AFRICAN CENTRE FOR ECONOMIC GROWTH

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FINAL REPORT FOR:

THE EAC STUDY ON THE RULES OF ORIGIN

Submitted by:

African Centre for Economic Growth

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African Centre for Economic Growth

Longonot Place,Apartment 3,

Harry Thuku Road

P O Box 55337-00200,

Nairobi (KENYA)

Tel: 254 20 2217308/2217315

Fax: 254 20 2196203

Email: *aceg@aceg.org*

URL: *www.aceg.org*

ABBREVIATIONS

ACP	Africa, Caribbean and Pacific
AGOA	Africa Growth Opportunity Act
CARIFORUM	Caribbean Forum
CEMAC	Central Africa Monetary and Economic Union
CEPGL	Economic Community of the Great Lakes
COMESA	Common Market for Eastern and Southern Africa
CTC	Change of Tariff Classification
CTH	Change in Tariff Heading
DDA	Doha Development Agenda
EAC	East African Community
EC	European Community
ECOWAS	Economic Community of West African States
EFTA	European Free Trade Area
EPA	Economic Partnership Agreement
ESA	East and Southern Africa
EU	European Union
FEPA	Framework for Economic Partnership Agreement
FTA	Free Trade Area
GATT	General Agreement on Trade and Tariffs
IGAD	Inter-Governmental Agreement on Development
MFN	Most Favoured Nation
OCTs	Overseas Countries and Territories
RECs	Regional Economic Communities
SADC	Southern Africa Development Community
SCCC	Special Committee on Customs Cooperation
TR	Technical Requirements
VA	Value Added
WCO	World Customs Organization
WO	Wholly Obtained
WTO	World Trade Organization

1.0 INTRODUCTION

1.1 Background

The East African Community (EAC) was established in 1999 and came into force in July 2000 after *The Treaty for the Establishment of the East African Community* was ratified. The Treaty stipulates, according to Article 5(2) that the Community will progress from *"a Customs Union, a Common Market and subsequently a Monetary Union and ultimately a Political Federation"*. After successful negotiations the East African Customs Union Protocol was signed on 2nd March 2004 and came into effect on 1st January 2005. Negotiations are currently ongoing on the EAC Common Market Protocol that is expected to come into effect in January 2010. The EAC Treaty and the Customs Union Protocol were originally signed by the three (3) original Partners States Kenya, Tanzania and Uganda that were joined by Burundi and Rwanda in July 2007.

The objectives of the Community as articulated by Article 5(1) of the Treaty are *"to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence and legal and judicial affairs"*. The goal of the cooperation is to promote accelerated and sustained economic development in the Community. As indicated by Article 5(2), this is to be achieved through the strengthening and regulation of *"industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States"*. These objectives were amplified by Article 3 of the Customs Union Protocol that called for: increased liberalization of intra-regional trade; promotion of efficiency in production; enhanced domestic, cross border, and foreign investment in the Community; and, promotion of economic and industrial development in the Community.

The Treaty (Article 130) and the Customs Union Protocol (Article 37) also recognize and allow the involvement and commitment by the Partner States in other regional trade arrangements. Article 37 of the Customs Union Protocol was designed to take into account the multiple memberships in regional integration schemes by the EAC Partner States that include four (4) other key Regional Economic Communities (RECs) namely: COMESA, SADC, CEPGL and IGAD. Tanzania belongs to SADC while the rest of the four Partner States belong to COMESA.

Kenya and Uganda belong to IGAD and Burundi and Rwanda also belong to CEPGL. All these countries also belong to Africa, Caribbean and Pacific (ACP) that has been trading with the European Union (EU) under the Cotonou Agreement signed in 2000.

The multiple memberships to RECs by these countries pose several challenges that include: conflicting mandates and duplication of policies and programs; and, unnecessary administrative and financial costs. Some examples of the conflicting policies would be differences in the timing and speed of trade liberalization, tariff structures and nomenclatures, customs documentation requirements and rules of origin. This is especially true as the RECs are at different stages of integration; for example EAC as a customs union is at a higher level of integration than the other regional integration groupings.

The EAC Treaty and Customs Union Protocol in particular recognizes the development of EAC as an important step towards the achievement of the objectives of the Treaty Establishing the African Economic Community. The importance of the need for the Community to co-operate with other regional and international organizations to promote the objectives of the Community is underlined. The EAC Customs Union Protocol goes further by stating that:

- The Community will facilitate the implementation of common trade policy by coordinating its trade arrangements with other countries.
- The Partner States shall establish convergence on their relationships with other integration blocs and other organizations.
- A Partner States may conclude or amend a trade arrangement with a third party provided the arrangement is not in conflict with the Customs Union Protocol.

The Treaty and the Customs Union Protocol therefore provide the necessary authority to the Community to negotiate the Economic Partnership Agreement with the European Union. More importantly the EAC Summit held in Kampala, Uganda on 14th April 2002 directed that EAC negotiate as a bloc when negotiating EPAs with the EU and in multilateral negotiations under the World Trade Organization. On this basis Kenya, Uganda and Tanzania undertook a successful Joint Trade Policy Review in the WTO in October 2006.

1.2 ACP-EU Agreements

The European Union and the African, Caribbean and Pacific countries have had a unique trade, development and political co-operation dating back to 1957. It was originally an association of France and its dependent overseas countries and territories (OCTs), but the membership to the arrangement expanded over time as more countries gained independence. This relationship was operationalised through conventions beginning with the Yaounde I & II and then Lome Conventions I-IV. The Cotonou Agreement signed in 2000 sought to change the trade regime that had governed trade between the EU and the ACP since1963 when Yaounde I was signed. The membership to the ACP/EU Agreement has expanded from 18 ACP countries and 6 European countries when Yaounde I convention was signed to 79 ACP and 27 EU countries that are involved in the current arrangement.

