

**THE EFFECT OF THE EAST AFRICAN COMMUNITY INTEGRATION PROCESS  
ON INFORMAL CROSS-BORDER TRADE: AN ANALYSIS OF THE CUSTOMS  
UNION PROTOCOL.**

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## ABSTRACT

Informal cross border trade (ICBT) includes imports and exports that are traded across borders informally by escaping the normal border procedures like customs clearance. As a consequence of the said informality, ICBT is viewed as illegal cross border activities. Despite the fact that it is not possible to give the accurate extent of ICBT in EAC, it continues to grow by the day and has contributed significantly to economic and sustainable growth. It is a source of employment and income to a significant number of citizenry, it has contributed to food security in the Community and consequently supports the on-going initiatives on poverty reduction. In fact, if properly managed, it definitely has the effect of boosting the economies. The concept therefore that ICBT is illegal trade shows that legislators have not fully appreciated the benefits of this trade and the fact that they have downplayed it means overlooking a significant proportion of trade.

The main aim of the study therefore is to give an overview of the nature and scope as well as the significance of ICBT in EAC. The study also analyses the Customs Union Protocol and highlights opportunities that can be derived from specific articles for the benefit of the informal cross border traders.

The research also discusses the regional integration initiatives taken with the aim of promoting economic development in the Community and their effect on ICBT. The route taken by Africa as a whole is market integration which involves the linear progression in integration from a free trade area to a total economic integration. It was borrowed from the European Union model. However, market integration has not been without hiccups and the question that begs an answer is whether it is indeed the best model for Africa's Development. As an alternative, this research proposes the regionalism from below strategy as the better way forward in the quest for regional economic integration. The said strategy involves bringing on board the informal sector which it views as a support to the shrinking formal economy. Embracing the regionalism from below strategy would mean tapping into informal trade by building on informal trade networks to create a robust economy bearing in mind that is where a substantial proportion of cross-border trade is conducted. This would ultimately lead to formalizing ICBT.

While it may seem difficult, the research affirms that formalizing ICBT and having its official recognition in the Customs Union Protocol would be a stepping towards realizing economic integration within the Community. ICBT is a kind of trade that is there to stay and

as a result of the shrinking formal economy; EAC will definitely have to deal with ICBT as a parallel and alternative source of employment in relation to the formal sector.

**ABBREVIATION LIST**

BOU	Bank of Uganda.
CET	Common External Tariff
COMESA	Common Market for East and Southern Africa.
EAC	East African Community
ECCAS	Economic Community of Central African States.
GATT	General Agreement on Tariffs and Trade.
GDP	Gross Domestic Product
ICBT	Informal Cross-Border Trade
ILO	International Labour Organisation.
NTB's	Non-Tariff Barriers
OAU	Organisation of African Unity.
REC	Regional Economic Community
SACU	Southern African Customs Union.
SAPS	Structural Adjustment Plans.
SPS	Sanitary and Phytosanitary
VAT	Value Added Tax
WICBT	Women in Cross Border Trade.
WTO	World Trade Organization.

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## CHAPTER ONE

### 1. THE EFFECT OF THE EAST AFRICAN COMMUNITY INTEGRATION PROCESS ON INFORMAL CROSS-BORDER TRADE: AN ANALYSIS OF THE CUSTOMS UNION PROTOCOL.

#### 1.1. INTRODUCTION

The informal sector constitutes about 43 per cent of the GDP in Africa. Within the informal sector is informal trade. When the informal trade is carried out across borders, it is referred to as ICBT which is the subject matter of this study. While it is difficult to gauge the extent of ICBT in EAC, various researches show that it constitutes a significant proportion of regional cross border trade.<sup>1</sup> It is therefore an important aspect in Sub-Saharan Africa considering that it is an important contributor to the socio-economic progress.<sup>2</sup>

ICBT is a form of trade that is mainly carried out by small scale traders and often goes unrecorded in official statistics. It is characterized by under-reporting, mis-classification or under-invoicing of goods. However, despite its nature, it has the potential to assist in the numerous efforts to alleviate poverty. This is due to the fact that it is a source of income to many households in EAC, it also enhances regional food security, boosts women economic empowerment and is a source of employment.<sup>3</sup>

Owing to the fact that ICBT is carried out informally, it is viewed with suspicion by a number of people who construe it to be nothing but illegal cross border activities. This therefore has resulted to ICBT being neglected when trade policies and legislation are being passed. The concept that ICBT is illegal trade shows that legislators have not fully appreciated the benefits that this trade can offer and the fact that they have downplayed it means overlooking a significant proportion of trade.

The main aim of this chapter therefore is to give an introduction to the entire study. It discusses the background to the study, the statement of the problem, the objectives of the study, limitations, methodology and concludes with the chapter breakdown.

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<sup>1</sup>C Lesser and EM Leeman 'Informal Cross-Border Trade and Trade Facilitation Reform in Sub-Saharan Africa' (2009) 86 TAD/TC/WP(2008)13/FINAL 24.

<sup>2</sup>PF Makombe, 'Informal Cross-Border Trade and SADC: The Search for Greater Recognition' available at [http://www.trademarksa.org/sites/default/files/publications/Informal\\_Cross\\_Border\\_Trade\\_and\\_SADC\\_2011.pdf](http://www.trademarksa.org/sites/default/files/publications/Informal_Cross_Border_Trade_and_SADC_2011.pdf) accessed on 15 September 2015.

<sup>3</sup> JK Afrika and G Ajumbo, 'Informal Cross Border Trade in Africa: Implications and Policy Recommendations' (2012) 3 *AFDB* at 1.

## 1.2. BACKGROUND TO THE STUDY

In the modern era and since its ‘discovery’ in the 1970’s, the informal sector has been the subject of numerous research and policy debates.<sup>4</sup>

In 2002, the International Labour Conference, *Resolution on Decent Work and the Informal Economy* came up with a framework that recognized the diversity of players in the informal sector and consequently gave a broader understanding of its parameters<sup>5</sup>. During the said Conference, there was a consensus on the need to protect those in the informal sector. Due to their informality, it was agreed that they are neither recognized nor registered in the national statistics. As a consequence thereof, it was decided that the way forward in the quest for protecting the informal sector was to formalize it so as to offer protection and support to the traders’.<sup>6</sup>

However, despite attempts to protect the informal economy, it still continues to be frowned upon due to the assumption that it is comprised of trade in illegal commodities. This is because transactions in the informal sector are seldom recorded in national statistics which then creates a very thin line between the informal sector, fraud and blatant disregard of national laws and regulations.<sup>7</sup>

Within the informal economy lies informal trade. This informal trade grows as a result of population increment, rural to urban migration which leads to job scarcity, economic hardships due to poor political and financial governance as well as civil wars, for instance what has been happening in Burundi.<sup>8</sup> This informal trade allows for the free movement of goods across borders. In such instances, the traders are able to make a substantial amount of income which enables them to meet their basic needs. On the other hand, the characteristic of informality makes the informal trade to be deemed as illegal, unofficial, underground, smuggling and contraband activities.<sup>9</sup>

Informal trade includes cross-border trade and/or domestic trade that is usually carried out along the streets as well as in the market places. Cross border trade that is carried out

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<sup>4</sup>International Labour Organization ‘The Informal Economy and Decent Work: A Policy Resource Guide Supporting Transitions to Formality’ 2013.

<sup>5</sup>Ibid.

<sup>6</sup> Ibid.

<sup>7</sup>United Nations Economic Commission for Africa, African Union and African Development Bank ‘*Assessing Regional Integration in Africa IV; Enhancing Intra-African Trade*’, May 2010, available at <http://www.uneca.org/sites/default/files/publications/aria4full.pdf>, accessed on 04 April 2015.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

informally is called ICBT. It may be registered or unregistered. Registered ICBT is determined bilaterally or unilaterally by neighbouring countries. For instance in East Africa, ICBT between Sudan and Ethiopia is determined by bilateral agreements. Ethiopia has similarly made unilateral decisions to liberalize ICBT with Djibouti, Kenya and Somalia while Uganda has unilaterally liberalized ICBT in commodities below USD 1,000.<sup>10</sup> Among the major commodities traded informally in East Africa informally is livestock. The main reasons as to why the aforementioned countries allow ICBT in livestock are, first, that Kenya has a strong economy and a ready market for meat, especially in Nairobi. The second reason is that even though Somalia is a failed state, it has a port that is used to export livestock to the Middle East. The final reason is that Somalia and Ethiopia have massive bare land that is used for grazing of livestock. Furthermore, the communities that live along these borders are tied by kinship groups based on trust. These close relationships enable ICBT to thrive effectively in the Horn of Africa.<sup>11</sup> In East Africa therefore, ICBT is seen to be most distinguishable when compared to other regions in Africa. Uganda, Tanzania, Ethiopia and Somalia are recognized as sources of non-processed foods that are consumed in Kenya and South Sudan. Kenya on the other hand is the source of manufactured goods which are sold informally to other countries in the region. However, this paper focuses on ICBT among the EAC countries being Kenya, Uganda, Tanzania, Burundi and Rwanda.

ICBT has no definite definition. One of the definitions is that it involves the flow of commodities across borders outside the designated formal frameworks. This means therefore that the transactions in ICBT are usually not recorded in government statistics and are neither inspected nor taxed through official channels.<sup>12</sup>

Nonetheless, over time, ICBT has grown by leaps and bounds and has contributed immensely to economic and sustainable growth. Indeed as earlier stated it is a source of income to about 43 per cent of Africa's population, it is a source of employment, enhances food security and boosts women's economic empowerment.<sup>13</sup> While the advantages of ICBT may be significant, the downside of the trade is that governments lose a significant amount of revenue through evasion of taxes at border points and formal trade is consequently weakened due to unfair competition.

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<sup>10</sup> United Nations Economic Commission for Africa, op cit note 7.

<sup>11</sup> Ibid.

<sup>12</sup> Market Analysis Sub-Group of Food Security and Nutrition 'East Africa Cross Border Trade Bulletin' (2015) 9 *FEWS NET/FAO/WFP* 1.

<sup>13</sup> Afrika and Ajumbo op cit note 3.

Undoubtedly, in the quest for regional integration, trade plays a very significant role. It creates employment opportunities, leads to increase in intra-regional trade and enhances export competitiveness as well as industrial diversification.<sup>14</sup> Cross-border trade, ICBT in particular, is therefore an important aspect of the EAC regional economic integration process. Indeed in 2004, the presidents of Kenya, Uganda and Tanzania signed the Protocol on the Establishment of the East Africa Customs Union. (Hereinafter referred to as the Customs Union Protocol) Rwanda and Burundi thereafter joined the Union in 2008. The Customs Union Protocol's main objective is the formation of a single customs territory through elimination of internal tariffs and non-tariff barriers to trade. It also seeks to liberalize intra-regional trade in goods on the basis of mutually beneficial trade arrangements among Partner States, promote efficiency in production within the community, enhance domestic, cross-border and foreign investment in the community and finally to promote economic development and diversification in industrialization in the community.<sup>15</sup> This simply means the removal of internal tariff and non-tariff barriers among the EAC countries and the imposition of a CET to non-member countries.

However, since the inception of the Customs Union Protocol in 2005, only policies aimed at strengthening formal trade among member countries have been realized. ICBT has completely been downplayed despite the fact that it constitutes a significant proportion of regional cross border trade.

This research therefore discusses the nature and scope of ICBT in EAC and creates a link between ICBT and the Customs Union Protocol. The Customs Union Protocol can be of great importance to informal cross border traders if a wide and wholesome interpretation of the articles can be adopted in order to utilize the said provisions to extend protection to the informal cross-border traders so as to improve their economic well-being.

It also discusses the effect of the integration process on ICBT and argues that ICBT has mostly been relegated to the back seat when trade policies are made despite the fact that it constitutes a significant portion of regional cross border trade. It continues to add that ICBT promotes social integration especially considering that in the day to day interactions, traders are able to exchange their cultures, ideas, languages, experiences and beliefs. As a consequence therefore, in the regional integration agenda, the trade flows between

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<sup>14</sup> Eastern African Sub-Regional Support Initiative for the Advancement of Women (EASSI), 'Gender Analysis of the East African Community (EAC) Roadmap' *EASSI* 2011.

<sup>15</sup> Protocol on the Establishment of the East Africa Community Customs Union of 2004, art. 3.

neighbouring countries should always be the starting point. The study thus proposes that ICBT should for that reason be recognized and re-attached to the formal economy through the strategy of 'regionalism from below' to bring on board informal cross-border regional activities.<sup>16</sup> This is supported by the fact that ICBT has grown substantively and if properly managed, has the potential to support the on-going initiatives to alleviate poverty and consequently strengthen the EAC economies.

### **1.3. STATEMENT OF THE PROBLEM**

There are numerous reasons why a number of people choose to engage in ICBT. The one fact that remains constant is that all they seek is survival; to be able to obtain income to make ends meet and escape poverty.

In EAC, despite the fact that there are numerous initiatives on eradicating poverty, none of them have considered looking into ICBT. For a long time ICBT has been relegated to the back seat. For instance, the EAC integration process led to the signing of the Customs Union Protocol in 2005 whose main objective was to remove internal tariffs as well as non-tariff barriers to trade so as to create a large single market and investment area. In that regard it was meant to facilitate cross border trade and promote economic development in the region.

Nonetheless, the legislation has not taken into account the plight of ICBT considering that only policies that aim at strengthening formal trade among member countries have been realized. Further, the Customs Union Protocol has not even been effectively publicized. As a consequence, many informal cross border traders are not aware of its existence and are therefore oblivious of the benefits that they can derive there from.

The neglect of ICBT shows that legislators have not fully appreciated the benefits that this trade can generate and the fact that they have downplayed it means overlooking a significant proportion of trade.

This study therefore will highlight the significance of ICBT to the economy and bring into cognizance the plight of informal cross border traders who for a long time have been neglected and demonstrate how the Customs Union Protocol can be of benefit to them.

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<sup>16</sup> M Lee, 'Regionalism in Africa: A Part of the Problem or a Part of the Solution,' Polis/R.C.S.P./C.P.S.R. Vol. 9, NuméroSpécial, 2002, available at, <http://www.polis.sciencespobordeaux.fr/vol110ns/lee.pdf>, accessed on 05 April 2015.

#### **1.4. OBJECTIVES OF THE STUDY**

The objective of this study is to give a detailed account of ICBT in EAC so as to inform policy making in relation to the opportunities that informal cross border traders can derive from the Customs Union Protocol. The study gives an overview of the nature and scope as well as the significance of ICBT in EAC. It also discusses the characteristics of traders as well as the goods that are traded, trade patterns among member countries and the effect of ICBT to the economies.

