SEATINI

Strengthening Africa in World Trade

AN ANALYSIS OF THE RENDEZVOUS CLAUSE IN THE EAC-EU-EPA

Implications on Uganda's and EAC's economy and on people's livelihoods"

Trade & Investment

TRANSPARENCY
Public Procurement

The Rendezvous Clause in the EAC-EU EPA:

Implications on Uganda's and EAC's economy and on people's livelihoods"

ABBREVIATIONS AND ACRONYMS

ACP	African, Caribbean and Pacific
CBD	Convention of Biological Diversity
CET	Common External Tariff
CPA	Cotonou Partnership Agreement
EAC	East African Community
EBA	Everything But Arms
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreements
GSP	General System of Preferences
ILEAP	International Lawyers and Economists Against Poverty
LDCs	Least Developed Countries
MFN	Most Favoured Nation
MTIC	Ministry of Trade, Industry and Cooperatives
RTAs	Regional Trade Agreements
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

ACKNOWLEDGEMENT

This publication was produced by SEATINI Uganda. SEATINI Uganda wishes to extend their appreciation to Ms. Elizabeth Tamale for spearheading the research study and analysis of the Rendezvous Clause in the EAC-EU-EPA and the production of the report. Further appreciation goes to Ms. Jane Nalunga, Ms. Faith Lumonya and Mr. Martin Luther Munu for their technical support and contribution towards the finalization of this study.

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INTRODUCTION

The EAC-EU EPA negotiations were concluded on16th October 2014 after 12 years of negotiation. The EPA negotiations were based on the Cotonou Partnership Agreement (CPA) which was concluded in 2000 and revised in 2005. The CPA provided for the framework for cooperation between the EU (European Union) and Africa, Caribbean and Pacific (ACP) countries; and for the negotiation of new trading arrangements [1] that are compatible with World Trade Organisation on (WTO) trade rules, to replace the unilateral trade regime that was prevailing at the time. Formal negotiations commenced in September 2002 and were scheduled for conclusion by 31st December 2007.

An interim EPA between the EAC and EU was initialed on 27thNovember 2007 and negotiations of a comprehensive EAC-EU EPA were concluded on the 16th October 2014 after twelve (12) years of negotiations. The agreement is undergoing legal scrubbing, ratification and eventual implementation. The concluded EAC-EU EPA Agreement contains an inbuilt agenda that provides for areas for further negotiations in Chapter VI; Article 134 (Rendezvous Clause). These include Trade in services; Trade related issues namely: Competition policy; Investment and private sector development; Trade, environment and sustainable development; Intellectual property rights; Transparency in public procurement; and any other areas that the Parties find necessary.

The time period for the negotiations of these issues is provided for in Article 3 (2) which states that : "The Parties undertake to continue and conclude the negotiations in the subject matters listed under Chapter VI , within 5 years upon entry into force of this Agreement". Negotiating binding rules in these areas will have far reaching implication on Uganda and EAC partner states since they will constrict the policy space that is so crucial for EAC governments to put in place policies to foster development. This is the very reason that developing countries, including Uganda and the EAC have rejected binding rules in these issues in the WTO. Therefore it is important that Uganda and EAC negotiators appreciate the implications of these issues on the region's economy and people's livelihoods. The study is organized as follows:

The first chapter will provide the background to the EPA agreement including its objectives and principles. The second chapter will examine the provisions in the rendezvous clause and their likely implications on EAC's economy and peoples' livelihood. This chapter will also provide specific recommendations under each issue discussed. The last chapter will provide general recommendations and propose negotiations positions to guide the EAC's negotiations in order to maximize opportunities while minimizing the risks therein.

1 Cotonou Partnership Agreement (CPA) Articles 36&37

CHAPTER 1

1.2 BACKGROUND TO THE EU-ACP ECONOMIC PARTNERSHIP AGREEMENT (EPA)

1.2.1 Lome Agreement 1975-2000

Economic Partnership Agreements (EPAs) between the European Union (EU) and the African, Caribbean, and Pacific (ACP) countries can be traced as far back as 1975 when the EU and 71 African, Caribbean and Pacific (ACP)countries signed the "Lome Convention". Under this agreement, goods and services from ACP countries which comprised of mainly agricultural products and minerals were exempted from tariffs and duties in the EU markets though this excluded products that were competing with EU agricultural products which were subjected to quotas. Since this was not a reciprocal agreement, goods from EU were not granted the same treatment in ACP countries. EU also agreed to invest in ACP countries and provide them with development assistance. The Lome Convention was renewed four times every after five years and each renewal was accompanied by an increase in development aid through the European Development Bank.[2]

The Lome Convention lasted for 25 years and ended in 2000. However it faced several challenges; on the side of ACP, many countries did not fully access EU markets due to the stringent Rules of Origin. Secondly, the WTO Agreement that came into force in 1995, introduced rules covering preferential treatment.

In this case, the Lome Convention and its preferential arrangements were seen as a deviation from the General Agreement on Trade and Tariffs (GATT). This is because beneficiaries were not only least developed countries (LDC), but also developing countries. It was therefore regarded as discriminatory since not all developing countries in WTO were beneficiaries of the Lome Convention. At the same time, ACP countries still maintained high tariffs on imports from EU while their exports were at zero tariff. In order to be compatible with WTO rules, ACP countries would be required to negotiate a reciprocal trade agreement with the EU.

1.2.2 The Cotonou Partnership Agreement

The ACP/EU Partnership Agreement is a comprehensive aid and trade agreement concluded between 77 ACP (African, Caribbean and Pacific) countries and the European Union. It was signed in June 2000 in Cotonou (Benin) and is therefore commonly referred to as "the Cotonou Agreement". The Cotonou Agreement builds on twenty-five years of ACP-EU co-operation under 4 successive Lome Conventions.

2 The ABC of EAC-EU Economic Partnership Agreements (EPA) Page 6

Under the trade cooperation pillar, the ACP –EU Partnership Agreement in Chapter 2, Article 37 provides for the negotiations of new trading arrangements between the ACP countries and the EU:

"Economic partnership agreements shall be negotiated during the preparatory period which shall end by 31st December 2007 at the latest. Formal negotiations of the new trading arrangements shall start in September 2002 and the new trading arrangements shall enter into force by 1st January 2008, unless earlier dates are agreed between the parties."[3]

The EPA negotiations were formally launched in September 2002. Negotiations were to be carried out in 2 phases; at the pan- ACP-EU level to agree on principles and approaches to be adopted , the structure and the modalities for the negotiation and cross cutting issues of common interest for the ACP ; and from September 2003 negotiations on specific regional EPAs

1.2.3 The EAC-EU Economic Partnership Agreement (EPA) Negotiations.

On 27th November 2007, the EU and East African member States signed an interim framework EPAs to provide a transitional period while they make efforts to conclude the full EPA. This also helped them to counter the expiration of the Cotonou Agreement and members were able to continue exporting their products at preferential terms. The EAC was also required to harmonize its market access offer. Members agreed to negotiate outstanding issues and conclude the negotiations before October 1, 2014. Failure to conclude the Agreement would mean that Kenya as a developing country would be required to use the Generalized System of Preferences (GSP) which would mean that their exports would attract import duties ranging from 5% - 22%, while Uganda, Rwanda, Burundi and the United Republic of Tanzania would continue to use Everything But Arms (EBA) preference scheme that was granted to LDCs by EU on 5th March 2001.[4]

The comprehensive EAC–EU EPA negotiations were concluded and initialed on the 16th of October 2014.The agreement is currently undergoing legal scrubbing after which it will be presented for approval according to the domestic procedures of each EAC Partner state. The agreement focuses on trade in goods and provides conditions for the movement of goods between the EAC and the EU including duty free and quota free access for EAC exports to EU; applicable duties and taxes, multilateral and bilateral safeguards ; and national treatment and Most Favoured National Treatment (MFN) provisions. Other areas include fisheries, agriculture, Economic Development Cooperation; Dispute settlement , General and final provisions.

