



World Trade Organisation members' compliance with article XXIV of the General Agreement on Tariffs and Trade: The case of Tanzania

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Abstract

WTO provides the bedrock of international trade law. Thus, it supports open and predictable trade. Regional trade arrangements have become an accepted channel for trade development, consequently, they are recognised by WTO under article XXIV of GATT and the Enabling Clause. Most RIs are brought about by regional trade arrangements. The most common forms of RI are CUs and FTAs. WTO legal framework on RTAs in CUs and FTAs with regards to trade in goods are governed by the Text of Article XXIV GATT.

Tanzania has three RTAs – EAC, SADC and AfCFTA. The focus of this study is on two – EAC and SADC. Tanzania is in a multilateral preferential trade arrangement that is inconsistent with WTO requirements on RTAs. That is to say, Tanzania as a member of EAC which is a CU implies that she has to comply with WTO requirements on RTAs as provided for under article XXIV of GATT. The major being to enter into trade agreements collectively with other members of CU and not individually, since they operate as a single customs territory with a common external trade regime. However, Tanzania is both a member of a CU – EAC and a member of an FTA – SADC to the exclusion of other members of CU.

WTO members are required to notify WTO upon the formation of RTAs so that the same can be examined by the Committee on RTAs. However, the Committee has enjoyed little success in assessing the consistency of the RTAs notified to WTO over the years. Therefore, functions of the Committee should be reviewed to serve as a forum for notification and provision of clarity on RTAs to WTO members on the basis of factual presentations by WTO Secretariat.

Due to multiple memberships of member states in various RECs, both EAC and SADC use RoO to determine whether goods originate from partner states in order to qualify for community preferential treatment. The administration of EAC CET faces a number of challenges including the lack of a customs authority at the regional level that would ensure uniformity in the management of CU. Another setback in the implementation of the CET is multiple memberships of member states where preferential treatment is still extended to other RECs despite a restricting provision and existence of CU, thus, eroding the gains of such union. This is brought about by problems in drafting Treaties where partner states exploit loopholes, for instance, Protocol on EACCU does not prohibit EAC member states from maintaining trade arrangements they had prior to the formation of CU or signing individual agreements thereafter such as FTAs. This became evident during the ratification of AfCFTA Agreement.

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1. Introduction

1.1 Background

The World Trade Organisation (WTO) provides the bedrock of international trade law. To such end it supports open and predictable trade.¹ Regional trade arrangements have become a well-accepted channel for trade advancement and development; as a result, it is recognised by WTO under the most favoured nation (MFN) principle. This is accompanied by a departure provided for under article XXIV of the General Agreement on Tariffs and Trade of 1994 (GATT), that include the potential of regional trading arrangements. Most regional integrations (RIs) are brought about by regional trade arrangements. The typical forms of RI are preferential trade agreements (PTA), free trade areas (FTA), customs unions (CU), common markets and economic unions.² According to WTO rules, preferential trade assumes three major forms namely unilateral, bilateral and regional or mega-regional.³ For preferential trade to occur trade agreements are inevitable between member states thereto. Trade agreements at present make up approximately 60 percent of global trade, and the percentage is getting higher.⁴ As of 30 June 2021, 350 regional trade agreements (RTAs) by WTO members were in force.⁵

The primary focus of this study is on FTAs and CUs in the area of goods and RTAs. WTO legal framework on RTAs in FTAs and CUs in the area of trade in goods are governed by the Text of Article XXIV of the General Agreement on Tariffs and Trade of 1994 complemented with the Text of Note Ad Article XXIV⁶ and its updates together with the Text of the Understanding on the Interpretation of Article XXIV of GATT of 1994 (GATT Understanding).⁷

¹ MS Akman and others 'World trading system under stress: Scenarios for the future' (2020) 11(3) *Future scenarios for the world trading system* 360 at 362.

² J Rutaihwa & N Rutatina 'What does the intra-industry trade data on EAC tells us?' (2012) 1(5) *International Journal of Academic Research in Economics and Management Sciences* 174 at 176.

³ Akman and others (n 1) 362.

⁴ As above.

⁵ WTO 'Facts & figures: Regional trade agreements 1 January 2021 – 30 June 2021' https://www.wto.org/english/tratop_e/region_e/rtafactfig_e.pdf (accessed 25 September 2021).

⁶ https://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm#adarticleXXIV (accessed 20 September 2021).

⁷ WTO 'Regional trade agreements' https://www.wto.org/english/tratop_e/region_e/region_e.htm#rules_ita (accessed 20 September 2021).

An FTA means a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories.⁸

A CU means,

the substitution of a single customs territory for two or more customs territories,
so

that:

- (i) duties and other restrictive regulations of commerce...are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and
- (ii) ...substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union.⁹

That is, the constituent members of CU are supposed to put in application substantially similar duties and other regulations of commerce to external trade with third countries. Thus, the constituent members of CU are supposed to put in application a common external trade regime, in relation to both duties and other regulations of commerce.¹⁰

Establishing a CU or an FTA is a right of all WTO members under article XXIV of GATT.¹¹ However, there are limitations as provided for under article XXIV:5 of GATT. Furthermore, in the establishment or expansion of CU, member states thereto are

⁸ Art XXIV:8(b) of the General Agreement on Tariffs and Trade 1994 (GATT).
https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXXIV (accessed 17 May 2021).

⁹ Art XXIV:8(a) of the General Agreement on Tariffs and Trade 1994 (GATT).

¹⁰ *Turkey – Restrictions on Imports of Textile and Clothing Products*, Report of the Appellate Body (22 October 1999), WTO Doc WT/DS34/AB/R (1999) (*Turkey-Textile case*).

¹¹ *Turkey-Textile case* (n 11) para 11.

required to the largest feasible degree refrain from bringing about negative impacts on the trade of other partner states,¹² but to facilitate trade.¹³

The provisions of article XXVI of GATT are applicable to the metropolitan customs territories of the contracting member states and to any other customs territories. Every such customs territory shall, entirely for the object of the territorial application, be regarded as if it were a contracting party.¹⁴ That is to say, after member states forming a CU, such a union will be regarded as a single territory with the intention of territorial application and therefore, the rules of article XXIV of GATT shall be applicable accordingly. Thus, member states of CU are to trade collectively and not individually since they operate as a single customs territory with a common external trade regime.

With regards to regional trade, Tanzania has three RTAs – the East African Community (EAC), the Southern African Development Community (SADC)¹⁵ and the recently ratified highly ambitious African Continental Free Trade Area (AfCFTA).¹⁶ In other words, Tanzania is a member of three regional economic communities (RECs). That is, EAC which is a CU with a common external tariff (CET),¹⁷ SADC which is an FTA^{18,19} and AfCFTA which is an FTA.²⁰

The focus of this study is on the two RECs – EAC and SADC. Over 21 percent of Tanzanian's total trade is intra-Africa and about 75 percent of Tanzanian's main African

¹² Preamble to the Text of the Understanding on the Interpretation of Article XXIV of General Agreement on Tariffs and Trade of 1994 (GATT Understanding) https://www.wto.org/english/docs_e/legal_e/10-24_e.htm (accessed 17 May 2021).

¹³ Art XXIV:4 of GATT.

¹⁴ Art XXIV:1 of GATT.

¹⁵ O Mashindano, D Rweyemamu & D Ngowi 'Deepening integration in SADC: Tanzania – torn between EAC and SADC' (2007) 9 *Regional Integration in Southern Africa* at 107.

¹⁶ Tralac 'Status of AfCFTA ratification' <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (19 November 2021).

¹⁷ 'Trade Policy Review: East African Community' (20 September 2006) WTO Doc WT/TPR/S/171 at viii.

¹⁸ Trade Policy Review (n 17) 9.

¹⁹ Trade Policy Review (n 17) 1.

²⁰ G Erasmus 'Should the RECs disappear in order to have the AfCFTA?' tralac trade brief no. S21TB04/2021 (2021) at 9 <https://www.tralac.org/documents/publications/trade-briefs/tb2021/4413-s21tb042021-erasmus-should-the-recs-disappear-in-order-to-have-the-afcfta-01112021/file.html> (accessed 20 November 2021).

trading partners are member states of EAC and SADC under the conditions of preferential market access.²¹

With the exception of South Sudan which is an observer, all state parties to the two RECs including Tanzania are WTO members.²² Therefore, every member is completely accountable to adhere to the entire provisions of GATT. Consequently, they are obliged to take such feasible actions as may be accessible to them to establish such compliance by regional and local governments and authorities in their territories.²³

1.2 Research problem

Tanzania is in a multilateral preferential trade arrangement that is inconsistent with WTO requirements on RTAs. To be specific, Tanzania as a member of EAC which is a CU implies that she has to comply with WTO requirements on RTAs as provided for under article XXIV of GATT. The major being to enter into trade agreements collectively with other members of CU and not individually, since they operate as a single customs territory with a common external trade regime. However, Tanzania is both a member of CU and a member of an FTA to the exclusion of other members of CU. Members of CU are supposed to apply CET and enter into trade arrangements with third parties as a block but Tanzania is in an FTA arrangement as an individual. Despite a lot of scholars on RTAs and regional integration finding this arrangement problematic, they have neglected to look at it in depth. Therefore, this study seeks to so ascertain the basis and modality that Tanzania has used to enter into such an arrangement and managed to maintain it to date.

1.3 Research objectives

The overall objective of this study is to ascertain the basis of Tanzania as a member of the EAC which is a CU entering into an FTA arrangement to the exclusion of other members of the CU contrary to article XXIV of GATT. The specific objectives of this study are:

²¹ Tralac 'Tanzania: Intra-Africa trade and tariff profile 2018'
<https://www.tralac.org/documents/publications/trade-data-analysis/2948-tanzania-trade-and-tariff-profile-2018-infographic/file.html> ((accessed 21 November 2021).

²² WTO 'Members and observers' https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm
(accessed 20 June 2021).

²³ Art XXIV:12 of GATT Understanding.

- i) To determine the customs regime Tanzania uses in the two trade arrangements especially with respect to goods from an FTA
- ii) To examine the challenges that an FTA arrangement in question poses, has posed or might pose to other CU members and the effective operation of a CU in line with the Protocol on the Establishment of the East African Community Customs Union
- iii) To examine the extent of effects to other members of CU and the CU itself – if any.

1.4 Research questions

The major question this study seeks to address is what is the basis for Tanzania as a member of EAC which is a CU entering in an FTA arrangement to the exclusion of other members of CU contrary to article XXIV of GATT?

In addressing this question, the following ancillary questions will also be answered:

- i) Which customs regime does Tanzania use in these two trade arrangements especially with respect to goods from an FTA?
- ii) What challenges does an FTA arrangement in question pose, has posed or might pose to other CU members and the effective operation of a CU in line with the Protocol on the Establishment of the East African Community Customs Union?
- iii) What is the extent of effects to other members of CU and the CU itself – if any?

1.5 Significance of the study

This study is necessary because it describes and analyses the present status of Tanzania in relation to RECs in question. Not only that but this study also sheds some light to the unanswered questions concerning such an extraordinary arrangement Tanzania is into. This could also be used as a case study if at all such arrangements can exist all together to the benefit of all members in both arrangements.

2. Literature review

Nicolas and Andrew argue that article XXIV:8(a)(ii) of GATT insists on members of CU to put in application substantially similar duties and other regulations of commerce to the trade with third countries. This demand creates a common external trade regime or a common commercial policy where parties are obliged to coordinate their individual external trade procedures governing trade with third countries.²⁴ They further state that under an FTA, members are under no obligation to adopt collective external regulations for external trade, that is, member states to an FTA normally carry on applying their separate external trade rules. However, there may be circumstances where the formation of an FTA may coordinate particular domestic regulations, such as sanitary and phytosanitary measures, and consequently reforming the commensurate external regulations.²⁵ This study thus seeks to find out the tariffs Tanzania applies with respect to the two trade arrangements.

