Article 16-19 of the Protocol Establishing the East Africa Customs Union WTO consistent?
- b. What is the effect of the provisions on trade remedies in the Protocol Establishing the EAC Customs Unions?
- c. Should trade remedy provisions within the EAC customs union be eliminated as other restrictive regulations of commerce?

VI. Justification/Significance of the Research

This study is of utmost importance as it seeks to clarify the legality of trade remedies of the EAC in relation to the WTO. This study is significant to various stake holders involved in the matter. First, the Dispute Settlement Body (DSB). The DSB's decisions will increase in accuracy as to whether trade remedy provisions should be established within customs unions notified under the enabling clause. Second, the EAC customs union. When provisions of the EAC customs union confirm to WTO consistency, then this improves the efficiency of the provisions. Third, the EAC customs union parties. The relationship between the EAC customs unions parties will be improved because the WTO consistent regulations will be able to cater for the parties' interests. Fourth, this study will be of benefit to members of the WTO outside the EAC customs union because once the threshold of WTO consistency is determined within the EAC customs unions, other members would also benefit from the light shed on this grey area.

III. Scope and Limitations of the Study

1. There were unknown conditions such as incompetency at the facility the researcher went to carry out their research such as government or judicial offices. The researcher will focus on getting the most integral and knowledgeable member of the institution.
2. The number of interviewees were not enough to form a widely determined conclusion. The researcher will strive to interview various people from different areas so as to get a holistic view and conclusion.

IV. Outline of Dissertation and Flow of Arguments

This study is divided into five chapters:

Chapter 1 deals with the introduction part of the study. It will include background, Objectives that this study seeks to meet, the research questions this study has, the statement of the problem leading to this study, the justification of why the study is being carried out, hypothesis, literature review and timeline of the study.

Chapter 2 will mainly expound more on the theoretical framework and how the different theories highlighted in this proposal (Public Interest, Conflict theory, TWAIL) will be used in the study. A brief background of the theories will be provided.

Chapter 3 will examine the current situation of the relationship of including trade remedy provisions within CUs. This will be done by establishing what it means for a measure to be WTO consistent, focusing on the relationship between Article XXIV:5(a) and 8(a) GATT, dealing with the definitions and differences between ORCs and ORRCs and lastly what it means to be notified under the enabling clause.

Chapter 4 will focus on the effects of the EAC trade remedies within its parties. The study will focus on a brief review of the existing trade remedy provisions within the EAC CU, how the provisions are implemented and whether they are necessary as seen through the analysis of CUs in chapter 3 above.

Chapter 5 will be the conclusion part of the study. It will also provide recommendations as to how the situation on EAC CU trade remedies can be improved.

V. Summary of Overall Results

To obtain the various objectives and hypotheses that the study is meant to determine, the study goes beyond all limited factors in a bid to find the answers and all that establish the answers the way they are. To the question of WTO consistency of trade remedy provisions, the study brings out the aspect that there are no written laws expressing the thought that trade remedies within the EAC customs union goes against WTO laws and regulations. Thus, the study uses a different technique in attempt to determine if the said hypothesis is true. The study dives into the practicability aspect of the effects that the trade remedy provisions have on the member states. The results show that there is more that need to be done in actively using the trade remedies and also explains the benefits and downfalls that this may have on the member states.

VI. Summary of Overall Conclusions.

Conclusively, the study rounds up the fact that the WTO consistency of including trade remedy provisions within the EAC depends on the overall benefits that it brings. Since the WTO does not place stringent rules and laws on customs unions that have been notified under the enabling clause, then they are at discretion to choose what works best for the region. In a bid to do this, the WTO still has a lot to do within such customs unions, the EAC being a well set out example. Thus it would be a premature and inert decision to base the consistency of the inclusion of trade remedy provisions within the EAC by comparing the EAC to other CUs that include developed countries. This is because developing countries are still growing and there is need for the flexibility in regulations so as to assist them in their journey of economic growth and regional integration. For this purpose, the study concludes that it would not be fair to outright term the trade remedy provisions within the EAC as inconsistent and should allow more time to actually produce accurate results.

CHAPTER 2: THEORETICAL FRAMEWORK

I. Introduction

This Chapter will explore the various theoretical foundations of African Custom Unions (CUs) as devolved from RTAs with an aim of highlighting the legal differences faced by African CUs. The main proposition of the study is whether the inclusion of trade remedies within the EAC Custom union is WTO consistent. This is because African CUs specifically the EAC veer off the traditional principles that CUs should heed to as lay out by WTO principles.

This chapter will explore two theories namely: The Theory of African Regional Trade Agreements as a flexible regime which will be mainly aimed to highlight the flexibility of African RTAs as compared to the traditional layout and the Theory of the Third World Approach to International Law (TWAAIL) that would seek to explain why this difference occurs and how it could be harmoniously incorporated within the already existing system.

i. Theory of African Regional Trade Agreements as a flexible regime

Seeing African RTAs on their own as flexible regimes helps us understand them differently and not as examples of treaty regimes on a path to becoming more like their European and North American counterparts.²³ This way, it is better to understand the challenges that these RTAs have been designed to address. Most African structures prefer informal settings as compared to the bureaucratic way of doing things.²⁴ It is for this reason that it is almost impossible to relate their performances by comparing them to European or American RTAs with the hope that they should emulate them in order to meet the requirements of integration.²⁵ The role of treaties was setting a formal structure with specific objectives such as creating peace and building mutual relations between States.²⁶ This was applied to the first generation of African RTAs but was later abandoned for the second generation of African RTAs which were more flexible and could set other objectives to achieve their purpose.²⁷ Eventually, this contrasted with the aim of RTAs which was to achieve

²³ Tiyanjana Maluwa, 'The Move from Institutions? Examining the Phenomenon in Africa', *Society of International Law Proceedings*, 2006, 264.

²⁴ Tiyanjana Maluwa, 'The Move from Institutions? Examining the Phenomenon in Africa', *Society of International Law Proceedings*, 2006, 264.

²⁵ Ravenhill J, 'The Future of Regionalism in Africa', in *The Future of Regionalism in Africa* by Ralph I. Onwuka & Amadu Sesay, Macmillan Education, 1985, 205.

²⁶ Dorr O & Schmalen K, 'Introduction: On the Role of Treaties in the Development of International Law in Schmalen K, *Vienna Convention on the law of Treaties: A commentary*, (ed), Springer Publishers, Berlin, 2012, 1-6.

