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**The Ugandan transit constraints in Kenya and possible Ugandan claims under
the Agreements of the East Africa Community and the GATT Agreement 1994**



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Chapter 1 - Introduction, Methodology and Scope

1. Uganda – A brief introduction

Uganda has a population of 32.7 million and Gross Domestic Product amounted to US\$ 15.7 billion in 2009.¹ It has substantial natural resources at its disposal, including fertile soils, regular rainfall, sizeable mineral deposits of copper and cobalt. Now recently also significant amounts of oil² and natural gas have been explored in western Uganda.

The Ugandan economy is still consumption driven: Agriculture, producing tea, coffee and flowers, is still the most important sector of the economy employing over 70% of the work force and accounting for over 90% of exports, even though the fishing sector, the manufacturing and the service sector increased their share of Gross Domestic Product.³

2. The burden of being a landlocked country

Since Uganda does not have its own access to the sea, i.e. is landlocked, most Ugandan exports and imports are transported on road on the Northern Corridor between Kampala and Mombasa, whereas transport by railway and airplane only account for less than 10% of the aggregate exports and imports.⁴

2.1. Dual vulnerability of Uganda

Over the past years the burden of landlocked countries and the relation between transport costs and trade have come into the focus of the discussion of international trade:⁵ One of the main obstacles of landlocked countries is their so-called 'dual vulnerability', i.e. they are (i) vulnerable on their own account for trade restrictions within their own country and (ii) in addition to that they are also dependent on the goodwill, infrastructure and procedures within the transit country on which the landlocked country has no or only limited influence.⁶

¹ Robert ZL et al (eds.) *The Global Enabling Trade Report 2010* (2010), page 270.

² So far the exploitable oil deposits are estimated to amount to over 2 billion barrels, see Kavuma R 'Great expectations in Uganda over oil discovery' (2009).

³ World Bank *Uganda Moving Beyond Recovery: Investment & Behaviour Change, For Growth* (2007) pages 11 and 47 f.

⁴ Olanyo, Josef 'Traders seek options for sea routes' (2012)

⁵ Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010); United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007); Annovazzi JL *Landlocked countries: opportunities, challenges and recommendations*, in: United Nations Economic Commission for Europe - Cosgrove-Sacks C & Apostolov M (eds.), (2003) *Trade Facilitation: The Challenges for Growth and Development*; Faye M et al *The challenges facing landlocked developing countries* (2004); Rudaheranwa N *Trade policy and transport costs in Uganda* (2009); Irwin AD & Tervio M *Does trade raise income? Evidence from the 20th Century* (2002); Sachs JD et al *Ending Africa's Poverty Trap* (2004).

⁶ Annovazzi JL *Landlocked countries: opportunities, challenges and recommendations*, in: United Nations Economic Commission for Europe - Cosgrove-Sacks C & Apostolov M (eds.), (2003) *Trade Facilitation: The Challenges for Growth and Development*, page 83; Thapa R *Article V of General Agreement on Tariffs and Trade 1994: From the perspective of ensuring freedom of transit to landlocked countries* (2010), page 2.

2.2. Higher trade costs of landlocked countries

Traders in landlocked countries in general face higher trade costs than their competitors from maritime countries. These additional costs comprise of direct and indirect transit costs for the transport of goods through a neighbouring country to such a port.⁷

- Direct transit costs consist for example of port and transit fees as well as fuel, labour and maintenance costs for the trucks to travel through the transit country.
- Indirect costs, in contrast, consist of the (i) non-transport costs of traders to overcome trade barriers such as (a) costs to comply with the comprehensive documentation requirements and administrative procedures, (b) delays at the port resulting in demurrage fees, (c) delays and bribes to be paid at roadblocks, weigh-bridges and the border, (d) additional maintenance costs resulting from inadequate infrastructure facilities, in particular due to bad roads,⁸ and (e) costly transactions such as insurance bonds and the (ii) the so-called "hedging costs" incurred by traders to cope with the uncertainty of unpredictable delivery schedules.

The effect of these hedging costs on trade has been examined in detail in various studies only recently⁹: In particular because of this uncertainty and unpredictability traders in landlocked underdeveloped countries have to maintain higher stocks of goods to be able to meet the demand of their customers in case the next delivery is delayed. By providing this additional inventory, a higher amount of the traders' financial resources is bound than in (developed) maritime countries, where traders can rely on the delivery of the ordered goods just in time. Furthermore, traders also have to pay for the warehousing of the higher stock of goods.¹⁰ Alternatively, they can also shift to a faster, more expensive mode of transportation.¹¹

In general, indirect costs have a greater impact on traders than direct costs have since labour and fuel costs are usually not so high in landlocked developing countries.

2.3. Effects on trade - reduced competitiveness

The effect of these additional transit costs on trade has also been subject to certain recent studies which agree that such high transportation costs result in a significant disadvantage of

⁷ Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010), page 26 ff.

⁸ The road system in Kenya is one of the worst in the East African Community. Because of the bad state of the roads, trucks transiting Kenya have to drive slower and maintenance costs are also higher, see Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010), page 38.

⁹ Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010); United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007); Freund C & Rocha N *What constraints Africa's exports?* (2010); Christ N et al *Land transport for exports: The effects of cost, time and uncertainty in Sub-Saharan Africa* (2009).

¹⁰ Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010), page 32 f.; United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007), page 33. In regard to the uncertainty see also Freund C & Rocha N *What constraints Africa's exports?* (2010), page 4; Christ N et al *Land transport for exports: The effects of cost, time and uncertainty in Sub-Saharan Africa* (2009), pages 17 ff.

¹¹ Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010), page 32 f.

landlocked countries, such as Uganda, to compete with its maritime neighbours, such as Kenya or Tanzania, in its own domestic market or on the global market¹²:

- Rudaheranwa, for example, argues that the Ugandan transit costs are equivalent to effective protection of over 20% as well as to an implicit tax on exports of over 25%.¹³
- Pursuant to a study by Faye et al., the increased costs of trade for landlocked countries are represented by the ratio of transport and insurance costs to the total value of exports and for landlocked countries this ratio generally lies approximately 9% higher than for their maritime neighbours.¹⁴ In the case of Kenya, this ratio amounts to 0.13, whereas the respective ratio for Uganda is 0.35 - almost three times as high as for Kenya.¹⁵ It is worth noting that Faye's model does not take into consideration the additional costs of transport and transit delays or further transit related costs, such as bribes to be paid on the numerous roadblocks and weigh-bridges as well as for services rendered at the respective customs facilities at the port or the border.¹⁶ Thus, the actual trade disadvantage for Ugandan traders is even higher than the ratio provided by Faye.
- According to another study by Freund and Rocha, one day of delay in transit translates into a 1.5 percentage points decrease in all importing country tariffs. In other words, a one day reduction in transit time would lead to a 7% increase in exports.¹⁷
- Arvis et al. plead in their study to use a micro-level based supply chain model to measure the negative trade effects of transportation costs, which also considers such non-transport and so-called delays hedging costs.¹⁸ However, it should be pointed out that Arvis et al. do not present any calculation or practical results in their work and, thus provides only limited contribution to this thesis.

According to these studies, transit costs result in increased import prices and reduced export revenues in the landlocked country¹⁹ and thus undermine the competitiveness of landlocked

¹² United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007), page 31.

¹³ Rudaheranwa N *Trade policy and transport costs in Uganda* (2009), page 19.

¹⁴ Faye M et al *The challenges facing landlocked developing countries* (2004), page 40.

¹⁵ Faye M et al *The challenges facing landlocked developing countries* (2004), page 41 (Table 3).

¹⁶ Pursuant to information provided by CPCS Transcom, the bribes paid at roadblocks and weigh-bridges alone can amount in total to more than US\$1,000 for an import container, depending on the value of the cargo, see CPCS Transcom *Analytical comparative transport costs study along the Northern Corridor Region* (2010). However, pursuant to the EAC Business Climate Index the average bribe per weigh-bridge amounts only to US\$ 2.10, see East African Business Council *The Business Climate Index Survey 2008* (2008), page 5).

¹⁷ Freund C & Rocha N *What constraints Africa's exports?* (2010), page 4.

¹⁸ Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010), page 9 and in particular Appendix 2. Please note that the Authors do not apply their model in the book to any data, so the benefit of this model cannot be assessed.

¹⁹ Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability*, (2010), page 2.

countries on the international market.²⁰ Since tariff barriers have been reduced considerably within the recent past direct and indirect transit costs have gained importance in the discussion of international trade due to their greater effect on restraining the participation of landlocked countries on regional and international markets.²¹

2.4. Socio-economic effects of being a landlocked country

The geographical disadvantage of being a landlocked country has not only a negative effect on trade, but also on the overall socio-economic development of landlocked countries: The trade reducing effect of high transport costs for landlocked countries (i) feeds into product prices and thus diminishes the purchasing power and consumption levels of the national residents, (ii) decreases the rate of return on capital investors require to finance a project within a country, and (iii) as a consequence significantly impacts Gross Domestic Product negatively.²² Pursuant to certain studies, average Gross Domestic Income per capita of landlocked countries is only approximately 57% of that of their maritime neighbours.²³ Moreover on average landlocked countries trade 30% less than maritime countries.²⁴

However, it has to be noted that the disadvantage of being landlocked varies significantly depending on the level of development of the transit countries, in particular its transit infrastructure and the respective administrative procedures: In the case of landlocked European countries, such as Switzerland, Hungary or Austria, the burden of being landlocked is significantly lower than in the case of landlocked African countries such as Malawi, Niger, Mali or Uganda, where transit infrastructure and administrative procedures in the neighbouring transit countries are in a poor condition and highly ineffective in comparison.²⁵

2.5. The Ugandan case

Uganda, as a landlocked country, also faces the aforementioned challenges²⁶: Goods coming from or destined to Uganda have to transit through Kenya, which is the closest connection to a sea port and, thus, the main transit route, or they are shipped through the Central Corridor in Tanzania. This transport of goods from or to the port of Mombasa entails additional direct and

²⁰ Rudaheranwa N *Trade policy and transport costs in Uganda* (2009), page 25; Vasudave D et al *Trade & Development in Least Developed Countries – Assessing Transport & Trade Facilitation in Uganda, Rwanda and Tanzania* (2010), page 2.

²¹ United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007), page 21 and 25; Arvis JF et al *The Costs of Being Landlocked - Logistics Costs and Supply Chain Reliability* (2010), pages 25 ff.

²² United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007), page 10; United Nations Economic Commission for Africa *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (2010), page 241.

²³ Faye M et al *The challenges facing landlocked developing countries* (2004), page 33.

²⁴ Irwin AD & Tervio M *Does trade raise income? Evidence from the 20th Century* (2002).

²⁵ United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007), page 25; Christ N et al *Land transport for exports: The effects of cost, time and uncertainty in Sub-Saharan Africa* (2009), page 5.

²⁶ It has to be noted that Uganda as a least developed country suffers - in addition to the transit problem - from an ineffective infrastructure within the country, in particular in regard to roads, rails and utilities such as electricity and telecommunication. These restrictions also need urgently to be addressed in order to create further economic growth. However, in the following this thesis will focus in particular on Ugandan transit restrictions in Kenya.

indirect costs for Ugandan traders²⁷: These additional direct and indirect transit costs for Ugandan traders – which are not incurred by their competitors from Tanzania or Kenya – for instance, amounted to 36% of the value of exported Ugandan goods in 2001.²⁸

The dramatic effect of direct and indirect transit costs on trade also becomes apparent when comparing the transport costs of a 20ft container from Mombasa to Kampala worth US\$ 2,700 to US\$ 4,800²⁹ for a distance of 1,170 km which can be over 200% of the cost of transporting the same container from Europe to Mombasa.³⁰ An important part of these costs is caused in Uganda's neighbouring countries: Pursuant to a study by Mimouni, these countries account for more than 40% of all reported trade barriers, despite existing trade agreements³¹: One explanation for that is that Ugandan exporters also have to comply with transit country health and safety requirements in addition to the respective requirements of their final export destinations.

3. Possible solutions for Uganda to overcome this dilemma

One way to escape the dilemma of being a landlocked country is to invest in an efficient infrastructure and trade environment, both in the country itself and in the neighbouring transit countries – in regard to the latter, mainly by way of co-operation and joint infrastructure projects – in order to facilitate trade, as we have seen for landlocked European countries. Successful trade facilitation measures can reduce transport and transit costs, can make border controls more effective, can enhance trade competitiveness and can, thus, even create new trade.³²

3.1. Trade facilitation

Because of this, trade facilitation has been widely discussed in international trade during the last decade. The World Trade Organisation (hereinafter referred to as the „WTO“), and numerous other international institutions such as the United Nations Conference on Trade and Development (hereinafter referred to as „UNCTAD“), the United Nations Economic Commission for Europe (hereinafter referred to as „UNECE“), the World Customs Organisation (hereinafter referred to as „WCO“), the International Chamber of Commerce (hereinafter referred to as „ICC“) or the International Maritime Organisation (hereinafter referred to as „IMO“) have issued recommendations and guidelines for trade facilitation. Furthermore, two binding conventions exist:

²⁷ Faye M et al *The challenges facing landlocked developing countries* (2004), pages 47 f.

²⁸ Ancharaz V et al *The First Africa Region Review for EAC/COMESA* (2010), page 9.

²⁹ The respective amount varies between the different reports. Pursuant to Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), page 36, the transport costs for a 40 foot container amounted on average to US\$ 2,500, whereas Wambi M *Business wants to put brakes on new Common Market* (2010), states these costs with US\$ 4,800. Some other Reports estimate the respective costs about US\$ 3,500.

³⁰ Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), page 37; Wambi M *Business wants to put brakes on new Common Market* (2010).

³¹ Mimouni M et al *Obstacles to Trade from the Perspective of the Business Sector: A Cross-Country Comparison*, in: Robert ZL et al (eds.) *The Global Enabling Trade Report 2009* (2009), pages 72 f.

³² Simpson J A 'Tour of the on-going Work of the World Trade Organisation on Trade Facilitation: The Traders Perspective', in: Robert ZL et al (eds.) *The Global Enabling Trade Report 2009* (2009), page 60; Akinkugbe O 'Trade Facilitation And Africa's Manufactured Goods Export: A Panel Data Analysis' (2009); Portugal-Perez A & Wilson JS. 'Why trade facilitation matters to Africa' (2009).

(i) the International Convention on the Simplification and Harmonisation of Customs Procedures of 1974 of the WCO (revised in 1999, hereinafter referred to as the „Revised Kyoto Convention“) and (ii) the UNECE Convention on the International Transport of Goods under Cover of TIR Carnets of 1978 (hereinafter referred to as the „TIR Convention“). Currently, trade facilitation is also part of the still on-going so-called WTO Doha Negotiations Round.³³

3.1.1. Definition

Up to date, however, no consensus has been reached on a definition of trade facilitation, i.e. what specific measures are covered in this respect.³⁴ The WTO defines trade facilitation as *“the simplification and harmonization of international trade procedures”* where international trade procedures are defined as the *“activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade.”*³⁵ The advantage of this narrow definition is that it focuses mainly on the reformation and harmonisation of customs procedures which are critical to international trade: Customs is the primary agency at international borders with comprehensive responsibilities such as the collection of duties and other taxes or the enforcement of national laws regarding public health and safety and intellectual property.³⁶ An insufficient and ineffective customs performance consequently has a tremendous negative impact on most international trade transactions.

According to broader approaches, trade facilitation comprises not only customs issues, but the aggregate environment in which trade takes place, i.e. all stages of the supply chain.³⁷ Consequently, it also includes the improvement of trade-related infrastructure and the provision of efficient and competitive services. The ICC, for example, defines trade facilitation as *“the adoption of a comprehensive and integrated approach to simplifying and reducing the cost of international trade transactions, and ensuring that the relevant activities take place in an efficient, transparent and predictable manner based on internationally accepted norms and standards and best practices”*.

Considering the purpose of trade facilitation, which is – insofar all definitions agree – to reduce time and costs of business transactions,³⁸ the broader definition of trade facilitation seems more appropriate: Otherwise, i.e. if one would only consider the customs procedures and re-

³³ In this respect, please see also Chapter 6 below.

³⁴ Bolhöfer, Caroline Eve 'Trade facilitation – WTO law and its revision to facilitate global trade in goods' (2007), page 32; Grainger A 'Customs and trade facilitation: From concepts to implementation' (2007), page 20; Mutahunga E 'Trade facilitation as an engine for development – The Ugandan case' (2005), page 2.

³⁵ Cosgrove-Sacks C et al 'Trade Facilitation: The Challenges for Growth and Development' (2003), page 10; Sheikhan P 'Trade Facilitation in the Multilateral Trading System – An Analysis of the Doha Round Negotiations on Trade Facilitation' (2008), page 8.

³⁶ Simpson J 'A Tour of the On-going Work of the World Trade Organisation on Trade Facilitation: The Traders Perspective', in: Robert ZL et al (eds.) *The Global Enabling Trade Report 2009* (2009), page 60.

³⁷ Milner C et al 'Trade facilitation in developing countries' (2008), page 4 ff.; Buyonge C & Kireeva I 'Trade facilitation in Africa: Challenges and possible solutions' (2007), page 41; Ancharaz V et al *The First Africa Region Review for EAC/COMESA* (2010), page 6.

³⁸ Kafeero E 'Customs and trade facilitation in the East African Community' (2008), page 63; Njinkeu D et al 'Trade facilitation – What it is and how does it help?' (2007), page 3.

quirements at the border leaving the goods to their own on their way to the trader on inadequate road and rail networks, at the numerous official and unofficial roadblocks and weigh-bridges or with other restrictions, the majority of trade restrictions, in particular the ones to the transit through another country, would not fall under this definition.

3.1.2. Focus of trade facilitation efforts

In the past, the solution for landlocked countries was mainly seen to lie in the improvement of road and rail infrastructure, both in landlocked and transit countries. Much money was spent for comprehensive infrastructure projects, the outcome of which was disappointing: In many cases the lengthy and costly development of new and the improvement of the existing infrastructure did not have the expected impact on transportation prices.³⁹ One reason for this was that this strategy did not consider other transit restrictions such as inefficient customs or transport services due to a lack of capacity and monopolies in the latter sector. Even if the transport time from the port to the border was – in some cases – reduced significantly by better roads, much time and money was – and still is – lost either at the port, on the road from the port to the border or at the border due to insufficient logistic and personnel capacities, cumbersome transit procedures, corruption at roadblocks, etc.⁴⁰

In addition, on the Northern Corridor the transit time between Mombasa and Kampala has been reduced significantly from 39 to 46 days before 1994 to between 12 and 15 days in 2003⁴¹ and on average 7 days in 2007⁴². This was mainly due to infrastructural improvements. Yet, now the situation may arise that Ugandan trucks transiting through Kenya will have to spend more time waiting at the port to form a convoy and then again at the border to Uganda than they need to travel through the whole of Kenya.⁴³ Without having addressed these non-physical restrictions even the best infrastructure could not have resulted in lower transportation costs. The newer literature thus has extended the discussion on the improvement of transit related services and the liberalisation of transport sectors.⁴⁴

In 2003, the International Ministerial Conference of Landlocked and Transit Developing Countries, Donor Countries and Various International Institutions was held in Almaty, Kazakhstan, resulting in the so-called Almaty Programme of Action. This programme aims to tackle the costs of being landlocked by (i) reviewing and facilitating transport regulatory frameworks, (ii) developing multi-modal networks (road, rail and pipeline infrastructure projects) and (iii) implementing trade and transport facilitation measures in both landlocked and transit countries.

³⁹ Raballand G & Macchi P 'Transport prices and costs: The need to revisit donor's policies in transport in Africa' (2008).

⁴⁰ Ancharaz V et al *The First Africa Region Review for EAC/COMESA* (2010), page 5; Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), pages 36 f.

⁴¹ Rudaheranwa N 'Trade policy and transport costs in Uganda' (2009), page 19.

⁴² Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 60.

⁴³ Kenyan Shippers Council 'Kenya: Issues in Trade Logistics' (2005), page 39.

⁴⁴ Behar A 'Africa: Transit needs more than infrastructure boost' (2008), page 5; Raballand G & Macchi P 'Transport prices and costs: The need to revisit donor's policies in transport in Africa' (2008), pages 3 f.; Ancharaz V et al *The First Africa Region Review for EAC/COMESA* (2010), pages 9 ff.

The international community is supposed to assist poorer landlocked and transit countries by providing technical and financial support and by encouraging foreign direct investment.⁴⁵

In 2008, the United Nations General Assembly held a midterm review of the implementation of the Almaty Programme of Action. All in all, landlocked and transit developing countries have made tangible progress in implementing the Almaty Programme of Action as far as trade development is concerned. In 2007 for example, traders in landlocked countries only spent on average 49 days to export and 56 days to import, in contrast to 2006 where they spent 57 and 72 days respectively.⁴⁶ But there are still various matters of concern, such as the need to improve procedural, regulatory and institutional systems as well as customs and bureaucracy fees, inadequate infrastructure, transit problems, inefficient transport organisation, as well as increasing technical and financial international assistance.⁴⁷

3.2. Political and economic reforms

Uganda made several attempts to cope with these obstacles after it had become independent. After having gained independence, the Ugandan history has been rather eventful with authoritarian governments and civil wars. Uganda and its economy have been challenged by political instability ever since Uganda has gained independence in 1966, in particular under the rule of Idi Amin (between 1971 and 1979) and the following civil war between the Ugandan People's Congress of Milton Obote (the "UPC") and the National Resistance Army (the "NRA" – the military arm of the now ruling National Resistance Movement, "NRM" of President Museveni) in the early 1980's. In this time period, the Ugandan economy declined – besides the effects of the civil war – due to (i) the expulsion of the – at that time – economically important Asian community in Uganda under Idi Amin, (ii) anti-export bias created by state-owned trade and processing monopolies as well as (iii) a tight control over the foreign exchange market.⁴⁸ As a result thereof, Uganda's economy was almost ruined in 1986 when the new (and current) government took over, with a high inflation, a shrinking Gross Domestic Product and all sectors operating beyond their full capacity.⁴⁹

However, since the present government came into power in 1986 calm has returned to Uganda. The newly elected government under President Museveni then re-established stability putting largely an end to the human rights abuses of earlier governments, initiating over the years political liberalization and general freedom of the press, and instituting broad economic reforms after consultation with the International Monetary Fund, such as the diversification of

⁴⁵ *Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries* (2003), downloaded on 25 November 2010 at http://www.un.org/special-rep/ohrls/lldc/Almaty_PoA.pdf.

⁴⁶ Pursuant to Mr Diarra, United Nations Under-Secretary-General, Special Adviser on Africa and High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, speaking at a press conference on the occasion of the 2-3 October high-level meeting devoted to the midterm review of the Almaty Programme of Action, downloaded on 25 November 2010 at http://www.un.org/News/briefings/docs/2008/081002_Almaty.doc.htm.

⁴⁷ Pursuant to Mr Diarra, see previous footnote.

⁴⁸ Morrissey O et al *Trade Policies, Performance and Poverty in Uganda* (2006), page 4.

⁴⁹ World Bank *Uganda, Moving Beyond Recovery: Investment & Behaviour Change, For Growth* (2007), page 2 (1.4).

the economy away from the production of traditionally traded goods (coffee, tea, tobacco and cotton) to non-traditional goods (flowers, fish and fish products, gold and corn), but also in regard to trade partners.⁵⁰ The Economic Recovery Programme („ERP“), launched in 1987, set in place comprehensive structural reforms focusing in particular on market and trade liberalisation, in order to improve the competitiveness of Ugandan exports and to restore incentives for producers. These reforms consisted, inter alia, of the⁵¹:

- Implementation of various trade facilitation measures, such as the introduction of an open general licence scheme, the introduction of a certification system instead of the existing import and export licensing system or the introduction of a duty drawback scheme;
- Significant reduction of the existing tariff rates from a tariff schedule in 1995 with 0%, 10%, 20%, 30% and 60% to one in 2001 consisting of 0%, 7.5% and 15%;⁵² and
- Abolishment of taxes on exports.