3 The ACP-EU Partnership Agreement pg. 26.

4 Everything But Arms (EBA) is an initiative of the European Union under which all imports to the EU from LDCs are duty Free and Quota Free, with the exception of armaments.

Under the Market access offer the EU's offer consists of duty free and quota free access for all EAC exports to EU, except for arms and ammunition. EAC products that attracted tariffs into the EU under the Cotonou Partnership Agreement became zero-rated. On the other hand, the EAC Market Access offer consists of liberalization of 82.6% of imports from the EU over a twenty five (25) year transition period. This liberalization is to take place in three phases, with the first phase from 2010 involving only products with which are already zero rated. The products covered in this phase do include raw materials or capital goods. This constitutes 65.4% of EAC's imports from the EU. The second phase will be between 2015 and 2023, where EAC Partner States will liberalize a further 14.6%. Products in this category are intermediate inputs and attract 10% duty. The third phase will be between 2020 and 2033, where the EAC Partner States will liberalize a further 2.6% of its imports from the EU. This phase includes finished products whose availability at lower cost was deemed to have a positive effect on consumer welfare, and not to have a potentially negative impact on EAC economies.

It is important to take note that approximately, one-fifth (17.4%) of EAC imports from the EU is excluded from liberalization commitments under the EPA. These products constitute the EAC Exclusion List (including the list of sensitive products under the Common External Tariff (CET). Criteria for including products on this list included: the contribution to rural development; employment; livelihood sustainability; promotion of food security; fostering infant industries; contribution to government revenues. Products which were deemed to contribute or to have a potential to contribute to increased production and trade competitiveness were excluded from the list as well as all products subsidized by EU are on this list..

This level of liberalization is likely to have an impact on the EAC Partner States' efforts to industrialize and also reduces policy space. This type of liberalization assumes that EAC countries will always be importing intermediate goods and will never be able to produce these goods for export. Yet there may be a possibility for these countries to develop the capacity to produce these goods competitively and export them to countries like the EU in the future. Permanent removal of tariffs will make it difficult for EAC to produce them in the future thus hindering the industrialization process and the region may end up by perpetually producing raw materials for export to the EU.

The Agreement puts restrictions on the imposition of duties and taxes on exportation of goods to the other Party. Export taxes are an important development tool that can be used to promote industrialization and create incentives for value addition to local products to reduce export of raw materials, thereby increasing opportunities of employment. However sometimes they are looked at as trade distortive by some countries and there are efforts to regulate them in the WTO.

The EU's position on export taxes is articulated in the "Raw Materials Initiative", which recognizes the importance of raw and secondary raw materials in EU trade and regulatory policy, and therefore the need to promote rules and agreements on sustainable access to raw materials though this issue is still under discussion in the WTO Specifically the Initiative states that: 'Access to primary and secondary raw materials should become a priority in EU trade and regulatory policy. The EU should promote new rules and agreements on sustainable access to raw materials where necessary, and ensure compliance with international commitments at multilateral and at bilateral level, including WTO accession negotiations, Free Trade Agreements, regulatory dialogue and non-preferential agreements'. The EU therefore ensures that any trade agreement they negotiate prohibits export taxes to ensure that they have guaranteed access to raw materials.

Another critical issue under this Agreement is the MFN clause whereby the EAC partner states agreed that any concession they make with third countries will automatically extend to EU. It will therefore not be possible for EAC to negotiate more favorable terms (than what has been negotiated with EU) with third countries limiting the possibility of extended market access and promotion of South –South Cooperation.

These provisions within the EAC-EU EPA agreement could in effect have far reaching implications on the economies of the EAC Partner states.

CHAPTER 2

1.3 RENDEZVOUS CLAUSE

The concluded EAC-EU EPA agreement contains an inbuilt agenda under the Rendezvous clause providing for the continuation of the negotiation on other areas that were not covered in the signed agreement. Article 134 (Rendezvous Clause) provides for the subject matters to be negotiated. These include Trade in services; Trade related issues namely: Competition policy; Investment and private sector development; Trade, environment and sustainable development; Intellectual property rights (IPR); Transparency in public procurement; and any other areas that the Parties find necessary. The time period for the negotiations of these issues is provided for in Article 3 (2) which states that : "The Parties undertake to continue and conclude the negotiations in the subject matters listed under Chapter VI , within 5 years upon entry into force of this Agreement" Many of the issues i.e. Competition, Investment and government procurement are areas of negotiations that developing and LDCs rejected in the WTO during the Singapore Ministerial meeting in 1996.Trade Facilitation was recently accepted by the Members during the Ninth Ministerial meeting that took place in December, 2013 in Bali, Indonesia; while IPR, Services, environment and sustainable development have been on the WTO agenda. However, it should be noted that the rules guiding RTA negotiations in WTO do not specify that countries should include all these mentioned subjects in their regional trade agreements apart from services.

This chapter will therefore examine the provisions in the Rendezvous clause and their likely implications on EAC's economy and peoples' livelihood.

This analysis will draw heavily from the EU –CARIFORUM EPA. The EU concluded an extensive Economic Partnership Agreement (EPAs) with the CARIFORUM states[5] on 30th October 2008. The Agreement covered critical areas such as; Investment, Trade in Services and electronic Commerce, Government Procurement, and Competition and Intellectual Property Rights.

According to the analytical note by South Centre[6]; the EU-CARIFORUM EPA may serve as blue print for other regions such as the EAC. It is therefore important to draw lessons from its implications. Currently, implementation of this agreement has slowed down due to absence of complementary sector specific strategies, policy, regulatory, human and financial resources that are necessary for the EPA implementation in the CARIFORUM States.[7]

5 The Cariforum States Are :Antigua And Barbuda, The Commonwealth Of The Bahamas, Barbados, Belize, The Commonwealth Of Dominica, The Dominican Republic, Grenada, The Republic Of Guyana,
The Republic Of Haiti, Jamaica, Saint Christopher And Nevis, Saint Lucia, Saint Vincent And The Grenadines, The Republic Of Suriname, The Republic Of Trinidad And Tobago,

6 South centre, 2008 Analytical Note SC/AN/TDP/EPA/18

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2.0 COMPETITION POLICY

Competition policy refers to a set of laws, regulations and measures employed by governments aimed at ensuring that markets remain competitive through maintaining a fair degree of competition by eliminating restrictive business practices by private enterprises. It covers the broad spectrum of economic policies that have a bearing on competition in the economy, such as trade policy, sectoral regulation and privatization among others. The policy acts as an instrument to achieve efficient allocation of resources, technical progress, and consumer welfare (CUTS 2014). Competition Policy aims at ensuring that competition in the marketplace is not restricted in a way that is detrimental to society. It is essential since if left on their own, firms may resort to actions such as collusion, mergers which lessen competition, predatory behavior and exclusionary behavior that increase their profits, but harm society.

2.1. Competition at the Multilateral, regional and national Level

There are currently no multilateral disciplines on competition policy. Most developed and developing countries have been reluctant to subject competition to multilateral rules because of the complexity of implementation and the cost. In addition, they feel that Members need to complete the Doha development agenda before they can embark on new issues. In July 2004, WTO Members agreed not to continue with negotiations on a multilateral competition framework. A Working group that had been established to develop modalities was disbanded by the General Council.

At the regional level, the EAC developed a competition policy and Act in 2006 to guide member states in as far as cross border trade is concerned. Member states were mandated to develop competition policy and establish a competition authority. It was also envisaged that a Regional Competition authority would be established. However the interest regarding competition issues differ amongst EAC partner states, this can be exhibited to the different levels of development of the decisions of the EAC.