²⁷ Vaitos CV, 'Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey', *World Development*, 1978, 718.

regional trade integration as integration requires a formal compliance with liberation commitments within specific time frames.²⁸ However, this is not necessarily the case as the flexible African RTAs have similar commitments meaning that flexibility does not necessarily translate to incompatibility.²⁹ This is known as the principle of variable geometry where these RTAs adopt flexibility by incorporating rules that provide different obligations between members and differences in timelines to comply with commitments that are based on the differences in the economic abilities of their members.³⁰

African RTAs contrast sharply with their counterparts in Europe and America where there is seen to be a high compliance of the legal framework.³¹ Treaty Commitments and experiences between African RTAs show the flexible regimes that are featured in African RTAs.³² Flexibility in African RTAs means that: first, they are regarded as flexible regimes as opposed to the rigid and scrupulous adherence. Second, they incorporate the principle of variable geometry of following timetabled and other commitments. Third, they equally adopt social, economic and political objectives. Fourth, they demonstrate preference for practical objectives. Fifth, they demonstrate a commitment to equitable distribution of trade gains. Sixth, they are characterized by overlapping and multiple memberships.³³

The Vinerian Theory assumed that trade creation would outweigh trade diversion if trade barriers were lifted.³⁴ This does not inform the African context of RTAs as many countries have similar products without bringing the issue of comparative costs.³⁵ African RTAs have not been set out on the principles of strictly complying with regional treaties. The effect of this leads to a growth in

²⁸ Vaitos CV, 'Crisis in Regional Economic Cooperation (Integration) Among Developing Countries: A Survey', *World Development*, 1978, 719.

²⁹ Chayes A & Chayes A H, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge MA, 1995, 200.

³⁰ Chayes A & Chayes A H, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge MA, 1995, 200.

³¹ Gathii J T, *African Regional Trade Agreements as Legal Regimes*, Cambridge University Press, Cambridge, 2011, 1.

³² Gathii J T, *African Regional Trade Agreements as Legal Regimes*, Cambridge University Press, Cambridge, 2011, 2.

³³ Bhagwati J and Krueger A O, *The Dangerous Drift to Preferential Trade Agreements*, AEI Press, Washington DC, 1995, 2-3.

³⁴ Viner J, *Studies in the Theory of International Trade*, Harper and Brothers Publishers, New York, 1937, 1-14.

³⁵ Viner J, *The Customs Union Issue*, Carnegie Endowment for International Peace, New York, 1950, 221.

regionalism not only through formal methods but informal ways as well.³⁶ The reason for this is that Africa is a diverse continent made of countries with different religions and cultures this is unlike Europe that was founded on major similarities.³⁷ The effect of this leads to a growth in regionalism not only through formal methods but informal ways as well.³⁸

African RTAs flexibility regime is a way of protecting this diversity while still finding a way to integrate the different economic interests in the regions. It is for this reason that CUS such as the EAC are dynamic and not rigidly set on compliance of legal frameworks. However, this should not be a ground to term these CUs and their trade remedies provisions as WTO inconsistent.

i. Third World Approach to International Law (TWAAIL)

The Third World according to TWAAIL-ers is a group of States that are economically, politically and culturally diverse but united in their common history of colonial experiences.³⁹ Most of the States had an effect of Eurocentric and pan-Eurocentric ideas influencing their ways of life after colonization.⁴⁰ TWAAIL is not a method classified by commonality of concerns but a sensibility and political orientation.⁴¹ The objectives of TWAAIL include: *first*, aim to develop an understanding as to how international law subordinates non-Europeans to Europeans through international law norms⁴²; *second*, to create opportunities for third world state participation in international law;⁴³ *third*, to propose an alternative of international law and to encourage coexistence of international law and other neoliberal approaches to international law;⁴⁴ *fourth*, to

³⁶ Gathii J T, *African Regional Trade Agreements as Legal Regimes*, Cambridge University press, Cambridge, 2011, 12.

³⁷ Gathii J T, *African Regional Trade Agreements as Legal Regimes*, Cambridge University press, Cambridge, 2011, 10-12.

³⁸ Gathii J T, *African Regional Trade Agreements as Legal Regimes*, Cambridge University press, Cambridge, 2011, 11.

³⁹ Mutua M, 'What is TWAAIL?', Proceedings of the 94th Annual Meeting of the American Society of International Law, 2000, 35.

⁴⁰ Chimni B S, 'Third World Approaches to International Law: A Manifesto', *International Community Law Review* 8, Netherlands, 2006, 1-5.

⁴¹ Eslava, L., & Pahuja, S, 'Beyond the (Post) Colonial: TWAAIL and the Everyday Life of International Law', *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, 45(2), 195-221.

⁴² Mutua M and Anghie A, 'What Is TWAAIL?', Proceedings of the Annual Meeting, *American Society of International Law*, vol. 94, 2000, 31-40.

⁴³ Mickelson K, 'Taking Stock of TWAAIL Histories', *10 International Community Law Review* 355, Netherlands, 2008, 357.

⁴⁴ Chimni B S, 'Third World Approaches to International Law: A Manifesto', *International Community Law Review* 8, Netherlands, 2006, 22.

focus on the eradication of underdevelopment of third world countries;⁴⁵ *fifth*, to understand and engage third world scholars in the analysis of international law.⁴⁶

According to B.S Chimni in his paper *Third World Approaches to International Law: A Manifesto*, states that third world countries deem international law as a way of Recolonization and not a way to achieve Neo-liberalization.⁴⁷ Mutua Makau agrees with this predicament as he terms international law as illegitimate and predatory.⁴⁸ Over the past decades, various other scholars have attempted to study the intellectual and political energy identifying the political, cultural and economic biases between international law and Third World countries.⁴⁹

This theory states that international law has a claim to be a universal kind of law and that this claim is not completely accurate.⁵⁰ However, Hugo Grotius highlighted international law to emanate European and Christian origin.⁵¹ Hugo expounds that international law is based on Europe as the center, Christianity as the basis for civilization, capitalism as innate in humans and imperialism as necessity.⁵² This outlook was the key to justifying, managing and legitimizing colonialism.⁵³

Looking into International Economic Law with concentration on the WTO laws on ratification allowing developing countries to notify their RTAs under the Enabling clause and not Article XXIV GATT, is an attempt by the developing states to administer the TWAIL theory for their own benefit.

⁴⁵ Mutua M and Anghie A, 'What Is TWAIL?', Proceedings of the Annual Meeting, *American Society of International Law*, vol. 94, 2000, 31.

⁴⁶ Mickelson K, 'Taking Stock of TWAIL Histories', *10 International Community Law Review* 355, Netherlands, 2008, 357.

⁴⁷ Chimni B S, 'Third World Approaches to International Law: A Manifesto', *International Community Law Review* 8, Netherlands, 2006, 1-5.

⁴⁸ Kennedy D, 'A New Stream of International Legal Scholarship', *7 Wis International Law Journal* 1, 1988, 81.

⁴⁹ First Generation Scholars: R. P Anand, Upendra Baxi, Christopher Weeramantry; Second Generation Scholars: Bhupinder Chimni, Joel Ngugi, Celestine Nyamu.

