

# ‘STATES AND MARKETS AS TWO SIDES OF THE SAME COIN’

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## I. Introduction

This chapter provides an elaborate exposition of the law and its application bridging the gap between markets and in so doing enables them to co-exist in fostering desired markets discipline and stability. The term law can be used to connote many things, for this reason, the law is used to refer to the rules governing global markets. The law in its varied contexts is a subset of politics and therefore whether one is talking of market rules or the law in other respect, the law is a reflection of prevailing political climate in a country and other regulatory domains. The analysis of the law and its usage in regulation of global markets will be limited to interstate agreements adopted by states to govern global markets such as the WTO, IMF and the World Bank and other oversight institutions. The market can be understood in the context of emerging regional initiatives such as the EAC, the WTO rules and those engendered by other supranational initiatives. It is an inescapable fact that the relationship between states and markets is complimentary and mutually reinforcing to the extent that when the market sneezes, the state catches the cold literally speaking. What remains sacrosanct is that there is no market without the state and vice versa, meanwhile, they both need the law as a bridge to co-exist in their respective regulatory domains. The law helps to create the space where markets and states work together harmoniously without overlapping each other's regulatory roles. The author has drawn examples from the East African Community and the European Union member countries to tease the relationship between states and markets (which are literally two sides of the same coin). The irony however is that most of global regulatory regimes are evolved at the periphery of the State, (for example in Brussels for the case of EU Countries) but implemented within the state. The foregoing challenge tends to create tensions/challenges in implementation of engendered market rules conflict with the constitutional mandate of sovereign states. Desired market rules are evolved either at a regional level such as the East African Community (EAC) or the European Union (EU) or at a global level such as the WTO oversight rules on trade. It is worth noting that while the State has seemingly been emasculated by proliferating regional groupings, it still calls the shots and as such dictates the pace at which ratified treaties can be implemented and hence dictate the effectiveness of engendered global market initiatives. A good case in point is the recently concluded Brexit in EU whereby the United Kingdom invoked Article 50 of Lisbon Treaty (2009) and quit the EU.<sup>2</sup> Thus, the ability of states to implement their international obligations often depends on the goodwill and the prevailing political climate within a state. The challenge has been that states have been emasculated by ceding constitutional powers to regional markets in areas erstwhile within its exclusive domain where it needs to have a strong presence. For examples, important laws on immigration control in Europe are decided in Brussels (the periphery of states) but implemented within member's states notwithstanding the far reaching ramifications this has on member states in terms of jobs, housing and other social services provisions within a state. Member States regardless of their economic development interests are urged to transpose and harmonise treaty obligations and directives in all

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<sup>2</sup> Article 50 of the Treaty on European Union, enacted by the Treaty of Lisbon on 1 December 2009, introduced for the first time a procedure for a member state to follow if it wants to withdraw voluntarily from the EU.

EU member countries. The tensions between states (in liberalisation of their markets) can best be analysed in the East African Community and European Union as a case in point. It should however be noted that there are also tensions in other regional markets which have threatened to take states back to the inward looking state protectionism, ironically in the era of globalisation.

## II. East African Common Market

Law can be best understood when viewed in its local context. Therefore the author has articulated the interplay between states and markets largely drawing examples from the East African Community (hereinafter the EAC) as a common market initiative. The EAC was established in (1967) for integration of three East African Countries of Kenya, Tanzania and was dissolved in 1977 after being in existence for only ten years. Uganda was disenchanted that Kenya was disproportionately taking a lion's share of accrued benefits from the EAC and the impulsive Idi Amin had had enough and pulled Uganda out of EAC in 1977. However, it was revived in the early 1990s because EAC countries were increasingly marginalized in international trade system and was operationalized again in 2000. Driven by the desire to promote trade and economic development in the East African Countries (EAC), the Partner States established transitional stages for implementation of the common market.<sup>3</sup> Accordingly, the common market was established as the second regional integration phase that became operational in January 2010.<sup>4</sup> This phase reflected the desire by the Partner States to integrate their markets into a single market by maintaining certain privileges and rights like the right of establishment, free movement of labour and services.<sup>5</sup> The freedoms and rights are meant to promote sustainable development among the citizens of the Partner States. Hence the Protocol on the East African Community Common Market provides that citizens of the Partner States are guaranteed the freedom to work and right to establish their businesses in another Partner State.<sup>6</sup> To enhance labour mobility in the EAC the Partner States agreed that services supplied and service suppliers of national of the Partner States must move freely within the community.<sup>7</sup> Further, that such citizens mustn't be discriminated against based on their nationality.<sup>8</sup> For example, if a Rwandan national wants to immigrate to Uganda for purposes of taking up employment and he or she has followed the right procedures, the rules of the market must supersede the interests of the state and grant him or her the required assistance such as a work permit to facilitate him or her work in Uganda.

To ease the movement of labour within integrated markets, Partner States are urged to harmonize their labour laws, policies, programmes, national social security policies, laws and systems.<sup>9</sup> In this same regard, Partner States must recognize the academic and professional qualifications received, experience obtained, requirement met, licenses or certifications granted from a member country.<sup>10</sup> That's why when the state enters the CMP it sets a timeline when to actualize the CMP and make reforms including to facilitate mobility of labour.<sup>11</sup> However, the pace at which the Partner States

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<sup>3</sup> EAC Treaty (n 3) arts 2(2), 76(2).

<sup>4</sup> - 'What is the Common Market' <<https://www.eac.int>> accessed 24 December, 2018.

<sup>5</sup> EAC Treaty (n 3) arts 1, 76(1); Protocol on the Establishment of the East African Community Common Market (2009) art 2 (4) (c), (d), (f).

<sup>6</sup> Protocol on the Establishment of the East African Community Common Market (2009) arts 10(1), 13(1).

<sup>7</sup> *ibid* art 16(1), (2).

<sup>8</sup> *ibid* arts 10(2), 13(2), 17.

<sup>9</sup> *ibid* art 12(1), (2).

<sup>10</sup> *ibid* art 11(1).

<sup>11</sup> Mary Karugaba, 'Quicken Implementation of Common Market Protocol-EALA' *New Vision* (Kampala, 4 February, 2016) <<https://www.newvision.co.ug>> accessed 25 December, 2018.

are implementing the EAC laws and policies is appallingly slow and some states have demonstrated that they are less passionate about the provision for free movement of workers. Some partner States have been protective of their labour market from the upsurge of foreign workers. For example, Tanzania has refused to grant working permits to qualified teachers from Uganda and Kenya. One should also not be oblivious to the disparities in national laws and government policies, political ideologies, double taxation, different levels of development and education curriculum, security and language barriers, which undermine a fully integrated EAC market. In 2016, 'efforts to freely offer cross-border services such as professional services, distribution, transport and communication were slowed lack of compliance of states with their treaty obligations'<sup>12</sup> which in return affected labour mobility in the community. However the challenge has been that the procedure and costs of getting a working permit to facilitate labour mobility of citizens of member countries has become a barrier' among the Partner States in the EAC.<sup>13</sup> The foregoing process is not as automatic in practice as it is on paper, apparently due to the slow pace of harmonisation of national laws and inflexibility of states to transpose provisions on the CMP.<sup>14</sup> For instance, when a worker applies for employment that exceeds ninety days in a Partner State, they must apply for a special pass while awaiting to get a working permit.<sup>15</sup> As well those establishing businesses in the Partner States must also seek a special pass as they establish their business<sup>16</sup> hence creating an obstacle towards the efficient application of the CMP. States cannot open up their markets and remain nationalistic in outlook because this will act as a barrier to trade. There is a buy only British community groups to encourage the buying of only British goods in the UK even though it is the member of the European Union. The community advises members to reach out and recruit more members to champion the marketing of British goods. The group advises selling of British-made goods and calls on community members to like-minded people that come together to help each other buy all of the great things that are made in Britain – whether that's clothes, food, electronics or furniture. There are similar sentiments in other countries across the globe.<sup>17</sup> Some commentators have equated economic policies by governments of encouraging nationals to buy and sell only domestically produced goods to achieving full economic independence of countries. This premise however does not help to foster liberalisation of trade since it runs counter to the fundamental principles such as MFN and NT on which the liberal market is anchored. However, in a global market countries will need to venture outside domestic economies to increase their market share.

In 2013, Rwanda and Kenya abolished work permit fees for any EAC nationals working in their jurisdictions while Uganda followed pursuit in 2015 through the dubbed coalition of will and removed work permits.<sup>18</sup> Notably although the trio partner states removed work permits, the procedure for attaining the permit is sometimes hefty in that "acquiring a permit may take up to

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<sup>12</sup> Anita Chepkoech, 'EAC Yet to fully implement Common Market Protocols' *The East African* <<https://www.theeastafrican.co.ke>> accessed 25 December, 2018.