The Cotonou Agreement was intended to change cooperation between ACP and EU in several fundamental ways. The most important was to reverse the non-reciprocal trade preferences that ACP exports to EU had been enjoying for years. This was necessary to ensure that the ACP/EU trade regime complied with WTO rules. The Agreement also aimed to:

- promote development of ACP states, through increased access to EU markets and reduction of supply side constraints and transaction cost
- promote integration among ACP states in integration groupings with EU as an example of a successful integration scheme and by encouraging the states to negotiate in groups
- promote partnership between ACP and EU through increased cooperation

The vehicle to achieve these objectives is the EPAs being negotiated between the EU and seven ACP regional groupings: West Africa, Central Africa, EAC, Eastern and Southern Africa (ESA), SADC, Caribbean and the Pacific. Negotiations were programmed to be completed by the end of 2007 for a WTO compatible agreement to be in place by the beginning of 2008. However, although negotiations started in 2002 only the CARIFORUM-EU EPA was initialed before the end of 2007. The rest of the regions have entered into interim arrangements with the EC for the purpose of maintaining trade preferences since the EPAs replaced the Cotonou Agreement on 1st January 2008.

In Africa only EAC has initialed a Framework EPA as a region. In the other regions- ECOWAS, CEMAC, ESA and SADC some individual countries have initialed the interim EPAs. Examples are Cote d'Ivoire and Ghana in ECOWAS; Cameroon in CEMAC; Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe in ESA; and, Lesotho, Swaziland, Mozambique and Namibia in SADC. In the Pacific only Papua New Guinea and Fiji have initialed an Interim EPA.

The regions and countries that have initialed interim Agreements have committed to conclude the EPAs in 2008. The CARIFORUM EPA that was initialed in 2007 was signed on 15th October, 2008 despite strong political pressure on the Caribbean countries not to sign the Agreement. Similarly many African countries are under pressure not to proceed with negotiations for comprehensive EPAs. The increasing number of countries signing up to Interim EPAs and the continuing EPA negotiations underlines the importance of Europe as an important market for ACP countries.

1.3 Rationale for the Study

The Agreement Establishing a Framework for an Economic Partnership Agreement between the East African Community Partner States on one part and the European Union on the other part (FEPA) provides in **Protocol 1** the RoO that will form the basis for negotiating the rules that will apply to goods traded between the Parties. The Agreement in Article 12 notes that "*during the period between the entry into force of this agreement and entry into force of the comprehensive EPA, the Parties shall review the provisions of this Protocol with a view to their simplification*". It further states that the review "*shall take into account the development needs of the EAC Party and development of technologies, production processes and all other factors, including on-going reforms of rules of origin*".

The purpose of this study as called for by FEPA; and as required by the terms of reference is to propose simple Rules of Origin that will form the basis for concluding the EPAs negotiations between EAC and the EU. The study will in particular:

- Review and analyze Protocol No. 1 in the Framework for an Economic Partnership Agreement (FEPA) to identify areas of divergence with a view to harmonizing and incorporating them in the EAC draft proposal on RoO.

- Benchmark the Study with other existing RoO such as those applicable in Australia, New Zealand and Canada.
- Analyze work on RoO being undertaken in ESA and SADC and identify areas of divergence with a view to harmonizing and incorporating them in the EAC Proposal.

In undertaking this work, the following will be taken into account:

- Full cumulation within EAC and the other ACP countries.
- The need to come up with appropriate and flexible value addition and raw material content thresholds in the determination of RoO.
- The peculiarity in the determination of value addition of EAC landlocked countries in view of the inland transport implications.

2.0 PREFERENTIAL TRADING AGREEMENTS

2.1 WTO Rules on Trade Arrangements

The asymmetric trade preferences enjoyed by ACP under the Cotonou Agreement went against the GATT rules. Article 1of GATT asserts the primacy of the principle of the Most Favoured Nation (MFN) in international trade as defined in Article 1(1) thus *"an advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"*. Trade arrangements involving members that discriminate other contracting parties to GATT are prohibited. It has been argued that the MFN was pushed by countries, led by the USA that wanted to end preferences given by some European colonial powers led by Great Britain and France to their colonies. The ACP/EU preferences were seen as perpetuation of the colonial preferences and therefore resented by the non-beneficiaries, mostly in the developing world.

The exception to the MFN is given by Article XXIV that allows some contracting parties to reach regional trade agreements thus: *"the provisions of this Agreement shall not prevent …the formation of a customs union or a free trade area or the adoption of an interim agreement necessary the formation of a customs union or a free trade area"* (Article XXIV (5)). This Article underlines that such agreements are for the purpose of promoting trade among the parties and are not to be used to raise barriers against trade from non-participating contracting parties. Trade liberalization by members of a customs union or a FTA is assured by the requirement that restrictions on intra-regional trade are to be eliminated; while trade with third is protected from increased barriers by the requirement that duties and other forms of protection should not be higher or more restrictive than it was before the formation of the customs union or free trade area.

It is evident that Article XXIV allows for interim agreements, similar to the one between EAC and the EU, as a step to the formation of a free trade area. Paragraph 5(c) of the Article stipulates that the establishment of such interim agreements should include a plan and schedule for the formation of a free trade area within a reasonable time. This means for example that if it is not possible to finalise the EAC/EU EPA Agreement within this year it is possible to agree on an additional "reasonable time" required to conclude the Agreement that goes beyond 2009.

However, because such an agreement has to be notified to the contracting parties, care has to be taken to ensure compliance especially given the historical hostility of the ACP/EU agreements by some WTO members.

The ACP/EU preferences, because of their non-reciprocal nature have been challenged over the years; particularly with respect restrictions on imports of non-ACP bananas that were challenged three times between 1993 and 2000. In all the challenges the EU lost at the appellate stage making ACP/EU preferential arrangement illegal under WTO rules. In any case the Lome convention operated under WTO waivers between 1994 and 2000 and its successor the Cotonou Agreement received the last waiver in 2001 that was programmed to expire at the end of 2007; leading to the commencement of the EPAs in January 2008.