The study then analyses the Customs Union Protocol and highlights opportunities that can be derived from specific articles for the benefit of the informal cross border traders and eventually comes up with policy recommendations to provide a regulatory environment that can accommodate both the formal and informal sector.

It also discusses the regional integration initiatives taken with the aim of promoting economic development in the Community and their effect on ICBT. The route taken by Africa as a whole is market integration which has not been without difficulties. As an alternative, the research proposes that the ‘regionalism from below’ strategy could be the better way forward in the quest for regional economic integration considering that ICBT has greatly supported the shrinking formal economy. This would mean tapping into this informal trade by building on those informal trade networks to create a robust economy bearing in mind that is where a substantial proportion of cross-border trade is conducted. The results of this research will therefore show the necessity of creating a link between ICBT and the formal sector by formulating policy recommendations that effectively incorporate ICBT to the formal economy.

#### **1.5. RESEARCH QUESTIONS**

1. What are the characteristics of ICBT?
2. How important is ICBT in EAC?
3. What are the benefits and challenges of ICBT?
4. What is the effect of the Customs Union Protocol on ICBT?
5. How can the informal sector be incorporated in the formal sector?

#### **1.6. LIMITATION TO THE STUDY**

Due to the informal nature of ICBT, it is mainly un-documented. As a result of this, there is therefore no accurate information on its true extent, and its true impact to the economies. Further, while a lot has been written on the informal economy, there is not much literature

focusing on ICBT and the little there is focuses more on ICBT in Kenya, Tanzania and Uganda, and less on Rwanda and Burundi.

### **1.7. METHODOLOGY**

The study employs qualitative data. It is based on review of existing studies and literature. It also relies on books, journals and reports as well as internet sources.

### **1.8. CHAPTER BREAKDOWN**

This paper consists of five chapters. Chapter one gives a brief introduction of the research. It also contains the statement of the problem, objectives of the study, limitations to the study, research questions, methodology as well as the chapter break down.

Chapter two looks at the conceptual definitions and literature review. It elaborates on the various definitions of ICBT, discusses the factors that influence the growth of ICBT, characteristics of traders, the main goods traded, trade patterns within the region as well as the social-economic effect of ICBT in EAC. This chapter illuminates the significance of ICBT and shows how the negative labelling of ICBT as ‘illegal cross-border activities’ leads to the neglect of a significant proportion of trade.

Chapter three discusses the effect of the regional integration process in EAC on ICBT. It discusses the regional integration agenda in Africa and thereafter narrows it down to EAC. It also evaluates the transition from the informal to the formal economy and concludes that formalizing ICBT could be the better way forward.

Chapter four analyses the Customs Union Protocol and highlights its specific articles that can be interpreted to confer opportunities to informal cross border traders.

Chapter five provides the conclusion. This is a summary of the findings of the research on ICBT in EAC and gives policy recommendations.

## CHAPTER TWO

### 2. CONCEPTUAL DEFINITIONS AND LITERATURE REVIEW

#### 2.1. INTRODUCTION

To fully appreciate and understand the nature of ICBT, this chapter will delve into literature review so as to expound on some of the definitions. Unfortunately, as expressed in the preceding chapter, there is limited literature on ICBT considering that most of the transactions are unrecorded. Further, on the literature available, the focus is more on Kenya, Uganda and Tanzania and least on Burundi and Rwanda.

Having stated so, this chapter will discuss the factors that influence the growth of ICBT, characteristics of informal cross-border traders and the challenges they face, the nature of goods traded, as well as the advantages and disadvantages of this trade.

Eventually, it will show that despite the negativity towards ICBT, the advantages outweigh the disadvantages and if properly managed, ICBT has the capability to support the initiatives on poverty eradication in the region.

#### 2.2. CONCEPTUAL DEFINITIONS OF ICBT

There is no universally accepted definition of ICBT. The following are examples of definitions that have previously been applied:

ICBT constitutes transactions that are done outside the formal framework. It has however been quite difficult to ascertain the true extent of this trade which has resulted to irregularities in the actual statistics of ICBT.<sup>17</sup>

It is a trade that constitutes the activities of small scale traders engaged in the buying and selling of goods across national borders. The reason why this trade is believed to be informal is due to the fact that it involves small entrepreneurs, the goods traded are mainly bought and sold in informal markets and because traders mostly escape formal import and export channels.<sup>18</sup> However, despite the fact that it constitutes informal transactions, ICBT constitutes a significant proportion of trade. It contributes towards food security, it is an important income earning activity, it boosts women economic empowerment, it provides

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<sup>17</sup> E Chinyama, 'Informal Trade in Africa' 7 *ATPC* 1.

<sup>18</sup> S Peberdy 'Hurdles to Trade? South Africa's Immigration on Policy and Informal Sector Cross-Border Traders in the SADC' (2002) available at, <http://www.queensu.ca/samp/Conferences/Agendas/Agenda7d.pdf> accessed on 20 August 2015.

employment opportunities for the traders and their employees and ultimately leads to poverty alleviation.<sup>19</sup>

Despite the advantages that ICBT has to offer, there is however a general negative perception as the trade is viewed more as a threat needing control rather than a genuine economic activity. These concerns are contributed by the fact that ICBT is mainly conducted outside the formal framework. It is therefore difficult to ascertain its true extent since most of its activities are unrecorded in national income statistics.<sup>20</sup> The fact that it is unrecorded means that there are incorrect statistics on its true extent among member countries, which ultimately jeopardizes the assessment of national wealth.<sup>21</sup>

ICBT has also been defined as imports and exports of legitimately produced goods and services which directly or indirectly escape from the regulatory framework for taxation by the government, and often go unrecorded or incorrectly recorded into official national statistics.<sup>22</sup>

It also refers to trade in processed or non-processed commodities which may be legal imports or exports on one side of the border and illicit on the other side and vice-versa, on account of not having been subjected to statutory border formalities such as customs clearance.<sup>23</sup>

Further, it has been described to largely consist of those goods exchanged across borders either by bypassing the official customs checks and recording points while deliberately being undervalued or unrecorded.<sup>24</sup>

For purposes of this research, ICBT can be said to be trade carried out informally by small scale entrepreneurs who are involved in the buying and selling of various commodities among neighbouring countries. This trade is usually regarded as 'informal' because it goes unrecorded in the national income statistics as the traders usually evade the formal import and export channels. As a consequence thereof, it has been perceived as an illegal economic activity. However, ICBT grows as a result of a number of factors as discussed below.

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<sup>19</sup> S Peberdy op cit note 18.

<sup>20</sup> Chinyama op cit note 17.

<sup>21</sup> Ibid.

<sup>22</sup> V Ogalo. 'Informal cross-border trade in EAC: Implications for Regional Integration and Development' (2010) *CUTS African Resource Centre*.

<sup>23</sup> Afrika and Ajumbo op cit note 3.

<sup>24</sup> Makombe op cit note 2.

### 2.3. FACTORS THAT INFLUENCE GROWTH OF ICBT

There is no country that exists without the informal economy. As for Africa, it is often said that if you judge it by its governments and leadership you judge it by what it does worse and when you ignore its informal sector you ignore what it does best.<sup>25</sup> This is because informal trade is a major source of employment for a significant number of people. In this regard, it provides between 20 and 75 per cent of total employment.<sup>26</sup> In addition, it is also a source of income for many households thus assisting in the quest for poverty eradication. The informal sector is therefore a pillar of Africa's economy and as the economies grow, ICBT grows parallel as one of its important affiliates.

ICBT dates back to the pre-colonial era where traders moved freely across borders to participate in barter trade. The colonial masters then came up with boundaries to demarcate their regions and upon gaining independence, ICBT became illegal.<sup>27</sup> This is because tariffs and non-tariff barriers were imposed which completely disrupted the economic activities.<sup>28</sup> As a consequence therefore, some would prefer to engage in ICBT because they are more comfortable in continuing with a practice that has been on-going before the colonial era. ICBT can therefore be explained as a continuation of the indigenous patterns of trade.

In EAC there is a long and rich history in cross border trade.<sup>29</sup> However, the same has been marred by increase in population, economic crises resulting from failure of political and financial governance, HIV/AIDS prevalence<sup>30</sup> and civil unrest, for instance in Burundi. The aforementioned crises consequently push people towards informal trade which in turn becomes a means of coping with the environment. Most informal cross border traders only seek a means of survival so as to escape the glaring teeth of unemployment and abject poverty.

In essence, there is no specific reason why people choose to engage in ICBT; it is a result of a number of factors. Some traders choose ICBT as they consider it to be more attractive than formal trade while others encounter problems that push them to ICBT. Whatever the

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<sup>25</sup> K Douglas, 'Don't ignore what Africa Does best-The Informal Sector,' July 2014, available at <http://www.howwemadeitinafrica.com/dont-ignore-what-africa-does-best-the-informal-sector/41592/>, accessed on 09 April 2015.

<sup>26</sup> Chinyama op cit note 17.

<sup>27</sup> United Nations Economic Commission for Africa op cit note 7.

<sup>28</sup> Ibid.

<sup>29</sup> Ogalo op cit note 22.

<sup>30</sup> United Nations Economic Commission for Africa op cit note 7.

reason, many opt for ICBT as a survival tactic to improve their standards of living. The following are some of the factors that contribute to the growth of ICBT in EAC:

### **i. Flexibility**

Flexibility is one of the main reasons why people choose to engage in ICBT. This is because they are able to carry out their transactions without being subjected to structural laws. ICBT offers an escape route where informal cross border traders are able to escape from the rigid laws; for instance, labour laws that require the drawing up of formal contracts, procedures when hiring and firing, remittance of taxes and social security contributions in addition to the complicated and bureaucratic import and export regulations.<sup>31</sup>

Informal cross border traders therefore carry out their transactions based on their financial capacities, their individual perceptions of the risks of doing business as well as demand and supply.<sup>32</sup>

As a consequence of this flexibility, informal cross border traders are able to transact on minimal costs as they do not have to deal with complex import and export documentation or business registration documents required of formal traders.

### **ii. Indigenous patterns of trade**

ICBT predates the colonial era where communities were engaged in long and short distance trade.<sup>33</sup> These traders would travel far and wide, freely crossing borders to participate in barter trade which was mainly based on the availability of commodities, population density and good weather conditions.<sup>34</sup> However, at the Berlin conference of 1884, during the scramble and partition of Africa, the colonial masters came up with boundaries to divide their zones of control. The borders disrupted communities that had strong economic ties considering that at the dawn of independence, these borders were taken up as national boundaries<sup>35</sup> and tariff and non-tariff barriers were introduced. It was therefore no longer easy to cross borders and conduct trade and ICBT became illegal.

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<sup>31</sup> Ogalo op cit note 22.

<sup>32</sup> United Nations Economic Commission for Africa op cit note 7.

<sup>33</sup> Ibid.

<sup>34</sup> S Golub 'Informal Cross-border Trade and Smuggling in Africa' available at [http://www.swarthmore.edu/sites/default/files/assets/documents/user\\_profiles/sgolub1/Smuggling%20Literature%20Survey\(0\).pdf](http://www.swarthmore.edu/sites/default/files/assets/documents/user_profiles/sgolub1/Smuggling%20Literature%20Survey(0).pdf) accessed on 14 March 2015.

<sup>35</sup> Ibid.

Taking the aforesaid into consideration, ICBT may be nothing but a continuation of a trading norm which has only been made difficult by the introduction of borders and the consequent tariffs and non-tariff barriers to trade.

### **iii. Shrinking of the formal economy**

In the early 1980s SAPs were introduced by the World Bank and International Monetary Fund. Their main aim was to restructure the economy and reduce intervention by the Governments. However, the SAPs were inappropriately implemented and brought about the shrinking of the formal economy.<sup>36</sup> This was characterized by massive rural to urban migration in search for non-existent jobs. However, what they were faced with was low wages and retrenchments which led to their seeking an alternative to formal employment.<sup>37</sup>

ICBT offered that alternative. It consequently came about in response to the backfired market liberalization policies which exposed the EAC economies to unfair competition and which prevented government intervention hence leading to poverty and unemployment.<sup>38</sup>

### **iv. Unemployment**

As discussed above, structural adjustment plans resulted in poverty and unemployment. It therefore goes without saying that unemployment would definitely lead to some people seeking an alternative source of income.<sup>39</sup> In addition, due to high population rates and the ensuing rural to urban migration, the market is not in a capacity to absorb new people. As a result therefore many have turned to ICBT as a source of employment. Further, as an added advantage, ICBT does not discriminate. So long as one has the necessary resources and can meet the demand and supply, ICBT absorbs small and large scale traders, men and women as well as the educated and the uneducated.

### **v. Source of income generation**

When ICBT becomes a source of employment, it means that it is a source of income generation. This can either be as a sole source of income generation or as a supplement to the low wage that is provided in some formal sector jobs. The earnings derived from ICBT are used to meet the daily needs. These informal cross border traders are therefore able to buy

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<sup>36</sup> Ogalo op cit note 22.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

food, pay rent, pay school fees for their children and meet the necessary expenses at home which in turn lead to improved standards of living.<sup>40</sup>

#### **vi. Ignorance of existing laws and regulations**

Some traders are unaware of the national and regional legislations in force as well as the roles and responsibilities of government officials at the border posts. For instance, some do not know of the existence of the Customs Union Protocol hence are not aware of the benefits that they can derive from it to facilitate their activities.<sup>41</sup> They continue to engage in ICBT despite the fact that the Customs Union Protocol has a number of provisions aimed at accruing financial gains<sup>42</sup> and improving their transactions. For instance, the Customs Union Protocol provides for a tariff free environment<sup>43</sup>, substantive tax reduction<sup>44</sup>, reduction of trade documentation and adoption of common standards of trade documentation and procedures, non-discrimination of goods among EAC members<sup>45</sup>, enabling of subsidies<sup>46</sup> and special economic arrangements.<sup>47</sup>

However, due to the nature of the informal activities, it is difficult for regional trade policy initiatives under EAC, especially the Customs Union Protocol to have any significant impact on them.<sup>48</sup> Further, due to the traders' ignorance of the laws in place, officials at the border posts take advantage by demanding for duties on goods that ordinarily do not require payment of any duties.

#### **vii. Corruption and porous borders**

Porous borders and rampant corruption enables ease of entry of goods among neighboring countries. Corruption grows from the fear and ignorance of most informal cross-border traders as they are not aware of the national and regional legislations and the tax rates in

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<sup>40</sup> UN Women Headquarters 'Unleashing the Potential of Women Informal Cross Border Traders to Transform Intra- African Trade' (2010) United Nations Entity for Gender Equality and the Empowerment of Women (UN Women).