Fiorentino, Verdeja and Toqueboeuf argue that members in CUs, if played by the rules, restricts individual members' option for future RTA memberships as a smooth operation of CU demands that any arrangement with a third country to include CUs as a unit. They further stress that the requirement in CU of CET and harmonisation of the members' commercial policies does not permit in general a 'go alone' policy whereby one member state individually negotiates a preferential arrangement with a third country. This is because such a circumstance would interfere with the operation of CU as goods from the third country could enter the union at a preferential rate through the bilateral RTA, resulting to a loss of tariff revenues for the other member states to CU.²⁶

Gerhard Erasmus similarly argues that in a CU the partner states are deprived of the policy space over the use of the import tariff and cannot individually conclude trade deals with third parties. In an FTA the state parties maintain individual policy space, while concurrently engage in national and REC-related integration agendas.²⁷

WTO secretariat is of the view that membership in overlapping preferential agreements, particularly the combination of FTAs – SADC and CU – EAC, makes their trade regimes complicated, and hard to administer. This may limit the perfect

²⁴ NJS Lockhart & AD Mitchell 'Regional trade agreements under GATT 1994: An exception and its limits' in AD Mitchell (ed) *Challenges and prospects for the WTO* (2005) 217 at 20-21.

²⁵ NJS Lockhart & AD Mitchell 'Regional trade agreements under GATT 1994: An exception and its limits' in Mitchell (n 24) 22.

²⁶ RV Fiorentino, L Verdeja & C Toqueboeuf 'The changing landscape of regional trade agreements: 2006 update' Discussion paper no. 12 (2007) at 7.

²⁷ Erasmus (n 20) 8.

operation of EAC as a CU.²⁸ This study thus seeks to investigate whether Tanzania's stance affects the proper functioning of the EACCU.

Furthermore, WTO is of the view that the rise of RTAs has created the phenomenon of overlapping membership. This can impede trade flows especially when traders strive to comply with numerous collections of trade regulations. Additionally, as the range of RTAs widens to incorporate policy areas not monitored multilaterally, there may be greater chances of disparities between various arrangements. For instance, older RTAs included tariff liberalisation and associated regulations such as trade defence, standards and rules of origin only. Gradually, RTAs have progressed to cover liberalisation of services as well as obligations in services regulations, investment, competition, intellectual property rights, electronic commerce, environment and labour. This could result into administration uncertainties and enforcement difficulties.²⁹

Josie Knowles says that, despite lack of awareness, a large majority of Tanzanians are positive about the proposed economic aspects of integration, including CU. However, elite figures do not approve of Tanzania's membership in SADC, they find it problematic.³⁰ Moreover, from the surveys conducted the approval of citizens – Tanzanians on CU was 60 percent in 2008 that somewhat declined to 55 percent in 2012, whereas disapproval of CU had risen from 19 percent to 35 percent in the same period.³¹ Therefore, this study seeks to question the elite assertion with regards to Tanzania's membership in an FTA.

Crawford and Fiorentino argue that there is enough proof to indicate that the negotiation and management of numerous arrangements overburden the institutional capacity of developed countries too and such may lessen commitment for liberalisation at the multilateral stage. RTAs generate conferred interests intended to evade reducing preferential scopes, while cumbersome rules of origin make global trade extra costly and complicated. They further argue that RTAs may present a risk to an even growth of global trade through multiple trade and investment diversion, specifically if liberalisation on a preferential arrangement is not associated with

²⁸ Trade Policy Review (n 17) ix.

²⁹ WTO 'Regional trade agreements and the WTO'

https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 20 September 2021).

³⁰ J Knowles 'East African federation: Tanzanian awareness of economic and political integration remains poor, but there is growing support for political links' Afrobarometer briefing paper no. 146 (2014) at 2.

³¹ Knowles (n 30) 5.

simultaneous MFN liberalisation where the smallest and weakest states may find themselves marginalised.³²

Henry Mutai argues that within the law, member states to CU are constrained to participate in any separate trade negotiations with third countries, but to negotiate as a whole. To that end, the discrimination of members through entering individual, preferential agreements with third countries would thus, be prevented.³³ He further argues that the major historical problem encountering trade liberalisation in the Eastern and Southern African regions and that has presented itself in the increase of overlapping RTAs is the absence of a consistent, practical policy to govern the process. Although the Lagos Plan of Action of 1980 and the Treaty Establishing the African Economic Community of 1991 provide for a general insight of a united Africa, they unwittingly established the foundation for the increase of RTAs. He further stress that with all RECs having similar overall goals, there was no disincentive to participate in as plenty as were accessible in the label of cooperation with one's neighbours. When this was in place, nonetheless, problems presented by sovereignty and myopic interests have demonstrated to be a hindrance to effective liberalisation.³⁴

³² J Crawford & RV Fiorentino 'The changing landscape of regional trade agreements' Discussion paper no. 8 (2005) at 16.

³³ HK Mutai 'Regional trade integration strategies under SADC and the EAC: A comparative analysis' (2011) 1 *SADC Law Journal* 81 at 90.

³⁴ Mutai (n 33) 95.

3. Methodology

This study is desk and library based. The University of Pretoria Oliver R Tambo Law Library was the main resource. The researcher also used resources available on websites of relevant institutions such as AfCFTA, EAC, SADC, tralac, WTO and other online resources to gather relevant existing information.

The scope of this study is CUs and FTAs in the area of goods and RTAs. Limitations of this study are that some relevant resources are not available or accessible online – over the websites of the relevant institutions. Therefore, secondary sources were used where applicable.

4. Findings and discussion

4.1 Tanzania within regional economic communities

Tanzania is a union of two previously independent states, Tanganyika – also known as mainland Tanzania and Zanzibar that merged in 1964 to form the United Republic of Tanzania. Tanganyika gained independence in 1961, whilst Zanzibar revolution was in 1963. With the establishment of independent states, free trade relations that existed during colonial times were not continued.³⁵

Tanzania is a signatory and a founding member of WTO.³⁶ She was a member of WTO since 1964.³⁷ Tanzania is also an active member of EAC, SADC and recently AfCFTA. Thus, on the continent, she is implementing EACCU and SADC FTA³⁸ and AfCFTA.

One of Tanzania's key political priorities is to promote considerable integration and deepen relations with other African states and other regional communities. To that end she played a significant part in re-establishing EAC, actively supports the deepening of SADC integration³⁹ and recently ratified AfCFTA. This chapter explores the status of Tanzania in the two RECs, that is, EAC and SADC in detail.

4.1.1 Southern African Development Community

Tanzania is a founding member of SADC; she was there since the establishment of frontline states. SADC existed since 1980, when it was established as a free association of nine majority-ruled states in Southern Africa known as the Southern African Development Coordination Conference (SADCC) in Lusaka, Zambia. The major purpose of SADCC was to harmonise development programmes so as to lower economic reliance on at that point in time apartheid South Africa.⁴⁰ The conversion of the association from a Coordinating Conference into a Development Community (SADC) occurred on 17 August 1992 – came into effect on 30 September 1993 at Windhoek, Namibia, when the Declaration and Treaty of the Southern African Development Community of 1992 (Treaty of SADC) was signed at the Summit of heads of state and

³⁵B Balassa 'Types of economic integration' in F Machlup (ed) *Economic Integration: Worldwide, regional, sectoral* (1976) at 27

https://www.google.com/url?sa=t&source=web&rct=j&url=https://documents.worldbank.org/curated/en/657491468178769801/pdf/REP69000Types0of0economic0integration.pdf&ved=2ahUKEwigo6nEyO_yAhVMG6YKHU2iBzwQFnoECCKQAQ&usq=AOvVaw1AjRpQecWbjBaPUY5Zaumt (accessed 08 September 2021).

³⁶ World Bank 'Tanzania diagnostic trade integration study (DTIS) update 2017: Boosting growth and prosperity through agribusiness, extractives, and tourism' (2018) (Tanzania DTIS) at 19.

³⁷ Tanzania DTIS (n 36) 33.

³⁸ Tanzania DTIS (n 36) 19.

³⁹ Mashindano, Rweyemamu & Ngowi (n 15) 102.

⁴⁰ SADC 'History and Treaty' <https://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 16 September 2021).

government, consequently granting the association a legal personality.⁴¹ That is, from a free alliance into a legally binding agreement.

Community means the organisation for economic integration (EI).⁴² The aim of converting SADCC into SADC was to foster deep economic cooperation and integration to assist in addressing a lot of challenges that make it hard to maintain economic development and socio-economic growth, such as prolonged reliance on exports of a couple of basic products. It was thus, inevitable for SADC member states to quickly change and reform their economies. The little volume of their separate markets, poor socio-economic infrastructure, high per capita costs of equipping infrastructure and their small revenue base, created hardships for them to separately stimulate or support key investments for their sustained development.⁴³

The main objectives of SADC are to increase partner states' economic development, investment, job creation and equitable intra-regional growth.⁴⁴ SADC is currently made up of 16 partner states namely: Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. SADC headquarters are in Gaborone, Botswana.⁴⁵ Appendix 1 provides a pictorial illustration of SADC member states.

Member states and SADC are allowed to enter into trade arrangements with third countries, regional and international organisations whose purposes are consistent with those of SADC and provisions of the Treaty of SADC.⁴⁶

SADC is dedicated to deepen the integration processes among its member states and has approved the regional indicative strategic development plan (RISDP) so as to present key recommendations in the draft and development of SADC programmes, projects and activities that would help in attaining development and economic growth, elimination of poverty, improving the level and conditions of lives of the citizens of Southern Africa and providing for the community deprived with the aid of RI.⁴⁷

In 2004 Tanzania notified WTO through its Permanent Mission that SADC member states subscribed to a Protocol on Trade in the Southern African Development

⁴¹ Art 2(1) of Treaty of the Southern African Development Community of 1992 (Treaty of SADC).

⁴² Art 1 of Treaty of SADC.

⁴³ Mashindano, Rweyemamu & Ngowi (n 15) 181.

⁴⁴ Mashindano, Rweyemamu & Ngowi (n 15) 15.

⁴⁵ Art 2(2) of Treaty of SADC.

⁴⁶ Art 24(1) of Treaty of SADC.

⁴⁷ Mashindano, Rweyemamu & Ngowi (n 15) 3.

Community Region aiming at establishing an FTA as provided for under article XXIV of GATT.⁴⁸

4.1.1.1 Tanzania's implementation of Protocol on trade in the Southern African Development Community Region

Protocol means an instrument of implementation of the Treaty whereas region means the geographical area of the SADC member state.⁴⁹ SADC has been attempting consistently to establish policies applicable to accelerate trade, since trade has been one of the very essential strengths of integration and a source of development of a lot of states.⁵⁰ For that reason the Protocol on trade in the Southern African Development Community Region (SADC Protocol on Trade) was adopted in 1996 and came into force in 2001.⁵¹ Therefore, SADC Protocol on Trade in goods and services is one of the core fields of cooperation between the partner states. Partner states' goals, as provided for in the Protocol, cover the liberalisation of intra-regional trade in goods and services on the footing of fair, mutually equitable and beneficial trade arrangements and the establishment of an FTA including partner states.⁵² SADC Protocol on Trade aimed at removing intra-regional trade barriers and transforming the community into an FTA for 85 percent of goods by 2008, and for all goods by 2012. That is, to accelerate trade in the absence of any restrictions, by removing import duties,⁵³ abolishing export duties⁵⁴ and NTBs.⁵⁵

As noted above SADC Protocol on Trade was notified to WTO under article XXIV of GATT⁵⁶ and referred by the Council for Trade in Goods to the Committee on RTAs for evaluation.⁵⁷ Evaluation of the Protocol's provisions demonstrate a close link between the rules set out under the Protocol and the rules found in WTO agreements, with

⁴⁸ WTO 'Southern African Development Community Free Trade Area: Notification from Tanzania' (9 August 2004) WTO Doc WT/REG176/N/1 (2004).

⁴⁹ Art 1 of Treaty of SADC.

⁵⁰ Mashindano, Rweyemamu & Ngowi (n 15) 182.