Status of competition law, regulations and institutions in the EAC partner states and the region (CUTS 2014)

	Competition Act	Competition Regulations	Competition Department in Ministry of Trade /EAC Sec.	Independent Competition Authority	Competition Tribunal
Tanzania	√	√	n.a.	√	√
Kenya	√	√	n.a.	√	x
Rwanda	√	x	√	x	x
Burundi	√	x	√	x	x
Uganda	x	x	x	x	x
EAC	√	√	√	x	x

Uganda has developed a Competition and Consumer Protection policy but is yet to develop an Act. At the EAC level, all member states have developed competition policy while some have enacted Acts but do not have competition authorities in place except in Kenya and Tanzania. Uganda's interest in the competition negotiations is to ensure that whatever is agreed to does not compromise what has been agreed to at the national and regional level. This includes the following:

(i) creation of competition level that doesn't not hinder research and development

(ii) ensure coordination between competition authorities;

(iii) regulate multinational practices

(iv) regulate while not prohibiting the state intervention in sectors of social and economic importance to the country

(v) ensuring that the agreement does not hinder policy space to support national firms/ sectors,

(vi) ensure that a competition framework does not require the prohibition or privatization of state monopolies or the deregulation of sectors that are considered to be of strategic interests to the country.

However, given the complexities which surround the implementation of such an agreement including the need for technical skills, proper administrative set up and the costs required. It is recommended that Uganda and the EAC in general put in place policy and institutional frameworks for handling competition issues before giving consideration to engaging in the negotiation of a binding agreement.

2.2 The EU Proposal

Like other developed countries, the EU has gradually been including Competition policy in their trade negotiations. The policy statement published by the European Trade Commissioner (DG Trade) [8]articulates a more aggressive approach to expanding the EU markets by ensuring that all obstacles to entry in these markets are eliminated. The EU therefore regards lack of competition policies in their overseas markets as detrimental to their trade interests. The EU has strategic interests in developing international rules on competition policy to ensure market access to their products and services in overseas markets.

The EU policy sets out to control anti competitive practices by both the private and public firms, which are deemed to restrict competition in one market. The aim is to promote free and effective competition, and it prohibits the following:

(i) cartels on agreements among rival firms to stop competing by fixing prices; allocating or sharing markets

(ii) Prohibition of abuses of dominant market power by large firms and monopolies;

(iii) Control and review of mergers and acquisition which may lead to a creation of the dominant player in the market;

(iv) Conditions for allocation of state aid and the conditions under which public (state) enterprises operate.

Under Article 127, in the EU-CARIFORUM EPA, CARIFORUM states are expected to establish competition bodies within five years after signing the agreement (2008) at national and regional level in compliance with Article 125 (1); such bodies are to provide for exchange of information and enforcement of the competition regulations. In this case, any existing state monopoly had to be brought under competition policy. 2.1.3 Implications on Uganda/ EAC Partner States:

The EU has completed several bilateral free trade agreements and many of them include competition policy. However the actual content of each competition chapter depends on the level of institutional and legislative capacity of each partner concerned[9].

The Articles negotiated include: substance of competition policy provisions: abuse of dominant position, concerted practices, public (state) aid, mergers and acquisitions; Reference to legislation: mutual recognition of legislation; Sole reference to EU legislation; State monopolies and public enterprises: Ban positive discrimination for commercial state monopolies, ban special exclusive rights for public enterprises and technical cooperation.

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9 South Center competition policy in Economic Partnership Agreements (CARIFORUM) page 3

The EAC needs to examine these articles and assess which are critical to them so that they can be included in the agreement.

The agreement on competition policy usually contains strong and binding commitments to put in place a competition policy that follows the European model unless if a negotiating Partner has in place a competition policy that follows the European guidelines. Some countries like South Africa have ensured that they include different flexibilities in implementing the competition policy. In this case, the EAC may need to scrutinize its competition policy including partner states' policies. The EAC must therefore be prepared to push their policy, though they may need to re-examine the policy to ensure that the different flexibilities are included in the agreement.

2.3 Recommendations

Care should be taken to ensure that EAC does not get a replica of the EU competition policy. They should reexamine the policy already developed to ensure that it addresses their development objects and could use it as a basis for negotiations. Competition policy should be used for development purposes. It should be used to promote the development of domestic industrial capacity and for the attainment of dynamic efficiency through technological advancement which are imperative for enhancing the country's trade competitiveness. Considering the fact that the EAC partner states' interest regarding competition issues differ among EAC Partner states, harmonization of the partner states positions and policies on the issues is imperative before they embark on negotiating a chapter on competition.

Negotiations should be aimed at the following:

(i) Developing legal and institutional framework to implement the competition policy in line with the country's level of development;

(ii) Ensuring that domestic firms are not disadvantaged by foreign firms;

(iii) Securing capacity building and technical assistance

Considering that some of the EAC Partners states such as Uganda, Burundi and Rwanda, lack functioning competition authorities, it is clear that they do not have the capacity to handle competition issues as they arise. In this regard, it is advisable to focus on technical and capacity building and cooperation rather than focus on a legally binding document-regulating competition between the EU and EAC member states.

3.0 TRADE IN SERVICES

Trade in services is bound to play a more prominent role in the economic development of Uganda. Services accounts for almost 50.2% of Uganda's GDP (2013/14) with tourism and travel taking lead in sector contributions.

Currently, efforts are underway to develop a Uganda national Services policy. As per the current draft[10], the policy seeks to create a conducive environment and nurture services sector competitiveness for Uganda's growth into prosperity. The policy aims to, among other things, strengthen the regulatory and institutional framework to support the development of investment and trade in the services sector.

A number of studies done by UNCTAD, ILEAP, ICSTD, and World Bank express Uganda's services regime as fully liberalized with absence of regulations and in some cases outdated policy and legal framework to support the growth of the sector. In addition, the capacity to supply and also trade in services needs to be enhanced. It is therefore important that Uganda develops and strengthens institutional and firm level capacity to improve competitiveness. Having liberalized services without establishing regulations in some key sectors that have been committed under EAC puts Uganda in a critical situation.

The Cotonou Partnership Agreement provides a framework under which both parties can negotiate the agreement on services. Article 41 (2) Parties reaffirm their respective commitments under the General Agreement on Trade in Services (GATS) and underline the need for Special and differential treatment to ACP suppliers of services. Clause (3) provides for progressive liberalization in trade in services as provided for in Article XIX of GATS. It also states that there will be sympathetic consideration of the ACP states' priorities for improvement in the EC schedule with a view to meeting their specific interests. Clause 5 states that the community shall support the ACP states effort to strengthen their capacity in the supply of services.

In light of the above, the negotiations for the EU-EAC-EPA agreement on Services and subsequent agreement must definitely take cognizance of the different flexibilities for developing countries enshrined in the Cotonou partnership agreement, which may give them a leeway to negotiate a better agreement responding to their unique position and in line with their development aspirations. In addition, any negotiations undertaken should take into account the of the status of all EAC Partner states; more especially the 4 who are still LDCs and provide appropriate flexibility in the sequencing of liberalization commitments.

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Since both parties are members of the WTO, they should respect each others rights and obligations under GATS. GATS Art XIX permits developing countries to open fewer sectors, liberalise fewer types of transactions, progressively extend market access in line with their development situations and attach market access conditions when making access to their markets available to foreign services suppliers. Further, Article V of the GATS deals with economic integration and provides for more flexible requirements governing regional trade agreements for developing countries. This could also be used as a guiding principle while undertaking negotiations with EU.

