

CUSTOMS AND TRADE FACILITATION IN THE EAST AFRICAN COMMUNITY (EAC)

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Abstract

This article expounds and evaluates the contribution of Customs to trade facilitation within the East African Community (EAC). It is developed against the background of trade facilitation as understood by the World Trade Organization (WTO). Hence, it examines *how* and *to what extent* the trade facilitation-related aspects of the WTO are (or are not) reflected in the EAC customs law and administration. The World Customs Organization's Trade facilitation instruments, particularly the Revised Kyoto Convention, are also considered. After scrutinising the EAC customs law and administration, suggestions are made for better coordination, harmonisation and simplification of international trade/customs procedures within the EAC.

I. Introduction

Cooperation in trade liberalisation and development is one of the fundamental pillars of the East African Community (EAC).¹ For this purpose, the EAC Partner States agreed in the EAC Treaty of 1999 'to establish among themselves... a Customs Union, a Common Market, subsequently a Monetary Union and ultimately, a Political Federation.'² The East African Community Customs Union (EACCU) commenced its operations within Kenya, Tanzania and Uganda on 1 January 2005. Burundi and Rwanda acceded to the EAC in July 2007.

In the EAC, as in many other countries, Customs³ is on the forefront of the various agencies that intervene in international trade in goods. Customs is, for instance, deeply involved in controlling goods which cross borders, determining goods' nomenclature and origin, and collecting revenue as well as administering trade policies. Hence, the manner in which Customs operates highly affects international trade either negatively or positively. In other words, the manner in which Customs operates can either complicate or simplify the international trade in goods. And this introduces us to the concept of trade facilitation.

There are a number of definitions of trade facilitation used by different authors and different organisations. The United Nations Economic Commission for Europe (UN/ECE), for instance, defines it as a 'comprehensive and integrated approach to reducing the complexity and costs of the trade transaction process, and ensuring that all these activities can take place in an efficient, transparent, and predictable manner, based on internationally accepted norms, standards and best practices'.⁴ And the International Chamber of Commerce considers Trade Facilitation as relating to improvements in the efficiency of administrative and logistic steps associated with the international trade of goods.⁵ Cutting short the list of examples, it is important to stress that many of the various definitions refer to reducing the time and costs of the trade transaction process.

For the scope of this article, the term 'trade facilitation' will be used as defined by the World Trade Organization (WTO) as the 'simplification and harmonisation of international trade procedures; where trade procedures are the activities, practices, and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade' (WTO

1998). In line with this concept and keeping track of the WTO negotiations⁶ in this area, this article expounds and evaluates Customs' contribution to trade facilitation within the EAC.

II. Publication and administration of the EAC's customs law

Article X, GATT 1994 provides for publication of trade-related laws, regulations, rulings and agreements in a prompt and accessible manner; restraint from enforcing measures of general application prior to their publication; and administration of the above-mentioned laws, regulations, rulings and agreements in a uniform, impartial and reasonable manner. Thus, it stipulates the institution of tribunals or procedures for the, *inter alia*, prompt review and correction of administrative action relating to customs matters. Fundamentally, all this is aimed at attaining transparency. These provisions are crucial for trade facilitation, for instance, a trader from country A needs to know the relevant trade laws and practices in country B in order to maximise the trade benefits. Moreover, information should not only be available but it should also be simple and easily accessible even to small and medium-sized enterprises (SMEs).

The importance of publication and administration of trade regulations in international trade is even demonstrated by the many disputes revolving around Article X, GATT 1994. These include, for example, the *Japan – Film case*⁷ where the panel referred to the *Panel Report on US – Underwear*⁸ when interpreting the term 'of general application' as follows:

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

A. Publication of the EAC's customs law

The customs law of the EAC consists of relevant provisions of the EAC Treaty, the *Protocol on the Establishment of the East African Community Customs Union* (EACCU Protocol) and its annexes, regulations and directives made by the Council of Ministers of the EAC, applicable decisions made by the East African Court of Justice, Acts of the Community enacted by the East African Legislative Assembly, and relevant principles of international law.