⁵⁰ Mutua M and Anghie A, 'What Is TWAIL?', Proceedings of the Annual Meeting, *American Society of International Law*, vol. 94, 2000, 31-40.

⁵¹ Parker R, 'A Concise History of the Law of Nations by Arthur Nussbaum', *Journal of Legal Education*, vol. 7, no. 2, 1954, 295-297.

⁵² Janis M W, 'Towards a New International Order by Mohammed Bedjaoui', *6 B.C. International & Comparative Law Review* 355, 1983.

⁵³ Mutua M and Anghie A, 'What Is TWAIL?', *Proceedings of the Annual Meeting (American Society of International Law)*, vol. 94, 2000, 31-40.

Criticism to TWAIL by different scholars such as David P Fidler⁵⁴ and Jose Alvarez⁵⁵ seek to highlight that TWAIL does not really offer any positive agenda or way of dealing with International law or reforms within international law. Firstly, Jose Alvarez states that TWAILers did not bring any new ideas to the table.⁵⁶ Secondly, he recognized that TWAILers have a radical deconstruction of international law and that this approach is of nihilistic nature.⁵⁷ Alvarez's main concern was that TWAILers are disinterested in the pragmatic reforms that remain relevant to the needs of practice.

TWAIL's attention to post-colonial nature of international law aims to uncover, redress, the broad array of political, economic and social asymmetries.⁵⁸ The study highlights these asymmetries as that of the categorization and notifications of developed countries under Article XXIV GATT and developing countries under the enabling clause.

Conclusion

The above theories encourage advancement of WTO rules outside the norm. This is because the question being dealt with involves the EAC CU which is considered a CU outside of the traditional realm of WTO CUs that are notified under Article XXIV. Furthermore, the above theories are ideal for this study as they focus more on developing countries and the flexibility of this regions which is an extensive part of the study as will later be explained in the study.

⁵⁴ Fidler D P, 'Revolt Against or From Within the West? TWAIL, the Developing World and the Future Direction of International Law, 2(1) *Chinese Journal of International Law* 29, 2003, 29.

⁵⁵ Alvarez J, ' My Summer Vacation (Part III): Revisiting TWAIL in Paris', *International Commission of Jurists*, 2010 <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/> Accessed on 7 October, 2019.

⁵⁶ Alvarez J, ' My Summer Vacation (Part III): Revisiting TWAIL in Paris', *International Commission of Jurists*, 2010 <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/> Accessed on 7 October, 2019.

⁵⁷ Alvarez J, ' My Summer Vacation (Part III): Revisiting TWAIL in Paris', *International Commission of Jurists*, 2010 <http://opiniojuris.org/2010/09/28/my-summer-vacation-part-iii-revisiting-twail-in-paris/> Accessed on 7 October, 2019.

⁵⁸ Eslava L and Sundhya P, 'Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law.'" *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 45(2), 2012,198.

CHAPTER 3: NOTIFICATIONS OF CUSTOMS UNIONS UNDER THE ENABLING CLAUSE AND ARTICLE XXIV GATT

Introduction

This chapter will focus more on the different effects of notifications of Customs Unions under the enabling clause and Article XXIV GATT. The Chapter will be discussing the traditional approach that the WTO outlines for the formation of Customs unions under Article XXIV GATT versus the approach taking by the Enabling Clause. This chapter will seek to answer the study's first research question on whether the trade remedy provisions within the EAC CU are WTO consistent. Part I will deal with the introduction to CUs and their notification and examination process, its importance and the different ways of notifying, part II will begin by explaining what it means for a provision to be WTO consistent with focus on customs unions as seen under Article XXIV GATT. Part III will deal with CU requirements under Article XXIV:5(a) and 8(a) of GATT. Part IV will deal with CU requirements as seen in the Enabling Clause.

I. Introduction to CUs and the Notification Process

RTA exceptions are all made with one purpose. The purpose is to enable and facilitate trade amongst members in a region without making it more difficult for the parties to trade with non-party members.⁵⁹

This exception has been proven to be flexible among developing countries. RTAs are an exception to WTO rules because they accord favored treatments towards the members within the RTA or within their region as compared to other countries. This goes against the MFN principle which states that all members of the WTO should be accorded similar treatment.

Normally, issues arise over the timings of notifications, the information to be supplied and non-compliance with the notification requirement. The Secretariat as seen in the WTO RTA database has also noted that many RTAs in force have not yet been notified or were notified after a substantially long period for example that of ten years as seen in the MERCOSUR RTA.⁶⁰ Moreover, out of the 294 RTAs that are in force to date, 264 of them have been notified under Article XXIV of the GATT while only 50 have been notified under the Enabling Clause.⁶¹

⁵⁹ Article XXIV:4, GATT 1994.

⁶⁰ WTO RTA Database <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> Accessed on 12 July, 2019.

⁶¹ WTO RTA Database <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> Accessed on 12 July, 2019.

The examination process serves two purposes: a) to ensure the transparency of RTAs and b) to allow members to evaluate an agreement's consistency with WTO rules.⁶² This examination process is done by the CRTA which is a standing review committee for RTAs. Its purpose is to examine individual notification of RTAs under Article XXIV of the GATT.⁶³

The areas where the Enabling Clause and Article XXIV differ in requirements cause ambiguity for example with the use of specific terms such as Substantially All Trade under Article XXIV without a clear outline or definition of the term. Omission of reference to some terms such as customs unions under the Enabling Clause fails to provide clear direction concerning the setting up of a common external tariff thereby suggesting that developing country customs unions may not be eligible for notification under the Enabling Clause.⁶⁴ Supporting this statement is the fact that prior to the enabling clause, developing countries had been notifying their customs unions under Article XXIV as was the case of the African Common Market⁶⁵ and the Arabic Common Market.⁶⁶ This clearly lays out the fact that the Enabling Clause was not intended to cater for such arrangements.

II. WTO Consistent Provisions: What does it mean to be WTO consistent?

For a provision to be WTO consistent then it must conform to the WTO requirements as laid out in the GATT 1994. For the CUs, these requirements would be those set out under Article XXIV especially XXIV:8(a)(ii) GATT whereby a prerequisite for the CUs to be considered would mean that each member of the CU applies substantially the same duties and other regulations of commerce.⁶⁷ However, there has been contention as to whether this is the only prerequisite needed for the CUs to be consistent with the WTO requirements. Paragraph 8(a) expounds on this matter by giving an internal requirement that requires members of the CU to eliminate duties and restriction on substantially all trade.⁶⁸ This includes any other regulations of commerce (ORCs) or other regulations restricting trade.⁶⁹ The inclusion of any such restrictions including trade remedies

⁶² Committee on Regional Trade Agreements, WTO Doc WT/L/127, 1 (Decision of 6 February 1996).

⁶³ WTO, 'Work of the CRTA' found on https://www.wto.org/english/tratop_e/region_e/regcom_e.htm Accessed on 12 July, 2019.