2.2 Interim-EPAs

The EAC Partner States did not belong to one EPA negotiations configuration from the beginning. Tanzania initially belonged to SADC configuration, while the rest of the countries negotiated under ESA. However, the Partner States eventually decided to negotiate EPAs as a single bloc as directed by the EAC Summit in Kampala in 2002. This led to the initialization of an interim Agreement on 27 November, 2007.

In this Agreement substantial progress was only made in trade in goods and in fisheries. However, key market access issues were not concluded, the most important being the Rules of Origin. Other outstanding areas of cooperation to be fully negotiated are contained in Article 37 of the Agreement, as follows:

i. customs and trade facilitation
ii. technical barriers to trade and sanitary and phytosanitary measures
iii. trade in services
iv. trade related issues, namely:
    - competition policy
    - investment and private sector development
    - trade, environment and sustainable development
    - intellectual property rights
    - transparency in public procurement

v. agriculture
vi. economic and development co-operation
vii. dispute settlement mechanism and institutional arrangements

These issues are currently being negotiated. The most controversial of the outstanding areas are the trade related issues that include the so-called Singapore Issues: competition policy; investment; and, transparency in public procurement. Except for Customs and Trade facilitation, negotiations on these issues have been set aside under the WTO Doha Development Agenda (DDA). It would be prudent for the Partner States to ensure that in negotiating the EAC/EC EPAs coherence with DDA is maintained with respect to the Singapore issues.

The EAC/EC Framework Agreement envisages that the negotiations will be concluded by 31 July 2009. In this context negotiations were initiated in Bujumbura on 15-17 September 2008. The complexity of the issues to be negotiated and sensitivity of the process suggests that the period that will be necessary to conclude the negotiations could be much longer than currently envisaged. It would be prudent for the Partner States to avoid committing themselves to the current timetable.

2.3 Rules of Origin (RoO)

World trading system is governed by the GATT/WTO Agreement on the RoO defined by Article 1(1) of the Agreement as *"those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods"*. The Agreement emphasizes that the RoO is to guarantee certainty and not to distort or restrict international trade. In this context the rules are expected to be:

i. Objective, understandable and predictable,

ii. Coherent

iii. Administered in a consistent, uniform, impartial and reasonable manner

iv. Based on a positive standard

In designing the RoO, the objective is to ensure that the rules meet these criteria. Similarly any evaluation of a RoO regime should ensure that it musters these criteria.

The origin of products ("originating products") is usually classified either as wholly obtained/produced or substantially transformed (sufficiently worked). The FEPA in Article 6 adopts the World Customs Organization (WCO) in classifying "wholly obtained" products from the EAC or the EU as:

i. mineral products extracted from their soil or from their seabed
ii. fruit and vegetable products harvested there
iii. live animals born and raised there
iv. products from live animals
v. products obtained by hunting or fishing and products of aquaculture
vi. products of sea fishing and other products taken from the sea outside the territorial waters of the Community or of an EAC Partner State by their vessels;
vii. fish products made aboard their factory ships
viii. used articles collected there fit only for the recovery of raw materials, including used tyres fit only for retreading or for use as waste;
ix. waste and scrap resulting from manufacturing operations conducted there;
x. products extracted from marine soil or subsoil outside their territorial waters provided that they have sole rights to work that soil or subsoil;
xi. goods produced there exclusively from the products specified in (i) to (xi).

In the case of fish products, the "wholly obtained" criteria applies only where the vessels and ships used:

i. are registered in an EC Member State or in an EAC Partner State;
ii. sail under the flag of an EC Member State or of an EAC Partner State;
iii. meet one of the following conditions:

- they are at least 50 % owned by nationals of an EC country or of an EAC Partner State; or

- they are owned by companies that have their head office and their main place of business in an EC Member State or in an EAC Partner State; and, are at least 50% owned by an EC Member State or by an EAC Partner State, public entities or nationals of that State.

Substantial transformation (sufficiently worked) criteria is further classified into three types change of tariff Heading (CTH); value addition(VA), expressed as minimum local value added to the final product to qualify as originating; and, technical requirements (TR), i.e. specified processing operations that a product must have gone through before qualifying as originating. Under FEPA (see Article 7), as in other FTAs goods are considered sufficiently worked when they meet conditions often listed in a protocol often annexed to the Agreement. Similarly, processing activities that do not qualify to confer origin are usually specified. As an example Article 8 of FEPA specifies insufficient working or processing as:

i. preserving operations to ensure that the products remain in good condition during transport and storage;
ii. breaking-up and assembly of packages;
iii. washing, cleaning; removal of dust, oxide, oil, paint or other coverings;
iv. ironing or pressing of textiles;
v. simple painting and polishing operations;
vi. husking, partial or total bleaching, polishing, and glazing of cereals and rice;
vii. operations to colour sugar or form sugar lumps; partial or total milling of crystal sugar;
viii. peeling, stoning and shelling, of fruits, nuts and vegetables;
ix. sharpening, simple grinding or simple cutting;
x. sifting, screening, sorting, classifying, grading, matching; (including the making-up of sets of articles);
xi. simple placing in bottles, cans, flasks, bags, cases, boxes, fixing on cards or boards and all other simple packaging operations;
xii. affixing or printing marks, labels, logos and other like distinguishing signs on products or their packaging;
xiii. simple mixing of products, whether or not of different kinds; mixing of sugar with any other material;

xiv. simple assembly of parts of articles to constitute a complete article or disassembly of products into parts;

xv. a combination of two or more operations specified in (i) to (xiv);

xvi. slaughter of animals.

Generally the "wholly obtained" criteria and technical requirements are the most restrictive rules and often used for protection; although WO criteria is transparent and easy to apply. On the other hand, CTC is the most commonly used criteria because it is the most transparent. The VA criteria, though transparent has historically been used for protection. It is now considered that a 10% VA on raw materials used by developing countries is the least protective.