<sup>13</sup> Richard E Mshomba, *Economic Integration in Africa: The East African Community in Comparative Perspective* (Cambridge University Press, Cambridge 2017) 111.

<sup>14</sup> *Ibid*, 107.

<sup>15</sup> The East African Community Common Market (Free Movement of Workers) Regulations (2009) reg 6(6).

<sup>16</sup> The East African Community Common Market (Right of Establishment) Regulations (2009) reg 6(2), (3).

<sup>17</sup> In 2014, the Government of Uganda adopted a Policy of "Buy Uganda, Build Uganda (BUBU)" to encourage Uganda to buy Ugandan domestically produced goods. The policy charges the Ugandan Government to create a conducive environment to nurture and facilitate BUBU policy

<sup>18</sup> Thome H Wolfgang, 'Uganda, Rwanda, Kenya: No More Work Permits Necessary' (15 June, 2015) <<https://www.eturbone.com>> Uganda-r...> accessed 28 October, 2018.

six months”<sup>19</sup> Tanzania has stubbornly refused to remove work permit fees<sup>20</sup> for the other Partner States thus causing the delay in implementation of unified labour policies, laws and programmes in the EAC.<sup>21</sup> For instance, Tanzania charges fees for work permits for ‘all EAC partner states at USD\$250, Kenyan firms expanding or setting up subsidiaries was also reduced from USD\$ 484 to USD\$242’.<sup>22</sup> It has also become apparent that some Partner States use discriminative procedures in granting permits while questioning for instance a company why they are hiring a foreigner that is a citizen of another Partner State other than national of that state.<sup>23</sup> For example in 2018 the Tanzanian authorities denied a worker permit to the chief executive officer of Vodacom Tanzania and reported that “there are more experienced Tanzanians to take on the task”.<sup>24</sup> Firstly, countries refusal to grant visa and work permits to facilitate easy movement of workers from one state to another contravenes the non-discrimination principle which underpins the CMP and the East African Community Common Market (Free Movement of Workers) Regulations. It also contravenes the WTO Agreement on GATS which Tanzania and any other country for that matter signed on accession to the WTO and governing principles WTO.<sup>25</sup> Therefore the inward looking attitude of states and refusal to adopt robust policies to foster harmonisation of ratified treaties has become one of the “walls or barriers” to trade. The provisions on labour mobility in the EAC Partner States and in the EU are there but their application has posed many challenges and as a result they tend to diminish the purpose for the establishment of common markets when states do one thing in theory but do the exactly opposite of what was agreed in practice. To reinforce the foregoing analysis by drawing on EU for instance, the UK has always been less passionate about subordinating her sovereignty to another authority (in Brussels) in crucial areas of national self-importance such as immigration. The precarious issue of immigration and protection of jobs for her natives, among other things, is what led the UK to re-evaluate its relationship with the EU by calling a referendum in June 2016 whereby the leavers won with a slim majority over those who wanted to remain in EU. This explains the current impasse in Europe over ongoing BREXIT process (the UK’s bid to leave the EU).

It can be conveniently argued that there is no state today, not even United States dominant as it is that can afford to act unilaterally, posture or to be protectionist, every state will need to join common market and to open up their markets to remain relevant. The WTO concept of liberalisation is premised on eradication of constraints to cross-border trade thus encouraging market access.<sup>26</sup> States have for long traded with each other, at some point they used barter trade as a mechanism of carrying out business. For example during Homeric times cattle was used as money alongside gold and copper: As well, weapons, tools, metals, ornaments, and intoxicating

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<sup>19</sup> Andrew Luzzi, ‘EAC States Need to Harmonization of their Citizens’ Work Permits’ (21 June, 2014) <<https://www.the-star.co.ke>> Siasa> accessed 29 October, 2018.

<sup>20</sup> Mshomba (n 13) 117.

<sup>21</sup> CMP (n 19) art 12(1).

<sup>22</sup> - ‘Tanzania Revises Business Permit Fees for EAC Partner States to \$250’ <<https://www.corporate-digest.com>> accessed 29 October, 2018.

<sup>23</sup> Ibid.

<sup>24</sup> - ‘Vodacom Tanzania Says Sylvia Mulinge Denied Work Permit’ *Daily Nations* (28 September, 2018) <<https://www.nation.co.ke>> accessed 29 October, 2018.

<sup>25</sup> CMP (n 19) arts 16(1), (2) (a), (b); The East African Community Common Market (Free Movement of Workers) Regulations (n 21) reg 13 (1) (a), (b).

<sup>26</sup> Wendy Dobson, ‘Financial Services Liberalisation in the Millennium Round’ in Klaus Gunter Deutsch and Bernhard Speyer (eds) *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century* (Routledge, London 2001) 97.

liquor were used as a form of trade.<sup>27</sup> Also according to the Jay Treaty of January 1794, the United States of America granted Most Favoured Nation (MFN) trading status to Britain where Madison called for the introduction of resolutions calling for the imposition of discriminatory duties on British shipping.<sup>28</sup> All these help to foster liberalisation of trade through enhanced market access. Therefore, without a doubt, the principle of MFN is designed to foster a 'borderless global economy by encouraging free international trade and the free flow of foreign direct investment'.<sup>29</sup> In this regard, the "market" can be defined as 'the opportunity for buying and selling goods or services; which often depends on the extent of economic demand and supply'.<sup>30</sup> Thus countries exert their goods and services in the global village by forming multilateral, plurilateral and bilateral agreements with each other thereby promoting market access. This encourages trade liberalisation among States<sup>31</sup> resulting in their improved welfare occasioning from the removal of trade barriers.<sup>32</sup> Notably, to ensure market access, the WTO through the Uruguay Round of Multilateral Trade Negotiations concluded on 15 April 1994 and came into force on 1<sup>st</sup> January 1995<sup>33</sup> with the aim of promoting a 'multilateral trading system'.<sup>34</sup> Multilateralism is superior to regionalism and Regional Trade Agreements (RTA) complement the WTO's mission in foster liberalisation of trade.<sup>35</sup> The fundamental principles and rules of the WTO are based on 'non-discrimination, market access, unfair trade and promoting harmonisation of national regulation in specific fields'<sup>36</sup> thus regulating the market and maintaining trade liberalism.

Some scholars have postulated that while countries adopt the MFN principle, this principle has been made a mockery by the upsurge of Preferential Trade Agreements (PTAs) 'involving customs unions, regional and bilateral Free Trade Agreements (FTAs). Regional Trade Agreements (RTAs) and bilateral trade agreements (BTAs) and other arrangements'<sup>37</sup> have diminished the significance of MFN Principle to promote and liberalise international trade.<sup>38</sup> They further added 'the practice of levelling the playing field based on the principle of reciprocity has gained momentum than non-discrimination principles such as Most Favoured Nation (MFN) and National Treatment (NT) Principles'.<sup>39</sup> Therefore unless international treaties are followed and applied as envisaged without being circumvented by states in one way or the other, international law will continue to be questioned whether it is law at all or whether it is just a game of politics normally dominated by

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<sup>27</sup>Isaac A Hourwich, 'The Evolution of Commercial Law' (1915) 1(2) *American Bar Association* <<http://www.jstor.org/stable/25699734>> accessed 12 February 2018.

<sup>28</sup> Todd Estes, *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture* (University of Massachusetts Press, Massachusetts 2006) 20.

<sup>29</sup> Peter Van de Bossche, *The Law and Policy of the World Trade Organization: Texts, Cases and Materials* (2<sup>nd</sup> edn, Cambridge University Press, Cambridge 2008) 4, 5.

<sup>30</sup> Bryan A Garner (ed), *Black's Law Dictionary* (9<sup>th</sup> edn, Thomson business, 2009) 1055.

<sup>31</sup> Virek Arora and Athanasios Vamrakidis, *How Much do Trading Partners Matter for Economic Growth?* (International Monetary Fund, 2004) 3.

<sup>32</sup> Umme Humayara Manni and Munshi Naser Ibne Afzal, 'Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy' (2012) 1(2) *Journal of Business, Economics & Finance* 37, 38.

<sup>33</sup> Peter Van de Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Case and Materials* (3<sup>rd</sup> edn Cambridge University Press, Cambridge 2013) 40; Agreement Establishing the World Trade Organisation 1994 (hereafter referred to "Marrakesh Agreement") art I.

<sup>34</sup> Bossche (n 4) 37; Marrakesh Agreement (n 8) Preamble recital 5.

<sup>35</sup> Akiko Yanai, 'Characteristics of APEC Trade Liberalization: A Comparative Analysis with the WTO' in Jiro Okamoto (ed) *Trade Liberalization APEC* (Routledge, London 2004) 27.

<sup>36</sup> Bossche (n 34) 37.