As a consequence of these reforms, Uganda experienced significant growth in its economy, with an average annual real growth of 6.9% in the 1990's.⁵³ This growth rate was mainly driven by an increase of Ugandan exports, in particular by the coffee boom in the 1990's but also by the export of non-traditional goods, such as fish, flowers and gold.⁵⁴

In the time period between 2001 and 2003, however, the recovery of the Ugandan economy seemed to have come to an end: the decline of commodity prices – in particular of Uganda's main export commodities coffee and fish – and the escalating price for petroleum together with a severe draught in the years 2002 and 2003 slowed down Ugandan economic growth.⁵⁵ Uganda has undertaken various efforts to facilitate its internal and external trade in order to increase economic growth again – also within the framework of the re-established East African Community. As a result thereof, in 2005, Uganda had one of the most liberal trade regimes of any African country.⁵⁶ Between 2005 and 2009 Uganda's Gross Domestic Product increased

⁵⁰ Morrissey O et al *Trade Policies, Performance and Poverty in Uganda* (2006), page 7; World Bank *Uganda, Moving Beyond Recovery: Investment & Behaviour Change, For Growth* (2007), page 13; Rudaheranwa N 'Trade policy and transport costs in Uganda' (2009), page 6; Tumuhumbise C & Ihiga S A *Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), pages 8 f.

⁵¹ Morrissey O et al *Trade Policies, Performance and Poverty in Uganda* (2006), page 4.

⁵² In 2001, Uganda thus had the lowest tariffs in the COMESA region, with an average Ugandan tariff for COMESA countries of 6% and one average Ugandan tariff of 12% for other countries, in contrast to the respective COMESA average tariffs of 19% and 33%.

⁵³ World Bank *Uganda, Moving beyond Recovery: Investment & Behaviour Change, For Growth* (2007), pages 4 f. (1.8 and 1.13).

⁵⁴ Morrissey O et al *Trade Policies, Performance and Poverty in Uganda* (2006), page 7; World Bank *Uganda, Moving beyond Recovery: Investment & Behaviour Change, For Growth* (2007), page 13.

⁵⁵ International Monetary Fund *Uganda – Staff Report for the 2006 Article IV Consultation, First Review of the Policy Support Instrument, Request for Waiver Criteria, and Request for a Three Year Policy Support Guarantee* (2007), pages 5 f.

⁵⁶ Morrissey O et al *Trade Policies, Performance and Poverty in Uganda* (2006), page 1.

again from US\$ 10.0 to 15.7 billion, with an average real Gross Domestic Product growth of 7%.⁵⁷

It has to be noted that, even though the Ugandan trade volume has increased since 2005, trade in Uganda has not developed as significantly as it was expected to do under the prevailing economic theory.⁵⁸ Furthermore, the share of Ugandan exports to the aggregate global exports has remained the same in this time period, i.e. 0.01%.⁵⁹ And, in addition to that, Ugandan exports still comprise mainly unprocessed, non-value-added agricultural products⁶⁰: Pursuant to a study by Bakunda, Uganda's value added agricultural sector is enormously challenged by – mostly Kenyan, European and South African – imports which have already swamped out the respective Ugandan products in many cases.⁶¹ According to Reinert, the unprocessed agricultural sector alone is not capable of generating sustainable growth because of its diminishing returns.⁶² Moreover, the ability of Ugandan farmers to compete with farmers in the first world is limited to subtropical conditions with erratic rainfalls and a limited use of fertilizers since they are too expensive due to the high transport costs.⁶³

Uganda should therefore focus its efforts on promoting the production and export of value added products.⁶⁴ But, since Ugandan producers are not yet competitive in this sector due to the landlockedness of the country, another possibility could be to also promote services, since in that sector transit costs do not play a vital role.

3.3. Regional integration – The East African Community

In addition to these structural reforms, Uganda also promoted a policy of regional integration to secure new peace and stability in the region as well as to improve trade in the region: Uganda initiated and became – together with Kenya and Tanzania – a founding Partner State of the East African Community taking up economic cooperation of colonial and post-colonial times.⁶⁵

⁵⁷ Robert ZL et al (eds.) *The Global Enabling Trade Report 2010* (2010), page 270; also see <http://data.un.org/CountryProfile.aspx?crName=Uganda>.

⁵⁸ Bakunda G *'The impact of a liberalised trade regime on the potential for agricultural value addition in Uganda'* (2008), page 29.

⁵⁹ United Nations Conference on Trade and Development *Trade, Trade Facilitation and Transit Transport Issues for Landlocked Developing Countries* (2007), page 31.

⁶⁰ Bakunda G *'The impact of a liberalised trade regime on the potential for agricultural value addition in Uganda'* (2008), page 33.

⁶¹ Bakunda G *'The impact of a liberalised trade regime on the potential for agricultural value addition in Uganda'* (2008), page 46.

⁶² Reinert E *How Rich Countries Got Rich and Why Poor Countries Stay Poor* (2007), page 154.

⁶³ Sachs JD et al *Ending Africa's Poverty Trap* (2004), page 133.

⁶⁴ Wiegatz J et al *Competing and Learning in Global Value Chains: Firms Experiences in the Case of Uganda – A Study of five Sub-Sectors with Reference to Trade between Uganda and Europe* (2007), pages 45 ff.

⁶⁵ Uganda, Kenya and Tanzania were colonised under British control as Tanganyika. In 1948, Britain established the East African High Commission to oversee the common services such as rails, harbours, postal and custom services. After the countries attained independence the common service initiatives were to be continued under the East African Cooperation which was established in 1967. However, the East African Cooperation crumbled from a lack of political will, inter-territorial imbalances in trade and an inequitable redistribution of gains and thus ceased meetings and operation in 1971.

3.3.1. Establishment and development of the EAC

On 30 November 1999, the Treaty was signed in Arusha by the presidents of the founding Partner States Kenya, Uganda and Tanzania,⁶⁶ it entered into force on 7 July 2000.

Objective of the EAC is the comprehensive cooperation of the Partner States *"in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared."*⁶⁷ In accordance with the built-in agenda of the Treaty,⁶⁸ in 2005, the Partner States entered into the EAC Customs Union (Protocol on the Establishment of the East African Customs Union, dated 2 March 2004, hereinafter referred to as the "Customs Union Protocol") and five years later they joined the Common Market (Protocol on the Establishment of the East African Common Market, dated 20 November 2009, hereinafter referred to as the "Common Market Protocol").

3.3.2. Main principles of the EAC

In these Protocols, the Partner States have confirmed and substantiated the main principles set out in Article 7 of the Treaty, such as:

- the principle of good governance;⁶⁹
- the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure;⁷⁰
- the comprehensive co-operation in political, economic, social and cultural fields as well as security, legal and judicial affairs;⁷¹
- the principle of asymmetry;⁷² or
- the equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations.⁷³

3.3.3. Effects of the EAC Customs Union on Uganda

The implementation of the Customs Union tremendously increased intra-EAC trade: For example, exports from Uganda to the rest of the EAC increased from US\$ 132.0 million in 2004 to US\$ 152.8 million in 2006 and at last in 2008 they amounted to US\$ 377.4 million; in the

⁶⁶ Rwanda and Burundi acceded to the EAC only in 2007.

⁶⁷ Article 5(1) and 5(2) of the Treaty.

⁶⁸ Pursuant to Article 5(2) of the Treaty, the Partner States: *'undertake to establish among themselves [...] a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation [...].'*

⁶⁹ Article 7(2) of the Treaty.

⁷⁰ Article 7(1)(b) of the Treaty.

⁷¹ Article 5(1) of the Treaty.

⁷² Article 7(1)(h) of the Treaty.

⁷³ Article 7(1)(f) of the Treaty.

same time period Ugandan imports from the rest of the EAC increased from US\$ 416.3 million in 2004 to US\$ 570.6 million in 2008.⁷⁴

Yet, the introduction of the Common External Tariff (in particular the 10% tariff band for semi-finished goods, but also the maximum common external tariff of 25%) in the course of the EAC Customs Union in 2005 also had a negative effect for Uganda: Ugandan tariffs for goods from outside the EAC and, thus, the average effective rate of protection, had been raised substantially after progress was made pursuing a liberal trade regime in the 1990's significantly increasing prices for imports from outside the EAC and, at the same time, strengthening protection of Ugandan producers against competition from abroad the EAC. For example the effective rate of protection for the following sectors more than doubled⁷⁵: manufactured goods,⁷⁶ textiles, clothing and footwear,⁷⁷ chemicals,⁷⁸ metals and machinery⁷⁹ and transport equipment⁸⁰. On the other hand, protection of Ugandan producers towards competition from within the EAC has been reduced since, with effect as of 1 January 2010, all tariffs in the EAC have been abolished after lapse of the transitional period between 2005 and 2010 with asymmetric tariff regimes in the different Partner States. In particular, competition from Kenya pose problems for Ugandan producers in certain sectors since their competitors can produce cheaper due to their direct access to the sea and cheaper production costs resulting thereof. As a consequence of this, there have been negative welfare effects in Uganda.⁸¹

3.3.4. Trade facilitation efforts in the EAC

This increase in import and production costs was supposed to be offset by reduced trade costs due to the reduced tariffs for intra-EAC trade and increased trade facilitation measures within the EAC pursuant to Article 6 of the Customs Union Protocol. In order to improve the trade volumes of the Partner States and thus economic growth within the EAC members have implemented a comprehensive trade facilitation programme consisting of, inter alia,⁸²

- increased customs cooperation such as the introduction of one-border posts;
- the simplification and harmonisation of customs procedures and legislation;⁸³
- the harmonisation and introduction of standards;

⁷⁴ East African Community *East African Community Facts and Figures - 2009* (2010), page 36.

⁷⁵ Rudaheranwa N 'Trade policy and transport costs in Uganda' (2009), page 16.

⁷⁶ From 23% to over 60%.

⁷⁷ From 31% to about 87%.

⁷⁸ From 28% to over 85%.

⁷⁹ From 25% to over 71%.

⁸⁰ From 25% to over 69%.

⁸¹ Khorana S et al 'Regional integration under the East African Community: An assessment of the trade and welfare effects for Uganda' (2007), pages 15 ff.; Khorana S et al 'Assessing the welfare effects of the East African Community Customs Union's transition arrangements in Uganda' (2009).

⁸² The World Bank *Doing Business in the East African Community* (2010), pages 38 ff.; World Trade Organisation *Trade Policy Review - Report by the Secretariat - East African Community* (2006), pages 2 ff.

⁸³ See also in this context for example the EAC Customs Management Act (2004).

- the introduction of a monitoring mechanism for elimination of non-tariff barriers in the EAC and
- the abolishment of tariffs from goods within the EAC.

However, it has to be noted, that these measures are only implemented very slowly in practice, e.g. the Kenyan authorities in many cases still do not accept sanitation certificates of its neighbouring partner institutions and most reported non-tariff barriers are not followed up and eliminated by the respective authorities.

3.3.5. Still dependant on Kenya for the transport of goods through Kenya

The transport of goods to or from Uganda through Kenya for Ugandan traders has been – and still is, despite all trade facilitation initiatives in Uganda and of the EAC – subject to a vast amount of measures adopted in Kenya resulting in further costs and delays, such as⁸⁴:

- demurrage charges at the port of Mombasa after the short grace period for warehousing of the goods in the amount of 21 days has lapsed;
- countless roadblocks (the various reports differ in regard to the amount of roadblocks between up to 27 between the Ugandan border and the port in Mombasa,⁸⁵ according to another report on the road between Malaba and Eldoret alone, a journey of only 1.5 hours, approximately 8 road blocks have been recorded⁸⁶);
- numerous compulsory and mobile weigh-bridges between Mombasa and the Ugandan border;⁸⁷
- Kenyan police only allows trucks registered in Kenya to transport goods through Kenya;
- Kenyan Revenue Authority (hereinafter referred to as “KRA”) imposes a double licensing arrangement on trucks requiring that trucks licenced to carry only transit goods – such as most Ugandan trucks – have to return home empty;
- certain Kenyan municipalities apply charges and fees from transiting trucks without legal grounds and
- transit trucks carrying imports destined to Uganda have to travel in a convoy which is only formed three times a week.

As a consequence of the aforementioned restrictions transit Ugandan traders have to pay considerable additional costs⁸⁸: Pursuant to Rodrigue, in 2009 the indirect and direct costs for the transport of a 20ft container from Mombasa to Nairobi amounted to over 40% of the total lo-

⁸⁴ Regional Trade Facilitation Programme *Inventory of Regional Non-Tariff Barriers: Synthesis Report* (2007), page 67; Ancharaz V et al *The First Africa Region Review for EAC/COMESA* (2010), pages 9 ff.; Arvis JF et al *The Cost of Being Landlocked: Logistic Costs and Supply Chain Reliability* (2010), page 44. For further details, please see Chapter B below.

⁸⁵ Ancharaz V et al *The First Africa Region Review for EAC/COMESA* (2010), page 11.

⁸⁶ Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 60.

⁸⁷ World Bank *Non-Tariff Measures on Goods Trade in the EAC – Synthesis Report* (2008), page v.

⁸⁸ Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 60.

gistics costs.⁸⁹ In addition to that, Ugandan bound commercial vehicles through Kenya take on average about 7 days, while this time could be reduced to 2 days.⁹⁰

3.3.6. Conclusion

The implementation of the Customs Union and the new Common External Tariff has raised prices on imports to Uganda from outside the EAC increasing production costs and lowering the respective capital returns.

At the same time, Kenyan and Tanzanian competitors have gained access to the Ugandan market without any protection for Ugandan producers since no tariffs are applicable anymore within the EAC as of 2010.

On the other hand the various trade facilitation initiatives of the EAC did not have the expected effect of lowering the trade costs significantly for Ugandan traders who are as a result thereof put at an additional, i.e. besides trading from a landlocked country, disadvantage towards their Kenyan or Tanzanian competitors.

3.4. Possible legal action

One way to force Kenya to abandon these restrictions could be to take legal action against these practices before a court having jurisdiction, as the restrictions in place in Kenya could violate the respective provisions under the relevant EAC Agreements and also under other international agreements, such as the law of the WTO, of which both Kenya and Uganda are members. Taking legal actions against these Kenyan restrictions before one of the relevant courts could significantly lower the – direct and indirect – trade costs for Ugandan traders and thus support other initiatives by the Ugandan government to increase the economic development of Uganda.

4. Research problem and methodology

Uganda's ability to improve its transit of goods through Kenya by eradicating these Kenyan measures is limited. However, Kenya is under Article V of GATT 1994 obliged to guarantee freedom of transit for goods coming from or going to Uganda through the Northern Corridor. In the various Agreements of the EAC there is no explicit provision for the freedom of transit corresponding to Article V of GATT 1994, but Kenya undertook various obligations to guarantee the free movement of goods coming from or destined to Uganda.⁹¹ Therefore, Uganda could challenge these restrictions before the EAC Court of Justice.

Reducing transit restrictions in Kenya for Ugandan goods through negotiations or – should these be in vain – by using the available dispute settlement procedures would create a faster and cheaper transit of goods from or to Uganda through Kenya supporting the various other efforts of the Ugandan government and the EAC to facilitate trade in goods. Pursuant to multiple stud-

⁸⁹ Rodrigue JP et al *The Geography of Transport Systems* (2009).

⁹⁰ Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 60.

⁹¹ For further details, please see Chapter 3 lit. 3 below.

ies, a cheaper and, in particular, faster transit through Kenya would lead to a significant increase of the Ugandan trade volume: Djankov concludes that, on average, each additional day goods are delayed reduces trade by a minimum of 1%.⁹² According to a study by Limao and Venables, a general 10% decrease in transport cost is estimated to increase trade volumes by as much as 20%.⁹³ Hence, even a smaller reduction in Ugandan costs for transiting through Kenya by taking legal action could result in a considerable increase of Ugandan trade and thereby help to support economic growth in Uganda leading to more revenues from taxation and reducing poverty in Uganda.

Even though every day goods are transiting other countries all over the world to their final destinations, some of which are subject to certain restrictions, the first – and up to now the only – case in regard to Article V of GATT 1994 has been decided just recently by a WTO Panel.⁹⁴ The East African Court of Justice, too, has not decided such a case up to now: It even has not yet decided any trade dispute between two Partner States.

The problems connected with transit of goods also have been mostly neglected in the respective literature so far: In most books about the law of the WTO, Article V of GATT 1994 has been left out completely or reference is only made to the text of the article.⁹⁵

In the following, this thesis will thus examine (i) what transit restrictions exist for the transport of Ugandan goods from and to the international market through Kenya (see Chapter 2 below); (ii) whether these measures adopted in Kenya are in compliance with the relevant law of the EAC (see Chapter 3 below) and of the WTO (see Chapter 4 below); and (iii) if there is a conflict in jurisdiction in this respect (see Chapter 5 below). In addition, it will then shortly show the current status of the current negotiations of the WTO Trade Facilitation Committee and the possible implications of the Revised Draft Negotiation Text (see Chapter 6 below).

5. Scope

Ugandan trade is also affected by various other measures adopted in Kenya, such as discriminatory goods inspections, discriminatory technical standards enforcement, cumbersome documentary requirements for Ugandan exports to Kenya⁹⁶ and the widespread corruption in Kenya. It would go beyond the scope of this thesis to examine all relevant measures constraining Ugandan trade.

Furthermore, and for the same reason, the thesis will only examine the transit of goods under the EAC and WTO law and will not consider Article VIII GATT 1994 (Customs) or Article X of

⁹² Djankov S et al *Trading on Time* (2006), page 17; The World Bank *Doing Business in the East African Community* (2010), page 37; Njinkeu D et al *'Expanding trade with Africa – The impact of trade facilitation'* (2008), page 14.

⁹³ Limao N & Venables A *'Infrastructure, geographical disadvantage and transport costs'* (2000).

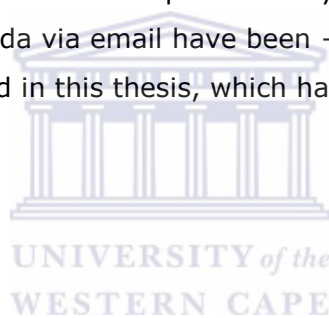
⁹⁴ Panel Report *Columbia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, dated 27th April 2009.

⁹⁵ Matsushita M et al *The World Trade Organisation – Law, Practice and Policy* (2003); Pryles M et al *International Trade Law: Commentary and Materials*, 2ed (2004); Petersmann EU *International Trade Law and the GATT/WTO Dispute Settlement System* (1997); Bhala R *International Trade Law: Theory and Practice* 2 edition (2001); World Trade Organization *WTO Analytical Index: Guide to WTO Law and Practice* (2007); Croome J *Guide to the Uruguay Round Agreements* (1999).

⁹⁶ Kenya is reluctant to accept certificates issued by the Ugandan Bureau of Standards, such as in the dairy industry.

GATT 1994, trade in services or the law of the other regional trade agreements such as (i) law of COMESA, (ii) the Northern Corridor Transit Agreement (dated 1985, hereinafter referred to as the "Northern Corridor Transit Agreement") between Kenya, Uganda, Burundi, Rwanda and Zaire⁹⁷ and (iii) the Central Corridor Transport Agreement (hereinafter referred to as the "Central Corridor Agreement") between Uganda, DR Congo, Burundi, Rwanda and Tanzania.⁹⁸ The problem with these transit agreements is, however, that not all Partner States of the EAC are signatories to both agreements, e.g. Tanzania has not acceded the Northern Corridor Transit Agreement and thus cannot pursue any claims in case the transit of its traders is impeded on the Northern Corridor. The same applies to Kenyan traders and the Central Corridor Agreement.

The lack of accurate, relevant and up-to date data also needs to be noted. During the conducted research, there have been at most times contradictory data to certain measures and procedures such as the costs for the transport of a container from Mombasa to Kampala, the time needed, the road conditions, the respective distance and, most importantly, the restrictions Ugandan traders face on this route. All attempts to clarify the data with various governmental and private organisations in Uganda via email have been – up to now – in vain. Therefore, only certain measures will be examined in this thesis, which have been affirmed by various sources.



⁹⁷ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (2010), page 249. Zaire only acceded to the Northern Corridor Transit Agreement in 1987.

⁹⁸ United Nations Economic Commission for Africa *Assessing Regional Integration in Africa IV: Enhancing Intra-African Trade* (2010), page 250.

Chapter 2 - Restrictions on Ugandan trade dependant on transit of goods through Kenya

Besides the 'general' restrictions of transport in Kenya, such as bad road or rail infrastructure, comprehensive documentary requirements and the widespread corruption at the numerous roadblocks and weigh-bridges, the transit of Ugandan goods through Kenya is furthermore subject to the following, sometimes discriminatory, measures adopted by Kenyan authorities:

1. Restrictions at the port of Mombasa

Ugandan traders face the following restrictions at the port of Mombasa when clearing their goods destined to Uganda:

1.1. Delayed clearance of goods

Due to the – for the most part – insufficient and slow working cranes to offload delivery vessels traders spend a minimum of two weeks to one month to clear goods from the port.⁹⁹ Pursuant to a report by the World Bank, the clearance of cargo destined for Uganda by the Kenya Port Authority (hereinafter referred to as the „KPA“) is, in addition to the usual lengthy clearance, discriminatory: Transit goods spent on average 37,5 days in the port whereas containers destined to Kenya only spent on average 12,4 days in the port.¹⁰⁰ In addition to that, ships also have to wait outside the harbour until they can clear their goods due to the insufficient port infrastructure, as a consequence of which shipping companies charge Ugandan traders high surcharges.

However, recently, the average dwell time at the port of Mombasa has been reduced significantly because of investment in the port infrastructure and due to implemented trade facilitation measures such as increased capacity training and cooperation between the Kenyan authorities involved. Pursuant to a recent newspaper article, cargo thus moves rather quickly from KPA facilities: In 2009 the port dwell time for goods destined for the Kenyan market was on average 5.9 days.¹⁰¹ Yet, according to the same article, the dwell time for transit cargo was still estimated for the same point in time to be on average 7.5 days.¹⁰² But pursuant to a newsletter of the Kenyan Shippers Association, there exists no discriminatory clearance practice at the port of Mombasa.¹⁰³ Since the actual dwell time at the port could not be further clarified, it will not be considered in the following.

⁹⁹ Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), pages 19, 26 and 44.

¹⁰⁰ World Bank *Non-Tariff Measures on Goods Trade in the EAC – Synthesis Report* (2008), page 27.

¹⁰¹ Pursuant to the KPA 6.2 days, see Kenyan Port Authorities 'Mombasa ports remains a regional hub' (2009).

¹⁰² Roberts A 'Kenya: Congestion at Mombasa port to blame for slow pace of Kenya's growth into regional hub' (2010).

¹⁰³ Kenyan Shippers Council *Members Newsletter No. 7*, dated 6 July 2009, page 3.

1.2. Insufficient grace period before application of demurrage charges

Imports through Mombasa port are subject to a demurrage charge in the amount of US\$ 40 per container and day, after lapse of a grace period of 30 days from the time they have entered into a customs warehouse at or near the port.¹⁰⁴ However, this grace period is not sufficient given the fact, that goods normally have to stay in the port area for at least 30 days: It usually takes (i) more than 10 days for the trader to conclude the correspondence on a letter of credit; (ii) 10 days to clear the goods at the docks; and (iii) 10 days to complete the process of declaring the cargo to customs, pay duty and applicable shipping surcharges before the goods can be released.¹⁰⁵

Furthermore, the stored goods can – after lapse of the initial warehousing period of 21 days – only be re-warehoused for extra seven days.¹⁰⁶ Given the average time needed to complete the clearances of goods at the port and the grace period for the goods to stay in the custom warehouse of 21 days is thus grossly insufficient and results in unjustified additional costs for Ugandan traders. Please note that Ihiga points out in a footnote that the warehousing period before demurrage charges imposed by Kenyan authorities has been extended to 30 days. Pursuant to a decision by the EAC Ministers,¹⁰⁷ Kenya agreed not to apply these demurrage charges on transit goods after 21 days. However, pursuant to Rodrigue, demurrage charges still form a considerable part of the transit costs.¹⁰⁸ Due to the fact that the current procedure in regard to demurrage charges could not be further clarified as well, it will not be considered in the following.