In some trade arrangements the restrictiveness of the RoO are mitigated by allowing sourcing of some non-originating materials from specified regions or countries without losing originating status. This is called cumulation and already applies under the Cotonou Agreement. Of interest is diagonal cumulation under which developing countries are allowed to source materials from designated developing countries. This would not only promote backward integration among participating countries, but would also lead to increased development as countries source materials from least cost sources. Under FEPA cumulation applies to materials originating from EAC and EU; while for EAC diagonal cumulation is allowed with Algeria, Egypt, Libya, Morocco and Tunisia. This suggests that FEPA diagonal cumulation by limiting the number of developing countries involved in the process is not as development oriented as AGOA that allows for wider cumulation. The most interesting case is the limitation of cumulation from South Africa, while allowing for cumulation with the five (5) North African countries. This should be a serious negotiating point.

In this study we propose to carefully review the proposed RoO in Protocol 1 of FEPA to determine the distribution of items by the various RoO criteria. This will provide information on the restrictiveness of the proposed RoO. A comparative review will be undertaken using the RoO proposed for negotiations in ESA and SADC and those under implementation in Australia, New Zealand and Canada. In the case of the three countries examples that could be used are the Australia-Chile FTA, New Zealand-China FTA and Canada- European FTA. The Cotonou and CARIFORUM RoO will also be reviewed. The purpose of the comparative analysis will be to

establish what would be considered the most appropriate RoO for development purposes in EAC. This will be compared with the proposal in Protocol 1 to determine areas of divergence, leading to recommendations of areas requiring harmonization and incorporation in the EAC draft proposal on RoO.

The comparative analysis in this study will include methods to be used to mitigate the negative effects of the recommended RoO; especially cumulation. This will enable us to recommend the most appropriate cumulation for EAC. The same analysis will apply to the determination of value addition to be recommended to cater for the development needs of the EAC Partner States that are landlocked.

3.0 METHODOLOGY

3.1 Introduction

The comparative analyses of the RoO and our recommendations on the same have been informed by three key principles.

- The rules should be simple, transparent and easy to apply so as to reduce transaction cost of customs administration; and ultimately reduce the cost of doing business by the private sector.
- The rules should also be development oriented in the sense that they should encourage backward integration through increased use of local materials, but must also allow for the use of imported raw materials to promote local industrial development. Use of RoO purely for protectionism should be discouraged.
- The rules should promote regional integration; including integrating the region in the world economy. It is therefore important that the RoO encourages trade among the EAC Partner States and the use of regional raw materials, including those from other RECs in the sub-region.

The review of the RoO is guided by the international best practice, first as provided under WTO rules and as practiced under other FTAs. In this case and as a first approximation we have concluded that agriculture and minerals products are mostly wholly obtained(WO); while most of the other products fall under substantial transformation-(value addition (VA), change in tariff headings (CTH) and technical requirements(TR)). Of the rules covered by substantial transformation, change in tariff heading is preferred because it is the most transparent, unlike the other two that are protectionist by design.

3.2 ACP/EU RoO: a Comparative Analysis

The rules of origin that governed trade between the EU and ACP states under the Cotonou Agreement; and the so called Cotonou + that to some extent govern the EPAs Interim agreements are considered among the most restrictive rules in application. The terms of reference calls for a comparative analysis of FEPA RoO and those of ESA and SADC; and the benchmark our recommendations with rule of origin applicable in Australia, New Zealand and Canada.

Comparative analysis of FEPA rules of origin and those of ESA and SADC has not been possible because the other two RECs did not sign interim agreements with EU. In both RECs individual members signed interim agreements. For example in ESA out of 10 countries, 6 (Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe) signed interim agreements. In SADC only 5 (Botswana, Lesotho, Swaziland, Mozambique and Namibia) of the 15 members signed interim agreements before the end of 2007. In both cases the rules of origin are under negotiation. We have been unable to obtain interim agreements signed by any of the countries, but we believe the applicable RoO is the Cotonou + that is effectively similar to the FEPA RoO.

To undertake a comparative analysis involving Australia, New Zealand and Canada we reviewed various FTAs that these countries have entered with other countries and regional groupings. In the end New Zealand/China, Australia/Chile and Canada/EFTA free trade area agreements were chosen. The RoO under implementation in these FTAs are compared below to the FEPA RoO with respect to agricultural products (chapters 1-24) and textiles (Chapters 60, 61 & 62).

The comparative analysis of the RoO on agricultural products in the four FTAs (Table 3.2) shows that the RoO of the other FTAs are simple and more transparent than those of FEPA. Whereas change in tariff heading is the main RoO used in the other FTAs, a large variety of rules are used under FEPA. The change in tariff heading is almost exclusively used in Australia/Chile and New Zealand/China FTAs and is used in over three quarter of the cases in Canada/EFTA FTA. In the case of FEPA, the products are distributed between CTH (23%), WO (28%) and VA (13%); but a large proportion (26%) of the products fall under the more restrictive TR, exceptions or a combination involving both. This type of RoO regime would complicate the process of compliance by exporters and may in some instances reduce exports or the use of the regime.

Table 3.1: Share (%) of Agricultural Products by RoO

Rule of Origin	FEPA	Australia/Chile	New Zealand/ China	Canada/EFTA
Change in Tariff Heading (CTH)	23	90	91	77
Wholly Obtained (WO)	28	0	7	0
Value Addition (VA)	13	0	2	0
CTH+VA	8	10	0	0
CTH+ Exceptions[1]	7	0	0	10
CTH+ Technical Requirements	0	0	0	6
Technical Requirements (TR)	4	0	0	1
TR+ Exceptions	0	0	0	6
Others[2]	15	0	0	0
Total	100	100	100	100

Source: own calculations

In the case of textiles as shown in Table 3.2, the RoO for the comparator FTAs are simple; CTH provides originating status to the products as long as they are cut and sewn in the territories of the Parties. However, originating rules for these products under FEPA are so complicated that they require side notes that are themselves complicated. These are issues that will be addressed by this study with a view to recommending a simpler RoO regime. The most important point to note is that FEPA and CARIFORUM rules are the same and essentially the Cotonou + rules. Since CARIFORUM has signed a full agreement with the EU, EAC has to ensure that it is not ensnared into signing a similar agreement that in our view is intended to protect European interests at the expense of developing (ACP) states.