⁵¹ SADC 'Documents & publications' <https://www.sadc.int/documents-publications/show/Protocol%20on%20Trade%20> (accessed 17 September 2021).

⁵² Art 2 of Protocol on Trade in the Southern African Development Community Region (SADC Protocol on Trade).

⁵³ Art 4 of SADC Protocol on Trade.

⁵⁴ Art 5 of SADC Protocol on Trade.

⁵⁵ Art 6 of SADC Protocol on Trade.

⁵⁶ WTO 'Southern African Development Community Free Trade Area: Notification from Tanzania' (9 August 2004) WTO Doc WT/REG176/N/1 (2004).

⁵⁷ WTO 'Protocol on Trade in the Southern African Development Community: Notification from Tanzania' (27 August 2004) WTO Doc WT/REG176/1/Rev.1 (2004).

several rules on various disciplines having been embraced directly from WTO. Although this move had the advantage of assuring that there is no inconsistency between these provisions, the chance to design the provisions to the needs of SADC partner states some of whom were not WTO members at the time was lost.⁵⁸

Tanzania has made laudable improvement in administering SADC Protocol on Trade. Barriers to intra-SADC trade have been gradually removed – especially those connected to the elimination of tariffs and non-tariff barriers and import duties. The liberalisation of Tanzania's trade regime has led to lowering of its tariffs at nearly 7 percentage points since the middle of 1990s. Tanzania's import duties have also fallen evidently lower than the regional average. Notably, all tariffs are ad valorem, and there are no seasonal duties, tariff quotas, or variable levies.⁵⁹

In 2003, EAC and SADC constituted approximately 10 percent of Tanzania's exports, with substantial trade to EAC members revolving around agri-food products and for SADC, primarily minerals and industrial goods. With regard to imports, in 2003, SADC was virtually three times as significant as EAC as a source of goods.⁶⁰

Protocol on Trade⁶¹ as well as Treaty of SADC⁶² recognise the provisions of other RTAs, bilateral trade agreements, and multilateral trade agreements and rules under GATT and WTO.⁶³ Moreover, member states are allowed to conclude new preferential trade agreements among themselves, as long as such agreements conform to the provisions of the Protocol.⁶⁴

SADC Protocol on Trade, that constitutes the framework of SADC trade regime, is in fact older than the new EAC Treaty, as it was signed in August 1996 whereas EAC Treaty was signed in November 1999. Nonetheless, it was not until four years later, in 2001 that it came into effect. Such a delay in Protocol's coming into effect was, presumably, an earlier indication of the region's absence of willingness to participate in trade liberalisation.⁶⁵

SADC Protocol on Trade prohibits member states to conclude preferential trade agreements with third countries that may hamper or defeat the purposes of the Protocol and that any benefit, concession, privilege or power accorded to a third

⁵⁸ Mutai (n 33) 84.

⁵⁹ Mashindano, Rweyemamu & Ngowi (n 15) 17.

⁶⁰ Mashindano, Rweyemamu & Ngowi (n 15) 108.

⁶¹ Art 27(1) of SADC Protocol on Trade.

⁶² Art 24(1) of Treaty of SADC.

⁶³ Mashindano, Rweyemamu & Ngowi (n 15) 34.

⁶⁴ Art 27(2) of SADC Protocol on Trade.

⁶⁵ Mutai (n 33) 84.

country under such arrangements ought to be accorded to other partner states.⁶⁶ Since the signing of EACCU, Tanzania has accorded market access preferences to Kenya and Uganda that are greater than those provided to her SADC partner states. This means Tanzania is required to grant EAC free intra-regional trade preferences to all SADC partner states. Nonetheless, SADC Protocol on Trade also provides SADC partner states a deviation from the commitment to grant benefits if the supplementary privileges are dealt with in the circumstances of an arrangement that came before the SADC Protocol on Trade.⁶⁷ Since EAC Treaty entered into effect three months prior to SADC Protocol on Trade, the waiver could apply to Tanzania. However, as integration deepens, these matters need to be determined or else it might result to unreasonable trade deflection.⁶⁸

Comparably, in SADC, Protocol on Trade made provisions for the removal of barriers to intra-SADC trade and lowering tariffs. Such removal and lowering were to be implemented under the principle of asymmetry, that were supposed to be attained in an eight-year period, that was, by 2008.⁶⁹ That was a lengthy transition period than that assumed by EAC, although SADC process commenced in advance. The schedule formulated by partner states catered for the five Southern African Customs Union (SACU) member states to spearhead the abolition of their tariffs. Moreover, the removal of barriers to intra-SADC trade takes into account the existing PTAs between and among member states.⁷⁰ Protocol on Trade also provides for goods to be classified into various categories aimed at lowering tariffs. Therefore, goods in Category A were to be liberalised instantly; those in Category B were singled out for progressive liberalisation; while Category C constituted of goods recognised as being sensitive and whose tariffs are last to be liberalised.⁷¹

The following are impacts of SADC Protocol on Trade on regional trade. First, rules of origin (RoO) on a number of products are more restrictive than those of EAC. Second, additional costs to member states as costs of negotiating in a number of forums are high and customs officials have to be trained in all RECs in order to make efficient business decisions.⁷² Third, infant industries of small states like Tanzania could be forced to close as more powerful members like South Africa intensify regional competition. Fourth, possible losses of customs revenue due to unwarranted trade

⁶⁶ Art 28(2) of SADC Protocol on Trade.

⁶⁷ Art 28(3) of SADC Protocol on Trade.

⁶⁸ Mashindano, Rweyemamu & Ngowi (n 15) 113.

⁶⁹ Art 3(1)(b) of SADC Protocol on Trade.

⁷⁰ Art 3(1)(a) of SADC Protocol on Trade.

⁷¹ Mutai (n 33) 85.

⁷² Mashindano, Rweyemamu & Ngowi (n 15) 112.

deflection⁷³ as well as possible losses of government revenue due to the phasing out of tariffs on intra-regional trade. Fifth, the opening of domestic markets to partner countries can increase competition in sectors with previously highly concentrated industrial structures. This would tend to reduce the monopolistic pricing power on incumbents - increasing welfare for the economy as a whole.⁷⁴ Sixth, the possible costly trade diversion rather than welfare-enhancing trade creation, if trade is shifted from efficient producers outside SADC to preferential trading partners that produce at higher costs. In both cases, government loses tariff revenue on imports from third countries. Without domestic producers benefiting to a corresponding extent from lower import prices the elimination of intraregional trade barriers between small countries is likely to generate more trade diversion and little trade creation. The risk for trade diversion to occur is particularly high because trade within SADC countries accounts for only a small share of overall trade. Last but not least, SADC FTA will be net-improving, with small economies like Tanzania reaping smaller benefits in relation to its GDP than other SADC members.⁷⁵

4.1.2 East African Community

EAC is a regional intergovernmental organisation of six member states – admission of the seventh is on-going. The three founding partner states are the Republics of Kenya, Uganda and the United Republic of Tanzania. The Republics of Burundi and Rwanda joined in 2007 and the Republic of South Sudan joined in 2016. EAC headquarters are in Arusha, Tanzania.⁷⁶

East African RI dates far back to the early 20th century, at that point in time comprising of three of the current partner states of EAC namely Kenya, Tanzania and Uganda. The formal social and economic integration measures in the East African region began with, *inter alia*, the establishment of the Customs Collection Centre in 1900.⁷⁷ The history of cooperation can be traced as far back as in 1917 when the British protectorates of Kenya and Uganda were united altogether in CU,⁷⁸ that subsequently the then Tanganyika became a member in 1927.⁷⁹

⁷³ Mashindano, Rweyemamu & Ngowi (n 15) 113.

⁷⁴ Mashindano, Rweyemamu & Ngowi (n 15) 137.

⁷⁵ Mashindano, Rweyemamu & Ngowi (n 15) 138.

⁷⁶ EAC 'Overview of EAC' <https://www.eac.int/overview-of-eac> (accessed 17 September 2021).

⁷⁷ Preamble to the Treaty for the Establishment of the East African Community of 1999 (Treaty for EAC).

⁷⁸ Mutai (n 33) 82.

⁷⁹ EAC 'History of the EAC' <https://www.eac.int/eac-history> (accessed 16 September 2021).

The initial move in attempting to re-establishing EAC would be traced back to measures taken by Presidents Arap Moi of Kenya, Ali Hassan Mwinyi of Tanzania and Yoweri Museveni of Uganda that led to the signing of an agreement for the establishment of a Permanent Tripartite Commission for East African Co-operation, in Arusha, Tanzania, on 30 November 1993, in the attendance of the late Mwalimu Julius Kambarage Nyerere. The Secretariat of the Commission was formed in 1996, followed by the signing of the Treaty reviving EAC on 30 November 1999 – Treaty for the Establishment of the East African Community of 1999 (Treaty for EAC). The Treaty came into effect on 7 July 2000⁸⁰ with the official inauguration on 15 January 2001.⁸¹

The overall objective of the EAC regional bloc is to strengthen the integration process through the co-operation in liberalisation and advancement of intra-regional trade.⁸² To that end, EAC member states agreed to develop and adopt an East African trade regime⁸³ including an undertaking to establish among themselves, *inter alia*, a CU.⁸⁴ Article 75 of Treaty for EAC provides for the formation of CU to be detailed in a Protocol. Consequently, Protocol on the Establishment of the East African Community Customs Union of 2004 (Protocol on EACCU) was signed on 02 March 2004 at the EAC Summit. Article 2 of the Protocol on EACCU establishes EACCU. EACCU became operational on 01 January 2005.⁸⁵ As per the Treaty, CU was to be established progressively over the course of a transitional period.⁸⁶ Therefore, EACCU became fully-fledged on 01 January 2010 following the end of a five-year transitional period.⁸⁷ This arrangement was fairly unusual as EAC did not follow a linear model to EI as both an FTA and CU stages were implemented simultaneously.⁸⁸

EAC was notified as an RTA to WTO under the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries Decision of 28

⁸⁰ AF Lwaitama, J Kasombo & K Mkumbo 'A synthesis research report on the participation of citizens in the East African Community integration process' (2013) at 12 <https://library.fes.de/pdf-files/bueros/tanzania/10173.pdf> (accessed 01 September 2021).

⁸¹ Rutaihwa & Rutatina (n 2) 175.

⁸² Rutaihwa & Rutatina (n 2) 175.

⁸³ Art 74 of Treaty for EAC.

⁸⁴ Art 5(2) of Treaty for EAC.

⁸⁵ EAC 'History of the EAC' <https://www.eac.int/eac-history> (accessed 16 September 2021).

⁸⁶ Art 75(2) of Treaty for EAC.

⁸⁷ EAC 'History of the EAC' <https://www.eac.int/eac-history> (accessed 16 September 2021).

⁸⁸ Mutai (n 33) 83.

November 1979 (Enabling Clause) on 9 October 2000.⁸⁹ The differential and more favourable treatment for developing countries under the Enabling Clause was formulated to accelerate and boost the trade of developing states.⁹⁰ Therefore, WTO members may grant differential and more favourable treatment to developing states without granting such treatment to other members.⁹¹ This is with regards to the exceptional economic problems and the special development, financial and trade demands of the least developed countries⁹² whereby developed states do not require mutual obligations made by them in trade negotiations to lower or abolish tariffs and other barriers to the trade of developing states,⁹³ for instance, under GSP measures.⁹⁴ EAC reflects the regional agreements entered into between less developed member states for the reciprocal lowering or abolition of tariffs.⁹⁵ This kind of arrangement is also known as partial scope agreements.⁹⁶ Similar to article XXIV of GATT, the Enabling Clause is an exception⁹⁷ to MFN principle⁹⁸ although less stringent.

EAC was notified to WTO as a CU on 01 August 2012.⁹⁹ Although EAC's notification was not under article XXIV of GATT, the provisions of the Protocol on the Establishment of the East African Community Customs Union do conform to the provisions of article XXIV in terms of definition and conceptualisation of a CU. And as indicated earlier the Text of Article XXIV of GATT are the governing provisions with respect to CUs.

