

**CLOSING THE GAPS IN CUSTOMS LAWS AND REGULATIONS TO BOOST TRADE
CAPACITY: WILL UGANDA’S RATIFICATION OF THE TRADE FACILITATION
AGREEMENT OFFER THE REMEDY?**

by

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Declaration

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Certification

Save for references explicitly indicated, this Mini-Dissertation is solely my own work.

Signed: Dorah Kwikiriza

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List of Acronyms

COMESA:	Common Market for Eastern and Southern Africa
EAAACA:	East African Association of Anti-Corruption Authorities
EAC:	East African Community
EACCU:	East African Community Customs Union
EPRC:	Economic Policy Research Centre
GATT	General Agreement on Tariffs and Trade
GVCs:	global value chains
ICT:	information and communication technology
IGAD:	Intergovernmental Authority on Development
ITC:	International Trade Centre
JITAP:	Joint Integrated Technical Assistance Program
LDC:	least developed country
MFN:	Most-Favored-Nation
NTBs:	Non-Tariff Barriers
OECD:	Organization for Economic Cooperation and Development
S&D:	special and differential treatment
SMEs:	small and medium-sized enterprises
TFA:	Trade Facilitation Agreement
TFAF:	Trade Facilitation Agreement Facility

TPR: Trade Policy Review

UNCTAD: United Nations Conference on Trade and Development

UNECE: United Nations Economic Commission for Europe

UNESCAP: United Nations Economic and Social Commission for Asia and the Pacific

VAT: value-added tax

WBG: World Bank Group

WCO: World Customs Organization

WTO: World Trade Organization

List of Treaties and Instruments

Kyoto Convention General Annex Guidelines Chapter 9

Treaty for the Establishment of the East African Community

The East African Community Customs Management Act, 2004

The East African Community Customs Management Regulations 2010

The East African Customs Management (Compliance and Enforcement) Regulations

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The Treaty for the Establishment of the East African Community (The Treaty), 1999

The Protocol on the Establishment of the East African Community Customs Union (CUP), 2004 as amended

The East African Standardization, Quality Assurance, Metrology and Testing Act, 2007

The East African Standardization, Quality Assurance, Metrology and Testing (Designation of Testing Laboratories) Regulations 2013

The General Agreement on Tariffs and Trade 1994

WTO Agreement on Trade Facilitation

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ABSTRACT

The last few years have witnessed countries making every effort to prioritise enhancement of international trade. While there has been great and significant success in those efforts, one major concern still prevails and that is the need to ensure efficient Customs management which presents an impediment to effective participation in international trade.

Accordingly, the main supply constraint that has hampered Uganda's participation in international trade has mainly been sloppy customs- related legislation which allows for inefficient, slow and unreliable customs clearance procedures.

This mini-dissertation sets out to study the gaps in the law relating to customs management in Uganda as one of the major supply-side constraints limiting her the trade capacity and whether the ratification of Trade Facilitation Agreement under the WTO framework would open the space for enactment of appropriate laws or amendment of the existing ones with the main aim of closing the current gaps and ultimately up scaling Uganda's trade capacity and unleashing her potential for international trade and economic growth.

CHAPTER ONE

1.1 Background

In order to consolidate her international trade achievements, for the last 16 years, Uganda's trade policy objectives have been pursued through continuing liberalization with increased involvement and participation in regional agreements.¹ There have been several other efforts put in place with a major objective being to create strategic possibilities to realise the intended benefits of improved international trade.

However, according to research done by the Economic Policy and Research Centre,² there are still impediments that affect the smooth flow of trade. The major ones among these include cumbersome customs documentation and clearance procedures, border controls, transportation and transit traffic regulations, visa requirements and corruption among many others.³

Article 13 of the Protocol Establishing the EAC Customs Union makes provision for the legal commitment and obligation to eradicate Non-tariff barriers to trade in the EAC as a whole.⁴ The law requires the countries that make up the EAC put in place measures that detect and observe the elimination of NTBs.⁵

Following the Protocol, several policies were put in place and some laws were enacted to address supply side constraints and practices that affected the flow of international trade in Uganda. However complaints relating to hurdles that were being encountered in relation to customs clearance and management procedures persisted.

It could be argued that it was against this background that Uganda ratified the Trade Facilitation Agreement (TFA) of the World Trade Organization (WTO) in an effort to close the gaps that are still prevalent even with implementation of Customs laws that should deal with those impediments. The big question is whether the TFA introduces any new considerations that might guide legislative reform to fill those gaps as anticipated. Considering the attendant expected

¹ <http://www.fao.org/docrep/005/y4632e/y4632e0x.htm> accessed on December 3, 2015

² The Economic Policy Research Centre (EPRC) is Uganda's leading think tank in economics and development policy oriented research and policy analysis.

³ Lawrence Otheino Barriers to Uganda's trade within the regional trade blocs of the EAC and COMESA 1

⁴ Mrs .Olive Z. Kigongo WTO Agreement on Trade Facilitation : Implications for LLDCs 3

⁵ As above

benefits due to effective implementation of the TFA, there is hope for a likely hood of unlocking trade potential for Uganda using the legislative frame work guided by the Agreement.

The rather lengthy and tortuous negotiations that led to the approval of Trade Facilitation agreement were concluded by the members of WTO in the month of December 2013 at the Bali Ministerial Conference, this Agreement was a part of a bigger package that was referred to as the “Bali Package”.⁶ The ‘Bali Package’ is considered to be a subsection of the bigger Doha Development Agenda.⁷ The major focus of the Doha round that culminated into the adoption of the TFA was mainly focused on all issues concerning enhancement of trading extrapolations of developing and least developed countries.⁸ It should be noted however, that this Agreement was not entirely new to the business of WTO as GATT Article V, Article VII, Article VIII, and Article X had for all intents and purposes already positioned a firm foundation for issues relating to trade facilitation.⁹

Therefore, in line with the decision embraced in Bali, WTO members adopted on 27 November 2014 a Protocol of Amendment to insert the new Agreement into Annex 1A of the WTO Agreement.¹⁰ The Protocol is an essential step in line with the requirements to make the TFA a vital part of the WTO Agreements.¹¹ That said, the Trade Facilitation Agreement is all about enabling quickening the processes that relate to the movement, release and clearance of goods, including goods in transit¹² among other things. It further contains provisions for technical assistance and capacity building in this area.¹³

The general belief that was underlying the negotiations that led to the adoption of the Agreement was that full implementation of the TFA would contribute to economic growth and recovery, improved revenue collection and mitigation of poverty.¹⁴ Especially considering that trade which is carried out in a manner that is quick, predictable and timely is an essential aspect of trade

⁶ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm accessed on December 3, 2015

⁷ D Kasee The WTO Agreement on Trade Facilitation: status of play in Southern African Customs 9

⁸ As above

⁹ As above

¹⁰ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm accessed on December 3, 2015

¹¹ D Shark Benefits of the WTO's Trade Facilitation Agreement 5

¹² <https://wto.org/tradefacilitation>

¹³ As above

¹⁴ World Customs Organization: INTRODUCTION to the Implementation Guidance for the WTO Trade Facilitation Agreement 3

improvements.¹⁵ Moreover there is continued awareness that superfluous and wasteful customs rules and bureaucracies adversely affect trade.

It was from that background that members came to a consensus that the astounding role of Customs in facilitating trade could not be ignored anymore; moreover it had been up to that moment, receiving noteworthy recognition. As noted earlier, Trade facilitation involves minimizing hurdles of doing trade between countries. Accordingly, Article VIII of GATT 1994 (Fees and Formalities connected with Importation and Exportation¹⁶); and in particular, paragraph 1(c) recognizes “the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements”.¹⁷ This is only possible by ensuring that strategies are put in place to guarantee effective and efficient risk control so as to safeguard against a possibility of trade facilitation prejudicing other important roles of the Customs department. In line with that consideration therefore, WTO members premised their introduction of risk management techniques in Customs procedures as the major force behind and enshrined in the TFA, as a means to expedite clearance of goods.¹⁸

Throughout this study, the term ‘trade facilitation’ will be used as defined by the World Trade Organization (WTO) and that is to say, the “simplification and harmonization of international trade procedures;¹⁹ in this regard trade procedures are considered as the *activities, practices, and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade*”.²⁰

It is undisputable that the TFA embodies a significant development by crafting an international framework for mitigating costs related to trade especially international trade.²¹

In Uganda as a country, and the EAC as a bloc, as in many other countries, Customs occupies a vital position in as far all the different agencies that matter in international trade are concerned. It

¹⁵ As above

¹⁶ Analytical Index of the GATT: Text of Article VIII and interpretative note; fees and formalities connected with importation and exportation 10

¹⁷ https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art8_e.pdf accessed on 3rd December 2016

¹⁸ Information Note: WCO instruments and GATT Articles V, VIII and X

¹⁹ <http://tfig.unece.org/details.html> accessed on 28th June 2016

²⁰ http://gtad.wto.org/trta_subcategory.aspx?cat=33121 accessed on January 23rd, 2015

²¹ Shark (n11 above) 9

is important to note that Customs plays a significant role in determining how and when goods move from one country to another. It therefore goes without saying that the way in which customs and Customs officials handle the international trade transactions will ultimately have a far reaching effect on the whole trade process.

As already noted, Customs is a strategic border agency that is uniquely responsible for all international trade transactions and as such, it is fundamental for the implementation of the TFA.²²

Therefore in line with the above assertion, this study expounds and evaluates the likely impact of the TFA on Customs' related legislation as a contribution to improvement of trade facilitation in Uganda owing to the fact that the significance of trade facilitation to international trade is essentially irrefutable. The major question at hand however, is whether or not the ratification of the TFA by Uganda offers any cutting-edge position that is not in the existing laws already, and whether such changes that might be introduced by the TFA will open the space for enactment of appropriate laws or amendment of the existing ones with the main aim of closing the current gaps in customs management and ultimately upscale Uganda's trade capacity and unleash her potential for international trade and economic growth.

1.2 Research problem

Customs management is very vital and is the central point for international trade in goods. This is demonstrated by the control of goods across borders, determining the goods' classification and origin, collecting revenue as well as administering trade policies²³. It therefore goes without saying that the way in which customs management is handled impacts greatly on a country's cross border trade.

²² WCO's publication: INTRODUCTION to the WCO Implementation Guidance for the WTO Trade Facilitation Agreement (2014) 3

²³ D Widdowson International Trade Facilitation: The Customs Imperative, presentation to the APEC Workshop on the WTO Trade Facilitation Negotiations, Kuala Lumpur, (March 2005) 8

Statistics show that overall Uganda's international trade flow has declined over the years and this has been partly attributed to a range of factors including but not limited to the cumbersome customs procedures among many other issues²⁴.

Currently procedures for cross border trade for Uganda involve copious steps.²⁵ The laws relating to customs management and other areas that have a direct bearing on NTBs are very sloppy. This in the long run hinders the full exploitation of potential international trade benefits as envisaged under the WTO framework.

This study argues that one of the supply-side constraints limiting the trade capacity of Uganda is the gaps in the country's laws relating to customs and that with the ratification of Trade Facilitation Agreement under the WTO framework, it would open the space for enactment of appropriate laws that will close the current gaps and upscale Uganda's trade capacity and unleash her potential for international trade and economic growth.

It is against this backdrop that this study will seek to explore if Uganda's ratification of the Trade Facilitation Agreement (TFA) which embodies all principles of trade facilitation will help to bridge the gaps in customs laws and regulations.

1.3 Research question(s)

The overarching question which this study will attempt to answer is: what are the legal remedial effects of Uganda's ratification of the TFA on the gaps in the laws relating to customs management?

In answering the overarching question, the following sub-questions will also be answered:

- i. What is the nature of TFA?
- ii. What are the gaps in the Uganda's customs laws and regulations constraining her capacity to trade internationally?

²⁴ Lawrence (n3 above) 5

²⁵ T Kristof: The Changing Cross-border Trade Dynamics between North-Western Uganda, North-Eastern Congo and Southern Sudan, Institute of Development Policy and Management, University of Antwerp (2012) 9

iii. How can Uganda's ratification of the TFA close the gaps in the customs laws and regulations?

1.4 Thesis statement

This study argues that one of the supply-side constraints limiting the trade capacity of Uganda is the regulatory gaps in the country's laws relating to Customs management and that with the ratification of Trade Facilitation Agreement under the WTO framework would open the space for enactment of appropriate laws that will close the current gaps and upscale Uganda's trade capacity and unleash her potential for international trade and economic growth.

1.5 Significance of the study

The key objective which this study seeks to achieve is to interrogate the potential benefits of Uganda's ratification of the TFA in as far as it relates to the closing of regulatory gaps pertaining to customs management.

It will identify the scope and nature of NTBs that affect Uganda's international trade and assess the importance of having a robust legislative framework for customs management.

It also ultimately aims at developing a reference point for related government ministries and departments that are actively involved in the matters relating to external trade in Uganda especially for the making of the vital decision of whether or not to ratify the TFA.

Last but not least, the study is also aimed at making a significant contribution to the debate on the TFA that is currently taking center stage in the WTO negotiations.

1.6 Literature review

The TFA is a relatively new subject but there is considerably a prodigious volume of literature on it.

From the available literature, it is evident that the most contentious issues are whether the ratification of the TFA present any potential benefits for developing and least developed

countries (amongst whom Uganda falls), and whether trade facilitation is relevant for improving trade liberalization and hence trade expansion.

The proponents of the ratification of the TFA argue that it holds massive benefits for the improvement of international trade especially amongst developing and least developed countries while the opponents assert that it will burden those countries even more with its numerous obligations.

Nitya Nanda²⁶ argues that the potential benefits of the TFA are exaggerated and that developing and least developed countries are unlikely to improve their trade performance through trade facilitation if other areas of supply side constraints as well as the increase in non-tariff barriers (NTBs) remain unaddressed. He even seems to suggest that the TFA will be an extra burden for the developing world.

The author's point of departure from this line of thought is that Nitya seems to fail to realize the interconnection between trade facilitation and NTBs, the point that is underscored in the scholarly articles of other writers shows trade facilitation as a panacea for NTBs.

Robert. Z Lawrence²⁷ on the other hand argues that the TFA will yield significant benefits for the trade expansion and economic development of the developing world. He avers that the special and preferential treatment provisions will ensure that it produces genuine change and make a real difference to the ease with which developing countries can expand their trade. This is in line with the general view that trade facilitation is a pivotal requirement for trade expansion and therefore economic development as envisaged by the notion of trade liberalization which presupposes removal of all barriers to trade, that is to say tariff barriers and non-tariff barriers.

