

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

EAST AFRICAN COMMUNITY-EUROPEAN UNION ECONOMIC PARTNERSHIP AGREEMENT, TO BE OR NOT TO BE? WILL ECONOMIC PARTNERSHIP AGREEMENT UNDERMINE OR ACCELERATE TRADE DEVELOPMENT WITHIN THE EAST AFRICAN COMMUNITY?

A MINI THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE LL.M DEGREE IN INTERNATIONAL TRADE, INVESTMENT AND BUSINESS LAW IN AFRICA, UNIVERSITY OF THE WESTERN CAPE

BY

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DECLARATION

I, **MACHERU MARYANNE WAMBUI** declare that **East African Community-European Union Economic Partnership Agreement, to be or not to be? Will Economic Partnership Agreement undermine or accelerate trade development within the East African Community?** Is my own work and that it has not been submitted before for any degree or examination in any other university and all the sources I have used or quoted have been indicated or acknowledged as complete references.

Signed

Macheru Maryanne Wambui

May 2011



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DEDICATION

This work is dedicated to my dear mum. Thank you mum for your support and love which has kept me strong throughout my studies. Yours is a sacrifice that I will never be able to repay. You held my little hand and took me to school to start a journey that has brought me this far and throughout this journey your love and encouragement have made me what I am today. Mum you are a source of many rivers in my life. Thank you for always being there. I love you mum.

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LIST OF ACRONYMS

ACP	African Caribbean Pacific Countries
AEC	Africa Economic Community
AGOA	African Growth and Opportunity Act
BLNS	Botswana, Lesotho, Namibia and Swaziland
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
CET	Common External Tariff
CEN-SAD	Community of Sahel-Saharan States
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EBA	Everything But Arms
EC	European Commission
ECCAS	Economic Community for Central African States
ECOWAS	Economic Community of Western Africa
EEC	European Economic Community
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GSP	Generalised System of Preferences
IGAD	Intergovernmental Authority on Development
LDC	Least Developed Countries

MFN	Most Favoured Nation
RoO	Rules of Origin
RTA	Regional Trade Agreement
SACU	Southern Africa Customs Union
SADC	Southern Africa Development Community
SDT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TDCA	Trade, Development and Cooperation Agreement
UNECA	United Nations Commission for Africa
WTO	World Trade Agreement



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CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 Introduction

The economic relationship between the African, Caribbean and Pacific group¹ (ACP) and the European Union (EU) formally the European Economic Community (EEC) has a long history that stretches beyond 30 years of Lomé and Yaoundé Conventions.² Formally this relationship started in 1957 when the EU signed an Agreement in Yaoundé, Cameroon with the ACP countries³ committing to help the latter in promoting their economic and social development.⁴ The Yaoundé Convention allowed for non-reciprocal duty free market access of the imports from the ACP countries into the European market. The Convention which had a life span of five years was renewed in 1969 for further five years till 1975 hence Yaoundé II Convention.⁵ The structure established in Yaoundé remains the framework for many aspects of ACP-EU cooperation until to date.⁶ Yaoundé II Convention was

¹The ACP group is made up of Seventy Nine Countries, forty eight of them are Sub-Saharan Africa sixteen are from the Caribbean and fifteen are from the Pacific. The group comprises of the following countries: Angola, Antigua, Barbuda, Belize, Cape Verde, Comoros, Bahamas, Barbados, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Kinshasa), Cook Islands, Cote d'Ivoire, Cuba, Djibouti, Dominica, Dominican Republic, Eritrea, Ethiopia, Fiji, Gabon, The Gambia, Ghana, Grenada, Republic Of Guinea, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Solomon Islands, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Suriname, Swaziland, Tanzania, Timor Leste, Togo, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia and Zimbabwe. Available at <http://www.acspec.org/en/faq.htm> (accessed 1 September 2010).

²Kenya European Union Post Lome Trade Negotiations (KEPLOTRADE) available at <http://www.trade.go.ke>(accessed 10 December 2010).

³The ACP group of countries was created under the Georgetown Agreement entered into between the ACP countries and the European Union. The Georgetown Agreement defines the main objectives of the ACP group as follows; Sustainable development of its members states and their gradual integration into the global economy which entails poverty reduction as well as establishing a new fairer and more equitable worldwide order; Coordination of the activities of the ACP group to enhance implementation of the ACP-EU Partnership Agreement; Consolidation of unity, understanding and solidarity among ACP countries and finally establishment and consolidation of peace and stability in a free and democratic society. Available at http://www.acpsec.org/en/about_hm_website (accessed 3 November 2010).