1.3. Auctioning of Ugandan goods after lapse of warehousing period

It is also worth pointing out that the Kenyan customs authority is entitled to auction any warehoused goods after failure to remove goods from port area after the re-warehousing period of 7 days. Many Ugandan bound vehicles are reported to have been auctioned for that reason.¹⁰⁹

2. Restrictions on the transit through Kenya

In addition to that, the transport of Ugandan goods on the way through Kenya is subject to the following restrictions:

¹⁰⁴ Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), page 26; Ihiga Simon - *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 59.

¹⁰⁵ Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), page 26.

¹⁰⁶ Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), pages 59 f.; Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), page 26.

¹⁰⁷ Dated 25 August 2006 (EAC/CM12/DC24), downloaded on 20 January 2011 at http://www.eac.int/council_decisions/sectorDecision.php?sectorID=CUSTOMS.

¹⁰⁸ Rodrigue JP et al *The Geography of Transport Systems* (2009).

¹⁰⁹ Ihiga Simon *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), pages 59 f.; Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), page 26.

2.1. Kenyan police only allows trucks registered in Kenya to transport goods destined to Tanzania through Kenya

Kenyan Police requires that all trucks carrying goods from Uganda to Tanzania through Kenya and vice versa have to be trucks registered in Kenya.¹¹⁰ As a consequence thereof, additional costs incur to Ugandan traders for hiring Kenyan transport companies instead of using their own trucks or hiring cheaper Ugandan transport companies. These additional costs also accrue for the necessary repacking of the goods. Another effect of this measure adopted by the Kenyan police is that Ugandan registered transporters are running out of business on Kenyan routes.

2.2. No back haulage allowed by Kenya for Ugandan transit trucks

Kenya issues transit licences for trucks to Ugandan transporters only allowing them to route Ugandan goods through Kenya, but not to return to Uganda with import cargo, i.e. they have to return empty (no back haulage).¹¹¹ This leads to, transport costs escalating for Ugandan traders since the trucks cannot transport other cargo back to Uganda – as is common practice in the transport sector – to reduce the costs.

2.3. Application of local council fees applied to Ugandan transit cargo

Namanga District Council, Kajiado, has instituted fees for trucks passing by using an old Act which allows the council to levy fees. But, pursuant to that Act such levies may only be applied to locally produced goods and not to transit cargo.¹¹²

3. Restrictions at the Kenyan border

Kenyan Customs officers at border crossings in various cases continue applying national taxes, duties, regulations and procedures long after relevant rules are harmonised or abolished by the EAC Council of Ministers.¹¹³ In the past, for instance, Kenya used to carry out Pre-shipment Inspections under which a 2.75% Import Declaration Fee was applicable on the value of goods. Even though these Pre-shipment Inspections were abolished in July 2005, the fee was not removed and is still applied by Kenyan customs.¹¹⁴ This Import Declaration Fee should have been abolished after the phase out of the Pre-Shipment Inspection.

¹¹⁰ Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries – Final Report* (2007), page 38; Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 60.

¹¹¹ World Bank *Non-Tariff Measures on Goods Trade in the EAC – Synthesis Report* (2008), page 29; Roberts A 'Kenya: Congestion at Mombasa port to blame for slow pace of Kenya's growth into regional hub' (2010).

¹¹² East African Business Council *Current Trade Barriers within the East African Community* (2010).

¹¹³ Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 31.

¹¹⁴ Tumuhumbise C & Ihiga S *A Survey of Non-Tariff-Barriers that affect Ugandan Imports and Exports within EAC and COMESA Countries* (2007), page 15; Ihiga S *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC* (2009), page 59.

4. Conclusion

Ugandan traders face a variety of obstacles in Kenya transporting their goods to or from the port in Mombasa such as, inter alia, the Kenyan practices to (i) auction Ugandan goods after lapse of the warehousing period, (ii) only allow trucks registered in Kenya to transport goods destined to Tanzania or Kenya, (iii) issue only one-way transit licences for Ugandan trucks, (iv) apply council levy fees for locally produced goods to goods in transit and (v) to apply abolished taxes at the Kenyan border.

These Kenyan measures (all together hereinafter referred to as the "Kenyan restrictions") make the transit of Ugandan goods through Kenya significantly more expensive: Either directly for additional payments, such as demurrage charges, local fees or no longer applicable taxes, or indirectly for (i) higher transportation prices since Ugandan freight-forwarders have to pass on the costs for the empty drive back or the repacking of goods on Kenyan trucks to the Ugandan traders; (ii) for higher transportation prices since Ugandan traders have to hire Kenyan transporters to higher prices due to lack of competition; and (iii) for time lost for repacking the goods.

As a consequence of this, Ugandan traders are less competitive with their competitors from Kenya. The same counts for the Ugandan economy. On the basis of these additional costs that have to be passed on to Ugandan consumers diminishing the purchasing power and consumption levels of national residents, the return on capital required by investors to finance projects within Uganda declines and thereby negatively impacting Gross Domestic Product.

However, the Ugandan influence in Kenya to abolish these obstacles is limited as it is relying on the goodwill of the Kenyan authorities. Thus, the only way to put pressure on Kenya is to initiate legal proceedings either before the EAC Court of Justice or a respective panel of the WTO, should these restrictions violate the law of the EAC or the WTO.

Chapter 3 - Compliance of these measures with the law of the EAC

There is no explicit article in the various agreements of the EAC providing explicitly for freedom of transit in the EAC. Nevertheless, in several articles Kenya – as a signatory of the Treaty, the Customs Union Protocol and the Common Market Protocol (all together hereinafter referred to as the „EAC Agreements“) – undertook inter alia (i) to guarantee the free movement of goods, (ii) to remove all non-tariff barriers, (iii) not to apply discriminatory measures to nationals from Partner States, (iv) to facilitate trade as well as road transport and (v) to gradually reduce and finally eliminate non-physical barriers to road trade within the Community.¹¹⁵

In the following, this thesis will first briefly establish the applicable set of rules for the interpretation of these agreements and then present, in a second step, the main general objectives and principles of the EAC Agreements before it will examine, in a third step, whether or not Kenyan restrictions to the transit of Ugandan goods through Kenya comply with the Kenyan obligations under the EAC Agreements.

1. Sources of law of the EAC

The law of the EAC, in general terms, mainly comprises the internal law of the EAC and the main sources of international law¹¹⁶:

- The internal law of the EAC consists of the Treaty, the EAC Agreements, Acts of the EAC organs such as the EAC Legislative Assembly, its Council and Summit as well as the decisions of the EAC Court of Justice;¹¹⁷
- as an organisation based on international agreements also the main sources of international law, such as international treaties and conventions, customary law as well as general principles of law and teachings of the most highly qualified publicists, form a source of law of the EAC.¹¹⁸

The different possible sources of EAC law, too, have been stated in Article 39(1) of the Customs Union Protocol, which explicitly refers to the Treaty, the Customs Union Protocol, regulations and directives by the Council, applicable decisions by the Court, Acts of the Community enacted by the Legislative Assembly and relevant principles of international law as possible sources of the EAC Customs law.

2. Application of the Vienna Convention on the Law of Treaties

To date, neither any preparatory materials exist nor do commentaries on the EAC Agreements available, or any decisions of the East African Court of Justice clarifying the interpretation of

¹¹⁵ For further details, please see Chapter 3 lit. 2.2 below.

¹¹⁶ Kafeero E 'Customs and trade facilitation in the East African Community' (2008), pages 93 f.

¹¹⁷ Kafeero E 'Customs and trade facilitation in the East African Community' (2008), pages 93 f.

¹¹⁸ See for example Article 38(1)(a) to (c) of the International Court of Justice Statute; Pauwelyn J *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), pages 89 ff.

the EAC Agreements in this respect, i.e. in regard to non-tariff barriers. Up to now, no such case between two Partner States of the EAC has been decided yet.¹¹⁹

Therefore, the common rules of interpretation for international treaties of the Vienna Convention on the Law of Treaties¹²⁰ (adopted 23 May 1969 and entered into force on the 27 January 1980, hereinafter referred to as the „Vienna Convention“) are to be applied to interpret the EAC Agreements. The Vienna Convention is applicable as both Uganda and Kenya have ratified the Vienna Convention on 24 June 1988 respectively on 9 November 1988 and it entered into force in Uganda on 22 September 1988 and in Kenya on 7 February 1989.¹²¹ Furthermore, the requirements for application of the Vienna Convention are given in the present case: The EAC Agreements (i) are international agreements concluded between states in written form and governed by international law and (ii) have been concluded after the Vienna Convention has entered into force.¹²²

It has to be noted that even in case the parties of an international treaty have not signed the Vienna Convention, the relevant principles of this convention would nevertheless be applicable since they are recognised elements of international customary law.¹²³

2.1. Summary of the rules of the Vienna Convention

The Articles of the Vienna Convention can be briefly summarized as follows¹²⁴:

- The provision to be interpreted first of all has to be broad and ambiguous enough to allow an interpretation;
- interpretation is about giving the ordinary meaning to the terms of the treaty, in their context and in light of their object and purpose;
- if the terms are still ambiguous or unreasonable after such an interpretation, recourse can be made to subsequent means of interpretation and the preparatory work as well as to any subsequent decisions and practices; and
- it is not allowed to extend or to create new rules through interpretations.

2.2. The general objectives and principles of the EAC Agreements

The following main general objectives and principles govern the EAC Agreements and are, thus, to be considered when interpreting these agreements:

¹¹⁹ Pursuant to www.eacj.org/judgments.php, last checked on 2 September 2013.

¹²⁰ United Nations, Treaty Series, Vol. 1155, p. 331.

¹²¹ United Nations Environment Programme, status downloaded at http://ozone.unep.org/Ratification_status/rat-if_by_country.shtml?cntryname=Uganda and http://ozone.unep.org/Ratification_status/rat-if_by_country.shtml?cntryname=Kenya.

¹²² See Article 1 and 2(a) of the Vienna Convention; Verosta S 'Die Vertragsrechts-Konferenz der Vereinten Nationen 1968/69 und die Wiener Konvention über das Recht der Verträge' (1969), page 659.

¹²³ Pryles M et al *International Trade Law: Commentary and Materials*, 2 edition (2004), page 123 (3.115); Petersmann EU *International Trade Law and the GATT/WTO Dispute Settlement System* (1997), page 330.

¹²⁴ Pauwelyn J *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), pages 244 ff.; Matsushita M et al *The World Trade Organisation – Law, Practice and Policy* (2003), pages 356 f.

2.2.1. Objectives of the EAC¹²⁵

The main objectives of the EAC are (i) to strengthen regional integration and development through a (ii) comprehensive co-operation between the Partner States in order to (iii) create an enabling environment for its citizens. This follows from the following provisions:

- Pursuant to the Preamble of the Treaty, the Partner States of the EAC are „*with a view to realising a fast and balanced regional development, resolved to creating an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities through the development of sound macro-economic and sectorial policies and their efficient management [...]*“.¹²⁶
- Article 5(1) of the Treaty determines the objectives of the EAC as to „*develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.*“
- According to Article 2(1) of the Common Market Protocol, the Partner States establish amongst themselves a common market, with the objective to „*accelerate economic growth and development of the Partner States through the attainment of the free movement of goods, persons and labour, the rights of establishment and residence and the free movement of services and capital.*“¹²⁷

Economic development with the Partner States as a basis for social development, in particular the reduction of poverty,¹²⁸ thus is one of the most important objectives of the EAC.

2.2.2. Principles of the EAC

These objectives of the EAC are backed up by various fundamental and operational principles in the Treaty governing their implementation, such as:

- „*the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, service, capital, information and technology;*“¹²⁹
- *to observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality;*¹³⁰
- *to accord treatment to nationals of other Partner States not less favourable than the treatment accorded to third parties;*¹³¹

¹²⁵ Kafeero E 'Customs and trade facilitation in the East African Community' (2008), pages 91, 100 ff.

¹²⁶ Preamble of the Treaty, page 2 at the bottom.

¹²⁷ Article 4(2)(a) of the Common Market Protocol.

¹²⁸ See in this respect also Article 120(a) of the Treaty according to which „the Partner States undertake to co-operate closely [...] in employment, poverty alleviation programs and working conditions.“

¹²⁹ Article 7(1)(c) of the Treaty.

¹³⁰ Article 3(2)(a) of the Common Market Protocol.

- *good governance*;¹³²
- *co-operation for the mutual benefit*;¹³³ and
- *the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure.*¹³⁴

The drafters of the Treaty, too, were aware of the special situation of the landlocked countries. The Treaty thus stipulates that with regard to the co-operation in infrastructure and services „*special treatment shall be granted to the landlocked Partner States.*“¹³⁵ This obligation has been further substantiated in Article 93(d) of the Treaty, pursuant to which „*coastal countries shall co-operate with landlocked Partner States and grant them easy access to port facilities.*“

3. Compliance of the Kenyan restrictions with EAC law

The Kenyan restrictions to the transit of Ugandan goods through Kenya could violate the Kenyan obligations under the EAC Agreements.

3.1. Violation of the Kenyan obligation to co-operate in the implementation of customs requirements for the transit of goods

The only provision in the EAC Agreements referring explicitly to transit of goods is Article 4(2)(e) of the Customs Union Protocol according to which the Partner States undertake to co-operate in „*implementing the customs requirements for the transit of goods.*“

However, pursuant to the clear wording, this article only provides for the claim of one Partner State against another for co-operation in regard to the implementation of customs requirements for the transit of goods. There is no place for a broader interpretation of this provision, such as an implicit guarantee of freedom of transit, because of the clear wording of this provision: Such a broad interpretation would go beyond the clear meaning of this article, it would be beyond the scope of interpretation and thus be inadmissible.

In any case, Kenya has fulfilled its obligation under Article 4(2)(e) of the Customs Union Protocol with the ratification of the EAC Customs Management Act in 2004 (as amended in 2008, hereinafter referred to as the „Customs Management Act“) and the EAC Customs Management Regulations in 2006 (hereinafter referred to as the „Customs Management Regulations“), which regulate in detail the treatment applied by EAC customs to goods such as clearance of goods and other custom formalities, custom warehousing, importation and exportation. But, apart from these general customs procedures and practices, neither the Customs Management Act nor the Customs Management Regulations provide for a right for an unrestricted transit of goods through another Partner State.

¹³¹ Article 3(2)(b) of the Common Market Protocol.

¹³² Article 6(d) and Article 7(2) of the Treaty.

¹³³ Article 6(f) of the Treaty.

¹³⁴ Article 7(1)(b) of the Treaty.

¹³⁵ Article 89 Sentence 2(e) of the Treaty.

Consequently, Uganda cannot claim from Kenya the elimination of the restrictions for its goods transiting through Kenya under Article 4(2)(e) of the Customs Union Protocol.

3.2. Violation of the Kenyan obligation to eliminate non-tariff barriers on the importation of goods into the territory of a Partner State

There are certain obligations within the EAC Agreements regarding the elimination of non-tariff barriers on the importation of goods into the territory of a Partner State, such as Article 75(5) of the Treaty pursuant to which the Partner States must "*remove all the existing non-tariff barriers on the importation of the goods into their territory from the other Partner States*" or Article 13(1) of the Customs Union Protocol which has almost the same wording as Article 75(5) of the Treaty. However, the wording of these articles expressly only refers to the removal of non-tariff barriers on the 'importation of goods' within intra-EAC trade and therefore are not applicable in the present case:

The importation of goods does not cover the transit of goods through another Partner State: Pursuant to its ordinary meaning, goods are imported into a state if they are brought in from a foreign country for use, sale, processing, re-export, or services.¹³⁶ The term 'transit' in comparison can refer to two related concepts in the discussion of international trade¹³⁷:

- in the context of trade facilitation transit traffic refers in particular to the procedure of goods being moved through a territory with the beginning and the end of the transit operation being outside this territory (so-called international transit);
- customs transit, in contrast, in the context of customs, refers to the procedures under which goods are transported under customs control from one customs office to another under temporary suspension for the payment of duties and taxes.

Since Article 75(5) of the Treaty and Article 13(1) of the Customs Union Protocol deal with trade facilitation measures, the first meaning of transit is applicable for the interpretation of these provisions. In any case, both the definitions of international transit and customs transit require that the transit goods leave the respective country. In contrast, imported goods remain in the country after they have been in transit, or they have to be directly brought to the country.

Therefore, the importation of goods and the transit of goods refer to two different and, thus, incomparable cases. The wording of these articles is unambiguous and the respective provision is, thus, not open for interpretation. As a result, Uganda cannot claim the elimination of the Kenyan restrictions under Article 75(5) of the Treaty or Article 13(1) of the Customs Union Protocol.

¹³⁶ "import" at Dictionary.com Unabridged. Random House Inc., retrieved on 2 February 2011 at <http://dictionary.reference.com/browse/import>.

¹³⁷ United Nations Conference Trade and Development - 'Freedom of transit, regional transit agreements and customs transit' (2008), page 2.

3.3. Free movement of goods

Furthermore, the Kenyan restrictions to the transit of Ugandan goods could violate its obligation pursuant to Article 6 of the Common Market Protocol. Article 6(1) of the Common Market Protocol reads as follows: *"The free movement of goods shall be governed by the Customs Law of the Community as specified by Article 39 of the Protocol for the Establishment of the East African Customs Union."*

3.3.1. Basis for a Ugandan claim

Pursuant to its wording, Article 6(1) of the Common Market Protocol does not explicitly provide for an obligation of the Partner States to guarantee the free movement of goods, it rather implies that such an obligation already exists: Instead of providing for a guarantee of the Partner States for the free movement of goods, as it is the case for example for the free movement of persons,¹³⁸ workers¹³⁹ and services,¹⁴⁰ the right of establishment of nationals of the other Partner States¹⁴¹ and the right of residence,¹⁴² where *"the Partner States hereby guarantee"* the respective freedoms, Article 6(1) of the Common Market Protocol merely states that the free movement of goods is to be governed by the customs law of the EAC as specified in Article 39 of the Customs Union Protocol. Article 6(1) of the Common Market Protocol, thus, has to be read in connection with the Customs Union already existing between the Partner States. Article 39 of the Customs Union Protocol reads as follows:

1. *"The customs law of the Community shall consist of:*

- (a) relevant provisions of the Treaty;*
- (b) this Protocol and its annexes;*
- (c) regulations and directives made by the Council;*
- (d) applicable decisions made by the Court;*
- (e) Acts of the Community enacted by the Legislative Assembly; and*
- (f) relevant principles of international law.*

2. *The customs law of the Community shall apply uniformly in the Customs Union except as otherwise provided for in this Protocol."*

As a consequence thereof, Article 6 of the Common Market Protocol is to be read as to only repeat and affirm the already existing obligations of the Partner States pursuant to the Customs Union Protocol.

¹³⁸ Article 7(1) of the Common Market Protocol.

¹³⁹ Article 10(1) of the Common Market Protocol.

¹⁴⁰ Article 16(1) of the Common Market Protocol.

¹⁴¹ Article 13(1) of the Common Market Protocol.

¹⁴² Article 14(1) of the Common Market Protocol.

This reading of Article 6(1) of the Common Market Protocol is also confirmed by the prevailing theory of economic integration, according to which the establishment of a customs union and the one of a common market are subsequent stages of economic integration¹⁴³ and, this is why, the latter necessarily requires the former.¹⁴⁴

So the free movement of goods is mandatory for a Common Market as it has already been granted under the preceding stage of the Customs Union.

However, as stated above, the Treaty and the Customs Union Protocol do not provide explicitly in any article for the free movement of goods as is the case for the free movement of persons, services, etc. But these agreements stipulate in various provisions that customs duties and other charges of equivalent effect are to be eliminated and non-tariff barriers between the Partner States are to be removed:

- Pursuant to Article 75(1)(c) of the Treaty, the Partner States are to establish a Customs Union, the respective Protocol must call for the elimination of non-tariff barriers. The Partner States fulfilled this requirement with the coming into force of the Customs Union Protocol in 2004, affirming this aim in the Preamble: *„AND WHEREAS the Partner States are desirous to deepen and strengthen trade among themselves and are resolved to abolish tariff and non-tariff barriers to create the most favourable environment for the development of regional trade.“*¹⁴⁵

Implementing this aim, Article 2(4) of the Customs Union Protocol therefore determines: *“Within the Customs Union:*

a) customs duties and other charges of equivalent effect imposed on imports shall be eliminated save as is provided for in this Protocol;

b) non-tariff barriers to trade among the Partner States shall be removed.“

- In addition to that, the elimination of non-tariff barriers has also been provided for by the Partner States in other provisions of the EAC Agreements: In regard to non-tariff barriers for the importation of goods in the respective territories of goods originating in the other Partner States Article 13(1) of the Customs Union Protocol states that *„each of the Partner States agrees to remove, with immediate effect, all the existing non-tariff barriers to the importation into their respective territories of goods originating in the other Partner States and, thereafter, and not to impose any new non-tariff barriers.“* And the Common Market Protocol too, provides for the elimination of tariff, non-tariff and technical barriers of trade as well as the harmonisation and mutual recognition of standards.¹⁴⁶

¹⁴³ Such as Free Trade Agreement, Customs Union, Common Market and Economic Union.

¹⁴⁴ Delux T 'Essence and phases of international economic integration' (2010), pages 3 f.

¹⁴⁵ Preamble of the Customs Union Protocol, page 2.

¹⁴⁶ Article 5(2)(a) of the Common Market Protocol.

- The importance of the elimination of barriers to trade has furthermore been reaffirmed in the subsequently concluded Common Market Protocol, according to which “*the Partner States agree to eliminate tariff, non-tariff and technical barriers to trade; harmonise and mutually recognize standards and implement a common trade policy for the Community*” in order to achieve a free movement of goods.¹⁴⁷ The Common Market Protocol is to be considered for the interpretation of Article 2(4)(b) of the Customs Union Protocol pursuant to Article 31(1)(a) of the Vienna Convention since it is a subsequent agreement between the same parties as in the Customs Union Protocol and its subject is connected with it.

These obligations of the Partner States to eliminate tariffs and to remove non-tariff barriers, however, describe the typical characteristics of the free movement of goods: Goods can only move freely through a country when they are able to circulate without any restrictions, i.e. without being subject to any charges or non-physical barriers, throughout the member states of the customs union. Since Article 2(4) of the Customs Union Protocol determines that customs duties and other charges are to be eliminated and non-tariff barriers shall be removed, it therefore provides implicitly for the free movement of goods. Article 2(4) of the Customs Union is also applicable since Article 6(1) of the Common Market Protocol refers to Article 39(1) (b) of the Customs Union Protocol which, in turn, determines that the provisions of the Customs Union Protocol form part of the EAC customs law.

Consequently, Article 6(1) of the Common Market Protocol guarantees, in combination with Article 39(1)(b) and Article 2(4) of the Customs Market Protocol, for the free movement of goods.

3.3.2. Requirements of Article 2(4)(b) of the Customs Union Protocol

The aforementioned Kenyan restrictions to the transport of Ugandan goods transiting Kenya are not tariff restrictions, but non-tariff barriers since they are not applied at the border due to the importation of goods. According to Article 2(4) (b) of the Customs Union Protocol, Kenya has to remove all such barriers to trade.

3.3.2.1. Definition non-tariff barrier

The first question in regard to this provision is how the term non-tariff barriers is to be interpreted, i.e. what measures are subject to this obligation. In spite of a voluminous literature in international trade, there exists up to now no uniform definition of the terms “non-tariff measures” and “non-tariff barriers”.

It has to be noted that in some cases these terms are used interchangeably.¹⁴⁸ However, even though both terms cover the same types of measures or barriers, a distinction between both these terms is made in the discussion of international trade pursuant to the justification of the

¹⁴⁷ Article 5(2)(a) in combination with Article 5(1) of the Common Market Protocol.