<sup>37</sup> Mikio Kuwayama and Others, *Bilateralism and Regionalism: Re-establishing the Primacy of Multilateralism a Latin American and Caribbean Perspective* (United Nations Publications, Santiago 2005) 9.

<sup>38</sup> Kuwayama (n 37).

<sup>39</sup> Kuwayama (n 37).

dominant actors. The concepts of regionalism and GSP have resulted in the deregulation of the market with the ideology that all parties to that regional integration or GSP have access to the market of a member state regardless of the developmental status and are according preferential treatment which is not discriminatory in nature. Regionalism is meant to be an ‘expression of a common sense of identity and destiny combined with the creation of institutions that express that identity and shape collective action’.<sup>40</sup> This has resulted in adoption of regional groupings that are governed by RTA with a view to advance the objective of reducing barriers to trade between member countries.<sup>41</sup> Lynch inscribed that RTAs grant preferential treatment among trading partners that include, ‘nonreciprocal preferential trade agreements, non-comprehensive free trade agreements, free trade agreements, customs unions, common markets, monetary union and political union’.<sup>42</sup> More so disputes arising from RTAs are handled by the stipulated judicial Fora not the dispute settlement under the WTO.<sup>43</sup> By 2017, 25 RTA notifications were in force and received by WTO increasing the number to 669 by 31 December 2017 of which 455 were in force.<sup>44</sup> In Africa the regional communities include the ‘East African Community (EAC), Southern African Development Community (SADC), Economic Community of West African States (ECOWAS), Arab Maghreb Union (UMA) and Common Market for Eastern and Southern Africa (COMESA)’.<sup>45</sup> In Europe the European Union is comprised of 28 member countries<sup>46</sup> while USA has alliances with Canada and Mexico through National American Free Trade Agreement<sup>47</sup> (herein referred to “NAFTA”). In Southeast Asia, the ‘Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 in Bangkok, Thailand comprising of 10 member States’.<sup>48</sup>

With respect to GSP, preferential treatment is accorded to the goods from developing and least developed countries by reducing tariffs on such product, thus enabling them to have a large share of the market beyond their borders.<sup>49</sup> GSPs have traces from the 1970’s to date and they include the European Union’s policy of Everything but Arms initiative (EBA) and the USA’s policy on African Growth and Opportunity Act (AGOA).<sup>50</sup> Under the AGOA scheme, as of 22 December 2017 “47 of 48 Sub-Saharan African countries are currently eligible for the GSP”.<sup>51</sup> Persson and Wilhelmson dotted that special trade preference for African, Caribbean and Pacific Countries (ACP) is traced from the 1957 Treaty of Rome between the members of the European colonies

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<sup>40</sup> Paul Evans, ‘Between Regionalism and Regionalisation: Policy Networks and the Nascent East Asian Institutional Identity’ in T J Pempel (ed), *Remapping East Asia: The Construction of a Region* (Cornell University Press 2005) 196.

<sup>41</sup> Parthaprati Pal, ‘Deal Breaker or the Protector of Interests of Developing Countries? India’s Negotiating Stance in WTO’ in Malabika Roy and Saikat Sinha Roy (eds) *International Trade and International Finance: Explorations of Contemporary Issues* (Springer, West Bengal 2016) 174.

<sup>42</sup> David A Lynch, *Trade and Globalization: An Introduction to Regional Trade Agreements* (Rowman & Littlefield Publishers, Inc, Lanham 2010) 18, 19.

<sup>43</sup> Evans (40).

<sup>44</sup> -*Annual Report 2018* (31 May 2018) <[https://www.wto.org/english/news\\_e/news18\\_e/anrp\\_30may18\\_e.htm](https://www.wto.org/english/news_e/news18_e/anrp_30may18_e.htm)> accessed 16 June 2018.

<sup>45</sup> *Regional Economic Communities in Africa*, (12 January 2010) <<https://www.claiminghumanrights.org/afric...>> accessed 28 February 2018.

<sup>46</sup> -*Countries* <[https://www.europa.eu/countries\\_en#28members](https://www.europa.eu/countries_en#28members)> accessed 26 February 2018.

<sup>47</sup> -*North American Free Trade Agreement (NAFTA)* <<https://www.ustr.gov/trade-agreement/nort...>> accessed 15 June 2018.

<sup>48</sup> -*About ASEAN* <<https://www.asean.org/asean/about-asean/>> accessed 12 July 2018.

<sup>49</sup> International Business Publications, *Kenya Business Law Handbook: Strategic Information and Laws* (International Business Publications, Washington DC 2013) 74.

<sup>50</sup> Paul Brenton, ‘Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything but Arms’ (2003) WPS3018 *Policy Research Working Paper* <<https://www.elibrary.worldbank.org>> accessed 12 July 2018.

<sup>51</sup> -*General Country Eligibility Provisions* <<https://www.trade.gov/agoa/eligibility>> accessed 13 July 2018.

and the European Communities and by 2000 the ACP preferences are provided for in the Cotonou agreement.<sup>52</sup> These authors further added that such preference is granted depending on the sensitivity of the product by reducing the tariffs of the developing countries.<sup>53</sup> This encourages developing countries' produce to pierce the market of the developed countries.

### III. Regulation of the Market

While today's markets are globally interconnected, for the most part they are regulated and supervised at a national level.<sup>54</sup> This renders markets prone to regulatory failures at a national level. Samir Amin considers deregulation a mere guff that in reality no market can operate without proper regulation.<sup>55</sup> The regulations provided for by the laws must be complied with because they ensure the smooth running of the market among States. Therefore the Marrakesh Agreement provides that States enter 'into reciprocal and mutually advantageous arrangements to eliminate discriminatory treatment in international trade relations'.<sup>56</sup> Thus it is mandatory that all Members to the WTO are bound by the non-discriminatory principle in order to maintain trade and promote market access. This is through the vital criteria of the WTO of MFN and national treatment<sup>57</sup> thus Member States must grant market access to the Members' imports and exports. However the early WTO Panel exclaimed in the Canada-Patent Protection of Pharmaceutical Products case while tackling discrimination and warned 'against adopting an unduly broad and universalised concept of discrimination'.<sup>58</sup> The Panel added that 'discrimination extends beyond the concept of differential treatment standards by which the justification for differential treatment is measured are subject to infinite complexity'.<sup>59</sup>

### IV. Most Favoured Nation

As some commenters have put it, when a state offers concessions to one state both in goods and services, it has to do so to all other states in order not to be seen discriminating against other states.<sup>60</sup> Therefore the MFN principle, mandates States to treat like products of goods originating from different foreign countries equally<sup>61</sup> for example if Uganda a member to WTO reduces tariffs on spirits from China by 10 per cent then She is supposed to reduce tariffs on the similar spirits from other WTO members. This Principle was elaborated in Turkey-Rice case where United States of America filed a complaint resulting from Turkey's imposition of trade import restriction

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<sup>52</sup> Maria Persson and Fredrik Wilhelmsson, 'Assessing the Effects of the EU Trade Preferences for Developing Countries' in Yves Bourdet and Others (eds) *The European Union and Developing Countries: Trade, Aid and Growth in an Integration World* (Edward Elgar Publishing Limited, Cheltenham 2007) 30.

<sup>53</sup> Persson and Wilhelmsson (n 27) 31.

<sup>54</sup> John Fontecchio, "The General Agreement on Trade in Services: Is it the answer to creating a harmonised global securities system?" (1994) *North Carolina Journal of International Law and Commercial Regulation* 115 at 119—120.

<sup>55</sup> Debal Deb, *Beyond Developmentality: Constructing Inclusive Freedom and Sustainability* (Earthscan, London 2009) 456.

<sup>56</sup> Marrakesh Agreement (n 8) Preamble recital 3.

<sup>57</sup> General Agreement on Tariffs and Trade (1947) as amended by the Uruguay Round 1986-1994 (GATT 1994) art I (1), II, III.

<sup>58</sup> WT/DS114/R (2000) as cited by Andrew D Mitchell and Others, *Non-Discrimination and The Role of Regulatory Purpose in International Trade and Investment Law* (Edward Elgar Publishing Limited, Cheltenham and Northampton 2016) 9.

<sup>59</sup> WT/DS114/R as cited by Mitchell and Others, (n 32).

<sup>60</sup> Malgorzata Wróblewska, *Most – Favoured – Nation Clause in the Light of EC Case C-335/05 Rizeni Letoveho Provozu Cr, S.P.V. Bundesamt Fur Finanzen* <<https://www.law.muni.cz/wroblewska>> accessed 12 July 2018.