[1] Exceptions exclude certain raw materials from processing. The most notable are those affecting headings 1904 and 1905 for FEPA. In the case of 1904, cereal and cereal products originate if wholly produced (except durum wheat); but may not use chocolate (heading 1806); and any sugars (Chapter 17) used may not exceed 30% of the ex-works price of the product. Bread, pastry, cakes, biscuits etc (heading 1905) are considered originating if they are manufactured from materials other than products of milling (Chapter 11).

[2] Others include other combinations of all the rules not shown in the table.

Table 3.2: Rules of Origin for Articles of Apparel and Clothing by FTA

Chapter/Heading	FEPA	CARIFORUM	New Zealand/China	Australia/ Chile	Canada/EFTA
Chapter 60: Knitted or crocheted fabrics Chapter 61: Articles of apparel and clothing accessories knitted or crocheted -obtained from sewing two or more pieces of fabric cut to form or obtained directly to form	Manufactured from yarn Manufacture from fabric	Manufactured from yarn Manufacture from fabric	CTH provided cut and sewn in the territory of one or both of the parties[3] CTH provided cut and sewn in the territory of one or both of the parties	CTH provided cut and sewn in the territory of one or both of the parties CTH provided cut and sewn in the territory of one or both of the parties	CTH provided cut and sewn in the territory of one or both of the parties CTH provided cut and sewn in the territory of one or both of the parties
-Other Chapter 62: Articles of apparel and clothing accessories not knitted or crocheted, except for: (6214 &6214)-handkerchiefs, shawls, -- -Embroidered	Manufacture from yarn Manufacture from Fabric Manufacture from yarn Or Manufacture from unembroidered fabric provided the value of the fabric used does not	Manufacture from yarn Manufacture from Fabric [similar] [similar]	CTH provided cut and sewn in the territory of one or both of the parties	CTH provided cut and sewn in the territory of one or both of the parties	CTH provided cut and sewn in the territory of one or both of the parties

[3] Note that these are given by heading (four digits) in case of the three FTAs, unlike FEPA and CARIFORUM that are essentially the Cotonou + RoO.

	exceed 40% of the ex-works price of the product				
-other	Manufacture from yarn	[similar]			
	Or Making up followed by printing accompanied by at least two preparatory or finishing operations where the value of the unprinted goods of heading Nos 6213 and 6214 used does not exceed 47.5% of the ex-works price of the product	[similar]			
(6217)-other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading No 6212:					
-embroidered	Manufacture from yarn	[similar]			
	Or Manufacture from unembroidered fabric provided the value of the unembroidered fabric used does not exceed 40% of the ex-works price of the product	[similar] [similar]			
-fire resistant equipment of fabric covered with foil of aluminized polyester	Manufacture from yarn	[similar]			

	or Manufacture from uncoated fabric provided the value of the uncoated fabric used does not exceed 40% of the ex-works price of the product	[similar]			
-interlinings for collars and cuffs, cut out	Manufacture in which: - all the materials used are classified within a heading other than that of the product; - the value of all the materials used does not exceed 40% of the ex-works price of the product	similar] [similar] [similar]			

3.3 Review of FEPA RoO

3.3.1 Review of Articles

The Articles to Protocol 1 have been reviewed with the aim of simplifying and making the protocol easier to administer. This has led to amendment of several articles. One of the main consequences of the amendments is the change in the renumbering of the various articles.

Article 1: This Article was not changed.

Article 2: Not changed.

Articles 3, 4, and 5: These have been combined into one article (Art. 3) on cumulation. This was done to remove repetitions and to align to best practices in other trading blocs e.g. New Zealand-China and Australia-Chile FTAs.

Article 4 (Former Art. 6): Paragraph 1 of this article has largely remained unchanged, but paragraphs 1(b) and (i) have been slightly expanded by adopting best practices from other trading blocs.

Paragraph 2: Not changed.

Paragraph 3: This was amended to provide that EAC will only be obliged to inform EU of the registration of "their vessels" because it was considered that the condition that registration could be done "*provided that the charter or lease agreement, for which the Community has been offered the right of first refusal, and has been accepted by the Special Committee on Customs Cooperation as providing adequate opportunities for developing the capacity of the EAC Partner State to fish on its own account and in particular as conferring on the EAC Partner State the responsibility for the nautical and commercial management of the vessel at its disposal for a significant period of time*" was inappropriate and would give undue advantage to the EU over the other partner states.

Paragraph 4: This has been deleted because it did not add any value.

Article 5 (Former Art.7): Paragraph 3 of the former Art 7 was deleted because paragraphs 1 and 2 are considered sufficiently clear.

Article 6 (New): This is a new Article on De Minimis to replace former Article 7(4), (5) and (6). The de minimis value was reduced from 15% to 10%.

Article 7(Former Art.8): Except the change in numbering, the contents of the Article were not changed.

Article 9(FormerArt.10): Except the change in numbering, the contents of the Article were not changed.

Article 10(Former Art.11): the value of admissible non-originating product was reduced from 15% to 10% ex-works price, otherwise there was no other change.

Article 11(Former Art.12): Except the change in numbering, the contents of the Article were not changed.

Article 12(Former Art.13): Except the change in numbering, the contents of the Article were not changed.

Article 13(Former Art.14): Except the change in numbering, the contents of the Article were not changed.

Article 14(Former Art.15): Except the change in numbering, the contents of the Article were not changed.

Articles 15(Former Art.16): Except the change in numbering, the contents of the Article were not changed.