⁶⁴ Mutai H K, 'The Regulation of Regional Trade Agreements: Harnessing the energy of regionalism to power a new era in multilateral Trade', Unpublished PHD Thesis, University of Melbourne, Melbourne, 2005, 103.

⁶⁵ African Common Market, GATT doc L/1835 (1962).

⁶⁶ Arab Common Market, GATT doc L/2366 (1965).

⁶⁷ Article XXIV:8(a)(ii) GATT 1994.

⁶⁸ Article XXIV:8(a) GATT 1994.

⁶⁹ Teh R, Prusa T J.; Budetta, 'Trade remedy provisions in regional trade agreements, WTO Staff Working Paper', No. ERSD-2007-03, World Trade Organization (WTO), Geneva, 2007, 7-10 ; Accessed on <
<http://dx.doi.org/10.30875/79daa09a-en>>

within CUs would suggest that the above mentioned CUs are inconsistent with GATT rules and regulations.⁷⁰ A defense for CUs that are inconsistent with other GATT provisions is provided for under the chapeau of paragraph 5 of Article XXIV GATT. This shall be expounded on in the next part.

III. Article XXIV GATT

a. Article XXIV:4 GATT & the Chapeau of paragraph 5

This Article places a requirement on the formation of customs unions that they shall not raise barriers to trade of other contracting parties. The AB in *Turkey-Textiles* identified paragraph 4 as an important element in interpreting paragraph 5. It stated that the purpose of a customs union is to facilitate trade between its members and not raise trade barriers with third countries who are not part of the customs union.⁷¹ This suggests a balance of some sort between the members of the CU and third party countries. Thus the introduction of quantitative restrictions by Turkey with the intent to harmonize Turkey's import regime with the ECs was not acceptable.

In the appeal, the AB referred to the chapeau of paragraph 5 by highlighting the fact that provisions of the GATT 1994 shall not prevent or make impossible the formation of a customs union. This means that the chapeau may be used as a justification for adopting measures that would otherwise be inconsistent with other GATT provisions. This justification can only be done if the measure is essential to the formation of a CU and that the CU depends on it for its formation.⁷² Thus for a CU that is otherwise inconsistent with other GATT provisions to depend on this above mentioned defense, then the two conditions must be met. A panel is required to examine that CU has met the above requirements if it is to invoke this defense. The second condition is entirely dependent on the first condition and can only be determined if the first condition has been fulfilled.⁷³ This is also known as the 'necessity test'.

⁷⁰ Teh R, Prusa T J.; Budetta, 'Trade remedy provisions in regional trade agreements, WTO Staff Working Paper', No. ERSD-2007-03, World Trade Organization (WTO), Geneva, 2007, 7; Accessed on <
<http://dx.doi.org/10.30875/79daa09a-en>>

⁷¹ Appellate Body Report, *Turkey-Textiles*, [57].

⁷² Appellate Body Report, *Turkey-Textiles*, [56].

⁷³ Appellate Body Report, *Turkey-Textiles*, [58-59].

Additionally, the panel in *Turkey-Textiles* stated that the right to form a CU must be performed in a manner that does not violate and one that respects the rights of members that are not party to the CU.⁷⁴

b. Article XXIV:5(a): Are Trade Remedies ORCs?

The AB in *Turkey-Textiles* held that Article XXIV:5(a) requires that Other Regulations of Commerce (ORCs) applied by members after the formation of a CU should not be more restrictive than the regulations applied before the formation of the CU.⁷⁵ The interpretation of the term ORC has proven difficult within the WTO thus making it harder to determine and measure if their inclusion within a CU has made it more restrictive.⁷⁶ The Panel in *Turkey-Textiles* proposed a general definition of ORCs stating that ORCS can be understood to mean and include any regulation that has an impact on trade. These measures include sanitary and phytosanitary, customs valuation, anti-dumping and technical barriers to trade. This is an evolving concept and is still subject to change over time.⁷⁷

The WTO Secretariat has also attempted to provide a definition of the term. After Korea's submission to the WTO on RTAs⁷⁸, the Secretariat produced a list of regulations that may affect trade between members in an FTA/CU and third parties.⁷⁹ This list includes duties and charges, Rules of origin, Standards (TBT and SPS), Safeguards, Anti-dumping and countervailing measures, Subsidies and state-aid among other specific provisions. The list is not exhaustive. Despite this inclination towards trade remedies being considered as ORCs, there are diverse perspectives of this. The EU for example believes that ORCs should be neutral and should be determined on a case to case basis to see if they are consistent with WTO.⁸⁰

⁷⁴Panel Report, *Turkey-Textiles*,[54].

⁷⁵ Appellate Body Report, *Turkey-Textiles*,[54].

⁷⁶ Bagwell K W & Mavroidis P C, *Preferential Trade Agreements: A Law and Economic Analysis*, Cambridge University Press, Cambridge, 2011, 254.

⁷⁷ Panel Report, *Turkey-Textiles*,[54].

⁷⁸ Communication from the Republic of Korea, Submission on Regional Trade Agreements, TN/RL/W116.

⁷⁹ Standard format for information on Regional Trade Agreements, WTO Secretariat, August 1996, WT/REG/W6.

⁸⁰ TN/RL/W/179, 4 on 12 May 2005.

c. *Article XXIV:8: Other Restrictive Regulations on Commerce (ORRCs) and Trade Remedies.*

Article XXIV:8(a)(i) establishes the standard for internal trade between members so as to satisfy the requirements of CU. Firstly, As is the case with ORCs, ORRCs have not been clearly defined under Article XXIV:8 and there is no clear agreement as to which regulations are concerned. Sub paragraph 8(a)(i) of Article XXIV sets out the standard for internal trade between members.⁸¹ Members of a CU are required to eliminate duties and ORRCs with respect to substantially all trade between them.⁸² However, members may choose to maintain certain ORRCs permitted under Articles XI through XV and Article XX of GATT 1994. It is not clear whether the provided list is exhaustive or indicative.

The AB in *Turkey-Textiles* examined whether the formation of the EC-Turkey CU would have been prevented had it not incorporated the restrictions. Turkey argued that it needed to implement the said restrictions so as to prevent the EC from excluding certain products from the free trade. However, the AB found that the restrictions were not necessary as there were alternatives available for the said purpose.⁸³ It is still uncertain whether trade remedies are considered as ORRCs and conclusively whether they should be prohibited within CUs and RTAs. While some countries strove to determine if trade remedies were ORRCs, some members argued that the most important aspect would be whether the application of the said measures led to restrictions on trade with third parties.⁸⁴ Scholars such as Onguglo and Ito argue that if trade remedy measures are to be allowed within CUs, developing countries would still attempt to call for a restraint in the way the measures should apply to them.⁸⁵

Following the AB's decision on *the Shrimp-Turtles* case, it is credible to note that tariff barriers have declined thus leaving room for non-tariff barriers in trade.⁸⁶ Thus, picking from *Turkey-Textiles*, since there is no defined method of determining what no-tariff barriers are, we should

⁸¹ Article XXIV:8(a)(i), GATT 1994.