<sup>61</sup> Werner Zdouc, 'WTO Dispute Settlement Practice Relating to the General Agreement on Trade in Service' in Federica Ortino and Ernst-Ulrich Petersman (eds) *The WTO Dispute Settlement System, 1995-2003* (Kluwer Law International, The Hague 2004) 381.

on rice from a specific period commencing September 2003 denying or failing to grant certificates of control on import rice at the MFN tariff rates.<sup>62</sup> The Panel held that Turkey had ‘denied or failed to grant licences to import rice at the most-favoured-nation tariff rate i.e. outside the tariff rate quotas’.<sup>63</sup> Similarly in Colombia – Ports of Entry case, Colombia imposed indicative prices and restrictions on ports of entry on textile, apparel and footwear from Panama.<sup>64</sup> The Panel considered the acts of Colombia discriminatory and against the MFN principle elaborated in GATT 1947 since she was offering advantages of like products to other Member States of the WTO.<sup>65</sup> The MFN principle enshrined in GATT 1947 and WTO maintains that concessions granted to like products from one WTO Member State are granted to all members.

It has been noted that treat like cases alike and different cases differently<sup>66</sup> this should apply equally to ‘products, services, service providers, investors or investments’.<sup>67</sup> Under the General Agreement on Trade in Services (GATS), members are duty bound to treat the services and service suppliers of any other country with no less favourable treatment.<sup>68</sup> In the US-Gambling case, Antigua and Barbuda instituted proceedings against the United States on the supply of gambling and betting services where the Appellant Body reversed the Panel’s decision since the US enforcement measures were discriminatory in nature thus its measures did not explicitly provide the scope of applicability of service suppliers.<sup>69</sup> This encourages trade liberalisation which entices market access encouraging development among countries. If South Africa grants concessions to medical service providers from Tanzania, then she ought to provide the same concessions to other fellow WTO Member States.

## V. National Treatment

The national treatment principle maintains that the member states should accord similar treatment to foreign and like products upon arriving at customs.<sup>70</sup> If Movit, a company in Uganda produces hair products and is given reasonable tariffs then Mega growth products from United States of America must also be treated with such reasonable tariffs as accorded to the domestic like product in this case hair products. This principle is explained in Turkey-Rice case where the Panel held that the act of Turkey requiring importers to firstly purchase domestic rice to be allowed to import rice under tariff quotas was contrary to the national treatment principle by offering discriminatory treatment to imported rice than to domestic rice.<sup>71</sup> Similarly in EC-Bananas III case European Communities introduced on 1 July 1993 on the importation, distribution and sale of bananas by imposing tariff quota shares to some members and not to other member.<sup>72</sup> The Appellant body held that the act by the European Communities procedures and requirements were discriminatory as licence for importing bananas were distributed from non-African, Caribbean and Pacific

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<sup>62</sup> Turkey – Rice (United States v Turkey) DS334 [2007] 139 as cited by John Adank, *WTO Dispute Settlement: One-Page Case Summaries 1995-2016* (2017 edn) <<https://www.wto.org/disputes>> accessed 4 June 2018.

<sup>63</sup> DS334 as cited by Adank (n 36) accessed 4 June 2018.

<sup>64</sup> Colombia – Ports of Entry (Panama v Colombia) DS366 [2009] 151 as cited by Adank (n 36) accessed 4 June 2018.

<sup>65</sup> DS366 as cited by Adank (n 36) accessed 4 June 2018.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> General Agreement on Trade in Services (1994) art II (1).

<sup>69</sup> DS285 (2005) as cited by Adank (n 36) accessed 4 June 2018.

<sup>70</sup> Zdouc (n 62); GATT 1947 (n 31) art III.

<sup>71</sup> DS334 as cited by Adank (n 60) accessed 4 June 2018.

<sup>72</sup> EC-Bananas III (Ecuador and 4Ors v European Communities) DS27 [1997] 9 as cited by Adank (n 36) accessed 4 June 2018.



suppliers was inconsistent with the national treatment principle.<sup>73</sup> On a high note, the principle of non-discrimination is mainly meant to liberalise trade by encouraging States to trade with each other in a fair and just manner. This in the end permits countries to fully export and import their commodities and services since they are fully aware of protection accorded to them by the WTO.

## **VI. Deregulation of the Market**

The principle of non-discrimination as explained in the preceding headings is to the effect that members to the WTO must treat all products in a like manner. However the emergence of regional groupings and formation of GSP has proved otherwise since preferential treatment is accorded to specific partners or members to the RTAs resulting in the deregulation of the WTO principle of non-discrimination.

Thus deregulation implies the imposition of reformed regulations towards a 'more market-friendly or incentive-oriented regulatory instruments that is, maximizing regulation that enhances or guarantees competition and market access'.<sup>74</sup> Such reforms include RTAs, FTAs and GSP. In addition Deb dotted that deregulation is proclaimed since it frees the market and benefit everyone.<sup>75</sup> Therefore GSP grant the developing countries and LDCs products to access market of the developed world through reduction of trade barriers. Under regional groupings developing countries and LDCs establish groups which are characterised by PTA and Free Trade Area (FTAs) permitting market access.

## **VII. Generalised System of Preference (GSP)**

Member States ought to accord favourable treatment to developing countries and LDCs in order to enable their produce to pierce the global market. Member States must establish a fair and market-orientated agricultural trading system and that the developed countries in order to implement market access, they ought to fully consider the needs and conditions of the developing countries members through providing improved opportunities and terms of access for agricultural products including the full liberalization of trade in tropical products.<sup>76</sup> More so the Marrakech Agreement provides for the need to secure market for the developing countries products and services mainly the LDCs to be able to gain from international trade where they are still marginal participants.<sup>77</sup>

This was explained in EC-Tariff Preferences case where India complained against the European Communities granting generalised tariff preferences scheme to developing countries and economies in transition that were facing grave drug problems.<sup>78</sup> India was not included among the 12 countries as India's imports were not benefitting from the drug arrangement under the Generalised Tariff Scheme thus the dispute.<sup>79</sup> The Panel held that the 'tariff advantages under the

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<sup>73</sup> Zdouc (n 62).

<sup>74</sup> Michael J Finger, 'Flexibilities, Rules and Trade Remedies in the GATT/WTO System' in Amrita Narlikar and Others (eds) *The Oxford Handbook on The World Trade Organization* (Oxford University Press, Oxford 2012) 451.

<sup>75</sup> Deb (n 29).

<sup>76</sup> Agreement on Agriculture (1994) Preamble recitals 2, 5.

<sup>77</sup> Marrakesh Agreement (n 8) Preamble recital 2.

<sup>78</sup> EC-Tariff Preferences (India v European Communities) DS246 (2004) 101 as cited by cited by Adank (n 36) accessed 4 June 2018.

<sup>79</sup> DS246 as cited by Adank (n 36) accessed 4 June 2018.

Drug Arrangements that were accorded to the 12 beneficiary countries and not granted to the like products from all other Members including those from India were inconsistent with art I(1)<sup>80</sup> thus violating the MFN principle of non-discrimination and like products. The Appellant body upheld the conclusion of the Panel but did not agree with the discriminatory position it laid down.<sup>81</sup> Instead the Appellant body founded that:

(...) not every difference in tariff treatment of GSP beneficiaries necessarily constituted discriminatory treatment hence giving different tariff preference to products originating in different GSP beneficiaries is allowed provided that the relevant tariff preferences respond positively to a particular development, financial or trade need and are made available on the basis of an objective standard to all beneficiaries that share that need.<sup>82</sup>

Further by according special and preferential treatment to the developing and LDCs, these States are granted flexibilities when to apply WTO agreements and its explicit principles. With regard to the Agreement on Agriculture developed countries are granted more favourable treatment in respect of commitment and thus developing countries are accorded 10 years to implement reduction commitments while LDCs mustn't be required to undertake reduction commitment.<sup>83</sup> Additionally in the Agreement on Subsidies and Countervailing Measures prohibition of subsidies is not extended to developing countries or other developing country members for a period of 8 years or to a period not exceeding 5 years and to LDCs for a period of 8 years from the date of entry of the WTO Agreements.<sup>84</sup>

Additionally such preferential treatment was permitted during the Nairobi Ministerial Conference that took place from 15 to 19 December.<sup>85</sup> Through the Nairobi package, the Member States adopted the abolition of export subsidies for farm exports which were to be effected immediately by developed member countries, the developing countries were to comply by 2018 while considering the flexibilities 'to cover marketing and transport costs for agricultural exports until the end of 2023'.<sup>86</sup> Also 'the poorest and food importing countries would enjoy additional time to cut export subsidies'<sup>87</sup> With respect to market access for cotton, the developed countries were supposed to give duty-free and quota free access to markets with effect from 1 January 2016.<sup>88</sup>

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<sup>80</sup> DS246 as cited by Adank (n 36) accessed 4 June 2018.

<sup>81</sup> DS246 as cited by Adank (n 60) accessed 4 June 2018.

<sup>82</sup> DS246 as cited by Adank (n 60) accessed 4 June 2018.

<sup>83</sup> Agreement on Agriculture (n 60) art 15.