Many of these customs laws, regulations, judicial decisions and administrative rulings are published. For example, the EACCU itself is established by Article 2 (1) of the EACCU Protocol. And this Protocol is founded on the provisions of Articles 2, 5 and 75 of the *EAC Treaty – 1999*. Moreover, the *East African Community Customs Management Act, 2004* and the *East African Community Customs Management Regulations, 2006* have been published. Though many of the relevant customs laws have been published, provisions of Article X, GATT 1994 are still far from being thoroughly observed within the EAC.

Inadequacy with regard to 'prompt publications' has been observed in the East African Community. For example, while the EAC customs law *officially* came into effect on 1 January 2005, it was *actually* a month later that this law became applicable in Uganda. Commenting on this issue, the Commissioner General of the Uganda Revenue Authority said that Uganda would wait for a month, and the intermediate period would be used for publicity and distribution of the new law to customs staff, clearing agents and importers.⁹

The publication problem becomes even more acute with respect to the manner/mode of publication and the distribution of the published laws. Well, passed laws are officially published in the East African Community Gazette. But, the big question is whether the stakeholders and possible stakeholders have easy access to this gazette. For instance, it was noted during a seminar¹⁰ held in Dar es Salaam (two years after the commencement of the EACCU) that no well-bound copy of the East African Community Customs Management Act had been produced. Such an important Act was on mere pamphlets held by a few 'EAC Customs insiders'!

The few selected examples given above show how Article X:1, GATT 1994 is violated within the EAC, which violation greatly hampers trade facilitation. This author, therefore, maintains that all trade-related laws, regulations, rulings and agreements which affect Customs' processes, conditions and procedures ought to be published and made easily and cheaply available not only via the East African Community Gazette but also electronically (via the Internet) to all stakeholders all over the world.

B. Language

Successful trade effectively requires effective communication. And effective communication requires mastery of language. Article 137 of the *EAC Treaty – 1999* stipulates English as the official language, while Kiswahili is the *lingua franca* of the EAC. Currently, however, almost all EAC laws are available *only* in English – and that is a problem! It is noted here that not all stakeholders are conversant in and with English. There are some traders involved in intra-East African trade, even within Kenya, Tanzania, and Uganda, who cannot adequately understand the legal, administrative texts written in English. In this regard, small and medium-sized enterprises (SMEs) – which are a majority in the EAC – are particularly affected.

Moreover, Rwanda and Burundi have long had French as their official language. It should also be noted that the Democratic Republic of Congo, particularly the eastern part, is a key player in EAC trade. Yet French and Kiswahili are the best medium of communication within that region.

It would, therefore, be a very big contribution to trade facilitation if EAC customs laws were translated into Kiswahili and French. In this connection, Kiswahili should be emphasised, especially for the stakeholders in Uganda. There is already a strong move to popularise Kiswahili in Uganda.¹¹ This momentum should be maintained.

C. Legal proceedings and appeals

Instituting judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters is another indispensable aspect of transparency which is necessary for trade facilitation. This issue is not only treated by Article X:3, GATT 1994 but also by the Revised Kyoto Convention in General Annex, Chapter 10 and the accompanying guidelines.

It is observed that this important aspect of trade facilitation is catered for in EAC customs law. Cases may not only be settled administratively¹² but also through competent courts within the Partner States. Moreover, by including the provision for the release of goods pending the outcome of the appeal procedures 'upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner,'¹³ the legislators in this particular aspect proved committed to trade facilitation.

III. Fees and formalities connected with importation and exportation in the East African Community

It is a fact that fees and formalities connected with importation and exportation can constitute a big hindrance to trade facilitation. Considered here are all fees and charges of whatever character in connection with importation or exportation 'with exception of import and export duties as well as internal taxes within the scope of Article III, GATT 1994'.¹⁴ Such fees, charges, formalities and requirements may relate to consular transactions, such as consular invoices and certificates; licensing; exchange control; statistical services; documents, documentation and certification; analysis and inspection, and so forth.