Article 16(Former Art.17): Except the change in numbering, the contents of the Article were not changed.

Article 17(Former Art.18): Except the change in numbering, the contents of the Article were not changed.

Article 18(Former Art. 19): Except the change in numbering, the contents of the Article were not changed.

Article 19(Former 20): Except the change in numbering, the contents of the Article were not changed.

Article 20(Former 21): Except the change in numbering, the contents of the Article were not changed.

Article 21(Former 22): Except the change in numbering, the contents of the Article were not changed.

Article 22(Former 23): Except the change in numbering, the contents of the Article were not changed.

Article 23(Former Article24): Except the change in numbering, the contents of the Article were not changed.

Article 24(Former Article 25): Except the change in numbering, the contents of the Article were not changed.

Article 25(Former Article 26): Except the change in numbering, the contents of the Article were not changed.

Article 26(Former Art 27): Except the change in numbering, the contents of the Article were not changed.

Article 27(Former Art 28): Except the change in numbering, the contents of the Article were not changed.

Article 28(Former Art 29): Except the change in numbering, the contents of the Article were not changed.

Article 29(Former Art 30): Except the change in numbering, the contents of the Article were not changed.

Article 30 (Former Art 31): Except the change in numbering, the contents of the Article were not changed.

Article 31(Former Art 32): Except the change in numbering, the contents of the Article were not changed.

Article 32(Former Art 33): Except the change in numbering, the contents of the Article were not changed.

Article 33(Former Art 34): Except the change in numbering, the contents of the Article were not changed.

Article 34(Former Art 35): Except the change in numbering, the contents of the Article were not changed.

Article 35(Former Art 36): Except the change in numbering, the contents of the Article were not changed.

Article 36(Former Art 37): Except the change in numbering, the contents of the Article were not changed.

Article 37(Former Art 38): Except the change in numbering, the contents of the Article were not changed.

Article 38(Former Art 39): Except the change in numbering, the contents of the Article were not changed.

Article 39(Former Art 40): Except the change in numbering, the contents of the Article were not changed.

Article 40(Former Article 41): The article as presently drafted is unnecessarily too detailed. It was therefore amended with only one paragraph indicating that derogations will be adopted by the Special Committee on Customs Cooperation (SCCC) in accordance with established rules of SCCC and information availed by the concerned Parties.

Article 41(Former Art.42): Except the change in numbering, the contents of the Article were not changed.

Article 42(Former 43): This article was redrafted to reflect the changes introduced in Article 3.

Article 43(Former Art.44): Except the change in numbering, the contents of the Article were not changed.

Article 44(Former Art.45): Except the change in numbering, the contents of the Article were not changed.

3.3.2 Introductory Notes

Annex I to Protocol 1 provides introductory notes that qualify originating criteria for some products in Annex II. These notes are for the most part complicated and not self explanatory.

The recommendation to simplify the tariff schedules of Annex II, for example listing the products by heading (4 digits) or subheading obviate the need for the notes. Moreover, the dominance of the use of change in tariff heading addresses most of the explanations given in the notes by providing specific RoO for each heading or subheading. This especially applies to note 3, 4, 5 and 6. In chapters 27 and 34 technical processes that apply to each product are provided there, therefore making note 7 unnecessary. It is therefore recommended that Annex I to protocol l be deleted.

3.3.3 Analysis of RoO

The recommended rules of origin and other provision conferring criteria (for example Articles) are provided in Protocol 1. In section we provide a summary of how the recommendations were arrived at, and give a broad classification of goods by rule of origin.
In arriving at our recommendations we have been guided by the WTO guidelines outlined in section 2.3; and the principles provided in section 3.1. In general we find that the rules of Protocol I of FEPA do not conform to both the guidelines and the principles. They are in many instances cumbersome to implement and protectionist.

As shown in Table 3.3 under FEPA all the products of chapter 6 originate if all materials used are wholly obtained and if the value of all the materials used does not exceed 50% of the ex-works price of the product. The application of the two rules would be cumbersome; and the second, the value addition rule is protectionist as the 50% requirement is very high. We propose the wholly obtained rule that is simple and transparent. Moreover this recommendation is in line with Annex II(a) that allows for derogations to the provisions of Annex II by allowing all materials of chapter 8 to be wholly obtained.

Table 3.3: RoO for products of Chapter 6

HS Heading No.	Description of product	FEPA RoO	Proposed RoO
Chapter 06	Live trees and other plants; bulbs, roots and the like; cut flowers and ornamental foliage	Manufacture in which: - all the materials of Chapter 6 used must be wholly obtained; - the value of all the materials used does not exceed 50% of the ex-works price of the product	Wholly obtained

Table 3.4 provides an example of sugar and sugar confectionary that face different RoO under FEPA. To start with Chapter 17 has only 4 headings, so the change in tariff heading rule attached to the chapter is confusing. Under heading 1702 three items are listed and assigned different RoO. In cases like these we recommend the use of subheadings. The maximum value of materials in all the cases is set at 30% ex-works that we consider too high; as we recommend 10%.