<sup>84</sup> Agreement on Subsidies and Countervailing Measures (1994) art 27(2), (3), annex VII.

<sup>85</sup> -*WTO Members Secure "Historic" Nairobi Package for Africa and the World* (19 December 2015) <<https://www.wto.org/english/news.....>> accessed 16 June 2018.

<sup>86</sup> (n 85) accessed 16 June 2018.

<sup>87</sup> (n 85) accessed 16 June 2018.

<sup>88</sup> (n 85) accessed 16 June 2018.

Therefore the WTO in itself grants the special and different treatment to some of its WTO members in order to enable them acquire market and better the standards of living of such Members.

Further the vital aspect of AGOA is to ensure market access. This GSP was introduced between the United States of America and sub-Saharan African countries (SSAC) in 2000 for investment and trade purposes on the part of USA and to permit market access at a nonreciprocal duty-free for SSAC's products.<sup>89</sup> This is evident in the agreement between USA and EAC that they undertake to reduce "non-tariff trade barriers" facilitating market access.<sup>90</sup> Upon such goods arriving at the customs of USA, a certificate of origin of the product exported must be proved in order to grant such preference.<sup>91</sup> A few of the products exported by the SSACs to USA include, wine and footwear from South Africa, essential oils and fresh cut roses from Kenya, jewellery and baskets from Ghana, organic cotton T-shirts from Uganda and flowers from Ethiopia.<sup>92</sup> Through this 'in the six quarters between January 2001 and July 2002 AGOA export apparel accounted for \$1.4billion representing around 1.5 per cent of total US imports of apparel'.<sup>93</sup>

Due to AGOA, Kenya has been a major beneficiary through gaining market access and creating employment above for example in 2002, 20,000 jobs were created and the increment of Kenyan exports to the US market from \$106.4 million in 1999 to \$128.7 million in 2001.<sup>94</sup> An increment of 10,000 to 30,000 jobs created in 2004 and a total of 200,000 jobs generated between 2000 and 2002.<sup>95</sup> In 2016 Kenya was estimated to have exported United States dollar 394 million worth of textiles and apparel to the United States of America under AGOA'.<sup>96</sup> Uganda garnered \$32,000 in 2002 resulting from AGOA exports and in January and February 2003 the amount increased to \$156,000. All these the developing countries and LDCs not only through acquiring market for their produce but also create jobs for the members under AGOA which enable people acquire income, pay taxes and improve on the Gross Domestic Product (GDP).

Further is the ACP-EU partnership where ACP countries acquire market for their produce in the EU market through GSP. This elaborated in the Cotonou Agreement that this partnership is purposely for the liberalisation of trade with the aim of providing preferential market access to ACP countries although it essential to consider the level of development of those countries.<sup>97</sup> The

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<sup>89</sup> Brock R Williams, 'African Growth and Opportunity Act (AGOA): Background and Reauthorization' (2014) *Congressional Research Services* <<https://www.everycrsreport.com>> accessed 18 July 2018.

<sup>90</sup> Trade and Investment Framework Agreement between the East African Community and the Government of the United States of America (16 July 2008) Preamble recital 7.

<sup>91</sup> -*Review of AGOA Certificate of Origin-Request for Comments 2013* (15 July 2013) <<https://www.agoa.info/about-agoa/rules-of-origin.html>> accessed 18 July 2018.

<sup>92</sup> Laura Páez and Others, 'A Decade (2000-2010) of African-U.S. Trade under the African Growth Opportunities Act (AGOA): Challenges, Opportunities and a Framework for Post AGOA Engagement' (2010) *African Development Bank* <<https://www.afdb.org>> accessed 18 July 2018.

<sup>93</sup> Marcelo Olarreaga and Çağlar Özden, 'AGOA and Apparel: Who Captures the Tariff Rent in the Presence of Preferential Market Access?' (2005) 28(1) *World Economy* 63, 66.

<sup>94</sup> Moses M Ikiara and Lydia K. Ndirangu, 'Prospects of Kenya's Clothing Exports under AGOA after 2004' (2003) 24 *Kenya Institute for Public Policy Research and Analysis* <<https://www.researchgate.net>> accessed 18 July 2018.

<sup>95</sup> Páez and Others (n 66), accessed 18 July 2018.

<sup>96</sup>The Independent, *East Africa: US Warns Uganda, Rwanda and Tz on Used Clothes Import Ban* *The Independent* (Kampala, 20 February 2018) <<https://www.allafrica.com>>accessed 3 March 2018.

<sup>97</sup> The Cotonou Agreement (Signed in Cotonou on 23 June 2000, Revised in Luxembourg on 25 June 2005 and in Ouagadougou 22 June 2010) arts 37(4), 84(1), 85(1), Joint declaration on support for market access in the ACP-EC partnership (Declaration I) paras 1, 2 and 3.

Cotonou agreement grants preferences to three main products ‘beef, rice and sugar’.<sup>98</sup> Between 1962 and 1992, the GDP of SSAC was at 0.4 per cent as compared 2.3 per cent for developing countries.<sup>99</sup> Negotiations of an Economic Partnership Agreement (EPA) were concluded between EAC and EU on 16 October 2014.<sup>100</sup> Kenya ratified the agreement in 2016.<sup>101</sup>

A few of the products exported to the EU from the EAC are ‘coffee, cut flowers, tea, tobacco, fish and vegetables whereas the products imported from the EU to the EAC are machinery and mechanical appliances, equipment and parts, vehicle and pharmaceuticals’.<sup>102</sup> Among the main feature of the EPA is “duty-free quota-free access to the EU market.”<sup>103</sup> This has benefitted Kenya as She exports Her flowers at duty-free also Ghana exports pineapples at duty and quota free.<sup>104</sup> Therefore this promotes market access between the EU and ACP countries which leads to job creation and encourages foreign direct investment.

## VIII. The Gyre in the current global market

However although such preferential treatment is accorded, still African States are challenged by the excessive subsidies used by developing countries leaving most African countries at a standstill. For instance United States subsidies, that depress prices on the global market from other countries especially corn that accounts for 9-10 prices, wheat 6-8 prices and rice 4-6 prices further its Aggregate Measure of Support was 29.1 billion in 2000, 25.3 billion in 2001 and 26.3 billion dollars in 2006 which is in excess of the 19.1 billion limit.<sup>105</sup> Such controversies are not in line with the WTO agreements resulting in robust disagreements among the Member States as they distort international trade.

During the Doha Ministerial Conference of 2001 in Qatar aimed at tackling discrepancies in agriculture among the USA, European Union and developing countries.<sup>106</sup> Developing countries argued that they could hardly compete against any surplus agricultural goods that the developed countries mainly USA and European Union were selling on the world market at low and subsidized prices.<sup>107</sup> They additionally asserted that they face implementation issues particularly with the implementation of the agreements drafted and commenced at the end of the Uruguay Round because they have limited and lack technical assistance thus they have not realised any benefits.<sup>108</sup>

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<sup>98</sup> OECD, African Development Bank, *African Economic Outlook 2002* (OECD Publishing, Paris 2002) 33.

<sup>99</sup> Arvind Panagariya, ‘EU Preferential Trade Policies and Developing Countries’ (2002) 25(10) *World Economy* <<https://www.repec.org>> accessed 19 July 2018.

<sup>100</sup> - *Economic Partnership Agreement between the EU and the Eastern African Community (EAC)* (October 2015) <<https://www.trade.ec.europa.eu/doclib/html/142194.htm>> accessed 19 July 2019.

<sup>101</sup> - *Countries and Regions East African Community (EAC)* <<https://www.ec.europa.eu/...>> Countries and regions> accessed 19 July 2019.

<sup>102</sup> - (n 100) accessed 19 July 2019.

<sup>103</sup>- (n 100) accessed 19 July 2019.

<sup>104</sup> - *The EU's Economic Partnership Agreements (EPAs) with countries in Africa, the Caribbean and the Pacific (ACP): Supporting businesses and communities in ACP countries* <<https://www.trade.ec.europa.eu/doclib/html>> accessed 19 July 2018.

<sup>105</sup> Daniel A Summers, ‘Boxed In: Conflicts between US Farm Policies and WTO Obligations’ (2005) 32 *Trade Policy Analysis* <<https://www.cato.org/publications...>> accessed 22 June 2018.

<sup>106</sup> Ian F Fergusson, ‘World Trade Organization Negotiations: The Doha Development Agenda’ 2008 *Library of Congress Washington DC Congressional Research Services* <<https://www.dtic.mil/dtic/tr/fulltext/u2/a486294.PDF>> accessed 12 June 2018.

<sup>107</sup> Fergusson (n 106) accessed 12 June 2018.

<sup>108</sup> Fergusson (n 106) accessed 12 June 2018.

