

# **UGANDA LAW SOCIETY WORKSHOP**

## **DISPUTE SETTLEMENT UNDER THE CUSTOMS UNION**

**PAPER PRESENTED BY  
PAUL MWEBESA  
ADVOCATE  
UGANDA LAW REFORM COMMISSION**

**25/06/2005.**

# **DISPUTE SETTLEMENT UNDER THE CUSTOMS UNION**

## **1.0 Introduction.**

East African Community is established by the East African Community Act. A Customs Union and a Common Market are transitional stages to and integral parts of the Community. Subsequently the Common Market is to be transformed into a Monetary Union; and ultimately a political federation<sup>1</sup>. Under Article 8(2) and (4) of the Treaty, Community laws and organs take precedence over national laws.

For the purposes of implementation and establishment of a Customs Union, the Partner States were required to conclude the protocol establishing the customs union within a period of four years. Following a period of negotiations, the East African Community Customs Union Protocol (the Protocol) was signed establishing the East African Community Customs Union. The Protocol was signed on 2nd March 2004 and came into force on 1st January, 2005. The Protocol seeks to implement article 75 of the East African Community Treaty (the Treaty).

This paper discusses the dispute resolution mechanism under the customs union and is divided into the following parts; an introduction, a brief on the East African Community Customs Union and dispute settlement under the Customs Union.

## **2.0 The East African Community Customs Union.**

Chapter eleven of the Treaty provides for an East African Trade Regime and cooperation in trade liberalisation and development. Article 75, provides for the establishment of a customs union to include *inter alia*, the following:

- (a) The application of the principle of asymmetry;
- (b) The elimination of internal tariffs and other charges of equivalent effect;
- (c) The elimination of non-tariff barriers;
- (d) Establishment of a common external tariff
- (e) Rules of origin;

---

<sup>1</sup> Article 2

- (f) Dumping;
- (g) Subsidies and countervailing duties;
- (h) Security and other restrictions to trade;
- (i) Competition;
- (G) Duty drawback, refund and remission of duties and taxes;
- (k) Customs co-operation;
- (l) Re-exportation of goods; and
- (m) Simplification and harmonisation of trade documentation and procedures.

## **2.1 The East African Community Customs Union Protocol.**

The Protocol is divided into six parts and constitutes forty four articles. Part A and B are general provisions covering interpretation and establishment of the East African Community Customs Union. Part C covers customs administration. Part D and E cover the substantive provisions on trade liberalization and trade related aspects. This part outlines the nature of internal tariffs and common external tariff applicable in the customs union.

Part E outlines the rules to govern trade in the customs. This includes provisions on the rules of origin which qualify products originating from Partner States; principle of national treatment, out ruling any form of discrimination against the same or like products of other Partner States; prohibition of dumping and provision for anti-dumping measures. This part also provides for a mechanism within which subsidies may be given and the levying of countervailing duties to offset the negative effects of subsidization on products imported into the customs union.

In additions safeguard measures are provided for to apply to situations where there is a sudden surge of a product into a Partner State which causes or threatens to cause injury. Furthermore, any concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the community is prohibited. This part also covers goods that may not be imported in the customs union and those that are restricted.

To implement all the provisions under these two parts, Annexes were adopted and some are yet to be adopted. These are -.

- (a) Harmonised Customs Commodity Description and Coding System (Annex 1);
- (b) Products originating from Uganda and Tanzania to Kenya and subject to the transitional programme on internal tariffs (Annex II).
- (c) A mechanism for identifying and monitoring the removal of non tariff barriers (yet to be adopted);
- (d) EAC Rules of Origin (Annex III);
- (e) EAC Customs Union (Anti Dumping Measures) Regulations (Annex IV);
- (f) EAC Customs Union (Subsidies and Countervailing Measures) Regulations (Annex V);
- (g) EAC Customs Union (Safeguard Measures) Regulations (Annex IV);

Parts F, G and H contain provisions on export promotion schemes such as duty draw back schemes, duty and value added tax remission schemes, manufacture under bond, export processing zones, free-ports and exemption regimes<sup>2</sup>.

Under the Protocol, the administration of the customs union, including legal and institutional matters shall be governed by the customs law<sup>3</sup>.

This is in accordance with article 8(4) of the Treaty which provides that-

*"Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty"*

From the above therefore, it is clear that, the law applicable in all matters under the Customs Union is the customs law.

Part I of the protocol includes provisions on arrangements with other countries and organizations. The Protocol promotes Partner States' commitments to other multilateral and international organizations to which they belong. The Community

---

<sup>2</sup> Section 114 and the Fifth Schedule of the EAC Customs Management Act.

<sup>3</sup> Article 34

is expected to coordinate its trade relations with foreign countries so, as to facilitate implementation of a common policy in the field of trade. A procedure is set out in the Protocol which enables Partner States to conclude separate trade agreements.