⁸² Appellate Body Report, *Turkey-Textiles*, [48].

⁸³ Appellate Body Report, *Turkey-Textiles*, [61].

⁸⁴ Trachtman J P, *Trade Law, Domestic Regulation and Development*, World Scientific Publishing Cp, London, 2015, 440.

⁸⁵ Onguglo B and Ito T, 'In defence of the ACP submission on special and differential treatment in GATT Article XXIV', Discussion Paper No. 67, European Centre for Development Policy Management, 2005, 7.

⁸⁶ Trachtman J P, *Trade Law, Domestic Regulation and Development*, World Scientific Publishing Cp, London, 2015, 485.

focus more on considering a definition based on what is inherent within a CU. What is inherent may depend on historical factors and other factors such as the objectives of internal trade facilitation and avoiding barriers to external trade.⁸⁷ This same criteria should be used when determining if trade remedies are ORRCs and if they aim more towards achieving an inherent goal within CUs or not.

IV. The Enabling Clause

Requirements for notification under the Enabling Clause differs from the ones under Article XXIV GATT in that it imposes some substantive obligations on developing countries wishing to extend preferential treatment to one another through RTAs.⁸⁸ This is because the Enabling clause does not bring specificity by mentioning customs unions or RTAs, instead it only refers to global and regional arrangements entered into by less developed contracting parties which is an umbrella term for developing countries and least developing countries.⁸⁹ This gives developing countries a choice as to whether they can reduce or completely eliminate tariffs on imports from one another unlike Article XXIV which obliges parties to elimination.⁹⁰

RTAs in developing country regions are notified under the Enabling Clause. It has been argued that exempting developing countries from the application of Article XXIV GATT has weakened the capacity of the WTO to effectively regulate RTAs.⁹¹ The Enabling clause does not show or indicate any restriction similar to the framework of Article XXIV of the GATT. Mr Henry Mutai argues that the enabling clause is an extension to the Protocol Relating to Trade Negotiations, but it has been widely used as a cover for RTAs between developing countries.⁹²

Presumptions have also been made that the Enabling Clause deprives developing countries of the legal discipline to establish effective free trade areas and customs unions. Mutai argues that for

⁸⁷ Trachtman J P, *Trade Law, Domestic Regulation and Development*, World Scientific Publishing Co, London, 2015, 485.

⁸⁸ Mutai H K, 'The Regulation of Regional Trade Agreements: Harnessing the energy of regionalism to power a new era in multilateral Trade', Unpublished PHD Thesis, University of Melbourne, Melbourne, 2005,102.

⁸⁹ Mutai H K, 'The Regulation of Regional Trade Agreements: Harnessing the energy of regionalism to power a new era in multilateral Trade', Unpublished PHD Thesis, University of Melbourne, Melbourne, 2005,102-103.

⁹⁰ Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, BISD 26S/203 ,1979, [2 (c)].

⁹¹ Mutai H K, 'The Regulation of Regional Trade Agreements: Harnessing the energy of regionalism to power a new era in multilateral Trade', Unpublished PHD Thesis, University of Melbourne, Melbourne, 2005,4.

⁹² Mutai H K, 'The Regulation of Regional Trade Agreements: Harnessing the energy of regionalism to power a new era in multilateral Trade', Unpublished PHD Thesis, University of Melbourne, Melbourne, 2005,103.

developing countries to achieve greater trade liberalization then they must accept greater legal discipline which can only be attained by adhering to Article XXIV requirements.⁹³

Conclusion

From the above discussion, defining Trade remedies as ORCs or ORRCs has been a constant struggle for the WTO and its members. Even though the WTO Secretariat would consider them as ORCs, some other members still insist to refute this view and base the trade remedies on their discriminatory nature as ORRCs. Their point being that in as much as they are not directly restrictive, they still bear the discriminatory factors of favoring one member's interest over the others and for this matter, they should be termed as ORRCs. This study is inclined to support the EU's and India's view on the matter that the main concern should not be whether trade remedies are ORCs or ORRCs. The main matter should be whether their inclusion within CUs leads the members of the CU towards an inherent goal. Furthermore, if the inclusion of trade remedies is the only way towards facilitating trade within regions and with third parties outside the CU then they should definitely be allowed within CUs. However, seeing from the evidence collected in the above chapter, it is highly unlikely that trade remedies within CUs may achieve this factor as they are 'discriminatory' thus this would lead to an even higher barrier on trade within the region. For this matter, I do not believe that trade remedies should be included within CUs.

⁹³ Mutai H K, 'The Regulation of Regional Trade Agreements: Harnessing the energy of regionalism to power a new era in multilateral Trade', Unpublished PHD Thesis, University of Melbourne, Melbourne, 2005, 2.

CHAPTER 4: EAC TRADE REMEDY PROVISIONS AND ITS EFFECTS TO EAC PARTIES

Introduction

This chapter will aim to bring out the effect of the different provisions on trade remedies within the EAC Customs Union. The Chapter will focus on answering Research Questions (b) and (c) on the *effect the inclusion of trade remedies within the EAC has brought up* and on *whether trade remedy provisions within the EAC should be maintained or eliminated*. The chapter will begin with the general history of the EAC in Part I. Part II will deal with the implementation of trade remedies provisions within the EAC. Part III deals with the whether the inclusion of trade remedy provisions is necessary within customs unions with focus on the EAC.

I. History of the EAC Customs Union

Five years into the establishment of the EAC, the Customs Union Protocol took effect.⁹⁴ The EAC chose to begin by directly establishing a CU as opposed to the steps that the EU took by first establishing a Free Trade Area. The main objective of forming the CU was so as to enable the ease of forming a political federation in the EAC.⁹⁵

The Protocol Establishing the EAC dealt with various matters such as those of elimination of internal trade barriers, the establishment of a common external tariff, anti-dumping measures, rules of origin, subsidies and countervailing duties among other restrictions to trade. It also came into effect to deal with cooperation of customs, exportation of goods and harmonizing of trade.⁹⁶ Other than all the above, the main goals of the EAC CU were those of liberalization of trade in goods to create mutually beneficial trade relations among the member states, enhance domestic and cross border trade among other objectives.⁹⁷ Its specific objectives include creating a Common External Tariff (CET) system for goods coming from outside the East Africa region, to come up with common customs laws within East Africa. These regulations will be applied equally among the member states and this will seek to harmonize and simplify customs procedures.⁹⁸

⁹⁴ <https://www.eac.int/integration-pillars/customs-union> Accessed on 24 November 2019.