4.1.2.1 Tanzania's implementation of Protocol on the Establishment of the East African Community Customs Union

Protocol on the Establishment of the East African Community Customs Union (Protocol on CU) was signed on 2 March 2004 and came into effect on 1 January 2005.¹⁰⁰ As an

⁸⁹ WTO 'Regional trade agreements database' <https://rtais.wto.org/UI/PublicAllIRTAList.aspx> (accessed 17 September 2021).

⁹⁰ Art 3(a) of the Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries Decision of 1979 (Enabling Clause).

⁹¹ Art 1 of Enabling Clause.

⁹² Art 6 of Enabling Clause.

⁹³ Art 5 of Enabling Clause.

⁹⁴ Art 2(a) of Enabling Clause.

⁹⁵ Art 2(c) of Enabling Clause.

⁹⁶ Crawford & Fiorentino (n 32) 5.

⁹⁷ *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Panel Report (1 December 2003) WTO Doc WT/DS246/R (2003).

⁹⁸ WTO 'Principles of the trading system'

https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 17 September 2021).

⁹⁹ WTO 'Regional Trade Agreements Database' <http://rtais.wto.org/UI/PublicAllIRTAListAccession.aspx> (accessed 17 September 2021).

¹⁰⁰ EAC 'History of the EAC' <https://www.eac.int/eac-history> (accessed 17 September 2021).

active member of EAC, Tanzania was executing CET since 2004.¹⁰¹ She consequently changed her trade policy regime in January 2005, when together with Kenya and Uganda joined EACCU. Thus, EAC member states adopted a CET.¹⁰² As a result, the Community is required to harmonise its trade dealings with third countries in order to accelerate the operation of a common policy in the area of external trade.¹⁰³ CET means a similar percentage of tariffs charged on products imported from foreign countries.¹⁰⁴

The major objective of CU is to promote the liberalisation of intra-regional trade in goods on the condition of reciprocal favourable trade deals between member states.¹⁰⁵ Protocol on CU provides for, *inter alia*, the abolition of tariffs and other levies of similar character on imports and the establishment of CET.¹⁰⁶ Since the then three member states were at distinct status of economic growth, the method opted for was continuous and uneven, with instant duty-free transportation of goods from Tanzania and Uganda to Kenya, and between Tanzania and Uganda.¹⁰⁷ Goods transported from Kenya to Tanzania and Uganda were classified into two categories namely, Category A goods qualified for instant duty-free preference, whereas Category B goods qualified for a progressive lowering of tariffs.¹⁰⁸

4.1.3 African Continental Free Trade Area

AfCFTA is a member-driven¹⁰⁹ trade arrangement in the form of an FTA.¹¹⁰ AfCFTA is established under article 2 of the Agreement Establishing the African Continental Free Trade Area of 2018 (AfCFTA Agreement) that was signed at the 10th Extraordinary Summit of the African Union (AU) Assembly of heads of state and government held on 21 March 2018, in Kigali, the Republic of Rwanda.¹¹¹ The agreement entered into force on 30 May 2019 and became operational on 7 July 2019. The commencement of

¹⁰¹ Tanzania DTIS (n 36) xvii.

¹⁰² Mashindano, Rweyemamu & Ngowi (n 15) 133.

¹⁰³ Art 37(2) of Protocol on EACCU.

¹⁰⁴ Art 1(1) of Protocol on the Establishment of the East African Community Customs Union of 2004 (Protocol on EACCU).

¹⁰⁵ Art 3(a) of Protocol on EACCU.

¹⁰⁶ Art 2(4) of Protocol on EACCU.

¹⁰⁷ Arts 11(1) & (2) of Protocol on EACCU.

¹⁰⁸ Art 11(3) of Protocol on EACCU.

¹⁰⁹ Art 5(a) of the Agreement Establishing the African Continental Free Trade Area of 2018 (AfCFTA Agreement).

¹¹⁰ Erasmus (n 20) 9.

¹¹¹ AU 'AU member countries create history by massively signing the AfCFTA agreement in Kigali'

Press release N.XX/2018 https://au.int/sites/default/files/pressreleases/34053-pr-pr-_au_member_countries_create_history_at_the_afcfta_extraordinary_summit_in_kigali_f.pdf (accessed 28 September 2021).

trading under AfCFTA Agreement began on 1 January 2021. As at 9 September 2021, 38 countries had deposited their instruments of ratification and 41 countries had ratified the agreement.¹¹² AfCFTA is aimed at creating a single continental market for goods and services facilitated by movement of persons¹¹³ with an estimate of 1.2 billion consumers that is projected to reach 2.5 billion by 2050.¹¹⁴ Thus, AfCFTA is projected to be the largest FTA in the world in terms of numbers of participating countries since the establishment of WTO.¹¹⁵

Tanzania ratified the ambitious AfCFTA Agreement on 09 September 2021.¹¹⁶ AfCFTA aims, is determination and committed to promote intra-African trade in goods.¹¹⁷ AfCFTA also aims to resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.¹¹⁸ This is due to the fact that RECs FTAs are acknowledged as building blocks towards the establishment of AfCFTA.¹¹⁹ AfCFTA Agreement defines RECs to mean RECs recognised by the AU including EAC and SADC.¹²⁰

Essentially, state parties that are members of other RECs, regional trading arrangements and CUs that have attained among themselves higher levels of regional integration including the elimination of customs duties and trade barriers than those provided for under AfCFTA Agreement and Protocol on Trade shall maintain and where possible improve upon those such higher levels of trade liberalisation among themselves.¹²¹

Furthermore, AfCFTA is premised on the preservation of the *acquis*.¹²² The *acquis* is not defined in AfCFTA texts but is meant to refer to what has already been achieved. The effect is that the tariff concessions extended as part of AfCFTA negotiations, would only be among those state parties 'that have no preferential arrangements in place

¹¹² Tralac 'Status of AfCFTA ratification' <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 19 November 2021).

¹¹³ Art 3(a) of the Agreement Establishing the African Continental Free Trade Area of 2018 (AfCFTA Agreement).

¹¹⁴ AfCFTA 'Who we are' <https://afcfta.au.int/en/who-we-are> (accessed 28 September 2021).

¹¹⁵ AfCFTA 'Who we are' <https://afcfta.au.int/en/who-we-are> (accessed 28 September 2021).

¹¹⁶ Tralac 'Status of AfCFTA ratification' <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (19 November 2021)

¹¹⁷ Art 3(a) of AfCFTA Agreement; Preamble to the AfCFTA Protocol on Trade in Goods; art 2(2) of AfCFTA Protocol on Trade in Goods.

¹¹⁸ Art 3(h) of AfCFTA Agreement.

¹¹⁹ Preamble to the AfCFTA Agreement; Art 3(c); Art 5(b) of AfCFTA Agreement.

¹²⁰ Art 1 of AfCFTA Agreement.

¹²¹ Art 19(2) of AfCFTA Agreement; art 8(2) of Protocol on Trade.

¹²² Art 5(f) of AfCFTA Agreement.

between them.’ Intra-REC trade is fully governed by the relevant REC FTA regimes and will not see any liberalisation via the AfCFTA negotiations.¹²³

All in all, what makes AfCFTA distinct from other African RECs is the provision providing for the review of the agreement every five years after its entry into force by state parties to ensure its effectiveness, achievement of deeper integration and adapting to the evolving regional and international developments whereby state parties may make recommendations for amendments taking into account the experience acquired and progress achieved during the implementation of the agreement.¹²⁴

4.1.4 Comparative analysis of Tanzania’s position within regional economic communities

With regards to trade relations with third countries, SADC’s situation is unlike that applied by EAC in that SADC Protocol on Trade incorporates an MFN clause.¹²⁵ Thus, member states are allowed to grant or maintain PTA with third countries, on the condition that such agreements do not hinder the purposes of the Protocol and any benefit, concession, privilege or power afforded to a third country under such agreements should also be granted to other member states.¹²⁶ The consequence of this provision for Tanzania, which is an EAC member state, is that the privileges and benefits afforded to the other EAC member states ought to also be afforded entirely to all the other SADC member states. However, SADC Protocol on Trade goes on to stipulate that partner states are not required to grant preferences of another trading group to which they were a member at the time of the Protocol’s entry into force.¹²⁷ When SADC Protocol on Trade entered into force Tanzania was already a member of EAC. Therefore, this unusual circumstance is an evident instance of legal problems brought about by overlapping memberships or the spaghetti bowl syndrome.¹²⁸

One of the fundamental features of CUs is that member states ought to conduct trade arrangements with third countries as a block, however, EAC is conscious of individual member states commitments in other RECs.¹²⁹ Thus, it requires partner states to adhere to their commitments with regards to other multilateral and international organisations to which they are members.¹³⁰ This implies that Tanzania, which was by

¹²³ Erasmus (n 20) 7.

¹²⁴ Art 28 of AfCFTA Agreement.

¹²⁵ Art 28(1) of SADC Protocol on Trade.

¹²⁶ Art 28(2) of SADC Protocol on Trade.

¹²⁷ Art 28(3) of SADC Protocol on Trade.

¹²⁸ Mutai (n 33) 90.

¹²⁹ Preamble to the Protocol on EACCU.

¹³⁰ Art 130(1) of the Treaty for EAC; Art 37(1) of Protocol on EACCU.

that time a member of SADC and had signed SADC Protocol on Trade before the new EAC became operational, is not obliged to suspend her commitments under SADC. Nonetheless, this can evidently result to uncertainties where Tanzania's EAC commitments are in conflict with those of SADC. Moreover, it indicates the absence of a consistent trade policy.¹³¹ Additionally, EAC member states are allowed to separately or individually enter or alter trade arrangements with third countries.¹³²

Given the prevalence of overlapping RTAs in the Southern African Region when SADC was established, it was crucial to cater for member states that were already party to other arrangements. To realise this, SADC partner states are allowed to uphold preferential trade and other trade associated agreements that were in place when the Protocol on Trade came into effect.¹³³ They are also allowed to participate in new preferential trade agreements between themselves.¹³⁴ This is the implementation of the principle of variable geometry, that allows member states that want to liberalise trade amongst themselves at a swift speed to do so. Although this has the advantage of making sure that member states that are economically strained do not delay their partners, it also hinders the implementation of commitments in the Protocol.¹³⁵ Tanzania has not been able to participate in the variable geometry initiatives both in EAC and SADC as she was absent in the Northern Corridor Integration Project of EAC as well as the Accelerated Programme for Economic Integration of SADC.

Although member states are not required to carry out negotiations as a block, they are strongly encouraged to harmonise their trade policies and negotiating positions in regards to dealings with third countries or groups of third countries and international organisations.¹³⁶ However, due to proliferation of RECs this is impractical and had proved failure, for instance, in the negotiations with the EU regarding Economic Partnership Agreements (EPAs), a group of SADC countries – Angola, Botswana, Eswatini, Lesotho, Mozambique, Namibia and South Africa were negotiating as a group. The six other members – the Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Zambia and Zimbabwe were negotiating under the Eastern and

¹³¹ Mutai (n 33) 94.

¹³² Art 37(4) of Protocol on EACCU.

¹³³ Art 27(1) of SADC Protocol on Trade.

¹³⁴ Art 27(2) of SADC Protocol on Trade.

¹³⁵ Mutai (n 33) 94.

¹³⁶ Art 29 of SADC Protocol on Trade.

Southern Africa arrangement, while Tanzania was negotiating an EPA with her EAC partners.¹³⁷

At present all EAC member states except for South Sudan have entered AfCFTA Agreement separately and not as a block. This is a clear indication of the absence of a consistent trade policy within EAC.