<sup>41</sup> M Masinjila 'The East African Customs Union: Opportunities and Challenges for Small Scale Women Traders' April 2009, available at [http://repository.uneca.org/bitstream/handle/10855/2139/bib.%2017614\\_I.pdf?sequence=1](http://repository.uneca.org/bitstream/handle/10855/2139/bib.%2017614_I.pdf?sequence=1) accessed on 02 July 2015.

<sup>42</sup> Ogalo op cit note 22.

<sup>43</sup> Protocol on the Establishment of East Africa Customs Union of 2004 art.2 and 10.

<sup>44</sup> Ibid, articles 3 & 4.

<sup>45</sup> Ibid, articles 6 & 7.

<sup>46</sup> Ibid, articles 17 & 18.

<sup>47</sup> Ibid, article 32.

<sup>48</sup> Eastern African Sub-Regional Support Initiative for the Advancement of Women (EASSI) op cit note 14.

place.<sup>49</sup> As a result of their ignorance, border officials usually demand bribes from them to ensure a smooth clearance of their goods. The informal cross border traders are then forced to part with their hard earned cash to avoid unnecessary extra costs or delays at the borders. For women in particular, it is cumbersome having to camp at the border post for days awaiting clearance of goods as they are exposed to sexual harassment, their goods are sometimes stolen and there is also fear for their own personal security. To avoid this unnecessary impunity at the borders, they are then forced to use informal channels by engaging middle men who take advantage of the porous borders and ensure the smooth transition of their goods across member countries.<sup>50</sup>

#### **viii. Non-tariff barriers**

Both the EAC Treaty<sup>51</sup> and the Customs Union Protocol<sup>52</sup> provide for the elimination of NTB'S. The ones that cause a major headache for EAC are SPS measures which create a level of protectionism among member countries.<sup>53</sup> A case in example is Uganda maintaining a ban on importation of beef from Kenya and only recently lifted the ban on bull semen after Kenya lifted the ban on the importation of one day old chicks from Uganda.<sup>54</sup> Other Non-tariff barriers include discriminatory rules of origin, complicated rules of origin, certificates of origin and/or authenticity, road blocks, classification of products, unreasonable packaging and labelling standards and bureaucratic customs procedures.<sup>55</sup>

As a result of these measures, many opt to engage in ICBT for faster facilitation of their goods across borders without being subjected to the aforesaid complicated and sometimes unjustified measures.

## **2.4. CHARACTERISTICS OF INFORMAL CROSS BORDER TRADERS**

Informal cross border traders are characterized as 'informal' due to the fact that they mainly buy and sell their goods in informal markets. Further, because they also evade payment of import and export duties as well as requisite domestic taxes. In short, they escape normal

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<sup>49</sup> M Masinjila 'Gender Dimensions of Cross Border Trade in East Africa Community- Kenya/Uganda and Rwanda/Burundi Border' (2009) 1 *ATPC* 1.

<sup>50</sup> *Ibid.*

<sup>51</sup> Article 75(5) provides that member states should remove all existing non-tariff barriers on goods originating from member states and being imported in their countries and consequently desist from imposing any further non-tariff barriers.

<sup>52</sup> Protocol on the Establishment of East Africa Customs Union, *Supra* note 43 at 16, art. 13.

<sup>53</sup> HK Mutai, 'Regional Trade Integration Strategies under SADC and EAC: A Comparative Analysis.' (2011) 1 *SADC Law Journal* 81 at 88.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

institutional systems of rules, rights, regulations and enforcement penalties that govern formal traders.<sup>56</sup>

These traders mostly operate in small scale as they are thinly spread financially and due to the fact that it is easy to transport goods in small consignments to avoid detection at the borders. However, that may not always be the case as large scale traders are also involved in ICBT. This is usually done by packaging their goods in small consignments and ferrying them across borders at intervals to make up large consignments when added up.<sup>57</sup>

Essentially, ICBT is comprised of both formal and informal traders.<sup>58</sup> Formal traders can be categorized into two groups. The first one comprises of those that deal with legitimately produced goods but evade trade related regulations. The second category comprises of traders that deal with legitimately produced goods but partially evade trade related regulations for instance by under-invoicing of their goods, mis-declaration of the country of origin and misclassification of their goods so as to pay less tax at the border posts.<sup>59</sup>

The informal category, which is the subject matter of this study comprises of informal unregistered traders who deal with legitimately produced goods but escape from the regulatory framework for taxation.<sup>60</sup>

The traders can then be divided into four categories; first being the producers of the various commodities, second the wholesalers and/or semi-wholesalers who stock produce in large quantities and sell to the third category being the retailers and finally other facilitators who serve as brokers or middle-men.<sup>61</sup>

In terms of their employment relationships, informal cross border traders do not engage in contractual relationships with their employees. Due to the nature of the trade, employment laws are not followed since most of the traders are engaged on part-time basis while others operate based on mutual trust dependent on clan/community/kinship ties.<sup>62</sup>

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<sup>56</sup> EL Feige 'Defining and Estimating Underground and Informal Economies: The New Institutional Economics Approach' (1990) available at <file:///C:/Users/user/Downloads/0912f50572c34eca9400000.pdf> accessed on 15 September 2015.

<sup>57</sup> Ogalo op cit note 22.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> United Nations Economic Commission for Africa op cit note 7.

<sup>62</sup> Ibid.

To add on to that, due to harsh economic conditions, ICBT absorbs every Tom, Dick and Harry so long as one has the necessary resources and has the ability to meet demand and supply.<sup>63</sup> Most of informal cross border traders are in the age bracket of 25 and 39<sup>64</sup> and the majority are women.<sup>65</sup> They engage in ICBT mainly due to unemployment, lack of skills and illiteracy. However, there are also other women who have chosen to engage in ICBT because they have established better chances of success in ICBT as compared to formal trade. Whatever the reasons, all these women seek is to meet their basic needs and improve their standards of living.<sup>66</sup>

#### 2.4.1. Women in cross-border trade

In Subs-Saharan Africa, 60 per cent of non-agricultural employment to women is provided by trade. These women have limited financial resources and as a result thereof run small scale survivalist enterprises whose main component is agricultural products like food crops, fruits, grains and vegetables.<sup>67</sup> So as to survive, they move goods informally across borders to trade and eventually derive income. ICBT is therefore one of the means by which they are able to improve their standards of living as they are able to cater for their basic needs.

Despite the fact that the Customs Union Protocol provides for the liberalization of intra-regional trade, enhances domestic, cross border trade and foreign investment as well as promote economic development and diversification in industrialization,<sup>68</sup> women continue to face numerous problems when carrying out their transactions. One of the major challenges that WICBT face is that they are oblivious of the Customs Union Protocol. As for those who know of its existence, they are not too confident that it will have any positive impact as they are of the opinion that it would bring about introduction of taxes. Taxes would mean that they will have to cede with a proportion of their profits, something that many would not want to part with.<sup>69</sup>

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<sup>63</sup> United Nations Economic Commission for Africa op cit note 7.

<sup>64</sup> Ogalo op cit note 22.

<sup>65</sup> M Mutoni *Informal Cross-Border Trade of Agricultural Products between Rwanda and Burundi: A Case Study of Female and Male Small Holder Traders of Bugesera District, Rwanda*, LLM (Hogeschool) (2013) 7 & 8.

<sup>66</sup> TM Njenga 'Women Working in the Informal Economy: Challenges and Policy Considerations' April 2015, available at <http://www.osisa.org/buwa/economic-justice/regional/women-working-informal-economy-challenges-and-policy-considerations> accessed on 25 August 2015.

<sup>67</sup> Masinjila op cit note 41.

<sup>68</sup> Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, art. 3.

<sup>69</sup> Masinjila op cit note 49.

Therefore, for these WICBT to fully appreciate the benefits of the Customs Union Protocol there needs to be policy and institutional reforms that would adequately create an enabling environment for ICBT. The first step would be to disseminate information on the essence of the Customs Union. This is because it is important that these informal cross border traders are aware of its implications so that they can prepare themselves adequately on possible challenges they may have to deal with as well as embrace the opportunities that they can derive there from.

## **2.5. CHALLENGES FACED BY INFORMAL CROSS BORDER TRADERS**

The main objective of the Customs Union Protocol is the formation of a single customs territory. In so doing, it seeks to liberalize intra-regional trade, enhance the promotion of economic development and diversification in industrialization and facilitate domestic, cross-border and foreign investment in the community.<sup>70</sup> This shows that trade is the crux of the Customs Union.<sup>71</sup>

However, informal cross border traders continue to encounter numerous obstacles in trade as discussed below:

### **i. Lack of access to loans from financial institutions**

Financial institutions do not grant credit to informal cross border traders due to the informal nature of their businesses. As a consequence, informal cross border traders do not have legal documents and their businesses are not always financially stable as they most likely lack a payback guarantee. Further, access to credit means complex payment terms due to the legal requirements of paying service charges and interest. These traders operate under very minimal resources hence the payment of interest or services charge would greatly decrease their profit margin. As a result of this, most traders resort to bilateral agreements with their peers where they agree on terms that are mutually beneficial.<sup>72</sup>

### **ii. Lack of capital**

Due to the fact that these traders are not able to access finances as discussed above, they lack necessary capital to start big businesses. To add on to that, their businesses sometimes do not have financial stability hence they are not able to access loans. Their source of support

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<sup>70</sup>Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, art. 3.

<sup>71</sup>EAC Secretariat, 'Implications and Benefits of the EAC Customs Union' 2004.

<sup>72</sup> Afrika and Ajumbo, *op cit* note 3.

therefore comes from their own meagre resources and loans from family and friends who are able to advance them only but a small amount of credit which is repaid on short term basis, with or without interest.<sup>73</sup>

### **iii. High Taxes**

One of the characteristics of informal cross border trade is the fact that the traders evade payment of taxes. However the case may not always be that it is outright refusal. Some of the traders are not aware of the exact taxation rates applied for commodities which leads to border officials taking advantage and charging exorbitant taxes. As a consequence thereof, informal cross border traders refuse to pay taxes because they are of the view that the taxes will only be used ‘to feed the hungry stomachs’ of border officials’.<sup>74</sup>

### **iv. Corruption**

Corruption is a menace in EAC. It comes about as a result of the delay of clearing goods at the border posts. Due to the bureaucratic procedures, goods can take up to five days to clear. Further, it is contributed by the fact that some informal traders are ignorant of existing legislation. For instance, despite the fact that the Customs Union Protocol has been in operation since 2005, most traders are not aware of its existence. As a consequence, they are not aware that internal tariffs have been abolished as stipulated in the Customs Union Protocol.<sup>75</sup> Accordingly, border officials take advantage of their ignorance and continue to charge them exorbitant duties on their goods. So as to clear their goods quickly and the fact that they do not know the legislations in place, they pay bribes to avoid further delay. Corruption is a disease that needs to be done away with as once it is eradicated, not only is intra-regional trade encouraged but also the business environment is improved where trade costs are reduced and foreign investment is encouraged.

### **v. Violence and sexual harassment**

Women, in particular are subject to violence and sexual harassment at the borders. This occurs when the customs clearance procedures take too long to clear their goods and as a result thereof they are forced to spend days at the border. This exposes them to sexual harassment and sometimes even rape by the customs officials as well as their male

<sup>73</sup> Afrika and Ajumbo, op cit note 3.

<sup>74</sup> K Titeca and Kimanuka ‘Walking in the Dark: Informal Cross-Border Trade in the Great Lakes Region’ September 2012, available at <http://www.international-alert.org/sites/default/files/publications/201209WalkingDarkCrossBorder.pdf> accessed on 25 August 2015.

<sup>75</sup> Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, art. 3.

counterparts.<sup>76</sup> Some women also opt to exchange the ease of passage of their goods in exchange for sexual favours. These sexual favours in turn result to the high rise of HIV/AIDS at border posts.

## **2.6. NATURE OF GOODS TRADED AND TRADE PATTERNS IN EAC**

The goods traded in EAC informally can be classified as:

- i. Non-processed goods;
- ii. Manufactured goods; and
- iii. Re-exports.

Non processed goods comprise mainly of food stuff like maize, beans, vegetables, fish, bananas, ground nuts and rice. The non-processed foods also comprise non-food stuff like hides and skin as well as crafts and beadwork. Manufactured and non-processed goods comprise of manufactured goods of low quality as well as counterfeits from Asia. They include soft drinks, sugar, edible oils, second hand clothes, cosmetics, edible oils, shoes, electronics, pharmaceutical drugs and petroleum products.<sup>77</sup>

Non-processed goods comprise the larger proportion of goods traded informally among member countries. This is due to the fact that majority of the population live in rural areas and depends on agriculture as the major source of livelihood.<sup>78</sup> Uganda is the only country in EAC that has made deliberate attempts to assess the impact of ICBT to its economy. In such efforts, the Uganda Bureau of Statistics has conducted a number of surveys to try and expound on the scope of ICBT in EAC. For instance, in the 2009 report, the informal exports from Uganda to the other member states was estimated to have been US \$ 1.3 billion in 2008 which was an increase from US \$ 776.5 million in 2007. Consequently, the total informal imports to Uganda from the region were US \$ 73.5 million in 2008 compared to US \$ 57.2 million in 2007.<sup>79</sup>

From the survey, it is clear that informal exports from Uganda have increased over the years while the imports have decreased. The increase in informal exports from Uganda to Tanzania, Rwanda and Burundi was as a result of trade liberalization in the region, political stability as well as increase in demand for goods to meet the needs of the growing population.

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<sup>76</sup> Mutoni op cit note 65.

<sup>77</sup> Afrika and Ajumbo op cit note 3.

<sup>78</sup> Mutoni op cit note 65.

<sup>79</sup> Uganda Bureau of Statistics Report, 2009.

It was also as a result of substantial informal exports to South Sudan which was estimated to constitute 69.4 per cent of the total informal exports. The increase of informal exports from Uganda to Kenya in 2009 was contributed by the 2007/2008 post-election violence that resulted to massive internal displacement of people as well as the intense drought that affected the Eastern and North Eastern Region.<sup>80</sup> The two reasons were a major cause of direct impact to food insecurity in Kenya.