¹⁴⁸ Ferrantino M 'Quantifying the trade and economic effects of Non-Tariff Measures' (2006), page 5 (footnote 2).

respective barrier: (i) non-tariff measures are all barriers applied for legitimate reasons whereas (ii) non-tariff barriers, in contrast to that, are all barriers used as instruments of protection, i.e. who have an unjustified trade distorting effect.¹⁴⁹

Most definitions, however, agree that both these terms are to be defined as (i) measures other than tariffs that (ii) affect the flow of international transactions in goods and, in doing so, (iii) act as a barrier to trade.¹⁵⁰ So, the definition of non-tariff measures and non-tariff barriers is relatively flexible. Various international trade organisations, such as the OECD, the UNCTAD or the WTO, have released catalogues for the classification of non-tariff measures with different main categories, such as government participation in trade, customs and administrative entry procedures, sanitary and phyto-sanitary measures, technical barriers to trade, specific limitation and quantitative restrictions, and intellectual property.

Nevertheless, the question, which of these catalogues is to be applied, is not essential in this context since the Customs Union Protocol defines non-tariff barriers as „*laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State whose effect is to impede trade.*“¹⁵¹ And pursuant to Article 31(4) of the Vienna Convention this meaning given by the signatories is binding. The Kenyan restrictions, however, constitute such administrative requirements.

3.3.2.2. Are 'transit barriers' barriers to trade?

The second question in regard to Article 2(4)(b) of the Customs Union Protocol is namely, whether these restrictions also impede Ugandan 'trade', i.e. whether or not this provision also calls for the freedom of transit of goods through Kenya coming from or destined to Uganda. Should that be the case Kenya would be obliged to eliminate the respective non-tariff barriers.

There exists no decision of the East African Court of Justice on the interpretation of the term 'trade'. Therefore, this provision has to be interpreted according to Article 31 of the Vienna Convention, giving the ordinary meaning to its terms, in its context and in light of its object and purpose, and taking into consideration any subsequent decision and practices of the contracting parties.

a) The ordinary meaning of trade

Pursuant to the dictionary, the term 'trade' is used to denote the activity of buying and selling, or exchanging goods or services between people or countries.¹⁵² According to this definition only the transaction between a buyer and a seller would be covered, for

¹⁴⁹ Ferrantino M 'Quantifying the trade and economic effects of Non-Tariff Measures' (2006), page 7; Kirk R 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community' (2010), page 1; Cadot O et al 'Non-Tariff Measures: Impact, regulation and trade facilitation' (2010), page 1.

¹⁵⁰ Ferrantino M 'Quantifying the trade and economic effects of Non-Tariff Measures' (2006), page 7; Kirk R 'Addressing trade restrictive non-tariff measures on goods trade in the East African Community' (2010), page 1; Cadot O et al 'Non-Tariff Measures: Impact, regulation and trade facilitation' (2010), page 1; Matsushita M et al *The World Trade Organisation – Law, Practice and Policy* (2003), pages 112 ff.

¹⁵¹ Article 1 of the Customs Union Protocol, page 6.

¹⁵² See for example the Cambridge Dictionary Online, <http://dictionary.cambridge.org/dictionary/british/trade1>.

which other legal frameworks exist already, such as the United Nations Convention on Contracts for the International Sale of Goods,¹⁵³ and not the transit of goods through another country, the meaning of which is in general the conveyance of people or goods from one place to another only.¹⁵⁴

But beyond that narrow definition of 'trade', this term can also be understood in a broader sense as the whole environment in which trade takes place, as for example in the context of trade facilitation where trade comprises all stages of the supply chain including the transportation of the goods to their destination.¹⁵⁵

The ordinary meaning of the term 'trade' is thus ambiguous and therefore the further means of the Vienna Convention are to be applied.

b) The context of Article 2(4)(b) of the Customs Union Protocol

According to Article 31(2) of the Vienna Convention also the context of the provision in question, i.e. the text of the treaty, including its preamble and annexes, as well as subsequent treaties between the parties relating to that treaty, is to be considered.

- The Preamble of the Customs Union Protocol reads as follows: "*The Partner States are desirous to deepen and strengthen trade among themselves and are resolved to abolish tariff and non-tariff barriers to create the most favourable environment for the development of regional trade.*"¹⁵⁶

This Preamble calls for the 'creation of the most favourite environment for the development' of regional trade. This indicates that the drafters of this protocol acted on the assumption of a broader definition of trade since the term 'environment' usually also comprises all stages of a process, from the production of the goods, their transportation, up to the actual sale of the goods.

- This assumption of a broad interpretation of 'trade' is further supported by Article 1 of the Customs Union Protocol, according to which 'trade facilitation' "*means the co-ordination and rationalisation of trade procedures and documents relating to the movement of goods from their place of origin to their destination.*"¹⁵⁷

This definition of trade facilitation explicitly refers to the rationalisation of trade procedures relating to the movement of goods 'from their place of origin to their destination'. In a reverse conclusion, that means that the term 'trade' also has to cover all these stages and not only the sale of the goods.

¹⁵³ United Nations *United Nations Convention on Contracts for the International Sale of Goods* (1980).

¹⁵⁴ For an overview, please see <http://www.thefreedictionary.com/transit>.

¹⁵⁵ See Chapter 1 lit 3.1 above.

¹⁵⁶ Preamble of the Customs Union Protocol, page 2.

¹⁵⁷ Article 1 of the Customs Union Protocol, page 7.

- This interpretation of Article 2(4)(b) of the Customs Union Protocol is further backed up by Article 6(c) of the Customs Union Protocol which refers to the transportation in the context of trade facilitation: "*The Partner States shall initiate trade facilitation by ensuring adequate co-ordination and facilitation of trade and transport activities within the Community.*" So also according to this provision transport activities in the EAC are an integral part of trade facilitation.
- When interpreting Article 2(4)(b) of the Customs Union Protocol also Article 89 sentence 2(e) of the Treaty is to be considered according to which the Partner States shall "*grant special treatment to landlocked Partner States*" in regard to the co-operation in infrastructure and services.

It has to be noted that Article 89 of the Treaty only refers to the respective chapter of the Treaty, i.e. the co-operation in infrastructure and services, and does not constitute a general principle of the Treaty. However, the evaluation of this provision can be considered when interpreting other provisions of the Treaty or the subsequent agreements based thereon: This provision shows that the drafters of the Treaty were aware of the general problems of landlocked countries, i.e. the additional costs due to the longer transportation ways and the transit through other countries. A special treatment of the landlocked Partner States, however, requires a broad interpretation of the term 'trade', i.e. that their transport and transit costs are reduced by eliminating the respective non-tariff barriers in the transit countries. Therefore, also the call for a special treatment of landlocked countries indicates that the obligation to remove non-tariff barriers to trade also has to comprise the barriers to the transit of goods.

Thus, the context of Article 2(4)(b) of the Customs Union Protocol implies that the term 'trade' in the Customs Union Protocol has to be understood in a broader sense, including also the transport of goods from their place of origin to their final destination and therefore also the transit of goods on their way to their final destination.

c) The object and purpose of the Customs Union Protocol

Article 31(1) of the Vienna Convention states that also the object and the purpose of a treaty need to be considered when interpreting a provision. The object and purpose of the Customs Union Protocol, however, also call for a broad interpretation of the term 'trade', including the transit of goods.

The objective of the Customs Union Protocol is to liberalise intra-regional trade within the EAC and to create an enabling environment for its traders in order to create economic growth in the region. This results from the following obligations of the Partner States:

- The Preamble of the Treaty determines that the Partner States are resolved to create an '*enabling environment*' in all Partner States. According to Article 31(2)(a) of the Vienna Convention, the Treaty can be consulted for the interpretation of Article 2(4)(b) of the Customs Union Protocol: The conclusion of the Customs Union Protocol has already been provided for in the Treaty¹⁵⁸ and the Customs Union Protocol refers in numerous provisions to the Treaty,¹⁵⁹ so these agreements are to be considered as connected in terms of this provision.
- This objective of creating an enabling environment in the EAC of the Treaty has also been reaffirmed in the Preamble of the Customs Union Protocol, stating that "*the Partner States are desirous to deepen and strengthen trade among themselves and are resolved to abolish tariff and non-tariff barriers to create the most favourable environment for the development of regional trade.*"¹⁶⁰
- According to the Customs Union Protocol, the Partner State thus must (i) promote the objectives of the Treaty,¹⁶¹ (ii) "*further liberalise intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the Partner States,*"¹⁶² and (iii) "*promote efficiency in production within the Community, and promote economic development and diversification in industrialisation in the Community.*"¹⁶³

However, such a most favourable environment for the development of regional trade can only be achieved when the entire environment of trade is included, i.e. as well the transit of goods. If the transit of goods was covered by the obligations to eliminate trade barriers, the respective restrictions would continue to exist with the aforementioned negative consequences for landlocked countries,¹⁶⁴ such as increased transport and production costs, making all efforts to facilitate trade within the EAC more difficult. Hence, also according to the object and purpose of Article 2(4)(b) of the Customs Union Protocol, this provision has to be interpreted in a broad way as to include the transit of goods on their way to their final destination.

d) Subsequent decisions and practices

Article 31(3) of the Vienna Convention also provides for the consideration of any subsequent decisions and practices between the signatories when interpreting a treaty. The term 'subsequent decisions' refers to any formal amendments or interpretative

¹⁵⁸ See Article 2(2), Article 5(2) and in particular Article 75 of the Treaty.

¹⁵⁹ See the Preamble, Article 1, Article 2(1) and (5), Article 38, Article 39 of the Customs Union Protocol.

¹⁶⁰ Preamble of the Customs Union Protocol, page 2.

¹⁶¹ Article 2(1) of the Customs Union Protocol.

¹⁶² Article 3(a) of the Customs Union Protocol.

¹⁶³ Article 3(d) of the Customs Union Protocol.

¹⁶⁴ See Chapter 1 lit. 2 above.

notes concluded between the Partner States¹⁶⁵ However, up to now, there exist neither any subsequent decisions nor any subsequent practices of any EAC organ in regard to Article 2(4)(b) of the Customs Union Protocol.

e) Conclusion

Consequently, Article 2(4)(b) of the Customs Union Protocol has to be interpreted in a broad way comprising the aggregate trade environment including the transit of goods through the Partner States.

f) Beyond the limitations of interpretation?

This interpretation of Article 2(4)(b) of the Customs Union Protocol does not go beyond the limitations of interpretation either: It does not create a completely new obligation for the Partner States, but only considers the object and purpose of the provision in question which is also expressed in Article 4(2)(e) of the Customs Union Protocol: According to this provision, the Partner States shall co-operate in the matters of trade facilitation "*implementing the customs requirements for the transit of goods*". This reference implies that the drafters of the Customs Union Protocol assumed that transit issues are part of trade facilitation and, therefore, in a reverse conclusion that the transit of goods also forms part of trade.

It has to be noted that also pursuant to the established case law of the European Court of Justice (hereinafter referred to as the "ECJ"), the free movement of goods according to Articles 28 EC to 30 EC comprises goods in transit through a member state coming to or destined to another member state.¹⁶⁶ According to the ECJ a customs union established between states necessarily implies that the free movement of goods also comprises the freedom of transit: The free movement of goods also has to include the transport of goods transiting through one member state coming from or destined to another member state. Otherwise, trade between the various member states would be significantly impaired by increased transportation and production costs due to transit restrictions in other member states. It is therefore in the mutual interest of the Partner States, to acknowledge the existence of a general principle of freedom of transit of goods within a custom union.¹⁶⁷

This interpretation of the ECJ is not binding for the EAC Court of Justice, but it has an indicative effect since the same legal principles of economic integration are to be considered: Both the EAC and the EC are mandated to create a unified market and therefore acknowledge the principle of free movement of goods.

¹⁶⁵ Matsushita, M et al *The World Trade Organisation – Law, Practice and Policy* (2003), page 358.

¹⁶⁶ ECJ *Società Italiana per l'Oleodotto Transalpino (SIOT) v Ministero delle Finanze* (case no. 266/81, dated 16 March 1983), para 16; ECJ *Commission of the European Communities v Italian Republic* (case no. C-173/05, dated 5 October 2006), para 19.

¹⁶⁷ ECJ - *Società Italiana per l'Oleodotto Transalpino (SIOT) v Ministero delle Finanze* (case no. 266/81, dated 16 March 1983), para 16.

3.3.2.3. Conclusion

Consequently, Article 2(4) (b) of the Customs Union Protocol calls for the elimination of any laws, regulations, administrative and technical requirements other than tariffs imposed by Kenya on transit of Ugandan goods whose effect is to impede trade.

3.3.3. Consistency of the Kenyan measures restricting Ugandan transit through Kenya under Article 2(4)(b) of the Customs Union Protocol

As shown above, the transit of Ugandan goods through Kenya is subject to various restrictions in Kenya,¹⁶⁸ which could be inconsistent with Article 2(4)(b) of the Customs Union Protocol.

3.3.3.1. Auctioning of goods after lapse of re-warehousing period

The auctioning of Ugandan goods stored in Kenyan warehouses at the port of Mombasa by the Kenyan customs after lapse of the re-warehousing period is inconsistent with Article 2(4)(b) of the Customs Union Protocol and also not justified under Article 36(1) of the Customs Union Protocol.

a) Violation of Article 2(4) (b) of the Customs Union Protocol

The auctioning of goods which remain in the warehouse after the respective re-warehousing period has lapsed, i.e. 30 days after they have been warehoused, by Kenyan customs is the most serious thinkable impairment to trade: The Ugandan traders lose the stored goods and have to reorder them as a consequence of which they cannot deliver the goods in time to their customers and even may become liable towards them. This administrative Kenyan practice thus impedes Ugandan trade in the most significant way.

b) Justification according to Article 36(1) of the Customs Union Protocol

However, this restriction of Ugandan traders could be justified pursuant to Article 36(1) of the Customs Union Protocol.¹⁶⁹ Please note that the wording of this provision exactly corresponds with Article 78(1) of the Treaty. Yet, in the following, reference will only be made to Article 36 of the Customs Union Protocol as the provision being closer in substance.

The requirements of Article 36(1) of the Customs Union Protocol are not given in the present case: There is neither a serious injury nor a threat thereof to the Kenyan economy apparent through the application of the Treaty, i.e. the elimination of the respective Kenyan measures, nor would the auctioning of the goods be a necessary safeguard measure.

¹⁶⁸ See Chapter 2 above.

¹⁶⁹ Article 36 (1) of the CUP reads as follows: *"In the event of serious injury or threat of serious injury occurring to the economy of a Partner State following the application of the provisions of this Protocol, the Partner State concerned shall, after informing the Council through the Secretary General and the other Partner States, take necessary safeguard measures."*

aa) No serious injury of threat thereof

From its ordinary wording, a threat is in general given, if there is a high degree of likelihood that an anticipated danger materialises in the near future whereas an injury is present in case the anticipated danger already has materialised itself. There is no danger apparent to the Kenyan economy through the extension of the remaining of the Ugandan goods in the Kenyan warehouses at the port which could materialise in the future or which has already done so. As far as Kenya claims the congestion of the port as such endangers its economic development it has to be noted that the congestion has decreased significantly within the last years and the impact thereof on the Kenyan economy is quite limited.

But even if one would assume that such an injury or the threat thereof would be given in this case, there would still be a lack of the requirement of the seriousness of the injury or the threat. According to its ordinary wording the term serious has the meaning of grave in nature or disposition or worthy of regard because of substantial quantity or quality.¹⁷⁰ The term 'serious' injury or threat is ambiguous since it is not clear from the wording to which extent the economy has to be injured or threatened in order to be seriously threatened or endangered, i.e. there exists a range of interpretation. However, considering the exceptional character of this provision, it has to be defined narrowly as a significant overall impairment of the economy in question.

Article 36 of the Customs Union Protocol is located in Part I of the Customs Union Protocol, the General Provisions. The context of this provision is thus not really helpful for the interpretation. In this miscellaneous context, it provides for a general exception allowing a Partner State in certain circumstances – after informing the EAC Council (hereinafter referred to as the “Council”) – the implementation of the necessary safeguard measures, which would be otherwise forbidden under the Customs Union Protocol. The object and purpose Article 36 of the Customs Union Protocol is therefore to provide for temporary flexibility for the Partner States in case their economy is threatened to be seriously harmed or injured by the implementation of the regulations of the Customs Union Protocol. However, it is a generally accepted principle of legal interpretation that exceptional provisions, such as Article 36 of the Customs Union Protocol, have to be interpreted as narrowly as possible.¹⁷¹ Otherwise, the Partner States could justify any protective measure even though the respective impact to its economy would only be insignificant and thus open this provision for misuse for protective purposes.

¹⁷⁰ serious. (n.d.). Collins English Dictionary - Complete & Unabridged 10th Edition. Retrieved 23 January 2011, from dictionary.com (<http://dictionary.reference.com/browse/serious>).

¹⁷¹ Petersmann EU *International Trade Law and the GATT/WTO Dispute Settlement System* (1997), page 334. Larenz K and Canaris C-W *Methodenlehre der Rechtswissenschaft* (2009) page 176.

In other words, this Kenyan restriction could only be justified pursuant to Article 36 of the Customs Union Protocol, if the Kenyan economic development with the remaining of the Ugandan goods in the warehouses for an extended time period in the near future was significantly worse than without them. However, there is no reason apparent how the remaining of the stored goods in the warehouses for a longer time period could lead to such a significant overall impairment of the Kenyan economy.¹⁷²

In addition to that, finally, it has to be noted that the burden of proof, that a threat to the Kenyan economy exists due to the further remaining of Ugandan goods in the warehouses, would be on Kenya¹⁷³ And, in addition, Kenya would need to present this threat to be credible, i.e. it must be given from the standpoint of a reasonable, similar situated government. The latter requirement of Article 36 of the Customs Union Protocol follows again from the exceptional character of that provision: Otherwise it could be abused by a Partner State to justify almost any (discriminatory) practice on unreasonable grounds.

bb) Not a necessary safeguard measure

But even supposing that such a serious threat would be given in the present case, the Kenyan action would in any case not be 'necessary' in the sense of Article 36(1) of the Customs Union Protocol.

The term 'necessary' again has to be examined in its ordinary meaning, in its context and in the light of the object and purpose of Article 36(1) of the Customs Union in accordance with Article 31(1) of the Vienna Convention.

'Necessary' in its ordinary meaning denotes something that is indispensable to some purpose,¹⁷⁴ i.e. it describes the relationship between a condition and a goal. Therefore, this term is ambiguous since different ranges of degrees of necessity are applicable¹⁷⁵: It can have the meaning of an 'absolutely essential' condition for the achievement of that goal or, on the other side of this range, of 'needed', i.e. simply making a contribution to achieve the goal.

As an exceptional provision, Article 36 of the Customs Union Protocol has to be interpreted as narrow as possible¹⁷⁶ to avoid the misuse of this provision for protective purposes. Therefore, a measure is only 'necessary' if it is absolutely essential

¹⁷² See two paragraphs above (page 43).

¹⁷³ The principle of the burden of proof is applicable as a general principle of international law, see Pauwelyn J *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), pages 125 f.

¹⁷⁴ See for example Webster's Revised Unabridged Dictionary (1913) or The Collaborative International Dictionary of English v.0.48, both referred to at (<http://www.dictionary.net/necessary>).

¹⁷⁵ See in this respect also the Panel Report *Mexico – Measures affecting Telecommunications Services*, page 221 ff. and the *Appellate Body Report Korea – Measures affecting Imports of fresh, chilled and frozen Beef* paras. 161 ff.

¹⁷⁶ See footnote 170 above.

to protect the Kenyan economy, i.e. in case there are no other measures at hand which are equally suitable to achieve this purpose and are less restrictive to trade.

Even if one would assume an urgent need of Kenya to recover its costs for the warehousing of the Ugandan goods if a trader does not pay the respective charges or only a limited amount of space in these warehouses, there would be other means available which restrict the Ugandan trade in a lesser way: for example the Ugandan owners of the goods could be given a last chance to avoid the auctioning of the goods by giving them notice of that possibility giving them a last chance to pay their debts and to remove the goods as provided for in the Customs Management Act. In regard to the congestion of the port, Kenya could alternatively also improve and extend the existing port and rail infrastructure, which is in most cases responsible for the long stay of the goods in the warehouses. Last but not least, Kenya could also build additional warehouses.

There is, thus, no apparent reason as to why the Ugandan goods remaining longer in Kenyan warehouses without the automatic possibility to auction could harm the Kenyan economy.

This frequent practice of the Kenyan customs, however, can in any case not be necessary pursuant to Article 36 of the Customs Union Protocol, as it is itself inconsistent with Article 42(1) of the Customs Management Act, according to which the customs are entitled to auction the goods after lapse of a 30 days warehousing period in case (i) the Commissioner has given notice by public gazette and (ii) the goods have not been removed within 30 days after this notice. It is a general principle of international law that a measure encroaching in a right of another state can only be justified if that measure itself is consistent with the relevant applicable national law. A measure inconsistent with Kenyan law, therefore, cannot be a valid defence under Article 36 of the Customs Union Agreement.

cc) Conclusion

Consequently, the entitlement of the Kenyan customs to auction Ugandan goods after lapse of the re-warehousing period without any further requirements and the respective Kenyan practice to do so constitutes an unjustified non-tariff barrier to Ugandan transit through Kenya and, thus, also to Ugandan trade.

Therefore, Kenya is obliged under Article 2(4) (b) of the Customs Union Protocol to eliminate the laws and regulations pursuant to which the Kenyan customs are entitled to automatically auction the Ugandan goods after lapse of the re-warehousing period.

3.3.3.2. Kenyan police only allows trucks registered in Kenya to transport goods destined to Tanzania through Kenya

The frequent practice of the Kenyan police that only trucks registered in Kenya are allowed to transport goods destined to Tanzania on their way through Kenya also constitutes a significant impediment to Ugandan trade: Ugandan traders cannot use their own trucks or hire possibly cheaper Ugandan transporters but have to hire Kenyan transporters at least for the transport through Kenya. This results in additional costs for Ugandan traders for time lost repacking the goods or for the engagement of more expensive Kenyan transporters as a consequence of which Ugandan carriers run out of business on these routes.

This practice of the Kenyan police is also not justified under Article 36 of the Customs Union Protocol. There is no apparent reason why the transport of goods through and in Kenya by non-Kenyan freight-forwarders can threaten to cause a serious harm to the Kenyan economy¹⁷⁷: The Kenyan transport industry is competitive and holds a significant share of the regional market.¹⁷⁸ There is also no sign that this sector is in danger by its international competition.

3.3.3.3. No back haulage allowed by Kenya for transit trucks

The issuance of transit licences to Ugandan transporters, which forbids them to transport goods on their way back, also is an unjustified impediment to Ugandan trade. This practice leads to higher transportation prices for Ugandan traders due to additional costs and time lost for repacking or higher prices to be paid to more expensive Kenyan freight-forwarders. As a consequence thereof, Ugandan traders are less competitive than their Kenyan competitors.

This Kenyan ban for Ugandan transporters to transport goods on the way back is also not justified pursuant to Article 36 of the Customs Union Protocol. There is no serious threat to the Kenyan transport sector and thus its economy apparent.¹⁷⁹

3.3.3.4. Application of local council fees on transit cargo

The application of local council fees to transit cargo as well is impairment to Ugandan trade increase transportation costs of Ugandan traders and thereby reducing their competitiveness.

This Kenyan practice as well cannot be justified under Article 36 of the Customs Union Protocol, as the respective act, which the application of this fee is based on by the council, only allows the council to impose fees on locally produced goods¹⁸⁰ and is thus on its face not applicable to transit goods.

3.3.3.5. Application of abolished taxes to Ugandan goods at the Kenyan border

The application of abolished taxes at the Kenyan border by the Kenyan customs also is an unjustified impediment to Ugandan trade. The amounts paid feed into Ugandan prices reducing

¹⁷⁷ Article 36 of the Customs Union Protocol.

¹⁷⁸ Kenyan Shippers Council *Kenya: Issues in Trade Facilitation* (2005), pages 57 ff.