As indicated above the major objective of EAC is to promote the liberalisation of intra-regional trade which aligns with AfCFTA's objective, determination and commitment. However, the effective and coordinated implementation of AfCFTA as a continental regime will be a major challenge for state parties, AfCFTA institutions, RECs, existing trade arrangements, and CUs. This will take time; will require assistance, adjustments, and careful monitoring of progress.¹³⁸ The World Bank also acknowledges the fact that the implementation of AfCFTA will be a significant challenge despite offering big opportunities for development in Africa.¹³⁹

However, despite these challenges – including overlapping memberships, it appears each REC that Tanzania is a member – EAC, SADC and recently AfCFTA has its distinct benefits to state parties making it difficult to cure the same. Thus, AfCFTA foresees the co-existence of several African trade regimes alongside each other. That is to say, RECs with their own regional integration agendas will pursue their strategies on deeper integration, as well as other disciplines considered to be necessary for specific regional agendas.¹⁴⁰ For instance, some of them have developed wide-ranging additional functions and have adopted obligations over matters not covered in AfCFTA and they are not parties to AfCFTA Agreement – a good illustration is SADC that has a Protocol on Trade, Finance, Investment and more than 20 additional ones.¹⁴¹ The best move would be for state parties to different RECs including Tanzania to critically weight the benefits against drawbacks of each before opting out.

Moreover, since overlapping memberships are a long-standing problem and AfCFTA intends to cure the same through RECs' FTAs acting as 'building blocks.'¹⁴² AfCFTA Agreement does not contain indications of how or when this will happen. This leaves

¹³⁷ Mutai (n 33) 94.

¹³⁸ Erasmus (n 20) 2.

¹³⁹ World Bank 'The African Continental Free Trade Area: Economic and distributional effects' (2020) at 8 <https://www.tralac.org/documents/news/3965-the-african-continental-free-trade-area-economic-and-distributional-effects-world-bank-july-2020/file.html> (accessed 20 November 2021).

¹⁴⁰ Erasmus (n 20) 7.

¹⁴¹ Erasmus (n 20) 7.

¹⁴² Art 3(h); Art 5(b) of AfCFTA Agreement.

a room for debate about how RECs will support AfCFTA, and about tackling the long-standing issues around overlapping REC memberships.¹⁴³

4.2 Customs implications of Tanzania within regional economic communities

Tanzania Revenue Authority (TRA) is the lead agency charged with the duty to manage the borders and customs clearances in the United Republic of Tanzania.¹⁴⁴ TRA was established in 1995.¹⁴⁵ It is in charge of managing the assessment, collection, and accounting of all central government revenues.¹⁴⁶ TRA is a semi-autonomous agency that works together with the Ministry of Finance and Planning (MoF).¹⁴⁷ Tax revenue is the major source of domestic revenue in Tanzania. Other tax revenues include customs duty, value added tax (VAT), and excise duty – imports and local.¹⁴⁸ In the 2014 fiscal year, trade taxes accounted for 15.5 percent of total tax revenues.¹⁴⁹

Approximately 70 percent of all trade is operated through the port of Dar es Salaam. Clearances are authorised at 86 customs stations, including 25 seaports, and eight airports, though more than 90 percent of all clearances are through nine major border posts. TRA also operates six transit-monitoring stations. All the major border posts use electronic clearance. However, at present, customs control is premised on the obsolete idea of prioritising real-time physical inspection, rather than applying substantial use of risk assessment. Thus, all containers are liable to mandatory physical scanning, that adds to costs and slows down port clearance timeframes. That is to say, approximately 80 percent of cargo is still being singled out for inspection.¹⁵⁰ There are 680 licensed freight forwarders in Tanzania, who are also members of the Tanzania Freight Forwarders Association. All freight forwarders are licensed by the Customs Department of TRA.¹⁵¹

¹⁴³ Erasmus (n 20) 7.

¹⁴⁴ Sec 2 of Tanzania Revenue Authority Act [Cap 399 RE 2006] (TRA Act).

¹⁴⁵ Sec 4(1) of TRA Act.

¹⁴⁶ Secs 5(1)(a) & (b) of TRA Act.

¹⁴⁷ Tanzania DTIS (n 36) 35.

¹⁴⁸ Mashindano, Rweyemamu & Ngowi (n 15) 83.

¹⁴⁹ Tanzania DTIS (n 36) 20.

¹⁵⁰ Tanzania DTIS (n 36) 35.

¹⁵¹ Tanzania DTIS (n 36) 45.

Since the union with mainland Tanzania in 1964, Zanzibar has been a semi-autonomous state in the United Republic of Tanzania. Thus, she administers her own development projects, and she is in charge of her own financial matters.¹⁵² Zanzibar Tax administration remains complicated and onerous for private businesses. That is, businesses are obliged to pay taxes singly to TRA, the Zanzibar Revenue Board (ZRB), and municipal and district councils. While TRA accounts for central government taxes in mainland Tanzania as well as union taxes in Zanzibar, ZRB is responsible for domestic consumption taxes other than customs, excise, and income taxes on behalf of the government of Zanzibar.¹⁵³ Major domestic taxes administered by ZRB include VAT, excise duty – local, hotel levy, restaurant levy, tour operation levy, stamp duty, airport service charge, sea port service charge, road development fund, petroleum levy, fuel sector development fund, road license fees, motor vehicle registration fees, driving license fees, ministry collections, and parastatal contributions.¹⁵⁴ Having seen the office mandated to manage borders and customs clearances in the United Republic of Tanzania, the following sections provide customs implications of Tanzania in RECs.

4.2.1 Southern African Development Community

SADC launched its FTA in September 2001. In 2007 by then 14 member states had begun phasing in an eight-year schedule for the abolition of tariffs on a variety of products with their origin within an FTA.¹⁵⁵ By 2012 SADC FTA had eliminated most tariffs; nonetheless, obstructive rules of origin on essential agricultural and labour-intensive categories persist to restrict the prospects for trade creation.¹⁵⁶

Tanzania's trade policy intends to accelerate open cross-border trade in order to improve economic growth, diversification and industrialisation. To that end, Tanzania has concluded an agreement with other SADC member states on RoO for majority of goods.¹⁵⁷

¹⁵² Tanzania DTIS (n 36) 144.

¹⁵³ Sec 3 of Zanzibar Revenue Board Act 7 of 1996 [RE 2013].

¹⁵⁴ Tanzania DTIS (n 36) 147.

¹⁵⁵ Mashindano, Rweyemamu & Ngowi (n 15) 34.

¹⁵⁶ Tanzania DTIS (n 36) 22.

¹⁵⁷ Mashindano, Rweyemamu & Ngowi (n 15) 105.

RoO are an inherent characteristic of FTAs because they are used to regulate products that qualify for preferential treatment.¹⁵⁸ Without RoO, imports from third countries would be able to penetrate an FTA through member state with the lowest external tariffs before moving on to other member states to an FTA, thus denying the latter of customs revenues.

A member state which is a party to various RTAs each one with distinct sets of RoO may demand exporters to attune their goods in conformity with a formidable range of requirements so as to be eligible for preferential treatment in various markets. Research has demonstrated that exporters may sometimes decide to give up preferential tariffs provided within an RTA, on the assumption that the scope of preference is not immensely sufficient to counterbalance the regulatory obligations of adhering to regulations.¹⁵⁹

In SADC, Annex I to SADC Protocol on Trade sets out RoO used to govern which goods qualify for preferential treatment as originating goods.¹⁶⁰ Originating goods are goods of a member state.¹⁶¹ Annex is a legal instrument of implementation of the Protocol, which forms an essential part thereto, and has a similar legal effect.¹⁶²

SADC RoO provide for two different criteria under which goods can be regarded as produced within a partner state. The first category comprise of goods that have been wholly manufactured within any partner state.¹⁶³ Another category comprise of products that have been procured within any partner state including raw materials that have not been wholly manufactured there, on the condition that such commodities have gone through adequate working or procedure within any partner state.¹⁶⁴ This provision further refers to a distinct Appendix framing out the requirements to be satisfied by such goods.¹⁶⁵ This is a complicated procedure that is not appropriate for simple implementation by the business community. The risk of such a complicated

¹⁵⁸ Mutai (n 33) 85.

¹⁵⁹ Crawford & Fiorentino (n 32) 17.

¹⁶⁰ Art 12 of SADC Protocol on Trade.

¹⁶¹ Art 1 of SADC Protocol on Trade.

¹⁶² Art 1 of SADC Protocol on Trade.

¹⁶³ Rules 2(1)(a) & 4 of Annex I to SADC Protocol on Trade Concerning Rules of Origin for Products to be Traded between Member States of SADC (Annex I to SADC Protocol on Trade).

¹⁶⁴ Rule 2(1)(b) of Annex I to SADC Protocol on Trade.

¹⁶⁵ Rule 2(2)(a) & Appendix I of Annex I to SADC Protocol on Trade.

RoO regime is that it will deter traders from pursuing the advantages of reduced tariffs as the time frame and costs of complying with the rules will be challenging. Consequently, the tariff line will be underutilised and the consideration of those for whom it was established will be gone.¹⁶⁶ The Annex also provides for functioning and procedures regarded as inadequate to substantiate an assertion that products were produced within a partner state.¹⁶⁷

An assertion that products were produced from a member state ought to be accompanied by a certificate (SADC Certificate of Origin) given by the exporter or their authorised representative in prescribed form. Furthermore, the certificate ought to be verified by a seal of an agency appointed for such function by each partner state.¹⁶⁸

If the manufacturer is not the exporter with regards to products aimed for export, he shall provide the exporter with a written declaration (Declaration by the Producer) acknowledging that products meet the requirements as produced within the partner state.¹⁶⁹

Where there is a doubt, the competent agency appointed by an importing partner state may in an unusual situation and regardless the submission of a certificate require additional confirmation of the declaration included in the certificate. In such circumstances partner states via their competent agencies ought to cooperate with one another. The confirmation is required to be done within three months of the request being made. A form used for this purpose is entitled 'Form of Verification of Origin.'¹⁷⁰

As a means to accelerate trade, the importing partner state shall not preclude the importer from getting hold of the consignment of products merely on the reason that it demands additional proof but may demand collateral for any tariff or levy to be paid. However, the requirements for the consignment under collateral shall not be applicable if such products are liable to any restrictions.¹⁷¹

¹⁶⁶ Mutai (n 33) 87.

¹⁶⁷ Rule 3 of Annex I to SADC Protocol on Trade.

¹⁶⁸ Rule 9(1) & Appendix II of Annex I to SADC Protocol on Trade.

¹⁶⁹ Rule 9(2) & Appendix III of Annex I to SADC Protocol on Trade.

¹⁷⁰ Rule 9(3) & Appendix IV of Annex I to SADC Protocol on Trade.

¹⁷¹ Rule 9(4) of Annex I to SADC Protocol on Trade.

4.2.2 East African Community

As noted above Tanzania joined EACCU in January 2005. As such she has applied and she is currently implementing EACCU CET since 2005 on all products imported into EAC.¹⁷² This is with the exception of chosen agricultural products – wheat and corn, processed pulses, wheat flour, olive oil; iron and steel structures; grinding and cutting machinery; and vehicles.¹⁷³ In EAC, every member state's revenue agency accounts imports on intra-EAC trade as they are mandated to levy VAT on majority of goods.¹⁷⁴

In EAC, CET has three bands structure¹⁷⁵ with a minimum rate of zero percent on raw commodities, capital goods and meritorious goods, such as medical, pharmaceutical and educational supplies. A middle rate of ten percent on intermediate goods, and a maximum rate of 25 percent on finished goods. Tariffs on a few sensitive goods – 61 tariff lines are higher than 25 percent and therefore, do not adhere to the three-tier framework of CET. Agricultural goods constitute most of the sensitive products namely, milk at 60 percent, wheat at 35 percent, corn at 50 percent, rice at 75 percent or US\$345 per metric ton, and sugar at 100 percent or US\$ 460 per metric ton. Other goods like cement attract a 35 percent CET, primary cells and batteries attract 35 percent, matches attract 50 percent, and Khanga, Kikoi, and Kitenge fabrics that attract a 50 percent CET also constitute the sensitive list.¹⁷⁶ Overall, EAC member states have classified 58 products as sensitive, which qualifies them to declare tariffs above EAC maximum CET of 25 percent.¹⁷⁷

In 2010, after a five-year transitional period to cater for tariff adjustments in some member states, imports among EAC partner states were totally liberalised. EAC reviews the maximum rate of CET after a five-year period.¹⁷⁸ However, since the adoption of CET in 2005 there have been no significant changes of the tariff structure with the exception of sensitive goods. Tanzania's tariff schedule has 5 437 tariff lines with a large number of them appearing in one of the three standard CET rates. That is, 37

¹⁷² Tanzania DTIS (n 36) 19.