This part also contains amending provisions and the customs law of, the community. As outlined in article 39, the customs law of the community consists of -

- (a) relevant provision of the Treaty;
- (b) the Protocol and all its annexes;
- (c) regulations and directives made by the Council;
- (d) applicable decisions made by the East African Court of Justice;
- (e) Acts of the Community enacted by the EAC Legislative Assembly; and
- (f) Relevant principles of international law.

Finally, this part constitutes specific provisions on dispute settlement. Article 41 outlines the main principles for administration and management of disputes which emphasize peaceful settlement of disputes. Emphasis is put on giving due consideration to Partner States' complaints, consultation where such complaints have been raised and where a decision has been made, implementation of the decision in good faith.

Implementation of these principles is set out in East African Community Customs Union (Dispute Settlement Mechanism) Regulations specified in Annex **IX** to the Protocol.

### **3.0 Dispute settlement under the Customs Union.**

Dispute settlement under the Customs union is covered under the Treaty, the Protocol and the EAC Customs Management Act. Management of trade disputes is the mandate of the EAC Trade Remedies Committee, the Council and the EAC

Court of Justice, as set out in the Protocol; while management of customs disputes is the mandate of the Commissioner; the tax tribunals and the national courts.

The EAC Customs Management Act takes precedence over the Partner States laws with respect to any matter to which its provisions relate<sup>4</sup>.

Furthermore, the EAC Customs Management Act makes provision for the management and administration of customs and related matters. This includes management of customs offences as well as handling disagreements on customs matters. .

Part XVII of the EAC Customs Management Act sets out various offences and how they are handled. Under the Act, the Commissioner and national courts have the authority to handle custom and custom related offences committed under the Act.

In addition any subsidiary legislation made under partner States laws are saved and remain in force, as long as they are not inconsistent with the Act, until new subsidiary legislation with respect to the same matter is made under the Act.<sup>5</sup>

### **3.1 Powers of the Commissioner.**

Section 2 of the Act defines a Commissioner to mean-

*" the Commissioner of Customs appointed under section 5 of the EAC Customs Management Act ...."*

Under Section 5 of the Act Partner States are empowered to appoint, in accordance with their national legislation, a Commissioner responsible for the management of customs. The jurisdiction under section 219 may, however be exercised by any officer authorized by the Commissioner<sup>6</sup>.

Section 219(1) provides that

---

<sup>4</sup> Section 253

<sup>5</sup> Section 252

<sup>6</sup> Section 5(3)

*"The Commissioner may, where he or she is satisfied that any person has committed an offence under this Act in respect of which any thing is liable to forfeiture, compound the offence and may order such person to pay a sum of money, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may deem fit; and the Commissioner may order anything liable to forfeiture in connection with the offence to be condemned. "*

From the above it is clear that the Commissioner exercises the powers of a court and makes an order to that effect. The Commissioner determines the amount of money to be paid by the offender. In case of forfeiture, the Commissioner determines the method and means through which the goods are handled. Unlike an ordinary court, one does not go through the formalities of prosecution and conviction. Under section 219(1), the offender must make a specific request for this procedure. The offender is required to fill a prescribed form admitting that he or she committed the offence and also requesting the Commissioner to deal with the matter<sup>7</sup>.

If the Commissioner is satisfied that the person committed the *offence*, he or she will make an order requiring the offender to pay a sum *of* money. Such order must be in writing; specify the offence committed and the penalty imposed by the Commissioner. The offender's request for the Commissioner's intervention must be attached to the order. An offender whose case is handled under this procedure is not liable to further prosecution in respect of the offence<sup>8</sup>. An order made by the Commissioner in this respect is final and is not subject to appeal. The order is enforceable in the same manner as a decree or order of the High Court<sup>9</sup>.

### **3.2 Jurisdiction of the court.**

Proceedings in court are covered under Section 220. Criminal matters are determined by subordinate courts and all cases of a civil nature determined in

---

<sup>7</sup> Section 219(2)

<sup>8</sup> Section 219(3)

<sup>9</sup> Section 219 (3) (e)

accordance with, the laws of the Partner States<sup>10</sup>. In this case therefore, the applicable law in a subordinate court which in this case is the magistrate's court is the Magistrates Courts Act<sup>11</sup> and the pecuniary jurisdiction of the magistrate's court will apply. For instance all civil actions (save those appearing under Part XVII relating to anything seized under the Act) whose subject matter exceeds 50,000,000/- must be heard by a Chief Magistrate.

Under section 220(2), any proceedings of a civil nature relating to any thing which has been seized under Part XVII of the Act may be heard and determined by a subordinate court (magistrate's court) without limit of amount. This is irrespective of section 220(1) which enforces pecuniary jurisdiction under the Magistrates Courts Act.

Unless otherwise expressly specified, offences shall be dealt with in accordance with the laws relating to criminal procedure of a Partner State in which the court is situate<sup>12</sup>.