John S. Wilson²⁸, asserts that trade costs associated with transportation charges, documentation requirements and delay in clearance at a national border are as important as tariffs and quantitative restrictions. The ability of countries to deliver goods and services in time and at low costs is a key determinant of their participation in the global economy. Easier movement of

²⁶ N Nanda: Expanding Frontiers of Global Trade Rules: The Political Economy Dynamics of the International Trade Systems, Routledge Taylor and Francis Group 10

²⁷ Z. Lawrence: The Global enabling Trade Report (2008) 4

²⁸ S. Wilson: A Review of Trade Facilitation and the World Bank Agenda 1

goods and services clearly drives export competitiveness and fosters diffusion of better technologies through imports and foreign direct investment. Increasing awareness of those trade-related transactions costs has called for multilateral rule making and regional or plurilateral coordination regarding trade facilitation.

Andrew Grainger²⁹ argues that in the area of supply chain security, trade facilitation is a concept that can help improve controls and offset the additional burden on legitimate traders. He further on avers that, within the WTO trade round negotiation; trade facilitation provides a relatively non-contentious and promising initiative in the non-tariff area.

Bernard Hoekman³⁰ agrees with this position and maintains that without deliberate efforts to enhance trade facilitation the potential gains from trade cannot be maximized. He asserts that there is extensive empirical evidence that suggest that trade facilitation can give a significant boost to bilateral trade, support diversification along the extensive margin of trade, and increase aggregate welfare. He maintains that trade facilitation as envisaged by the TFA will invariably benefit trade especially with a reduction in uncertainty for traders regarding market entry conditions.

The author is in unequivocal agreement with a report by the International Trade Centre which stresses that the TFA has the potential to be of particular benefit to traders in developing countries, who continually face lengthy and costly border delays. It states further that it will be important for business in developing countries to monitor its implementation in the countries with which they trade³¹.

From the above literature, the author agrees that in light of the pursuit for effective regional integration, there is need for procedures which allow for faster clearance of goods and ultimately trade facilitation is crucial; accordingly, the ratification of the TFA by Uganda which will ultimately have a significant impact on the legislative framework governing customs management is timely.

²⁹ A Grainger: Customs and Trade Facilitation: From Concepts to Implementation 4

³⁰ B. Hoekman: The Bali Trade Facilitation Agreement and Rulemaking in the WTO: Milestone, Mistake or Mirage? 13

³¹ International Trade Centre: WTO Trade Facilitation Agreement a Business Guide for Developing Countries (2013) 3

1.7 Research methodology

To conduct this study, the author will use a multiplicity of approaches. The main approaches adopted will be descriptive, analytical and prescriptive.

The descriptive approach will deal with the overview of the TFA and the current legislative regime for customs management; the analytical approach on the other hand will cover the evaluation of the likely impact of the ratification of the TFA in bridging the gaps in laws and regulations pertaining to Customs management and lastly, the prescriptive approach will inform the way forward and therefore recommendations.

1.8 Chapter overview

Chapter 1 which is the introductory chapter discusses the preliminary issues such as the introduction, the research problem, the research questions, the thesis statement, the study justification, literature review and methodology. Chapter 2 gives a synopsis of the TFA, while the chapter 3 analyses the gaps in the Uganda's Customs laws and regulations constraining her capacity to trade internationally, chapter 4 assesses how Uganda's ratification of the TFA can close the gaps in the laws relating to customs management and therefore make positive impact on her ability to trade with other nations.

Lastly, chapter five provides a summary of the study findings, draws the author's conclusions and makes recommendations.

CHAPTER TWO

AN OVERVIEW OF THE TRADE FACILITATION AGREEMENT AS A TRADE PROTOCOL

2.1 Introduction

The Trade Facilitation Agreement (TFA) is a trade protocol that is specifically aimed at giving an impetus to international trade and doing away with the stumbling blocks prevalent in doing cross border business between countries.³²

As international trade continues to gain ground particularly amongst WTO members especially with concerted efforts to remove tariff related barriers to trade, a lot many other changes have started being noticed in the functional setting for the global trading community.³³ Chief among these has been the concern relating to disorganized border procedures which ultimately become burdensome, attracting negative impacts on all stakeholders involved in international trade, from governments to businessmen and consequently to the general economy.³⁴

As a result of such Customs procedures inadequacies, traders begin to smuggle goods across borders causing revenue loss to governments over and above the related security and other concerns, when government does not raise revenue in ways it anticipates it increases taxes which ultimately leads to the final customer paying the price.³⁵ This clearly demonstrates the cost of inefficient customs management in the whole chain of international trade.

In the effort to correct the mess discussed above thereby making international trade quicker, smoother, predictable and cost efficient, WTO members launched the negotiations that culminated into the adoption of the Trade Facilitation Agreement also known as the TFA.

This chapter gives a detailed breakdown of the Trade Facilitation Agreement, discusses its nature and context. It analyses the historical path of the Agreement and ultimately answers the question pertaining to why it became imperative to have it in place.

By ratifying the Agreement, Uganda considers this a step towards empowering everyone to be able to transact in international trade.

³² <http://howtoexportimport.com/trade-facilitation-agreement-tfa-and-india-843.aspx> accessed on December 7th, 2015

³³ OECD Publication Overcoming Border Bottlenecks the Costs and Benefits of Trade Facilitation (2015) 3

³⁴ As above

³⁵ As above

2.2 Trade Facilitation placed in the bigger context of the WTO

The general and undisputed fact that runs through and across most of the WTO Agreements is the promoting of enhanced trade especially in the bigger context of development.³⁶ This undeniably cannot be achieved without improving trade facilitation.

The topic of trade facilitation therefore is not very new to the WTO. For example the preamble to the General Agreement on Trade and Tariffs (GATT) makes unequivocal allusion to the fact that it is focused on removing barriers to trade, ‘other’ than non-tariff barriers to trade.³⁷

The preamble states in part as follows,

*“[...] being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”*³⁸

Even well before the GATT, the need for simplification of trade measure runs through all the major trade-centred discussions.

Later on many other trade-related international organizations picked interest in the topic and began to include the issues of trade facilitation as central to their mandate.

That said, it is very important to note that trade facilitation is very specific to the issues that affect functioning characteristics of international trade and that’s what sets its aside from the major discussion that centres on the issue of tariffs as a focus for trade negotiations.³⁹

One could ask why there was a need to negotiate the TFA as a multilateral agreement considering the fact that it could still be implemented individually or unilaterally so to say, the quickest answer to that question would be that a multilateral agreement brings more added value. Owing to the fact that it provides greater legal certainty especially when it comes to the changes in policy, additionally it helps to enhance coordination by mitigating problems that would otherwise have been created by different approaches to changing border procedures.⁴⁰

The bigger discussion on the historical evolution of the topic of trade facilitation and hence the TFA will be discussed below.

³⁶ T Butterly Trade Facilitation in a Global Trade Environment, Trade Facilitation, UNECE 6

³⁷ https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm accessed on June 21, 2016

³⁸ The General Agreement On Tariffs And Trade (1994)

³⁹ The North-South Institute The Reality of Trade: The WTO and Developing Countries 11

⁴⁰ Shark (n11 above) 7

2.2 The Trade Facilitation Agreement at a glance and its historical evolution

Hot off the grill of the business of the WTO is the current discourse on the fresh Agreement on trade facilitation. The Agreement is set to amend and inevitably widen WTO law. However the much that has been written on the Agreement is mainly by economic scholars. Legal academia scrutiny of the Agreement on the other hand has been very limited. This study is thus desirous to make an effort to fill that information gap by analyzing the impact of its ratification on the legislative framework governing Customs management in Uganda.

At the moment, it is important to note that even with the need to ensure that Africa in general, and LDCs in particular are successfully included in the Doha Development Round as an issue of critical concern, more important is the need to push for the implementation of the TFA.⁴¹ The TFA affords LDCs and developing country members a number of flexibilities, these flexibilities were not just handed over to them but they had to fight tooth and nail to be considered. For that matter it is in the best interests of the LDCs and developing countries to effectively implement the TFA in order to enjoy the benefits it seeks to offer.⁴²

Before the study delves into the actual business, it is imperative to first trace the genesis (albeit briefly) of the process that finally led to the conclusion of the TFA.

After nearly 10 years of talks, WTO Members concluded the negotiations on the Trade Facilitation Agreement at the Ninth Ministerial Conference held in Bali, Indonesia in December 2013.⁴³

On November 27, 2014, Members officially adopted and opened for acceptance the Protocol of the amendment that would effectively introduce the Agreement as part of the WTO.⁴⁴

However, it can be factually said that the actual exertions for the negotiations that would finally lead to the crafting of the TFA began a lot earlier than the Singapore Ministerial Conference. For a very long time there was always a push at WTO and even before it, as mentioned earlier, GATT time, to look for ways to reducing hurdles that were prevalent in doing business across borders. Truth be told, the WTO is all concerned with improvement of international trade and hence trade facilitation.

⁴¹ G Valensisi, et al Towards an Assessment of the Costs and Benefits of Implementing Trade Facilitation Measures in Africa 17

⁴² As above

⁴³ Members subsequently conducted a legal scrub to correct grammatical errors and inconsistent use of terms and formatting, etc. The final version of the TFA was issued on July 15, 2014 (WT/L/931).

⁴⁴ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm accessed on Jan 7, 2016

Accordingly, the debate that led to the discussion on trade facilitation began as early as 1921 during the Barcelona Convention and Statute on the Freedom of Transit together with the International Convention Relating to the Simplification of Customs Formalities in the year 1923.⁴⁵

Thereafter in 1974, the so called Kyoto Convention under the auspices of the World Customs Organization also alluded to various issues that in effect touched on the topic of trade facilitation.⁴⁶

Over and above that, even the World Customs Organization later under the Framework of Standards to Secure and Facilitate Global Trade; together with the Harmonized Commodity Code Description and Coding Systems in partnership with the WTO extensively addressed several aspects on trade facilitation.⁴⁷

The fact that the TFA was finally concluded after a winding 18 years of no successful multilateral trade agreement was a great landmark for WTO.⁴⁸ More than just the Agreement, which in many ways was novel, members re-arranged the structure of negotiations with specific considerations for developing and least developed countries.⁴⁹ In view of the final outcome at Bali, and the out of the usual normal processes that were employed the TFA, will go a long way further than just enabling improved international trade but will also have a profound impact on the general WTO framework and what it stands for.

As the Uruguay round ended, there were mixed feelings amongst WTO members especially in regard to readiness to take on any new trade commitments.⁵⁰ These feelings were mainly expressed by the least developed and developing countries members.

It was against that background that the Bali conference made every effort to put to rest those concerns.⁵¹ This explains the extra consideration that was given in regard to special and differentiated treatment in section 2 of the Agreement.

According to Norah Neufeld⁵² *“There was no opposition to work on Trade Facilitation as such. Against the background of dramatically lower tariff barriers, governments agreed on the*

⁴⁵ S. Khanderia-Yadav Implications of the World Trade Organization’s Agreement on Trade Facilitation for Emerging Economies (Manchester Journal of International Economic Law Volume 12, Issue 1: 33-58, 2015)

⁴⁶ As above

⁴⁷ As above

⁴⁸ N Neufeld: The Long and Winding Road: How WTO Members finally reached a Trade Facilitation Agreement 7

⁴⁹ As above

⁵⁰ https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf accessed on May 22, 2016

⁵¹ As above

*importance of addressing remaining obstacles on the non-tariff side. But most developing countries favoured a gradual approach that focused on non-binding rules. They preferred to develop recommendations as opposed to mandatory disciplines.”*⁵³

From that brief background it is clear that the importance of having in place a “set of rules” that establish a system that improves and enables efficient international trade did not just spring up overnight. Moreover that seems to be the integral and main purpose for WTO. The TFA was thus timely.

2.3 The Nature and Context of the TFA

The TFA redirects all efforts of WTO to come up with an agreement that goes beyond the usual considerations for developing nations. While most of the WTO Agreements still address concerns of developing nations with special differential treatment clauses, this Agreement goes a step further in the way it deals with issues of implementation of obligations in light of capacity constraints.⁵⁴

The purpose of the WTO Trade Facilitation Agreement (TFA) is to expedite the movement, release and clearance of goods, including goods in transit. It also sets out measures for effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues.⁵⁵

It is premised on the need for the reduction of delays and all incidental costs that are accrued by the same to traders, especially traders dealing in cross border transactions caused by clumsy customs procedures.⁵⁶ These procedures are usually prolonged by not having any clear set out guidelines based on clear rules and regulations founded in law.

The Trade Facilitation Agreement is a landmark for the WTO as well as for the trade and development of countries like Uganda. It is the first World Trade Organisation multilateral trade agreement reached since it was created in 1995.⁵⁷ Notably, it is an agreement that incorporates

⁵² Neufeld (n 48 above) 10

⁵³ As above

⁵⁴ https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm accessed on April 9, 2016

⁵⁵ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm accessed on April 9, 2016

⁵⁶ http://www.doingbusiness.org/reports/doing-business/~/_media accessed on December 9, 2015

⁵⁷ Aid For Trade at a Glance : Reducing trade costs for inclusive, sustainable growth - © OECD, WTO (2015) 4

the principle, not found in any prior WTO or GATT agreement, that a developing or least developed country (LDC) country's obligation to implement the provisions of the agreement shall be conditioned upon that member's acquisition of the necessary technical capacity, which may require donor support, based on each member's evaluation of its own needs and priorities.⁵⁸

In order to realize this unique principle, the Agreement contains extensive provisions that define the roles and responsibilities of developing and LDC members on the one hand and the donor members and the international and multilateral organisations supporting trade facilitation on the other.⁵⁹ The agreement also sets out the institutions and procedures to support delivery of assistance.⁶⁰

As mentioned earlier, this study and most particularly this chapter presents a deep legal analysis of the Agreement. The ultimate goal is to ascertain whether its ratification by Uganda will have any eventual useful impact on the current legislative frame work governing Customs and finally alleviate her prevalent supply side constraints relating to international and cross border trade.

The study argues that the TFA is majorly inclined to creating solutions for developing and least developing countries especially in regard to special and differential treatment (S&D), as earlier said, it introduces a new system of categorization that does away with the usual considerations of other WTO Agreements like TRIPS that assume that all developing and lest developed countries have similar needs and capacities and as such, blanket S&D provisions should apply equally to them, which is definitely not the case.

As already noted, not only does it make that ground breaking reflection on S&D, it also creates a qualified connection between the developing and least developed countries' commitments and donor country members provision of aid and support for capacity building.⁶¹ That support is not legally enforceable but it doesn't rule out the possibility of donor countries working on their good will to make provisions for such assistance.