⁴ACP-EU Development Cooperation, available at http://www.ACP-EU_Development_Cooperation.org (accessed 9 January 2011).

⁵ACP-EU Development Cooperation, available at http://www.ACP-EU_Development_Cooperation.org (accessed 9 January 2011).

⁶ACP-EU Development Cooperation, available at http://www.ACP-EU_Development_Cooperation.org (accessed 9 January 2011).

succeeded by a new Agreement known as the Lomé Convention which was signed in the capital of Togo in 1975.

The Lomé Convention was signed by nine European Commission (EC) member states and 46 ACP countries.⁷ The Lomé Convention like its predecessor established a trade system that was both preferential and non-reciprocal.⁸ Under the Lomé Conventions ACP countries enjoyed non-reciprocal trade preferences where many of their products were granted duty free-quota free access to the EU market whereas ACP countries could apply barriers on imports from the EU market. However, these preferences were not extended to non-ACP countries and therefore violated the requirements of non-discrimination principle among the World Trade Organisation (WTO) members as set out in Article 1.1 of the WTO's General Agreement on Tariffs and Trade (GATT) 1947.⁹

The illegality of the EU discriminatory measure came before the Dispute Settlement Body through the EC Bananas case¹⁰ as a complaint lodged by certain Latin American countries.¹¹ It was not until the EU lost the case twice that it was forced to retreat and seek a WTO waiver that saw the continuation of the EU-ACP relationship to the expiry of its term in 2000.¹²

After the expiry of the Lomé Convention in 2000, the parties agreed to negotiate a new trading arrangement in response to the shortcomings of the Lomé regime which was in conformity to the GATT/WTO requirements on non-discrimination. In 2000 in

⁷ACP-EU Development Cooperation, available at http://www.ACP-EU_Development_Cooperation.org (accessed 9 January 2011).

⁸UNCTAD and UNDP 'Trade Negotiations and Africa: Policy Issues for African Countries in Multilateral and Regional Trade Negotiations' (2006) 27 Series No.3, available at <http://www.unctad.org> (accessed 25 September 2010).

⁹Article 1.1 provides 'With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any 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'.

¹⁰WT/DS 27/1 European Communities-Regime for the Importation, Sale and Distribution of Bananas, available at <http://wto.org.innopac.uatac.za/english> (accessed 9 January 2010).

¹¹Destra MG 'EC-ACP Economic Partnership Agreements and WTO Compatibility: An experiment in North-South Inter-Regional Agreements?' (2006) 43 *Common Law Review* 1356.

¹²Udombana JN 'Back to the Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union' (2004) 40 *Texas International Law Journal* 69.

Cotonou Benin, the ACP countries and the EU member states signed a partnership Agreement commonly referred to as Cotonou Agreement. The Agreement is to remain in force for a period of 20 years. The Cotonou Agreement contrary to the previous Lomé Conventions requires the new trading arrangements between the parties to be WTO compatible.¹³

In this regard it was imperative that the EU-ACP countries enter into new trade Agreements that were WTO compatible, hence the Economic Partnership Agreements¹⁴ (EPAs). The EPAs key feature is their reciprocity and their non-discriminatory nature.¹⁵ African countries through various regional integration blocks have been negotiating EPAs with the European Union (EU).

The EPAs are meant to replace the Cotonou Agreement which governs trade relations between EU and the African, Caribbean and Pacific group (ACP). However, for the Least Developed Countries (LDCs) within the ACP group that have not negotiated EPAs with the EU, the Cotonou Agreement will still regulate the non-reciprocal trade benefits received under the Everything But Arms (EBA) Regulation.¹⁶

The EPAs were set to be signed by 31 December 2007 and begin implementation on 1 January 2008. The EU and ACP have been trading under a WTO waiver that expired on 31 December 2007. The EU-ACP waiver enabled the WTO partners to trade with non-reciprocal preferences by enforcing the special and differential treatment.

Due to expiry of the waiver, current trade under the Cotonou Agreement could not continue, in this regard the EU and ACP countries had to conclude a new trade Agreement except the LDCs who can continue enjoying non-reciprocal trade benefits

¹³UNCTAD and UNDP 'Trade Negotiations and Africa: Policy Issues for African Countries in Multilateral and Regional Trade Negotiations' (2006) 29 Series No.3, available at <http://www.unctad.org> (accessed 25 September 2010).

¹⁴EPAs are a trade regime meant to ensure the continued enjoyment of trade preferences by the countries that sign them on the EU market beyond the expiry of the Cotonou trade regime. Their compatibility with WTO shields them against legal challenges by any WTO member.