Overall, maize is the commodity that is most traded in EAC accounting for 68 per cent of total informal flows. It is then closely followed by beans then rice.<sup>81</sup> In relation to the actual borders, the following are the major goods traded:

- i. **Busia border, between Kenya and Uganda-** second hand clothing, cosmetics, maize, beans, sorghum, sugar, salt, soap and edible oils.<sup>82</sup>
- ii. **Namanga border, between Kenya and Tanzania-** crafts, beadwork, textiles.<sup>83</sup>
- iii. **Katuna border, between Uganda and Rwanda-** beans, Irish potatoes, tomatoes, peas, fruits, second hand clothes, shoes and construction materials like cement and nails.<sup>84</sup>
- iv. **Mutukula border, between Uganda and Tanzania-** second hand clothes.<sup>85</sup>
- v. **Kanyaru border, between Rwanda and Burundi-** second hand clothes, maize, beans and sorghum.<sup>86</sup>

## 2.7. EFFECTS OF ICBT

EAC countries are engaged in massive trade amongst each other, majority of it being conducted informally. However, ICBT is not usually captured in official records therefore does not appear in the national statistics which is often relied upon by legislators when coming up with trade related policies. Depending on a number of factors, ICBT has different impacts on producers, traders, consumers and governments. It has both positive and negative impacts as discussed below:-

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<sup>80</sup> Uganda Bureau of Statistics Report op cit note 79.

<sup>81</sup> Dr. SO Gor 'An assessment of the Informal Sector Trade in Kenya' (2012) 13 *esteyjournal.com* 105.

<sup>82</sup> Eastern African Sub-Regional Support Initiative for the Advancement of Women (EASSI) op cit note 14.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

### **i. Creates employment**

ICBT contributes about 20 to 75 per cent of total employment in EAC. This is in response to the shrinking formal economy which has resulted into retrenchment of some of its employees. It is also a source of income for most families where about 60 to 70 per cent are sustained by the proceeds obtained from ICBT.<sup>87</sup> Further, for those who earn low wages in the formal economy, this informal trade becomes an additional source to supplement the low income. As a result of being engaged in gainful employment, these traders are able to meet their basic needs like pay school fees for their children, pay rent and buy food.

### **ii. Availability of goods for consumers**

The goods traded are usually more affordable than what is sold in the domestic markets. Further, trading with neighbouring countries enables consumers to get access to foods that may not be readily available in the domestic market which enables the consumers access a wider variety of foods leading to consumption of a balanced diet. However, the negative impact of this is that these goods are ferried through informal channels hence not subject to the necessary phytosanitary and sanitary measures at the borders. This can therefore make consumption riskier as failure to subject the goods to the necessary inspection standards exposes consumers to health, safety and environmental risks.<sup>88</sup>

### **iii. Food security**

Food security has been defined by Food Agricultural Organization as being the ability to have both physical and economic means to access food at all times.<sup>89</sup> For this to be the case, there must be adequate food supply, stability of the food supply must be maintained and that all consumers must be supplied.

A large number of people in EAC are subject to abject poverty and cannot afford the commodities sold in the domestic markets. However, through their networks, informal cross border traders are able to supply their goods even in the very remote areas of the region. Further, most of the agricultural foods imported informally are relatively cheaper than what is sold by the domestic farmers. As a result of this, the poor are able to access food. The

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<sup>87</sup> Chinyama op cit note 17.

<sup>88</sup> Afrika and Ajumbo op cit note 3.

<sup>89</sup> Makombe op cit note 2.

affordability and high demand of these food stuffs presents opportunities for ICBT to support the agricultural sector in enhancing food security in the region.<sup>90</sup>

#### iv. **Social-Economic Progress**

ICBT as indicated above is a source of employment for a large population in EAC. The significance of the informal imports is that they serve a large portion of the urban rich as well as the rural poor. Those from poor backgrounds however tend to be the majority benefactors as they are able to access these informal imports at a cheaper price than those produced locally. They therefore can afford clothes, electronics, shoes, textiles, pharmaceutical drugs as well as food stuffs which they would normally have to struggle to afford if they had to buy the same locally. Further, the informal trade allows equitable opportunities for entry and distribution of benefits. All that is required is sufficient capital as it accommodates the rich, poor, educated, and un-educated, men and women. This opportunity is not easily accorded by the formal sector taking into consideration high population rates and the subsequent shrinking of the formal sector which results into the market not being able to absorb new people.<sup>91</sup>

#### v. **Loss of revenue**

One of the main characteristics of informal cross border traders is that they evade paying taxes at the border points. That is usually the main reason which leads to ICBT being branded as illegal. As a consequence of evading taxes, the Community lose millions of dollars annually from unpaid import and export duties as well as domestic taxes like VAT. These losses are significant in the EAC where trade taxes from imports contribute to a significant source of fiscal revenue.<sup>92</sup> This revenue that ICBT deprives the government is one that could be channelled to other national development priorities like infrastructure, health and education.

However, Uganda is one country that is proof that even though the government lost revenue from ICBT, the economy boomed with foreign export earnings from ICBT. For instance, in 2007, the export earnings from ICBT were estimated to be US \$ 776.5 million which then increased to US \$ 1.3 billion in 2008.<sup>93</sup>

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<sup>90</sup> Makombe op cit note 2

<sup>91</sup> Ibid.

<sup>92</sup> Lesser and Leeman op cit note 1.

<sup>93</sup> Uganda bureau of statistics op cit note79.

## **vi. Unfair competition**

The goods imported are usually cheaper than those produced in the domestic market hence creating unfair competition.<sup>94</sup> This is so for manufactured goods which are often imported substandard goods from Asia. As for the agricultural products, ICBT traders bring in cheaper goods from neighbouring countries which forces local farmers to decrease the prices of their goods leading to price distortion. However, the competition is sometimes healthy as it brings about price efficiency especially in situations where the formal traders are making supernormal profits.<sup>95</sup>

Clearly, the positive impacts outweigh the negative impacts. The fact that ICBT creates employment opportunities, provides income, improves the living standards of the citizenry and provides food security is an indication that it significantly contributes to the economy.

The study has confirmed the significance of ICBT in EAC as it plays a major role towards meeting the numerous and diverse needs of consumers. It should therefore not be perceived as a threat to formal trade for it is indeed a response to the shrinking formal economy. It is but a survival strategy for many who wish to improve their standards of living. ICBT is here to stay and can therefore not be wished away.

As a consequence, it is imperative that the Community addresses it promptly instead of relegating it to the back seat. This would mean coming up with necessary measures that will reduce the negative impact it may have to the economy. The first step would be to carry out a survey to determine the true extent of ICBT and gather the true impact it has on the economy.

A massive education of the citizenry as to the benefits of the Customs Union Protocol is imperative. When the people are knowledgeable, they are able to understand their rights as well as the duties of the border officials which will significantly contribute to the elimination of corruption at border posts.

Eventually the Community would have to evaluate the possibility of formalizing ICBT by creating an enabling environment that allows both the formal and informal trade to thrive effectively. Formalization of ICBT would enable the Community have accurate information on the trade patterns as well as goods traded within the countries which will be useful when

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<sup>94</sup> Ogalo op cit note 22.

<sup>95</sup> Ibid.

planning and making any trade related decisions. It would also save the Community from massive losses incurred through evasion of taxes.

Indeed if properly managed, ICBT has the potential to boost the economies, lead to a wider market access due to the wide variety of commodities sold as well as support the initiatives toward poverty eradication in the East African Community.

## CHAPTER THREE

### 3. INFORMAL CROSS BORDER TRADE AND REGIONAL INTEGRATION IN EAC

#### 3.1. INTRODUCTION

After the cold war era, the changing dynamics of the world order gave rise to regionalism and regional integration initiatives at both international and regional levels.<sup>96</sup> Consequently, the quest for regional integration can therefore be said to be one in response of the change in world order after the cold war.

At the dawn of independence, regional integration initiatives were also taken up by African countries. The approach taken was that of market integration, which was what the European Union had adopted.<sup>97</sup> Market integration involves a linear progression from the creation of a free trade area to a political federation.<sup>98</sup> However, market integration has not been without a few hiccups and has achieved minimal success especially in terms of socio-economic and cultural development.<sup>99</sup> One can argue that the success of regional integration should be measured by gauging the extent to which it promotes intra-regional trade<sup>100</sup> which however still remains at a very low percentage in Africa at large. While this may bring about numerous debates, one fact remains that indeed measuring the level of intra-regional trade would be a plausible factor to consider when gauging the success of market integration. In the case of EAC, market integration has been weighted down by some difficulties such as:

The countries lack economic complementarity. This is due to the fact that the major goods traded in are agricultural products and only a few commodities in the manufacturing and services sector are traded. As a consequence therefore, the fact that there are no diverse commodities to trade in is one of the major impediments to market integration.<sup>101</sup>

The second impediment is associated with the level of intra-African trade. So far intra-African trade is minimal at around 20 per cent while trade with the rest of the world is at the

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<sup>96</sup> SJ Kiproti *The East African Community (EAC): Achievements and Challenges since 2001* LLM (Cape Town) (2012) 1.

<sup>97</sup> Lee op cit note 16.

<sup>98</sup> Ibid.

<sup>99</sup> Kiproti op cit note 96.

<sup>100</sup> R. Gibb 'Regional Integration and Africa's Development Trajectory: meta-theories, expectations and reality' (2009) available at, <http://dx.doi.org/10.1080/01436590902867136> accessed on 26 August 2015.

<sup>101</sup> Ibid.

remaining 80 per cent.<sup>102</sup> Among the factors that hinder intra-African trade are tariff and non-tariff barriers, poor infrastructure which is an impediment to the movement of goods, failure to explore other sectors that could generate income as well as failure to tap into Africans as a resource. Considering so far intra-regional trade is at 20 per cent, one would be of the inference therefore that market integration has failed to promote substantial economic development.

Further, for market integration to work, the countries have to be at least on the same level of development. In EAC, Kenya is the economic dominant as it has the largest economy which is much more dynamic than the other four. While the economic development trajectory remains positive, it is clear that some countries are lagging behind development wise. For instance Burundi is among the poorest countries in the world considering that it has been faced with civil unrest which has largely affected its growth and development.<sup>103</sup> A scenario, where member countries are at different levels of economic growth definitely creates another difficulty for the market integration theory.

To add on to that is the problem of overlap of membership. In EAC, Tanzania is a member of SADC. Similarly, Kenya, Uganda, Burundi and Rwanda are members of COMESA while Burundi is a member of ECCAS. Overlap of membership creates a situation where there is duplicity of obligations, competition for resources, inconsistencies in formulating policies and fragmentation of markets which ultimately inhibit the integration agenda.<sup>104</sup>

The first UN secretary general, Butros Butros Ghali once lamented that Africa's external debt is a millstone around the neck of Africa. This was as a result of the huge amount of debt owed by Africa to external donors. As a consequence therefore, any little money made from export income, capital or the aid itself goes back to paying the external debtors<sup>105</sup>. This then becomes a problem in the pursuit of regional integration as the burden of debt by Africa makes paying back external loans the priority as opposed to channelling that money to regional integration and development projects.

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<sup>102</sup> T Østergaard, 'Classical Models of Regional Integration-What Relevance for Southern Africa?' 1993 available at <http://www.diva-portal.org/smash/get/diva2:273407/FULLTEXT01.pdf> accessed on 15 September 2015.

<sup>103</sup> MS Kimenyi and J Kibe 'Africa's Powerhouse' available at <http://www.brookings.edu/research/opinions/2013/12/30-kenya-economy-kimenyi> accessed on 27 August 2015.

<sup>104</sup> GN Muuka, DE Harrison and JP McCoy 'Impediments to Economic Integration in Africa: The case of COMESA' 1998, available at <http://www.ewp.rpi.edu/jbdn/jbdnv203.htm> accessed on 12 September 2015.

<sup>105</sup> Ibid.

The other problem that cripples market integration is the looming civil wars in some countries which has resulted to poor economic development. For instance Burundi in EAC has been marred by civil war for decades. That has contributed to its being among the poorest countries in the world. As a result thereof, it becomes a bit difficult for these countries to effectively compete with their counterparts in the REC's.<sup>106</sup>

As a result of the aforesaid, it can be said that when considering the market integration theory, not many questions were taken into account on its relevance and applicability. When confronted with the actual reality facing African countries, market integration may not be the best option.

This chapter therefore discusses the regional integration initiatives taken up by Africa as a whole and then narrows down to EAC. In EAC, the main objective of regional integration has been to foster economic growth through trade liberalization and ultimately create the largest single market in East Africa. This study will discuss the successes as well as the challenges encountered especially on the market integration approach already adopted. It then proposes that regionalism from below could be an alternative to market integration. Regionalism from below absorbs the informal sector into the formal sector. This chapter argues that ICBT contributes to the regional integration agenda as it builds on the informal networks that have been in existence for ages. These informal networks are where a significant level of intra-African trade occurs therefore it would be of the essence to tap into this trade so as to meet the economic development agenda.

## **3.2. CONCEPTUAL DEFINITIONS ON REGIONAL INTEGRATION**

### **i. Regionalism**

Regionalism refers to the efforts taken up by countries to heighten their economic, political, social or cultural interaction so as to unite economically and politically.<sup>107</sup> It is the process that combines separate economies into one large economic region.<sup>108</sup> The efforts taken to realize regionalism include market integration, regional integration, regional co-operation and development integration. The concept that has been embraced by the African leaders towards

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<sup>106</sup> GN Muuka, DE Harrison and JP McCoy op cit note 105.

<sup>107</sup> Lee op cit note 16.

<sup>108</sup>SKB Asante *Regionalism and Africa's Development* (1997) 19.

regionalism is market integration which is borrowed from the European Economic Community model of integration.<sup>109</sup>

Market integration involves a linear progression approach. It begins with a free trade area which involves the removal of tariffs among member countries and the imposition of tariffs among non-members. Second is the formation of a customs union which includes the free trade area as well as a common external tariff to non-members. Third is a common market which includes a customs union and also provides for the free movement of goods, services and labour. Fourth is a monetary union which encompasses a common market as well as harmonization of monetary and fiscal policies, and eventually the creation of a political federation.<sup>110</sup>

Even though African leaders have considered it as the best remedy towards getting rid of Africa's marginalization to the rest of the world, market integration has not been as successful as discussed above. It has been argued that market integration is not workable for Africa<sup>111</sup> and has failed for a number of reasons *inter alia*: lack of political will, overdependence on external donors, overlapping membership among the regional economic communities, economic inequalities among member countries and unequal distribution of benefits where the stronger economies tend to take the lions share as well as low intra-African trade.<sup>112</sup>

## **ii. Regional Integration**

Regional integration is the concept where states in a geographical area agree to come together and pursue common interests, as well as come up with common rules, policies and regional institutions. The essence of regional integration in Africa is to pursue the pan-African agenda as well as promote economic development. The economic development agenda is promoted through regional integration by allowing member states to have access to each other's markets while the pan-African agenda enables the continent to advocate for its interests in a singular voice in the international arena.<sup>113</sup>

However, for states to effectively reap the benefits of regional integration, they first must make a serious commitment to the regional integration agenda through regional co-operation.