⁵⁸ As above

⁵⁹ As above

⁶⁰ As above

⁶¹ L Gregorsson: Legal Analysis of the New WTO Agreement on Trade Facilitation - With a focus on developing countries (2013) 11

2.4 The evolution of the differential and special treatment for LDCs and Developing Countries

Briefly, the issue of the S&D as elaborated by the TFA is not a topic that was originally on the schedule for WTO, neither did it even feature much in the GATT.⁶²

It should be noted that even though the original 23 membership of the GATT on its formation in 1947 had 11 of them being from developing countries, they were never given any special considerations or recognition.⁶³

It was in the later years, that these countries started advocating for spaces for differentiated treatment, it was not possible to ignore such demands; the UNCTAD was thus created and adopted as part IV of GATT in 1965 to respond to the pressure from developing countries.⁶⁴

While it was a plausible development, the wording of part IV of the GATT did not have legal enforceability, it was based on aspirations of the members not backed by legal implementation. And it was against that background that later in 1979, the enthralling Enabling Clause⁶⁵ was introduced.⁶⁶ This formed the legitimate origin for preferential tariff treatment of exports from developing countries and greater flexibility in the establishment of preferential trade agreements between least developed countries, developing countries and other members of WTO.⁶⁷

The crafting of the enabling clause marked the beginning of further deliberations on S&D considerations for developing and least developed countries; the discussion was later extended to the Uruguay Round of negotiations and further strengthened in the Doha round. It has been given a new dimension in the TFA as the study shall expound later.

⁶² Gregorsson (n61 above) 12

⁶³ As above

⁶⁴ Matsushita et al: *The World Trade Organization: Law, Practice, and Policy* (2nd edn). Oxford: Oxford University Press, (2006) 33

⁶⁵ GATT Contracting Parties, Decision of November 28 1979, on Differential and More Favourable Treatment, Reciprocity and Fuller Participation on Developing Countries

⁶⁶ The Enabling Clause adopted in 1979 as part of the results of the Tokyo Round. Provided permanent legal bases for derogation from the MFN principle to allow developed countries to grant trade preferences on a generalized, non-discriminatory basis to developing countries (para. 2(a) and footnote 3);derogation from the the MFN principle to permit deeper preferences to be extended to least-developed countries within GSP schemes (para . 2(d); and derogation from the MFN principle to permit developing countries to enter into regional trade agreements among themselves (para. 2(c))

⁶⁷ Gregorsson (n61 above) 13

2.5 The Doha Development Agenda (DDA) and the Trade Facilitation Agreement

This round of negotiations started towards the end of 2001 with the first of its meetings taking place in Doha, Qatar.⁶⁸ The negotiations for this round are still ongoing and so far the greatest outcome has been the successful negotiation of the TFA.

Basically this round is the latest and current round of trade negotiations for the WTO Members.⁶⁹ The major objective of the Doha Round is mainly to bring about change in all matters pertaining to international trade with a particular focus on removing all barriers to trade especially for LDCs and developing country members.⁷⁰ It is for this reason that among about over twenty areas of trade that form the agenda of the Round, the TFA still takes centre stage. The Round was officially launched at the WTO's Fourth Ministerial Conference in Doha, Qatar, in November 2001.

Essentially, the DDA as it is famously referred to, places the needs of developing and least developed country members at the helm of the WTO agenda.

While there has been a lot of opposition in the negotiations of this round, trade facilitation is one of the topics that has had a somewhat smooth debate culminating into a successful agreement.

The focus of the chapter is to extensively analyse the TFA, looking at its nature and context within the WTO framework.

It can be said authoritatively that the concept of trade facilitation was not introduced to the WTO by this agreement. When one scrutinizes the WTO and what it stands for, it is easy to note that the one the thing that is emphasized in its wider agenda is facilitation of trade.

The only thing that is newly introduced by the TFA is the concept of enhancing customs procedures and management to facilitate trade.⁷¹

It was at the 1996 Singapore Ministerial Conference that members were given a first go ahead to start discussions on the TFA. The mandate to “undertake exploratory and analytical work,

⁶⁸ https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm accessed on May 11, 2016

⁶⁹ WCP publication (n22 above)

⁷⁰ As above

⁷¹ (n68 above)

drawing on the work of other relevant international organizations, on the simplification of trade procedures in order to assess the scope for WTO rules in this area⁷²” was given to the Council for Trade in Goods⁷³

This marked the point at which the WTO members started deliberating matters that specifically addressed issues of for developing countries and least developing countries.

Consequently at the Ninth Ministerial Conference in Bali 2013, a full and final text of the TFA was by consensus adopted.⁷⁴ The Agreement is so far the utmost accomplishment of the WTO which has over the recent past observed a growing dependence on Regional Trade Agreements.⁷⁵

The TFA is centered on the following key features- Expediting the movement, clearance and release of goods as well as those in transit; emphasis on customs and the elimination of inefficiencies within the customs system; provisions for enhanced collaboration between customs and other relevant authorities on trade facilitation; and creation of national committee on trade facilitation bringing together all relevant national stakeholders to oversee the implementation.⁷⁶

Accordingly, the Agreement is divided into two distinct sections with section I dealing and setting out the main and fundamental provisions that deal with member obligations including commitments regarding customs and other border procedures. While Section 2 covers for differential and special treatment provisions for developing and least developed countries.

2.6 The Trade Facilitation Agreement vis – a – vis the GATT

Annex D of the Doha Work programme provided the requisite platform for the launch of the debate that led to the conclusion of the TFA.⁷⁷

The processes for negotiations on trade facilitation provided that (*with relevance to this subheading*) “[n]egotiations shall aim to clarify and improve relevant aspects of Articles V, VIII

⁷² WTO, Singapore Ministerial Declaration, WT/MIN(96)/DEC, para. 21

⁷³ Gregorsson (n61 above) 14

⁷⁴ https://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm accessed on December 11, 2016

⁷⁵ C Bellman The Bali Agreement: Implications for Development and the WTO 7

⁷⁶ [http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/customs-and-trade-facilitation/wto-trade-facilitation-agreement-\(tfa\)/](http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/customs-and-trade-facilitation/wto-trade-facilitation-agreement-(tfa)/) accessed on June 28, 2016

⁷⁷ Gregorsson (n61 above) 13

*and X of the GATT 1994 with a view to further expediting the movement, release and clearance of goods, including goods in transit”.*⁷⁸

The above mentioned articles make provision for matters relating to freedom of transit for goods, fees and formalities connected with importing and exporting, and the publication and administration of trade regulations.⁷⁹

As we shall see in the successive discussion, most of the provisions of the Agreement originate from the GATT. This even led to a heated discussion by some scholars who contend that the TFA does not introduce any new aspects that were not already covered in other prior agreements and other trade-related protocols.

Articles 1-5 which largely forms the integral part of the Agreement lays down the requirements that deal with transparency issues and in away expands the obligations laid down in Article X of the GATT.⁸⁰

Accordingly, as opposed to the general belief that the GATT 1994 provides extensively for trade facilitation and as such making the TFA irrelevant, this study argues that the mandate provided for in the TFA in relation to the GATT is a more open-ended, expansive mandate, and suggests that the scope of the TFA as is in its legal text is meant to extend further and beyond the prescriptions of the underlying GATT articles and other WTO Agreements with similar GATT-related mandates⁸¹ making it very relevant.

2.7 The detail

The Agreement is divided into three sections, Section I provisions relate to the necessary legal obligations imposed upon members, they are the ones that if implemented will ultimately define the scope and basis for trade facilitation. Section II provisions are about special and differential treatment (S&D) provisions which are meant to permit developing LDCs to define when they will be in position to implement individual provisions of the Agreement and to identify provisions that they will only be able to implement upon the receipt of technical assistance and

⁷⁸ As above

⁷⁹ The General Agreement on Tariffs and Trade (GATT 1994)

⁸⁰ As above

⁸¹ Gregorsson (n61 above) 13

support for capacity building.⁸² Lastly, Section III is about the establishment of a permanent committee on trade facilitation at the WTO and the requirement for WTO Members to have in place a national committee to facilitate for domestic coordination and implementation of the provisions of the Agreement.⁸³ Additionally, Section III, sets out a number of final provisions, such as the possibility of regional approaches to the implementation of the TFA.⁸⁴

Section 1 under Article 1 provides for two main issues namely; “prompt publication of information in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested parties to become acquainted with them”.⁸⁵

The kind of information that is referred to is that which relates to importation, exportation and transit procedures and the required forms and documents, applied rates of duties and taxes imposed in connection with importation or exportation, or other aspects enumerated in the said Article.⁸⁶

Accordingly, members are obliged to inform all parties that are likely to be affected by any government rules or procedures relating to the issues above mentioned so that they can adjust their undertakings.⁸⁷

Information forms an integral part of all business and especially international business transactions. It becomes very hard for anyone to trade when they are oblivious of the necessary procedures to be followed and complied with. The requirement to have such information promptly published is very crucial and not only published but in a non-discriminatory manner. There is however a concern regarding the manner in which the Agreement goes about this requirement. It should not have been left as a “best endeavor” requirement but rather mandatory. Parties that choose to include this provision in their laws should make it mandatory rather than leaving it to the discretion of concerned parties to choose whether to publish or not. How this relates to doing business in Uganda will be extensively discussed in the chapter that follows.

⁸² WCO publication (n32 above)

⁸³ As above

⁸⁴ As above

⁸⁵ WTO Agreement on Trade Facilitation, UNCTAD Trade Facilitation Technical Note No. 1

⁸⁶ W Hans-Michael Wolfgang et al: Old wine in new skins: analysis of the Trade Facilitation Agreement vis-à-vis the Revised Kyoto Convention

⁸⁷ (n85 above)

Further, in sub Article 2, members are compelled to avail the information mentioned in 1 above through the internet such that all interested parties are able to easily access information, regardless of their location.⁸⁸

In furtherance of the core attribute of the Agreement which is transparency, this article aims at enabling access to and circulation of trade-related information in a cheap yet easily accessible manner.

It should be noted that most of the trade related information in countries like Uganda are only found in centralized places like the Ministry in charge of Trade, this particular Ministry only has offices in the capital city and as such it becomes costly for traders and stakeholders that do not reside within the city to access such information. The requirement to avail such information through the internet which can be accessed from any other location makes the process less cumbersome even for stakeholders who are not necessarily Ugandans but transact their business either within or through Uganda, as this information is also relevant for transit goods.

Under Article 1.3, WTO Members are required to establish and maintain enquiry points to answer reasonable enquiries of governments, traders and other interested parties on matters relating to publication of the above mentioned information.⁸⁹ This provision is also aimed at enhancing transparency and predictability through the fluent flows of information among the relevant stakeholders and to provide easily accessible, precise and complete information in a timely and cost effective way.⁹⁰

Enquiry points are very crucial in so far as trade facilitation is concerned. One of the greatest impediments to free flow of international trade especially in Uganda is the level of confusing information that is given to traders and other interested parties. Having such points in place would undoubtedly ensure consistency and ultimately remove one of the main obstructions to proficiency in international trade transactions.

⁸⁸ As above

⁸⁹ WTO Agreement on Trade Facilitation UNCTAD Trade Facilitation Technical Note No. 6

⁹⁰ As above

The Agreement under Article 1.4 compels Members to apprise the Committee on Trade Facilitation of all the places where they have officially published that information referred to above, including websites in case there are any as well.⁹¹

This requirement is also in furtherance of the obligation for members to be transparent. It is grounded from the background of the requirement for ensuring consistency. It is very unlikely that a member would submit to the Committee on Trade Facilitation any uncoordinated information.

In summation of the whole Article, it is clear that the overarching principle is the enabling of transparency for international trade related transactions. If members are able to adopt all the measures articulated in the Article, international trade will be enhanced, it will be discussed later in the next chapter how the inability to access reliable information is one of the factors that constrain the ability of Uganda to trade internationally, consequently adopting such measures should be able to bridge that gap.

The Agreement in Article 2, obliges Members [*to the extent practicable and in a manner consistent with domestic legal systems*],⁹² to provide traders and other interested parties with opportunities and an appropriate time period to comment on the introduction or amendment of laws and regulations and regulations of general application related to the movement, release and clearance of goods, including goods in transit.⁹³

Laws and Regulations relating to trade are enacted to assist in aiding smooth flow of business transactions and as such have a bigger bearing on the people that do transact in the businesses. It is only fair that they are given an opportunity to comment on such laws if they are being newly introduced or in case of amendments. The requirement in the Agreement under Article 2 is thus very proper. The only issue that could arise with such a requirement would perhaps be the scope and limit of the comments. The fact that Article qualifies the obligation with the fact that it shall only be applicable if it is “*practicable and consistent with domestic legal systems*”⁹⁴ makes its

⁹¹ As above

⁹² WTO Agreement On Trade Facilitation - Analysis of Section I (and Article 23) based on the WTO TF Toolkit and potential implications on WCO - Rev. 2, November (2014) 8

⁹³ Wolfgang *et al* (n86 above) 16

⁹⁴ https://www.wto.org/english/thewto_e/minist_e/mc9_e/desci36_e.htm accessed on May 10, 2016

enforceability rather complicated as there is no standard measure for practicability and members may choose to subjectively apply it. This contention will be exhaustively tackled in chapter 4 of this study.

Further, under Article 3, the Agreement makes requirement for Members to issue advance rulings where appropriate and have procedures for pre-arrival processing, electronic payments, risk management and expedited shipments.⁹⁵

First, it should be noted that an advance ruling (in the context of the TFA) ‘is a written decision provided by a Member to an applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to (i) the good’s tariff classification, and (ii) the origin of the good’.⁹⁶

In essence, the Article requires WTO Members to issue advance rulings regarding the tariff classification and the (non-preferential) origin of goods and sets the rules stipulating the issuance of advance rulings in a reasonable and time bound manner, including cases where an application may be declined by WTO Members.⁹⁷

In addition, WTO Members are encouraged to issue advance rulings for other areas such as customs valuation and requirements for relief or exemption from customs duties.⁹⁸

It goes without saying that availability of information on customs matters (to those who need it) is one of the key elements of trade facilitation and such when such information is requested, it is the responsibility of Customs to provide it completely and accurately and as soon as possible.⁹⁹

In addition to the requirement for advance rulings, members are required to make known all the necessary procedures for the review of administrative decisions issued by Customs (administrative appeal/review and/or judicial review).¹⁰⁰

⁹⁵ The legal text of the Trade Facilitation Agreement

⁹⁶ As above

⁹⁷ Ministerial Conference: Ninth Session, Bali, 3-6 December 2013 Wt/Min(13)/36, Wt/L/911 Agreement on Trade Facilitation (2013) 2

⁹⁸ As above

⁹⁹ As above

¹⁰⁰ As above

The gist of this Article is to warrant that WTO Members make it possible that any person to whom Customs issues an administrative decision has the right to administrative appeal or review, and/or judicial appeal or review; and that the administrative and judicial review is carried out in a non-discriminatory manner intended to instill confidence among users especially in as far as customs administration is concerned.¹⁰¹

To that end, the TFA brings out clearly and expressly the principle of ‘non-discrimination’,¹⁰² which is evidently central to all WTO law. This adds strength to Articles 1 and 2.