3.2 EU Proposal

One of the major interests of EU in negotiating Services with other countries is to enhance trade liberalization by eliminating barriers to trade in services. The text that the EU uses to negotiate varies between countries depending on the policies on liberalization of services areas, history of negotiations,[11]key areas in the negotiations is the Services. The Cariforum negotiated a comprehensive liberalization framework covering sectors of interest to their economies. This included financial, tourism, ICT and E-commerce. There is a possibility that the EC may use what they achieved under CARIFORUM as a basis for negotiations with the EAC.

3.3 Recommendations

(i) Guiding Framework

The future guiding framework for negotiations should be clear at the onset. It is clear that EPA services negotiations between EU and LDCs like Uganda and the other 3 EAC LDC partner states is GATS plus and therefore modalities for negotiations must be properly analysed. The ESA approach to the EPA negotiations is one based on the GATS architecture. Any attempt to adopt a different architecture based on a "modal approach" may lead to protracted negotiations. While the ESA proposal sets out common obligations and disciplines for the four modes of supply of services, the EU one establishes separate disciplines for each mode of supply and therefore departs from the GATS approach. So far both parties have agreed to work on a merged EC-ESA text, but unfortunately divergence on certain key elements like mutual recognition of qualifications and domestic regulations on the MFN clause continue to persist.[12]

(ii) Scope

(a) Uganda and other EAC Partner states should carefully look at the scope of the proposed agreement. For instance in the CARIFORUM –EPA services excludes air traffic rights; services supplied in the exercise of governmental authority and procurement of services by governments, employment and immigration policies.

11 Page 1 Services ---
12 ICTSD, 2010 Bridges news on E-ESA EPA trade negotiations

(b) In the case of the schedule of commitments under E-Cariforum EPA, sector coverage was 65%, and 75% for Cariforum LDCs and MDCs and 85% for Dominican Republic. They took account of the various levels of development and same should be reciprocated in the EAC-EU negotiation framework.

(c) In the case of Uganda, a critical analysis has to be made to trade off sectors for liberalisation. Further liberalization could therefore be reserved for sectors where the country has comparative and competitive advantage and where there is absence of specialised skills or capacities and where there is a high need for investment. In order to ensure that the country does not lose out on labour opportunities arising out of these investments, economic needs assessment needs to be undertaken by the Ministry of Labour which can be used as a basis for negotiations.

(d) Progressive Liberalisation

It is evident that services sector export readiness and performance varies and thus the need to sequence liberalisation in a more practical phased manner. This can be borrowed from the modalities on goods where parties agreed to have asymmetric and gradual opening of the EAC to EU goods with a view of taking into account the differences in levels of development. The same was reciprocated in the E-Cariforum EPAs where the principle of asymmetry is commensurate with Cariforum countries capacity to adjust; preserve space for their countries to pursue national processes of economic development and regional integration process.

Given that Uganda is as an emerging services exporter, the growing trade potential could be threatened by liberalization. A clear analysis has to be made of objectives winning and gaining sectors and subsectors within the Ugandan services economy, including in the EU-EAC-EPA context the value of Modes 1 and 4, as well as the potential impact of development cooperation[13]. The EU must recognize that liberalization has been undertaken unilaterally, and may seek compensation for it and link additional market access to provision of regulatory capacity building and strengthen completion bodies. In addition, the EAC will have to develop regulatory provisions that aim at preventing anti competitive practices and abuse of dominance in different services sectors. Considering that the EU has advanced services sectors, full liberalization may disadvantage EAC services suppliers.

The EAC partner states should work within the provisions and flexibilities of the GATS and focus on developing their human resource and technological capacity to strengthen and facilitate increased competitiveness in global services trade. Commitment to further liberalization by EAC Partner states should be linked to delivery of capacity building support like it was done in the WTO Trade Facilitation Agreement.

13 UNCTAD, 2011 National Services Policy Review – Uganda pp.26 UNCTAD/DITC/TNCD/2010/1

(e) Temporary or Emergency Safeguards

Trade defense provisions with safeguards allow each party to re-introduce temporary measures or regulations in case of serious balance of payment and external financial difficulties or threat to the domestic market. Uganda and the EAC should push for this provision as it provides sufficient policy space to achieve similar development objectives.

(f) MFN Clause

In the E-ESA negotiations, the MFN clause was interpreted differently due to divergent interests. In the case of ESA countries, they demanded EU to bind commitments on mutual recognition for professional qualifications whereas the EU is responded with an endeavour clause. In the case of EU, they are demanding for extension of preferences given to third parties like South-South Cooperation to be automatically granted to them.

Uganda and other EAC states should be careful having a similar clause in the agreement. As proposed by ESA states, the EU should guarantee that measures relating to qualification requirements and procedures do not constitute disguised restrictions to trade and consultations should be made prior to adoption of any new regulation on trade in services.

The issue of reciprocity cannot be avoided in such agreements; however it is critical that at this stage EAC partner states demand for tagged reciprocity where countries will be able to reciprocate until such a time their capacity to competitively supply has been strengthened.

(g) Technical and Development cooperation

As was done in the E-Cariforum, a chapter on economic and development cooperation aiming to enhance the competitiveness of the EAC economies, addressing supply capacity and enabling the EAC members in implementing the EPA smoothly is a must.

The EU-EAC-EPA agreement has a strong economic and development cooperation component, aimed at addressing supply-side constraints, impediments to business and enabling EAC Partner States to build capacity to exploit the trade opportunities created by Agreement. This can be effectively used in the context of EAC efforts in setting up effective regulatory and institutional frameworks.[14]

The commitment by EU to the development chapter is an important aspect that should not be ignored. As was noted above, the EU has failed to support the Cariforum countries and this ultimately affected implementation of the EPAs.

14 UNCTAD, 2011 National Services Policy Review for Uganda, pp. 26

(h) Private Sector Cooperation

Uganda must push for mutual recognition of qualifications. It is anticipated that professional bodies in EU and EAC can enter into MRAs. Furthermore, domestic regulations relating to qualification requirements and procedures should not constitute as disguised restrictions to trade.

(i) WTO LDC services Waiver

Uganda and other 3 partner states can demand for technical cooperation linked to operationalization of the WTO LDC services waiver scheme. This will definitely be a positive step to encourage private sector partnerships; cooperation with professional agencies or bodies; and providing technical and financial support for domestic capacity and firm level competitiveness.

4.0 TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)

Trade related Intellectual property issues have become increasingly important in regional trade agreements. Although these are issues are also addressed at the multilateral level i.e. in WTO and the World Intellectual Property Organisation, developed countries have seen it fit to include them in bilateral trade agreements to make them more binding. It is important to note that in WTO, the least developed countries have special and differential treatment and therefore they are treated differently from developed and developing countries in terms of implementation periods and coverage of protection among others. Most bilateral agreements tend to treat all countries the same and therefore do not provide special and differential treatment as provided for in WTO.

Article 46 of the Cotonou Partnership Agreement especial clause 2, 3, 4 and 5 should guide the negotiations on IP between EU and EAC/Uganda.

Clause 2 states that the parties will adhere to the Agreement on trade Related Intellectual Property rights in WTO and the Convention for Biological diversity.

Clause 3 states that Parties will accede to all relevant international convention on Intellectual, industrial and commercial property as referred to in part 1 of the TRIPS Agreement and in line with their level of development and

Cause 4 states that parties may consider conclusion of an agreement aimed at protecting trademarks and Geographical indications for products of particular interest of either party.

Clause 5 refers to cooperation in preparation of laws and regulations for the protection and enforcement of IPR and prevention of abuse of such by rights by right holders and infringement by competitors.