Table 3.4: RoO for products of Chapter 17

HS Heading No.	Description of product	FEPA RoO	Proposed RoO
ex Chapter 17	Sugars and sugar confectionery; except for:	Manufacture in which all the materials used are classified within a heading other than that of the product	Change in tariff heading
ex 1701	Cane or beet sugar and chemically pure sucrose, in solid form, flavoured or coloured	Manufacture in which the value of any materials of Chapter 17 used does not exceed 30% of the ex-works price of the product	Change in tariff heading

1702	Other sugars, including chemically pure lactose, maltose, glucose and fructose, in solid form; sugar syrups not containing added flavouring or colouring matter; artificial honey, whether or not mixed with natural honey; caramel:		
	- Chemically pure maltose and fructose	Manufacture from materials of any heading including other materials of heading No 1702	Change in tariff heading
	- Other sugars in solid form, flavoured or coloured	Manufacture in which the value of any materials of Chapter 17 used does not exceed 30% of the ex-works price of the product	Change in tariff heading
	- Other	Manufacture in which all the materials used must already be originating	Change in tariff heading
ex 1703	Molasses resulting from the extraction or refining of sugar, flavoured or coloured	Manufacture in which the value of any materials of Chapter 17 used does not exceed 30% of the ex-works price of the product	Change in tariff heading
1704	Sugar confectionery (including white chocolate), not containing cocoa	Manufacture in which: - all the materials used are classified within a heading other than that of the product; - the value of any materials of Chapter 17 used does not exceed 30% of the ex-works price of the product	Change in tariff heading

Chapter 28 contains chemical PRODUCTS in 53 headings that undergo specific processing. The FEPA (Table 3.5) provides general RoO for all these products, except four headings 2805, 2811, 2833 and 2840. One unique feature here are the optional RoO given in columns 3 and 4; that is one could use RoO specified in column 3 or 4. The multiple rules introduce discretionary application of the RoO and therefore we recommend against it.

Table 3.5: RoO for products of chapter 28

HS Heading No.	Description of product	Working on non-originating materials that confers originating status (3)	Working on non-originating materials that confers originating status or (4)	Proposed RoO
ex Chapter 28	Inorganic chemicals; organic or inorganic compounds of precious metals, of rare-earth metals, of radioactive elements or of isotopes; except for:	Manufacture in which all the materials used are classified within a heading other than that of the product. However, materials classified within the same heading may be used provided their value does not exceed 20% of the ex-works price of the product	the value of all materials used does not exceed 40% of the ex-works price of the product	Change in tariff heading
ex 2805	"Mischmetall"	Manufacture by electrolytic or thermal treatment in which the value of all materials used does not exceed 50% of the ex-works price of the product		Change in tariff heading
ex 2811	Sulphur trioxide	Manufacture from sulphur dioxide	the value of all materials used does not exceed 40% of the ex-works price of the product	Change in tariff heading
ex 2833	Aluminium sulphate	Manufacture in which the value of all materials used does not exceed 50% of the ex-works price of the product		Change in tariff heading
ex 2840	Sodium perborate	Manufacture from disodium tetraborate pentahydrate	Manufacture in which the value of all materials used does not exceed 40% of the ex-works price of the product	Change in tariff heading

The other concern is the use of technical requirements in the case of 2805, 2811 and 2840 which are difficult to implement. The cases of value addition used are high and therefore anti-development.

3.3.4 Criteria for Conferring Originating Status: a Summary

1. **Wholly obtained criteria is recommended in the following headings and sub-headings;**
    - Chapters 1-14 (except sub- heading 0910-*mixtures of spices, for which change in tariff heading is recommended*);
    - Chapter 24-25
    - Heading 2716-*on electrical energy,*
    - Heading 4012, 4017; heading 7101 *on Natural and cultured pearls*
    - Heading 7503, 7602, 7802, 8002-*on waste and scrap of base metals*

Wholly obtained criteria is recommended in these cases because the products covered are basic raw materials that are in abundance in EAC.

2. **Technical specification**

    - Chapter 27 (except 2716)

The basic origin conferring criteria for the products in this chapter is change in tariff heading. However, technical specification criteria also apply because these products are mainly hydrocarbon oils that are obtained from specific technical processes.

3. **Value addition;**
    - Headings 8406-8485 machinery and parts thereof,
    - Chapters 85-87; and 90-93.

Value addition is recommended as the origin conferring criteria to the above chapters and headings because goods under these headings are finished products; and the materials used in manufacturing process are mainly assembly of various parts obtained from elsewhere.

4. **Change in Tariff Heading criteria is recommended for the following headings and sub-headings:**
    - Chapters 26
    - Chapter 28-40 (except 4012-*retreated or used pneumatic tyres of rubber* and 4017-*articles of hard rubber*);
    - Chapter 41-83 (except 7101);

- Chapter 88-89 and 94-97.

It is evident that change in tariff heading as origin conferring criteria covers the majority of the tariff lines in FEPA RoO. This is because the criteria is transparent and easy to implement, and therefore is the most likely to facilitate trade between the parties.

3.3.5 Cumulation

Provisions of Articles 3 and 4 allow cumulation by EAC Partner States with any other EAC country, other ACP states OCTs and EC. Article 5 also allows EAC to cumulate with neighbouring developing African countries listed in Annex VIII, namely: Algeria, Egypt, Libya, Morocco and Tunisia. Cumulation with South Africa is however restricted (Article 4(8)): with Annex XI listing products from South Africa that are excluded from cumulation and Annex XII Restrictions on cumulation by EAC with South Africa will be disadvantageous because South Africa is a major EAC trading partner; moreover Tanzania belongs to the same REC (SADC) with South Africa. More importantly the Summits of EAC, COMESA and SADC directed at a meeting in Kampala, Uganda on 20th October 2008 that the three RECs form a FTA. This directive could be frustrated if EAC Partner States cannot cumulate with South Africa. In any case it does not make sense that the 5 North African countries with little trade relations with EAC can cumulate while South Africa cannot. We therefore recommend that South Africa be considered as a neighbouring developing country with which EAC should cumulate.

3.3.6 Treatment of Landlocked Countries

This study is expected examine and recommend how value addition could be used to address the peculiar problems of the landlocked countries of the EAC, especially with respect to the high cost of inland transportation. It is without doubt that inefficiencies in the Northern and Central Corridor and other transport corridor systems impose high costs of doing business, thus making products of landlocked countries uncompetitive in international markets.

This problem however is a development issue and cannot be addressed through changes in value addition under the rules of origin. The best mechanisms to address the problem include:

- Increased investments in the transport systems

- Increased operational efficiency at the points of entry and border posts
- Increased efficiency along the corridors, e.g. removal of road blocks and rent seeking activities
- Simplification and harmonization administrative and regulatory procedures and requirements
- Introduction of a single customs authority

Some of these issues are currently being addressed under the Northern Corridor trade facilitation programme. However, increased resources would be required to effectively deal with the issues. In this respect it is our view that such resources should be negotiated as part of the development agenda under the EPAs.