In line with its fundamental rules of WTO of improving impartiality, non-discrimination, and transparency three measures are advanced by Article 5 of the TFA namely: (1) notifications for enhanced controls or inspections; (2) detention; and (3) test procedures.¹⁰³

Accordingly, the Agreement lays down two essential principles that should be followed in case a member chooses to implement measures or processes intended to improve controls especially in regard to food stuffs and/ or beverages; principle of “risk based”¹⁰⁴ and “uniform application”¹⁰⁵ these are laid down in paragraph 1 of Article 5.

As deliberated on in the foregoing discussion, access to information concerning rules and procedures relating to trade is very crucial for all interested parties, in such a case it would be imperative to be aware of all the major principles that are outlined under Article 5.

The issue for the need for advance rulings cannot be overstated. Traders and business people transacting in cross border trade are most times held for long hours culminating into days at border posts waiting for outcomes for days on end for their documents lodged with Customs officials. Being able to cut out such delays would enable improvement of international trade. As this study will expound on this issue later, the delays at customs also forms a major constraint for Uganda’s international trade transactions.

¹⁰¹ As above

¹⁰² https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm accessed on March 29, 2016

¹⁰³ World Customs Organisation: WTO Trade Facilitation Agreement Customs takes centre stage, WCO news (June 2014) | n° 74 | also @ www.wcoomd.org

¹⁰⁴ The legal text of the Trade Facilitation Agreement

¹⁰⁵ As above

The key requirement as spelt under Article 6 paragraph 1 is that members publish information on fees and charges imposed on or in connection with importation and exportation, and to review the fees and charges periodically with a view to reducing their number and range.¹⁰⁶

Under Paragraph 2, members are obliged to limit in amount to the approximate cost of the services rendered on or in connection with the specific import or export operation in question; and, that such fees are not required to be linked to a specific import or export operation provided they are levied for services that are closely connected to the customs processing of goods.¹⁰⁷

This Article also makes reference to availing information and it specifically refers to information relating to fees and charges. The second part in Paragraph 2 obliges members to make sure that such fees are commensurate to services rendered even if they don't have to.

Article 7 contains provisions on pre-arrival processing; electronic payment; separation of release from final determination of customs duties, taxes, fees and charges; risk management; post-clearance audit; establishment and publication of average release times; trade facilitation measures for authorized operators; expedited shipments; and perishable goods.¹⁰⁸

The central messages in all these provisions are the requirement for WTO Members to adopt or maintain procedures allowing for the submission of import documentation prior to the arrival of goods, and to allow electronic lodgment of such documents.¹⁰⁹

The article also emphasizes the use of modern methods of management such as risk management and post-clearance audit.

According to Article 8, all national border authorities/agencies are supposed to cooperate with each other and coordinate border control and procedures to facilitate trade.¹¹⁰ Such cooperation and coordination may include 'alignment of working days and hours; alignment of procedures

¹⁰⁶ As above

¹⁰⁷ <http://www.tfafacility.org/article-6> accessed on May 22, 2016

¹⁰⁸ (n104 above)

¹⁰⁹ Wolfgang *et al* (n86 above)

¹¹⁰ Border Agency Cooperation: Quick summary notes@ <http://www.tfafacility.org/article-8> accessed on February 9, 2016

and formalities; development and sharing of common facilities; joint controls; [and] establishment of one stop border post control'.¹¹¹

There are several research reports and studies that have pointed out the major obstacles experienced at borders post are majorly because of poor infrastructure but one other great impediment comes from uncoordinated border procedures. It becomes very complicated dealing with different border agencies for example who are involved in the same trade process but have different operating hours, such that even if a trader is done with one agency, they still need the approval of another that may at that point not be open due to the different operating hours. These impediments are likely to give rise to uncontrolled corruption which will ultimately have far reaching effects on trade facilitation.

Article 8 therefore is to the effect that those uncoordinated procedures are given due attention with an aim of facilitating trade. The one important issue that should be put in consideration should be making sure that working days and hours are aligned.¹¹² This can be effectively enforced by providing for it in the law.

Article 9 obligates WTO Members, 'to the extent practicable and provided all regulatory requirements are met, [to] allow goods intended for import to be moved ... to another customs office ... where the goods would be released or cleared'.¹¹³

This article is premised on the need to have a short clearance procedure for goods especially by allowing for the possibility for inland depot clearance.¹¹⁴ The tedious processes currently requiring that all imports have to be cleared at the border posts is one of the major constraints to international trade in Uganda. If enforced this move would speed up the movement of goods and would ultimately have an exceptional impact on the border clearance times.¹¹⁵

¹¹¹ As above

¹¹² D Kasse et al: Will implementation of the WTO Trade Facilitation Agreement promote integrity in Africa? 12

¹¹³ Movement of Goods Intended for Import Under Customs Control @ <http://www.wcoomd.org/en/topics/wco-implementing-the-wto-atf/atf/movement-of-goods-under-customs-control-intended-for-import.aspx> accessed on May 14, 2016

¹¹⁴ International Trade Centre (ITC) WTO Trade Facilitation Agreement: A Business Guide for Developing Countries 7

¹¹⁵ As above

The Agreement under Article 10 requires that members regularly review all formalities relating to documentation. This requirement is necessary to reduce cases of difficulties arising out of import, export and transit formalities.¹¹⁶ To put it succinctly, it requires efforts to simplify requirements relating to documentation. The main focus for this Article is on issues that are crucial for importation, export and transit, these include; documentation requirements; acceptance of copies; use of international standards; single window; pre-shipment inspection; use of customs brokers; common border procedures and uniform documentation requirements; rejected goods; temporary admission of goods; and inward and outward processing.¹¹⁷

One other major constraint to effective international trade in Uganda is the complexity that is associated with the documentation requirements. This Article therefore provides a panacea for that problem.

The recent launch of the electronic single window¹¹⁸ should be deriving from this article. Except there has not been any legislation providing for it.

Article 11 deals with issues that relate to freedom of transit.¹¹⁹ It obligates members to simplify requirements that relate to traffic in transit especially if those requirements are not necessarily essential. The Article further calls for members to only charge transit fees if they are for transportation or at least if they are proportionate, with administrative expenses involved or with the cost of services offered.¹²⁰

This article is a long-drawn-out version of the requirements that are covered in GATT Article V. According to Article V GATT, members of WTO are obliged and it states “...*to treat products in transit no less favourably than if they were being transported to their destination without going through the territory of that Member State*”.¹²¹

It comprises numerous requirements aimed at facilitating procedures relating to transit namely; the pre-arrival declaration; and prohibits restrictive measures in relation to customs charges,

¹¹⁶ (n104 above)

¹¹⁷ Wolfgang *et al* (n86 above)

¹¹⁸ www.trademarka.com/press-releases/uganda-on-course-to-open-wide-an-electronic-single-window-for-trade/ accessed on March 11, 2016

¹¹⁹ (n104 above)

¹²⁰ As above

¹²¹ As above

formalities, and inspections other than at the offices of departure and destination. It also contains provisions relating to guarantees.¹²² If these requirements are put in practice, transit procedures should be made easy and ultimately international trade improved.

Article 12 mainly concerns itself with issues relating to cooperation concerning customs administration.¹²³ For instance, it sets the terms and requirements for WTO Members to share information to ensure effective customs control while respecting the confidentiality of the information exchanged.¹²⁴ The Article allows WTO Members flexibility in terms of establishing the legal basis for information exchange.¹²⁵ Therefore the overarching objective of this article is to set out an outline for the obligation of WTO members to cooperate and share trade related information so as to guarantee orderly harmonization of customs control.¹²⁶ This would simplify and improve customs procedures.

Moreover, WTO Members may even enter into or maintain bilateral, plurilateral or regional agreements for sharing or exchanging customs information and data, including advance information.¹²⁷

In relation to institutional arrangements, the Agreement requires members to establish or maintain a National Committee on Trade Facilitation or designate an existing mechanism to facilitate both domestic coordination and implementation of the Agreement.¹²⁸

This arrangement would work well for business since it would be able to facilitate dialogue between government agencies and the trade and business community, this would in the long run ensure monitoring the implementation of the agreement.

In summation, it is important to note that not all the provisions in Section 1 are mandatory. Cases in point are the provisions on border agency cooperation, movement of goods under customs control intended for import, use of international standards, establishment or

¹²² Trade Facilitation Handbook Part II, Technical Notes on Essential Trade Facilitation Measures (2013) 5

¹²³ (n104 above)

¹²⁴ As above

¹²⁵ As above

¹²⁶ International Trade Centre: A business guide for developing countries (2012) 3

¹²⁷ (n104 above)

¹²⁸ As above

maintenance of a single window and customs cooperation.¹²⁹ The Agreement in these parts of section 1 uses the best endeavor language.

Section 2 links implementation with the capacity of developing countries, including LDCs.¹³⁰ It comprises of provisions relating to special and differential treatment (S&D) for developing and least-developed Members.¹³¹ These provisions lay down the necessary flexibilities for those members (developing and least developed countries) and the guidelines for implementation of the Agreement.

This part of the Agreement permits what is termed as “self-determination”¹³² whereby members (developing and LDCs) are allowed to individually decide on the dates that they will be ready to implement each of the measures and to also point out the provisions where they will need external (donor) assistance.¹³³

This part further obliges developing countries or LDCs to categorize the different provisions of Section 1 in one of the three different categories which determine the deadline for notification. The different categories are A, B and C and are explained here below-

- Category A: provisions that the Member designates for implementation upon entry into force of the Agreement.¹³⁴
- Category B: provisions that the Member designates for implementation on a date after a transitional period of time following the entry into force of the Agreement.¹³⁵
- Category C: provisions that the Member designates for implementation on a date after a transitional period of time following the entry into force of the Agreement and requiring the acquisition of implementation capacity through the provision of assistance and support for capacity building.¹³⁶

¹²⁹ As above

¹³⁰ As above

¹³¹ As above

¹³² WCO Implementation Guidance (n14 above) 5

¹³³ (n104 above)

¹³⁴ As above

¹³⁵ As above

¹³⁶ As above

Accordingly, LDCs and developing countries are required to classify the obligations contained in Articles 1-12 in the three categories above-mentioned.

Consequently, provisions falling under Category A are to be implemented upon the entry into force of the Agreement in the case of developing countries, and one year thereafter by least developed countries.¹³⁷

With respect to Category B obligations, developing countries are expected to notify the Committee on Trade Facilitation upon the entry into force of the Agreement, the provisions designated in this category and the corresponding indicative dates for implementation. These are to be confirmed within one year of the entry into force of the Agreement.¹³⁸

LDCs on the other hand are obligated to notify the provisions designated in Category B to the Committee within one year after the entry into force of the agreement and the corresponding indicative dates for their implementation.¹³⁹ These are to be confirmed within two years of the entry into force of the Agreement.¹⁴⁰ The section makes provision for the possibility of LDCs and developing countries to apply for an extension of the time frame.¹⁴¹

Regarding Category C obligations, developing countries are required to notify the Committee on Trade Facilitation upon the entry into force of the Agreement, the provisions designated in Category B and the corresponding indicative dates for implementation.¹⁴² It requires that information should also be provided on the assistance and support for capacity building required to implement the relevant obligations.¹⁴³

It further states that developing countries should within one year after the entry into force of the agreement, together with relevant donors provide information to the Committee on the

¹³⁷ As above

¹³⁸ As above

¹³⁹R HOLLER, et al : A Comprehensive Approach to Trade Facilitation and capacity building connecting developing countries to supply chains (2012) 15

¹⁴⁰ As above

¹⁴¹ As above

¹⁴² As above

¹⁴³ As above

arrangements maintained or entered into that are necessary to provide assistance and for capacity building to enable implementation of Category C commitments.¹⁴⁴

In the same way, LDCs are expected to notify the Committee one year after the entry into force of the Agreement the provisions designated in Category C.¹⁴⁵ After the lapse of one year from this date, it shall notify information on assistance and support for capacity building that it requires in order to implement its obligations.¹⁴⁶

Not later than two years after the notification on assistance and support, the LDC together with relevant donors shall provide information to the Committee on the arrangements maintained or entered into that are necessary to provide assistance and for capacity building to enable implementation of Category C commitments.¹⁴⁷ The LDC would be expected at this point to notify indicative dates for the implementation of its commitments.¹⁴⁸

The Agreement provides for the possibility for LDCs and developing countries to request an extension of the time-frames or shift obligations between Categories B and C under the Agreement.¹⁴⁹

What stands out prominently in as far as the category system is concerned especially in regards to category B and C, is the fact that the Agreement does not set time limits in terms of definitive dates which are moreover self-determined, meaning that a developing or least developed country is entitled to notify a date as far as it can choose but still enjoy implementation of obligations from other members.¹⁵⁰

While this will work in the favour of the developing and least developed countries it should be noted that it limits precision and clarity in terms of effective implementation.¹⁵¹

¹⁴⁴ As above

¹⁴⁵ As above

¹⁴⁶ As above

¹⁴⁷ J Apecu Unlocking Export Competitiveness: The Role of Trade Facilitation The WTO Agreement on Trade Facilitation: Thoughts on Implementation for African WTO Member Stakeholders (November 2014) 13

¹⁴⁸ As above

¹⁴⁹ C Michalopoulos: Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries (2011) 7

¹⁵⁰ As above

¹⁵¹ As above

The fact that Agreement also gives different grace periods this may result in a lack of uniformity, which when coupled with the differences in implementation dates mentioned above, is likely to lead to a reduction in legal clarity and difficulty in determining the viability of claims against developing countries.¹⁵²

The Agreement contains several provisions that aim to ensure that developing and LDC Members receive the assistance they need to acquire the capacity to implement the measures.¹⁵³ Article 21 of the Trade Facilitation Agreement provides that donor Members will facilitate the provision of assistance and support for capacity building for developing and LDC Members, and will help them build capacity to implement the provisions of the Agreement.¹⁵⁴ Article 22 of the Agreement requires donor Members to make information on their implementation support programs available through notification to the WTO.¹⁵⁵

Extensive trade facilitation-related assistance is already being provided by regional and multilateral agencies, public and private entities, bilateral donors and other stakeholders through a broad range of different programs.¹⁵⁶ Some of this is carried out by donors who have a field presence and implementation capacity, while others provide grants or budgetary support in order to respond to expressed needs.¹⁵⁷ Yet many developing countries and LDCs expressed concern about potential difficulties in accessing TFA support.¹⁵⁸ For this reason, some developing and LDC Members were concerned about committing to implementation of the TFA measures without assurance that sufficient donor support will be available to all WTO Members that need it.¹⁵⁹

¹⁵² Gregorsson (n61 above) 3

¹⁵³ (n104 above)

¹⁵⁴ As above

¹⁵⁵ WTO Trade Facilitation Agreement: Facility Operational Guidelines (2014)

¹⁵⁶ As above

¹⁵⁷ As above

¹⁵⁸ Information provided as part of the Aid for Trade Global Review monitoring exercise shows that developing and LDC Members have problems accessing information on funding opportunities, ensuring TFA implementation is a national development planning priority, mobilizing political will for TFA implementation, differing priorities of national donors and other constraints.