This clearly shows there is no obligation to negotiate the EPAs. Several issue emerge from this Article:

(i) Since both parties are members of WTO, they are already guided by the principles enshrined in the TRIPS Agreement;

(ii) The Article recognizes that parties have different levels of development which may determine their choice of different conventions they may accede to;

(iii) The conclusion of agreement aiming at protection of trademarks and geographical indications on products of interest for both parties is left optional;

(iv) Cooperation

It is therefore clear that Article 46 of the Cotonou Agreement does not require a detailed substantive EPA type approach to governing the IPR relationship between the EC and the EAC as both parties are already members of the WTO and therefore have this as the governing regime for their IPR regime.

In case the two parties agree to negotiate the IPR agreement, the WTO TRIPS Agreement should form a basis. Recognizing the provisions of WTO, there should be a special provision that provided for special provisions for LDCs so that they will not be required to apply the provisions of the agreement other than Art 3, 4, and 5 and the provisions of sub section 2 and 5. The agreement should also recognize the different decisions by the General Council waiving the obligations under the TRIPS Agreement i.e. TRIPS and Public Health, extension of the transitional period for the protection of IPR, extension of the transitional period for the protection of patents.

It is also important that parties should recognize that protection of IP should be commensurate with their level of development of member states and their development needs.

4.1 Transfer of technology

One of the critical issues still under discussion in WTO is the transfer of technology to LDCs as per Article 66.2 which calls upon developed country WTO members to provide incentives to their enterprises and institutions to promote technology transferto least developed countries to improve their technological base. However, LDCs have been complaining that what developed countries report in in the annual reviews falls under technical cooperation as stated under Article 67 and not technology transfer. And yet this article applies to all developing and LDCs unlike Article 66.2. It is for this reason that LDCs have requested the review of the reporting mechanism so that it is more specific to LDCs and with clear explanation of what type of technology has been transferred to recipient countries.

With regards to the negotiations with EU, Uganda should therefore ensure that the chapter on technology transfer mandates EU to provide clear annual report on what type of technology has been transferred to Uganda.

The EAC and Uganda in particular will have to reexamine its IP laws to ensure that they provide adequate policy space as provided for in the WTO Agreement and other provisions.

They should also ensure that the dates of protection of the different IP rights are the same as what is provided for in the WTO Agreement. For example in one of the draft seen, EU was suggesting to protect TM for a period of 10 years instead of 8 years.

Uganda needs to identify its development interests specifically on the linkage between IPRs industrial policy linked with economic and social consideration.

Another important consideration will be for Uganda to take stock of its implementation experience with the TRIPS Agreement recalling that recent negotiations on the duly motivated request under Article 66.1 and the amendment of the TRIPS Agreement and see what has changed not only in terms of implementation of the different IP legislations but also in accessing what the implication of this legislation has been to the national development objectives specifically on industrial policy. Uganda and other LDCs will have to think ahead and examine what all this will mean systematically at the multilateral level. For example in the event that Uganda requests for the extension of the waiver under Art 66, what arguments will it use when it has given full comprehensive and far reaching. Uganda needs to ensure that whatever agreement they come up with EU, it does not lead to tighter IPR regime, since whatever they will agree on with EU will be applicable to other WTO members. Therefore, the agreement should rather focus more on technical cooperation and capacity building for institutions rather than legal document on IPR.

One of the challenges of negotiating an IP agreement with EU is that EAC does not have a harmonized IP regime. Efforts have been made to develop a Pharmaceutical Manufacturing Plan through the use of WTO flexibilities however this is limited in scope. In addition, the implementation of IP is at different levels Considering that the EAC does not have a harmonized IP system neither do they have an EAC IP policy/act, it may be difficult to negotiate a legally binding document partner states have an option From the above, it is clear that Uganda can negotiate from the point of view of an LDC and ensure that the different flexibilities for LDCs enshrined in the TRIPS Agreement are integrated into the EPAs.

Uganda should also examine the different IP laws to ensure that they address all our development needs.

In case Parties agree to negotiate a comprehensive IPR agreement, Uganda needs to review all the laws to ensure that the laws include the different flexibilities, which addresses its development concerns. Below are some of the specific recommendations:

4.2 Copyright

(i) The existing copyright law should be able to have a provision for compulsory licensing and parallel importation to facilitate importation of educational materials;

(ii) The law should allow open source of software and public access to digital information for educational research and cultural purposes;

(iii) Implementation of the law should be left to national entities;

(iv) The dates of protection should be synonymous with what is provided for in WTO.

4.3 Patents and Public Health

The laws should recognize the different transitional periods for LDC provided for under the TRIPS Agreement. These include the transition periods that apply to the general IP provisions and the other which is specific to pharmaceuticals i.e. until 2021 and 2033 respectively. In negotiating this issue, the EAC which is home to four LDC states should take cognizance of these transition periods and utilize the TRIPS flexibilities while domesticating them in their laws. They should ensure that this policy space secured at the multilateral level is not lost by concluding a binding and restrictive agreement on IP with the EU under the EPA.

4.4 Protection of Plant varieties

Considering that Uganda has competitive advantage in genetic resources and traditional knowledge and folklore which can competitively be used in patents and copyright, any discussion to this effect should take into account the demands that developing and LDCs have been making in WTO while discussion Article 23.7 on the review of relationship between Convention of Bio diversity (CBD) and the TRIPS Agreement.

(i) Protection of Plant varieties should be on a sui generis system;

(ii) Should require patent applicants that have used genetic resources, traditional knowledge to disclose the source of the genetic resource and traditional knowledge used in their invention.

(iii) It should also be mandatory to show evidence of prior consent and evidence of benefit sharing agreement

4.6 Conclusion

Uganda and other EAC Partner states should ensure that any discussion on IP enforcement does not add extra burdens or obligations to its institutions as per TRIPS Agreement. In stead, they should focus more on technical and financial support to its domestic institutions to be able to implement the WTO TRIPS Agreement. The different flexibilities provided to LDCs in the TRIPS Agreement should be part of the agreement. In addition Partner States should ensure that EU takes cognizant of efforts made to establish an EAC pharmaceutical manufacturing policy and plan based on the TRIPS flexibilities. EAC Partners states will also need to develop an IP policy that recognizes the different obligations of LDCs and developing countries in WTO. This could be used as a basis for negotiations.

5.0 TRADE, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT (TESD)

The EU is an ardent advocate of the reconciliation between trade, environment and sustainable development. This commitment was entrenched in the Cotonou Partnership Agreement (CPA) Articles 1&2 that reaffirm that the principles of sustainable management of natural resources and the environment are to be applied and integrated at every level of their partnership, as part of their overriding commitment to sustainable development; and in the general commitment of reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development. Article 32 of the Cotonou Agreement includes environment and natural resources as thematic and crosscutting issues.

Against this background, the EU tabled a proposal in January 2012 on Trade, environment and sustainable development (TESD) Although the parties agreed to defer negotiations of TESD to a later date, this proposal provides a good starting point for analyzing EU's positions on this issue. This section will examine the EU proposal in the context of the global debate around TESD and the implications of these proposals on Uganda/EAC's development. The section will conclude with specific recommendations to guide Uganda/EAC's negotiations.

5.1 The Trade, Environment and Sustainable development debate

The interaction between Trade, environment and sustainable development; and how they can be made mutually beneficial has been an issue of intense debate at national and global levels. It has been universally recognised that economic and environmental policies are strongly interlinked and have differing impact on sustainable development. Various trade policies can affect the environment while policies designed to protect the environment can affect trade. For example, for the past 50 years, the volume of world trade has grown an average six percent every year. However during the same period the world has also seen enormous environmental degradation; pollution has increased and many of the world's natural resources have been seriously depleted. It is estimated that since 1970, some 30 percent of the planet's natural wealth has been lost. Given this relationship the link between environment and trade policies has become a topical subject.