The existence of some of these formalities and charges is, of course, justifiable. For example, the second interpretative note to Article VIII, GATT 1994 recognises that requiring the production of certificates of origin is not *as such* inconsistent with the Article in question. However, ‘the production of certificates of origin should only be required to the extent that is strictly indispensable’ (the emphasis is mine). In short, Article VIII seeks trade facilitation by reducing non-tariff fees and charges and other procedures – especially when they are applied in a protectionist manner. Fees and formalities as understood within the context of Article VIII, GATT 1994 can also be a hindrance to trade facilitation within the East African Community as will be further elaborated.

A. Official fees and charges

There are fees and charges contained within the EAC customs law, which are qualified in this article with the word ‘official’. Such fees contain, for instance, overtime fees (Regulation 6, *EAC Customs Management Regulations, 2006*), fees for cautionary visits (Regulation 8), fees for Customs revenue (Regulation 9), licence fees (Regulation 217), and fees for services to the public (Regulation 216) as indicated in the table below.

Table 1. *Fees for services to the public*

Service or Certificate	Fees
Certification of a copy of any document	US\$5.00
(b) Insurance of a landing certificate, for each original entry in which goods are entered	US\$10.00
Transshipment	US\$10.00
Transfer of ownership	US\$10.00
Issuance of certificate of weight for a consignment	US\$5.00
Approval of alterations in the marks, numbers or other particulars in any document submitted to Customs, other than an inward manifest	US\$5.00
Cancellation of entries	US\$10.00
Issuance or certification of any other certificate or document issued by Customs	US\$5.00
Amendment of an inward report	US\$10.00

Source: EAC Customs Management Regulations 2006

These fees and charges may not necessarily contravene Article VIII, GATT 1994 and may not necessarily hamper trade facilitation. There is even a provision in Chapter 3 of the General Annex to the Revised Kyoto Convention that addresses the issue of fees and charges for additional services. This is Standard 3.2, which stipulates that any expenses for customs procedures outside the designated business hours or away from a customs office may be chargeable by Customs. But there is a caution that the amount of such charges should be limited to the approximate cost of the services rendered. While the abovementioned official fees and charges may be justifiable, there is certainly a real problem with regard to non-official ones.

B. Non-official fees and charges

Despite the fact that some EAC Partner States signed the World Customs Organization (WCO) *Arusha Declaration*, which is a fundamental tool of a global approach to preventing corruption and increasing the level of integrity in Customs, corruption is still rampant within EAC Customs. And non-official fees and charges are some of the indicators of corruption. Bribes are paid by traders at various levels of the trade transactions. Worse still, some East African stakeholders seem to be so much used to corruption

that they consider it normal!¹⁵ Bribes may be paid to Customs officials to shorten the process of clearance so as to have a quicker release of goods. Some officials in charge of licensing (which is part of EAC customs law) may ignore some cumbersome processes if they are offered a bribe, and so forth. Such fees do not only hinder trade facilitation but also undermine the very spirit of genuine East African cooperation.

In the last ten years, however, there have been some attempts to improve integrity in Customs within the EAC. In this connection, some integrity seminars and workshops have been conducted by the respective revenue authorities of the Partner States. In 2001 for instance, an integrity workshop was conducted at the launch of a new ethics and anti-corruption campaign, during which the Ethics and Integrity Committee was created in the Uganda Revenue Authority.¹⁶ In May 2005, Kenya also held workshops on integrity and, since then, Kenya Revenue Authority embarked on a nationwide integrity sensitisation and training program.¹⁷

At a general and regional level, the Kenya Anti-Corruption Commission, the Inspectorate of Government of Uganda and the Prevention and Combating of Corruption Bureau of Tanzania launched the East African Association of Anti-Corruption Authorities (EAAACA) on 9 November 2007. The Anti-Corruption agencies of Rwanda and Burundi are also expected to join shortly. The main aim of the association is to cooperate in preventing and combating corruption in the East African Community.¹⁸

In an effort to enhance integrity in EAC Customs, full use of the integrity instruments developed by the WCO is recommended. These instruments include the Revised Arusha Declaration, the Integrity Development Guide and the WCO Compendium of Integrity Best Practices. Moreover, commitment to the Nairobi Resolution on Integrity, which was signed by the participants of the High Level Workshop on Integrity in East and Southern Africa Region (held in Nairobi, Kenya from 20-23 February 2007), is needed.