⁹⁵ <https://www.eac.int/customs> Accessed on 24 November 2019.

⁹⁶ <https://www.eac.int/sct> Accessed on 24 November 2019.

⁹⁷ <https://www.eac.int/trade> accessed on 24 November,2019.

⁹⁸ <https://www.eac.int/customs> Accessed on 24 November,2019.

For the above objectives to be achieved, there was a need to get rid of NTBs. Some institutions with this mandate were created within the EAC. ⁹⁹One of these institutions included the Trade Remedies Committee which was established under Section 24(1) of the Customs Union Protocol.¹⁰⁰ The main responsibility of this committee was to handle matters of Anti-Dumping measures, subsidies, countervailing duties, safeguard measures and how they were implemented in the DSS.¹⁰¹

Moreover, even though the EAC had all these implementations in place to get rid of NTBs, this process did not bear much fruit. This is seen through some loopholes that the EAC still has on this issue. For Example, it is unclear what should happen to the member states who do not get rid of NTBs.¹⁰² Instead, it only refers the matter to the Trade Remedies Committee as portrayed under Articles 12¹⁰³ & 15¹⁰⁴ of the EAC Elimination of Non-Tariff Barriers Act. This definitely leaves a lot of discretion to the committee which does not conclude as effective or efficient

III. Trade Remedy Provisions within the EAC Customs Union.

The Three trade remedy provisions available to the EAC Customs union partners are Antidumping measures,¹⁰⁵ Safeguard measures¹⁰⁶ and countervailing measures.¹⁰⁷ Article 20 of the Protocol on the establishment of East African Customs Union provides an explanation as to how partners can cooperate in order to investigate instances in which trade remedies may be applied.¹⁰⁸ The Protocol further states that the objective of the EAC customs union is to increase liberalization of intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the partners.¹⁰⁹ This would be slightly difficult to achieve if there were more hindrances to the easy flow of goods amongst the countries. Seeing that one of the main requirements in forming the

⁹⁹ Osoro P, 'The East African Community and Non-Tariff Barriers A Hindrance to the Trade Liberalisation Policy and Legal Proposals for Eliminating Non-tariff barriers', University of Nairobi, LLM Thesis, 2015.

¹⁰⁰ Section 24(1), *EAC Customs Union Protocol (2005)*.

¹⁰¹ Section 24(4), *EAC Customs Union Protocol (2005)*.

¹⁰² Osoro P, 'The East African Community and Non-Tariff Barriers A Hindrance to the Trade Liberalisation Policy and Legal Proposals for Eliminating Non-tariff barriers', University of Nairobi, LLM Thesis, 2015.

¹⁰³ Article 12, *East African Community Elimination of Non-Tariff Barriers Act (2015)*.

¹⁰⁴ Article 15, *East African Community Elimination of Non-Tariff Barriers Act (2015)*.

¹⁰⁵ *Article 16*, Protocol Establishing the East African Customs Union.

¹⁰⁶ *Article 17*, Protocol Establishing the East African Customs Union.

¹⁰⁷ *Article 18*, Protocol Establishing the East African Customs Union.

¹⁰⁸ *Article 20*, Protocol Establishing the East African Customs Union.

¹⁰⁹ *Article 3*, Protocol Establishing the East African Customs Union.

customs union was the reduction of tariffs in general and the elimination of all internal tariffs then the trade remedy provisions would seem like a contradiction to these requirements.

Article 24(1) (e) of the Protocol Establishing the EAC CU establishes and East African Trade Remedies Committee.¹¹⁰ The function of this committee is to handle matters pertaining to rules of origin, anti-dumping measures, subsidies and countervailing measures and safeguard measures. The Establishment of the above committee was impugned as most claimed that it was allegedly inconsistent with Articles 27(1) and 38(1) and (2) as it involved having parallel adjudicatory bodies as it would involve allowing national courts to handle customs disputes thus infringing on the jurisdiction of the East African Court of Justice (EACJ).¹¹¹ However, the EACJ in *East African Center for Trade Policy and Law v Secretary General* ¹¹²held that the establishment of the committee did not contradict the relevant provisions of the protocol as it did not prevent Partner States from complying with Articles 8(1)(a)¹¹³ imposing each members obligation to ensure the objectives of the community are met and 8(1)(c)¹¹⁴ containing a prohibition on each Partner State to take measure likely to jeopardize the Treaty. This above jurisprudence demonstrates the court’s adherence to separation of powers. However, if we investigate keenly, seeing that being within a CU like the EAC requires Partner States to get rid of other restrictions on trade then we would have no need or use for the trade remedy provisions let alone the committee. Thus, Partner States that seek to solve issues through the trade remedies committee shows that they are facing a violation under Article 8(1)(c) as a result of another Partner States imposing prohibited restrictions on them. This goes against the objectives of the treaty and formations of a CU under the enabling clause.

Furthermore, the treaty goes on to establish additional institutions whose responsibility is to monitor the imposition of Non-Tariff Barriers. These institutions are the EAC sectoral Committee on Trade, Industry, Finance and Investment,¹¹⁵ The EAC Secretariat¹¹⁶ and the National

¹¹⁰ Article 24(1)(e), Protocol Establishing the East African Customs Union.

¹¹¹ Wanyama M and Omolo CM, ‘The Road to East African Integration’, in Ugirashebuja E, Ruhangisa J E, Ottervanger T and Guyvers A, *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Brill Nijhoff, Leiden,2017, 65.

¹¹² EACJ Ref. No. 9 of 2012.

¹¹³ Article 8(1)(a), Protocol Establishing the East African Customs Union.

¹¹⁴ Article 8(1)(c), Protocol Establishing the East African Customs Union.

¹¹⁵ Article 20, Protocol Establishing the East African Customs Union.

¹¹⁶ Article 21, Protocol Establishing the East African Customs Union.

Monitoring Committees.¹¹⁷ In addition to these institutions, the EAC CU also put in place legislation in attempt to curb or stop NTBs. This was done through the East African Community Non-Tariff Barriers Act.¹¹⁸ This is rather repetitive as the EAC already has a trade remedy committee in place to deal with similar issues. This would lead to an overlap of dealing with these issues resulting to one body not acting efficiently or not performing its functions at all. Nevertheless, the Act comes to the rescue by creating a hierarchy in that where a Partner State fails to eliminate NTBs the Secretary General shall refer the matter not resolved by the Council to the EAC Committee on Trade Remedies.¹¹⁹ Positively, this may be the case on curbing NTBs. The problem arises when there is no specification on what action should be taken against a Partner State that fails to eliminate NTBs.¹²⁰ The silence of the Act on this part leaves a huge gap as to what role the Trade Remedies Committee plays at all and if there is any need of having it in the first place.