¹⁷³ Tanzania DTIS (n 36) 21.

¹⁷⁴ Tanzania DTIS (n 36) 20.

¹⁷⁵ Art 12(1) of Protocol on EACCU.

¹⁷⁶ Tanzania DTIS (n 36) 19.

¹⁷⁷ Tanzania DTIS (n 36) 22.

¹⁷⁸ Art 12(2) of Protocol on EACCU.

percent of tariff lines attract zero tariffs, 21 percent attract a ten percent tariff, and 40 percent attract a 25 percent tariff. Approximately one percent of tariff lines form a part of the sensitive register and attract tariffs above 25 percent. In WTO, Tanzania bound 13.5 percent of tariffs at 120 percent, constituting all agricultural goods – as provided for by WTO and one-tenth of one percent of non-agricultural goods also at 120 percent.¹⁷⁹

Table 1: Tanzania’s tariff structure

No. of tariff lines	CET (%)	% of tariff lines
2 011	0	36.90
1 170	10	21.50
2 194	25	40.40
13	35	0.20
1	40	0.02
19	50	0.35
16	60	0.29
4	75	0.07
9	100	0.17
Total = 5 437		

Source: Tanzania DTIS (2018)

EAC’s food category incorporates the highest maximum tariffs and has the highest standard deviation. This is indicated by the high degree of tariff protection provided to the sugar, corn, wheat, milk and rice categories. High tariffs levies on some products jeopardise the competition of downstream industries or the incentives for local production. For example, sugar which is an important input for many food products is charged a very high tariff – 100 percent or US\$460 per metric ton that could have an effect on the competition of industries that utilise it as an input. Though normally tariffs for sugar imported by industrial users are lowered under the duty remission scheme,

¹⁷⁹ Tanzania DTIS (n 36) 19.

it appears that only a small number of enterprises gain the benefits from the scheme – 25 enterprises in 2014 as the procedure of applying or lobbying to be included in the scheme might be over and above the resources of many small and medium-sized enterprises. Equally, tariffs on textiles inputs that range from ten to 25 percent might lower the likelihood of the growth of the local apparel industry that has manifested to be a convenient method of job creation in other African countries.¹⁸⁰ Manufacturers utilising mostly imported inputs, with reasonably little local value addition, the capability to acquire duty rebates presents considerable inducement to trade in EAC market instead of manufacturing for export.¹⁸¹

EAC CET for majority of agricultural inputs is zero, while agricultural products that are manufactured in Tanzania have been protected. Cane or beet sugar and chemically pure sucrose in solid form are charged a CET of 35 to 100 percent. Importation of sugar for industrial use is charged a 100 percent CET to promote the consumption of domestically or EAC manufactured sugar.¹⁸² CET for imported palm oil is low to meet the demand for the local market as both domestic production and production throughout EAC is still low. Nonetheless, imported rice attracts a 75 percent CET to protect domestic manufacturers from the contestation of efficient manufacturers in Pakistan and Vietnam to mention just a few. Comparably, imported processed maize flour attracts a 25 percent CET to develop and protect the milling industry in EAC. Goods that Tanzania has a comparative advantage, such as cashew nuts, coffee, tea, and tobacco, all attract 25 percent CET. Levying duties on these competitive sectors acts as a discouragement to agro-industrial growth and diversification by multiplying input costs, in spite of the fact that this is mitigated by EAC and SADC preferences whereby many inputs and agricultural products such as maize and rice can be imported duty-free.¹⁸³

As noted earlier EAC CET is implemented in the United Republic of Tanzania, nevertheless, Zanzibar has an exception to retain substantially lower tariffs on imports of rice and sugar intended for household consumption. The justification of the

¹⁸⁰ Tanzania DTIS (n 36) 20.

¹⁸¹ As above.

¹⁸² Tanzania DTIS (n 36) 60.

¹⁸³ As above.

exception to CET by the government of Zanzibar is that such low tariffs benefit Zanzibar households, nonetheless, the quantity imported regularly surpass household needs. International trade and customs administration are union matters, while internal trade, industry and consumer protection are the mandate of the government of Zanzibar.¹⁸⁴

Administration of EAC CET is faced with a number of problems which includes the lack of a customs authority at the regional level that would ensure uniformity in the management of the CU. This promotes a low degree of customs adherence, sluggish process of adoption of regional legislation in national legal systems and the continued seeking of stay applications in court which frustrates the uniform application of CET.¹⁸⁵ As noted above another setback in the operation of the CET brought about by multiple memberships of partner states to various RECs where preferential treatment is still extended to them – SADC and COMESA in particular despite concluding a CU, thus, eroding the gains of such a union. This also includes preferential treatments for goods approved by the Council of Ministers of EAC that still persist. These facts make member states reluctant to eliminate NTBs and most importantly, demonstrate the significance of the RoO.

Table 2: Tanzania’s agriculture common external tariff

Product	CET (%)
Milk (powder or solid)	60
Cashew nuts	25
Coffee	25
Tea	25
Maize (corn seed)	25
Rice or paddy (in the husk)	75
Raw cane sugar	35

¹⁸⁴ Tanzania DTIS (n 36) 148.

¹⁸⁵ EAC ‘5th Development Strategy 2016/17 - 2020/21’
<http://repository.eac.int/bitstream/handle/11671/1952/5th%20EAC%20Development%20Strategy-%20Final%20Version.pdf?sequence=1&isAllowed=y> (accessed 14 April 2021).

Sugar (and sugar for industrial use)	100
Tobacco	25
Fertiliser	0
Cotton	0
Cotton (sewing thread)	25
Agricultural machinery	0
Tractors	0

Source: Source: Tanzania DTIS (2018)

In EAC products are recognised as qualifying for community tariff preference solely on the condition that they have their origin in the member states.¹⁸⁶ For the benefit of ascertaining if products have their origin within the member state, the Protocol incorporates a comprehensive Annex providing for EACCU's RoO.¹⁸⁷ The prescribed RoO as set out by the East African Community Customs Union (Rules of Origin) Rules, Annex III to the Protocol on EACCU (EAC RoO) serve to implement the provisions of Protocol on EACCU and to assure that there is consistency between member states in the administration of RoO and that to the degree practicable the procedure is unambiguous, answerable, just, foreseeable and in conformity with the provisions of the Protocol.¹⁸⁸

Prior to 31 December 2012 EAC partner states accorded preferential tariff treatment to goods imported under SADC and the Common Market for Eastern and Southern Africa (COMESA) arrangements as prescribed in the partner state's legislation.¹⁸⁹ However, despite such a restricting provision the situation is still the same as good

¹⁸⁶ Art 14(1) of Protocol on EACCU; sec 111(1) of the East African Community Customs Management Act of 2004 [RE 2009] (EACCMA) <https://www.eac.int/documents/category/acts-of-the-community> (accessed 03 October 2021).

¹⁸⁷ Art 14(3) of Protocol on EACCU.

¹⁸⁸ Rule 2 of East African Community Customs Union (Rules of Origin) Rules, Annex III to the Protocol on EACCU (EAC RoO).

¹⁸⁹ Sec 112 (2) of EACCMA as amended by sec 2 of East African Community Customs Management (Amendment) Act of 2011 <https://www.eac.int/documents/category/acts-of-the-community> (accessed 03 October 2021).

from SADC destined to Tanzania are still accorded preferential treatment. Similarly, preferential treatment can still be applied to goods imported under any other tariff arrangement that may be approved by the Council of Ministers of EAC.¹⁹⁰

EAC RoO prescribe four distinct conditions under which products can be recognised as having their origin in partner states. The first condition classifies products that are completely manufactured in a member state.¹⁹¹ The second condition classifies products manufactured completely or partly from imported matters if the cost, insurance and freight (c.i.f.) value of the imported matters does not go beyond 60 percent of the total cost of the matters utilised.¹⁹² The third condition classifies products that value addition constitute at least 35 percent of the products' ex-factory cost.¹⁹³ The last condition classifies products which are categorised or become as such under a tariff heading other than the tariff heading under which they were imported.¹⁹⁴ Although these conditions are justly simple, there have been conflicts among partner states over their implementation. For example, Tanzania refused to permit automobiles erected in Kenya to enter Tanzania duty-free for the reason that they did not satisfy the conditions of the rules.¹⁹⁵ Foreseeing such circumstances, EAC Committee on Trade Remedies was created to handle issues concerning, *inter alia*, rules of origin,¹⁹⁶ and dispute settlement.¹⁹⁷ The Committee constitutes of nine members, qualified and proficient in matters of trade, customs and law.¹⁹⁸

Moreover, satisfying the requirements in order to take advantage of community preferential treatment can be burdensome for smallholder farmers and small-scale agricultural traders, particularly women especially in relation to complying with EAC

¹⁹⁰ Sec 112 (1)(b) of EACCMA.

¹⁹¹ Rule 4(1)(a) & 5 of EAC RoO.

¹⁹² Rule 4(1)(b)(i) of EAC RoO.

¹⁹³ Rule 4(1)(b)(ii) & First Schedule to EAC RoO.

¹⁹⁴ Rule 4(1)(b)(iii) & Second Schedule to EAC RoO.

¹⁹⁵ Mutai (n 33) 86.

¹⁹⁶ Art 24(1)(a) of Protocol on EACCU.

¹⁹⁷ Art 24(1)(e) of Protocol on EACCU.

¹⁹⁸ Art 24(2)(a) of Protocol on EACCU.

RoO, presenting a valid single-entry document and, when required, remunerating for the work of a clearing agent.¹⁹⁹

As a means to address such problems, a simplified trade regime (STR) has been established as part of EACCU. The scheme presents a simplified clearance process for goods that have their origin in EAC of commercial value not exceeding US\$2 000, and incorporated in the schedule of qualifying goods – mostly agricultural and livestock products. Farmers and traders who fulfil those essential conditions qualify to clear their consignment duty-free by presenting a document called EAC simplified certificate of origin (CoO). This is a simplified version of the single-entry document, normally issued by customs officials of member states at the border, that ought to be easy for any small-scale trader to complete without the help of a clearing agent.²⁰⁰

Considering the fact that the intention of STR is noble, and possibly that it might have been instrumental in increasing small-scale trade in EAC, knowledge of the advantages of the regime tends to be poor amongst desired recipients. Implementation by border officials is also occasional and difficult. For example, a series of field surveys administered by the Eastern African sub-regional support initiative for the advancement of women in 2012 with women cross-border traders at selected EAC borders including Mutukula (Tanzania and Uganda) and Namanga (Tanzania and Kenya), indicated that to a greater extent participants lacked awareness of STR, or the preferential treatment accessible under EACCU. A significant percentage of women at Mutukula revealed that they were still being charged duty by customs officials.²⁰¹

The assertion that products have their origin within a member state ought to be accompanied by a certificate (EAC Certificate of Origin) to be presented by the exporter or their authorised representative in prescribed form whereby the same needs to be verified by a competent authority.²⁰² The competent authority means a body or organisation appointed by the community to administer the customs law of the community.²⁰³

¹⁹⁹ Tanzania DTIS (n 36) 61.

²⁰⁰ As above.

²⁰¹ As above.

²⁰² Rule 12(1) & Third Schedule to EAC RoO; Sec 111 (2) of EACCMA.

²⁰³ Art 1(1) of Protocol on EACCU.