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<sup>109</sup> Lee op cit note 16.

<sup>110</sup> Ibid.

<sup>111</sup> Østergaard op cit note 102 .

<sup>112</sup> Lee op cit note 16.

<sup>113</sup> H Sippel, K Gastorn and U Wanitzek (eds) *Process of Legal Integration in the East African Community* 'Regional Integration in East Africa: A legal Historical overview' (2011) 27.

Regional co-operation has been defined as the collective undertaking of two or more member states to pursue common interests<sup>114</sup> for instance promotion of tourism, infrastructure, education or development.

Regional integration differs from market integration in that regional integration is assessed by the level of economic, cultural and social interaction between member states while market integration is assessed by the level of linear progression from a free trade area to total economic integration advocated for by the concept of market integration.<sup>115</sup> In the continent, EAC is the only REC that has gained the most milestones with respect to the market integration agenda. It has so far successfully launched a free trade area, a customs union and a common market. The realization of a monetary union is underway.

Regional integration embraces both the formal and informal sector. The notion of including the informal sector is known as ‘regionalism from below’.<sup>116</sup> This concept recognizes the role played by the informal sector and advocates that policy makers should ‘go back to basics’ and deal with the real issues affecting Africa’s economy. This would entail recognition of the informal economy and having it integrated to the formal economy. The starting point in this case is argued to be the actual trade flows, both formal and informal that exists between neighbouring countries. This is because it would be more essential to begin with the existing trade networks<sup>117</sup> in realizing the goal of the economic integration agenda as opposed to taking the market integration route.

### **iii. Regional economic integration**

The push for regional economic integration came up when most of Africa had attained independence. The reason behind it was to deal effectively with the issues that had arisen as a result of Africa’s balkanization.<sup>118</sup>

Upon gaining independence, African countries were left poor. A number of them were landlocked, majority had low population density, low per capita income and small domestic

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<sup>114</sup> Lee op cit note 16.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> K Naidoo ‘The Relevance of the Linear mode of Integration with Particular Reference to EAC, SADC and COMESA’ (2008) available at [http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Naidoo\\_Final\\_20110622.pdf](http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/Naidoo_Final_20110622.pdf) accessed on 15 September 2015.

markets.<sup>119</sup> Consequently, economic growth was seen as the key to eradicating poverty and improving the quality of life for Africans.

In order to improve the standards of living as well as enhance the negotiating power at the multilateral level, African leaders sought to have regional economic integration as their first priority. This is because they believed that through planned strategies and policies, the 54 economies could merge into one strong economy. The benefit of economic integration would be to exploit economies of scale by working collectively as a single market to improve local supply capacity thereby reducing the cost of transactions which would result in agricultural production and economic diversification. In the long run, it would lead to economic growth, employment opportunities, food security and eradication of poverty.<sup>120</sup> This concept of regional economic integration would be pursued through the creation of a continental economic community as explained below.

### **3.3. REGIONAL INTEGRATION IN AFRICA: TOWARDS AN AFRICAN ECONOMIC COMMUNITY**

Regional integration in Africa symbolizes the coming together of sovereign nationals to provide contribution to a new multilevel multilateralism.<sup>121</sup> It was steered by the liberation movements and thereafter by the young African States<sup>122</sup> through the idea of pan-Africanism and geared towards eradication of colonial boundaries, an end to colonialization and improving the standards of living.<sup>123</sup>

The notion of ‘Pan-Africanist Federation’ was instituted by the then President of Ghana, Dr Kwame Nkrumah who had the vision of a ‘United States of Africa.’ This is because he felt that political unity was the way forward towards achieving economic development in the continent. This resulted to the birth of OAU in 1963.<sup>124</sup>

The OAU was however more of a political organization. There therefore needed to be an agenda in place to consider development issues in the continent. The efforts to improve

<sup>119</sup> S Sharma, ‘A Perspective on Economic Integration in Africa- Part 1’ 2013, available at, [http://www.consultancyafrica.com/index.php?option=com\\_content&view=article&id=1231:a-perspective-on-economic-integration-in-africa-part-1-&catid=87:african-finance-a-economy&Itemid=294](http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1231:a-perspective-on-economic-integration-in-africa-part-1-&catid=87:african-finance-a-economy&Itemid=294), accessed on 23 May 2015.

<sup>120</sup> Ibid.

<sup>121</sup> T Mario, ‘Introduction: Globalization, New Regionalism and the role of the European Union’ 2007, available at, [http://www.ashgate.com/pdf/SamplePages/European\\_Union\\_and\\_New\\_Regionalism\\_2nd\\_Intro.pdf](http://www.ashgate.com/pdf/SamplePages/European_Union_and_New_Regionalism_2nd_Intro.pdf), accessed on 28 April 2015.

<sup>122</sup> AA Yusuf and F Ouguergouz (eds) *The African Union: Legal and Institutional Framework A Manual on the Pan African Organization* (2012) 187.

<sup>123</sup> OAU Charter, Article II.

<sup>124</sup> Yusuf and Ouguergouz op cit note 122.

Africa's economic situation at that juncture pushed the African leaders to work towards the establishment of an African Economic Community which would help eradicate underdevelopment in the continent.

To that effect, the Lagos Plan of Action in 1980 and the Final Act of Lagos in the 1990s was the outcome of the determination for a successful regional strategy for development in Africa.<sup>125</sup> The end goal was to ensure the economic, social and cultural integration of Africa. In June 1991, 51 out of 52 states in Africa signed the Abuja Treaty establishing the African Economic Community which came into force in 1994. The said Treaty advocated for the regional integration agenda. It called for solidarity and self-reliance, equality of member states, peaceful settlement of disputes and economic stability.<sup>126</sup>

The objectives of the African Economic Community were to promote African economic, social and cultural development as well as promote regional integration in the continent through six stages namely:-

- a) Strengthening of the existing RECs and establishment of new ones would take 5 years,<sup>127</sup>
- b) Stabilization of tariff and other barriers to trade would take 8 years,<sup>128</sup>
- c) Establishment of Free Trade Area and a Customs Union within the RECs to take 10 years,<sup>129</sup>
- d) Coordination and harmonization of regional customs unions with a view of creating a continental customs union to take 2 years,<sup>130</sup>
- e) Establishment of a common market to take 4 years,<sup>131</sup>
- f) Establishment of a monetary union as well as a Pan African Parliament to take 5 years.<sup>132</sup>

To realize the integration agenda, the continent was then divided into RECs which would eventually unite to one continental economy. The said RECs include: Economic Community for West African States (ECOWAS), Common Market for East and Southern Africa (COMESA), Southern African Development Community (SADC), Arab Maghreb Union

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<sup>125</sup> GJ Naldi *The Organization of African Unity* 2ed (1999) 241.

<sup>126</sup> Treaty establishing the African Economic Community of 1991, Article 3.

<sup>127</sup> Ibid article 6 (2) (a).

<sup>128</sup> Ibid article 6 (2) (b).

<sup>129</sup> Ibid article 6 (2) (c).

<sup>130</sup> Ibid article 6 (2) (d).

<sup>131</sup> Ibid article 6 (2) (e).

<sup>132</sup> Ibid article 6 (2) (f).

(AMU), Economic Community of Central African States (ECCAS), the Community of Sahel-Saharan States (CEN-SAD), Intergovernmental Authority on Development (IGAD) and East African Community (EAC).<sup>133</sup>

SADC, EAC and ECOWAS have adopted the market integration approach. Among the three, EAC is the best example towards realization of regional economic integration having formed a free trade area and customs union in 2005, a common market in 2010 and the realization of a monetary union is underway.

### **3.4. THE EAC AND REGIONAL INTEGRATION PROCESS**

During the colonial period, East Africa was divided between the Germans and the British. Tanganyika, Rwanda and Burundi were under German rule while Kenya and Uganda were under British rule. Regional integration efforts then begun in the British part of East Africa when the British sought to unify the East Africa protectorate and Uganda in 1899. A customs Union was then formed in 1923, a common market between 1923 and 1927 and the consequent East Africa High Commission in 1948.<sup>134</sup>

By the time it was meeting its demise in 1977, the EAC had garnered the most milestones in the world. This is due to the fact that it had a proficient customs union and a common market. To add on to that, it had developed infrastructure in terms of its harbours, railways, airways, post and telecommunications, health and medical research, etc. On the part of institutions, there was established the University of Eastern Africa with three colleges in Makerere, Nairobi and Dar es Salaam, East Africa Court of Justice with an appellate division that handled both criminal and civil matters, the East Africa Legislative Assembly and a Regional Secretariat.<sup>135</sup>

The fact that EAC collapsed in 1977 did not mean that the concept of regional integration was thrown out of the window. Negotiations and mediations continued on how best to revive the EAC. This led to establishment of the Secretariat of the permanent Tripartite Commission in Arusha, Tanzania, on 14<sup>th</sup> March 1996 which gave rise to the new EAC on 7<sup>th</sup> July 2000.<sup>136</sup>

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<sup>133</sup> United Nations Economic Commission for Africa (UNECA), 'Africa Union (AU) & Regional Economic Communities in Africa (RECs), available at, <http://www.uneca.org/oria/pages/african-union-au-regional-economic-communities-recs-africa>, accessed on 25 May 2015.

<sup>134</sup> H Sippel, K Gastorn and U Wanitzek op cit note 113.

<sup>135</sup> JV Mwapachu *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community* (2012) 327.

<sup>136</sup> Ibid.

So far, EAC is the most advanced REC in Africa. The mission of the EAC in achieving regional integration is to widen and deepen the economic, political, social and cultural integration so as to improve the standards of living through increased competitiveness, value added production, trade and investments. As a result thereof, in 2005, it established a Customs Union which seeks to eliminate tariff and non-tariff barriers as well as impose a common external tariff to non-members, in 2010 it launched a Common Market to ensure free movement of goods, labour and capital among member states and is working towards achieving a Monetary Union and eventually a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner states.<sup>137</sup>

### 3.5. REGIONALISM FROM BELOW

As discussed, regional integration is indeed an important strategy for development. However, the route taken by Africa's leaders on market integration has proved to be an unviable option as it has been marred by myriad Treaties and Protocols that have not effectively been implemented, lack of political will as well as low levels of intra-African trade.<sup>138</sup>

The fact that market integration has not been without glitches begs the answer as to what the next best option would be. The 'old regionalism' based on market integration that was dependent on trade and economic development as the key pillars seems not to be working for the betterment of the continent.<sup>139</sup> However, with the effects of globalization a 'new regionalism' has consequently been born. This 'new regionalism' is driven by economic factors from within and below and offers a multi-dimensional integration by embracing political, cultural and social effects so as to ensure sustainable development for the continent. In the African context, this 'new regionalism' brings on board the informal sector and in so doing, it supports the new concept of 'regionalism from below' which adopts informal cross border trade as an agent for regional integration efforts.<sup>140</sup>

Perhaps if taken into context, regionalism from below would be a solution to Africa's economic development. The basis of this argument is the fact that African economies have majorly been supported by informal trade even though in the quest towards the economic

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<sup>137</sup>Treaty Establishing the East African Community of 2009, article 5 (2).

<sup>138</sup> K Meagher, *Regionalism and Regional Integration in Africa: A Debate of Current Aspects and Issues* 'Throwing Out the Baby to Keep the Bathwater: Informal Cross-Border Trade and Regional Integration in West Africa,' in *Regionalism and Regional Integration in Africa: A Debate of Current Aspects and Issues*, (2001) 40.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.

integration agenda, the role of the informal trade has utterly been downplayed. It is argued that it is high time that Africa went back to basics and dealt with the real issues facing the economy and did away with the European Union model of market integration.<sup>141</sup> In this case, the concept of regionalism from below would require governments to begin with the actual trade flows and cooperation networks that already exist. This means embracing both the formal and informal sector where eventually the informal sector is integrated into the formal sector.<sup>142</sup> ICBT contributes immensely to the regional integration agenda as it builds on informal networks that have been in existence for ages. These informal contacts consequently strengthen regional economic integration networks and relationships as cross border transactions between neighbouring countries is where significant levels of intra-African trade can be found.<sup>143</sup>

Among the EAC member states, a substantial proportion of trade is conducted informally. Unfortunately, in realization of the economic integration agenda, only policies that promote formal trade have been formulated. For instance, the inception of Customs Union Protocol in 2005 was meant to liberalize intra-regional trade, enhance cross border and foreign investment as well as promote economic development in the community.<sup>144</sup> However, the said objectives were only in realization of formal trade as nothing was mentioned on ICBT.

In the quest for regional economic integration therefore, it would be plausible if informal cross border traders were incorporated to the formal economy. This is because they are the people on the ground that have effectively used informal channels to ferry goods across borders. They conduct a substantial proportion of trade which if properly managed has the effect of boosting the economies. These informal transactions have been a source of employment for many, contributes towards food security, is a source of income and enhances women empowerment. Evidently, it has the potential to support the on-going initiatives on poverty eradication which has the potential to improve the livelihoods of thousands of African households.

### **3.6. TRANSITIONING FROM THE INFORMAL TO FORMAL ECONOMY**

The term ‘informal economy’ begun with Keith Hart in 1970 when he was describing entrepreneurs from Ghana who were carrying out their businesses outside the formal

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<sup>141</sup> Lee op cit note 16.

<sup>142</sup> M B Oñs, *Regionalism and Regional Integration in Africa: A Debate of Current Aspects and Issues* ‘Regions and Regionalization: A Heretic’s view’ (2001) 36.

<sup>143</sup> Ibid.

<sup>144</sup> Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, art. 3.

framework. Thereafter in 1972, the ILO came about with a broader definition of the informal economy after using the said definition to analyse the economic activities carried out in Kenya.<sup>145</sup> The ILO, during the 2002 International Labour Conference on informality recognized the diversity and heterogeneity of players which involved a variety of activities from marginal survivalist work to profitable enterprises. It therefore opened up a broader understanding of the term ‘informal’ and most importantly proposed the formalization of the informal sector so as to offer support as well as to protect the informal traders.<sup>146</sup>

Formalization of the informal sector as proposed by the ILO is one that is enshrined in the concept of ‘regionalism from below’ as previously discussed. However, that concept raises eyebrows on exactly what it would entail. In dealing with the said strategy, a number of questions beg for answers. For instance:

- i. How effectively can the EAC member states deal effectively with ICBT?
- ii. How can ICBT be integrated in the formal economy?
- iii. What exactly is meant by formalization?
- iv. Would formalization of ICBT be the best answer towards realization of the regional economic agenda?