These issues resulted in the standstill of the application of the issues brought across as particularly USA and EU could not agree to reduce their subsidies.

Similarly in the Cancun Ministerial Conference held in Mexico in September 2003 ended in acrimony.<sup>109</sup> This ministerial conference, dealt with agriculture subsidies as it was about a joint proposal on cotton brought by Benin, Burkina Faso, Chad and Mali<sup>110</sup> laying out their grievances on how 'American cotton producers are given subsidies which are 60 per cent more than the total Gross Domestic Product (GDP) of Burkina Faso where over 2 million people depend on cotton production'.<sup>111</sup> Consequently subsidies affect one million farmers who live on less than one dollar per person per day and also only have 5 acres of cotton<sup>112</sup> as compared to the USA and EU farms. Fick wrote that US makes investment of 40 million yearly on education, health and other programmes in Mali instead of directing the investment in the main cash crop cotton of the country which blunt sag of prices for cotton.<sup>113</sup> In addition USA rather proposed that countries should 'diversify their economies away from cotton and towards textiles where USA would grant them preferential market access under African Growth and Opportunity Act (AGOA)'.<sup>114</sup>

Further developing countries mainly LDCs face many challenges both internally and externally making it hard for their products to enter the global market. These challenges include high cost of production with little or no help from their government, high commercial loans and standard guidelines imposed for the treatment of animal vectors which makes their products rather expensive due to the input they use for example milk in Uganda (UHT) is at Uganda Shillings 5000/= which is way beyond affordability<sup>115</sup> of an average Ugandan who scraps to get Uganda Shillings 5000/= a day as payment. To elaborate further high cost of production include the waters and electricity used, the labour employed, under developed infrastructure and the high taxes imposed that is a Uganda processor pays 25 per cent of excise duty on milk packaging material mainly from Kenya and yet this tax is not inclusive of the 18 per cent of the Value Added tax making the products uncompetitive.<sup>116</sup> As compared to the US only 2 per cent people are involved in agriculture and of the 2 per cent they own 90 million cows with a government subsidy of 4.5 billion in 2014 alone which is disproportionate with a Ugandan who owns 14 million cows<sup>117</sup> and given no subsidy which creates a negative impact on access to the world market.

In EC-Export Subsidies on Sugar case it was explained that, 'by EU pumping a lot of subsidies in the sugar production, it harms the farmers in the developing world resulting in EU's dumping of its surplus on their markets at a price below cost of production that farmers cannot contend'.<sup>118</sup> Thus encouraging the developing countries going beyond the WTO principles and GSP and rather opt for regionalism as the way forward since majority form allegiance and trade with each other which promotes market access of their produce.

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<sup>109</sup> -Cancun Ministerial Conference <<https://www.wto.org...>> accessed 12 June 2018.

<sup>110</sup> (n 83) accessed 12 June 2018.

<sup>111</sup> Fautomata Jawara and Aileen Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations the Lessons of Cancun, Updated Edition* (Zed Books, New York and London 2004) xxix.

<sup>112</sup> Jawara and Kwa (n 111).

<sup>113</sup> David Fick, *Africa: Continent of Economic Opportunity* (STE Publishers, Johannesburg 2006) 500.

<sup>114</sup> Jawara and Kwa (n111) xxx.

<sup>115</sup> Odrek Rwabwogo, *Western Subsidies and their Effect on Agriculture in Uganda* (22 August 2016) <[https://www.newvision.co.ug/news](https://www.newvision.co.ug/news/w...)> w...> accessed 23 June 2018.

<sup>116</sup> Rwabwogo (n 115) accessed 23 June 2018.

<sup>117</sup> Rwabwogo (n 115) accessed 23 June 2018.

<sup>118</sup>DS 265, 266, 283 (2005) as cited by Nhat A Trinh, *Understanding Illegal Agricultural Subsidies: A Study of Two WTO Cases* (Ava Jones, 2005) 9; as cited by Adank, (n 364) accessed 4 June 2018.

However it is not the assertion in this work that the WTO principles are not necessary, it's simply WTO laws are enacted but favour the developed States. For instance the Agreement on the Application of Sanitary and Phytosanitary Measures permits Member States to take all measures necessary for the protection of human, animal, plant or health life that are not arbitrary or discriminatory.<sup>119</sup> But the developed States usually take advantage and impose trade restrictions based on their national laws<sup>120</sup> normally asserting standardisation. Particularly European Union since 1998 imposes stringent rules on entry of foods in the EU as compared to what the Joint Expert Committee on Food and Agriculture Organization (JECFA) imposes.<sup>121</sup>

In the late 1990's fish from Kenya, Tanzania and Uganda was banned from the European countries market which cost Uganda 36.9 million dollars of earning while Tanzania's fishermen lost 80 per cent of the income earned.<sup>122</sup> It was further noted that the major reason for failing to meet standards is due to the constrained "technical and resource-capacity".<sup>123</sup> Another occurrence was in 2002 when USA fruit producers sought for the banning of the South Africa's AGOA benefits of canned pears asserting loss market which raised numerous grievances from South African producers hence when African producers raise penetrate the market, their benefits are threatened to be rescinded.<sup>124</sup> Thus in 2018 USA imposed a suspension of duty-free access to the Rwanda textile imports resulting from Rwanda's refusal to lower trade barriers for American-made clothing and shoes asserting that such suspension applies to all AGOA-apparel products from USA.<sup>125</sup> Thus the African States therefore form regional groups with each other in order to trade freely with little or no constraints which promotes market.

## IX. Regional Groupings

Regional groupings have emerged enormously in this contemporary volatile world. Kneller and Others al noted that the phrase one size fits all policy is not effective that what is best is a case by case basis.<sup>126</sup> While LDCs have limited resources and developed skills causing slow movement of the multilateral trading system thus the enticing trade on a regional basis due to discriminatory tendencies of the developed countries of the third world products.<sup>127</sup> For example the European Union banned the importation of flowers from Uganda asserting failure to comply with the phytosanitary certification requirements<sup>128</sup> creating a barrier to trade these assertions lead to countries to form regional groups in order to carry out trade. Also Pal inscribed that they are rampant because they promote liberalisation and expansion of trade as Member States have the free will to trade and adopt the right pace of trade liberalisation.<sup>129</sup> GATT 1947 exempts regional groupings from discrimination under the MFN principle that preferential treatment is accorded to

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<sup>119</sup> Agreement on the Application of Sanitary and Phytosanitary Measures (1994) art 2 (1), (3).

<sup>120</sup> Gumisai Mutume, *New Barriers Hinder African Trade* (January 2006) <<https://www.un.org>> January-2006>ne...> accessed 15 July 2018.

<sup>121</sup> Mutume (n 120) accessed 15 July 2018.

<sup>122</sup> Mutume (n 120) accessed 15 July 2018.

<sup>123</sup> Mutume (n 120) accessed 15 July 2018.

<sup>124</sup> Mutume (n 120) accessed 15 July 2018.

<sup>125</sup> Sarah McGregor, *US Suspends Duty-Free Benefits for Rwandan Textile Imports* (29 March 2018) <<https://www.agoa.info>> news> article>15401...> accessed 14 June 2018.

<sup>126</sup> Richard Kneller and Others, 'Trade Liberalisation and Economic Growth' (2008) 31(6) *The World Economy* <<https://www.onlineLibrary.wiley.com>> accessed 11 July 2018.

<sup>127</sup> K R Gupta (ed), *World Trade Organisation: Selected Documents Volume III (Atlantic Publishers and Distributors, New Delhi 2006)* 358.

<sup>128</sup> Dorothy Nakaweesi, 'Uganda Flowers Farmers facing Tough Times as Exports and Earnings Drop' *The East African* (2016) <[www.theeastafrican.co.ke](http://www.theeastafrican.co.ke)>Uga...> accessed 2 March 2018.

<sup>129</sup> Mutume (n 120) accessed 15 July 2018).

import duties or charges among Member States that are party to those groupings.<sup>130</sup> Under this heading, the discussion is centred on EAC and SADC.