¹⁵⁹ Facility Operational Guidelines (n155 above)

2.8 Conclusion

The chapter gave a detailed overview of the TFA. It discussed a brief historical background of the Agreement and dissected the actual agreement to the core. Before delving into the actual implementation of the Agreement it is imperative to first understand what it is about and why it could be important to Uganda's customs related legislative framework.

According to the text of the Agreement as noted in the foregoing discussion, WTO members have the discretion to implement the provisions which are formulated on a "best endeavors" basis if they so choose or they may just implement only the mandatory provisions. This sets a new precedent for developing and least developed countries S&D considerations but most importantly the part that requires that these two categories of members are given further support to implement their obligations.

This chapter placed the TFA in the bigger context of the WTO framework; it discussed the progressive realization for the need to put in place mechanisms especially legal mechanisms to give effectiveness to the bigger plan of improving trade liberalization among WTO members. There was indeed no better way to make that happen than to deal head on with issues that hamper customs procedural effectiveness, and the TFA was the panacea to this gap.

It could be argued that such leeway may also hamper the velocity with which the TFA will be implemented. The study will tackle that discussion in the chapters that will follow. The issue that the donor funding is also not mandatory raises issues but then again these two issues will be handled extensively later on.

CHAPTER THREE

3.0 GAPS IN UGANDA'S CUSTOMS LAWS AND REGULATIONS THAT CONSTRAIN HER ABILITY TO TRADE INTERNATIONALLY

3.1 Introduction

This chapter highlights the various gaps that are prevalent in the legislative framework for Customs management in Uganda which consequently have an impact on trade facilitation. It gives an overview of the different pieces of legislation and explores the gaps therein.

It is very important to note that for some time now many countries have made effort to address issues that affect international trade flows. Uganda is one of those many countries that have intensified their efforts in that line. However the greatest achievement so far has been success in lowering tariffs but the non-tariff barriers still exist.

The single most significant of those barriers is inefficient, slow and unreliable customs clearance measures. It is high time Uganda realised the need to address all the challenges that are posed by inefficient customs processes considering the major impact they have on trade facilitation.

If Uganda is to attain its dream for increased international trade, the following issues need to be addressed wholly, the high level of unclear and inconsistent rules pertaining to customs clearance as well as ridiculously long and most times redundant procedures. And certainly, removing all other administrative bottlenecks will also have powerful effects on reducing trade costs.¹⁶⁰

Accordingly, this chapter highlights the negative impacts inefficient Customs-related laws have on international trade particularly for a country like Uganda. Without effective legislation, sloppy customs management can cause more harm than good in relation to trade flow.¹⁶¹ In order to alleviate her supply side constraints, Uganda needs to shift her focus to improving customs and administrative procedures in particular publication of the necessary requirements, reducing the volume of documents and addressing the multitude of other formalities necessary for international trade and all the other issues outlined above.

¹⁶⁰ OECD/WTO “Implementing the Trade Facilitation Agreement”, in Aid for Trade at a Glance: Reducing Trade Costs for Inclusive, Sustainable Growth, WTO, Geneva/OECD Publishing, Paris (2015)

¹⁶¹ OECD Publication (n33 above)

It is important to note that in line with the provisions of the TFA, Uganda has already undertaken some measures to expedite movement and clearance of goods some of those measures include introduction of ICT protocols which are particularly geared towards making the cost of doing business much cheaper. Various studies show that it is very likely for countries to obtain massive benefits if they improve their customs and administrative procedures, for example it is estimated that reduction in border time delays has the effect of increasing trade by 10%.¹⁶²

The fact that there have been concerns regarding the prospects of promotion of trade using the TFA amidst disagreements on particular issues of great significance to African trade like matters in relation to trade in services and agriculture leaves a lot of doubt and cannot be easily ignored.

However the greater purpose for this study is not necessarily to calculate the economic gains of the TFA for Uganda but to scrutinize its relevance in regard to the legislative framework that is currently in place for customs management.

In line with the above discourse, following is a discussion examining the gaps in the current customs related law(s) that allow for customs management inefficiency which ultimately lead to reduced trade flow for Uganda. In a later chapter the study will seek to appreciate how the ratification and implementation of the Agreement might help to bridge those gaps.

3.2 The EAC legislative framework for Customs management

Uganda is a member of the East African Community's (EAC) Customs Union, along with Kenya, Tanzania, Rwanda and Burundi; and most recently, South Sudan.¹⁶³ A key objective for the adoption of East African Community (EAC) Customs Union was to enhance economic gains through elimination of tariffs and non-tariff barriers (NTBs) within the member states.¹⁶⁴

However, this study has established the fact that several NTBs continue to exist, even with various efforts put in place to address them. One of the greatest tools that has been used by Uganda in particular and the East African Community in general has been the enactment of laws. This study will give an overview of the different laws that have been put in place to address matters related to trade barriers.

¹⁶² OECD Publication (n33 above)

¹⁶³ <http://www.ugandaeconomy.com/the-east-african-community-eac> accessed on June 28, 2016

¹⁶⁴ J Okuk et al: Non-tariff barriers in EAC customs union: implications for trade between Uganda and other EAC countries (2012) 7

For example, in December 2004, the member states of the EAC enacted a law, “the East African Community Customs Management Act, 2004”¹⁶⁵ to be applied by all partner states in all matters relating to Customs Management.

This derived from the provisions of the Treaty for the establishment of the EAC under Article 74 which provides that-

*In order to promote the achievement of the objectives of the Community as set out in article 5 of this Treaty, and in furtherance of Article 2 of this Treaty, the Partner States shall develop and adopt and EAC trade regime and cooperate in trade liberalization and development in accordance therewith.*¹⁶⁶

Article 75.1 (m) alludes to the simplification and harmonisation of trade documentation and procedures;¹⁶⁷ Further Articles 6 and 7 of the EAC Customs Union Protocol¹⁶⁸ emphasizes the need for cooperation on trade facilitation initiatives at a regional level.¹⁶⁹

The Articles above mentioned particularly touches on the following issues:

- a) Reducing the number and volume of documentation required in respect of trade among the Partner States;¹⁷⁰ and
- b) Adopting common standards of trade documentation and procedures within the Community.¹⁷¹

In line with those provisions, the community has instituted measures and enacted several laws, most pertaining to harmonization of EAC standards, business registration and licensing procedures, methods for business names search and payment of fees/charges, axle load, export/import documentation, implementation of community based systems to ensure information flow between ports and customs along corridors, one-stop documentation centres to speed up clearance of containerized cargo, mutual recognition of quality marks issued by Partner

¹⁶⁵ E Kafeero: Customs and Trade Facilitation in the East African Community (EAC) Volume 2, Number 1 63 World Customs Journal (2013)

¹⁶⁶ http://www.eac.int/customs/index.php?option=com_content&view=article&id=19&Itemid=80 accessed on June 28, 2016

¹⁶⁷ As above

¹⁶⁸ As above

¹⁶⁹ ARTICLE 74 : East African Trade Regime

¹⁷⁰ S Julius Customs and Trade Facilitation in the East African Community (EAC) (2012) ix

¹⁷¹ As above

States National Standard Bureau, SPS certificates, and standards marks.¹⁷² All these are aimed at improving the facilitation of international trade.

However, even in light of these above mentioned various initiatives that the EAC partner states have put in place to improve trade facilitation and promote efficient international trade, there are still several gaps that can be patched up with the effective implementation of the TFA and those gaps are in the existing laws that can be amended to reflect the spirit and nature of the TFA in order for the efforts of improving trade facilitation to be realized.

Currently the laws that majorly govern customs related procedures and management are; the East African Community Customs Management Act (EACCMA), 2004 as amended; the East African Community Customs Management Regulations (EACCMR), 2010; as well as the East African Customs Management (Compliance and Enforcement) Regulations; the Treaty for the Establishment of the East African Community (The Treaty), 1999 as amended; the Protocol on the Establishment of the East African Community Customs Union (CUP), 2004 as amended; the East African Standardization, Quality Assurance, Metrology and Testing (SQMT) Act, 2007; the East African Standardization, Quality Assurance, Metrology and Testing (Designation of Testing Laboratories) Regulations 2013; and the East African Standardization, Quality Assurance, Metrology and Testing (Enforcement of Technical Regulations in Partner States) Regulations, 2013.

This chapter will highlight the different gaps that are identified prevalent in all these pieces of legislation above mentioned.

Uganda forms part of the EAC and as such her Customs procedures are governed by the above pieces of legislation. While it is clear that the Community in general and Uganda in particular already has legislation in place that is geared towards enhancing trade facilitation, it is also important to note that judged against the TFA, all these pieces of legislation still have gaps.

At a regional level specific trade facilitation provisions are precisely captured in the EAC under Articles 6 and 7 of the Customs Union Protocol, and Article 248 of the Common Market Protocol.¹⁷³

¹⁷² Dr. E Mugisa, et al: An Evaluation of the Implementation and Impact of the East African Community Customs Union (2010) 8

¹⁷³ 9th TRAPCA Annual Conference Report "Unlocking Export Competitiveness: The Role of Trade Facilitation" Arusha, Tanzania (2014) 15

Accordingly, the study, in this chapter examines the laws above named and outlines the different gaps that are still prevalent that need to be addressed in line with the TFA.

Due to the expansion of international trade growth amongst the countries that form the East African thereby increasing the volumes of goods crossing their borders, the recognition and need for improvement of trade facilitation cannot be ignored, chief among those is therefore to bridge all the current gaps in laws that have an impact on trade facilitation especially those related to Customs management.¹⁷⁴

3.3 The prevalent gaps

As this study has mentioned several times, for any country to promote international trade, it must make every effort to address Customs related loopholes. Uganda, together with the rest of the members of the East African Community made efforts to address the major Customs-related issues by enacting relevant laws. However there are still a number of gaps in those laws that still need to be dealt with.

Besides the laws, Uganda and the rest of EAC are carrying out processes based on best practices from other regions; however those practices do not have to have a lost sustainability plan considering that many of these are not grounded in the law.

It is against this background therefore that this study explores the different gaps that could be filled to achieve effective trade facilitation.

The following gaps have been identified across the entire current legislative framework relating to Customs management.

3.3.1 Publication and dissemination gap.

Just like it is alluded to in Article 1 of the TFA, publication and dissemination of information is very crucial in easing trade and all related procedures. While the practice is that Uganda and the other EAC countries have endeavored to disseminate trade related information, the practice is not grounded in the law.

The greatest one single constraint facing traders that deal in cross border transactions in Uganda is the lack of accessibility to information pertaining to international trade. While there is a lot of

¹⁷⁴ S Julius (n170 above) 14

information on trade-related matters, this information is neither easily accessible nor obtainable. This state of affairs makes it close to impossible for traders to be able to conform to Customs and other trade requirements.

The importance of publishing trade information is highlighted in many international agreements, such as the Revised Kyoto Convention¹⁷⁵ and the GATT¹⁷⁶. Article V of the GATT specifically addresses this point and so does Article X. These provisions have been further expounded in the TFA¹⁷⁷.

The TFA under Article 1 obliges members to provide for four major concerns, prompt publication of information ‘in a non-discriminatory and easily accessible manner in order to enable governments, traders and other interested parties to become acquainted with them;’¹⁷⁸ availability of information through the internet;¹⁷⁹ to establish and maintain enquiry points to answer reasonable queries¹⁸⁰ among others.

Noticeable efforts have been made to align the EAC laws with the requirements of the TFA especially in particular regard to publication of trade related information. However, if benchmarked against Article 1.1 of the TFA which obliges all members of the WTO to promptly publish all trade facilitating related information in a non-discriminatory and easily accessible manner the inadequacies in the manner in which the information in the EAC is published presents a major gap, this could perhaps arise from the fact that there is no law in place that obliges member states to provide for publication of information and especially in the manner prescribed by the TFA.

Certainly, if there was a provision in the law that made such a requirement for the prompt publication, this kind of gap would not be existent.

¹⁷⁵ <http://tfig.unece.org/contents/publication.htm> accessed on June 14, 2016

¹⁷⁶ As above

¹⁷⁷ As above

¹⁷⁸ (n104 above)

¹⁷⁹ As above

¹⁸⁰ As above

As alluded to earlier, according to article 1.1 of the TFA, each Member is obliged to promptly publish trade related information in a non-discriminatory and easily accessible manner in order to enable governments, traders, and other interested parties to become acquainted with it.¹⁸¹

The aim of this provision is that other WTO Members and traders affected, or others likely to be affected, by governmental measures imposing restraints, procedures, requirements and other burdens, should be given a reasonable opportunity to acquire reliable information about such measures and accordingly to protect and adjust their activities.¹⁸²

It is imperative to think of the publication gap putting in mind the manner in which information is published as well as distributed.

For instance, it was noted during a seminar held in Dar es Salaam two years after the commencement of the EACCU that no well-bound copy of the East African Community Customs Management Act had been produced.¹⁸³ It is noted that the Act was on mere pamphlets held by a few 'EAC Customs insiders' such incidences greatly hamper trade facilitation.¹⁸⁴ In any case, as observed earlier, there is no provision in the existing laws that requires for such publication to be made.

This is even aggravated by the fact that most trade-related information is only published in English. While it is not a mandatory requirement for translation according to the TFA, the fact that the Agreement alludes to accessibility of information in a non-discriminatory manner, and yet trade related information is now only available in a language that is not understood by most stakeholders is in its own way an issue of discrimination. It is very important to note that, with all due respect most traders are not exactly from the literate class of society especially in Uganda and in East Africa as a whole.

Therefore, in line with the obligations of Article 1 of the TFA, it suffices to say that there is a big publication requirement gap regarding the existing customs related laws in Uganda.

¹⁸¹ (n104 above)

¹⁸² WTO Agreement on Trade Facilitation UNCTAD Trade Facilitation Technical Note No. 1 (2011) 8

¹⁸³ Kafeero (n165 above) 5

¹⁸⁴ As above

It is also important to note that however good the practice is, as long as it is not backed by law, it becomes very hard to enforce. Accordingly, the EAC law that governs Customs related issues for the whole EAC with Uganda inclusive has a big lacuna in as far as publication of information in an easily accessible and non-discriminatory manner is concerned.