Enhancing integrity is a long term goal. Many of the initiatives to enhance integrity such as those mentioned above, are commendable and should be carried forward. Further, it is suggested that some initiatives should be extended to primary schools, secondary schools and tertiary institutions for it is there that future customs officials are educated. Also of great importance is the improvement of enforcement mechanisms in such a way that culprits of corruption are actually made to pay for all the losses and injuries they cause.

C. Procedures and formalities

The performance of trade procedures involves not only Customs but also other agencies such as freight forwarders, insurers, immigration authorities, police, plant inspectors, bankers, brokers, standards institutes, health, port authorities, and many more. However, the procedures and formalities treated here are those in which Customs is particularly involved.

Apart from the provisions of Article VIII:1(c) of GATT 1994, it should be noted that the *Revised Kyoto Convention* has a lot to offer to trade facilitation through its key standards, principles and best practices that contribute to the simplification and harmonisation of customs procedures and formalities. Such procedures and principles include standardised and minimum requests, minimum intervention and the use of risk management, separation of release from clearance, audit-based control, maximum use of information and communication technology, specially simplified procedures for authorised traders, and cooperation with other agencies as well as cooperation with foreign counterparts.

1. Legal Framework

Turning to the East African Community, one cannot fail to observe that many of the WTO/WCO trade facilitation principles, standards and recommended practices regarding import and export procedures and formalities have been incorporated in the EAC customs law. For instance, Article 6 of the EACCU

Protocol enumerates some basic strategies through which trade facilitation can be realised. These strategies include:

- reducing the number and volume of documentation required with respect to trade among the Partner States
- adopting common standards of documentation and procedures within the EAC where international requirements do not suit the conditions prevailing among Partner States
- regularly reviewing the procedures adopted in international trade and transport facilitation with a view of simplifying and adopting them for use by the Partner States
- promoting the development and adoption of common solutions to problems in trade facilitation among Partner States.

Additionally, the East African Community Customs Management Act, 2004 borrowed many of the principles, standards and recommended practices contained in the Revised Kyoto Convention such as transit (Sections 85-87), inward and outward processing (Sections 167-170), application information technology (Sections 187-192), export processing zones (Sections 167-170), and many others.

At a practical or implementation level, there is much being done albeit with some difficulties. An exhaustive description of the status quo with regard to ‘tangible’ harmonisation and simplification of customs procedures and formalities in the EAC would certainly go beyond the scope of this article. Thus, in the following paragraphs, only the outstanding strategies and actions are considered.

2. Information and Communication Technology

Maximum use of information and communication technology (ICT) is very important, *inter alia*, for efficient clearance procedures, uniform application of customs law, effective implementation of risk management, efficient revenue collection, effective data analysis and efficient production of trade statistics.¹⁹ In July 2005, Kenya introduced the new Customs Reform Modernisation program (also known as *Simba 2005*). Tanzania and Uganda use ASYCUDA++.²⁰ In the ICT sector, the Rwandan Revenue Authority is also performing well. These ICT systems have contributed a lot, for instance, by reducing the time for clearance and release. Electronic filing of customs documents has been introduced, document processing (in Kenya) has been centralised, and the level of transparency has generally increased.²¹ *Simba 2005* and ASYCUDA++ are *essentially* interoperable but using one ICT system in the whole EACCU would certainly be better. Moreover, it would be worthwhile to study other ICT systems used elsewhere, which might work better in future for the whole of the EAC.

3. Simplified procedures for authorised traders

The use of risk management and audit-based control makes *pecially* simplified procedures available for traders that are authorised by Customs at a certain level of compliance with regulations. Chapter 3 (Transitional Standard 3.32) of the Revised Kyoto Convention set some specially simplified procedures which are:

- release of minimum information
- clearance at the declarant’s premises
- periodic goods declaration
- self-assessment of duties and taxes by using own commercial records
- lodgement by entry in the corporate records.

Simplified procedures for authorised traders are already (to some extent) in use within the EAC. The use of ASYCUDA++, which classifies imports depending on their risk under ‘Green’, ‘Yellow’ or ‘Red’, already allows automatic release of goods for compliant traders. Imports which are labelled ‘Yellow’ are then subjected to scanning and then proceed for release or physical verification.