¹⁵WTO Compatible Trading Arrangements, available at <http://www.acp-eu-trade.org/index> (accessed 8 October 2010).

¹⁶EBA Regulation grants duty-free access to imports of all products from LDCs to the EU market, except arms and ammunitions without any quantitative restrictions (with the exception of sugar, bananas and rice for a limited period). Available at <http://www.ec.europa.eu/trade> (accessed 19 October 2010).

under EBA and South Africa.¹⁷ The EPAs must be geared towards trade liberalisation and the special trade preferences given by the EU cannot continue as was in the past.¹⁸ The Cotonou Agreement and the EPAs constitute independent legal entities but have common goals, namely; to promote sustainable economic development and contribute to poverty eradication by fostering the smooth gradual integration of the ACP countries into the world economy.¹⁹ It is in the context of these goals that EPAs are referred to as not only an instrument of economic and trade cooperation but also as an instrument of development in the ACP countries.

The EPAs will definitely have an impact on regional integration in Africa. Negotiations of the EPAs are being conducted separately within seven of the sub groupings under the ACP groupings.²⁰ The impacts of EPAs on economic developments of each member country cannot be underscored. Some of the African countries are of the view that EPAs do not represent their interests and that they are being forced into the EPAs.²¹

However, one cannot deny that there is need for a continued trade relationship between the EU and ACP countries. In essence EPA can be seen as a catalyst to the East African Community's ²² (EAC) development that will promote and consolidate regional integration and fast track the integration of the EAC into the global economy.²³

The EAC-EU EPA negotiations to open trade between the EAC and EU are still on the table. A deal was first initialled in 2007 between the EAC and EU. This was the Framework for an Economic Partnership Agreement (FEPA) drafted as a temporary stand-in to await a mutually agreed EPA but a formal deal has not since been

¹⁷South Africa continues to export under its own Free Trade Agreement (FTA) with the EU, the Trade Development and Cooperation Agreement (TDCA) which was concluded in 2000. Available at <http://www.acp.eu.trade.org> (accessed 15 October 2010).

¹⁸The main objective of the EPAs is the establishment of a free trade area in line with Article 24 of the GATT 1994 (liberalization of 'substantially all trade') see Why EPA Negotiations? Available at <http://www.acp-eu-trade.org> (accessed 25 September 2010).

¹⁹UNCTAD and UNDP 'Trade Negotiations and Africa: Policy Issues for African Countries in Multilateral and Regional Trade Negotiations' 17 Series No.3 available at <http://www.unctad.org> (accessed 25 September 2010).

²⁰ See Section 4.3 of this study for the ACP-EPA regional configurations.

²¹Wagner D 'Impacts of EPAs: The Scramble for East Africa' available at <http://www.pambazuka.org/en/category/features/65419> (accessed 1 August 2010).

²²EAC country members are: Republic of Burundi, Republic of Kenya, Republic of Rwanda, United Republic of Tanzania and Republic of Uganda.

²³EU-EAC EPA Negotiations held in Dar es Salaam in Tanzania on 9 June 2010, available at <http://www.eac.int/news> (accessed 25 August 2010).

reached because of an impasse over several key issues.²⁴ The implications of these issues have raised concerns among EPA critics for example former President of Tanzania Benjamin Mkapa arguing that EPAs are meant to stifle Africa's growth and that European efforts to secure access to EAC can be likened to the infamous 1884 Berlin-Conference, dubbed the Scramble for Africa.²⁵

The EAC countries were set to sign the EPA and usher in freer trade between the two regions by the end of November 2010.²⁶ The major question looming on the minds of the citizens of the regional block is whether the newly integrated common market which is still finding its feet will remain strong and united.

The final Agreement today remains unsigned; business between the two regions is therefore in an unpredictable and uncertain environment. The EAC-EU EPA negotiations have been dogged by a number of controversial issues including the meaning of market access to the EU by EAC countries and the strict rules of origin and strict sanitary and phytosanitary (SPS) measures²⁷ making it difficult for the EAC goods to penetrate into the EU market.²⁸

In addition a number of regional bodies including the East African Business Council and the East African Legislative Assembly have resolved to delay the signing of the EPA in its current form and urged the EU to work with the EAC to include interests of both parties.²⁹ Looking at this unpredictable scenario it is hard to guarantee that the EAC-EU EPA will contribute to trade development within the EAC.