Traders as well as other stakeholders need to access information in order to carry out their trade-related transactions. The information referred to includes the existing regulatory framework, applied procedures, operational practices, and intelligence information on the quality of services delivered for the importation and exportation.¹⁸⁵

Not only should that information be accessible, it should also be availed in a timely and accurate manner. Traders should be able to have precise information relating to important issues like opening hours and related border procedures, applicable fees and charges and tariff schedules. Such facts go a long way in impacting on the value and effectiveness of international trade practices.

To sum it up therefore, the issue of publication of trade-related information should not be addressed in an isolated and ad hoc manner; rather, it should be addressed as a comprehensive strategic objective of trade facilitation with a basis in the law governing Customs related issues.¹⁸⁶

Accordingly, all EAC Customs-related laws can be amended to specifically provide for publication of all procedural and administrative trade related information as specified in the TFA in a prompt, easily accessible and non –discriminatory manner.

Uganda can then consider (in operationalizing the EAC laws¹⁸⁷) developing comprehensive guidelines translated into Regulations for transparency and predictability. It is necessary to have an arrangement in place to identify the agencies responsible for publication of trade information, to define the scope of their responsibilities and the mechanism to co-ordinate publication

¹⁸⁵ UNCTAD: Notes on Trade Facilitation Measures @ http://unctad.org/en/docs/dtltlb20101_en.pdf

¹⁸⁶ Trust Fund for Trade Facilitation Negotiations Technical Note No. 1 Publication of Trade Regulations (2015)

¹⁸⁷ While EAC laws can be directly applied by member states at the domestic level, it is also advisable that when the EAC laws are passed at the regional level, member states make an effort to domesticate them at the national level.

activities so that traders and other interested parties can get coherent and contextualized information.

3.3.2 ICT gap

The importance of the use of ICTs in facilitating trade cannot be overstated. Maximum use of information and communication technology (ICT) is very important for efficient clearance procedures, uniform application of customs law, and effective implementation of risk management, efficient revenue collection, effective data analysis and efficient production of trade statistics.¹⁸⁸

The TFA under Article 1.2 obliges members to use ICTs, for publication of trade related information;¹⁸⁹ the aim of this Article is to ease accessibility of such information for users and stakeholders irrespective of their location.¹⁹⁰

Even if the provision goes ahead to allow room for flexibility because of using the words “to the extent possible” the extent to which, if legislated for, access to information using ICTs could help to facilitate trade cannot be ignored.

Currently, Articles 187 to 192 of the East African Community Customs Management Act¹⁹¹ make mention of the use of Information Technology but with limited scope which does not cover publication of information. In the circumstances, this is a major gap in the law.

Further, Article 103 (g) of the Treaty¹⁹² recognizes the need for promotion, development and application of information technology throughout the Community.¹⁹³ Under Article 128 (c),¹⁹⁴ Partner States undertook to establish a quality information technology system which will allow collection, harmonized processing and timely dissemination of data and information.¹⁹⁵ However there are no provisions that require Partner States to publish information via the internet.

¹⁸⁸ Kafeero (n165 above)

¹⁸⁹ (n104 above)

¹⁹⁰ As above

¹⁹¹ The East African Community Customs Management Act Articles 187 - 192

¹⁹² The Treaty for the Establishment of the East African Community Article 103

¹⁹³ As above

¹⁹⁴ As above

¹⁹⁵ As above

Nevertheless, Article 7 of the EAC Protocol¹⁹⁶, concerning simplification, standardization and harmonization of trade information and documentation, requires Partner States to take into account the use of electronic data processing systems which may cover the need for use of internet.¹⁹⁷ The SQMT Protocol Article 8¹⁹⁸ also states that publication will be made through any other means.

Article 1.2 TFA specifies the information which should be made available to the public (through internet) regarding import, export and transit procedures (including forms, documents and contact information for enquiry points).¹⁹⁹

The Treaty which seems to extensively deal with this issue does not provide for specific requirement to publish information through the internet. Accordingly, information exchange between the different revenue authorities has been implemented using standard technologies with the aim of achieving security and data reliability but not necessarily for information for other stakeholders²⁰⁰.

Undoubtedly, using ICTs means a lot in as far as improving access to trade- related information is concerned. This would mean that stakeholders would be able to have access to information at all times and for minimal cost. Using platforms like the recent WTO e-ping would alert traders of new updates.

Many countries have in recent years introduced electronic versions of the official government gazette publishing regularly adopted legislation.²⁰¹ This kind of information sharing should be adopted if Uganda and the rest of East Africa are to achieve their goals that drove them into the need for deep trade liberalization and hence improve international trade. Aiding trade facilitation is integral to that plan and improving access to information through the legislation for the use of ICTs becomes imperative.

¹⁹⁶ Protocol on the Establishment of the East African Customs Union Article 7

¹⁹⁷ As above

¹⁹⁸ The EAC SQMT Act, 2006 Article 8

¹⁹⁹ (n104 above)

²⁰⁰ As above

²⁰¹ UNCTAD Trust Fund for Trade Facilitation Negotiations Technical Note No. 11 (2011)

It is not hard to imagine the impact an efficient ICT arrangement would have on facilitating trade. Moreover many governments are now developing ICTs as a part of e-governance improvement efforts.

Accordingly, instead of making it sound like a casual requirement, Uganda and EAC at large should consider making specific legislation for the use of ICT to publish trade related information.

It is thus recommended that Part XVI of the CMA which covers “Application of Information Technology²⁰²” be amended by inserting a new Section to cover the publication of trade and customs information for public access. This should include the obligation to provide for consolidated publications whenever an amendment to a law has been adopted.²⁰³

3.3.3 Gap in relation to Enquiry points

Enquiry points are very necessary for businessmen to access information relating to laws and regulations. With enquiry points in place this information would be in a centralized manner, very precise and ofcourse timely. Ultimately, enquiry points would ensure timely and cheap access to complete information.

Under Article 3 of the TFA, each WTO member is required to maintain at least one enquiry point at national level.²⁰⁴ As noted earlier, a trade facilitation enquiry point can be defined as an official or office in a member government designated to deal with queries from other WTO Members and the public on trade facilitation issues.²⁰⁵ Indeed, it is responsible for obtaining answers from the relevant national bodies and replying to the country or person submitting the query.²⁰⁶

While there is a slight mention of requirements that can be equated to enquiry points in the current law, it does not exhaustively deal with the issue. Article 9 of the EAC SPS Protocol²⁰⁷ provides that Partner States undertake to cooperate through establishment and maintenance of a

²⁰²The East African Community Customs Management Act, 2004 Part XVI

²⁰³ This measure would ensure that the aspirations of the TFA are met

²⁰⁴ (n104 above)

²⁰⁵ As above

²⁰⁶ WTO Agreement on Trade Facilitation UNCTAD Trade Facilitation Technical Note No. 6 (2015)

²⁰⁷ EAC Protocol on Sanitary and Phytosanitary Measures Article 9

regional information management system, including (a) a list of contact points for plant health, animal health and food safety.²⁰⁸

There is however no specific guidance in the said law on the establishment of enquiry points. If provided for in the law, such a provision would help to enhance transparency and predictability through the smooth flows of information among the relevant stakeholders. The objective would be to provide easily accessible, precise and complete information in a timely and cost effective way. This measure would also enhance compliance.

One cannot overstate the need to have access to trade-related information. This access as a result of enquiry points would aid and improve precision and predictableness of trade-related procedures and ultimately improve cross border trade.

Accordingly, if Uganda made a requirement in the law to have national enquiry points, it would be able to facilitate access to information already published, with the additional benefit of providing it in a personalized and customized manner responding to specific requests.²⁰⁹

There are different ways in which enquiry points can manage trade information and provide its services.²¹⁰ They can either build their own comprehensive physical or electronic trade information library or can function as a coordinating body that transmits requests to the concerned national agencies, compiling their replies and sending them back to the requesting party.²¹¹

It could be argued that the reason that this requirement is not included in the current law is because its implementation would require a lot of financial resources.

However, ensuring that the information is up-to-date and complete also improves compliance through the avoidance of mistakes and the solving of problems related to missing information

²⁰⁸ (n207 above)

²⁰⁹ UNCTAD: Technical Notes on Trade Facilitation Measures (2011)

²¹⁰ As above

²¹¹ As above

prior to the transaction.²¹² Overall, enquiry points contribute to the quick and informed decision making process by traders.²¹³

3.3.4 Gap in relation to opportunity to comment

There is no legal provision in any of the Uganda's Customs-related legislation that gives opportunity to the business community to comment on new and amended laws and regulations. Thus, the business community does not receive any written communication from the relevant authority seeking their input on any proposed new rules. In practice, however, no new regional rules or amendments should be issued without having been reviewed first at national level.

Article 2.1 of the TFA places an obligation on WTO members (to the extent practicable and in a manner consistent with domestic law and legal system)²¹⁴ to provide an opportunity to traders and other interested parties to comment on proposed introduction or amendment of laws and regulations related to movement, release and clearance of goods, including goods in transit.²¹⁵

While it would make sense for a country to provide an opportunity to traders and other interested parties to comment on proposed introduction or amendment of laws before such amendments come into force, there is currently no provisions in Uganda's Customs related laws that addresses this requirement.

Nevertheless, it should be pointed out that the existing EAC structures provide for a mechanism that permits the private sector and civil society to effectively participate in the activities of the Community.²¹⁶ They participate in the committee meetings of the Community, they are also allowed to contribute to debates through the national consultative process which then presents all nations interests to the regional structures.²¹⁷

However, in order to give effect and meaning to the above processes that are aimed at improving facilitation of trade, such an issue should be backed by legislation.

²¹² UNCTAD (n209 above)

²¹³ As above

²¹⁴ (n104 above)

²¹⁵ As above

²¹⁶ Deepening and accelerating integration: EAC Development Strategy (2011/12 – 2015/16) 6

²¹⁷ As above

3.3.5 Advance rulings gap

Advance rulings improve efficiency of cross-border trade transactions. They have the ability to impact on the certainty of customs procedures by reducing to a very great extent, if not completely, likely disputes relating to customs clearance procedures in regard, for example, to matters of tariff headings, valuation and origin, to mention but a few.²¹⁸ Ultimately this cuts out on clearance delays and ensures that there are minimal chances of corruption that usually comes about as a result of uncertainty and unpredictability of customs clearance procedures.²¹⁹

Traders and businessmen dealing in international trade in Uganda face a major challenge of unreliable and inconsistent rulings depending on individual Customs officers. Absence of harmonised advance rulings leads to uncalled for ambiguity on the whole trade process and ultimately constrains cross border trade transactions.

There are currently no legal provisions in Uganda's and the whole of EAC laws that addresses the issuance of advance rulings.

Article 3 of the FTA places an obligation on WTO members to provide advance rulings in the areas of tariff classification and origin (which is also required by the WTO Rules of Origin Agreement).²²⁰ It also encourages members to provide advance rulings in respect of certain other requirements (relief/exemption, quotas etc).²²¹

As noted earlier, an advance ruling in the context of the TFA 'is a written decision provided by a Member to an applicant prior to the importation of a good covered by the application that sets forth the treatment that the Member shall provide to the good at the time of importation with regard to (i) the good's tariff classification, and (ii) the origin of the good'.²²²

In essence, the Article requires WTO Members to issue advance rulings regarding the tariff classification and the non-preferential origin of goods and sets the rules stipulating the issuance of advance rulings in a reasonable and time bound manner, including cases where an application

²¹⁸ OECD Publication (n157 above) 3

²¹⁹ As above

²²⁰ (n104 above)

²²¹ As above

²²² As above

may be declined by WTO Members.²²³ In addition, pursuant to the requirements of the TFA, WTO Members are encouraged to issue advance rulings for other areas such as customs valuation and requirements for relief or exemption from customs duties.²²⁴

In the introduction to the WCO guidelines²²⁵ to chapter 9 of the General Annex,²²⁶ it is clear that availability of information on customs matters to those who need it is one of the key elements of trade facilitation.

In the circumstances when such information is required, the Customs department has the absolute obligation to provide it completely and accurately and as soon as possible.²²⁷ This assertion is echoed in the RKC,²²⁸ which provides that binding rulings shall be issued at the request of the interested person.²²⁹

In the general spirit of this study therefore, it should be noted that the drafting and implementation of any law that provides for advance rulings would mean incorporating various aspects of rulings, including scope, notification, time limits and use.²³⁰ All these demonstrate the depth of the necessity and need to cover advance rulings in the legislation that relates to customs procedures.

3.3.6 Legal proceedings and appeals

The importance of the need to make provisions for legal proceedings and appeals is covered in Article 4 of the TFA which obliges Members to provide traders with the right to appeal decisions made by Customs in an administrative and/or judicial proceeding.²³¹ Under this article, WTO Members are encouraged to make the provisions applicable to an administrative decision issued by a relevant border agency other than Customs.²³²

²²³ (n104 above)

²²⁴ Wolfgang et al (n86 above)

²²⁵ WCO Strategic Trade Control Enforcement Implementation Guide, (2014) 5

²²⁶ Kyoto Convention General Annex Guidelines Chapter 9 Information, Decisions and Rulings Supplied by Customs

²²⁷ As above

²²⁸ General Annex Chapter 9 (9.9)

²²⁹ World Customs Organisation: Economic Competitiveness Package Toolkit, (2012) 3

²³⁰ As above

²³¹ (n104 above)

²³² As above

This requirement is aimed at ensuring that any person to whom Customs issues an administrative decision has the right to administrative appeal to or review and/or judicial appeal or review of the decision.²³³

Currently, it is almost impossible to challenge decisions of Customs officials who are half the time biased in their assessments. Traders and businessmen are thus faced with the challenge of unrestricted controls when it comes to such Customs decisions. Such incidences culminate in inefficient processes that are a fertile ground for corruption and hence a massive constraint to free flow of international trade.

Article 4.1 of the TFA especially refers primarily to Customs decisions (paragraph 1.1). According to paragraph 1.6, Members are also encouraged to make the provisions of this Article applicable to an administrative decision issued by a relevant border agency other than Customs.²³⁴

Instituting judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters is another indispensable aspect of transparency which is necessary for trade facilitation.²³⁵ This position is reiterated by Article X: 3, GATT 1994²³⁶ as well as the Revised Kyoto Convention²³⁷ in General Annex, Chapter 10 and the accompanying guidelines.²³⁸

According to EAC law, the Treaty indicates that Articles 27, 28, 30, 31, 32, 33, 34, 35 and 35 A are consistent with the measures in Article 4 of the TFA. Sections 229, 230 and 231 of the CMA provide for appeals procedures. Section 22 (5) of the SQMT Act provides for an appeal mechanism.²³⁹ Section 26 of the SQMT Act provides for a mechanism to address disputes **however**, administrative and judicial appeals against decisions of the customs administration are not provided for in any of the above mentioned provisions.