¹⁷⁹ See Chapter 3, lit. 3.3.3.1 bb) above.

¹⁸⁰ East African Business Council *Current Trade Barriers within the East African Community* (2010).

their competitiveness. And since the respective taxes have been abolished in Kenya this practice cannot be justified under Article 36 of the Customs Union Protocol.¹⁸¹

3.3.4. Conclusion

The obligation under Article 2(4) (b) of the Customs Union Protocol to remove all tariffs and barriers to trade, also calls for the freedom of transit as part of the free movement of goods. The Kenyan measures are unjustified impediments to Ugandan transit through Kenya and thus also to Ugandan trade and therefore violate the Kenyan obligations under Article 2(4)(b) of the Customs Union Protocol.

3.4. Violation of the obligation to eliminate non-physical barriers to road transport

Furthermore, the Kenyan restrictions could also be inconsistent with the Kenyan obligations under Article 90 of the Treaty.

In addition to the guarantee of free movement of goods, the Partner States undertook to co-operate in road infrastructure and services. Article 89 sentence 1 of the Treaty reads as follows: „*The Partner States undertake to evolve coordinated, harmonised and complementary transport and communications policies; improve and expand the existing transport and communication links; and establish new ones as a means of furthering the physical cohesion of the Partner States, so as to facilitate and promote the movement of traffic within the Community.*”

These obligations are further substantiated in Article 90 of the Treaty, according to which “*the Partner States shall: [...]*”

- *establish common measures for the facilitation of road transit traffic;*¹⁸² [...]
- *gradually reduce and finally eliminate non-physical barriers to road transport within the Community;*¹⁸³
- *ensure that common carriers from other Partner States have the same opportunities and facilities as common carriers in their territories in the undertaking of transport operations within the Community;*¹⁸⁴
- *ensure that the treatment of motor transport operators engaged in transport within the Community from other Partner States is not less favourable than that accorded to the operators of similar transport from their own territories;*¹⁸⁵ and
- *make road transport efficient and cost effective by promoting competition and introducing regulatory framework to facilitate the road haulage industry operations.*¹⁸⁶

¹⁸¹ See Chapter 3 4.4.1 b).bb) above.

¹⁸² Article 90(j) of the Treaty.

¹⁸³ Article 90(s) of the Treaty.

¹⁸⁴ Article 90(t) of the Treaty.

¹⁸⁵ Article 90(u) of the Treaty.

¹⁸⁶ Article 90(v) of the Treaty.

The Partner States shall furthermore initiate trade facilitation by „ensuring adequate co-ordination and facilitation of trade and transport activities within the Community.“¹⁸⁷

Article 90(s) of the Treaty provides for the gradual reduction and final elimination of non-physical barriers to road transport within the EAC.

a) Non-physical barriers

First of all, the meaning of the term non-physical barrier has to be clarified. From its ordinary meaning, the term 'non-physical barriers' refers to all barriers to the movement of goods which are not related to the existing infrastructure such as bad roads, i.e. it comprises mainly laws, regulations and practices impeding the transport of goods, such as the payment of tariffs, duties or charges.¹⁸⁸ Pursuant to Article 90(s) of the Treaty, Kenya is therefore obliged to gradually reduce and finally eliminate all unjustified statutory, administrative and regulatory norms in regard to the movement of goods or discriminatory application thereof.

b) Reduction and final elimination

These non-physical barriers are to be reduced and then finally eliminated by Kenya pursuant to Article 90(s) of the Treaty. However, over the last years Kenya has reduced some non-physical barriers, for example it (i) has invested in the port of Mombasa and its road infrastructure;¹⁸⁹ (ii) is reducing fees and charges at the port of Mombasa;¹⁹⁰ (iii) reduced the amount of static and mobile weigh-bridges;¹⁹¹ (iv) is introducing an electronic cargo tracking system;¹⁹² (v) has started an anti-corruption initiative;¹⁹³ and (vi) has introduced joint one-border posts with Uganda.¹⁹⁴ Therefore, Kenya is already gradually reducing the existing non-physical barriers and, as a result, complying with its obligations under Article 90(s) first alternative, even though there still exist various others restrictions.

The problem with Article 90(s) second alternative of the Treaty is that it does not state a time limit until when the respective non-physical barriers have to be finally eliminated by the Partner States. It only states that they have to be “*gradually reduced and finally eliminated*”. It would go beyond the clear meaning of the article in question to include a certain time limit for the elimination of these non-physical barriers by way of interpretation. Consequently, there is no space for such an interpretation of Article 90(s) of the Treaty.

¹⁸⁷ Article 6(c) of the Customs Union Protocol.

¹⁸⁸ De P et al 'Transit and trade barriers regime and performance of strategic border-crossings' (2008), page 12.

¹⁸⁹ Kihara G 'Work on second Mombasa port terminal to start in February' (2010).

¹⁹⁰ Oyuke J 'New regulations to push down shipping costs at Mombasa port' (2010).

¹⁹¹ Uganda National Monitoring Committee *Uganda Report to the East African Community Secretariat on Non-Tariff Barriers (NTBs) affecting Uganda* (2010), page 3.

¹⁹² Odhiambo A 'Kenya: Quarterly tax returns erode gains from reforms' (2010).

¹⁹³ Establishment of the Kenyan Anti-Corruption Commission in 2003 which has inter alia introduced a National Anti-Corruption Plan, see also Mulama J 'A new anti-graft plan, amidst old scandals' (2006).

¹⁹⁴ Article 10(2) of the Customs Management Act and the East African Community Proposed One Stop Border Posts Bill (2010).

c) Conclusion

Therefore, Uganda also cannot claim from Kenya the elimination of the restrictions for its goods transiting on road through Kenya under Article 90(s) of the Treaty.

3.5. Violation of the obligation to provide the same opportunities for carriers

Article 90(t) of the Treaty obliges Kenya to ensure that carriers from other Partner States have the same opportunities as domestic carriers in the undertaking of transport operations.

a) Kenyan police only allows trucks registered in Kenya to transport goods destined to Tanzania through Kenya

The frequent practice by the Kenyan police to only allow Kenyan registered trucks to transport goods through Kenya is inconsistent with Article 90(t) of the Treaty. Ugandan transporters are disadvantaged towards their Kenyan competitors since their opportunities to offer and provide their services in Kenya are limited by this practice. Kenyan transporters, in contrast to Ugandan carriers, can provide their services without any restrictions in Kenya and all over the region as a consequence of which carriers from these two countries do not have the same opportunities.

b) No back haulage allowed by Kenya for transit trucks

The ban on Ugandan carriers to transport goods on their way back to Uganda, when only a transit licence has been issued, also discriminates Ugandan carriers and is, therefore, inconsistent with Article 90(t) of the Treaty: This requirement does not apply to Kenyan carriers who can transport goods on each way without any limitations. As a consequence thereof, the Kenyan carriers can offer their services at lower prices than their Ugandan competitors because they do not have to charge the empty drive back to their customers. Therefore, Ugandan carriers do not have the same opportunities as their Kenyan counterparts.

c) No justification under Article 36 of the Customs Union Protocol

Both these practices are not justified by Article 36 of the Customs Union Protocol. Neither is there a serious harm to the Kenyan economy or threat thereof apparent nor would these Kenyan measures be necessary to prevent such harm.¹⁹⁵

3.6. Violation of the national treatment obligation for transport operators

According to Article 90(u) of the Treaty, the Partner States must, furthermore, ensure that motor transport operators from other Partner States are treated not less favourable than the operators of similar transport from their own territories.

¹⁹⁵ See Chapter 3 lit. 3.3.3.1 and lit. 3.3.3.2 above.

a) Kenyan police only allows trucks registered in Kenya to transport goods destined for Tanzania through Kenya

This practice by the Kenyan police discriminates Ugandan transporters since they are treated less favourably than their Kenyan competitors who can provide their services unrestrictedly within Kenya. It is therefore inconsistent with Article 90(t) of the Treaty.

b) No back haulage allowed by Kenya for transit trucks

This Kenyan practice discriminates Ugandan carriers and is, therefore, inconsistent with Article 90(u) of the Treaty: Ugandan carriers are treated less favourably than their Kenyan competitors who can transport goods also on their way back without any limitation and thus have lower costs which they can pass on to their clients.

c) No justification under Article 36 of the Customs Union Protocol

The Kenyan restrictions cannot be justified by Kenya under Article 36 of the Customs Union Protocol. Neither is there a serious harm to the Kenyan economy or a threat of apparent in this respect nor would these Kenyan measures be necessary to prevent such harm.¹⁹⁶

3.7. Violation of the obligation to provide for an efficient and cost effective road transport

The Kenyan practice not to allow Ugandan carriers to transport goods on their way back to Uganda in case only a transit licence has been issued could also be inconsistent with Article 90(v) of the Treaty, according to which the Partner States shall make road transport efficient and cost effective by promoting competition and introducing regulatory frameworks to facilitate road haulage operations. The question to be asked in this respect is to which extent Kenya has to 'promote competition'.

In general, competition law and policy is aimed at creating and maintaining functioning markets which allow firms to take advantage of business opportunities and ensure that economic efficiency is given to the fullest extent.¹⁹⁷ On that basis, the state has to ensure that private strategies, such as (i) collusive agreements between companies with regard to price fixing or market-sharing cartels, (ii) abuses by leading companies to drive out competitors or prevent entry of potential competitors and (iii) undue concentration, do not hinder competition.¹⁹⁸

However, according of Article 90(v) of the Treaty, the Partner States have to 'promote' competition. Pursuant to its ordinary meaning, promote means the '*contribution to the progress, prosperity or growth of something*'.¹⁹⁹ This implies that the Partner States have to make comprehensive efforts to promote competition, in particular to take an active role in the promotion

¹⁹⁶ See C.4.4.3 above.

¹⁹⁷ Bhattacharjea A 'Trade and competition policy' (2004), page 1; Jenny F *Globalisation, Competition and Trade Policy: Issues and Challenges* (1999), page 10.

¹⁹⁸ Bhattacharjea A 'Trade and competition policy' (2004), page 1; Jenny F *Globalisation, Competition and Trade Policy: Issues and Challenges* (1999), pages 9 ff.

¹⁹⁹ WordNet (r) 2.0 and Webster's Revised Unabridged Dictionary (1913), published at <http://www.dictionary.net/promote>.

of competition which goes beyond the introduction of a competition act. Therefore, under this provision Kenya is obliged to promote competition within the EAC by cracking down on private Kenyan restrictive business practices and is obliged to omit all restrictions to trade which may have a competition distorting effect.

The Kenyan practices not to allow Ugandan trucks to transport goods in Kenya since they are not registered there and not to allow Ugandan carriers to transport goods on their way back in case only a transit licence has been issued, have a competition distorting effect: Ugandan transporters can only offer and provide their services in Kenya in a limited way and have higher costs than their Kenyan competitors.²⁰⁰

These practices are also not justified according to Article 36 of the Customs Union Protocol.²⁰¹

As a consequence thereof, the Kenyan practices, only to allow trucks registered in Kenya to transport goods between Tanzania and Uganda in Kenya and not to allow Ugandan trucks to transport goods on their way back if only a transit licence has been issued, are also inconsistent with Article 90(v) of the Treaty.

3.8. Violation of Article 75(4) of the Treaty

In addition to that, the Partner States also undertook not to impose any new duties and taxes or to increase the existing ones with respect to the goods traded within the EAC.

Article 75(4) of the Treaty determines that „*with effect from a date to be determined by the Council, the Partner States shall not impose any new duties and taxes or increase existing ones in respect of products traded within the Community and shall transmit to the Secretariat all information on any tariffs for study by the relevant institutions of the Community.*”

a) Application of local Council fees

However, from its wording, Article 75(4) of the Treaty only refers to duties and taxes in regard to products traded within the EAC and thus do not apply to goods transiting one Partner State. Therefore, it does not apply to the local council fees for the passing through the Namanga district.

b) Application of abolished taxes at the border

Article 75(4) of the Treaty also does not apply to the frequent practice at the Kenyan border to apply abolished taxes to Ugandan goods: These taxes are not 'new duties or taxes' within the meaning of this provision: According to its ordinary meaning, 'new' duties and taxes have not existed before. Also, the context and the object and purpose of that provision argue against the application of Article 75(4) of the Treaty: Article 75 of the Treaty obliges the Partner States to establish within four years after the coming into force of the Treaty a customs union among them and calls for certain requirements for this customs union. In preparation of this customs union the Partner States undertake,

²⁰⁰ See 3.3.3.1 and 3.3.3.2 above.

²⁰¹ See 3.3.3.1.lit. b) above.

for example, not to enact discriminatory legislation or to apply discriminatory administrative measures²⁰² or to remove all existing non-tariff barriers to the importation of goods into their territory.²⁰³ Therefore, the objective and purpose of these provisions is to be seen as to provide for a minimum protection in the time period between the coming into force of the Treaty and the Customs Union Protocol. Hence, it has to be interpreted narrowly as to only refer to new and legitimate duties and taxes, i.e. such in accordance with the national legislation, applied at the border. As a consequence thereof, the application of abolished taxes does not violate the Kenyan obligations under Article 75(4) of the Treaty.

3.9. Violation of Article 2(4)(a) of the Customs Union Protocol

This obligation under Article 75(4) of the Treaty has been further substantiated in Article 2(4)(a) of the Customs Union Protocol, according to which „*within the Customs Union customs duties and other charges of equivalent effect imposed on imports shall be eliminated save as is provided for in this Protocol.*”

a) Application of local Council fees

However, Article 2(4)(a) of the Customs Union Protocol is not applicable in case of the local council fees introduced in Namanga District since these fees are not charges imposed on 'imports' but only on the journey through the respective area. Yet, such “toll charges” are not comprised by Article 2(4)(a) of the Customs Union Protocol: Pursuant to Article 1 of the Customs Union Protocol, customs duties are defined as “*import or export duties and other charges of equivalent effect levied on goods by reason of their importation or exportation, respectively, on the basis of legislation in the Partner States and includes fiscal duties or taxes where such duties or taxes affect the importation or exportation of goods but does not include internal duties and taxes such as sales, turnover or consumption taxes, imposed otherwise than in respect of the importation or exportation of goods.*”²⁰⁴ Since these council fees are based neither on the importation nor on the exportation of goods, this provision is not applicable.

b) Application of abolished taxes at the border

The application of abolished taxes at the border could be 'other charges of equivalent effect' within the meaning of Article 2(4)(a) of the Customs Union Protocol which are defined as “*any tax, surtax, levy or charge imposed on imports and not on like locally produced products and does not include fees and similar charges commensurate with the cost of services rendered.*”²⁰⁵ But under Article 2(4)(a) of the Customs Union Protocol only such customs duties and charges which are 'based on the legislation' in the Partner State have to be eliminated. Since these taxes have already been abolished

²⁰² Article 75(6) of the Customs Union Protocol.

²⁰³ Article 75(5) of the Customs Union Protocol.

²⁰⁴ Article 1 of the Customs Union Protocol, page 4.

²⁰⁵ Article 1 of the Customs Union Protocol, page 6.

they are no longer to be applied at the border and therefore not 'based on the Kenyan legislation'. Such illegitimate demands for payments are comparable with the demand at the border to pay bribes. But, the object and purpose of Article 2(4)(a) of the Customs Union Protocol is to prevent any impediments to intra-EAC trade through the introduction of duties and charges or the increase thereof for protectionist purposes. Such illegitimate demands for payments, however, fall under other provisions of the EAC Agreements, such as Article 2(4)(b) of the Customs Union Protocol.

c) Conclusion

Uganda therefore does not have any claims against Kenya under Article 75(4) of the Treaty and Article 2(4)(a) of the Customs Union Protocol because of the local council fees or the application of abolished taxes at the border.

4. Conclusion

Article 6(1) of the Common Market Protocol calls in combination with Article 39 and Article 2(4)(b) of the Customs Union Protocol for the free movement of goods and, in doing so, also for the freedom of transit within the EAC.

According to these provisions all laws, regulations, administrative and technical requirements – other than tariffs – imposed by Kenya on transit of Ugandan goods in transit are to be abolished by the respective Partner States.

The Kenyan restrictions to Ugandan transit through Kenya are inconsistent with the free movement of goods as stipulated under the law of the EAC.

In addition to that, the ban of Ugandan carriers to transport goods on their way back if only a transit licence has been issued to them and the frequent practice of the Kenyan police not to allow trucks which are not registered in Kenya to transport goods are also inconsistent with Article 90(t), Article 90(u) and Article 90(v) of the Treaty.

Thus, Uganda could initiate proceedings in front of the EAC Court of Justice against Kenya in order to eliminate the Kenyan restrictions.

Chapter 4 - Consistency of the Kenyan restrictions with Article V of GATT 1994

In contrast to the EAC Agreements, GATT of 1994 contains with Article V a provision which explicitly deals with goods in transit. As the title 'freedom of transit' indicates, Article V of GATT 1994 calls for freedom of transit through the territory of each member to or from the territory of another member on the most convenient route. In addition to that, it also regulates (via Article V:2 to V:4 of GATT 1994) which conditions a member can impose to goods transiting through its territory to a foreign destination: These conditions must (i) not cause any unnecessary delays or restrictions to traffic in transit; (ii) not impose any unreasonable charges; and (iii) accord the same treatment to transiting goods of all Members. Article V of GATT 1994 is applicable in the present case since both Kenya and Uganda are Members of the WTO.²⁰⁶

The Kenyan restrictions could thus also be inconsistent with the Kenyan obligations under Article V of GATT 1994. Should this be the case, Uganda would be entitled to request consultations with Kenya in accordance with Article XXII:1 of GATT 1994 and – should these be in vain – request the establishment of a panel pursuant to Article 4.7.f. of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO (also sometimes called Dispute Settlement Understanding, hereinafter referred to as the „DSU“).

Up to now, there exists only one panel decision in regard to Article V of GATT 1994 so the drafting history of this agreement could be important for the interpretation of this provision.

1. Negotiating history of Article V of GATT 1994

There have been several attempts to regulate the traffic in transit before Article V of GATT 1994 came into force. The first legal framework in this respect was the Convention and Statute on Freedom of Transit or the so-called Barcelona Convention (hereinafter referred to as the „Barcelona Convention“),²⁰⁷ which dealt with the conditions a state could apply to goods transiting through its territory destined for another state. The wording of Article V:1 and V:2 2nd sentence of GATT 1994 is even based on the corresponding provisions of the Barcelona Convention.²⁰⁸

In 1944, a conference was held on the establishment of a post-war international trading system in Bretton Woods, New Hampshire (the so-called „Bretton Woods Conference“) where the founding of international institutions such as the World Bank, the International Monetary Fund and also of the International Trade Organisation (also called „ITO“) was discussed.²⁰⁹ Part of these negotiations regarding the founding of the ITO was also the freedom of transit: The

²⁰⁶ See http://www.wto.org/english/thewto_e/countries_e/uganda_e.htm and http://www.wto.org/english/thewto_e/countries_e/kenya_e.htm.

²⁰⁷ Convention and Statute on Freedom of Transit, Barcelona, dated 29, 1921 (UN Document E/PC/C.II/54/Rev. 1), also see Neufeld N 'Article V of the GATT 1994 – Scope and application' (2005), page 2.

²⁰⁸ 7.394 of the Panel Report.

²⁰⁹ Pryles M et al. *International Trade Law: Commentary and Materials*, Second Edition (2004), pages 684 f.; Matsushita M et al. *The World Trade Organisation – Law, Practice and Policy* (2003), pages 1 f.

United States of America presented a 'Suggested Charter for an International Trade Organisations of the United Nations' which, in Article 10, called for the freedom of transit. The Technical Subcommittee subsequently commented this draft text of the United States in a report.²¹⁰ With respect to Article 10 of the Suggested Charter, this report points out that the Barcelona Convention's definition of traffic in transit was taken into account during these negotiations.²¹¹

These negotiations were continued by about 23 countries in Lake Success, New York, and Geneva in 1947. On the Geneva conference, inter alia, the preparation of a draft ITO charter, schedules for tariff reductions as well as a multinational treaty providing for the general principles of trade was decided. The negotiations regarding the latter two were completed by the end of 1947, whereas the final work on the draft ITO charter was postponed to the following year.²¹²

Another negotiation round was held between November 1947 and March 1948 in Havana where in particular the draft ITO charter was to be discussed. Article 33 of the so-called draft Havana Charter for an International Trade Organisation (hereinafter referred to as the „Havana Charter“) dealt with the freedom of transit.²¹³ The text of Article 33 of the Havana Charter was based on the Suggested Charter for an International Trade Organisations of the United Nations.

At that time, however, a shift of the balance of power in the Congress of the United States of America began to loom. After that it was expected that Congress would not support the founding of the ITO anymore. Since the consent of the United States of America was crucial for the establishment of the ITO, the governments participating in the negotiations decided to bring the already agreed tariff cuts and the GATT provisionally into force before the final round of negotiations to found the ITO were completed in order to save at least the outcome of the respective negotiations.²¹⁴ As a consequence thereof, they adopted the Protocol of Provisional Application to the General Agreement on Tariffs and Trade (hereinafter referred to as „GATT 1947“) which was signed by 23 negotiating countries bringing provisionally into force the tariff cuts and the GATT 1947 on and after 1 January 1948.²¹⁵

Further negotiations for the founding of the ITO, back then, were put on hold even though the contracting parties had agreed on the final text of the ITO charter and thereafter never started again because it became apparent that the Congress of the United States of America would not

²¹⁰ Preparatory Committee of the International Conference on Trade and Employment, Report by the Technical Subcommittee, dated 28 November 1946 (UN Document E/PC/T/C.II/54/Rev.1, (hereinafter referred to as the „Technical Sub-Committee Report“).

²¹¹ Technical Sub-Committee Report, page 7.

²¹² Pryles M et al. *International Trade Law: Commentary and Materials*, Second Edition (2004), pages 684 f.; Matsushita M et al. *The World Trade Organisation – Law, Practice and Policy* (2003), pages 2; Bhala R *International Trade Law: Theory and Practice*, Second Edition (2001), page 127.

²¹³ Neufeld N 'Article V of the GATT 1994 – Scope and application' (2005), page 2.

²¹⁴ Pryles M et al. *International Trade Law: Commentary and Materials*, Second Edition (2004), pages 684 f.; Matsushita M et al. *The World Trade Organisation – Law, Practice and Policy* (2003), pages 2 f.; Bhala R *International Trade Law: Theory and Practice*, Second Edition (2001), page 127.

²¹⁵ Available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

grant its necessary approval²¹⁶ and the other negotiating states were, as a consequence thereof, not willing to introduce a global trading system without the participation of the United States of America, at that time the largest economy in the world.²¹⁷

Due to its provisional character, GATT 1947 lacked the necessary framework for the work of an international institution: Neither did it call for any provisions regarding its institutions or procedures nor did it contain any regulation on GATT's authority or legal status.²¹⁸ To cure these 'birth defects' the member states decided to revise GATT 1947 during the so-called "Uruguay round".²¹⁹ The new World Trade Organisation was then finally founded in 1995 with the coming into force of the Marrakesh Agreement Establishing the World Trade Organisation (hereinafter referred to as the „WTO Agreement“). Annex 1A of the WTO Agreement consists of the current applicable GATT 1994 and various other agreements. GATT 1994 consists of the text of GATT 1947 which has been amended in certain provisions.²²⁰

The texts of GATT 1947 - and thus also GATT 1994 - were based on the Article 33 of the Havana Charter. However, there exist several differences in regard to these texts, mainly in regard to (i) the definition of traffic in transit,²²¹ and (ii) the respective interpretative notes: Article V of GATT 1994 has an interpretative note which has not been part of the Havana Charter which in contrast contained three interpretative notes to its Article 33 which were not carried into GATT.