On the other hand the conclusion of EAC-EU EPA negotiations, are seen as an avenue of promoting the regional integration process and notably supporting

²⁴Key unresolved issues are: losing export taxes that protect domestic industries against highly competitive and cheap European goods; EU concessions on economic and development cooperation and the Most Favoured Nation clause (MFN) that would force the EAC to duplicate for Europe any preferential agreements with for example China or India: Wagner D, Impacts of EPAs : The Scramble for East Africa available at <http://www.pambazuka.org/en/category/features/65419> (accessed 1 August 2010).

²⁵Wagner D 'Impacts of EPAs: The Scramble for East Africa' available at <http://www.pambazuka.org/en/category/features/65419> (accessed 1 August 2010).

²⁶EU-EAC EPA Negotiations held in Dar es Salaam, available at <http://www.eac.int/news> (accessed 25 August 2010).

²⁷Measures, regulations or procedures on food safety, animal and plant health standards taken by any WTO member based on scientific evidence. Available at <http://www.wto.org/english> (accessed 3 October 2010).

²⁸EU Faults Mkapa on EPA, *The Citizen Daily* via allfrica.com, 6 April 2010, available at <http://www.allafrica.com/stories> (accessed 28 August 2010).

²⁹Wagner D 'Impacts of EPAs: The Scramble for East Africa' available at <http://www.pambazuka.org> (accessed 1 August 2010).

measures taken by regional groupings themselves to open up trade with their neighbours and wider international community.³⁰ This is in the light that the EU is seen as the EAC's largest market therefore EAC will have a wider market access for its goods.

1.2 Research Objectives

This study aims at analysing the EAC-EU EPA negotiations and investigates the effects of EPA on trade development within the EAC having regard to the Common Market which came in force on 1 July 2010. In so doing the study will also draw experiences from the EU-SADC (minus) EPA negotiations where only five SADC member countries participated (Botswana, Lesotho, Mozambique, Namibia and Swaziland) and EU-CARIFORUM EPA negotiations.

Kenya being the only non-LDC within the EAC is in a dilemma of facing tariffs on its key exports to the EU market if it does not sign the EPA, yet doing so will foreclose its development³¹ options thus endangering its economy. Close to 80 per cent of the Kshs 70 billion worth of horticultural produce that Kenya exports every year is purchased in Europe.³² The Kenya Flower Council's Chief Executive Officer Jane Ngige made the following observation 'When EU governments begin to levy import taxes on Kenya's horticultural produce, we will lose a big pie of our market because the final prices to consumers will be much higher than those offered by many competitors who have since come up even within Europe itself'.³³

The other four EAC member countries being LDCs have the option to continue enjoying duty free quota free market access into the EU market under the EBA Regulation. Consequently they may not have immediate need to conclude a full EPA to avoid tariffs being increased on their exports to the EU. In light of the foregoing the

³⁰ Joint EAC-EU Communiqué on the Framework for an Economic Partnership Agreement (FEPA) and negotiations for the comprehensive EPAs dated 9 June 2010, available at <http://www.eac.int/new> (accessed 25 August 2010).

³¹ South Centre 'EPAs: The Wrong Development Model for Africa and Options for the Future' Analytical Note SC/TDP/AN/EPA/23 (2010) 4, available at <http://www.southcentre.org> (accessed 25 August 2010).

³² Omondi G 'Fear of exploitation mars East Africa trade talk' *Business Daily Nairobi* 16 November 2010 available at <http://www.tralac.org> (accessed 25 August 2010).

³³ Jane Ngige in an interview with *business daily Nairobi* 6 April 2010 available at <http://www.tralac.org> (accessed 25 August 2010).

study shall endeavour to explore possible alternatives for the EAC members to the current situation.³⁴

It is without doubt that there is a need to emphasize trade development in the EAC and more importantly give the newly integrated group more voice at the international arena.³⁵ The implementation of EPAs will inevitably pose a number of severe challenges especially loss of expected fiscal revenue due to elimination of tariffs.³⁶ In this respect the study will endeavour to analyse the provisions of the EAC-EU EPA and explore from a legal perspective with a view to determining how the same should be designed and implemented effectively in order to ensure that EAC is integrated into the global market as well as regional integration is enhanced.

1.3 Limitations of the Study

In view of the fact that EPA negotiations are taking place within seven sub-groupings in Africa which is a wider perspective, this study will be confined to the EAC-EU EPA negotiations. However the research will draw experiences from the EU-SADC (minus) EPA negotiations where only five SADC countries participated (Botswana, Lesotho, Mozambique, Namibia and Swaziland) and the EU-CARIFORUM EPA negotiations.