²³³ <http://www.wcoomd.org/en/topics/wco-implementing-the-wto-atf/atf/appeal-or-review-procedures.aspx> accessed on February 10, 2016

²³⁴ S Hamanaka: World Trade Organization Agreement on Trade Facilitation, Assessing the Level of Ambition and Likely Impacts, (2014) 8

²³⁵ As above

²³⁶ GATT 1994

²³⁷ RKC (n201 above)

²³⁸ Kafeero (n165 above)

²³⁹ EAC SQMT Act section 2 (5)

Therefore, while the EAC instruments are seemingly consistent with the TFA there still exists a gap especially in relation to the administrative and judicial provisions. Unfortunately, this desk review does not allow for verification for the extent to which appeals are actually lodged, both at administrative and judicial level, and to what extent the EAC Court is actually involved in ensuring a uniform application of Customs and other import and export related legislation.

Uganda in the effort of operationalizing the Treaty should put in place a law that makes provision for such appeals.

3.3.7 Official fees and charges gap

In order for governments to improve efficiency of their border procedures one important area of concern is in regard to fees and charges.

According to Article 6 of the FTA, information on fees and charges imposed on or in connection with importation and exportation²⁴⁰ is expected to be published in accordance with Article 1.1. It also anticipates an obligation to periodically review fees and charges in order to reduce the number and diversity “where practicable”.²⁴¹ This should be considered in the framework of Article 2.1.²⁴²

All fees including those that are charged in regard to SPS control, inspection and approval procedures and TBT conformity assessment procedures would seem to fall within the scope of this Article.²⁴³ Ultimately, businesses would benefit from the preclusion of random extortions and imposition of unpredictable and uncertain charges.

Granted, the Treaty covers publication albeit in a general manner as pointed out in provisions that relate to Article 1 of the TFA. The fees and charges are published in the EAC gazette before implementation; however, a consolidated version of all fees and charges seems to be missing. The EAC Treaty provides for gazetting but no specific provisions in the SPS Protocol, SQMTA and CMA to cover publication of fees and charges.

²⁴⁰ (n104 above) Article 6

²⁴¹ As above

²⁴² As above

²⁴³ As above

Therefore, while fees and charges are published in the EAC gazette before implementation there is however no provision in the EACCMA that requires an authority to publish fees and charges and to give reason for such fees and charges.

In sum therefore, what is currently needed is for Uganda to make specific legislation that in effect consolidates all the requirements for the publication of fees and charges as envisaged under Article 6 of the FTA.

Consequently, a series of disciplines could then be included on the imposition of penalties to ensure that penalties are imposed only on persons responsible for a breach of law or regulation, and guard against conflicts of interest in the assessment and collection of penalties and duties.²⁴⁴

The legislation can also specify that all penalties imposed are proportionate to the breach, taking into account mitigating circumstances, and that the penalties are communicated in writing, and are imposed within a fixed, finite period from the time of the alleged offence.²⁴⁵

3.3.8 Post-clearance audit

Post-clearance audit means audit-based Customs control performed subsequent to the release of the cargo from Customs' custody.²⁴⁶ The purpose of such audits is to verify the accuracy and authenticity of declarations and covers the control of traders' commercial data, business systems, records and books²⁴⁷. Such an audit can take place at the premises of the trader, and may take into account individual transactions, so-called "transaction-based" audit, or cover imports and/or exports undertaken over a certain period of time, so-called "company based" audit.²⁴⁸

One other major constraint to international trade in Uganda is the absence of the use of such clearance audit. This certainly means that all the necessary inspection is done at the border posts physically.²⁴⁹ Such a process translates into pointless delays considering that the human resources cannot be sufficient to carry out the inspections speedily. These delays are also

²⁴⁴ UNCTAD Trust Fund for Trade Facilitation Negotiations Technical Note 5, (2012)

²⁴⁵ As above

²⁴⁶ As above

²⁴⁷ As above

²⁴⁸ As above

²⁴⁹ As above

coupled with high prevalence of corruption which is enabled by the nature of the physical inspections.

Article 7.5 of the TFA requires Members to use post- clearance audit to facilitate the expediting release of goods.²⁵⁰ This can be done by selecting a person or a consignment for post- clearance audit in a risk based and transparent manner;²⁵¹ and are obliged to notify the person without delay about the results of the audit, the person’s rights and obligations, and the reasons for the results.²⁵² Information obtained in post clearance audit may be used in further administrative or judicial proceedings.²⁵³

While Section 236 of EACCMA slightly alludes to audit by empowering the commissioner to audit it does not expressly provide for post- clearance audit.²⁵⁴

Providing for post-clearance audit in the law or specifically enacting a law that explicitly addresses it would reflect a changed approach to Customs control, as it has the effect of offering an immediate release of goods or reduced release times and ultimately foster and enable international trade to flourish.²⁵⁵ Implementation of legislation relating to post-clearance audit would be a part of the risk management enhancement strategy.²⁵⁶

3.3.9 Publication of average release times

Time Release Study (TRS) were originally introduced by the World Customs Organisation.²⁵⁷ The TRS is a distinctive mechanism designed to calculate the definite duration of Customs activities as they directly relate to trade facilitation at the border.²⁵⁸

²⁵⁰ (n104 above)

²⁵¹ As above

²⁵² As above

²⁵³ ITC: Categorizing the TFA provisions “Implementing the WTO Trade Facilitation Agreement” (2013)

²⁵⁴ As above

²⁵⁵ As above

²⁵⁶ According to information obtained from the EAC Secretariat, amendments to the EAC CMA have been taken to provide for post-audit clearance. It may be advisable to introduce more explicit provisions, and to create a link to risk management, as required under the TFA.

²⁵⁷ WCO Time Release Study: Trade Facilitation Implementation Guide A tool for simplifying cross-border trade, (2012)

²⁵⁸ S Matsuda: The Time Release Study as a performance measurement tool for a supply chain and an international corridor (2012) 7

Such a study is crucial as it lays down benchmarks for the improvement of performance of all agencies that are concerned with cross border trade transactions.²⁵⁹ Any shortcomings that are exposed by the results of the study would then be responded to.²⁶⁰

One of the biggest constraints for international trade in Uganda is the long delays that are synonymous with the time it takes to release goods through the whole customs procedure. There is no predictability and the process usually takes a very long time. It thus becomes hard for traders dealing in cross border trade to make the necessary plans to manage their transactions. The whole issue is compounded by the fact that several agencies are involved in the release process and they do not have coordinated and harmonised procedures.

Article 7.6 of the TFA encourages Members to measure and publish their average release time of goods periodically and in a consistent manner.²⁶¹

The Members are further encouraged to share with the Trade Facilitation Committee their experiences on average release times, methodologies used, bottle necks identified and any resulting effects on efficiency.²⁶²

Time Release Studies have so far been carried out in the EAC; Uganda has carried out two so far on an ad hoc basis with no specific law in place that makes provision for these studies. Considering the benefits time release studies have on trade facilitation, there is need to have provisions in the Customs-related laws that address it.

3.3.10 Single window

Single window implementation is a vital element for trade facilitation. According to article 10.4 of the TFA, WTO Members are obliged to establish or maintain a single window to which a trader can submit all documents and/or data required by customs and all other border or licensing

²⁵⁹ WCO Time Release Study (n257 above)

²⁶⁰ As above

²⁶¹ (n104 above)

²⁶² As above

authorities for the import, export or transit of goods, and from which the trader will receive all notifications.²⁶³

It provides further that in cases where documentation and/or data requirements have already been received through the single window, the same documentation and/or requirements would not be requested by participating authorities or agencies except in urgent circumstances and other limited exceptions which are made public.²⁶⁴ Members are thus obliged to notify the Committee of the details of operation of the single window, and are encouraged, to the extent possible and practicable, to use information technology to support the single window.²⁶⁵

While Uganda and the other EAC partner states are currently implementing the single window, it is being done without the backing of the law and such one cannot be certain that the processes will be sustained hence the need to include it in the legislation.

Last but not in any way least, studies have shown that in comparison with international best practices, Uganda's Customs clearance requires a high level of trade documents and inspections.²⁶⁶ This is exacerbated by the disparities in the import and export procedural requirements from the other EAC partner states.²⁶⁷ It is not shocking therefore; that a report by the World Bank stated that the time it took to clear goods at customs in East Africa was "seven times less predictable than for any other region of the world".²⁶⁸ It further reported that while it would take an imported container in Uganda that does not require inspection 4 days to be cleared, it would on the other hand take one that requires clearance about ten (10) days. The one other issue therefore that needs to be sorted by legislation is the issue of documentation. This would go alongside the requirement for Customs coordination especially amongst agencies that seem to do repeat inspections.

²⁶³ (n104 above)

²⁶⁴ As above

²⁶⁵ As above

²⁶⁶ S Julius (n170 above) 14

²⁶⁷ As above

²⁶⁸ As above

3.4 Conclusion

The study shows that Uganda shares with the rest of the East African Community a number of laws that govern customs management and that these laws have a basic objective of facilitating trade, however several gaps were identified if when fixed, Uganda's overarching goal for enhancement of international trade without barriers will be achieved.

CHAPTER FOUR

4.0 HOW THE TFA CAN CLOSE THE GAPS IN THE EXISTING UGANDAN LAWS RELATING TO CUSTOMS MANAGEMENT

4.1 Introduction

The previous chapters have extensively discussed the measures that are contained in the Trade Facilitation Agreement, Chapter 3 in particular looked at the various gaps existing in the current laws relating to Customs management in Uganda and East Africa as a whole and how those gaps can be fixed with the adoption and implementation of the TFA. Accordingly, this chapter examines how the implementation of the TFA in Uganda can close gaps in the current legislative framework for Customs management and the benefits of the implementation generally.

Economic research and field evidence show that removing administrative and regulatory bottlenecks at borders can have powerful effects on reducing trade costs and increasing trade.²⁶⁹ As already alluded to, the purpose of the new WTO Trade Facilitation Agreement is to expedite the movement, release and clearance of goods, including goods in transit.²⁷⁰

Implementation of the TFA should be able to help Uganda to reduce border inefficiencies, by cutting down on all costs that result from those customs related inadequacies and ultimately

²⁶⁹ Aid For Trade at a Glance 2015: Reducing Trade Costs for Inclusive, Sustainable Growth - © OECD, WTO (2015) 4

²⁷⁰ (n104 above)

resulting in realizing gains from cross border trade and ultimately address the supply side constraints that inevitably affect her trade internationally.

Uganda suffers a lot of trade related costs because of the numerous border and Customs related hurdles. It is therefore critical to examine the trends and patterns of those costs so as to strategise on the necessary facilitation measures to curb those costs.²⁷¹

The one thing that cannot be disputed is the fact that reduction in trade costs will inevitably considerably enhance trade performance. Most importantly it makes more sense to understand the exact causes or sources of those costs, when the cost is determined and the source is established it is then possible to understand and hence determine the appropriate trade facilitation measure likely to present a solution.

The TFA is the first of its kind of all WTO Agreements to allow as much implementation flexibilities as it does especially for developing and least developing countries. The obligations that it sets down and the measures it advocates for are best termed as written in the “best endeavor” language which allows members to implement to the best of their ability.

Further, the Agreement also allows each developing or LDCs like Uganda to define its implementation capacity for each of the trade facilitation measure, and to also determine the support needed for the implementation of some measures that may necessitate additional financial or human resource requirements.

Several studies have shown that efforts aimed at reducing unnecessary or overly burdensome administrative barriers can have great and significant economic benefits in terms of added export potential, increased foreign investment and greater access to a wider variety of goods for consumers.²⁷² Uganda, as a least developed country and where these administrative and procedural barriers tend to be more prevalent, may have the most to gain from the reforms that come with the implementation of the TFA.

²⁷¹ G Valensisi, *et al* August 2014 Towards an Assessment of the Costs and Benefits of Implementing Trade Facilitation Measures in Africa, (2013) 5

²⁷² OECD publication (n33 above) 3

According to OECD studies, a 1% decrease in global trade costs would yield an increased global income of USD 40 billion at a minimum, the bulk of which (63%) is expected to be realized by developing and least developed countries.²⁷³ It goes without saying therefore, that the implementation of the TFA would help a country like Uganda patch up all gaps that are still prevalent in its customs related laws that have an effect on trade facilitation.

Ultimately, there is need for regulatory reform to incorporate all measures that are recommended by the TFA in the existing customs related laws or in other cases, promulgation of fresh laws that take into consideration trade facilitation measures that are provided for by the Agreement.

4.2 Reducing border costs

The TFA covers a wide range of practical conditions that are aimed at accelerating the procedures relating to cross border trade. These conditions or measures as they are commonly referred to, ensure that members improve transparency in relation to trade; develop policies that impact on Customs administrative processes and carry out simplified and efficient border procedures as well as putting measures in place that enhance the movement of goods in transit.²⁷⁴ Uganda ratifying and consequently implementing the TFA would no doubt address the major constraint to her cross border trade especially in line with reducing border costs which would in turn boost international trade flows.

4.3 Ensuring improved transparency

One of the key benefits of implementing the various measures of the TFA would be improved transparency in cross border trade and related transactions. It is an established fact that the increased difficulty that is encountered in efforts to access precise and consistent information about Customs procedures is a major hindrance to effective and efficient cross border trade, it presents unnecessary delays and ofcourse resultant costs that have a significant impact on trade.²⁷⁵

²⁷³ As above

²⁷⁴ World Customs Organization Information Note: WCO instruments and GATT Articles V, VIII and X

²⁷⁵ Trade, Trade Facilitation and transit transport issues for landlocked developing countries, (2007) 8

Valuable time is wasted as traders grapple with incomplete and unreliable information relating to customs procedures. There are several uncertainties and unpredictable costs regarding penalties and costs that could be avoided if there was less confusion.²⁷⁶

This is a particular concern of SMEs, who often do not have the resources to search out and comprehend the requirements of export markets, where they typically do not have a presence, particularly if requirements are available only in the form of legal acts or other technical documents and in a foreign language.²⁷⁷

A UNESCAP²⁷⁸ study found increased transparency and predictability tend to “increase the probability of exporting by SMEs as well as export propensity” because the costs and risks of doing business are lowered.²⁷⁹

The TFA makes a good case for improvement of transparency, for instance, it obliges Members to ensure access to all related information to traders by requiring publication of trade related information in a non-discriminatory and accessible manner.²⁸⁰ Further, the measure that requires for establishment of enquiry points reinforces the obligation for the increased transparency.²⁸¹

It is against this backdrop therefore, that it argued that if effectively implemented, the TFA comes with immense benefits that would fix all prevalent gaps in the current legislative framework for customs related laws especially by providing for all measures that are aimed at improving transparency e.g. publication, use of ICTs, advance ruling, establishing enquiry points, to mention but a few.