2. Interpretation of Article V of GATT 1994

Even though every day goods are trafficking through numerous countries all over the world on their way to their destination which are in some cases also subject to transit restrictions, only a handful of trade disputes have been brought before the GATT or the WTO. All of these disputes, however, have been settled between the respective parties in mutual agreements in various stages of the dispute settlement procedure and have, therefore, not resulted in a panel report.²²²

In 2009, finally, a trade dispute between Panama and Columbia regarding various Columbian customs measures to Panama exports of textiles, apparel and footwear, such as the use of

²¹⁶ Pryles M et al. *International Trade Law: Commentary and Materials*, Second Edition (2004), pages 684 f.; Matsushita M et al. *The World Trade Organisation – Law, Practice and Policy* (2003), pages 2 f.

²¹⁷ Evan MD *International Law* (2010), page 732.

²¹⁸ Pryles M et al. *International Trade Law: Commentary and Materials*, Second Edition (2004), pages 685; Matsushita M et al. *The World Trade Organisation – Law, Practice and Policy* (2003), page 3.

²¹⁹ Matsushita M et al. *The World Trade Organisation – Law, Practice and Policy* (2003), pages 6 ff.

²²⁰ See Article 1(a) of GATT 1994.

²²¹ Footnote 684 of the Panel Report, page 173.

²²² See Neufeld N 'Article V of the GATT 1994 – Scope and application' (2005), pages 7ff., referring to the following disputes: *Germany – Ban of Austrian vans during the night* (DS14/1,C/M/241); *United States – Ban on goods and vessels to or from Cuba* (WT/DS38/2); *Slovak Republic – Transit of cattle* (WT/DS/133); *United States – Entry and transit of Canadian trucks* (WT/DS/144); *Chile – Prohibition to unload swordfish in ports* (ET/DS193/3 and WT/DS193/3); and *Croatia – Ban on road transit of oil and oil products* (G/C/W/346 and G/C/W/360).

indicative prices in customs procedures and restrictions on ports of entry available for Panaman exporters of these goods, has been decided by a WTO Panel.²²³

Recently, another case concerning Article V of GATT 1994 was pending at the WTO: India and Brazil had requested consultations with the European Union in regard to Indian produced generic medicines which were destined for Brazil, but have been seized on grounds of patent infringement when transiting through the Netherlands.²²⁴ The central issue of this case is whether or not the freedom of transit also protects generic medicines which infringe patents or are suspected of such an infringement in the transit country although they are legal in the exporting and importing countries. Up to now, other countries have requested to join this dispute as a third party, such as Turkey,²²⁵ Canada,²²⁶ Ecuador,²²⁷ China,²²⁸ and Japan,²²⁹ which has been accepted by the European Union.²³⁰ However, in the following, no panel has been established as the parties of that dispute, again, reached a mutually agreed solution to the matter.²³¹

In front of this background, the panel decision, Columbia - Indicative Prices and Restrictions on Ports of Entry (hereinafter referred to as the "Panel Report", and the panel as the „Panel"), is, up to now, the only guideline for the interpretation of Article V of GATT 1994. The Panel noted in this respect that since Article V has never been interpreted by a WTO panel *"the Panel's task is therefore arduous since it will be necessary to interpret Article V of the GATT 1994 without any meaningful guidance."*²³² Subsequently, the Panel therefore analysed Article V of GATT 1994 *"in accordance with the principles of treaty interpretation set for the in the VCLT"*²³³.²³⁴

2.1. Systematic of Article V of GATT 1994

Article V of GATT 1994 consists of seven paragraphs and has – briefly summarised – the following scheme:

- Article V:1 of GATT only provides for a definition of 'transit in traffic' and has furthermore no further regulatory content;²³⁵
- Article V:2 1st sentence of GATT 1994 calls for the general freedom for goods in transit,²³⁶

²²³ Columbia – Indicative Prices and Restrictions on Ports of Entry, Report of the Panel dated 27 April 2009, WTO/DS366/R (hereinafter referred to as „Panel Report").

²²⁴ See the respective requests for consultations for India (WT/DS408/1) and Brazil (WT/DS409/1).

²²⁵ WT/DS408/5.

²²⁶ WT/DS408/2.

²²⁷ WT/DS408/4.

²²⁸ WT/DS408/6.

²²⁹ WT/DS408/7.

²³⁰ WT/DS408/8.

²³¹ Mercurio, Bryan *"Seizing' Pharmaceuticals in transit: Analyzing the WTO dispute that wasn't"* (2012)

²³² 7.388 of the Panel Report.

²³³ I.e. the Vienna Convention on the Law of Treaties.

²³⁴ 7.389 and 7.444 of the Panel Report.

²³⁵ 7.392 of the Panel Report (in particular footnote No. 680).

²³⁶ 7.387 and 7.443 of the Panel Report.

- Article V:2 2nd sentence and Article V:5 of GATT 1994 contain most favoured nation clauses for goods in traffic and for all charges and regulations imposed on traffic in transit;
- Article V:3 of GATT 1994 further substantiates the obligation under Article V:2 1st sentence of GATT 1994 determining that traffic in transit shall not be subject to unnecessary restrictions or delays and only to charges caused by the transit, whereas Article V:4 of GATT 1994 provides that such delays and restrictions must be reasonable;
- Article V:6 of GATT 1994 generally extends this most favourite nation protection to member's goods which have been in transit once they have reached their final destination;²³⁷ and
- Article V:7 clarifies that the provisions of Article V of GATT 1994 do not apply to the operation of aircraft in transit but to air transit of goods.

However, it has to be pointed out that the Panel remains silent in respect to the interpretation of paragraphs V:3 and V:4 of GATT 1994 and their relationship to paragraph V:2 of GATT 1994. But, pursuant to the systematic of Article V of GATT 1994, Article V:2 1st sentence of GATT 1994 contains the general provision for the freedom of transit whereas the paragraphs V:3 and V:4 contain a particular regulation for the circumstances stated therein. As a general principle of law, however, these particular provisions – as “*leges speciales*” – have to be applied prior to the general provision of paragraph V:2 1st sentence.²³⁸

2.2. Interpretation of Article V:2 of GATT 1994

As already mentioned above, Article V:2 of GATT 1994 contains two different obligations: The first sentence provides for the general freedom of transit whereas the second one calls for the most favourite nation treatment for goods in traffic.

The Panel applies the principles of the Vienna Convention to Article V:2 and considers this provision “*in accordance with its ordinary meaning in its context and in light of its object and purpose where necessary [...] including the travaux préparatoires to inform its interpretation.*”²³⁹

However, after having examined the preparatory material of (i) the Barcelona Convention, (ii) the Suggested Charter for an International Trade Organisations of the United Nations and the respective report by the Technical Subcommittee (iii) as well as the Havana Charter for an International Trade Organization, the Panel comes to the conclusion that this material is not of any assistance for the interpretation of Article V:2.²⁴⁰ It thus continues to interpret Article V:2 of GATT 1994 by applying the other means of the Vienna Convention.

²³⁷ 7.465 of the Panel Report.

²³⁸ Zorzetto, Silvia 'The *lex specialis* principle and its uses in legal argumentation – An analytical inquire' (2012)

²³⁹ 7.389 of the Panel Report.

²⁴⁰ 7.394 ff., in particular 7.396 of the Panel Report

It has to be noted that, according to the Vienna Convention, the preparatory material is only to be considered if the other means of interpretation do not produce any results, i.e. that the Panel examined the preparatory material prematurely. However, it does not make a difference in this case, since the preparatory material is not of further assistance whereas the other means of interpretation are:

2.2.1. Obligation under Article V:2 1st sentence of GATT 1994

According to the Panel, Article V:2 1st sentence of GATT 1994 contains three elements²⁴¹:

a) Freedom of transit

The Panel follows Panama's argumentation that 'freedom' means 'the unrestricted use of something' and that the first part of the 1st sentence thus calls for unrestricted transit traffic through the territory of each contracting party.²⁴²

b) On the most convenient routes

However, this obligation is then limited by the intermediate clause of the 1st sentence according to which this freedom of transit only has to be granted on the most convenient routes.²⁴³

It has to be noted that the Panel interprets the term 'the most convenient routes' in a dynamic sense, i.e. they not only have to be the most convenient routes at their opening, but also in the time thereafter. Should new routes be available in the future, which are more convenient than the already existing ones, the respective member has to adjust its transit routes to meet the needs of international transit.²⁴⁴

c) For traffic in transit

The remainder of the 1st sentence then determines that there shall be freedom of transit for 'traffic in transit'. The term 'traffic in transit' is defined in the preceding Article V:1 of GATT 1994 which reads as follows:

"Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".

Pursuant to the Panel, this provision seems sufficiently clear on its face, if read as a whole and objectively: „When applied to Article V:2, 'freedom of transit' must thus be extended to all traffic in transit when the goods' passage across the territory of a Member is only a

²⁴¹ 7.400 of the Panel Report.

²⁴² 7.399 f. of the Panel Report.

²⁴³ 7.400 of the Panel Report.

²⁴⁴ 7.401 of the Panel Report.

portion of a complete journey beginning and termination beyond the border of the Member beyond whose territory the traffic passes. Freedom of transit must additionally be guaranteed with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport."²⁴⁵

d) Conclusion

Considering the ordinary meaning of the term 'freedom' and the wording of Article V:2 1st sentence of GATT 1994 in the light of Article V:1 of GATT 1994, the Panel then finally concludes, *„that the provision of 'freedom of transit' pursuant to Article V:2, first sentence requires extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport. Accordingly, goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country.*"²⁴⁶

2.2.2. Most favourite nation obligation under Article V:2 2nd sentence of GATT 1994

In regard to Article V:2 2nd sentence of GATT 1994 the Panel first establishes that its text does not explicitly refer to transit in traffic but that is sufficiently clear from the text that the most favourite nation obligation of this provision is closely related to the obligation to extend freedom of transit in the first sentence.²⁴⁷

According to the Panel, the obligation of Article V:2 2nd sentence of GATT 1994 therefore complements the protection under the 1st sentence of Article V:2 of GATT 1994 prohibiting *„members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or the vessel of the goods.*"²⁴⁸ It finally concludes that *„goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international traffic.*"²⁴⁹ In any case, Article V:2 2nd sentence is not applicable in the present case because the Kenyan restrictions do not discriminate between the Ugandan and other non-Kenyan carriers.

2.2.3. Most favourite nation obligation Article V: 6 of GATT 1994

Pursuant to the Panel, Article V:6 of GATT 1994 generally extends the most favourite nation protection to a member's goods which have been in transit, i.e. once they have arrived in a member's territory of their final destination.²⁵⁰ However, Article V:6 of GATT 1994 is not applicable in the present case since the Kenyan restrictions only hinder the transport of Ugandan goods on their way to their final destination, i.e. which are still in transit.

²⁴⁵ 7.396 of the Panel Report.

²⁴⁶ 7.401 of the Panel Report.

²⁴⁷ 7.396 of the Panel Report.

²⁴⁸ 7.402 of the Panel Report.

²⁴⁹ 7.402 of the Panel Report.

²⁵⁰ 7.443 and in particular 7.465 ff. of the Panel Report.

2.3. Consistency with Article V:3 of GATT 1994

The Kenyan restrictions to the Ugandan transit of goods through Kenya could be inconsistent with Article V:3 of GATT 1994.

2.3.1. Interpretation of Article V:3 of GATT 1994

The Panel did not have to apply Article V:3 and V:4 of GATT 1994 since the Columbian measures in question only referred to the port of entry restrictions. The Panel Report is therefore silent about the interpretation of paragraph V:3 and V:4 and only examines whether the Columbian measures are consistent with the general obligation under V:2 1st sentence, 2nd sentence and V:6. However, since the former provisions contain the more particular regulation they have to be examined prior to Article V:2 of GATT 1994. In the following, the means of the Vienna Convention will be applied.

2.3.2. Obligations under Article V:3 of GATT 1994

Pursuant to its wording, the opening text of this provision simply reaffirms that freedom of transit only has to be granted on certain routes and a member thus can require that transit traffic enters its territory at the proper customs house.

The intermediate clause then calls – as a general rule – for (i) the unrestricted transit of the goods, i.e. the right of a member to transport goods through another member state without being subject to any unnecessary delays or impediments, and (ii) the exemption of traffic in goods from customs duties. These obligations, however, do not apply in the case of failure to comply with the applicable customs law and regulations of the transit member, i.e. only regular transit is subject to the conditions of Article V:3 of GATT 1994.

In regard to the latter obligation – (ii) – the remainder of Article V:3 of GATT 1994 then exempts from the obligation to guarantee unrestricted transit of goods two charges a Member may legitimately impose on traffic in transit which are (i) charges for transportation and (ii) for administrative expenses resulting from transit or services rendered in this respect.

It has to be noted that Article V:3 of GATT 1994 has to be read in connection with paragraph V:4 which provides as follows: *"All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic."* Article V:4 of GATT 1994 thus determines that the charges and regulations, which can, as an exemption, be imposed on traffic in transit, (i) must have been caused by this traffic and (ii) in addition to that must be reasonable. The term 'charges' in this context is to be interpreted as to include charges for transportation by government owned railways or other government owned modes of transportation.²⁵¹

²⁵¹ Sheikhan, Pegah 'Trade Facilitation in the Multilateral Trading System – An Analysis of the Doha Round Negotiations on Trade Facilitation' (2008), page 28.

2.3.3. Interpretation of the term 'unnecessary'

The Panel Bodies of the WTO have not yet commented on the meaning of the term 'unnecessary' in Article V of GATT 1994, but they have interpreted various other provisions in the WTO law referring as well to the term 'necessary', such as Articles XX and XXI of GATT 1994,²⁵² Articles VI:4 and XIV of GATS, Article 2 of the TBT Agreement,²⁵³ Articles 2.2 and 5.6 of the SPS Agreement.²⁵⁴

In these cases the Panel Bodies applied a so-called 'necessity test' balancing two important goals within the WTO law: On the one hand, they guarantee a member's right to regulate and pursue his or her own policy objectives and, on the other hand, they prevent undue trade restrictions by requiring that trade restrictive measures are only allowed in case they are 'necessary' to achieve this goal.

These necessity tests applied by the Panel Bodies, therefore, usually contain three elements: (i) the measure at issue, (ii) the objective, which the measure is aimed to achieve, and (iii) the link between this measure and this objective, the necessity of the measure to achieve the objective.²⁵⁵

However, it has to be pointed out, that the Panel Bodies consistently stressed that, even though some provisions have the same or a similar text, the interpretation of 'necessary' of a panel body of one provision cannot be automatically applied to another provision, but that each Article in the WTO law has to be interpreted individually in line with the customary rules of interpretation in international law as stated in the Vienna Convention, considering its ordinary meaning in its context and in the light of its object and purpose.²⁵⁶ One reason for this is the different nature of these provisions, some of which create an obligation for the members, whereas others formulate an exception to such an obligation. Since exceptional rules are, as stated above, to be interpreted narrowly the range of objectives a measure may seek is generally more limited and fundamental in nature and the degree of necessity to be achieved in order to be necessary is higher, whereas they are more open respectively lower in obliging provisions.²⁵⁷ Furthermore, also the burden of proof usually differs in obliging and exceptional provisions: In the former case, it is on the complainant to prove that all requirements of the respective provision are met, whereas in the latter case the respondent has to prove that the requirements of the exceptional provision are met.

²⁵² See for example the following reports: Appellate Body Report – United States – Standards for Reformulated and Conventional Gasoline; Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos Containing Products; Appellate Body Report, Korea – Measures affecting Imports of fresh, chilled and frozen Beef; Panel Report, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes; Panel Report United States – Section 337 of the Tariff Act of 1930.

²⁵³ Appellate Body Report, European Communities – Trade Description on Sardines.

²⁵⁴ Appellate Body Report, Australia – Measures Affecting Importation of Salmon.

²⁵⁵ World Trade Organisation '*Necessity tests in the WTO*' (2003), page 2.

²⁵⁶ See Chapter 4 lit. 2 above.

²⁵⁷ World Trade Organisation '*Necessity tests in the WTO*' (2003), page 2.

Article V:3 of GATT 1994 further substantiates the basic obligation of Article V:2 1st sentence of GATT 1994 regulating which conditions a member may impose on transit in traffic: It entitles a member to require from another member that its transit traffic is not subject to any unnecessary delays or restrictions and be exempt from customs charges. Therefore, it both creates a new obligation for the members and also exempts the necessary transit delays and restrictions from the basic obligation in paragraph V:2. As far as it constitutes an exception, i.e. in regard to the necessary delays and restrictions, it thus has to be interpreted narrowly.

Also the context of Article V:3 of GATT 1994 calls for a narrow interpretation: This Article is headed 'freedom of transit' and the previous paragraph calls for freedom of transit.

Furthermore, the Preamble of GATT 1994 implies a narrow interpretation: According to the Preamble of GATT 1994 the signatories recognized "*that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,*" and were thus „*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.*" A substantial reduction of other barriers to trade can, however, only be achieved, if the exceptions to the agreed obligations are interpreted narrowly to prevent their misuse.

The objective and purpose of Article V:3 of GATT 1994 as well requires a narrow interpretation of that provision. Article V:3 of GATT 1994 shall solve the conflict of interests between, on the one hand, the legitimate right of a member to secure that the traffic in transit through its country corresponds with its laws and regulations and, on the other hand, the right of the other members to transport goods through that country without being subject to any unnecessary restrictions and delays. This conflict has to be resolved by limiting the permissible delays and restrictions to the measures which are essential for the proper handling of the transit goods.

If interpreted narrowly, however, a delay or restriction is therefore only not 'unnecessary', i.e. necessary, if it (i) seeks to achieve a substantial objective and (ii) is on the continuum of necessity more on the side of 'being indispensable'.

3. Consistency of the Kenyan restrictions with Article V:3 of GATT 1994

The Kenyan restrictions could be inconsistent with Article V:3 of GATT 1994.

3.1. Article V:3 1st alternative of GATT 1994

Article V:3 1st alternative of GATT 1994 determines that the traffic in transit shall not be subject to any unnecessary delays.

3.1.1. The proper customs house

The goods destined for Uganda from third countries or vice versa generally are transported on the Northern Corridor, which is the most convenient route in that region, and thus enter Kenya on the proper customs houses.

3.1.2. Traffic in transit subject to any unnecessary delays?

Several of the Kenyan restrictions could result in unnecessary delays for the Ugandan traders:

3.1.2.1. Kenyan police only allows trucks registered in Kenya to transport goods destined to Tanzania on their way through Kenya

This frequent practice by the Kenyan police therefore has to result in delays which are unnecessary in order to be inconsistent with Article V:3 1st Alternative of GATT 1994.

a) Delays as a consequence of repacking

The ban of the Kenyan police for trucks not registered in Kenya to transport goods coming from Uganda destined to Tanzania and vice versa results in significant delays in case Ugandan carriers have to reload their goods on Kenyan registered trucks.

b) Unnecessary

This practice of the Kenyan police is not necessary and thus inconsistent with Article V:3 of GATT 1994. Kenya has up to now not provided any reasons for this practice. One objective for this practice mentioned unofficially in this respect is the prevention of business loss for Kenyan carriers in case carriers from other Partner States undertake transit transport.²⁵⁸ However, this objective is not sufficient to make this practice a necessary and thus permissible measure: As stated above, only substantive objectives, such as the protection of the life or health of the member's citizens or of the national security, can justify such a measure. Yet, the mere pecuniary interests of its carriers by giving them a competitive advantage over their competitors from neighbouring countries, is, in general, not such a substantive objective.

This applies even more so as this practice is also inconsistent with the Kenyan obligations under the EAC Agreements ratified by Kenya to guarantee freedom of transit, the same opportunities for all carriers of all Partner States or to eliminate non-tariff barriers.²⁵⁹ Kenya is obliged under Article 8(2) of the Treaty to "*secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty.*" Since this measure is also inconsistent with the Kenyan obligations under the EAC Agreements it can, as stated above, therefore, not be necessary. Only a measure consistent with these Agreements can be necessary. Otherwise, Kenya's behaviour

²⁵⁸ Ihiga Simon 'Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC' (2009), page 46.

²⁵⁹ See Chapter 3 lit. 3.3.3.1. b) bb) and 3.3.3.2 above.

would be conflicting and contradictory to its own obligations under the EAC Agreements.

Last but not least, also a weighing and balancing of the interests of the parties involved leads to the conclusion that this measure cannot be not necessary: The objective to protect the mere pecuniary interests of the Kenyan carriers, which stands in contradiction to the aims and objectives of the EAC Agreements and the WTO law, has to stand back behind the objective of fair trade and the interests of the Ugandan carriers to transport their goods as unrestrictedly as possible in order to be able to compete with the Kenyan carriers. With that practice in place fair competition is not possible, since the Ugandan carriers have additional costs they have to pass on to their customers. This impact of that Kenyan procedure, therefore, is out of proportion to its objective as a consequence of which it cannot be necessary as provided in Article V:3 1st Alternative of GATT 1994.

3.1.2.2. The auctioning of the Ugandan goods after lapse of the warehousing period

The auctioning of goods makes it impossible for Ugandan transporters to deliver their goods in time and thus also results in delays. This practice is as well 'not necessary' and thus inconsistent with Article V:3 1st Alternative of GATT 1994.

Kenya up to now has not submitted a reason for this measure. However, it has indicated that this measure is needed to decongest the port of Mombasa.²⁶⁰ This objective, however, is not a substantive objective within the meaning of Article V:3 of GATT 1994: The aim to decongest of the port is not comparable to the objective to protect the Kenyan citizens or their health. And, in addition to that, a state has to provide itself with the means to implement its policies, so the lack of doing so, cannot be used to justify its inconsistent behaviour. By this practice, however, Kenya transfers the burden of the ineffective port of Mombasa on to the Ugandan traders whose goods are auctioned even though the lapse of the grace period is in most cases not their own fault but rather caused by ineffective port and rail services in Kenya.

Furthermore, Kenya could apply other measures, that are less restrictive to trade, to solve this problem, in particular it could provide for more warehouse space at the harbour and for more effective port, customs and rail services. Alternatively, it could also extend the grace period to a more reasonable time period as it is provided for under Article 42(1) of the Customs Management Act, which calls for the lapse of another 30 days after notice has been given before the goods may be auctioned, and therefore also is violated by this practice.

But even if one would assume that no such alternatives exist, this practice would also be unnecessary after weighing and balancing the importance of the common interests or values protected by that regulation and the accompanying impact of the measure on the transit goods. This practice aims to decongest the port. On the other hand, the auctioning of goods is the

²⁶⁰ Ihiga Simon 'Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC' (2009), page 59.

most possible impairment of the rights of the importer: He loses the ownership of his goods and has to re-order them. It has to be pointed out in this context that in most cases the longer remaining of the goods is not the failure of the importer but rather a result of slow clearance at the port or lack of railway wagons. The importer's rights are thus affected in their essential component whereas the interests of the Kenyan customs are only affected peripherally. Therefore, the importer's rights have to be weighed more than the ones of the customs. Also for this reason and as a consequence this practice is unnecessary.

3.1.2.3. The other Kenyan restrictions

The other Kenyan restrictions do not result in significant delays for the transit of the Ugandan goods through Kenya and thus do not conflict with Article V:3 1st alternative of GATT 1994.

3.2. Article V:3 2nd alternative of GATT 1994

But the Kenyan measures could also constitute unnecessary restrictions according to Article V:3 2nd alternative of GATT 1994. Pursuant to its ordinary meaning a restriction is something that limits something else, in the present case the Ugandan trade.²⁶¹

3.2.1. Auctioning of Ugandan goods after lapse of warehousing period

As stated above,²⁶² the auctioning of Ugandan goods after lapse of the warehousing period by Kenyan customs is conceivably the most serious impairment, and thus constitutes a restriction to Ugandan transit since the Ugandan traders lose their goods and have to re-order them. This practice is also unnecessary since there are other less trade restricting alternatives for Kenya at hand and the Ugandan affected interest outweighs the Kenyan ones.²⁶³

3.2.2. Kenyan police only allows trucks registered in Kenya to transport goods through Kenya on their way to Tanzania

Also this Kenyan practice restricts the transit of Ugandan goods through Kenya to Tanzania since the Ugandan transporters lose time and money for the re-packing of the goods. In addition to that, it is as well unnecessary.²⁶⁴

3.2.3. No back haulage allowed by Kenya for Ugandan transit trucks

The ban on Ugandan transporters to transport goods on their way back if only a transit licence has been issued by the Kenyan authorities, too, restricts the Ugandan transit through Kenya making the transport of transit goods through Kenya more expensive.