1.4 Research Methodology

The research will mainly be conducted through literature review. The primary sources will be articles, books and research papers written by experts and various organisations in the field.

The secondary sources will include textbooks and trade Agreements. The research will also make use of data and statistics relating to trade relationship between EU and EAC member countries.

³⁴United Nations Economic Commission for Africa *Assessing Regional Integration in Africa IV: Intra-African Trade* (2010) 16.

³⁵Wolfe B *Regional Integration in Africa: Lessons from the East African Community* (2008) 63 South African Institute of International Affairs (SAIIA).

³⁶South Centre 'EPAs: The Wrong Development Model for Africa and Options for the Future' Analytical Note SC/TDP/AN/EPA/23 (2010) 8 available at <http://www.southcentre.org> (accessed 25 August 2010).

The research will draw experiences from EU-SADC (minus) EPA negotiations and EU-CARIFORUM EPA negotiations.

1.5 Significance of the Research

According to a report presented by a section of civil society within the EAC in 2007 it is estimated that upon implementation of the EPA, the EAC will incur revenue loss of US\$ 162.5 million every year due to lost revenue from imports on EU goods.³⁷ In addition reciprocity which is the key principle of EPA negotiations has twofold effects: trade creation and trade diversion.

Trade creation has the effect of flooding the EAC market with cheap goods from EU hence creating competition for the local goods. On the other hand trade diversion has the likelihood of causing regional turbulence since intra trade might be reduced to a greater extent.³⁸

It is against this background that this study seeks to find possible ways of counteracting these possible implications which might be visited upon the EAC once the provisions of the EPAs become legally binding.

1.6 Problem Statement

The EPAs are designed to end non-reciprocal preferential trade of goods from developing countries into European markets by taking down trade barriers against European goods flowing the other way. The EPAs make open trade a two-way street. This may have the effect of causing influx of goods from the European market and yet the EAC does not export so much to the EU market. Many industries in the EAC are infant industries and hence need a tariff wall, without it the community is likely to face deindustrialisation.³⁹

In addition, for various reasons the EAC does not seem to have enough concerns about the impacts of EPAs; most important being that they could have blind

³⁷CSOs analysis of possible implications of EU-EAC EPA deal, 2007. CSO is a joint consortium of Kenya civil Society Alliance, Tanzania Trade Coalition and Uganda Food Rights Alliance. Available at <http://docs.google.com/viewer?a=v&q=cache> (accessed 24 September 2010).

³⁸South Centre 'EPAs: The Wrong Development Model for Africa and Options for the Future' Analytical Note (2010) 16, available at <http://www.southcentre.org> (accessed 25 August 2010). See also Section 3.6 of this study for analysis on intra-trade.

³⁹South Centre 'EPAs: The Wrong Development Model for Africa and Options for the Future' Analytical Note (2010) 6, available at <http://www.southcentre.org> (accessed 25 August 2010).

confidence in the effects of free trade agreements regardless of the foundational condition of reciprocity.⁴⁰ This view could prove to be an erroneous and dangerous experiment for enhanced integration within the EAC.

In light of the above the major issue meriting investigation is whether the EPAs will undermine or accelerate trade development within the EAC.

1.7 Research Hypothesis

The investigative assumption which the proposed research will examine is that the implementation of EPAs will undermine trade development within the EAC. This is due to the fact that studies have shown that there will be estimated loss of revenue of US\$162.5 million every year due to lost revenue from imports on EU imports.⁴¹ In this regard the study will endeavour to seek answers to the following research questions:

- How will the EAC manage the expected losses of fiscal revenue as a result of elimination of taxes on EU imports?
- What are the effects of the reciprocal principle as propounded in the EPAs on trade development within the EAC?
- What will be the impact of EPAs on regional integration within the EAC especially with regard to the newly integrated common market?

1.8 Key Words

European Union (EU)-East African Community (EAC)-Economic Partnership Agreements (EPAs)-Africa Caribbean and Pacific (ACP)-Everything But Arms (EBA)-Least Developed Countries (LDCs)-World Trade Organization (WTO)

1.9 Proposed Chapter Breakdown

⁴⁰Jianxiang L, *The European Union Relationship to the Africa, Caribbean and Pacific Countries in terms of the Cotonou Agreement: Will the Economic Partnership Agreements Aid Regional Integration?* (Unpublished LLM Mini Thesis, University of the Western Cape, 2005) 2.

⁴¹CSOs analysis of possible implications of EU-EAC EPA deal, 2007 available at <http://docs.google.com/viewer?a=v&q=cache> (accessed 24 September 2010).