IV. Should you have Trade Remedy Provisions within the EAC Customs Union?

Ideally, the traditional approach following the GATT rules is inclined towards eliminating trade remedy provisions within CUs. Other Scholars argue that CUs are a way of eradicating trade remedies among WTO members thus enabling multilateralization of regions.¹²¹ Reducing trade remedies would diminish market distortions and make competition fair among producers worldwide.¹²² Moreover, Articles XXIV:5(a) and 8(a) of GATT's provision to eliminate trade provisions in the name of tariffs seems to preclude that trade remedies should as well be eliminated within CUs.¹²³ Thus having a CU that includes trade remedy provisions is entirely contradictory to this requirement. This may be the case with the EAC customs union.

The inclusion of trade remedies within the CU may suggest that the CU's structure is not as efficient as it should be and thus other ways of dealing with these inefficiencies such as trade

¹¹⁷ Article 22, Protocol Establishing the East African Customs Union.

¹¹⁸ The East African Community Elimination of Non-Tariff Barriers Act, 2015.

¹¹⁹ Article 12 & 15, The East African Community Elimination of Non-Tariff Barriers Act, 2015.

¹²⁰ Osoro P, 'The East African Community and Non-Tariff Barriers A Hindrance to the Trade Liberalisation Policy and Legal Proposals for Eliminating Non-tariff barriers', University of Nairobi, LLM Thesis, 2015.

¹²¹ Voon T, 'Eliminating Trade Remedies From the WTO: Lessons from regional Trade Agreements', *The International and Comparative Law Quarterly*, 59(3), 2012 ,626.

¹²² Voon T, 'Eliminating Trade Remedies From the WTO: Lessons from regional Trade Agreements', *The International and Comparative Law Quarterly*, 59(3), 2012 ,626.

¹²³ Voon T, 'Eliminating Trade Remedies From the WTO: Lessons from regional Trade Agreements', *The International and Comparative Law Quarterly*, 59(3), 2012 ,627.

remedies are welcome. Expansively, including trade remedies provisions within CUs beats purpose as they have a more detrimental effect than anything else. As Article 12 and 15 of the Protocol Establishing the EACC have laid out, the trade remedies committee is the last stage or the last resort to issues on NTBs. As seen in the *East African Centre for trade policy and law v the Secretary General*, the court comes to a conclusion that there are other ways for the Partner States within the EAC CU to deal with their trade disputes as stipulated under Article 24(1) of the EAC CU protocol. These methods include good offices, conciliation and mediation which is in line with the Dispute Settlement understanding.¹²⁴

Even if Partner States claim that Article 24¹²⁵ does not directly place jurisdiction on the EACJ to deal with Trade Remedy matters, the said Article does not expressly exclude the court from this jurisdiction as well. The EACJ still has jurisdiction over interpretation and application of matters within the protocol as governed by Article 54(1)¹²⁶ of the Treaty meaning it could exercise its jurisdiction on such matters.

Even though matters within the EAC Partner States seem to be well-governed, we could also take the perspective of considering that most of the countries within the EAC are also part of other trading blocs such as Common Market for Eastern and Southern Africa (COMESA)¹²⁷ , Intergovernmental Authority on Development (IGAD)¹²⁸ and EAC. Due to this, it is highly likely that they not only succumb to their own governmental structures, but to the various trading bloc structures as well.

This interference does not necessarily support the smooth transition of economic integration that the EAC CU is trying to bring out. The process of regionalization to achieve the goal of globalization does not always result to a positive aspect.¹²⁹ This raises the question on whether regionalism and globalization would one day result to a global conflict. In some instances, regionalization may be strong to a point that these regional blocs would not want to interact with other regions in the world and thus not promoting globalization.

¹²⁴ Article 4-5, 6-20, Dispute Settlement Understanding.

¹²⁵ Article 24, Protocol Establishing the East African Community Customs Union.

¹²⁶ Article 54(1), Treaty Establishing the East Africa Community.

¹²⁷ <https://www.comesa.int/> accessed on 24 November, 2019.

¹²⁸ <https://igad.int/> accessed on 24 November, 2019.

¹²⁹ Bornschier V and Chase-Dunn C, 'The Future of Global Conflict', *SAGE Publications*, London, 1999, 99-118.

Conclusion

As the TWAIL theory suggests, African regions such as the EAC face different problems as compared to their counterparts in the developed realm. This is because regions such as the EAC are still at a stage where they are learning what works for them. Thus, it could not be fair to directly impose similar WTO rules and regulations on them in comparison to the developed countries. However, this does not mean that the region should not turn a blind eye to the said regulations or structures as they may find in rare occasions that what worked for their counterparts may work for them as well. As we have already seen, the EAC CU is not notified under Article XXIV GATT and thus has less stringent requirements to be met. However, with less strict measures comes more freedom and responsibility. This does not mean that including trade remedy provisions within the CU is an effective way as it does more harm than good. However, the EAC CU could work on imposing and making use of measures already put in place such as the institutions, the Act and the court's jurisdiction on the matter. With this put in place, there would be no need for trade remedy provisions within the EAC CU

Additionally, most governments within Africa do not have the necessary arrangements to go through the trade remedy investigations.¹³⁰ They claim that this process is cumbersome and does not add significant value to their trade industries.¹³¹ Additionally, the overlapping nature of most trade remedy provisions with provisions laid out in other agreements may eventually lead to a crash that could lead to an emergence of a trade barrier.¹³² An issue of this nature occurred in the case of inconsistency between GATT and USA National Anti-Dumping Laws.¹³³ Inconsistency occurred between the two laws occurred when the USA national AD laws acknowledged the distinction between injury-to-competition and injury-to-competitors while GATT AD provisions did not historically take note of this distinction.¹³⁴ Due to such instances, if African regional blocs

¹³⁰ Erasmus G, 'Are Trade remedies important for achieving the AfCFTA Goals?' accessed on <https://www.tralac.org/blog/article/12764-are-trade-remedies-important-for-achieving-the-afcfta-goals.html> on 24 November, 2019.

¹³¹ Erasmus G, 'Are Trade remedies important for achieving the AfCFTA Goals?' accessed on <https://www.tralac.org/blog/article/12764-are-trade-remedies-important-for-achieving-the-afcfta-goals.html> on 24 November, 2019.

¹³² Barcelo J, 'A History of GATT Unfair Trade Remedy Law-Confusion of Purposes', *Cornell Law Faculty Publications*, Cornell, 1991, 311-312.

¹³³ Barcelo J, 'A History of GATT Unfair Trade Remedy Law-Confusion of Purposes', *Cornell Law Faculty Publications*, Cornell, 1991,313.

¹³⁴ Barcelo J, 'A History of GATT Unfair Trade Remedy Law-Confusion of Purposes', *Cornell Law Faculty Publications*, Cornell, 1991,313-314.

and CUs such as the EAC were to actively apply the various trade remedy provisions all at once, a collision may occur as there might be such slight differences in the typed provisions.