This practice is also unnecessary. Kenya also has, up to now, not submitted any reason for this practice, but a protectionist background seems to be likely, i.e. that Kenya wants to give their carriers another advantage over their competitors from other Partner States by keeping them

²⁶¹ Ihiga Simon 'Monitoring Mechanism for Elimination of Non-Tariff Barriers' in EAC (2009), page 59.

²⁶² See D.4.4.1.a) above.

²⁶³ See Chapter 4. lit. 3.1.2.2 above.

²⁶⁴ See Chapter 4. lit. 3.1.2.1 b) above.

away from their domestic market. This objective, however, is not a substantive one as requested to pass the necessity test of this provision.²⁶⁵ Furthermore, this practice is also inconsistent with EAC law and therefore unnecessary within the meaning of Article V:3 of GATT 1994.²⁶⁶ Finally, also the interests of the Ugandan traders of an unrestricted and fair trade and transportation through Kenya outweigh the Kenyan interests to protect the mere pecuniary interests of its transporters.

3.2.4. Local council fees applied to Ugandan transit cargo

This practice by the Namanga District Council also restricts the Ugandan transit through Kenya since it results in additional costs for Ugandan transporters and traders.

These council fees are not a charge for transportation in the meaning of the remainder of Article V:3 of GATT 1994 and therefore not permissible as an exemption: Pursuant to its ordinary meaning a charge for transportation is the return for the carriage of goods from one place to another, i.e. a member can only claim charges for transportation if it provides transportation services for the goods transiting through its country. This reading of paragraph V:3 of GATT 1994 also is backed up by the object and purpose of that provision, namely to balance the interest of the member to unrestrictedly transport goods through other member states and the interests of the transit member to secure the application of its laws and regulations and to get reimbursed for its respective costs, subject that these are reasonable. However, these council fees are not raised in connection with the provision of such transportation services, and this exception is, thus, not applicable.

These council fees can also not be qualified as administrative expenses entailed by transit. This alternative covers from its ordinary wording all administrative costs to build and maintain the transit infrastructure and for other administrative services rendered in connection with the transit of goods. However, since the underlying Kenyan act explicitly does not cover traffic in transit, these fees cannot be administrative fees caused by transit and this exception can therefore not be applied.

These fees are also unnecessary, because they are inconsistent with the Kenyan law, since according to the underlying act these fees shall not apply to transit goods. Also the weighing and balancing of the affected interests results in this measure being unnecessary: The Ugandan interest to transport goods through Kenya without being subject to unnecessary restrictions outweighs the Kenyan interest to enforce a measure inconsistent with its own laws.

3.2.5. Application of abolished taxes at the Kenyan border to Ugandan transit goods

Also the frequent practice to apply already abolished taxes at the Kenyan border to Ugandan transit goods restricts the Ugandan transit through Kenya due to the additional costs connected therewith.

²⁶⁵ See Chapter 4. lit. 3.1.2.1 b) above.

²⁶⁶ See Chapter 4. lit. 3.1.2.1 b) above.

This practice is unnecessary as well since under Kenyan law the Kenyan customs are not allowed to apply those abolished taxes anymore. Also the weighing and balancing of the affected interests results in this measure being unnecessary: The Ugandan interest to transport goods through Kenya without being subject to unnecessary restrictions outweighs the Kenyan interest to enforce a measure inconsistent with its own laws.

3.3. Conclusion

The Kenyan restrictions therefore are inconsistent with Article V:3 of GATT 1994.

4. Consistency of the Kenyan restrictions with Article V:2 1st sentence of GATT 1994

Since the Kenyan measures are inconsistent with the particular provision of Article V:3 of GATT 1994 they are automatically also inconsistent with the general and therefore broader obligation to guarantee freedom of transit under Article V:2 1st sentence of GATT 1994, i.e. its duty to extend unrestricted access via the most convenient routes to goods in transit.

5. Possible Kenyan defences

The Kenyan breach of its obligations under Article V of GATT 1994, however, could be justified if one of the exceptional provisions of GATT 1994 would be applicable.

5.1. Defence under Article XIX of GATT

The Kenyan restrictions cannot be justified under Article XIX of GATT 1994 which allows - under certain conditions - emergency actions on imports of particular products, since the Ugandan goods transiting through Kenya do not constitute such imports and this provision is therefore not applicable.

5.2. Defence under Article XXI of GATT 1994

Kenya can also not invoke Article XXI of GATT 1994 as a defence for its restrictions. According to this provision restrictions pertaining to national security are permitted. There is no obvious reason how the Kenyan restrictions can be related to the protection of essential Kenyan security interests.

5.3. Defence under Article XX(d) of GATT 1994

But the Kenyan restrictions could be permitted under Article XX(d) of GATT 1994. Article XX of GATT 1994, as a general exception, permits certain measures for particular purposes, such as the protection of public morals; the protection of human, animal, plant life or health. In the present case, however, only lit. d) could be applicable.

It has to be pointed out that pursuant to the established GATT case law, Article XX of GATT 1994 does not provide for new obligations itself, but instead calls for a list of general excep-

tions under which measures of a member, which are inconsistent with other obligations under the GATT 1994, are justified as an exception.²⁶⁷

The Appellate Body has consistently applied when examining, whether a measure is justified under Article XX of GATT 1994 or not, a two-tiered test:

„In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX.“²⁶⁸

In regard to paragraph XX(d) of GATT 1994 the Appellate Body stressed that two elements must be satisfied:

"For a measure, otherwise inconsistent with GATT 1994, to be justified provisionally under paragraph (d) of Article XX, two elements must be shown. First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.“²⁶⁹

With respect to the first element it has to be noted that pursuant to the established case law of the Appellate Body, the responding member's law will be treated as WTO consistent until proven otherwise.²⁷⁰

As for the second element, the Appellate Body has, over the years, established the following tests in order to examine whether or not a measure is necessary:

- **The 'reasonably available alternatives' test**

The Appellate Body has decided that a measure cannot be considered as 'necessary' within the meaning of Article XX of GATT 1994 *"if an alternative measure which [a Member] could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.“²⁷¹*

In this connection it has to be noted that the Appellate Body takes into account several factors to ascertain whether or not a suggested measure is reasonably available, such as (i) the importance of the value pursued by the measure at issue, (ii) the extent to

²⁶⁷ See Panel Report United States - Section 337 of the Tariff Act of 1930.

²⁶⁸ Appellate Body Report, US - Standards for Reformulated and Conventional Gasoline, page 22.

²⁶⁹ Appellate Body Report, Korea - Measures affecting Imports of fresh, chilled and frozen Beef, para. 157.

²⁷⁰ Appellate Body Report, US - Countervailing Duties on certain corrosion resistant carbon Steel flat Products from Germany, para. 157.

²⁷¹ Panel Report, United States - Section 337 of the Tariff Act of 1930, para. 5.26; Panel Report, Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, para. 74, Panel Report, EC - Measures Affecting Asbestos and Asbestos Containing Products, paras 7.211 ff.; Appellate Body Report, Korea - Measures affecting Imports of fresh, chilled and frozen Beef, paras. 166.

which the alternative measure contributes to the realisation of the end pursued, or (iii) the difficulties of implementation of this alternative measure.²⁷²

In regard to the first factor the Appellate Body has stressed that, in any case, the more vital or important the common interests or values pursued, the easier it will be to accept the measure as necessary to achieve these aims.²⁷³ As for the third alternative, the Panel Body held that the alternative measure can only be ruled out if it is shown to be impossible to be implemented, whereas an alternative measure does not cease to be reasonable only because of administrative difficulties.²⁷⁴

It has to be pointed out, that according to the established case law of the Appellate Body, the burden of proof that no such 'reasonably available alternative' exists is on the member invoking Article XX of GATT 1994,²⁷⁵ i.e. in our case on Kenya.

- **The 'weighing and balancing' test**

The Appellate Body introduced in its report '*Korea - Measures Affecting Imports of Fresh, Chilled and Beef*' another test, the so-called 'weighing and balancing' test. Looking first at the ordinary meaning of the term 'necessary', it concluded that there exists a certain range of necessity between being 'indispensable' on the one side and 'needed' or 'making a contribution to' on the other side of that range.²⁷⁶ The Appellate Body stressed in the following, that "*a necessary measure is [in the context of Article XX of GATT 1994], in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making contribution to.'*"²⁷⁷

According to the Appellate Body "*in every case a process of weighing and balancing of a series of factors" is to be conducted*" in order to determine the extent of necessity within the contemplation of Article XX of GATT 1994.²⁷⁸ The factors to be considered in this weighing and balancing may "*include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the*

²⁷² World Trade Organization '*WTO Analytical Index: Guide to WTO Law and Practice*' (2007), Article XX, para. 614 ff.; Panel Report, EC – Measures Affecting Asbestos and Asbestos Containing Products, paras 8.196 ff.; Appellate Body Report, Korea – Measures affecting Imports of fresh, chilled and frozen Beef, para. 157; Panel Report, US – Standards for Reformulated and Conventional Gasoline, paras. 6.26 ff.

²⁷³ Appellate Body Report, Korea – Measures affecting Imports of fresh, chilled and frozen Beef, para. 179.

²⁷⁴ Panel Report, US –, Standards for Reformulated and Conventional Gasoline paras. 6.26 ff.

²⁷⁵ Petersmann, Ernst-Ulrich '*International Trade Law and the GATT/WTO Dispute Settlement System*' (1997), page 334; Bhala, Raj '*International Trade Law: Theory and Practice*', Second Edition (2001), page 1626; World Trade Organization '*WTO Analytical Index: Guide to WTO Law and Practice*' (2007), Article XX, para. 580 ff.

²⁷⁶ Panel Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, paras 7.211 ff.; Appellate Body Report, Korea – Measures affecting Imports of fresh, chilled and frozen Beef, para. 161; Panel Report, Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain, paras 6.223 ff.; World Trade Organization '*WTO Analytical Index: Guide to WTO Law and Practice*' (2007), Article XX, para. 622.

²⁷⁷ Appellate Body Report, Korea – Measures affecting Imports of fresh, chilled and frozen Beef, para. 161.

²⁷⁸ Appellate Body Report, Korea – Various Measures on Beef, paras. 162 ff.; Appellate Body Report, Brazil – Measures affecting imports of retreaded Tires, paras. 151 ff. (in particular para 182).

common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."²⁷⁹

It has to be noted that the case law of the Panel Bodies regarding Article XX(b) of GATT 1994 can also be applied in the context of Article XX(d) of GATT since according to the established case law of the Panel Bodies the term 'necessary' in Article XX of GATT 1994 is to be interpreted in a uniform way, even though it refers to factually different situations²⁸⁰:

*"The Panel could see no reason why under Article XX the meaning of the term 'necessary' under paragraph (d) should not be the same as in paragraph (b). In both paragraphs the same term was used and the same objective intended: to allow contracting parties to impose trade restrictive measures inconsistent with the General Agreement to pursue overriding policy goals to the extent that such inconsistencies were unavoidable."*²⁸¹

In conclusion, a measure is, therefore, to be considered as 'necessary' if (i) there is an alternative measure available to that member, the member could be reasonably expected to employ and which is not inconsistent with other GATT provisions, or (ii) the process of weighing and balancing of the aforementioned criteria has to be conducted in order to determine whether a sufficient degree of necessity is given in the case in question.

Therefore, the Kenyan restrictions must be cumulatively (i) designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994 and (ii) necessary to secure such compliance.

5.4. Designed to secure compliance with GATT 1994 consistent laws or regulations

Pursuant to the burden of proof, Kenya has to prove that its restrictions are designed to secure compliance with laws and regulations that are themselves consistent with GATT 1994.²⁸² Up to now, Kenya has not identified any laws or regulations on which the restrictions at issue are based. Nevertheless, these measures are, in any case, not designed to secure compliance with laws and regulations which are themselves consistent with GATT 1994 and thus not justified under Article XX(d) of GATT 1994.

²⁷⁹ Appellate Body Report, Korea – Measures affecting Imports of fresh, chilled and frozen Beef, paras. 162 ff.

²⁸⁰ Petersmann, Ernst-Ulrich *'International Trade Law and the GATT/WTO Dispute Settlement System'* (1997), page 336.

²⁸¹ Panel Report, Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, para 74.

²⁸² Appellate Body Report, US – Measures Affecting Imports of Woven Wool Shirts and Blouses from India, page 16; Bhala, Raj *'International Trade Law: Theory and Practice'*, Second Edition (2001), page 1626.

5.4.1. Local council fees and application of abolished taxes at the border

As for the application of the local council fees and the application of abolished taxes at the border, these measures are not based on any laws or regulations applicable in Kenya.²⁸³ Hence, these Kenyan measures are not designed to secure compliance with a law or regulation.

5.4.2. Auctioning of Ugandan goods after lapse of warehousing period

With respect to the auctioning of Ugandan goods after lapse of the re-warehousing period, Kenya could possibly claim that this practice is supposed to ensure compliance with its customs warehousing procedures and practices. However, the respective provision in the Kenyan customs law entitling the Kenyan customs to auction the Ugandan goods after lapse of that period itself is inconsistent with Article V:3 of GATT 1994, because (i) it unnecessarily restricts Ugandan traffic in transit, (ii) there are less trade restrictive alternatives reasonably available to Kenya such as the improvement and extension of the existing port and rail infrastructure and (iii) it also violates Article 42(1) of the Customs Management Act.²⁸⁴

5.4.3. Remaining Kenyan restrictions

In regard to the other restrictions at issue, Kenya cannot claim that these are implemented to ensure compliance with its customs law since they do not relate in any form to the implementation of general customs procedures and practices, such as the clearance of goods or other formalities regarding the importation or exportation of goods. However, should there be a Kenyan laws or regulations, on which these measures are based, they would themselves in any case be inconsistent with Article V:3 of GATT because these laws and regulations themselves would unnecessarily restrict the Ugandan traffic.

5.4.4. Conclusion

Thus, there are no WTO consistent Kenyan laws and regulations, whose compliance shall be secured by the Kenyan restrictions. Consequently, the first element of Article XX(d) of GATT is not given with respect to the Kenyan restrictions in the present case.

5.5. Necessary to secure such compliance

However, even if one would assume that there are WTO law consistent laws and regulations the compliance of which shall be secured by the Kenyan restrictions, these measures would, in any case, not be necessary to secure such compliance.

Considering the aforementioned principles of the Panel Bodies with respect to the necessity tests, the Panel concluded: *"Thus, in evaluating whether the ports of entry measure is necessary within the meaning of Article XX(d), the Panel will consider: (i) the relative importance of the common interests or values that the law or regulation to be enforced is intended to protect; (ii) the extent to which the measures contribute to the realization of the end pursued; and, (iii)*

²⁸³ See Chapter 2 lit. 2.3 above.

²⁸⁴ See Chapter 4 lit. 3.1.2.1 b) above.

*the restrictive impact of the measure on imported goods.*²⁸⁵ Subsequently, the Panel considers if no alternative measure is available, that could reasonably be employed and which is not inconsistent with other GATT provisions.²⁸⁶

5.5.1. Auctioning of Ugandan goods after lapse of warehousing period

This Kenyan measure, too, is not necessary within the meaning of Article XX(d) of GATT 1994 as (i) it violates Article 42(1) of the Customs Management Act, (ii) there exist less trade restrictive alternatives which are also reasonably available to Kenya and (iii) the Kenyan interest to decongest the port is to be weighed less than the restrictive impact of that measure on the Ugandan traffic in transit.²⁸⁷

5.5.2. Kenyan police only allows trucks registered in Kenya to transport goods through Kenya on their way to Tanzania

This frequent practice by the Kenyan police is also not necessary. According to the established case law of the Panel Bodies, the more vital or important the common interests or values behind that measure are, the easier it would be to be accepted as 'necessary' a measure designed as an enforcement instrument.²⁸⁸ The protection of the pecuniary interests of the Kenyan carriers has – under the given circumstances – no significant benefit for the overall Kenyan economy whose transport sector is already competitive. This speaks against a necessity for this measure. The measure, on the one hand, is appropriate to achieve the end pursued, i.e. to protect the Kenyan carriers. But, on the other hand, this practice has significant impact on the Ugandan carriers who are running out of business on the transit routes to Tanzania. Therefore, it has a competition distorting effect as a consequence of which the interests of the Ugandan traders outweigh the Kenyan protectionist interests so the measure at hand cannot be necessary.

5.5.3. No back haulage allowed by Kenya for Ugandan transit trucks

This practice is also not necessary according to Article XX(d) of GATT 1994 since it only serves the pecuniary interests of the Kenyan carriers as well, which are outweighed by the significant trade restrictive impact on the Ugandan carriers.²⁸⁹

5.5.4. Local council fees applied to Ugandan transit cargo and application of abolished taxes at the Kenyan border to Ugandan transit goods

Since there is no legal basis for these Kenyan practices, the weighing and balancing results in the outweighing of the restrictive impact to Ugandan trade.

²⁸⁵ Panel Report, para. 7.550.

²⁸⁶ Panel Report, para. 7.610.

²⁸⁷ See Chapter 4 lit. 3.1.2.1 above.

²⁸⁸ Appellate Body Report, Korea – Measures affecting Imports of fresh, chilled and frozen Beef, paras. 162; Appellate Body Report, EC – Measures Affecting Asbestos and Asbestos Containing Products, para. 172.

²⁸⁹ See 9.3.3.4 above.

6. Conclusion

Article V of GATT 1994 is to be interpreted in accordance with the principles of treaty interpretation set out in the VCLT.

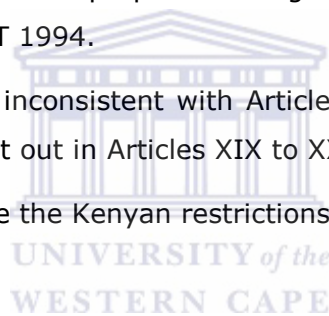
Applying these principles Article V:1 and Article V:2 1st sentence of GATT 1994 have to be read as a whole and objectively, so that Article V:2 of GATT 1994 calls for the unconditional freedom of transit on the most convenient routes for all traffic in transit.

Article V:2 2nd sentence complements this protection under Article V:2 1st sentence of GATT 1994 once the goods have arrived in the respective destination Member State prohibiting any discrimination based on the origin, of the means of transport or on the ownership of the goods.

Article V:3 of GATT 1994 further substantiates the basic obligation of Article V:2 1st sentence of GATT 1994 regulating the conditions a member may impose on traffic in transit and thus is the more concrete provision. As far as this provision allows – as an exception – necessary transit delays and restrictions it has to be interpreted narrowly, i.e. only the delays and restrictions which are absolutely necessary for the proper handling of the transit goods are necessary as provided for in Article V:3 of GATT 1994.

The Kenyan restrictions also are inconsistent with Article V:3 of GATT 1994 and not justified under one of the exceptions as set out in Articles XIX to XXI of GATT 1994.

Thus, Uganda could also challenge the Kenyan restrictions in front of a WTO panel.



Chapter 5 - Possible conflict of jurisdiction

Has it been a problem in the past to challenge possible breaches of international trade agreements because there were no competent international courts nowadays states often are in the comfortable position to be able to choose between dispute resolutions mechanisms of various international or regional institutions. This is in particular a result of the increase of regional trade agreements within the recent years²⁹⁰ which has also been described as the so-called 'spaghetti bowl' of overlapping regional trade agreements.²⁹¹

However, this situation also led to new discussions in international trade,²⁹² such as the issues of "double breaches"²⁹³ or "forum shopping"²⁹⁴. A double breach is the case that a measure by a state violates its obligations under different international trade agreements²⁹⁵ whereas the term forum shopping describes the consequences of such a situation and the opportunities of the complainant state to choose the best forum for to enforce its rights.²⁹⁶ The biggest concern resulting from such a situation is the risk of inconsistent rulings and that the remedies allowed under one agreement could violate the other agreement and vice versa.²⁹⁷

Since the Kenyan restrictions are inconsistent with both the EAC Agreements and GATT 1994 they constitute a double breach of the Kenyan obligations under these agreements which would, in general, entitle Uganda to institute dispute resolution proceedings in both the EAC and the WTO since both institutions have the respective jurisdiction.

But eventually Uganda could be banned to initiate such proceedings before one forum if one of the agreements contains a clause calling for the exclusive jurisdiction of the respective dispute resolution body. The Appellate Body had to deal with the question of jurisdiction and possible impediments in its report '*Mexico - Tax Measures on Soft Drinks and other Beverages*'. It came to the conclusion that even though the WTO panels have a right to determine, whether they have jurisdiction,²⁹⁸ they are in principle bound to rule a case presented by a Member consid-

²⁹⁰ Hillmann, Jennifer '*Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO - What should the WTO do?*' (2009), page 195.

²⁹¹ Bhagwati, Jagdish 'U.S. Trade Policy: The Infatuation with Free Trade Agreements' in: Bhagwati, Jagdish and Krueger, Anne O. (eds.) '*The Dangerous Drift to Preferential Trade Agreements*' (1995).

²⁹² Hillmann, Jennifer '*Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO - What should the WTO do?*' (2009).

²⁹³ Marceau, Gabrielle and Wyatt, Julian '*Dispute settlement regimes intermingled: Regional trade agreements and the WTO*' (2010).

²⁹⁴ Pauwelyn, Joost and Salles, Luiz Eduardo '*Forum shopping before international tribunals: (Real) concerns and (im)possible solutions*' (2009); Bush, Marc L. '*Overlapping institutions, forum shopping, and dispute settlement in international trade*' (2007).

²⁹⁵ Davey, William J. and Sapir, André '*The soft drink case: The WTO and Regional Trade Agreements*' (2009), page 23.

²⁹⁶ Bush, Marc L. '*Overlapping institutions, forum shopping, and dispute settlement in international trade*' (2007), page 1.

²⁹⁷ Pauwelyn, Joost and Salles, Luiz Eduardo '*Forum shopping before international tribunals: (Real) concerns and (im)possible solutions*' (2009), page 83.

²⁹⁸ Appellate Body Report, Mexico - Tax Measures on Soft Drinks and other Beverages, para. 47.

ering that any benefits accruing to that Member are being impaired by measures taken by another Member.²⁹⁹ The Appellate Body continued as follows:

*"We express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. [...] Finally, we note that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA had not been "exercised". We do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present. In any event, we see no legal impediments applicable in this case."*³⁰⁰

However, even though the Appellate Body did not take a stand to the question how it would rule in case of an exclusive jurisdiction clause, it referred in a footnote to the Panel Report 'Argentina - Definitive anti-dumping Duties on Poultry from Brazil'³⁰¹:

"The panel in Argentina - Poultry Anti-Dumping Duties referred to Article 1 of the Protocol of Olivos, which provides that, once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forum, that party may not bring a subsequent case regarding the same subject-matter in the other forum, and went on to state:

The Protocol of Olivos [...] does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure."

So the question, whether or not a WTO panel is entitled to decline its jurisdiction should there be some legal impediment at hand and if so under which requirements, has not yet been finally decided. But in case there is no exclusive jurisdiction in either of the agreements at hand this question would not have to be answered.

1. Wording of the respective clauses

Both the Treaty and the DSU contain provisions with respect to a possible violation of the respective agreement:

- Article 27(1) of the Treaty reads as follows:

²⁹⁹ Appellate Body Report, Mexico - Tax Measures on Soft Drinks and other Beverages, para. 54.

³⁰⁰ Appellate Body Report, Mexico - Tax Measures on Soft Drinks and other Beverages, para. 56.

³⁰¹ Appellate Body Report, Mexico - Tax Measures on Soft Drinks and other Beverages, footnote 19 on page 17.

"Jurisdiction of the Court

1. *The Court shall initially have jurisdiction over the interpretation and application of this Treaty:*

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States."