In trying to understand the transition process, it is imperative to consider the formal and informal economies taking into account the fact that within the informal economy lays ICBT. The starting point will be to give brief definitions in relation to the formal and informal economies:-

**i. Informal sector**

This includes the small scale units engaged in the production and distribution of goods and services with the objective of generating income. It only deals with the unregulated enterprises and does not delve into the labour issues of employment relationships.<sup>147</sup>

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<sup>145</sup> T Jamela *Experiences and Coping Strategies of Women Informal Cross Border Traders in Unstable Political and Economic Conditions: The Case of Bulawayo (Zimbabwe) Traders*. LLM (Johannesburg) (2013) 16 and 17.

<sup>146</sup> International Labour Office ‘Decent Work and the Informal Economy’ International Labour Conference, 90<sup>th</sup> Session (2002)

<sup>147</sup> HC Haan, ‘Training for Work in the Informal Sector: New evidence from Kenya, Tanzania and Uganda,’ 2002, International Labour Office (ILO), available at, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---ifp\\_skills/documents/publication/wcms\\_103995.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_103995.pdf), accessed on 28 May 2015.

## ii. **Informal economy**

This is a broader concept of the ‘informal sector’ and extends to include all activities that are, in law or practice, not covered by formal arrangements.<sup>148</sup>

## iii. **Formal economy**

It comprises of regulated enterprises as well as workers that are protected by the law.<sup>149</sup>

## iv. **Formal regulatory environment**

This comprises of governments’ policies, laws and regulations.<sup>150</sup>

Further, so as to understand the different theories of informality in the quest for formalization, the following schools of thought have had the following to say:

### i. **Dualism school of thought**

This school of thought is of the view that the informal and formal economies should operate as distinct separate sectors. They consider the informal economy as having insignificant linkage to the formal economy. They are of the opinion that the divide between the formal and informal economy is brought about by the fact that the formal economy operates within the confines of the law while the informal sector is comprised of illegal economic activities that transpire out of the legal framework hence the division between the two.<sup>151</sup>

### ii. **Structuralism school of thought**

Unlike the dualism school of thought, the structuralists believe informal and formal economies are naturally linked through employment. This happens when the formal businesses promote the informal economy by employing the informal traders since they provide cheap labour.<sup>152</sup> This school of thought is also advanced by the neo-Marxist economic theory where the rich exploit the poor. The structuralists view the informal sector as one that is riddled with underdevelopment, contributes very little to the GDP and constitutes a significant proportion of African households’ majority of whom are poor. According to this theory, the informal economy grows as a result of the failures of the formal economy which no longer has the capacity to absorb new people. As a consequence, they

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<sup>148</sup> MA Chen, ‘*Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment*’ 2007, available at, [http://www.un.org/esa/desa/papers/2007/wp46\\_2007.pdf](http://www.un.org/esa/desa/papers/2007/wp46_2007.pdf) accessed on 13 May 2015.

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

argue that acknowledging the link between the formal and informal economy would assist governments tackle the issue of unemployment and poverty. They argue that the informal economy should definitely be formalized.<sup>153</sup>

### iii. **Legalism school of thought**

The legalists focus on the relationship of the formal and the informal economies and how they can thrive together in a regulatory environment. They argue that the informal economy escape the legal hurdles in the formal economy and chose to operate outside the legal frameworks set up by the governments'.<sup>154</sup> It is also based on the neo-Marxist school of thought. This school of thought is of the opinion that the informal economy grows as a result of the inefficiency of the laws set up by the governments. The legalists argue that when the laws are complicated, unfair or stringent, people then chose to follow the informal path. Even though the legalists view these two as two distinct economies, they believe that the informal economy can be absorbed into the formal economy once the laws in the formal economy become fair and effective.<sup>155</sup>

### iv. **Voluntarism school of thought**

Voluntarists believe that the informal traders chose the informal economy after weighing the benefits of the informal trade against those of the formal trade. This school of thought not only focuses on the economic aspects but personal choices as well. On account of personal choices, informal cross border traders chose the ICBT because they feel that would be the better environment to reap more benefits.<sup>156</sup> This is further propelled by the fact that ICBT absorbs all irrespective of gender, education background or financial might, there are no stringent rules and regulations and the costs of doing business maybe cheaper compared to the formal economy.

### v. **Rational Legalist Theory**

This theory is a combination of the voluntarist and legalist theories discussed above. It views the informal and formal sectors as two distinct economies. The rational legalist theory attempts to determine the effect and impact that the informal sector can have when fused into the formal economy. It looks into the social and opportunity costs of formalizing the informal

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<sup>153</sup> Jamela op cit note 145.

<sup>154</sup> Chen op cit note 148.

<sup>155</sup> Jamela op cit note 145.

<sup>156</sup> Ibid.

sector. This theory argues that it is imperative to consider the costs of formalizing which would include social and opportunity costs before considering formalizing the informal sector.<sup>157</sup>

The rationalist theory tends to take into account the effects of the economy after formalizing ICBT. This study draws much from this school of thought. It would be trite to gauge the gains as well as the difficulties that will be experienced upon formalization of ICBT. The formalization process should take into account the diverse needs of the 5 countries as well as address the reasons that push some people to ICBT in the first place. So as to provide a regulatory environment, the Community needs to realize that the relationship between ICBT and the law is a policy issue. This is due to the fact that ICBT constitutes activities that are carried out outside the realm of the law. It will not be enough to come up with policies to offer incentives upon formalization. If thereafter the traders feel that the formal economy is not offering them the best benefits, they will slowly start engaging in ICBT which would mean going back to the drawing board. As a consequence thereof, the transition to the formal economy should be best done through policies that will promote economic dynamism, offer social protection to the traders, create employment opportunities as well as support the creation of enterprises.

### **3.7. IS FORMALIZATION THE BEST WAY FORWARD?**

In reference to the various schools of thought above, the question that arises is what exactly is meant by formalization? While there may not be a precise definition, it can have different meanings; formalization as may be interpreted by some would entail registration of businesses as well as putting up of punitive measures for non-compliance with the law.<sup>158</sup> Such an approach would however be least effective in advancing my argument towards formalization considering the said punitive measures are what encourage informality in the first place.

Formalization could also entail converting the informal enterprises to formal ones through registration of enterprises but with a wide array of incentives that would discourage informality like ensuring workers have secure contracts, access to finances, simplified trade regimes and social protection.<sup>159</sup> For instance, ICBT could be given recognition in the

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<sup>157</sup> Chen op cit note 148.

<sup>158</sup> International Labour Office (ILO), 'Transiting from the informal to the Formal Economy', (2014) International Labour Conference, 103rd Session, report v (1).

<sup>159</sup> Ibid.

Customs Union Protocol. This would mean giving social and legal protection to informal cross border traders. Article 32 of the Customs Union Protocol can be a good example in this case where it provides incentives in terms of giving the small scale traders preferential treatment; case in point is the fact that they can then lobby for the exemption of import duties as provided in Article 33 of the said Protocol.

However, for formalization to be effective there has to be political will and commitment. It is the governments' duty to ensure that there is a regulatory environment that would assist in the transition of the informal to the formal economy.<sup>160</sup> This means the reinvention of policy frameworks that would deal effectively with the informal economy. The said policies should be framed in a way that they recognize the importance of the informal economy, restrict it whenever necessary, but mainly increase its productivity so as to ensure it boosts the formal economy upon formalization.<sup>161</sup>

It would also entail civic education on the gains and protection that comes with formalization. The informal traders should feel comfortable when transitioning to the formal economy. As a consequence, the governments' policies should be ones that have appropriate rules and regulations, reasonable taxation, simplified registration and licensing procedures and favourable credit terms.<sup>162</sup>

Given the fact that ICBT represents a significant proportion of trade in EAC, policies aimed at incorporating it to the formal framework works for the benefit of national and regional development.<sup>163</sup> As discussed, ICBT does indeed contribute a significant proportion of trade. It also has a number of benefits such as the provision of employment opportunities, enhancing food security as well as eradication of poverty. Governments should therefore work towards integrating ICBT to the formal economy.

Of course it is unlikely that ICBT will be phased out completely as there will be a few traders who will still choose to escape the regulatory framework. Further, the EAC governments may argue that they do not have the capability to handle the formalization process in terms of issuing licenses if all informal businesses were to be formalized or the capacity to offer benefits to employees upon formalization of the informal economy. Nonetheless, even though that will be the case, attempts by the governments to bring ICBT

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<sup>160</sup> International Labour Office (ILO) op cit note 158.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Meagher op cit note 138.

on board and create a regulatory framework where it can thrive effectively will be beneficial to both formal and informal sectors as well as the economy. It is therefore imperative that the governments look into it for the wider interest of economic development. In fact, considering market integration is not working for Africa, perhaps this would be the right direction towards the regional economic integration agenda.

As discussed in the introduction to this chapter, market integration has been the preferred option by Africa's leaders. However, it has not been without setbacks and it has been argued as being not the very best option for Africa. Nevertheless, in the quest for regional economic integration, one goal remains clear; that of economic growth. This is to be achieved through the creation of employment opportunities, eradication of poverty as well as provision of food security. ICBT has without doubt provided the three as an alternative to a shrinking formal economy. It would therefore be important if the Community was to consider the formalization of ICBT. The formalization would be a step forward in addressing most of the issues that affect traders. It should however be effected through policies that will promote economic dynamism and offer to improve the living standards of informal cross border traders so as to discourage resorting to ICBT upon formalization. ICBT is here to stay, and as a result of a shrinking formal economy, it is necessary that EAC deals with it sooner rather than later considering that it has become a parallel and an alternative source of seeking a livelihood in competition with the formal sector.

## CHAPTER FOUR

### 4. THE EAST AFRICAN CUSTOMS UNION PROTOCOL: OPPORTUNITIES AND CHALLENGES FOR INFORMAL CROSS BORDER TRADERS

#### 4.1. INTRODUCTION

Customs authorities differ in functionality in relation to whether a country is either developing or developed. For developed countries, a customs authority has the main objective of trade facilitation. In developing and least developed countries like those in the EAC, a customs authority is mainly to deal with revenue collection through the imposition of customs duties and other taxes.<sup>164</sup> Generally, countries establish a customs union for the creation of uniform trade policies, pooling together of market power or having one global voice when negotiating at the global level. In Africa, formation of a customs union is one of the stepping stones towards deeper economic integration in accordance to the Abuja Treaty of 1991 which sets the formation of a customs union as the third step towards formation of an Africa Economic Community.<sup>165</sup>

In definition, a customs union is the coming together of two or more customs territories so that duties and restrictions to trade are eliminated to substantially all the trade among the joining countries or at least with respect to substantially all the trade in products originating in such territories.<sup>166</sup> It also includes the establishment of the same duties in relation to imports from non-members.<sup>167</sup> The two essential features of a customs union therefore are the elimination of internal tariffs among member states as well as the imposition of a common external tariff to all imports coming from other countries who are not members of the alliance.

To add onto that, the principle elements of a customs union include a common trade policy, a single customs territory and free circulation of goods.<sup>168</sup> A common trade policy entails the provision of a dispute settlement mechanism within the customs union, provision on rules of origin, trade remedy laws and a common external trade policy. A single customs

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<sup>164</sup> C Chimilila, C Sabuni and A Benjamin, 'Trade Facilitation in EAC Customs Union: Its Achievements and Implementation in Tanzania' (2014) 5 No. 25 IISTE at 1.

<sup>165</sup> Treaty Establishing the Africa Economic Community, *Supra* (n126) at 34 article 6 (2) (c).

<sup>166</sup> General Agreement on Tariffs and Trade (GATT), 1994, article XXIV (8a) (i).

<sup>167</sup> *Id*, article XXIV (8a) (ii).

<sup>168</sup> M.A Consulting Group, 'Attainment of a Single Customs Territory in a fully Fledged Customs Union for the EAC' available at, [http://nmcrwanda.org/IMG/pdf/sct\\_-\\_draft\\_final\\_report\\_-\\_ma.pdf](http://nmcrwanda.org/IMG/pdf/sct_-_draft_final_report_-_ma.pdf) accessed on 7 July 2015.

territory is the ultimate goal of a customs union as it achieved by the removal of all trade restricting measures with the intent of ensuring free circulation of goods within the union. Finally, free circulation of goods means that when imports enter the union, they should be free to circulate in any partner state without being subject to further customs procedures when they cross from one member country to another as the customs union is viewed as one single territory.<sup>169</sup>

It is also expected that before forming a customs union, the intending parties shall dutifully notify other members of the WTO so that they can make any necessary reports or recommendations on the intended customs union.<sup>170</sup> Further, it is also imperative that upon the formation of a customs union, the duties and other regulations of trade shall not be higher or more restrictive than the duties applicable before the formation of the union.<sup>171</sup>

The EAC Customs Union is in line with the requirements of article XXIV 8 (a) of the 1994 GATT. The Customs Union Protocol provides for removal of customs duties and other charges with respect to imports to the Community, elimination of non-tariff barriers and the establishment of a common external tariff in relation to goods imported from foreign countries.<sup>172</sup> In so doing, the EAC member countries agreed to liberalize intra and inter regional trade which was to be effected through 2 stages; for the first stage in 2005, a 0 per cent tariff was set on raw materials, capital goods, agricultural products and certain medicines. A 10 per cent tariff was set for intermediate goods and essential industrial products and finally a 25 per cent tariff on finished products. The second stage was effected in 2010 when the 25 per cent was to be reduced to 20 per cent subject to consultation and approval of all member states.<sup>173</sup>

In Africa, SACU is the oldest customs union having been formed in 1910.<sup>174</sup> Thereafter the EAC customs union was formed in 1923 even though it met its demise in 1977.<sup>175</sup> The new customs union in EAC was established in 2005 after the Protocol for the establishment of the East African Customs Union was duly signed by the Heads of State of Uganda, Kenya and Tanzania on 2 March 2004. Consequently, the main legal instrument for administration

<sup>169</sup> M.A Consulting Group op cit note 168.

<sup>170</sup> GATT, *Supra* (n166) AT 44, article XXIV 7 (a).

<sup>171</sup> *Ibid*, article XXIV 5 (a).

<sup>172</sup> Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, Article 2 (4).

<sup>173</sup> A Vitale, J Morrison and R Sharma, 'The East African Community External Tariff on Cereals: An Analysis of Stakeholder Perceptions.' (2013) 36 *FAO* 1.

<sup>174</sup> SACU Website, available at <http://www.sacu.int/> accessed on 6 July 2015.