Global debate around TESD can be traced back to the 1972 United Nations Conference on the Human Environment in Stockholm, Sweden. The central themes of the conference were:

- The interdependence of human beings and natural environment
- The links between economic and social development and environmental protection;
- The need for a global vision and common principles.

This Conference was followed by the UN Conference on Environment and Development (UNCED, the Earth summit) held in Rio de Janeiro in 1992. The Rio Declaration on Environment and Development firmly established the inherent link between environmental issues and development, stating, in its Principles 4, that "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be in isolation from it." The Declaration further stressed the need for translating the Rio principles into trade and environmental policies at national and global levels. The Rio conference also recognized the contribution that the multilateral Trading system could make on sustainable development.

The WTO agreement recognizes sustainable development as a central principle, and it is an objective running through all subjects in the current Doha negotiations. The Preamble to the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") includes direct references to the objective of sustainable development and to the need to protect and preserve the environment. WTO members recognize that "their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development." A number of Agreements also contain environment related aspects. These include the Agreement on agriculture (AOA), sanitary and Phyto-Sanitary (SPS) Measures, Subsidies and Countervailing Measures (SCM) and the Trade Related Intellectual Property Rights (TRIPs).

The 2001 The Doha Ministerial Declaration which launched the current negotiations strongly reaffirmed this mandate (see Paragraph 6). Ministers also called on the Trade and Environment and Trade and Development committees to act as forums for identifying and debating the environmental and developmental aspects of the negotiations, in order to help achieve the objective of sustainable development (see Paragraph 51). The WTO Doha work programme includes negotiations on trade and environment; and sustainable development has been a standing item on the agenda of the Committee on Trade and Environment (CTE).

Beyond the WTO, there are a number of Multilateral Environmental Agreements (MEAs) which include trade measures. The trade measures include regulating or restraining trade in particular substances or products, reporting requirements on the extent of trade in particular products, labeling, requirements for movement documents, notification and consent to export or import particular products, Export and import bans, fiscal and non fiscal measures.

The biggest challenge facing policy makers and practitioners in the field of trade and environment is how to reconcile the two objectives of environmental protection and trade liberalisation; and to actualize, define and contextualize a mutually supportive relationship. While environmental protection is a shared goal between developed and developing countries, they differ on approach and instruments needed to achieve trade and investments without harming the environment. Advocates of environmental provisions points to the high correlation between trade and environment; and argue that omission of adequate safeguard measures in trade agreements encourage developing countries to lower their standards in order to create a competitive advantage that would attract investments and lower prices of export goods. Consequently, the provision of environmental issues in trade agreements provides the opportunity to include trade sanctions against violation to ensure effective enforcement of environment commitments and obligations by Parties.

On the other hand many developing countries have resisted the inclusion of environmental provisions in trade agreements on a number of grounds including: high potential for negative economic impact through restricting market access; high compliance costs which can be significantly outweighed by any perceived environmental and developmental benefits; and weak capacity to adapt and comply. Thus many developing countries have been cautious about incorporating trade and environment at multilateral level and remain wary of incorporating them in regional trade agreements for fear of prejudicing their multilateral positions.

5.2 The EU Proposal on TESD

The EU's proposal on TESD is dated 31st January 2012 (Annex ...). The proposal is derived from the CPA; on the Treaty that established the EU; and on the current international conventions on environment, sustainable development and labour standards i.e. :

- The Agenda 21 on Environment and Development of 1992;
- The Johannesburg Plan of Implementation on Sustainable Development of 2002;
- The Ministerial declaration of the UN Economic and Social Council on Full Employment and Decent Work of 2006;

- The ILO Declaration on Social Justice for a Fair Globalization of 2008
- The CPA Articles 1 and 2 which commits parties to promote the development of international trade in such a way as to contribute to the objectives of sustainable development, in accordance with their overriding commitment on sustainable development; and article 32 (Environment and natural resources) and Article 49 on trade and environment.
- Article 2 of the EU Treaty states that its objectives consist in "the harmonious and balanced development of economic activity, sustainable non-inflationary growth, which should respect the environment, a high degree of convergence in the behaviour of their economies, a high level of employment and social protection, improvement in the level and quality of life, economic and social cohesion and solidarity between member States.

Against this background Article 1(2) of the EU Text therefore states that: "The Parties reaffirm their commitment to pursue sustainable development, whose pillars – economic development, social development and environmental protection – are interdependent and mutually reinforcing. They underline the benefit of considering trade-related labor and environmental issues as part of a global approach to trade and sustainable development".

The text covers issues related to labour standards. The proposal calls upon the parties to reaffirm their commitment to promote the development of international trade in a way that is conducive to full and productive employment and decent work for all. The EU proposal commits the parties to:

- Consult and co-operate as appropriate on trade related labor issues of mutual interest.
- Respect, promote and realize in their laws and practices in their respective entire territories the internationally recognized core labor standards, as embodied in the fundamental ILO Convention. The core standards include:
    - the freedom of association and the effective recognition of the right to collective bargaining;
    - the elimination of all forms of forced or compulsory labor;
    - the effective abolition of child labor; and
    - The elimination of discrimination in respect of employment and occupation.

- Ratification of the fundamental ILO Conventions; and their effective implementation

Regarding environmental protection, the EU text calls upon the parties to enhance the mutual supportiveness between trade and environment; to consult and cooperate as appropriate with respect to negotiations on trade-related environmental issues and other trade-related environmental matters of mutual interest; and to commit to achieve the objectives of the United Nations Framework Convention on Climate Change and its Kyoto Protocol and to cooperate on the development of the future international climate change framework in accordance with the Bali Action Plan and the Cancun Agreements.

The text further calls upon the Parties:

- To facilitate and promote trade and investment in environmental goods and services, including through addressing related non-tariff barriers.

- to facilitate the removal of obstacles to trade or investment concerning goods and services of particular relevance for climate change mitigation, such as sustainable renewable energy and energy efficient products and services, including through the adoption of policy frameworks conducive to the deployment of best available technologies and through the promotion of standards that respond to environmental and economic needs and minimize technical obstacles to trade.

The text also includes provisions for the conservation and sustainable management of forests; the conservation, restoration and sustainable use of biological diversity and ecosystem services in accordance with the objectives of the CBD and other relevant Multilateral Environmental Agreements (MEAs)

The EU Text calls upon the parties to work together on trade related aspects of environmental and labor standards; and to cooperate in a number of areas including cooperation in international for a addressing labour and environmental aspects of trade and sustainable development as provided for in the WTO, ILO, UNEP and MEAs.

5.3 The Implication

There has been a wide ranging conceptual debate on the link between international trade and labour standards; and trade and the environment; and on the effectiveness of these linkages. Hence the differences of opinion between developed and developing countries on the inclusion of labour and environment issues in the WTO. However many regional and bilateral Trade agreements included these issues, thus going beyond existing multilateral commitments.

These commitments have implications on the EAC Partner States' trade since their key trade sectors i.e. agriculture; fisheries and tourism are susceptible to the environment and to climate change. The EAC partner states would face challenges of restrictions of access of their products to the EU market if they fail to comply with the TESD commitments.

Complying with the proposed commitments will entail enhancing their capacity to efficiently and effectively coordinate and manage the environment and trade issues at both national and regional level. This will require technical assistance, capacity building and adequate resources.

5.4 Recommendations

Uganda and the EAC negotiators should enhance their capacity to understand the dynamics surround the environmental, labor and trade issues at both the multilateral and bilateral trade negotiations and in the UN.

Since each country has their own laws and standards according to their history and economic, social and political reality, it may require harmonization labour and environment standards at the EAC level before negotiations with the EU.

The TESD agreement should not have binding commitments but should focus on technical and capacity building to enable EAC Partner states comply with the various labor and environment provisions under the UN and other bodies.