Chapter One

This will introduce the subject matter, identify the problem statement, research questions and describe the methodology to be applied in the research as well as the limitations of the study.

Chapter Two

This chapter will discuss the historical overview of trade relations between the EU and ACP countries. In this regard the chapter will look at the Yaoundé I & II Conventions, the Lomé Conventions and the Cotonou Agreements.

Chapter Three

This will discuss regional integration. EPA negotiations are taking place in regional integration groups. The EAC is holding talks with the EU as a regional block. It is therefore imperative to look at the process of regional integration and the understanding of regional trade agreements and the concept of free trade area.

The history and evolution of the EAC to its current state will also be discussed. The chapter will also look at trade trends within the EAC.

Chapter Four

This chapter will discuss the concept of EPAs, the initiation and current developments in the EAC-EU EPA negotiations.

The EAC's Common Market came into force on 1st July 2010. EPAs will undoubtedly have an impact on the EAC which is still trying to stand on its feet and also due to the fact that economic developments of the five members countries are at different stages.⁴² To this end the research will bear focus on the impacts of the EAC-EU EPA on trade developments within the EAC.

Chapter Five

The chapter will give conclusions of the research and highlight possible solutions to the problems posed by the EU-EAC EPA negotiations and recommendation.

⁴²Uganda, Tanzania, Rwanda and Burundi are all least developed countries while Kenya is a developing country.

CHAPTER TWO

HISTORICAL BACKGROUND OF TRADE RELATIONS BETWEEN THE EUROPEAN UNION AND AFRICAN CARIBBEAN AND PACIFIC COUNTRIES

2.1 Introduction

The relationship between the European Community (EC) and the former European colonies African, Caribbean and Pacific (ACP) countries dates back to the colonial era and to the origins of the EC.¹

This relationship has undergone various stages from Yaoundé Conventions² to Lomé Conventions³ and finally to Cotonou Agreement⁴ which is set to pave way for a new trading arrangement between the ACP countries and the European Union (EU) which is compatible with the World Trade Organisation (WTO) rules.

It is against this background that this chapter seeks to illustrate a brief historical background of the Yaoundé Conventions, Lomé Conventions and the Cotonou Agreement to help the reader understand certain key aspects of the current Economic Partnership Agreement (EPA) negotiations and design.

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¹EU 'Green Paper on relations between the European Union and the ACP countries: Challenges and options for a new partnership' available at http://europa.eu/int/comm/development/body/publications/vert/lv1_en.pdf#zoom (accessed 20 January 2011).

²The Yaoundé Conventions were concluded in two stages, Yaoundé I and II.

³The Lomé Conventions were concluded in four stages, Lomé I, II, III and IV.

⁴The Cotonou Agreement signed in June 2000 established the basis for a new trading regime between the EU and ACP countries.

2.2 Yaoundé Conventions

The antecedents of Lomé Conventions were Yaoundé Conventions. The formal relationship between the EU and the ACP countries started with the Treaty of Rome which established the European Economic Community (EEC) in 1957.⁵ However, even before the Treaty of Rome came into force five of the six members of the EEC had some colonies and dependencies.⁶ These colonies and dependencies were deemed to be extensions of their respective European countries that colonised them and this made it necessary to have the colonies incorporated into the Treaty.⁷

Article 131 of the Treaty of Rome made provision for the establishment of the trade relationship. The main purpose of this relationship as envisaged under Article 131 was to promote the economic and social development of countries and territories and to establish close economic relations between them and the community as a whole.⁸ The Treaty of Rome created an avenue for cooperation with the Overseas Countries and Territories⁹ (OCTs) of the six signatory countries which were Germany, Belgium, France, Italy, Luxembourg and Holland.

Part IV of the Treaty of Rome established an association between the EEC and the overseas territories. Articles 131-136 of the Treaty sets out the terms of the association and highlights the Implementing Convention¹⁰ which was annexed to the Treaty. The Implementing Convention established what was perceived to be free trade area between the community and the overseas dependencies as well as the European Development Fund (EDF) which was supposed to be a source of supplementary aid.

With the Treaty of Rome coming into force, the EEC began providing special preferences to imports from overseas colonies and dependencies of France. By

⁵David D '40 years of Europe-ACP Relationship' (2002) 2 (hereafter Europe-ACP Relationship) available at http://ec.europa.eu/development/body/publications/courier/courier_acp (accessed 5 January 2011).

⁶The five members were Belgium, Italy, Luxembourg the Netherlands and West Germany.

⁷Hurt SR 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the end of the Lomé Convention' (2003) 24 Third World Quarterly 162.