## X. East African Community

This Community “is a preferential trading area”<sup>131</sup> consisting of six Partner States as of 15 August 2016 that is ‘Burundi, Kenya, Rwanda, South Sudan, United Republic of Tanzania and Uganda’.<sup>132</sup> EAC was first established in 1967 and dissolved in 1977 then re-established on 7 July 2000 with its headquarters are found in Arusha, Tanzania and the current summit chairperson is President Museveni.<sup>133</sup> This community is governed by the Treaty for the Establishment of the East African Community (The Treaty) that establishes the community and grants it legal capacity as a body corporate.<sup>134</sup> The East African Court of Justice (EACJ) has the mandate to hear disputes arising from the Partner States.<sup>135</sup> Notably, of the Partner States four are members to COMESA that is Kenya, Rwanda, Burundi and Uganda<sup>136</sup> while the United Republic of Tanzania is member under SADC.<sup>137</sup>

Further it is essential that the Partners ‘undertake to establish a Customs Union and Common Market in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political’.<sup>138</sup> To this effect through the East African Customs Union (EACU) the Partner States engaged in reducing tariff barriers by eliminating all existing non-tariff barriers and internal tariffs within their territories on goods originating from other Partner States<sup>139</sup> and that they ought to ‘formulate a mechanism for identifying and removal of the non-tariff barriers’.<sup>140</sup>

However to do away with these barriers at the customs duties it is paramount that the product must originate from either Partner State.<sup>141</sup> Thus in 2005 offers from Uganda to Kenya from January 2005 were at 10 per cent and by January 2010 they were at zero per cent<sup>142</sup> that is ‘Uganda offered one band tariff on Kenyan goods imported into Uganda’.<sup>143</sup> Additionally due to the customs union, the Partners are able to cut on the cost of importing there produce to the Partner thereby boosting trade and market access for example, to combat the ‘deficit of sugar in Tanzanian President Magufuli welcomed President Museveni’s proposal of encouraging Tanzanian entrepreneurs to buy sugar from Uganda since Tanzania imports her sugar from Brazil,

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<sup>130</sup> GATT 1947 (n 31) art I (1) (2), annex 1 Ad art XXIV.

<sup>131</sup> Meredith A McIntyre, *Trade Integration in the East African Community: An Assessment for Kenya* (International Monetary Fund, 2005) 3.

<sup>132</sup> *EAC Partner States* <<https://www.eac.int/eac-partner-states>> accessed 14 July 2018.

<sup>133</sup> *Quick Facts about EAC* <<https://www.eac.int/eac-partner-states>> accessed 20 July 2018.

<sup>134</sup> The Treaty for the Establishment of the East African Community (As Amended on 14 December 2006 and 20 August 2007) arts 2(1), 4.

<sup>135</sup> The Treaty (n 108) arts 9(1) (e), 23.

<sup>136</sup> *COMESA Member States* <<https://www.comesa.int/comesa-members-states/>> accessed 15 July 2018.

<sup>137</sup> McIntyre (n 105).

<sup>138</sup> The Treaty (n 108) art 5 (2).

<sup>139</sup> Protocol on the Establishment of the East African Customs Union [2004] arts 10, 13(1).

<sup>140</sup> EACU (n 113) arts 10, 13(2).

<sup>141</sup> EACU (n 113) art 10, 14.

<sup>142</sup> *Internal Tariffs* <[https://www.customs.eac.int/index.php?option=com\\_content&view=artic...](https://www.customs.eac.int/index.php?option=com_content&view=artic...)> accessed 15 June 2018.

<sup>143</sup> (n 116) accessed 15 June 2018.

Thailand.<sup>144</sup> This encourages good neighbourliness and comity among these Partners as they trade properly with each other.

Another vital aspect of the EACU is that the like products of each Partner should be treated fairly by the customs of each Partner State.<sup>145</sup> Therefore if Azam a Tanzanian company exports bread to Uganda it ought to be given proper concessions as those granted to Ntake Bakery's bread of Uganda thus if taxation is at 2 per cent, then let it be 2 per cent for all other like products originating from the Partner States. Hence this encourages the free movement of goods in the Partner States<sup>146</sup> which promote market access and trade liberalisation.

More so during the 2018 Summit of the East African Community heads of State the Ugandan President stated that 'we owe it to ourselves and future generations to ensure that this region has efficient, interlinked, and inter-operable infrastructure to enable people exchange goods and services'.<sup>147</sup> Complete infrastructure in the EAC includes 'northern corridor of Mombasa-Nairobi and the one-area network between Uganda, Kenya and Rwanda to ease telecommunication and cut costs'.<sup>148</sup> All these are effective in driving a strong market force in order to build a user friendly international business law regime between and amongst themselves in order to prosper.

The East African Common Market (EACM) is guided by the principle of non-discrimination that the services and services suppliers must be treated favourably in each Partner State<sup>149</sup> this encourages movement of persons freely with their services, labour and capital in the Partner States.<sup>150</sup> For instance to the promote of tourism, the single tourist visa was introduced that is applicable in Uganda, Kenya and Rwanda, where the nationals of these three States can freely travel into the other Partner State's jurisdiction.<sup>151</sup> The stringent criterions used to identify persons based on their nationality is dealt with by the EAC adopting an EAC e-passport which Tanzania followed pursuit by adopting the e-passport with effect from January 2018 and declared that by January 2020 the national documents shall be completely replaced<sup>152</sup> whereas Kenya had started issuing that passport by September 2017.<sup>153</sup> This eases the movements of person in any Partner States as one single document is used by the Partners of that community.

To further ensure the free movement of goods, persons, services and labour the customs border posts ought to be manned on a 24 hour basis.<sup>154</sup> Kago and Masinde wrote that the seven Kenyan borders are 'interconnected electronically and operational 24 hours: Jomo Kenyatta Airport,

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<sup>144</sup> Vision Reporter, 'Museveni asks Magufuli to buy Uganda Sugar' *New Vision* (Kampala, 22 February 2018)3.

<sup>145</sup> EACU (n 113) art 15.

<sup>146</sup> Protocol on the Establishment of the East African Community Common Market 2009 (hereafter called "The Protocol") arts 6(1), 5(1), (2) (a).

<sup>147</sup> Pascal Kwesiga and Cecilia Okoth, 'Museveni's Address to the Summit of EAC Heads of State' *New Vision* (Kampala 23 February 2018) 3.

<sup>148</sup> Kwesiga (n 121) 3, 4.

<sup>149</sup> EACM (n 120) arts 3(2), 17, 18.

<sup>150</sup> EACM (n 120) arts 2(4) (a), (b), (c), (f), (g), 5(1), (2) (e), 7(1) (2), (3), 16 (1), (2), 10(1), (2), (3), (5), 24.

<sup>151</sup> *T12-East Africa Tourist Visa-Rwanda Directorate General of Immigration and Emigration* <<https://www.migration.gov.rw>>...>accessed 2 March 2018.

<sup>152</sup> *Tanzania Rolls out Electronic Passports* (31 January 2018) *The East African* <<https://www.theeastafrican.co.ke/news/ea/Tanzania-rolls-out-electronic-passports...>> accessed 20 July 2018.

<sup>153</sup> Christabel Ligami, 'Uganda, Rwanda, Burundi to Roll out EAC e-Passport' *The East African* <<https://www.theeastafrican.co.ke/news/>> accessed 20 July 2018.

<sup>154</sup> Caroline Kago and Wanyama Masinde, 'Free Movement of Workers in the EAC' in Emmanuel Ugirashebuja and Others (eds) *East African Community Law* (Brill Nijhoff, Leiden 2017) 348.



Mombasa International Airport, Namanga, Lunga Linga, Taveta, Malaba and Busia'.<sup>155</sup> Also in *Samuel Mukira Mohochi v Attorney-General of Uganda*, the applicant was scheduled to meet the then Chief Justice of Uganda Benjamin Odoki on 14 April 2011 upon arriving at Entebbe airport.<sup>156</sup> Upon arriving at Entebbe International Airport, he was denied entry and thereafter detained and deported to Kenya without cause.<sup>157</sup> The applicant alleged infringement of freedom of movement and non-discrimination as enshrined in the Common Market article 7(2) and the Treaty article 104.<sup>158</sup> The East African Court of Justice held that although Uganda as a sovereign has the right to deny entry to unwanted persons, she has a duty to comply with the principle of freedom and non-discrimination under the Treaty and Common Market.<sup>159</sup>

The principles enshrined in the Treaty and Protocols deregulates the WTO non-discrimination principle since they permit the favourable treatment of Partner States to the exclusion of other States. However this deregulation has resulted in the improved market access among the Partner States thereby promoting trade liberalisation and improving on their GDP for example in 2014, it was at 6.2 per cent as compared to the average of 4.4 per cent of SSACs<sup>160</sup> as movement of labour and services is ensured reducing on the levels of unemployment. In 2016 Tanzania made a gradual remark by reducing Her residence permit fees from \$2000 to \$500 while the work permits were reduced from \$3000 to \$1500, the student pass for minors is now free of charge and \$500 is now the slated fee for Tanzanian men who marry foreign nationals<sup>161</sup>, however these sums are applicable to other Partner States of the EAC. President Magufuli further added that, '529 Kenyan companies operate in Tanzania with a collective investment valued at \$1.7 billion, employing 56,560 people'.<sup>162</sup> However Kenya, Rwanda and Uganda waived their work permits for the Partner States.<sup>163</sup> The gestures of Tanzania though not yet at zero per cent are remarkable since she is very protective of her sovereign as well by the three stated Partner States removing the barriers to trade, it not only improves on market access but also makes EAC attractive to foreign direct investment thus promoting international business law.