4.0 RECOMMENDATIONS

4.1 Rules of Origin

Negotiating the rules of origin will be ultimately done on a product by product basis. We therefore recommend the schedule as provided in Annex II to Protocol I should be given by subheading (four digits) and in exceptional cases in six digits. This is necessary to deal with the problem of aggregation and to enable materials to be distinguished from each other. For example the two tables below show presentation of FEPA RoO for Chapter 11 that is compared to the example of the China/New Zealand FTA.

Table 4.1 indicates that products of goods in chapter 11 originate if they are manufactured from materials of heading No. 0714 or fruit used must be wholly obtained. The exception is product of heading 1106 that must be made from materials of heading 0708. This study proposes that in both cases simple use of wholly obtained as a RoO is more transparent. We recommend however that for ease of reference and transparency all products in each chapter should be itemized by tariff heading. The product specific rules used in the China/New Zealand FTA (Table 4.2) are good examples.

Table 4.1: Example from EAC/ EU FEPA

HS Heading No.	Description of product	Working on non-originating materials that confers originating status	Proposed RoO
ex Chapter 11	Products of the milling industry; malt; starches; inulin; wheat gluten; except for:	Manufacture in which all the cereals, edible vegetables, roots and tubers of heading No 0714 or fruit used must be wholly obtained	Wholly obtained
ex 1106	Flour, meal and powder of the dried, shelled leguminous vegetables of heading No 0713	Drying and milling of leguminous vegetables of heading No 0708	Wholly obtained

In this example each of the nine headings has its own RoO that is simple and easily understood; and negates discretionary implementation of the rules of origin. This would be more evident if

each of the headings had a different RoO. The convoluted rules like those of EAC/EC FEPA are avoided.

Table 4.2: Example from New Zealand/China FTA

Tariff item		Description of product	Product specific rules of origin
Chapter 11		Products of the milling industry; malt; starches; inulin; wheat gluten	
1101		Wheat or meslin flour.	Change to heading 1101 from any other chapter
1102		Cereal flours other than of wheat or meslin.	Change to heading 1102 from any other chapter
1103		Cereal groats, meal and pellets.	Change to heading 1103 from any other chapter
1104		Cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced or kibbled), except rice of heading 10.06; germ of cereals, whole, rolled, flaked or ground.	Change to heading 1104 from any other chapter
1105		Flour, meal, powder, flakes, granules and pellets of potatoes.	Change to heading 1105 from any other chapter
1106		Flour, meal and powder of the dried leguminous vegetables of heading 07.13, of sago or of roots or tubers of heading 07.14 or of the product of chapter 8.	Change to heading 1106 from any other chapter
1107		Malt, whether or not roasted.	Change to heading 1107 from any other chapter
1108		Starches, inulin.	Change to heading 1108 from any other chapter
1109		Wheat gluten, whether or not dried.	Change to heading 1109 from any other chapter

The specific recommendations of the study with respect to the RoO based on Annex II of Protocol I are contained in the annex to this report. To repeat for emphasis, we recommend that the schedule of the rules to be negotiated with the EU going forward should be at the level of headings (4 digits). This will simplify and make the negotiations more transparent.

4.2 Cumulation

The provisions for cumulation provided under FEPA would seem to satisfy requirements of the TORs that the study should take into account "full cumulation within EAC and the other ACP countries". Moreover, it goes further by allowing cumulation with neighbouring developing countries. The main concern here is the restrictions placed on cumulation with South Africa. The study therefore recommends that cumulation with South Africa should take centre stage as EAC engages the EU in negotiating the final EPAs.

The minimum is that Annex XI and XII should be negotiated to reduce product coverage and dates after which cumulation applies.

4.3 Articles

The main changes in the provisions of Protocol 1 are the merging of Articles 3, 4 and 5 that now constitute Article 3. These articles were merged to remove repetitions and to align to best practices in other trading blocs e.g. New Zealand-China and Australia-Chile FTAs. The other change is the amendment of Article 6(3) to remove the requirement that EU would have the right of first refusal when EAC hires fishing vessels because this would restrict commercial activities. It is therefore recommended that the right of first refusal be replaced with a notification of vessels hired by the EAC.

The value of admissible non-originating products specified in Articles 6 and 10 (new) have been reduced from 15% to 10%. This is important to promote development in EAC and reduce the protectionist effects of the proposed trade regime. Another point to note is that Article 40 was changed to make it simpler, but without changing its import.

4.4 Conclusions

In formulating the RoO that EAC could use to negotiate the EPAs, benchmarking has been made with those applicable in New Zealand/China, Australia/ Chile and Canada/EFTA FTAs. The main result is that most products would fall under the change in tariff heading RoO, with very few falling under wholly obtained and value addition and the least under technical specifications. We are convinced that the recommended RoO are compatible with WTO rules and principles discussed in section 3.1.

In renegotiating FEPA, the challenge that EAC will face is going to be getting the negotiating partner (EU) to agree on a simple to administer and development oriented RoO and cumulation with South Africa. However, development of well informed positions will facilitate fruitful negotiations for the mutual benefit of all parties.

ANNEXES

1. List of officials Consulted at the EAC Secretariat

1. Dr. Julius Rotich, Deputy Secretary General, Finance and Administration
2. Mr. Kiguta, Director General, Directorate of Trade and Customs
3. Dr. Flora Musonda, Director of Trade
4. Mr. Michael Lukaiya, Principal Customs Officer
5. Dr. Anthony L. Kafumbe, Principal Legal Officer
6. Mr. Gerald Ajumbo, Principal Trade Officer/ International
7. Mr. Oltesh Thobias, Senior Procurement Officer