⁸Treaty Establishing the European Community as amended by subsequent Treaties, 1957 available at <http://www.hri.org/docs/Rome57/> (accessed 18 January 2011)

⁹These overseas countries and territories were essentially West and African countries which had close ties with France.

¹⁰According to Article 136 of the Treaty of Rome, the Implementing Convention was slated for 5 years after the entry into force of the Treaty. The Implementing Convention was to determine the details and procedure for the association of the countries and territories with the Community.

1960s some of the former colonies had gained independence from the European colonial powers. In 1963 representatives of the EEC member states and 17 African Associated and Madagascar countries (AASM) met in Yaoundé Cameroon and signed an Agreement which came to be known as the Yaoundé Convention.¹¹ The Yaoundé Convention was geared mainly towards financial, technical and trade cooperation, primarily in the sectors of economic and social infrastructure.¹²

The Convention allowed for non-reciprocal duty free market access of the imports from the AASM countries into European market. Yaoundé I was expected to put the interests of the new states at the forefront. However, contrary to expectation of the many the Convention seemed like a replica of Part IV Treaty of Rome.¹³ The structure of the Yaoundé Convention was probably not intended by the new states. However, one of the contributing factors of the outcome would be lack of negotiation skills amongst the newly independent states. Secondly the newly independent states could have been blinded by the obsession for financial assistance from the EEC thus giving the EEC an upper hand in conjuring them to accept to its terms.¹⁴

The Yaoundé Convention was officially aimed at strengthening the economic independence of the 'associated' states which eventually proved a contradiction in terms-promote their industrialisation and encourage African regional integration. Central to the Convention was the argument that the relationship between Europe and Africa was historically necessary and economically a sine qua non.¹⁵

France however, intended that these countries would form a free trade zone amongst themselves and eventually sign a reciprocal Agreement with the EEC as a regional trade group.¹⁶ Lecomte observes that Yaoundé I & II Conventions eventually failed to create this EEC-Africa free trade zone for three main reasons: First, the newly independent African states embarked on self-centred development strategies which relied inter alia on protectionist trade policies. Therefore they showed no

¹¹ ACP-EU Development Cooperation, available http://www.ACP-EU_Development_Cooperation.org (accessed 9 January 2011).

¹² David D 'Europe-ACP Relationship' (2002) 1.

¹³ Guy Martin 'Africa and the Ideology of Eurafica: Neo-Colonialism or Pan-Africanism?' 1982 *The Journal of Modern African Studies* 223.

¹⁴ David D 'Europe-ACP Relationship' (2002) 2.

¹⁵ Lecomte HB 'Effectiveness of Developing Country Participation in ACP-EU Negotiations' (2001) 8 (hereafter Developing Country Participation in ACP-EU Negotiations) available at <http://www.odi.org.uk/resources/download/3619.pdf> (accessed 20 January 2011).

¹⁶ Lecomte HB 'Developing Country Participation in ACP-EU Negotiations' (2001) 8.

readiness to provide trade preferences to their European partners. Secondly, the French international firms which had been benefitting from traditional preferential positions in ex-French colonies were keen to protect themselves from other potential European competitors. Finally the United States opposed Europe making Africa its restricted 'backyard' fearing that Europe would gain privileged access to African markets and natural resources at its expense.¹⁷

The Yaoundé I expired in 1968 thus paving way for Yaoundé II in 1969 which was slated to be in force for five years until 1975.

It is thus interesting to note that the idea of a free trade zone between Europe and Africa reincarnated in the EC's proposal for ACP-EU Economic Partnership Agreement is actually an old vision explicitly reminiscent of colonial times.

2.3 The Lomé Conventions

The Lomé Conventions were said to provide a legal framework for the ACP-EU partnership and reputed to be 'the largest, the most comprehensive and most enduring north-south multilateral accords of the time'.¹⁸ The Lomé Conventions arose out of attempts by the EU to establish an institutionalised arrangement governing its relations with former colonies of its members. The Convention developed from a colonial association of African territories to the EEC based on a mixture of moral obligation to compensate the former colonial countries and on the self-interest of the European States.¹⁹ Under the Lomé Conventions the ACP countries were generally entitled to non-reciprocal duty free access to EU markets, technical and industrial cooperation and economic assistance under the European Development Fund (EDF) as well as insurance schemes.

The initial Lomé Agreement was signed in 1975 as the Lomé I Convention and covered 46 ACP and nine EU countries.²⁰ Lomé I Convention was slated to be in force for 5 years. Its main characteristics were: non-reciprocal preferences for most exports from the ACP to EU countries; equality between partners, respect for

¹⁷Lecomte HB 'Developing Country Participation in ACP-EU Negotiations' (2001) 9.