Additionally, with regard to the recent global developments in Supply Chain Security initiatives,²² EAC Partner States may be said to implement the Authorised Economic Operator (AEO) program albeit at different stages. While the AEO program is still at a conceptual level in Rwanda and Uganda, Tanzania is implementing a 'Compliant Trader Scheme' (focused on revenue only), and Kenya is already at a pilot stage of a full AEO program (Buyonge 2007). In summary, it is noted that there is a considerable need for cooperation at a regional level such that procedures concerning authorised traders are harmonised within the EAC.

4. The Single Window concept

It has been reiterated that there are different agencies that intervene in international trade. If, for example, inspection of goods is undertaken separately by different border agencies, or if an importer has to present different documents (worse still, in paper form) to different agencies, it is clear that a lot of time *and money* is wasted in those procedures. That is why the Single Window concept, whereby a trader submits the required information *once* to a single designated authority (preferably Customs) for multiple purposes can be a great instrument of trade facilitation.

With regard to inter-agencies' cooperation, there is certainly much that needs to be done in the EAC. In Kenya, for instance, import/export inspection and certification procedures involve many government bodies which include Customs, Kenya Bureau of Standards, Kenya Plant Health Inspectorate, Pest Control Products Board, the Ministry of Agriculture and the Ministry of Livestock Development. These bodies do not collaborate adequately. This causes duplication of functions and wastage of resources thereby hindering efficiency in trade. And the situation is not very different in the other East African countries. The Single Window concept (preferably at the EAC level) would therefore be desirable.

As some authors have suggested,²³ the Single Window concept needs to be supplemented by the *One Stop Shop* which allows the performance of all necessary checks, controls, and administrative formalities at the same place, at the same time. With the finalisation of setting regional standards (in December 2007) and the foreseen centralisation of customs collection at the first point of entry,²⁴ there is hope that a Single Window will be developed and implemented in the EAC.

IV. Transit within the East African Community

'Freedom of Transit' is the title given to Article V, GATT 1994. This Article defines 'transit' and provides for freedom of transit, regulation of traffic in transit (urging Members to avoid unnecessary delays or restrictions), setting reasonable charges and regulations for traffic in transit, non-discrimination – with regard to like products as well as air transit of goods. It is clear that some of these transit issues²⁵ go beyond the strictly Customs domain. The following paragraphs will put more emphasis on those transit aspects in which Customs is strictly present, which have not yet been addressed in section III above, and which have a significant impact on trade facilitation in the EAC.

Unfortunately, transit procedures are some of the troubling non-tariff barriers to the intra-EAC trade. The fact, for instance, that there are differences in axle load and Gross Vehicle Mass amongst EAC Partner States leads to a situation whereby Tanzanian trucks transiting through Kenya, en route to Uganda, have to strip off excess cargo to avoid financial penalties for overloading. Of course, this is costly in terms of time and money. Moreover, Kenyan demand for a customs insurance bond (about US\$200 per 20-foot container) on transit goods destined to Uganda, Rwanda and Burundi affects traders,²⁶ and one wonders whether such an amount would violate Article V:4, GATT 1994.

Delays at roadblocks are also a reality in the EAC. This is mostly connected with the corruption issue which was elaborated above. Many traders report that police officers stop vehicles with goods in transit at various roadblocks, yet officially, they are only supposed to stop vehicles based on proof that goods being transported are suspicious. Additionally, although this is an infrastructural problem and hence, out

of the scope of the concept of trade facilitation followed in this article, it is noted that transit is very much affected by the poor transport systems in the region.

However, there are some positive developments in the region which are related to transit. The establishment of the Malaba joint border post (on the Kenya/Uganda border) is a good example of improved coordination and cooperation amongst authorities in the EAC. Moreover, with the credits from the World Bank (approved on 24 January 2006), there is progressive improvement in transit matters in the EAC through, *inter alia*, the setting up of more joint border posts.