## **XI. Southern African Development Community**

SADC is a free trade area that is governed by the Consolidated Treaty of the Southern African Development Community with headquarters in Gaborone, Republic of Botswana.<sup>164</sup> Initially in 1980 SADC was a 'development initiative coordinating community and it later changed to a development community in 1992'.<sup>165</sup> It is currently comprised of 15 Member States.<sup>166</sup> It is a vital

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<sup>155</sup> Kago and Masinde (n 128) 348, 349.

<sup>156</sup> *Samuel Mukira Mohochi v The Attorney General of Uganda*, Ref No.5 of 2011, 2 para 5.

<sup>157</sup> *Samuel Mukira Mohochi v The Attorney General of Uganda* (n 130) 2, 3.

<sup>158</sup> *Samuel Mukira Mohochi v The Attorney General of Uganda* (n 130) 4, paras 9 lines (i), (ii), (iii),10.

<sup>159</sup> *Samuel Mukira Mohochi v The Attorney General of Uganda* (n 130) 56 para 130 lines (ii), (iii), (iv).

<sup>160</sup> Mark *Hankins and Others, EAC Renewable Energy and Energy Efficiency Regional Status Report 2016* <<https://www.ren21.net/uploads/2016/10/R...>> accessed 20 July 2018.

<sup>161</sup> Gerald Andae and Neville Otuki, 'Dar Cuts Work Permit Fee for EAST Africans to \$500' (31 October 2016) *The East African* <<<https://www.theeastafrican.co.ke/news>> accessed 20 July 2018.

<sup>162</sup> Andae and Otuki (n 135) accessed 20 July 2018.

<sup>163</sup> Andae and Otuki (n 135) accessed 20 July 2018.

<sup>164</sup> Padamja Khandelwal, *COMESA and SADC: Prospects and Challenges for Regional Trade Integration* (International Monetary Fund, 2004) 36; Consolidated Treaty of the Southern African Development Community as Amended (1992) art 2.

<sup>165</sup> *SADC Facts and Figures* <<https://www.sadc.int/about-sadc/overview/sadc-facts-figures/>> accessed 20 July 2018.

<sup>166</sup> - (n 139) accessed 20 July 2018.

objective that SADC Member States develop policies with a view of eliminating trade barriers and rather promote the ‘free movement of capital and labour, goods and services and of people in the region generally among Member States’.<sup>167</sup> Among the policies is to ‘establish an FTA in SADC, eliminate import and export duties, non-tariff barriers (NTBs) and refrain from imposing new NTBs on goods from the Member States’.<sup>168</sup> Thus SADC is divided into 5 integration milestones, ‘free trade area, customs union, common market, monetary union and single currency’.<sup>169</sup> Therefore in September 2000, tariff reductions took effect in SADC that is

the effective reduction, zero tariffs after five years except on sensitive products among SACU members, on non-SACU members tariff reductions to start mainly after four years, zero tariffs after eight years except on sensitive products, category “A” goods comprising about 47 per cent of traded goods in SADC. Duty will be reduced to zero upon gazetting in each country, category “B” goods tariffs to be reduced over 8 years on an asymmetric basis. When complete, 85 per cent of goods traded within SADC will be duty free and category “C” goods, sensitive goods for which tariffs will not be reduced until 2012.<sup>170</sup>

These are few of the Member States that have complied with the tariff reduction that is Zambia reduced her tariffs in 2008 through the FTA phase and Southern African Customs Union implemented all tariff reductions in 2008<sup>171</sup> this improves on market access and encourages trade liberalisation in SADC.

Similar to the EAC, it is essential that the Member States treat favourably goods and services from each Member State.<sup>172</sup> For example if Zambia grants concessions to all exports from Lesotho, then she is supposed to grant similar concessions to all the SADC members. That is ‘tariffs on sensitive products in Mauritius were eliminated in 2014 while all exports which originate from SADC FTA Member States are duty free with the exception of Malawi, Zimbabwe and Tanzania that are still maintaining their custom duties on certain products’.<sup>173</sup> Further in 2013, Tanzania and South Africa entered into reciprocal arrangements where South Africans wishing to enter Tanzania on holiday and business purposes do not apply for visas while the Tanzanians as well visiting South Africa

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<sup>167</sup> Treaty of SADC (n 165) art 5(2) (d).

<sup>168</sup> Protocol on Trade in the Southern African Development Community (1996) art 2(5), 4(1), 5, 6.

<sup>169</sup> *Integration Milestones* <<https://www.sadc.int/about-sadc/integration-milestones/>> accessed 20 July 2018.

<sup>170</sup> Gavin Maasdorp, ‘OMESA and SADC-A New Free Trade Area and Another in the Making’ in R Grynberg and E Turner (eds) *Multilateral and Regional Trade Issues for Developing Countries* (Commonwealth Secretariat, London 2003) 184.

<sup>171</sup> Moses Tekere (ed) *Regional Trade Integration, Economic Growth and Poverty Reduction in Southern Africa* (Africa Institute of South Africa, Pretoria 2012) 94.

<sup>172</sup> Protocol on Trade (n 168) art 11, 28(1), (2), 4(1), (2); Protocol on Trade in Services (2012) art 15(1), (2).

<sup>173</sup> *Southern African Development Community (SADC)* <<https://www.mcci.org/trade-agreement>> accessed 20 July 2018.

are exempted from visas for 90 days.<sup>174</sup> This eases movement of persons which later encourages movement of labour thus encouraging movements of goods and market access.

## **XII. Conclusion**

The sales pitch for globalization of markets especially during the Clinton administration was that it would quickly lift countries out of poverty, and one wonders why this objective has not been realized. With Brexit (UK's bid to quit the European Union) and the seeming failure of other global regimes where many states have sought to solve emerging disputes outside institutional frameworks is one of the many instance of de-globalization phase. The Trump administration has been acting in an inward looking statist manner as if intentionally to undermine global institutions such as the WTO to regain what Trump calls "lost American glory and to make America great again,"<sup>175</sup> The UK is currently in advanced negotiation stages (after triggering Article 50 of Lisbon Treaty) to quit the European Union. Similar anti-globalization sentiments have been echoed in other European countries and across the globe such as the current tension between Uganda Rwanda over the closure of border even when they are both members of the East African Community.<sup>176</sup> One could also another question as to why the major crises (for example 1997/8 and 2007-2010 major global financial crises) could not be contained within the global regulatory rules against such exigencies. Why is it that the World Bank/ IMF oversight mandate was not utilized to avert the foregoing crises from happening and wreaking havoc globally? Is it that the World Bank and IMF lack a requisite mandate to foster desired market changes in all member Countries? Could this explain why some countries could have expressed their displeasure by creating parallel regulatory regimes? For example, the emerging market economies of Brazil, Russia, India, China, and South Africa (BRICS) have created alternative financial funding mechanisms through the BRICS Bank. One wonders whether this has been precipitated by policy failures in the global governance of markets or driven by other factors? Is it true that every time, there is a crisis, new oversight institutions should emerge or why not consolidate and strengthen existing institutions? Whatever the answers to the foregoing questions are, there seems to be a problem with the current global regulatory system that needs redress. The book postulates measures that could be adopted to revitalize the global market system so that the system globalizes development opportunities, not crises and challenges to countries—which have become characteristics of the current global system.

Non-discrimination is a fundamental principle under the WTO and regional groupings. However majority of the African countries feel the principle of non-discrimination such as MFN and NT is a mere bluff that does not translate into practice. Therefore some developing countries opted to forge regional groupings such as the EAC and SADC. On a positive note this furthers trade liberalisation as majority of trade barriers and NTBs are phased out in gradual processes which

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<sup>174</sup> Sylvester Ernest, *Tanzania Scraps Visas for SA Visitors* (8 October 2013) <<https://www.mg.co.za>> article> 2013-10-08-ta...> accessed 21 July 2018.

<sup>175</sup>This can be highlighted by the US Trade Representative Robert Lighthizer comments in July 2019, "For far too long, wealthy countries have abused the WTO by exempting themselves from its rules through the use of special and differential treatment. This unfairness disadvantages Americans who play by the rules, undermines negotiations at the WTO, and creates an unlevel playing field.

<sup>176</sup> Withdrawal from the European Union is the legal and political process whereby a member state of the European Union ceases to be a member of the union. Member states have the right to withdraw from the Union under the 2007 Treaty on European Union (TEU), Article 50, which states that: "Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

encourage market of those products that may not be permitted in the developed countries' market but permitted in the regional group with preferential treatment. Further other than the goods, it is essential that persons travel with their goods and services enticing development and an improved GDP. The irony has been that even within regional groups there has been some cracks which have threatening to rapture the edifice of the market, CAN THIS HAPPEN?

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