4.4 Improved trade governance

It is imperative that any law that addresses trade related matters legislates against acts that might result into corruption. The most prevalent cross border inefficiencies are as a result of several gaps in the law that allow room for corruption.

²⁷⁶ As above

²⁷⁷ OECD publication (n33 above) 11

²⁷⁸ United Nations Economic and Social Commission for Asia and the Pacific (2015) @

<http://www.unescap.org/event-organizer/united-nations-economic-and-social-commission-asia-and-pacific-escap>
accessed on July2, 2016

²⁷⁹ OECD publication (n33 above) 11

²⁸⁰ International Trade Centre: SMEs and the WTO Trade Facilitation Agreement a Training Manual (2015) 6

²⁸¹ As above

It is very unfortunate that these inefficiencies may persist where the government is not aware of their negative impacts on trade or that, possibly, other more efficient and effective solutions are available that would fulfill the government's regulatory objectives.²⁸²

The TFA obliges Members to make sure that they constantly review their trade related formalities and documentation requirements to ensure that such requirements are adopted or applied with a view to rapid release and clearance of goods, to reduce the cost and time of compliance and to determine there is no other reasonable alternative that would be less trade restrictive.²⁸³

Under Article 2, the TFA makes requirement for Members to give a chance to all traders and all other interested parties as well as stakeholders a chance and opportunity to comment on any proposed new or amended laws and regulations.²⁸⁴ To improve fairness in decision-making by border authorities, the Agreement also requires WTO members to provide rights of appeal against adverse customs decisions and imposes disciplines on the assessment of penalties by customs, requiring that the amount of any such penalties be commensurate with the level of the offense.²⁸⁵

The ultimate goal for this requirement is to improve governance and curtail incidences of corruption in cross border trade. Accordingly, if Uganda's legislative framework relating to Customs incorporates the measures stipulated under the TFA that concern improved governance; it would go along away in enhancing trade facilitation and ultimately growing international trade.

4.5 Modernized and improved border procedures

One of the other vital standards of the TFA is the requirement to streamline and modernize the procedures employed customs and other border authorities.²⁸⁶ These measures will require implementation of new techniques and processes such as the use of risk management to focus customs controls on high-risk goods, pre-arrival processing to allow importers to declare and

²⁸² The National Board of Trade: Trade Facilitation from a Developing Country Perspective @ http://www.cid.harvard.edu/cidtrade/Papers/1598_Trade_Facilitation_from_a_Developing_Country_Perspective.pdf accessed on July 2, 2016

²⁸³ WTO Trade Facilitation Agreement: A Business Guide for Developing Countries (2016)

²⁸⁴ (n104 above)

²⁸⁵ OECD publication (n33 above) 3

²⁸⁶ As above

possibly clear goods before they arrive, procedures to allow the release of goods from customs before payment of duty and tax, the use of electronic forms for payments and documents in clearance, the use of clearance simplifications for authorized traders and express consignment operators.²⁸⁷

Closely related to the above are the provisions that are intended to promote greater co-ordination among the different border authorities; the lack of which is itself a common source of delay, including cross-border co-operation and implementation of a single window to permit traders to submit documents required by all border authorities at a single point.²⁸⁸

Chapter 3 of this study which exhaustively discussed the gaps in the current legislative framework relating to Customs management in Uganda noted that these above mentioned measures are not covered. Therefore incorporating them in the law would go along way to enhance trade facilitation and in the long run improve international trade.

4.6 Transit efficiency

One other important aspect that is addressed by the TFA is the issue of goods in transit. Trade facilitation is not only concerned by the final destination of exports and imports but also when they are in transit.²⁸⁹

Accordingly, it covers a number of requirements that are aimed at responding to a wide range of costs and delays that importers and exporters face when their goods are moved through transit countries, such as excessive data and documentation requirements, internal checkpoints and mandatory use of convoys, delays in terminating transit operations and returning transit guarantees, poor transit infrastructure and lack of regional co-operation.²⁹⁰

²⁸⁷ A S. Wangora: The Role of Single Window in the WTO TFA Implementation (2015) @ <http://allafrica.com/stories/201512161066.html> accessed on July 1, 2016

²⁸⁸ OECD publication (n33 above)

²⁸⁹ World Customs Organization: Transit Handbook To Establish Effective Transit Schemes for LLDCs (2014) @ <http://unohrrls.org/custom-content/uploads/2013/09/WCO-Transit-Handbook-To-Establish-Effective-Transit-Schemes-for-LLDCs-2014.pdf> accessed on June 3, 2016

²⁹⁰ <http://www.oecd-ilibrary.org/> accessed on March 14, 2016

Providing for measures stipulated under the TFA to address such matters will go a long way in fixing up trade facilitation gaps in customs related laws in Uganda and therefore give the necessary spur to international trade.

4.7 General Benefits

The TFA represents an important milestone by creating an international framework for reducing trade costs. First, it provides greater legal certainty to the changes in policy.²⁹¹ Second, it helps reforming governments marshal support from domestic constituents.²⁹² Third, it helps solve a coordination problem that would have been created by different approaches to changing border procedures.²⁹³

Implementing the TFA will also increase the opportunity for Uganda and other least developing countries in particular, to participate fully and be included into global value chains (GVCs).²⁹⁴ It is important to note that GVCs have played a key role in the rapid expansion of trade in a large number of developing countries and this result suggests that the circle of beneficiary countries will continue to expand in the future.²⁹⁵

It is important to note that trade facilitation does not come without a cost, but also more important to mention that the benefits of the Trade Facilitation Agreement significantly outweigh the costs of implementation. Moreover, the TFA provides a vital part of the solution as its S&D provisions give developing and least developed countries sufficient room for differentiated undertakings that depend on their level of capacity and the receipt of assistance²⁹⁶. The Agreement makes provision for the accessibility of donor assistance which is intended to help developing and least developed Members to effectively and efficiently implement it.²⁹⁷

²⁹¹ The independent: WTO trade facilitation agreement to reduce cost of business: ICCB (2016) @ www.theindependentbd.com/arcprint/details/42867/2016-05-06 accessed on July 2, 2016

²⁹² As above

²⁹³ Shark (n11 above)

²⁹⁴ Global Value Chains: Challenges, Opportunities, and Implications For Policy OECD, WTO and World Bank Group Report prepared for submission to the G20 Trade Ministers Meeting Sydney, Australia, 19 July 2014

²⁹⁵ As above

²⁹⁶ https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm accessed on March 3, 2016

²⁹⁷ As above

Over and above the above measureable fiscal advantages or benefits of the TFA, there are several other general impacts of the Agreement that fit well within the international trade regime and the numerous procedures that underpin it.²⁹⁸

The TFA is the first multilateral agreement successfully negotiated at the WTO since its founding two decades ago. This illustrates that global rule-making is alive and well and able to effectively address impediments to commerce that concerns today's businesses.²⁹⁹ Since the Agreement forms part of the mandate of the Doha Ministerial Declaration, the WTO's success with the TFA also offers optimism that the negotiations which have been somewhat stuck are energizing and increasing the much needed stir.³⁰⁰

4.8 The Benefits of the TFA to small businesses in Uganda

Trade Facilitation Agreement is especially important to small businesses it provides a platform for them to latch on to massive opportunities that ultimately provide benefits from international trade.³⁰¹ The Agreement has a major focus on transparency and with increased transparency in trade related procedures, small businesses stand a great chance to benefit considering that half the time they face major challenges that arise from procedural inefficiencies.

Among its many other requirements, the TFA obliges Members to ensure that they transform Customs procedures and improve competence of cross border transactions. This is specifically important to small businesses as it will result in cutting down on the otherwise heavy costs associated with the current state of affairs regarding cross border trade and particularly considering the small businesses logistical abilities.³⁰²

The success of small businesses plays an important role in the growth of the global economy.³⁰³ According to the World Bank and World Economic Reform,³⁰⁴ bringing countries even halfway

²⁹⁸ Shark (n11 above) 4

²⁹⁹ As above

³⁰⁰ As above

³⁰¹ As above

³⁰² Y Dong, International Centre for Trade and Sustainable Development: How can trade facilitation help LDCs cut SPS barriers? (2014) 3

³⁰³ Weekly Trade Spotlight: The Benefits of the WTO Trade Facilitation Agreement to Small Business @ <https://ustr.gov/about-us/policy-offices/press-office/blog/2013/December/Benefits-of-WTO-Trade-Facilitation-Agreement-to-Small-Business> accessed on July 2, 2016

³⁰⁴ As above

to ‘best practices’ in trade facilitation would add 4.7% to world GDP, with much of the growth supported by small businesses.³⁰⁵ Expedited customs procedures and improving technological and shipping capabilities of small businesses, are key ways to “eliminate the red tape” and help small business engage in international trade and access its many job-creating benefits.³⁰⁶ This is very important for Uganda’s cross border trade.

4.9 Conclusion

According to the foregoing discussion, it goes without saying that Uganda’s ratification and eventual implementation of the TFA would close the gaps in the laws relating to customs management and therefore make positive impact on her ability to trade with other nations. It would ultimately create spaces for enactment of appropriate laws that would deal with the gaps noted in chapter 3.

³⁰⁵ As above

³⁰⁶ As above

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Recap of the research problem

By way of recap, the research problem which this study has sought to address is the issue of customs management which is very vital and is the central point for international trade in goods. As mentioned earlier, Customs management involves the control of goods across borders, determining the goods' classification and origin, collecting revenue as well as administering trade policies.³⁰⁷ It therefore goes without saying that the way in which customs management is handled impacts greatly on a country's cross border trade.

Statistics have shown that overall Uganda's international trade flow has declined over the years and while this state of affairs could be attributed to a range of factors, the major one that stands out is the cumbersome customs procedures.³⁰⁸

For instance, currently, procedures for cross border trade for Uganda involve copious steps. The laws relating to customs management and other areas that have a direct bearing on NTBs are very sloppy, which in the long run hinders the full exploitation of potential international trade benefits as envisaged under the WTO framework.

Accordingly, this study has argued that one of the supply-side constraints limiting the trade capacity of Uganda is the gaps in the country's laws relating to customs and that with the ratification of TFA under the WTO framework, coupled with the enactment of the attendant appropriate laws, the gaps will be closed and Uganda's trade capacity will be enhanced and her potential for international trade and economic growth unleashed.

5.2 Summary of findings

The study finds that Uganda's ratification and eventual implementation of the TFA would close the gaps in the laws relating to customs management and therefore make positive impact on her ability to trade with other nations.

³⁰⁷ Trade logistics and facilitation, the role of Customs @ <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTTRANSPORT/EXTTTLF/0,,contentMDK:22677049~menuPK:7327167~pagePK:210058~piPK:210062~theSitePK:515434,00.html> accessed on June 29, 2016

³⁰⁸ H Trudi Trade Law Centre for Southern Africa (tralac) Regional Integration in Africa (2011) 18

There is a further finding to the effect that Uganda shares with the rest of the East African Community a number of laws that govern customs management and that these laws have a basic objective of facilitating trade, however several gaps are prevalent in the said laws.

Accordingly if those gaps are fixed in accordance to the provisions of the TFA, Uganda's overarching goal for enhancement of international trade without barriers would be achieved.

However, it should also be noted that some of these great expected achievements that have been put forward as to derive from the TFA have also met with a few criticisms. Some studies insist that there are too many expectations that are not based in concrete justification to warrant being relied on and hence too unreliable to underline any strategic resolutions.

Such criticism is compounded by the fact that the costs of implementing the provisions of the TFA might outweigh its expected achievements considering that some measures require putting up infrastructure to be able to implement. There are some measures introduced by the TFA whose implementation would necessitate considerable investment. It could be argued that the Agreement allows for support from donor countries for implementation but then again it was discussed earlier in chapter two that that assistance is based on good will and is not legally enforceable and as such cannot be relied upon.

It is also very important to note that while the implementation of the TFA might enhance trade facilitation and improve Customs procedures and management, it is likely to affect Customs revenue collections, the current hurdles that are encountered at Customs and especially border posts are caused by the need to maximize revenue collection, thus shifting the focus from that to improving trade facilitation is likely to impact negatively on such collections.

While it would be great for Uganda to use The TFA as a framework for improvement of Customs administration, note should be taken of the fact that there is no standard to direct implementation. It leaves room for countries to apply their own understanding which can create a situation of mismatched implementation and this could in turn become a major obstacle to actual trade facilitation contrary to what is envisaged by the Agreement.

Lastly, the wording of the Agreement gives much leeway especially in terms of the requirements for implementation of obligations provided for in section 1. The self-determination and best endeavor phrases take away the obligatory need for effective implementation especially for developing and least developed countries.

The above critical issues put countries including Uganda on notice to weigh the costs that are likely to be incurred as a result of the ratification and ultimately the implementation of the TFA. It would be appropriate to deliberately put in consideration efforts aimed at alleviate the costs that might be associated with the implementation.

In summation, while it is not easy to ignore the criticism advanced towards that TFA especially in regard to its economic gains, it is undisputable that it provides a remarkable bench mark for legal jurisprudence especially for legislative reform in particular regard to customs management.

5.3 Conclusions

As part of the general conclusion however there are some facts that cannot be ignored. It is becoming noticeably harder to talk of individual customs related laws of any of the partner states of the EAC, the formulation of laws that govern the whole Community have gone a long way in improving and enhancing efforts to improve trade facilitation.

What is remaining however is to introduce suitable amendment of EAC customs law so as to incorporate the provisions of the TFA. It would also be practical that such reform makes use of the various other trade facilitation-related instruments.

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

The evidence gathered here gives cause for optimism that support can be delivered in a coherent and timely manner. Ensuring that trade facilitation is aligned with other national priorities and expressed by developing and LDC members through existing national and regional development dialogues with their development partners is a critical step in TFA implementation.

At the national level, successful implementation of reforms requires co-operation between government and private sector. In particular, implementation is most successful when the

measures are important to the private sector and are measures that can receive sustained political support by the government; and these reforms are also something that donors are willing to support.

5.4 Recommendations

Trade facilitation in Uganda must be enhanced further to enable the country participate effectively in international trade and maximize the accruable benefits, of for example reduced costs of trade, improved competitiveness of businesses and improved welfare of the people.

This study recommends holistic implementation of the TFA by domesticating it not only at the regional EAC level but also at the individual country Uganda level. This will go a long way in enhancing efficiency in customs operations and ultimately improve and boost international trade.

Last but not least, it is important to note that while the TFA might effectively create space for enactment and amendment of Customs related laws, it is not likely to have an impact on social behaviors of Customs personnel. Most of the issues that are encountered at Customs points may not only be attributable to sloppy laws but also to persons implementing them. Therefore as Uganda makes the necessary plans to ensure implementation of the TFA, efforts are also required to ensure adjustment of mindsets of Customs personnel and all relevant stakeholders involved in international trade.