CHAPTER 5: CONCLUSION & RECOMMENDATIONS

I. Conclusion

This study was started in a bid to determine if including trade remedies in the EAC Customs Union is WTO consistent. The research conducted during the study outlines the benefits and downfalls of including trade remedies within Customs unions in general and those specifically notified under the enabling clause. Throughout the study, it is clearly evident that customs unions notified under the enabling clause are less structured and stringent when it comes to enforcement of rules among members. With this depiction of freedom comes a great deal of choice to be made when coming up with rules and regulations to be adhered to by the members. To begin with, the whole point of members entering into trading blocs or communities such as customs unions is to reduce the amount of pressure and the barriers that come in the way of enhancing trade within regions.

The easement of these regulations is done in an attempt to increase globalization and trade as a whole in the globe. However, we see that at some points, regionalization may not necessarily lead to globalization due to the differences that different regions face. These differences result to some regions feeling vulnerable and not opening up to opportunities to trade with other regions due to the fear that they may be blindsided or dragged down. This is not always the case as seen through the study with examples such as the similarities that different customs unions may face, in this case, the EAC and ASEAN.

It is clear through WTO law on Customs unions through Article XXIV:5(a) and 8(a)(i) GATT, that including trade remedies within customs unions is not a viable and advisable way of trying to enhance intra-regional trade. What the GATT is unclear about is: whether the inclusion of said trade remedies within customs unions is inconsistent with WTO law; whether customs unions notified under the enabling clause should be forced to get rid of the said remedies within their communities. This study sought to answer this question by closely studying the effects that the inclusion of trade remedies has had among the EAC countries (positive and negative effects).

Through the EAC, we learn that most of the developing countries come into contact with trade remedy laws for the first time at regional level. What this means is that, most of these countries have not implemented trade remedies of their own at national level and are thus dependent on them at regional level. In fact, out of all six members of the EAC customs union, only Kenya has implemented trade remedies at national level. Due to this fact, it is highly evident that the members

have not interacted with the said laws enough to adjust them accordingly to their countries' needs. Deductively, this may be the reason as to why the introduction of the said laws may not be as effective and active within the EAC as a whole. Most of the members tend to shy away from the use of said trade remedies as they are not as familiar with them and how they work.

However, other factors arise from the study. One of them being that there are various ways/methods put in place to deal with reduction of NTBs within the EAC CU. These include, institutions, the NTB Elimination Act, The EACJ jurisdiction on trade related matters. The research reveals that the use of trade remedy provisions and the committee on trade remedies established under the EAC protocol is often considered after the other methods have failed to produce results. Many have also complained that if the trade remedies committee is allowed to actively participate in trade matters then this may be detrimental to the jurisdiction of the EACJ. This is not far from the truth as this overlap may result to the trade remedy committee being redundant and not efficient at all. For this matter, it would not be necessary to have a Committee that does not have any specific function or that may lead to conflict with the court if given broad jurisdiction allowing it to make final decisions on matters to do with trade.

On the issue of Partner States belonging to various regional trade blocs, the trade remedy provisions being included into the EAC customs union may be passed off as trying and cover up the gaps that the various countries have with each other in a bid to create a level playing ground. For starters, most of the member states belong to more than one trading bloc. Different trading blocs have different trade policies and may even include various ways of implementing the said trade remedies. This may cause a clash in ways that is beyond the EAC to solve as it is just but one of the trading blocs. As much as this may be a reason, it is not sufficient enough to allow trade remedy provisions within the EAC CU seeing the effects that the provisions have.

On the issue of WTO consistency, the EAC CU having been notified under the enabling clause means that there is no strict requirement laid out for it to meet WTO consistency under GATT. For this reason, the EAC CU may be inconsistent with Article XXIV GATT but not the enabling clause. Thus generally, one cannot conclude that the inclusion of trade remedy provisions is WTO inconsistent. It is for this matter, that this study has sought a different way of determining WTO consistency. The study sought to find out if the inclusion of trade remedy provisions assisted the partner states in achieving the goal set out in the enabling clause. This goal is to increase regional

trade and economic integration within the EAC CU. If it does not meet this goal then it is safe to conclude that the inclusion of trade remedy provisions is WTO inconsistent. As we have seen, the inclusion of trade remedy provisions does not set out a clear path towards this goal and if actively implemented then this may lead to more harm than good. Furthermore, the exclusion of these provisions would mean less barriers and would have a more positive than negative effect to the EAC CU. It is for this matter, that the conclusion of this study is inclined to determine that having trade remedy provisions within the EAC CU is WTO inconsistent.

II. Recommendation(s)

Due to the above conclusion, the most effective recommendation from this study is to eliminate the said trade remedy provisions within the EAC CU. However, a review of Article XXIV requirements on customs unions may also be inferred as follows:

- i. **Procedural Issues: Notification and Examination procedures within the WTO should be improved for RTAs and CUs.** This should include a timeframe and standard format for the examination report by the Secretariat. This should apply across the board for both CUs notified under Article XXIV and the Enabling Clause while still avoiding making the rules excessively burdensome on African and developing countries. Members of various RTAs and CUs should hold a conference discussion to brainstorm ways that would work for them as a group. This would begin by each member making a suggestion as to how they would want to be assisted and create a spectrum that works for the members in general. After which a committee would be formed to ensure that due procedure is followed.
- ii. **Defining Substantially All Trade:** The most contentious issue within article XXIV is the definition of terms, at the forefront being that of Substantially All Trade. Member States should begin negotiations on creating a benchmark on what substantially all trade means. This should include both quantitative and qualitative elements to allow accommodation of various factors. The benchmark should not only be created on a theoretical framework but within a framework that echoes the experiences that the countries have faced.
- iii. **ORCs and ORRCs:** More focus should be placed on finding out whether the inclusion of ORCs or ORRCs within CUs is beneficial for member states instead of trying to place trade remedies within one category. In the end the GATT provisions are clear on both of them being prohibited except from the exceptions listed within Article XXIV GATT. A small

window or timeline can be allocated to experiment on how such laws work (three month timeline) after which, representatives of each member should come back and report on their progress so that they may get a way forward as to what worked and what did not. Afterwards, they may be able to come up with a comprehensive definition as to what the trade remedy provisions are. However, the major concern should be on how each provisions works so as to determine the category in which they fall and whether they should be allowed or prohibited.

- iv. EAC and its Trade Remedy Provisions: The EAC should do away with its Trade Remedy Provisions within the CU. This is because there are already other alternative methods available to solve matters of that nature and thus even if the provisions were to be passed through the economic necessity test as provided for in *Turkey-Textiles* it would not pass thus showing lack of necessity to have them within the CU. Member states should focus on exhausting the already existing alternative methods before being fast to jump on trade remedy provisions because their counterparts in other regions adhere to them.

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