- On the other hand, Article 23(1) of the DSU, which is titled "*Strengthening of the Multilateral System*", provides as follows:

"1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements; they shall have recourse to, and abide by, the rules and procedures of this Understanding."

2. Types of jurisdiction clauses

Common provisions in regard to jurisdiction in international trade agreements are (i) choice of forum clauses, according to which exclusive jurisdiction is granted to a certain or to the first chosen dispute settlement mechanism, (ii) exclusive jurisdiction clauses requiring that the respective mechanism shall be exclusively competent for all disputes under the respective agreements, and (iii) preference clauses, regulating that one forum is preferably competent, but the parties may change to call on another dispute settlement mechanism.³⁰²

3. Interpretation of Article 27(1) of the Treaty

According to their wording, these provisions only refer to disputes between two Member States over the interpretation and application of the Treaty calling for jurisdiction of the respective dispute settlement mechanism. It has been argued that such a clause is to be considered as a compulsory exclusive jurisdiction clause which could result in a conflict of jurisdiction.³⁰³ However, such an interpretation, i.e. that all disputes between the Partner States – regardless of what other international agreement is in dispute – should be exclusively handled by the Court of Justice, would go beyond the clear wording of this provision and thus beyond the limits of interpretation.

Against the interpretation of Article 27(1) of the Treaty as a compulsory jurisdiction clause speaks that also the EAC Agreements acknowledge that each Partner State has to fulfil their obligation under other international agreements. Article 130(1) of the Treaty reads as follows: "*The Partner States shall honour their commitments in respect of other multinational and international organisations of which they are members.*" As the EAC Agreements have been con-

³⁰² Hillmann, Jennifer '*Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO - What should the WTO do?*' (2009), page 195.

³⁰³ Hillmann, Jennifer '*Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO - What should the WTO do?*' (2009), page 195.

cluded after the WTO agreements Article 130(1) of the Treaty can only be read that a compulsory jurisdiction of the WTO dispute settlement system is to be respected.

In addition to that, also the second half of Article 27(1) of the Treaty shows that not all disputes between the Partner States shall be under the jurisdiction of the Court of Justice since it excludes the interpretation to jurisdiction conferred by the Treaty to organs of Partner States.

Article 27(1) of the Treaty thus only contains an exclusive jurisdiction clause with respect to the interpretation and application of the Treaty.

4. Interpretation of Article 23(1) of the DSU

According to its wording, also Article 23(1) of the DSU refers to any disputes under the covered agreements only and does not explicitly state that all matters in this regard shall also fall under this jurisdiction.

It has been argued, that the title and the context of Article 23 of the DSU imply that this clause is to be interpreted broadly as a compulsory jurisdiction clause according to which all matters regarding the covered agreements shall be brought before the WTO panels.³⁰⁴ In particular Article 3(2) and (3) of the DSU shall stress the importance of the dispute settlement systems for the WTO for the effective functioning of the WTO and the balancing of the rights and obligations of its members:

„2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”

According to this view, these aims, however, can only be achieved if not just all disputes but all 'matters' concerning the covered agreements are exclusively dealt before the WTO under the DSU.³⁰⁵

³⁰⁴ Hillmann, Jennifer 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO – What should the WTO do?' (2009), pages 196 f.

³⁰⁵ Hillmann, Jennifer 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO – What should the WTO do?' (2009), pages 196 f.

But, one has to consider that the WTO law also acknowledges and promotes the existence and development of regional trade agreements. Article XXIV(5) of GATT 1994, for example, reads as follows:

"Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; [...]."

Such agreements, however, usually provide for a dispute settlement mechanism as a consequence of which one could argue that the permission to form a regional trade agreement tacitly implies that its members are allowed to regulate the dispute settlement mechanism in deviation of Article 23 of the DSU.

In any case, the Panel Bodies of the WTO have consistently stressed that they would not apply the law of other regional trade agreements and thus the aforementioned clause cannot be classified as a compulsory exclusive jurisdiction clause: If Article 27(1) of the DSU was interpreted in that way, the WTO panels would also be have to be able to apply relevant non-WTO law in certain cases should there be another related claim which is not provided for in the law of the WTO.

5. Conclusion

Thus, neither the Treaty nor the GATT 1994 provide for an exclusive jurisdiction clause, as a consequence of which Uganda could initiate proceedings before both the WTO dispute settlement mechanism and the EAC Court of Justice.

The choice which forum to choose depends on various factors, such as the differences in law, the timeliness of proceedings, the adoption of panel reports, the availability of remedies at the end of the dispute.³⁰⁶ Furthermore, also the precedent to be set by the respective case is to be considered: Even though another case by the complainant could be more easily solved, the precedent set by this case could also work against the complainant itself should the respondent or another member state of the respective agreement bring a case against the complainant.³⁰⁷

In the present case, however, it is to be recommended that Uganda initiates the respective proceedings – should further negotiations be in vain – before the WTO dispute settlement bodies, since the DSU provides for efficient and proven procedures to solve disputes and to adopt the respective reports whereas no such case has up to now been decided by the Court of Justice.

³⁰⁶ Bush, Marc L. 'Overlapping institutions, forum shopping, and dispute settlement in international trade' (2007), pages 6 ff.

³⁰⁷ Bush, Marc L. 'Overlapping institutions, forum shopping, and dispute settlement in international trade' (2007), page 12.

Furthermore, there is a lesser risk in front of the WTO panels that Kenya would take influence as it has been the case before the Court of Justice when it had ruled in a case against Kenya in regard to the election procedure of the Kenyan member for the EAC Parliament in the Kenyan Parliament where Kenya took strong influence after a court decision regarding the election practice in Kenya for the EAC Assembly which was undesirable to the Kenyan Government at that time. Kenya thus replaced several judges at the EAC Court and had for this purpose even amending the EAC treaties just to ensure that the Court of Appeal would decide in its favour.³⁰⁸



³⁰⁸ Wandia, Mary 'Stop manipulating and bullying the EA court' (2012); Onoria, Henry 'Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community' (2010).

Chapter 6 - Implications of the WTO Draft Negotiation Text on Trade Facilitation

As already stated above, trade facilitation got into the focus of the discussion of international trade within the last 20 years. This also forms a part of the on-going negotiations at the 9th Ministerial Conference, which is actually held in Bali. After all the years of negotiations the conclusion of a separate Trade Facilitation Agreement seems possible, but it still remains to be seen if the considerable resistance and reluctance of various countries against such a separate agreement will be overcome.

1. Singapore Ministerial Conference, 1996

Within the WTO, proposals for trade facilitation commitments were made at the WTO Ministerial Conference in Singapore 1996 for the first time, where it became part of the so-called Singapore Issues. In the following years the competent Council of Trade in Goods examined different aspects of trade facilitation in co-operation with numerous international and regional organisations as well as with the international business community. The main barriers to trade identified in these examinations were inter alia lack of transparency, excessive documentation requirements, inadequate procedures as well as a lack of modernization of customs and other government agencies.³⁰⁹

2. Seattle Ministerial Conference, 1999

In preparation of and during the WTO Ministerial Conference in Seattle in 1999, several proposals were made in vain to include the facilitation of trade in the next negotiation round. However, the discussions nevertheless made progress, as the participants could agree that the relevant Articles of GATT 1994 (i.e. Articles V, VIII and X of GATT 1994) were to be amended and on the focus of the future discussions on trade facilitation, in particular the import and export requirements and procedures, development issues and technical assistance.

3. Doha Ministerial Conference, 2001

In 2001, a new attempt to initiate separate negotiations in trade facilitation was made during the Ministerial Conference in Doha. But again the members could not reach a consensus in this respect, since some members only wanted to discuss the Singapore Issues all together and objected to an individual treatment of certain topics. In particular some developing countries, although agreeing in principle with the objectives of trade facilitation, were not willing to assume new obligations due to their limited implementation capacities and the possible exposure to new dispute settlement procedures in case these new trade facilitation obligations were not implemented in time.³¹⁰ On the other hand, however, these countries stressed the importance of technical assistance and capacity building in regard to trade facilitation.³¹¹ Therefore, it was

³⁰⁹ http://www.wto.org/english/tratop_e/tradfa_e/tradfa_overview1998_e.htm.

³¹⁰ Bolhöfer, Carolin Eve 'Trade facilitation – WTO law and its revision to facilitate global trade in goods' (2007), page 34.

³¹¹ For Uganda see for example Bategana, Salongo Laurean 'Uganda's interests in the DOHA round and the World Trade Organisation (WTO) trade negotiations', page 11.

decided that the discussions of trade facilitation should continue in the Council of Trade in Goods with one priority on a technical assistance work programme with the aim to provide guidance and to build capacities for trade facilitation in order that future results could be implemented quickly.

The Doha Ministerial Declaration thus reads as follows: *"Recognizing the case for further expediting the movement, release and clearance of goods, including goods in transit, and the need for enhanced technical assistance and capacity building in this area [...] and identify the trade facilitation needs and priorities of members, in particular developing and least-developed countries. We commit ourselves to ensuring adequate technical assistance and support for capacity building in this area."*

4. Cancún Ministerial Conference, 2004

Finally, trade facilitation, for the first time, became an independent topic in the negotiations within the WTO as part of the Doha Development Agenda, when the WTO members agreed on the wording of Annex D, Modalities for Negotiations on Trade Facilitation, of the Decision Adopted by the General Council on 1 August 2004 (the so-called **"July Package"**).³¹² Annex D determines that these negotiations shall be aimed to clarify and improve relevant aspects of Articles V, VIII and X of GATT 1994 *"with a view to further expediting the movement, release and clearance of goods, including goods in transit, and enhancing technical assistance and support for capacity-building in this area"* and also that a Negotiation Group on Trade Facilitation was to be installed. Subsequent to the Cancún Ministerial Conference, the Negotiation Group on Trade Facilitation was established and began its work.

5. Proposals and discussions regarding the freedom of transiting

Within the Negotiation Group on Trade Facilitation, up to 2009 more than 130 proposals have been submitted which may be categorized as follows:

5.1. First generation proposals

The first proposals submitted in 2005 dealt in general with the objectives and reasons for the respective amendments of the relevant Articles of GATT 1994.

5.2. Second generation proposals

The second generation proposals dating in the first half of 2006 summarised and refined the concepts of earlier discussions providing various draft languages. It has to be noted that in this time period wider coalitions between WTO members were formed between various developed countries, on the one hand, and some developing countries, on the other hand, each coalition working together on various proposals. One reason for this division was the conflicting interests. During these discussions, the developing countries, again, stressed the importance of

³¹² Annex D of WTO document WT/L/579; Bolhöfer, Carolin Eve *'Trade facilitation – WTO law and its revision to facilitate global trade in goods'* (2007), page 34.

receiving the right amount of technical assistance, while the developed countries insisted on their demands being met appropriately.³¹³

5.3. Third generation proposals

The proposals since the second half of 2006 can be referred to as the third generation proposals. They have in common that they further refine and clarify the concepts presented so far as a result of the on-going discussions within the Negotiation Group on Trade Facilitation.

6. Compilations by the WTO secretariat

The WTO secretariat has summarised these proposals in its Compilations of Member's Textual Proposals.³¹⁴ As regards content, the proposals focused, inter alia, on the following main issues³¹⁵:

- strengthening of non-discrimination measures;
- inclusion of a legitimate policy objectives list in Article V of GATT 1994 considering in particular security objectives;
- inclusion of transparency requirements such as the (internet) publication of transit fees and charges as well as requirements for customs formalities and document requirements;
- further harmonisation of customs documentation requirements and procedures, including the introduction of periodic reviews and the co-ordination of border agencies such as single window;
- simplification and facilitation of transit traffic through special transit procedures and facilities avoiding unnecessary controls ensuring the effective implementation of transit procedures;
- international, regional and national customs guarantee systems.

7. (Revised) Draft Consolidated Negotiation Text

In December 2009, a significant progress was finally made, when the members agreed to circulate the first Draft Consolidated Negotiation Text as a basis for future discussions. This draft

³¹³ Sheikhan, Pegah *'Trade Facilitation in the Multilateral Trading System – An Analysis of the Doha Round Negotiations on Trade Facilitation'* (2008), page 30.

³¹⁴ WTO Negotiations on Trade Facilitation *'Compilation of Member's Textual Proposals'* (TN/TF/W43/Rev.18), dated 24 April 2009, downloaded at http://www.wto.org/english/tratop_e/tradfa_e/tradfa_negoti_docs_e.htm on 5 March 2011.

³¹⁵ United Nations Economic and Social Council *'Organizational matters, Negotiating Group on Trade Facilitation at the WTO'* (ECE/TRADE/C/CEFACT/2008/17), dated 23 July 2008, page 3; Agency for International Trade Information and Cooperation *'Evolution of proposals on GATT Article V in the WTO trade facilitation negotiations'* (2009), pages 3 ff.; Sheikhan, Pegah *'Trade Facilitation in the Multilateral Trading System – An Analysis of the Doha Round Negotiations on Trade Facilitation'* (2008), page 30; Bolhöfer, Carolin Eve *'Trade facilitation – WTO law and its revision to facilitate global trade in goods'* (2007), page 38; Duvall, Yann *'Costs and benefits of implementing trade facilitation measures under negotiations at the WTO: An exploratory survey'* (2006), page 6 ff.

has been revised 16 times by now, for the last time 29 July 2013 resulting in the actual Revised Draft Consolidated Negotiation Text which actually comprises 30 pages.³¹⁶

The text of this draft thus has grown significantly, comprehensively covering and clarifying and improving most of the issues up to now in regard to trade facilitation. The draft comprises two sections of which the first one is covering in 13 Articles the various aspects of trade facilitation, in particular calling for freedom of transit in Article 11. The second section sets out special and differential treatment for developing and least developed countries.

According to the current draft, comprehensive obligations in the various aspects of international trade are set, such as making available the necessary information to traders (Articles 1 to 3), providing for the necessary appeal and review procedures (Article 4), disciplines on fees and charges in regard to the importation or exportation of goods (Article 6), regulations regarding the release and clearance of goods (Article 7), the prohibition of consular clearance requirement (Article 8), trade facilitation Article 9 and 10), customs cooperation (Article 12) and for the freedom of transit (Article 11).

8. Freedom of transit - Article 11 of the Draft Consolidated Negotiation Text

It has to be noted that the Revised Draft Consolidated Negotiation Text is supposed to be concluded as a separate Agreement substantiating the respective provisions of GATT 1994. Up to now, this draft does not repeat the rights and obligations under GATT 1994 as it was the general feeling that (i) there would be no purpose by repeating the language of that agreement and (ii) thus an effort was made to reduce duplication and eliminate unnecessary texts.³¹⁷ In consequence, e.g. Article 11 (Freedom of transit) does not provide for a corresponding obligation of the members but presupposes this obligation under Article V of GATT 1994. Therefore, the regulations of this draft have to be read together with the respective provisions of GATT 1994.

Article 11.2 clarifies that Member States shall secure that the (former) state enterprises with, formally or in effect, special or exclusive privileges on or in regard with transit in traffic will comply with the provisions of this agreement. This obligation would force Kenya to ensure that the KPA is treating Ugandan traders as they are treating Kenyan traders and thus could help to eliminate the discrimination of Ugandan traders at the port.

Article 11.3 calls for the proportionality and the proper purpose of charges in relation to charges, regulations and formalities in regard to transit. According to Article 11.3(1) (a) charges, regulations and formalities shall not be more restrictive on traffic in transit than necessary to fulfil a legitimate objective and according to lit. (b) only be maintained in that way as it is necessary for the respective circumstances and/or objectives and (c) shall not be applied in a

³¹⁶ WTO Negotiating Group on Trade Facilitation 'Report by the chairman on the meeting of 22 March 2010' (TF/TN/7). WTO 'Revised Draft Consolidated Negotiation Text' dated 29 July 2013 (TN/TF/W/165/Rev.17).

³¹⁷ WTO Negotiating Group on Trade Facilitation – Communication by India, dated 10 July 2012 (TN/TF/W/181).

manner that would constitute a disguised restriction on transit traffic. This provision merely stipulates the actual legal position as stated above but assures legal clarity. So, even according to these new requirements, the Kenyan restrictions would still also be in violation of the revised WTO Agreements.

Article 11(3)(2) clarifies that charges on traffic in transit are only allowed if they are imposed for the administrative procedures entailed or transit services provided in connection with the transit movement in question (lit. a) and that the charges shall not exceed the approximate administrative expenses entailed or costs of the transit service rendered.

According to Article 11(3)(3) each Member State shall periodically review its charges on traffic in transit with a view to reducing them, where practicable.

Article 11(4) clarifies that Member States are not to apply discriminatory measures to goods in transit, or to vessels or other means of transport of other Members, for reasons of any kind unless they are justified under the current WTO Agreements.

Article 11(5) and 11(6) call Member States to treat traffic in transit – on the same routes under the like conditions and for the like products – no less favourable than the one which is not in transit, i.e. which is either import, export or domestic traffic (Article 11(5)) and to treat products which will be in transit through the territory of any other Member treatment no less favourable than that which would be accorded to such products if they were being transported from their place of origin to their destination without going through the territory of such other Member (Article 11(6)).

Pursuant to Article 11 (8) formalities, documentation requirements and customs controls, in connection with traffic in transit, shall not be more burdensome than necessary to identify the goods and ensure fulfilment of transit requirements.

Article 11(13) to (15) set out special provisions for guarantees which have to be reasonable and shall not be applied in a manner that would constitute a disguised restriction on traffic in transit (Article 11(13)) and which shall be discharged without delay once the transit requirements are met (Article 11(14)).

Pursuant to Article 11(16) the use of customs convoys or escorts for traffic in transit is only allowed in circumstances presenting high risks whereas circumstances subject to customs convoys or escorts requirements have to be included in Members Customs regulations and are to be published.

It is unclear up to now whether or not also air transit shall fall under the definition in Article 11. According to the current draft, this shall not be the case and a clarifying clause may need to be added.³¹⁸

³¹⁸ See footnote 24 of the Revised Draft.

It has to be noted that the final wording of all these provisions is not yet agreed upon and that the provisions of the Revised Draft Negotiation Text contain different alternatives for each clause. Therefore, the outcome of the final text and thus the implications thereof can, at this point in time, not be further assessed.

9. Is the conclusion of an agreement still possible?

The question to be asked in this context is whether it is still possible to save the Doha round in the on-going negotiations in Bali as more or less no significant progress has been made over the last decade.

The reason for negotiation deadlock and the various delays of negotiation deadlines is to be seen in the complexity and the sensitive issues on the negotiation table, some of which have been unresolved since the Uruguay Round and the wrong negotiation methodology was used.³¹⁹

This round had been completed prematurely before Bill Clinton's authority to conduct trade negotiations expired leaving various issues unresolved.³²⁰ The main outcome of the Uruguay round was a significant degree in trade liberalisation across both developed and developing countries. However, further topics, such as the development agenda (i.e. the later the Doha Development Agenda), the liberalisation of the agricultural market, services, anti-dumping measures and subsidies, regional trade agreements, TRIPS, the environment and the so-called Singapore Issues remained unsolved and thus to be dealt with in the next negotiation round.³²¹

As a consequence hereof, there has been no need for the developed countries in the Doha round to further push the negotiations as they already had achieved most of their goals whereas there was the feeling by the developing countries that they were to be compensated for their acceptance of the full obligations of the Uruguay round.

This conflict of interests was even made harder to resolve by the negotiation concept of a "single undertaking" newly introduced at the Uruguay round. According to this concept all participants have to agree to the outcome of the negotiations or, put in other words, nothing is agreed to until everything is agreed upon.³²²

In order to speed up the negotiations Pascal Lamy made the attempt to separate the various negotiation topics into several negotiation blocks to be agreed upon independently, the so called 'three speed search'. According to this approach, the various topics of the Doha round agenda should be approached at different speeds: in fast, slow and medium lanes. This new methodology has been widely criticized as being inconsistent with paragraph 47 of the Doha

³¹⁹ Popa, Diana 'The collapse of the Doha Round and a possible completion of Negotiations' (2012); Ancharaz, Vinaye 'Can the Doha round be saved?' (2012); Bhandari, Surendra 'Doha round negotiations: Problems, potential outcomes, and possible implications' (2012)

³²⁰ Bhandari, Surendra 'Doha round negotiations: Problems, potential outcomes, and possible implications' (2012), page 356.

³²¹ Ancharaz, Vinaye 'Can the Doha round be saved?' (2012), page 102 f.

³²² Ancharaz, Vinaye 'Can the Doha round be saved?' (2012), page 102 f.

Declaration calling for the single undertaking concept.³²³ However, even this new concept did so far not result in the conclusion of partial agreements and the negotiations have been suspended for a longer time period before the actual Bali conference.

It remains to be seen if the negotiations can be at least partly concluded at the on-going 9th WTO Ministerial Conference where only a limited number of topics, such as the WTO Trade Facilitation Agreement, are on the table. One argument for a conclusion of such a separate WTO Trade Facilitation Agreements is that it is undeniable that all countries would benefit from it. According to the OECD it is expected that trade costs in developed countries would decrease by approximately 10% and in undeveloped countries even by up to 13.5% to 15% and the reduction of the global trade costs by 1% would result in an increase of the global worldwide income by approximately USD 40 billion, most of which would accrue in developing countries.

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However, some countries, like for example India and Brazil, seem to be unwilling to conclude a separate agreement on trade facilitation without getting something in return out of the remaining topics in the on-going Doha negotiation round whereas in particular developing countries press for credible commitments on technical assistance and support for capacity building.³²⁵

10. Conclusion

In conclusion, the 17th version of the Revised Draft Negotiation Text is to be read together with GATT 1994, in particular with its Articles V and X as the new agreement only clarifies the already existing regulations and provides for an additional forum to discuss the issues in regard to trade facilitation and transit traffic.

Article 11 of the Revised Draft Negotiation Text provides for various clarifications and improvements in regard to the freedom of transit making it easier for the respective Member States to enforce their claims assuring legal clarity.

It remains to be seen, if the Member States will agree to such a separate agreement and, and if so, on which wording of the Revised Draft Negotiation Text, they will agree upon.

³²³ Bhandari, Surendra 'Doha round negotiations: Problems, potential outcomes, and possible implications' (2012), page 361.

³²⁴ OECD 'Trade facilitation agreement would add billions to global economy' (2013)

³²⁵ Woolfrey, Sean 'Will we see a WTO Trade Facilitation Agreement in 2013?' (2013)

Chapter 7 - Conclusion and recommendations

The Kenyan restrictions have a significant negative effect on Ugandan trade and thus as well on its overall economy. Even a smaller reduction in the time and the costs for the transit of the Ugandan goods through Kenya is – under the prevailing economic theory – supposed to significantly reduce the indirect and direct transit costs for Ugandan traders on their way through Kenya and thus to result in a significant growth in the Ugandan GDP supporting the various efforts of the Ugandan government to further develop the country.

However, the Ugandan influence in Kenya to overcome these obstacles for its traders is more or less limited to negotiations as Uganda is dependent on the Kenyan goodwill in this matter.

As the Kenyan restrictions are inconsistent both with its obligations under the EAC Agreements and under GATT 1994 – which both provide for a free movement of transit goods through the respective Member States – both the EAC Court of Justice Uganda and the WTO panels are competent to decide about the Kenyan restrictions.

Since none of these agreements provide for an exclusiveness of its respective court, Uganda is free to choose the forum. It should initiate proceedings before the WTO panels in case Kenya omits to eliminate these transit restrictions in further negotiations as these WTO court guarantees neutrality, which seems not to be guaranteed in front of the EAC Court of Justice.

It remains to be seen whether or not the Member States of the WTO will agree on the actual Revised Draft Negotiation Text on Trade Facilitation at the on-going Ministerial Meeting in Bali which comprises some clarifications and improvements for the guarantee of freedom of transit already guaranteed in Article V of GATT 1994.

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Declaration

I declare that, "The Ugandan transit constraints in Kenya and possible Ugandan claims under the Agreements of the East Africa Community and the GATT Agreement 1994" is my own work that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Munich 28.10.2013



Christoph Müller