The Act has provisions on limitation of proceedings. Proceedings for an offence under the Act may be commenced and anything liable to forfeiture may be seized within five years of the date of the offence<sup>13</sup>.

Under section 223 of the Act, the onus of proof lies with the offender; averment of Commissioner is taken as prima facie evidence of such act; certificates or documents issued by the Commissioner, Directorate of Customs and Council etc are taken as prima-facie evidence.

In case of sale of any goods, the provision of the legislation of the Partner States applies.

### **3.3 Appeals**

---

<sup>10</sup> Section 220(1)

<sup>11</sup> Cap 16 Law of Uganda.

<sup>12</sup> Section 220(1)(3).

<sup>13</sup> Section 222.



Part XX of the Act covers appeals generally. An appeal for review against a decision is made to the Commissioner and if dissatisfied to a tax tribunal. Where a person is dissatisfied with the decision of the Commissioner or any other officer, he or she may lodge an application for review to the Commissioner within thirty days. The thirty days may be extended with sufficient reason. The Commissioner is required to give his or her decision within thirty days<sup>14</sup>

Where a person is dissatisfied with the decision of the Commissioner, he or she can appeal to a tax tribunal. An appeal against the decision of the Commissioner must be made within forty-five days after being served with the decision<sup>15</sup>. For this reason, each Partner State is required to set up a tax tribunal under national legislation to deal with such appeals. Uganda, has an operative tax tribunal<sup>16</sup> Proceedings of the tribunal in such matters, should be in line with the provisions of that Act.

### **3.4 Settlement of Trade Disputes**

Trade disputes under the customs union are managed by the EAC Trade Remedies Committee, the Council and the EAC Court of Justice. Unlike customs disputes, trade disputes are member based and can only be initiated by Partner States or partner states and non partner states

The Protocol provides a mechanism for settlement of disputes between nationals of Partner States and disputes between the Partner States or Partner State and non-Partner States.

The East African Community Committee on Trade remedies is established under Article 24 of the Protocol. The Committee is comprised of nine members qualified and competent in matters of trade, customs and law. Each Partner State nominated three members to the Committee.

The Committee handles any matters pertaining to:

---

<sup>14</sup> S.229.

<sup>15</sup> S. 230

<sup>16</sup> Tax Appeals Tribunal Act Cap 345 laws of Uganda.

- (a) rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules, specified in **Annex III** to the Protocol;
- (b) anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in **Annex IV** to the Protocol;
- (c) subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in **Annex V** to the Protocol;
- (d) safeguard measures provided for under the East African Community , Customs Union (Safeguard Measures) Regulations, specified in **Annex VI** to the Protocol;
- (e) dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in **Annex IX** to the Protocol; and
- (f) any other matter referred to the Committee by the Council

Article 24(3) requires each Partner State to notify the Committee of the investigating authority within its territory designated to initiate and conduct investigations on behalf of the Committee.

Article 24(4) outlines the functions of the Committee to include:

- (a) initiation, through the investigating authorities of the Partner States, investigation and disputes under the Regulations in Article 24(1);
- (b) make affirmative or negative determinations on investigation;
- (c) undertake consultations with Partner States and other countries on matters before it;
- (d) report to the Council on all determinations in relations to matters that are submitted to it and decisions made by it;
- (e) provide advisory opinions to the Partners States in relation to matters under Article 24(1);
- (f) review annually the implementation and operation of the matters in Article 24(1);
- (g) issue public notices under the matters in Article 24(1)

- (h) facilitate consultations by Partner States and parties to the dispute before it, to ensure timely fulfilment of all requirements by parties to the dispute and provide advice as may be appropriate;
- (i) administer and manage the dispute settlement mechanism; and
- (j) undertake any function that may be assigned to it by any regulation under this Protocol or by the Council.

Article 24(5) of the Protocol provides that except as otherwise provided under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, or under any other regulation under the Protocol, the decisions, of the Committee with respect to the settlement of disputes shall be final. The Committee determines its own procedure.

Article 41 sets out the general provisions on dispute settlement. Article 41(1) provides that each Partner State affirms her adherence to the principles for the administration and management of disputes and shall in particular-

- (a) accord due consideration to the other Partners states presentation or complaints;
- (b) accord adequate opportunity for consultation on representations made by other Partner States; and
- (c) implement in good faith any decisions made pursuant to the Community's dispute settlement mechanisms.

The implementation of article 41 is in accordance with the East African Community Customs Union (Dispute Settlement Mechanism) Regulations specified in **Annex IX** to the Protocol.

In conclusion, the East African Custom creates an opportunity for international trade. Effort has been made to avoid length dispute resolution mechanisms and promote amicable settlement of disputes arising from the Customs Union. Penalties for offences can be determined by the Commissioner and unlike most regional courts, an individual has direct access to the East African Court of Justice

and need not present his or her case through his or her government. In addition, there are no restrictions in terms of an individual having to exhaust the national mechanisms.