If the producer is not the exporter with regards to products aimed for export, he shall provide the exporter with a written declaration (Declaration by the Producer) indicating that products have their origin within a member state.²⁰⁴

Where there is a doubt, a competent agency may in unusual occasions and regardless the submission of a certificate requires additional authentication of the declaration incorporated in the certificate.²⁰⁵ Authentication is required to be made within three months of the request being made. The form used for this purpose is entitled 'Form of Verification of Origin'.²⁰⁶

Similar to SADC, in order to facilitate trade, the importing member state ought not to prohibit the importer from getting hold of the consignment of products merely by the reason that it needs additional proof, but may demand collateral for any duty or levy that is to be paid.²⁰⁷ However, the requirement for delivery under collateral shall not be applicable if such products are liable to any restrictions.²⁰⁸

Although a fully-fledged CU does not require RoO because member states apply CET to imports, EAC needs these rules because of the progressive character of the integration process, many exceptions to CET²⁰⁹ and multiple memberships of member states in various trade arrangements.

4.2.3 Agencies authorised to issue certificates of origin in Tanzania

As noted above partner states in both RECs – EAC and SADC apply RoO to determine goods originating from other partner states as a qualification for community preferential treatment. However, Tanzania is yet to comply with the directive that requires customs administrations to issue CoO, and lack of recognition of CoO by border customs officers is a persistent challenge.²¹⁰

²⁰⁴ Rule 12(2) & Fourth Schedule to EAC RoO.

²⁰⁵ Rule 12(3) of EAC RoO.

²⁰⁶ Rule 12(4) & Fifth Schedule to EAC RoO.

²⁰⁷ Rule 12(5) of EAC RoO.

²⁰⁸ Rule 12(6) of EAC RoO.

²⁰⁹ Mutai (n 33) 86.

²¹⁰ Tanzania DTIS (n 36) 22.

Member states in both RECs are required to deposit with their Secretariats the names of administrative divisions or competent authorities with a mandate to issue CoO. This includes samples signatures of officers with a mandate to validate certificates and the impressions of the official stamps to be used for that purpose, whereby such is to be disseminated to the partner states by the Secretariat.²¹¹ Copies of CoO and other pertinent documents are to be maintained by the appropriate administration of member states for a minimum of five years from the date of issuance.²¹² Below are detailed explanations of agencies that are authorised to issue CoO in Tanzania.

4.2.3.1 Tanzania Chamber of Commerce, Industry and Agriculture

Tanzania Chamber of Commerce, Industry and Agriculture (TCCIA) is a voluntary member based private sector association which was established in 1988 with the help of the government of Tanzania to promote the growth and strengthen the private sector. TCCIA is a non-profit, autonomous organisation which operates regional chambers in 26 regions of Tanzania Mainland and over 120 district chambers in the country – which are semi-autonomous in their operational activities. TCCIA is the sole country member of International Chamber of Commerce in Tanzania, a member of East Africa Chamber of Commerce, Industry and Agriculture, Pan African Chamber of commerce and Industry and East African Business Council (EABC).²¹³

All 26 regional chambers have nominal membership fees for its members. TCCIA currently has over 30 000 members. Services administered by TCCIA to the business community ranges from business information, training, advocacy, business supportive initiatives such as the issuance of CoO and processing business licenses as well as business promotion activities, for example, trade fairs and missions.²¹⁴

TCCIA is the only institution in Tanzania Mainland entrusted with a full mandate to authenticate the origin of all products produced or processed in the state for the export market issuing CoO.²¹⁵ TCCIA defines CoO as an essential international trade certificate verifying that products in an export consignment have been wholly

²¹¹ Rule 9(6) of Annex I to SADC Protocol on Trade; Rule 12(8) of EAC RoO.

²¹² Rule 9(5) of Annex I to SADC Protocol on Trade; Rule 12(7) of EAC RoO.

²¹³ TCCIA 'About TCCIA' <http://www.tccia.or.tz/page/about-tccia> (accessed 21 September 2021).

²¹⁴ TCCIA 'Our history' <http://www.tccia.or.tz/page/our-history> (accessed 21 September 2021).

²¹⁵ TCCIA 'Commerce' <http://www.tccia.or.tz/page/commerce> (accessed 21 September 2021).

obtained, produced, manufactured, or processed in a state. CoO is also an attestation by the exporter. There are two major types of CoO, namely non-preferential CoO – issued for products that do not benefit from any preferential treatment and preferential CoO – issued in the conditions of preferential trade arrangements that enables exporters to take advantage of tariff exemption or reduction for qualifying exports. CoO may be requested by customs authorities, importers, freight forwarders or banks for clearance of letters of credit.²¹⁶

TCCIA further defines RoO to mean the conditions that prescribe procedures essential to be undertaken domestically in order for products to be regarded as originating locally. RoO play a considerable part in global trade and is widely classified into two of criteria: non-preferential and preferential RoO. Non-preferential RoO are a set of rules used to allocate the origin of goods entering a state or territory and are normally a set of comprehensive conditions that enable customs administrations to characterise a state of origin to the imported goods entering its territory. On the other hand preferential RoO are those sets of rules and criteria that determine whether goods have obtained domestic economic origin and are connected directly to trade preferences and market access.²¹⁷ Essentially each state in the world takes into account the origin of imported products when determining the tariff applicable to products or, in some instances, whether or not the products may be legally imported at all.²¹⁸

TCCIA commenced to issue CoO in 1999 after the government of Tanzania's decided to entrust such role to the private sector. While this audacious and significant milestone was new in Tanzania, the function of chambers of commerce in administering CoO and RoO can be traced back to the Geneva Convention of 1923 relating to simplification of customs formalities provided for under article 11 as ultimately championed by the Kyoto Convention. The rationale of entrusting this function to TCCIA was, *inter alia*, the organisation's nationwide network, reliability, impartiality, direct connection with exporters thus, making it possible to efficiently serve the business community across the state.²¹⁹ To that end TCCIA offers

²¹⁶ TCCIA 'Frequent asked questions' <http://tccia.com/eco/faq.html> (accessed 21 September 2021).

²¹⁷ As above.

²¹⁸ As above.

²¹⁹ TCCIA 'About' <http://tccia.com/eco/about.html> (accessed 21 September 2021).

international trade facilitation through the issuance of CoO,²²⁰ capacity building of the compliance with the RoO for export of manufactured goods as well as industrial products verification for compliance with the RoO which provide an opportunity for Tanzania products to trade within EAC and SADC duty-free.²²¹

Table 3: Tanzania Chamber of Commerce, Industry and Agriculture Certificate of Origin – Issuance Fees Sheet

S/N	Certificate type	Specification	Applicable fee (in TShs)
1.	AGOA	N/A	20,000/-
2.	China	N/A	20,000/-
3.	EAC	N/A	5,000/-
4.	SADC	N/A	20,000/-
5.	EURO1	N/A	30,000/-
6.	GSP	Less than (<) 10 Million TShs	20,000/-
		Greater than (>) 10 Million TShs and less than (<) 50 Million TShs	30,000/-
		Greater than (>) 50 Million TShs	50,000/-
7.	International	Less than (<) 10 Million TShs	20,000/-
		Greater than (>) 10 Million TShs and less than (<) 50 Million TShs	30,000/-
		Greater than (>) 50 Million TShs	50,000/-

NB: Fee is subject to change from time to time

Source: TCCIA website http://tccia.com/eco/docs/fees_sheet.pdf (accessed 21 September 2021)

4.2.3.2 Zanzibar National Chamber of Commerce

Zanzibar National Chamber of Commerce (ZNCC) was created to unite voices of the private sector. It serves as a linkage between members, the government and other

²²⁰ TCCIA 'Business support' <http://www.tccia.or.tz/page/business-support> (accessed 21 September 2021).

²²¹ TCCIA 'Industry' <http://www.tccia.or.tz/page/industry> (accessed 21 September 2021).

stakeholders. ZNCC acts as an umbrella organisation representing members of the private sector and serving them in all matters to do with trade and business, marketing and trading opportunities, business advisory services and entrepreneurial skills. ZNCC collaborates with similar organisations within EAC and SADC regions. ZNCC is a co-chair of Zanzibar taxation forum which is co-hosted by TRA, Zanzibar Revenue Board (ZRB) and the private sector.²²²

ZNCC's definition of CoO is similar to that of TCCIA. Similarly, ZNCC issues two types of CoO namely, preferential and non-preferential CoO. Interested stakeholders for CoO are also similar to those of TCCIA. Similarly, the government of Zanzibar delegated the function of issuing CoO in the isles to the private sector – ZNCC.²²³

Other roles of ZNCC are to manage and issue the barcode system used by retailers, suppliers and their partners, on behalf of GS1.²²⁴ Not only that but ZNCC also advises members on trade opportunities and how to access regional and international markets such as EAC, SADC, ASEAN, Europe and United States to mention just a few.²²⁵ ZNCC charges their members US\$13.75 (TSh30 000) for a CoO for exports to third countries, while non-members are charged US\$18. Also, the issuance of EAC CoO costs US\$2.25.²²⁶

²²² ZNCC 'ZNCC background' <https://zncc.or.tz/index.php/about-us/about-zncc> (accessed 21 September 2021).

²²³ ZNCC 'Issuance of certificate of origin' <https://zncc.or.tz/index.php/pemba-2/certificate-of-origin> (accessed 21 September 2021).

²²⁴ ZNCC 'Barcode' <https://zncc.or.tz/index.php/pemba-2/organization-structure-2> (accessed 21 September 2021).

²²⁵ ZNCC 'Benefits of becoming a member of ZNCC' <https://zncc.or.tz/index.php/pemba-3/why-join-zncc> (accessed 21 September 2021).

²²⁶ Tanzania DTIS (n 36) 149.

5. Summary of key findings, conclusions and recommendations

5. 1 Summary of key findings

5.1.1 Assessment of regional trade agreements

Article XXIV of GATT comprises of strict requirements, that have hardly on any occasion, been entirely complied with in reality.²²⁷ This is due to the fact that, the Text of Article XXIV of GATT does not restrict the approval of RTAs that do not adhere to its requirements. Thus, examining whether or not RTAs comply with WTO requirements has been problematic as the interpretations of the rules remain unresolved. Thus, WTO members agreed to negotiate aiming to explain and improve disciplines and mechanisms in the prevailing WTO rules applicable to RTAs.

The examination of notifications is carried out basing on the information provided by members to an RTA as well as through written responses to questions presented by WTO members or through oral responses to questions presented at the Committee on RTAs meetings. The Committee on RTAs does not go beyond this and once factual examination is concluded, the Secretariat drafts the examination report. Thereafter, consultations are carried out and once the report is agreed by the Committee on RTAs, it is handed over to the relevant superior body for approval.

Nonetheless, because of the absence of an agreement amongst WTO members, no evaluation report has been completed since 1995 when evaluations of RTAs were carried out in separate working parties before the Committee on RTAs was established. After the creation of the Committee on RTAs, it initiated a consistent calendar for the presentation of biennial reports applicable to RTAs when an evaluation report had already been approved. In 2006, the Committee on RTAs postponed any action with this regard and since the adoption of Transparency Mechanism the procedure of presenting a schedule for biennial reports was halted. To that end, the Committee on RTAs has been incapable of carrying out successfully its roles of reviewing and overseeing the implementation of RTAs the fact that gives WTO members a considerable room to manoeuvre in drafting such agreements.

²²⁷ R Pomfret 'Regional trade agreements' in M Fratianni (ed) *Regional economic integration* (2006) 12 at 43 <https://web-b-ebshost.com.uplib.idm.oclc.org/ehost/detail?sid=646bf46c-4459-46fa-a125addbe041dc96@sessionmgr101&vid=0&format=EB&rid=1> (accessed 04 September 2021).