6.0 TRANSPARENCY IN GOVERNMENT PROCUREMENT

Transparency in Government procurement is one of the negotiating issues in the EAC – EU EPA rendezvous clause. Government Procurement refers to the purchasing activities of government controlled activities.[15] It comprises the expenditures of government on goods and services (including projects such as building of schools, roads, dams and industrial complexes, excluding personnel costs).[16]

The role of government in its procurement of goods and services typically accounts for 10 -15 percent of GDP for developed countries, and up to as much as 20 percent of GDP for developing countries.

There has been a sharp division between mainly developing and developed countries whether to have or not to have a government procurement Agreement in the WTO binding all members. At the moment there is a Plurilateral Government Procurement Agreement (GPA), which members are free to join or not join. There are a few developing country that have joined this agreement, as they {developing countries} concerned about the adverse social, economic and developmental implications for their economies.

The proposal to introduce a multilateral agreement on "transparency in government procurement" to deal only with transparency aspects, thus leaving members the freedom to determine whether or not to grant national treatment for foreign companies was also rejected by developing countries. The Singapore WTO Conference (1996) agreed "to establish a working group to conduct a study on transparency in government procurement practices, taking into account national policies, and based on this study, to develop elements for inclusion in an appropriate agreement. Therefore since 1996 many developing countries have clearly indicated that they were not ready to negotiate an agreement on government procurement.

The EU has been a consistent and strong proponent of the inclusion of a government procurement agreement in the WTO; and is a member of the Plurilateral GPA. In the WTO, the EU together with a number of developed countries pushed for an agreement on transparency in government procurement; which they hoped would be extended ultimately to areas of market access, MFN and national treatment for foreign firms. However the developing countries, at the Cancun WTO Ministerial meeting in 2003, asked that the issue of transparency in government procurement be dropped from the Doha negotiating agenda. In July 2004, the General Council made a decision to drop it from the Doha work programme.

15 Government Procurement is one of the so-called 'Singapore Issues' which are perhaps the most contentious of the issues that have been discussed or negotiated in the WTO since its establishment in 1995. The other Singapore Issues are investment, Competition Policy and Trade Facilitation.

16 South Centre, 'Government Procurement in Economic Partnership Agreements and FTAs', Policy Brief No. 15 of 2008 at 2

Outside the WTO, the EU has continued to push for binding rules on government procurement in the Free and Bilateral Trade Agreements. The EU is pushing for the negotiation of this issue in the EU-EAC EPA rendezvous clause. The EU's position can be discerned from the EU-CARIFORUM EPA. Public procurement is provided for in Chapter 3 of the EU-CARIFORUM EPA text. The text provides for principles of transparency, openness and due process in government procurement practices. The Text puts onerous obligations on the Partner to ensure transparency in government procurement. These include having in place, inter alia:

- Procedural guarantees that increase information flow on procurement opportunities, notification of specific procurement opportunities and guarantees that all suppliers will have access to the same information on an equal basis and provision for review mechanisms when disputes arise.
- Prompt publication, in appropriate publications including officially designated electronic media, of any law, regulation, judicial decision and administrative ruling of general application, and procedures, all modifications to such measures.
- Provision for effective dissemination of the tendering opportunities generated by the relevant government processes.
- Publish in advance a notice of intended procurement

The opening of tenders and awarding of contracts should be done in fair and transparent manner and the results of the procurement process should be promptly disseminated; and on request, any eliminated supplier should be informed of the reasons for the rejection of its tender and of the relative advantages of the successful supplier's tender. The text also allows the supplier to challenge domestic measures. Thus Parties have establish, identify or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of covered procurement.

6.1 Implications

Clearly EU's interest in this agreement is to access the lucrative government procurement market of the EAC countries with far reaching implications on their economies.

Government procurement is a major policy tool to boost the domestic economy and participation of locals in economic development and benefits by enacting national policies to give preference to local firms, suppliers and contractors.

Thus the ability of governments to procure from firms of its own choice and to provide preferences to local producers of goods and suppliers of services can assist governments to attain social objectives, to pursue an industrial policy; and it can also be an instrument for job creation and macroeconomic management.

It is also a major policy tool for achieving a balance in the participation in the economy of various communities within a nation. Similarly, it can be used to redress regional imbalances, for instance by specifying that certain regions be allocated a particular share of procurement business.

Most of the procurement laws in EAC provides for preference schemes for domestic suppliers especially small and medium sized enterprises. In addition, regulations guiding provision of contracts based on local content have also been or are being established. Having a procurement agreement covering market access will mean that the same preference schemes will be accessible to EU based firms thereby disadvantaging EAC firms.

If these provisions are included in the EU-EAC EPA; EAC partner states would find it increasingly difficult to devise their own development policies, including for building the capacity and competitiveness of local enterprises. The EAC partner states would also no longer be allowed to support their local industries therefore many local companies and firms may not be able to survive the competition resulting from such an agreement. The EAC partner states also lack the institutional, regulatory and administrative capacity to respond to the requirements of a potential agreement in this area and also to conduct procurement per some of the proposed provisions. The inclusion of the Most Favoured Nation (MFN) Clause will also constrain the EAC's ability to give preferences to certain foreign countries of their choice.

Another very important reason for not signing market access government procurement provision is the issue of the excessive compliance costs. Several studies have confirmed that government procurement transparency costs are likely to entail high compliance costs. Choi17 argued that the immediate economic costs of accession to a government procurement agreement might be smaller domestic supply, higher unemployment and a greater bureaucratic burden resulting from the need to comply with detailed transparency and procurement guidelines and reporting requirements.

6.2 Recommendations

Given the importance of government procurement policy as an important tool required for economic and social development and nation building; and given the competing development priorities and limited resources within the EAC Partner States, it is imperative that the EAC Partner states retain the right to have full autonomy and flexibility over their procurement policy. Currently there is insufficient evidence how a deal on Transparency in Government Procurement will support EAC partner states' development strategies. Therefore the EAC should negotiate for technical assistance and cooperation, and transparency and should desist from negotiating a binding agreement with market access and MFN provisions.

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7.0 INVESTMENT AND PRIVATE SECTOR DEVELOPMENT

Investment rules are about establishing the terms and conditions for private investment in the parties' respective territories. They are designed predominantly to protect investors abroad. The EU has been an ardent demandeur of binding rules on investment. It has pursued this position in a number of fora including the WTO; in bilateral negotiations on FTAs, in the various Bilateral Investment Treaties and also in the EPAs.

There have been attempts to establish multilateral rules on how countries regulate investment. Efforts to establish international rules on investment date back to 1948[1]. In particular, investor protection, market accesses for foreign investors and post admission provisions have generated a great deal of debate over the question of whether a multilateral framework for investment should be negotiated under the auspices of the World Trade Organization (WTO). There has been increasing disagreement on the potential merits of a WTO agreement on investment. The debate is complicated by the fact that there is as yet no evidence linking the conclusion of (bilateral) investment agreements with increases in Foreign Direct Investment (FDI) inflows in the developing world.

Broadly, there are two camps; the developed countries insisting on binding rules on investment, while most developing and poor countries insisting on policy space at national and regional levels for them to be able to manage their investment in the interest of development. Developing and poor countries have been arguing that binding agreement on investment will have serious implications on their economies especially given the fact that the complexity between trade and investment has not been fully understood. Most developing countries are also opposed to committing themselves because of the fear that such rules may undermine their sovereign right to pursue their own domestic development and industrial policies. The impasse between developed and developing countries on this issue was in large partly to blame for the breakdown of the WTO talks at the Cancun Ministerial in 2003. It became clear at Cancun that no consensus could be reached to begin negotiations on investment, which was therefore dropped from the Doha Round agenda.