V. Conclusions

In his opening speech during the World Customs Forum 2007,²⁷ the Secretary General of the World Customs Organization, Mr Michel Danet, referred to trade as an 'international public good to be safeguarded and facilitated'. This view, also shared by this author, is not only remaining in international discussion forums but also gradually pervading Customs in the EAC. Hence, taking into consideration the relevant provisions of the World Trade Organization, as well as other international 'champions' of trade facilitation such as the Revised Kyoto Convention, Customs in the EAC is slowly but surely getting involved in trade facilitation.

So far, many commendable strategies have been taken by Customs in the EAC, and some of these have been addressed in this article. At this juncture however, a few points must be stressed. The establishment of a unified *East African Customs Authority*²⁸ by 2010 can lead to trade facilitation only if there is a formidable amendment of EAC customs law so as to enable better coordination among all stakeholders in all the EAC Partner States. It is also advisable that such reform makes use of the various WCO trade facilitation-related instruments.

Finally, the current efforts to develop an EAC Customs Curriculum²⁹ are laudable for there are some EAC-specific aspects that need to be handled. In this regard, one cannot but think of *integrity* and the *dissemination of information*. More commitment is needed.

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Endnotes

- 1 *EAC Treaty - 1999*, Article 74.
- 2 *EAC Treaty - 1999*, Article 5, p. 15.
- 3 Chapter 2 of the *General Annex to the Revised Kyoto Convention* defines 'Customs' as the Government Service which is responsible for the administration of Customs law and the collection of duties and taxes and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods.

- 4 UN/ECE 2002, Trade facilitation in a global trade environment (Advance copy), Forum on Trade Facilitation, Committee for Trade, Industry and Enterprise Development, TRADE/2002/21, 21 March 2002, para. 43, p. 15.
- 5 WTO July 2007, Discussion Paper: Updated International Chamber of Commerce Recommendations for an Agreement on Trade Facilitation.
- 6 It should be noted that all the EAC Partner States are also Members of both the World Trade Organization and the World Customs Organization.
- 7 WT/DS44/R, Report of the Panel, 31 March 1998, *Japan - Measures affecting consumer photographic film and paper*.
- 8 WT/DS24/AB/R, Report of the Appellate Body, 10 February 1997, *United States - Restrictions on imports of cotton and man-made fibre underwear*.
- 9 *The Daily Monitor*; 6 January 2005.
- 10 Seminar title: 'Support to the Harmonisation of Trade and Customs Policies of the East African Community', 6-10 November 2006, Dar es Salaam, Tanzania; Organised by *InWEnt gGmbH*.
- 11 'Leaders to learn Kiswahili', *Sunday Monitor*, 1 August 2007.
- 12 See Section 219, *EAC Customs Management Act, 2004*.
- 13 See Section 229 (6), *EAC Customs Management Act, 2004*.
- 14 See Article VIII, GATT 1994.
- 15 One of the traders interviewed by this author put it simply: 'You bribe (Customs) and prosper or you stick to the ethical principles and perish!'
- 16 De Wulf & Sokol 2004.
- 17 See KRA homepage.
- 18 <http://www.kacc.go.ke/WHATSNEW.ASP?ID=97>, viewed 11 April 2008.
- 19 See Chapter 7 of the *Revised Kyoto Convention*.
- 20 The acronym ASYCUDA is derived from Automated SYstem for CUstoms DAta. The system was developed by UNCTAD for use by developing country members.
- 21 Buyonge 2007, pp. 55-62.
- 22 For more information about AEO, see the Framework of Standards, adopted by the WCO Council in 2007.
- 23 Lux & Malone 2006.
- 24 The EAC Development Strategy 2006-2010.
- 25 For example, in paragraph 2, Article V, GATT 1994.
- 26 The Gross Vehicle Mass is 54 tonnes (in Kenya), 46 tonnes (in Uganda) and 56 tonnes (in Tanzania). See EABC, *Proposed mechanism for the elimination of NTBs in EAC*.
- 27 WCO 11-12 December 2007, World Customs Forum 2007/WCO SAFE Framework of Standards, Brussels, Belgium.
- 28 The EAC Development Strategy 2006-2010.
- 29 Rwanda Revenue Authority 2008, *Revenue Magazine*, no. 20, p. 45.

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