<sup>175</sup> H Sippel, K Gastorn and U Wanitzek op cit note 113.

of the Customs functions is the East Africa Customs Management Act provided under article 39 of the Customs Union Protocol. This Act provides a uniform trading environment in the Community.<sup>176</sup>

As previously discussed, market integration for the continent has not been so successful. The next best option as I have previously suggested would be to embrace the regionalism from below concept. This would mean incorporating the informal sector to the formal one in a regulatory environment. One of the ways would be having a place for informal trade in the Customs Union Protocol. Among the objectives of the EAC Customs Union is the promotion of cross border trade as well as elimination of tariff and non-tariff barriers. However, while its objectives have been very noble, only policies aimed at strengthening the formal sector have been put in place. The informal sector has been utterly ignored. The essence of this chapter therefore is to provide an overview of the opportunities, challenges and implications that the Customs Union would have on informal cross border traders.

#### **4.2. THE EAC CUSTOMS UNION**

The EAC development strategy for 1997-2000 laid the foundation for the Treaty on the establishment of EAC. It considered the effects of globalization which brought about heightened competition as a result of trade liberalization.<sup>177</sup> As a consequence, among the objectives of the Community was to develop policies and programs aimed at widening and deepening co-operation among member states in political, social, economic and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit.<sup>178</sup> In pursuance of that, the Community was to establish a Customs Union, a Common Market, a Monetary Union and finally a Political Federation.<sup>179</sup> Thus far, the EAC established a customs union in 2005, a common market in 2010 and the establishment of a monetary union is underway.<sup>180</sup>

To achieve this, the Community was to be guided by the fundamental principles of peaceful co-existence, peaceful settlement of disputes, equitable distribution of benefits and co-operation for mutual benefit<sup>181</sup> to achieve a people-centred and market driven co-

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<sup>176</sup> K Bagamuhunda, 'EAC Customs Union Progress,' available at, *file:///C:/Users/Student/Downloads/P38-39%20Kenneth%20B%20(Customs).pdf* accessed on 29 June 2015.

<sup>177</sup> Masinjila op cit note 41.

<sup>178</sup> Treaty establishing the African Economic Community, *Supra* (n126) at 34, article 5 (1).

<sup>179</sup> *Id*, Article 5 (2).

<sup>180</sup> Mwapachu op cit note 135.

<sup>181</sup> Treaty establishing the African Economic Community, *Supra* (n126) at 34, article 6.

operation.<sup>182</sup> While ordinarily the Customs Union is usually the second stage in economic integration after a Free Trade Area, the EAC Treaty provided that the formation of a Customs Union would be the first step in the progressive course of a transition period of 5 years from the coming into force of the Customs Union Protocol.

Previously, the EAC founding member states being Uganda, Kenya and Tanzania traded under the COMESA trade regime. However, within that regime, Kenya had reduced its tariff rates by 90 per cent while Uganda and Tanzania had only managed 80 per cent tariff reduction.<sup>183</sup> This meant that Kenya was giving Uganda and Tanzania preferential market access at 90 per cent. Tanzania then dropped out of COMESA and the 3 countries agreed to continue trading preferentially in relation to the EAC Treaty which the Heads of States had signed on 30 November 1999 and came into force on 7 July 2000.<sup>184</sup> As previously discussed, the quest for regional integration had the ultimate goal of enhancing economic development through increasing trade among countries and uplifting the peoples' standards of living. This was certainly the driving force behind the formation of the East African Customs Union.

In accordance with the EAC Treaty, the Protocol for the establishment of the East African Customs Union was signed on 2 March 2004 in Arusha, Tanzania. At that time, only Uganda, Kenya and Tanzania were members. Rwanda and Burundi thereafter joined the Customs Union in July 2007.<sup>185</sup>

As per the Customs Union Protocol, the main objectives of the Customs Union are to liberalize intra-regional trade in goods through beneficial trade arrangements among Member States<sup>186</sup>, promote efficiency in production<sup>187</sup>, enhance domestic, cross border and foreign investment in the Community<sup>188</sup> and promote economic development and diversification in industrialization in the Community.<sup>189</sup> In essence, trade goes to the heart of the EAC Customs Union. In so doing, the Member States agree to co-operate on a number of trade related aspects towards realization of its objectives for instance on matters of trade liberalization<sup>190</sup>, simplification and harmonization of trade documentation, customs regulations and

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<sup>182</sup> Treaty establishing the African Economic Community, *Supra* (n126) at 34, article 7 (1) (a).

<sup>183</sup> East African Community Customs website, 'Brief on the East African Customs Union,' 2006, available at [http://www.customs.eac.int/index.php?option=com\\_content&view=article&id=22:brief-on-the-eac-customs-union&catid=29:why-a-cu&Itemid=29](http://www.customs.eac.int/index.php?option=com_content&view=article&id=22:brief-on-the-eac-customs-union&catid=29:why-a-cu&Itemid=29), accessed on 6 July 2015.

<sup>184</sup> *Ibid.*

<sup>185</sup> C Chimilila, C Sabuni and A Benjamin op cit note 164.

<sup>186</sup> Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, article 3 (a).

<sup>187</sup> *Id.*, Article 3 (b).

<sup>188</sup> *Id.*, Article 3 (c).

<sup>189</sup> *Id.*, Article 3 (d).

<sup>190</sup> *Id.*, Article 4 (1) (a).

procedures<sup>191</sup>, trade remedies<sup>192</sup>, production and exchange of customs and trade statistics and information<sup>193</sup> as well as promotion of exports.<sup>194</sup>

### 4.3. BENEFITS OF A CUSTOMS UNION

The coming into being of the Customs Union has had a great impact on economic development within the Community. The elimination of tariffs and non-tariff barriers, adoption of a common external tariff and the reform initiatives provided for in the Customs Union Protocol has contributed to immense growth of intra EAC trade.<sup>195</sup> Trade in EAC increased from 2 billion USD in 2005 to 5.5 USD in 2013 hence contributing to a growth of 36.36 per cent.<sup>196</sup> The said tabulation however is in exclusion of ICBT which has been estimated to be about 40 per cent of formal trade.<sup>197</sup> The common external tariff has also contributed to economic growth through as it has attracted more exporters and other foreign investors who wish to conduct trade in a predictable and transparent environment<sup>198</sup> as a common external tariff tends to be stable.

The Customs Union has also contributed to revenue generation for the Community. So far there has been an average revenue growth of 30 per cent per annum which has been as a result of increase in volumes of trade, increased investment flows and production and improved efficiency in revenue administration in the Community.<sup>199</sup>

Further, the Customs Union, being an integral part of the Community seeks to promote cross border trade and investment.<sup>200</sup> In so doing, it has provided opportunities for private-sector investors to explore more and better opportunities where they use comparative advantage to pursue and expand their investment without having to factor in the differences in tariff protection and transaction costs at the borders.<sup>201</sup>

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<sup>191</sup> Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, article 4 (1) (b).

<sup>192</sup> *Ibid*, article 4 (1) (c).

<sup>193</sup> *Ibid*, article 4 (1) (f).

<sup>194</sup> *Ibid*, article 4 (1) (g).

<sup>195</sup> C Chimilila, C Sabuni and A Benjamin op cit note 164.

<sup>196</sup> Trade Mark East Africa, 'East Africa: Intra-EAC Trade Soars with Customs Union Treaty,' available at <http://www.trac-fund.com/east-africa-intra-eac-trade-soars-with-customs-union-treaty.html> accessed on 6 July 2015.

<sup>197</sup> Amb. Dr. Richard Sezibera, 'Let's Rid EAC of these Non-Tariff Barriers,' available at, [http://www.sg.eac.int/index.php?option=com\\_content&view=article&id=116:lets-rid-eac-of-these-ntbs&catid=40:sgs-blog&Itemid=1](http://www.sg.eac.int/index.php?option=com_content&view=article&id=116:lets-rid-eac-of-these-ntbs&catid=40:sgs-blog&Itemid=1) accessed on 6 July 2015.

<sup>198</sup> C Chimilila, C Sabuni and A Benjamin op cit note 164.

<sup>199</sup> Bagamuhunda op cit note 176.

<sup>200</sup> Protocol on the Establishment of the East Africa Community Customs Union, *Supra* (n15) at 7, Article 3 (c).

<sup>201</sup> East African Community Customs website op cit note 183.

As individual countries, the EAC Member States have an average of 20 million people with a GDP of about 20 million USD. As a result thereof, as single countries they but attract minimal foreign investment. However, through the establishment of the Community, they create a single market of over 143 million people with a combined GDP of 110.3 billion USD.<sup>202</sup> Therefore the Community creates an environment that is more attractive to foreign investment.

The Customs Union also brings about the creation of uniform custom laws<sup>203</sup> in terms of competition policies, customs procedures and external tariffs on imports from foreign countries which create a transparent and predictable trading environment. This has subsequently resulted to increased investment in the region which has led to advancing in its economic development and poverty reduction agenda.<sup>204</sup>

Finally, the cooperation among members to form a common trade policy will be an added advantage at the global level as they will have the strength of 5 countries when negotiating as one trade bloc as opposed to negotiating as individual countries.

#### **4.4. ANALYSIS OF THE OPPORTUNITIES WITHIN THE CUSTOMS UNION PROTOCOL**

The benefits mentioned above only relate to formal traders. However, the Customs Union Protocol can also be interpreted to have significant benefits to informal cross border traders. For a long time the informal cross border transactions have been downplayed. For the Community to be an all-inclusive region, the need to go back to the drawing board on a critical analysis of the Customs Union Protocol and the opportunities available therein for informal cross border traders cannot be over emphasized.

The following are some of the provisions that can be interpreted to be beneficial to informal cross border traders which if effected, has the ability to improve their economic status;

**The Preamble** read together with **Article 11 (1)** provides that the establishment of a Customs Union shall be in the course of a transitional period of five years from the coming into being of the Customs Union Protocol. This transitional period is advantageous to

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<sup>202</sup> East African Community Customs website op cit note 183.

<sup>203</sup> Bagamuhunda op cit note 176.

<sup>204</sup> East African Community Customs website op cit note 183.

informal cross border traders who would need this time to familiarize themselves with the rules and regulations under the Protocol and take advantage of the incentives provided.<sup>205</sup>

**Article 2** provides for the elimination of tariff and non-tariff barriers to trade as well as customs duties and any other charges on imports. The elimination of these barriers to trade results to a free trade environment. Many of the traders engage in ICBT to evade paying tariffs as well as avoid the hassle of non-tariff barriers. The removal of these barriers would mean increase in competition.<sup>206</sup> Increase in competition would mean increase in production. Increased productivity would result in higher income for the traders which would lead to raised standards of living ultimately in economic growth.<sup>207</sup> For instance, the following goods exported from Kenya to Uganda will attract a 10, 8, 6,4,2 and eventually 0 per cent customs duty in years one, two, three, four, five and six respectively upon the coming into force of the Customs Union Protocol: dairy products, tea and its products, vegetable oils and fats, confectioneries, fruit juices, mineral water, tobacco and its products, domestic and industrial detergents, exercise books and stationeries, clothes and fabrics including *khanga*, *kikoi* and *kitenges*.<sup>208</sup> The progressive reduction of tariffs for the informal cross border traders would lead to their trading in larger quantities of goods as the profit margin would increase significantly. Increase of a profit margin is definitely the overall goal that any trader seeks to realize in business.

**Article 3** provides for the objectives of the Customs Union. This means the liberalization of intra-regional trade, promotion of efficiency in production within the Community, enhancement of domestic, cross border trade and foreign investment as well as promotion of economic development and diversification in industrialization. The fact that the Community seeks to promote cross border trade, coupled with elimination of tariffs and non-tariff barriers means that informal cross border traders would have opportunities to conduct their transactions more easily and tap into better opportunities within the Community.

**Article 4 (1)** provides a wide array of the scope of co-operation within the Customs Union. This co-operation includes matters of trade liberalization, simplification and harmonization of documentation, customs regulations and procedures, training facilities on customs and trade, trade remedies and the prevention, investigation and suppression of

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<sup>205</sup> Masinjila op cit note 49.

<sup>206</sup> K Edge, 'Free Trade and Protection: Advantages and Disadvantages of Free Trade' available at, [http://www.hsc.csu.edu.au/economics/global\\_economy/tut7/Tutorial7.html](http://www.hsc.csu.edu.au/economics/global_economy/tut7/Tutorial7.html), accessed on 27 June 2015.

<sup>207</sup> Ibid.

<sup>208</sup> Masinjila op cit note 41.

customs offences and promotion of exports. Training facilities would be beneficial to informal cross border traders as they would be taught the essence of a Customs Union, what would be expected of them and what they should expect from the Governments. This would assist get rid of corruption at the borders which is sometimes as a result of the border officials taking advantage of the traders fears and ignorance of the laws in place. Further, the simplification of trade documentation and custom procedures means bringing to a bare minimum the documents that the informal cross border traders have to deal with which would be advantageous considering some of the informal cross border traders are illiterate.

**Article 4 (2)** provides for the adoption of a standard system of valuation of goods based on the principles of equity, uniformity and simplicity of application in accordance with the internationally accepted standards and guidelines. This is a very important provision for informal cross border traders who have mostly been left out when trade policies are being formulated. The principles of equity and uniformity coupled with simplicity in application procedures means informal cross border traders will venture into trade more confidently<sup>209</sup>.

**Article 6** promotes trade facilitation through the reduction of the number and volume of documentation required with respect to trade among the member countries, adoption of common standards of trade documentation as well as collection and dissemination of information on trade and trade documentation. This provision together with Article 4 (2) explained above makes the environment user friendly.<sup>210</sup> Uniform trading standards provides a transparent and predictable trading environment where informal cross border traders from the member countries are able to conduct their transactions on terms, rules and regulations that they can easily relate to. Further, dissemination of trade information is necessary as it helps informal cross border traders make wise decisions on trade matters. Ignorance of laws and matters of regional trade has led to their being exploited at the borders. Therefore, it is trite to note that information is power.<sup>211</sup> Their ignorance has resulted to massive economic losses through bribes. When the informal cross border traders are duly informed, it could consequently assist reduce corruption at the border posts.

**Article 14** protects goods originating from the Member States as being eligible for Community tariff treatment. This provision seeks to preserve the authenticity of the goods

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<sup>209</sup> Friedrich Ebert Stiftung and Collaborative Centre for Gender and Development op cit note 177.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid.

emanating from EAC. As a result therefore, the informal cross border traders are ensured to reap the most benefits from the Union.

**Article 15** is in line with GATT rules on non-discrimination. The said provision relates to the national treatment principle. This principle means that imports should not be treated less favourably than domestic like products upon passing customs<sup>212</sup>. As a consequence, Member States agree not to enact legislation or impose internal taxes that indirectly or directly discriminate against the like products emanating from other Member States. Therefore, Tanzania cannot discriminate against imports from Rwanda and vice versa which therefore means that informal cross border traders would have the capacity to transact in whichever country without facing any form of discrimination in terms of excessive taxes or discriminatory laws so long as their transactions are in line with the Communities custom laws.