7.1 EU's Position on investment in the BITs

Over the past decades EU member states have signed a number of Bilateral Investment Treaties (BITs) with both developing and developed countries. The main features of these are rather well known and have remained constant in the past many years. Among these main features are the following:

- The right to entry and establishment which provides foreign investors the rights to entry and establishment in member countries without (or with minimal) conditions and regulations.
- "Non-discrimination" principles which includes National Treatment , the Most Favored Nation status and Fair and Equitable Treatment. They accord foreign investors and to the equal treatment of foreign investors from other countries.
- A very broad Scope and definition of investment including, inter alia, portfolio investments, credit, intellectual property rights (IPRs) and even non-commercial organisations, and in all sectors except security and defence.
- Prohibition of performance requirements (e.g. regulation on limits and conditions on equity, obligations for technology transfer, measures for using local materials and for increasing exports or limiting imports).

- Obligations to allow free mobility of funds into and out of the country by investors, thus restricting or prohibiting regulations/controls on funds transfer.
- Provisions for the protection of covered investments from both direct and indirect expropriation except in public interest. Indirect expropriation includes the loss of goodwill and future revenue/profits as a result of a government measure or policy.
- A dispute settlement system which also investors to bring cases against a state.

7.2. EU's investment position in the EU- CARIFORUM EPA

The EU and CARIFORUM signed a comprehensive EPA in 2009, which contains extensive provisions on investment. The CARIFORUM Agreement requires the Parties to remove restrictions on foreign ownership of their economy in sectors where they undertake positive commitments to liberalize. It prohibits a variety of instruments that are commonly used to limit or screen foreign investment with a view to enhancing its benefits for the host economy. The Agreement also establishes an obligation of national treatment; and also precludes performance requirements that encourage economic linkages or protect domestic enterprises.

The Agreement establishes an obligation of most-favoured-nation treatment which could be read expansively to incorporate into the Agreement post-establishment obligations from other investment treaties, including access to investor-state arbitration. By combining provisions on services and investment, the Agreement expands upon market access commitments in other

trade agreements by including non-service sectors (such as the investment aspect), and raises the prospect of future claims by foreign investors in service and non-service sectors alike.

Although the Agreement does not contain an investor-state mechanism, its market access commitments will trigger post-establishment protections, including access to investor-state arbitration, that are available to European investors in other investment treaties.

7.3 Implications

In the EU EAC-EPA negotiations, the texts tabled by the EU in 2007 incorporate investment liberalisation and protection in the chapter on "Establishment, trade in services and E-commerce". This chapter covers liberalisation on trade in services as well as liberalisation of investment in services and non-services sectors (agriculture, industry, minerals). Foreign investment is defined as "establishment".

The EU approach to liberalise investment outside the services sector essentially means that:

- EAC countries are obliged to allow foreign companies to invest without primary conditions, but EAC countries can choose which sector they open up, or even choose to not liberalise any sector.
- Investments from the EU and other important investing and trading countries have to be treated equally.
- Once a sector is included in the EPA agreement, governments and parliaments are restricted in the way they can regulate national or foreign investors in that sector. For the included sector(s):
    - Foreign investors have to be treated in the same way as national investors or companies, whatever their character i.e. national treatment principle.
    - Governments cannot make an assessment of the potential economic, social and environmental impact before authorizing a new investment.
    - Governments and parliamentarians cannot impose limitations on the number of operations of (foreign) investors or on the value of their operations.
    - Governments and parliaments have to allow 100% foreign ownership and thus also allow mergers and acquisitions taking over national companies.

The latter three conditions are new "market access" rules that so far have never been included in any investment agreement outside the services sector. Now, the EU wants to include them in all future free trade agreements. Only by making "reservations" or excluding these national treatment and or market access rules in the EPA annex can EAC governments and parliaments keep some of their authority to regulate sectors they wish to liberalise.

The importance of investment and investment liberalisation is recognised in the EAC region. Taking the example of Uganda, the National Development Plan (NDP) of Uganda (2010-2015), states that "Government will continue to pursue outward oriented policy by encouraging foreign investment..." This is in line with what the EU is proposing on investment under the EPA.

However, this policy stance is qualified in Section 4.3.1 by identifying investment priorities for the country. These are:

- Investment that increases the stock and improves the quality of public physical infrastructure in the energy, transport, ICT, trade, tourism, and agriculture sectors
- Investment that improves the quantity and strengthen the quality of human resource especially in the health, education and skills development sectors
- Investment that promotes science, technology and innovation that are suitable to the achievement of socio economic transformation need by the country
- Investment that facilitates the availability and the production of critical production inputs needed in the agricultural, water, metrological and manufacturing sectors

The NDP also emphasis that government will continue to play an active role in the economic dynamics via policy intervention. Section 1.1.6 states that: "government will continue to play a more proactive role in the context of a quasi market economy".

Despite the general desire for Uganda to attract foreign investment, the country's NDP is selective as to what type of investment is required. Liberalisation of investment policy is useful and recommendable to the country only if it supports increased investment in the priority areas. This stance is different from the unqualified position that is being proposed by the EU.

7.4 Recommendations

The EAC Partner states should consider the following as regards investment aspect in the EPA:

- That the Agreement's definition of the right to regulate, and its exclusion of a commitment to privatize public undertakings, should be strengthened. The Agreement should also clarify that MFN treatment is limited to the pre-establishment phase of an investment. The commitment in the Agreement to liberalize the capital account should be subject to the balance of payments safeguard.

- That the Agreement should preclude the arbitration under other investment treaties of disputes concerning the rights and obligations of the Parties to the Agreement, or of disputes that are the subject to dispute settlement under the Agreement.

- There are no further commitments to investor-state arbitration in an EPA or in any other treaty. Future consents to investor-state arbitration should be limited to investment contracts that are concluded in anticipation of a specific project.

For the EAC, Foreign Direct Investment (FDI) is not wanted for its own sake but for benefits to the region deliverable there from. Therefore investment rules should support rather than constraint efforts to achieve regional development objectives. Investment liberalisation policy as an enabler of increased investment can only be an appropriate policy stance if it indeed increases FDI flows to the region, but most important, if the enabled investment supports national development priorities. Hence, the EAC position on investment liberalisation as proposed in the EPAs should be informed by regional development priorities rather than the hypothesised potential to increase FDI to the region per se. In particular, the EAC should not consent to sections that limit regional and individual countries' policy space to come up with new policies to respond to national and regional development challenges, and to address development challenges as they arise in future.

8.0 CONCLUSION AND RECOMMENDATIONS

The issues in the Rendezvous Clause, specifically investment, competition policy and government procurement are the so called “New issues” in the WTO whichhave been on the backburner since 1996.Negotiating binding rules in these areas will have far reaching implication on Uganda and EAC partner states since they will constrict the policy space that is so crucial for EAC governments to put in place policies to foster development. This is the very reason that developing countries , including Uganda and the EAC have rejected binding rules in these issues in the WTO. For the other negotiating areas i.e. TESD, Services and Intellectual Property, negotiations are ongoing in the WTO. It is therefore important that negotiations under the Rendezvous clause do not go beyond what has been agreed on in the WTO. In any case the EPAs are supposed to be WTO compatible.

The time period for the negotiations of the Rendezvous clause of 5 year after entry into force of the EPA Agreement (Article 3 (2))is a very short time to negotiate such complex issues. The EAC Partner states are not adequately prepared to negotiate the rendezvous clause with the EU given the fact that they have no adequate joint policy frameworks in these issues against which they can negotiate with the EU. The issue of capacity, both human and financial, is also a limiting factor.

Therefore the EAC partner states should negotiate for areas of corporation in these issues.

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(Endnotes)

1 Havana Charter

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ISBN: 978-9970-9386-7-4