5.1.2 Rules of origin

EAC and SADC use RoO to determine as to whether goods originate from partner states as a condition for eligibility to community preferential treatment. However, RoO have been very poorly enforced. RoO are not clear and transparent to all members and to traders. Since the rules are not clear there is a considerable lack of awareness which is prevalent amongst small-scale traders that encourage them to circumvent official borders and porous borders even for goods that would not attract duties. On the other hand, customs officials can also manifest insufficient awareness of prevailing trade regimes or, in some cases, intentionally decline to put them in application to obtain illicit payments from traders. Furthermore, Tanzania's membership to SADC may affect the implementation of Protocol on EACCU in the sense that it may cause trade deflection especially where CoO could be fabricated after goods entering Tanzania duty-free. Consequently, EAC member states stand to lose customs revenues.

5.1.3 Regional economic communities

Tanzania is a member of EAC, SADC and recently AfCFTA. These overlapping memberships, whose objectives are seldom similar, present considerable problems in terms of conformity, successful performance of agreements, and the actual transparent RI. Multiple memberships have put significant overburden on Tanzania's inadequate administrative and diplomatic capacity that has impaired her efficiency and more rapid implementation of agreements.²²⁸ Thus, Tanzania bears some transaction costs, including the costs of negotiating in numerous forums that are always high. Not only that but also many trade-offs have to be settled prior attaining an agreement to execute a broad scope of consented policies, majority of which are either inconsistent with one another or unrelated.²²⁹ This necessitate forging additional attempts to realign EAC agreements with those required under SADC²³⁰ in order to avoid possible losses of customs revenue.²³¹ COMESA-EAC-SADC tripartite FTA negotiations to coordinate trade regimes of these distinct blocks have been encouraging but, considering the divergent aspirations of the three RECs, such negotiations do not provide great optimism of a short-term answer.²³² Although AfCFTA aims to resolve these challenges of multiple and overlapping trade regimes to achieve policy

²²⁸ Mashindano, Rweyemamu & Ngowi (n 15) 159.

²²⁹ Mashindano, Rweyemamu & Ngowi (n 15) 112.

²³⁰ Mashindano, Rweyemamu & Ngowi (n 15) 103.

²³¹ Mashindano, Rweyemamu & Ngowi (n 15) 113.

²³² Mutai (n 33) 95.

consistency by expediting the regional and continental integration processes. AfCFTA Agreement does not contain indications of how or when this will happen. This leaves a room for debate about how RECs will support AfCFTA, and about tackling the long-standing issues around overlapping REC memberships or the spaghetti bowl syndrome.

5.1.4 Customs administration

The administration of EAC CET is faced with numerous problems including the absence of a customs authority at the regional level that would ensure uniformity in the management of CU. This promotes minimal customs compliance, slow processes in adopting regional legislation in national legislative systems and the continued seeking of stay of applications in court which frustrates the uniform application of the CET. Another setback in the performance of CET is multiple memberships of partner states in various RECs where preferential treatment is still extended to them – SADC and COMESA in particular despite a restricting provision and existence of CU, thus, eroding the gains of such a union. This is brought about by problems in drafting Treaties where partner states exploit loopholes, for instance, Protocol on EACCU does not prohibit EAC member states from signing individual agreements such as FTAs. Therefore, officials need to be trained in both RECs for them to act coherently in their line of work. There is also persistence of preferential treatments for goods that are approved by Council of Ministers. These make member states reluctant to eliminate NTBs and most importantly, demonstrate the significance of RoO.

TRA has increased the rate of manual inspections and unnecessarily bureaucratic procedures due to concerns over revenue losses. This is despite new developments associated with the new customs clearance software (Tanzania Customs Integrated System (TANCIS)). Thus, the extent and complications of such *modus operandi* persist to levy additional trade costs in Tanzania on both importers and exporters, which decelerate and discourage formal transactions while exhorting parallel trade.

5.1.5 Availability of information

In Tanzania getting correct and legitimate details on prevailing trade rules and procedures is still a major challenge. In spite of most administrative agencies maintaining a website, the available information is in many instances incomplete or outdated. This applies even to agencies with a good website, as the information is not always kept up to date. This makes getting correct information especially on trade rules and procedures burdensome and time consuming to the general public.

5.2 Conclusion

WTO members' non-compliance with article XXIV of GATT is brought about by the existing situation in WTO whereby the assessment of RTAs compliance is not possible due to lack of consistency in the interpretation of rules. Therefore, the functions of Committees on RTAs and Trade and Development (T&D) are just to receive notifications. Then information and clarification are provided through factual presentations issued by the Secretariat.

This, however, does not remove the fact that RI can be an essential force for sustainable development as it can be used to advance economic development, lower poverty, promote social growth or conserve the environment. On the other hand, it can also have negative economic and social effects, particularly if the domestic regulatory framework is incompetent or not applied successfully.²³³

Obstacles to deeper RI in East Africa are usually at the policy level. There is no link between obligations made under regional agreements and execution because barriers impeding integration efforts to RI are not just physical but institutional as well. Thus, expenses to tackle these obstacles, considering the essential political will and dedication, are reasonable in comparison to some of the other investments desired, but the prospective advantages are noteworthy. Although RTAs are intended to benefit member states, anticipated advantages may not be realised if distortions in resource allocation as well as trade and investment diversion are not reduced.²³⁴

Furthermore, obstacles to integration advanced by the nature of the constitutive instruments is that, from a legal outlook, members involved will not find it simple to adhere to commitments incorporated thereto. For instance, some of the language setting out the commitments is vague, and the timeframes desired to adhere to them are impractical. Moreover, majority of provisions comprise overambitious objectives in conjunction with elaborate exemptions that completely compromise the purpose of establishing rules-based organisations.²³⁵ Given the increase of RTAs across Africa as a whole and in Eastern and Southern Africa specifically, this is a call, not for creating more of such agreements, but for the operationalisation, rationalisation and implementation of commitments under those agreements that already exist.²³⁶

²³³ Mashindano, Rweyemamu & Ngowi (n 15) 3.

²³⁴ WTO 'Regional trade agreements and the WTO'

https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm (accessed 20 September 2021).

²³⁵ Mutai (n 33) 95.

²³⁶ Mutai (n 33) 81.

In EAC, one notable institutional hindrance is the absence of coordination and complementarity between the trade and transport policies of the various member states. Thus, member states have devoted themselves to initiate coordinated and complementary policies, nonetheless, such devotion usually stays on paper, while every member state still approach policy development as a domestic exercise, considering only national precedence. Therefore, political will is key.

5.3 Policy Recommendations

5.3.1 Reviewing and redefining WTO rules on RTAs

WTO rules on RTAs – CU and FTAs should be reviewed and redefined so as to avoid ambiguity, ensuring practicability and stricter application. This will cure the very elastic and vague GATT rules and promote implementation since non-compliance is commonplace. This will also ensure that WTO has real authority with a rule-based system in the eyes of its members and the general public.²³⁷

5.3.2 Revision of the roles of Committees on Regional Trade Agreements and Trade and Development

The role of the Committee on RTAs in the examination of RTAs falling within the meaning of articles XXIV of GATT and V of GATS is to evaluate RTAs' compliance with WTO requirements whereas the Committee on T&D examines RTAs falling with the meaning of the Enabling Clause – including trade agreements amongst developing and least developed states. However, the Committee on RTAs has shown minimal successful outcomes in examining the compliance of RTAs notified to WTO over the years. Therefore, the roles of these Committees should be reviewed to serve as forums for notification and provision of clarity on RTAs to WTO members as it is presently, basing on factual presentations issued by WTO Secretariat. This role would be more realistic than the ones it has been unable to carry over the years.

5.3.3 Certainty of ease and ready access to accurate and relevant information

Since there are more than 30 distinct offices associated with trade clearances across borders in Tanzania, with close to 102 distinct trade associated documentation including distinct kinds of permits and approvals.²³⁸ There needs to be certainty of easy and readily accessible correct and relevant details on rules and regulatory

²³⁷ A Saurombe 'The Southern African Development Community trade legal instruments compliance with certain criteria of GATT Article XXIV' (2011) 14(4) *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* at 311 & 312 <http://dx.doi.org/10.4314/pelj.v14i4.10> (accessed 20 November 2021)

²³⁸ Tanzania DTIS (n 36) 38.

procedures necessary for importation and exportation by way of the government integrated information trade gateway where all the relevant information on administration – office opening hours, location, enquiry points and formalities can be accessed through a single simple search network. Online information also needs to be updated frequently. This can reduce costly clearance delays that in turn will also reduce trade costs.

Extensive sensitisation amongst both traders and customs officials, as well as consistent observation of the implementation of trade facilitation processes on the ground should be of prime significance to thoroughly take advantage of the export and growth golden chances handy at EAC and SADC inclusive of small-scale agricultural traders, women in particular.

5.3.4 Harmonisation of preferential rules of origin

When preferential RoO regimes are harmonised, it could allow the intersection with regards to a particular intercontinental preferential RoO regime. Therefore, significantly removing complexities from the network of regulations currently functioning. I am optimistic that AfCFTA will tackle this issue especially in the African context by adopting simple – clear and understandable, transparent, predictable and trade facilitating RoO for businesses and trade operators. Moreover, since EAC and SADC still the use of paper documents as CoO, digitalisation will reduce clearance time frames for imports and exports. This might also reduce documents fabrication and verification may be simple and timely. It is also about time Tanzania abides to the directive that customs authorities issue CoO in line with other member states.

5.3.5 Simplification and modernisation of customs procedures

The simplification and modernisation of customs procedures at the borders will multiply revenues and lessen trade expenses. This is a call for Tanzania to maintain modernising customs clearance policies by administering a comprehensive electronic single window system and embracing EAC Protocol on One-Stop Border Posts. Tanzania also ought to keep up modernising the port of Dar es Salaam. Upgrading digital data administration and digital procedures will allow Tanzania to intensify the operation of risk management and risk profiling.

This should be accompanied by the requirement for all government agencies to embrace risk management procedures that will minimise administrative pressure for

cooperative producers and traders and allow TRA, Tanzania Bureau of Standards and other administrative organs to assure greater safety and security. This could be facilitated by demanding administrative organs to issue data on examination, trial, or adherence rates. This will in turn assist administrative organs in the allocation of their scant resources including laboratories and experts to tackle predominantly major risks.

5.3.6 Reducing very high tariff peaks and encouraging revenue sharing between customs authorities; alternatively, forming of a regional customs authority

The prevailing sensitive sectors with tariff peaks above EAC CET maximum tariff of 25 percent range from 35 to 100 percent should be removed gradually as they are against the Protocol on CU. The prevailing tariff line has an implication of inducing a system that inhibits the growth of manufacturing for exports, but promote manufacturing for the local markets, causing unreasonable costs for essential food, that lowers lifestyle quality thus presenting unreasonable detrimental effects on the poverty-stricken class. Reducing the maximum CET would significantly mitigate the anti-export discrimination of the prevailing CET.

Lowering trade tariffs, while economies of Tanzania and other EAC member states are under major financial problems and budget shortfall, demands harmonising any external tariff alteration with extensive tariff modification. There should be a requirement to harmonise this with all EAC member states.²³⁹ I am optimistic that all these will be reflected in CET which is in the pipeline. Lowering tariff and NTBs to regional trade potentially shifts Tanzania into an excellent development path accompanied by concrete rewards derived from gaining access to a substantially huge market with the potential to bring about jobs and decrease poverty.

Moreover, since EAC is a CU, there should be an arrangement on customs revenue apportionment since duties collected by revenue authorities of member states under CET cannot be said to be reasonably administered among them. Thus, lessons can be learned from SACU particularly on revenue sharing between customs authorities.

²³⁹ Tanzania DTIS (n 36) 25.

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<p>Annex I to SADC Protocol on Trade Concerning Rules of Origin for Products to be Traded between Member States of SADC</p>		
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<p>Tanzania Revenue Authority Act of 1995 [Cap 399 RE 2006]</p>		
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Appendices

Appendix 1: A map of SADC member states



Source: SADC 'SADC overview' <https://www.sadc.int/about-sadc/overview/> (accessed 16 September 2021)

Appendix 2: A map of EAC member states



Source: EAC 'Overview of EAC' <https://www.eac.int/overview-of-eac> (accessed 17 September 2021)