**Article 16** deals with anti-dumping measures. It provides that member countries have the right to impose anti-dumping measures where there is injury or threat of material injury to the domestic markets. This is the case where the West and East make Africa a dumping ground for their cheap imports which eventually leads to the collapse of many East African industries. This provision therefore protects informal cross border traders as they will be allowed to thrive and eventually be restored to equilibrium if dumping occurs.<sup>213</sup>

**Article 17** allows Member States to provide grants or subsidies so long as in doing so they inform the other Community members. One of the hardships faced by informal cross border traders is the fact that they are not able to access loans from financial institutions due to the nature of their transactions. Therefore, subsidies in terms of loans or waiver of business levies<sup>214</sup> would come in handy as they would assist them raise capital necessary to establish their businesses.

**Article 21** encourages competition among member states and frowns upon any practice that negatively affects free trade or leads to the prevention, restriction or distortion of competition within the Community. Further, it results to increase in productivity, diversity in production, increased profits and lower commodity prices.<sup>215</sup> The benefits therefore to an informal cross border trader cannot be over emphasized.

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<sup>212</sup> GATT, *Supra* (n166) at 44, article 3.

<sup>213</sup> Masinjila op cit note 49.

<sup>214</sup> Friedrich Ebert Stiftung and Collaborative Centre for Gender and Development op cit note 177.

<sup>215</sup> *Ibid*.

**Article 24** read together with **article 41** provides for a dispute resolution mechanism in the region. The Customs Union will promote the crisscrossing of traders from one country to another. This is likely to bring about trade related disputes. A regional policy on dispute resolution would therefore assist in the swift settlement of trade related disputes.<sup>216</sup>

**Article 27** is a provision that can be used by Member States to encourage informal cross border traders to pay taxes through the tax remission schemes. Many explore informal trade to evade payment of customs duties which according to the traders is usually too high. The payment of taxes by the informal cross border traders will be an absolute benefit to the Community as they stand to generate more income which will then lead to economic growth.

**Article 32** gives the Council authority to approve establishment of special economic arrangements so as to promote development in the region. ‘Special arrangements’ implies a situation where some players are given preferential treatment. This provision can be of use to informal cross border traders in a situation where they can lobby the Council for preferential treatment for instance in exemption of import duties as provided in article 33 of the Customs Union Protocol.

**Article 33** provides for exemption regimes. Member States have agreed to adopt a list of goods that shall be exempt from payment of import duties. This can be of great importance to informal cross border traders considering they are a vulnerable group that has been neglected by the Governments if they can come together and speak as one voice to have their goods exempt from payment of import duties.

**Article 39** states the customs law of the Community which shall consist of the EAC Treaty, the Customs Union Protocol and its annexes, regulations and directives of the council, decisions by the East Africa Court of Justice, Acts of the Community enacted by the Legislative Assembly as well as relevant principles of international law. It further provides that the said laws shall apply uniformly within the Community. Uniformity provides a predictable trading environment for informal cross border traders.

#### **4.5. ANALYSIS OF THE CHALLENGES OF THE CUSTOMS UNION PROTOCOL**

While there are numerous advantages brought about by the Customs Union, there are also a number of challenges:

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<sup>216</sup> Friedrich Ebert Stiftung and Collaborative Centre for Gender and Development op cit note 177.

The Community comprises only of 5 members but still faces the problem of multiplicity of membership. Tanzania is a member of both EAC and SADC while Burundi is a member of EAC and ECCAS. Multiplicity of membership may result to trade deflection where for instance member countries of SADC may use Tanzania to smuggle goods to EAC at a preferential rate which would not otherwise be the case due to the existence of the common external tariff.<sup>217</sup>

In as much as the Customs Union envisages a tariff free environment, there still exists numerous non-tariff barriers that deter trade. These include import quotas, SPS measures, technical barriers to trade and rules of origin which have a negative impact on trade.

The free movement of goods in EAC is still to be realized as there still exists internal border controls as customs clearance and tax collections are still destination based. The imposition of domestic taxes on goods complicates the relaxation of border controls. Finally, the partner states are yet to bring their domestic laws in line with Community law which then brings about disharmony and contradiction.<sup>218</sup>

To add on to that, its implementation may not be a smooth sailing one as explained below:

So as to meet the objectives of the Customs Union Protocol, the implementation of **Article 7** simplification of trade documentation and **Article 39** on ensuring there is uniformity in customs law may prove to be difficult as some of the informal cross border traders remain ignorant of the laws/policies that are in place. For the Customs Union to be effective, the Community needs to publicize and educate the citizenry on existing legislation. Around 57.06 per cent are aware of the Customs Union and 55.4 per cent are aware of existing policies/laws while the rest remain ignorant.<sup>219</sup> When the informal cross border traders are not aware of the legislation in place, they will not know what benefits they can reap therefrom. They should therefore duly be informed of the challenges and opportunities the Customs Union has to offer. An example of a challenge in this context is the fact that informal cross border traders continue to pay exorbitant amounts of money in taxes for agricultural goods to Kenya despite the fact that taxes on agricultural goods to Kenya have been abolished<sup>220</sup>. For the Customs Union to effectively benefit informal cross border traders, the Community should make it a bottom-up affair where all players are duly informed and actively involved in trade related

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<sup>217</sup> Bagamuhunda op cit note 176.

<sup>218</sup> Ibid.

<sup>219</sup> Masinjila op cit note 49.

<sup>220</sup> Ibid.

matters.<sup>221</sup> This information would assist in their taking advantage of the opportunities presented by the Customs Union and enable them become streetwise when dealing with any challenges.<sup>222</sup>

**Article 21** promotes competition in the region and discourages practices that adversely affect free trade. However, on the flip side, the informal cross border traders may not have the muscle to deal with the already established businesses. The competition may lead to their being pushed out of the market hence making the argument as to their inclusion within the formal trading environment moot.

The implementation of the Customs Union in EAC has had both positive and negative impacts. However as discussed above, the positive aspects outweigh the negatives ones. It may also not expressly provide for informal cross border traders but as explained above, it is clear beyond peradventure that it can be interpreted to provide opportunities that informal cross border traders can take advantage of. ICBT shows a world that operates as though regional laws are not in existence. It is an economic activity that continues to thrive in the absence of structural laws but has significance contribution to the Community's economy. It has the potential to support current initiatives on poverty eradication, boost food security as well as improve the standard of living of many African folk. The fact however that it has been ignored over time shows that many, especially our legislators have not fully appreciated the significance of ICBT hence overlooking a significant proportion of trade. The Protocol, as seen above has a lot to offer to informal cross border traders is interpreted accordingly.

However, at the end of the day what really matters is political will. What would be a first step is data collection to give a clear indication of the extent of ICBT and consequently realize the true impact it has on the economy. So far, Uganda is the only country that carries out a survey on ICBT in the region. This has been effected since 2007 through the Bank of Uganda and Uganda Bureau of Statistics through monthly surveys at the border posts<sup>223</sup> which leads to accurate information in the national statistics.

The Customs Union Protocol has the ability to deal with the challenges faced by informal cross border traders but for it to effectively do so, the Community needs to disseminate information of the essence of the Customs Union. It is important for the informal cross border

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<sup>221</sup> Friedrich Ebert Stiftung and Collaborative Centre for Gender and Development op cit note 177.

<sup>222</sup> Ibid.

<sup>223</sup> Bank of Uganda and Uganda Bureau of Statistics, 'Informal Cross Border Trade Survey Report 2009-2010' at 72.

traders to be aware of the implications so that they can be adequately prepared to deal with any challenges and also develop counter strategies and coping mechanisms to ensure their survival as well as make informed trade related decisions.

For the informal cross border traders to fully reap benefits from the EAC Customs Union, it is imperative that the Community seeks formalize ICBT so as to improve the plight of informal cross border traders. Bringing informal cross border traders on board will be a good opportunity to strengthen the on-going initiatives to eradicate poverty as well as boost economic development within the region.

## CHAPTER FIVE

### 5. CONCLUSION AND RECOMMENDATIONS

#### 5.1. CONCLUSION

ICBT is an economic activity that exists outside the formal legal framework. It includes imports and exports that are traded across borders informally by escaping the normal border procedures. ICBT has continued to thrive without any structural laws even though its contribution to the economy has been significant. Despite that fact, it has been frowned upon by many who still view ICBT as illegal cross border activities that should completely be done away with. As a consequence thereof, when trade policies are being passed, ICBT is relegated to the back seat. The Legislators views that ICBT constitutes illegal cross-border activities shows that they are yet to fully understand and appreciate the benefits that this informal trade can generate for the Community and the fact that they continue to downplay it means they keep overlooking a very significant proportion of trade.

The main aim of the study was to give an overview of the nature and scope as well as the significance of ICBT in EAC so as to inform policy making in relation to the opportunities that informal cross border traders can anticipate from the Customs Union Protocol.

The research has established that ICBT is indeed beneficial to the Community. The three major advantages are first, that it is a source of employment. Second, ICBT assists in eradicating poverty and finally, it contributes immensely towards food security in the region. Without even delving to the other advantages that ICBT has to offer, these three are important for the development of EAC.

The research has also discussed the regional integration initiatives taken so as to promote development within the Community. The route taken by Africa as a whole is market integration which has not been without difficulties. As an alternative, regionalism from below could be the way forward for EAC considering ICBT has greatly supported the shrinking formal economy. This would mean tapping into this informal trade and building on those informal trade networks to create a robust economy bearing in mind that is where a substantial proportion of cross-border trade is conducted.

Indeed, with the inception of the Customs Union Protocol, there may be light at the end of the tunnel for informal cross border traders. Even though the Customs Union Protocol only addresses issues concerned with formal trade, it can as well be beneficial to informal cross border traders only if interpreted in a way that accounts for all players in the trading field.

ICBT is an important and a significant proportion of trade that needs to be appreciated by all. However, it is an activity that is still covered with controversy, myths and ignorance.<sup>224</sup> For instance, informal cross border traders are hardly aware of the existence of the Customs Union Protocol and therefore they have not been in a position to understand the benefits that can be derived there from. Second, majority of the people view ICBT as illegal as opposed to a genuine economic activity of people who merely seek to survive. Among the reasons some engage in ICBT is the fact that they have no opportunity in the formal sector and the only way to meet their basic need is to seek ICBT as an alternative for surely, man must live.

In addition, talking about formalising ICBT is an open ended argument as there is no clear definition of exactly what formalisation means.<sup>225</sup> Further, even if there was political will to formalise ICBT, there would still be the need for active dissemination of the essence of the Customs Union Protocol to the informal cross border traders so that they can know exactly how they would benefit as well as the challenges they would be likely to encounter.

While it seems difficult, I am of the opinion that formalizing ICBT and having its official recognition in the Customs Union Protocol would be a stepping stone to realizing economic development in the Community. This is because it contributes a significant proportion of trade that can be used to facilitate the on-going agendas to alleviate poverty as well as those that seek to enhance food security in the region. ICBT would also offer an alternative source of employment. It is therefore here to stay and as a result of the shrinking formal economy, EAC will with time have to deal with ICBT as a parallel and alternative source of employment in relation to the formal sector. Therefore, it is necessary that the Community deals with ICBT sooner rather than later as it has become a social-economic lifestyle for a large number of EAC citizens.

## **5.2. RECOMMENDATIONS**

The first step would entail EAC member countries carrying out a survey on the extent of ICBT within their borders. So far Uganda is the only country that has made an effort to determine the level of imports and exports traded informally through the Bank of Uganda and the Uganda Bureau of Statistics. Carrying out a survey would assist in getting accurate data on the true extent of ICBT especially when tabulating the national statistics. In so doing, it would be easy to present the volume of goods traded, the direction of trade flow and gauge

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<sup>224</sup> Ogalo op cit note 22.

<sup>225</sup> Ibid.

the extent of revenue lost through ICBT. This would also determine the magnitude of ICBT *vis a vis* formal trade so as to gauge the contribution that ICBT would make to the economy especially when integrated to the formal economy. Carrying out this survey would be important to the Community for effective planning as well as when making trade related decisions.

After a survey is carried out, integrating the ICBT to the formal sector through formalization would be the next step. It would involve officially recognizing ICBT in the Customs Union Protocol and including it in national and Community trade strategies as well as trade policies. As there has been no actual definition of what formalization would mean, a checklist can be made which would entail; ensuring that the social and economic rights of informal cross border traders are well articulated, for instance, by giving ICBT a legal and economic legitimacy and giving them comprehensive labour rights complete with capacity to have bargaining power. When this is sufficiently done, most needs of informal cross border traders will be met which will deter the need to sneak goods across the borders. In turn, the Community will be in a position to recoup revenue that would have otherwise been avoided by the informal cross border traders and use the same for other development issues in the Community like infrastructure, healthcare or education.

It is imperative that the Community works towards eradication of corruption at the border posts. The borders are porous and marred with corrupt officials who make it easy for ICBT to thrive. As a consequence thereof, corrupt customs officials should be subject to fines or subjected to disciplinary measures. Alternatively, the Community can adopt the Charter for Cross Border Traders. This is a collaboration document between the Ministry of Industry and Trade in Malawi and the World Bank and currently in use in the Zambia-Malawi border post. The said Charter provides for rights and duties of informal cross border traders and the obligations for border officials. When both parties appreciate their rights, duties and obligations, the distrust by traders to the officials and the exploitation of traders by officials would be minimized. It would also prevent the border officials from extorting money from informal cross border traders as well as prevent the traders from paying taxes on goods which are otherwise not taxable. Paying of taxes is one of the reasons many result in ICBT. When this is dealt with accordingly, it would also make it easy to clear goods at the border posts as the usual bureaucracies would be eliminated.

The Community needs to conduct widespread sensitization of the Customs Union Protocol. When the people are aware, then they can be able to understand the opportunities available as well as any challenges that they may face. In this case, when formalization initiatives start, the informal cross border traders would have an easier time adjusting. When they truly understand the impact of the Customs Union Protocol, the informal cross border traders can know their rights and the duties of border officials hence prevent their being taken advantage of at the border posts. It would also lead to economic autonomy as the traders will be in a position to make informed trade related decisions. This will definitely be a contributing factor to poverty reduction which is one of the major goals of EAC in its quest for regional integration.

Considering that majority of those who engage in ICBT are women, it is imperative that the Community ensures that they are catered for in the trade policies. This means including gender policies that recognize the role that women play and that are informed by the needs of these women. In the quest for women economic empowerment, these policies should include women's access to capital and capacity building as pointers when addressing the problems faced by women in informal cross border trade.

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