¹⁸David D 'Europe-ACP Relationship' (2000) 3.

¹⁹David D 'Europe-ACP Relationship' (2000) 3.

²⁰Karl K 'From Georgetown to Cotonou: The ACP Group faces up to New Challenges' available at http://ec.europa.eu/development/body/publications/courier/courier_acp/en/en_020.pdf (accessed 24 January 2011)

sovereignty, mutual interests and interdependence; the right of each state to determine its own policies; and finally security of relations based on the achievements of the cooperation system.²¹ The non-reciprocal preferences meant that although trade preferences were offered to ACP countries the EU did not demand trade advantages in return. However, since the preferences were only offered to certain countries, they were discriminatory against those countries that were not signatories to the Lomé Conventions.

One of the greatest achievements that Lomé I Convention is hailed for is the introduction of STABEX (stabilisation of export earnings) system, which was designed to compensate ACP countries for the shortfall in export due to fluctuations in the prices or supply in commodities.²² STABEX provided funds to offset losses incurred as a result of crops failure and price falls for a wide number of agricultural products like cocoa, coffee, groundnuts, tea and others.

Lomé I Convention also prioritised infrastructure-roads, bridges, hospitals, schools and sustainable agriculture and created protocols which were geared to favour ACP exports in sectors such as sugar, beef and bananas. Under the Sugar Protocol, the EEC agreed to fix quantity annually of sugar from ACP countries at an attractively high guaranteed price aligned to EU's own internal sugar price and established annual quotas for sugar producers. This arrangement has been valuable to the economic development of certain ACP countries like Mauritius, Fiji, Guyana, and Barbados. The Beef and Veal Protocol permitted a 90 per cent refund of tax normally paid on beef imports from several ACP countries and has especially benefitted Southern African countries.²³

The Lomé I went through various amendments and hence in 1979 Lomé II came in force, Lomé III in 1984 and Lomé IV in 1989. Lomé II which involved 58 ACP and nine EU countries did not introduce major changes to Lomé I except for the SYSMIN

²¹EUROPA 'The Lomé Convention' available at http://europa.eu.int/comm/development/body/cotomou/lome_history_en.htm (accessed 21 January 2011).

²²David D 'Europe-ACP Relationship' (2000) 3.

²³EUROPA 'The Lomé Convention' available at http://europa.eu.int/comm/development/body/cotomou/lome_history_en.htm (accessed 21 January 2011).

system to help in the mining industries ACP countries that were dependent on this sector.²⁴

Lomé III which covered 65 ACP countries and ten EU states coincided with an in-depth review of the effectiveness of aid and the emergence of a political dimension.²⁵ In this regard it understandably shifted the main attention of the relationship from the promotion of industrial development to self-reliant development on the basis of self-sufficiency and food security. It also alluded to the importance of human dignity (rather than human rights) and stressed economic, social and cultural rights.²⁶

Lomé IV covered 68 ACP countries and 12 EU states and was remarkable in many ways. The Convention for the first time was drawn up for a 5 years period.²⁷ It laid great emphasis on among other things; the promotion of human rights, democracy and good governance; decentralised cooperation; diversification of ACP countries; promotion of the private sector and increasing regional cooperation. It was the first development Agreement to set such a standard.

Other key changes under Lomé IV included the conversion of all uncommitted special loans under previous Lomé Conventions into grants, the banning of toxic waste movements between ACP countries and EU member states and the provision of more EDF monies for decentralised cooperation and diversification of the economy.

Lomé IV Convention was revised at its midterm review in 1995. The review was due to major economic and political changes in ACP countries (democratisation process and structural adjustments in these countries), enlargement and increasing attention to East European Mediterranean partners and lastly the international environment which was with regard to the Uruguay Round Agreement.²⁸ All these factors necessitated a review of Lomé IV. The amendment for the first time did not increase EDF in real terms but laid great emphasis on human rights, democratic principles

²⁴David D 'Europe-ACP Relationship' (2000) 4.

²⁵David D 'Europe-ACP Relationship' (2000) 4.

²⁶Article 5 of the Lomé III Convention.

²⁷Article 366 of the Lomé IV Convention.

²⁸EUROPA 'The Lomé Convention' available at

http://europa.eu.int/comm/development/body/cotomou/lome_history_en.htm (accessed 21 January 2011).

and the rule of law as essential elements of the Convention.²⁹ This in essence meant that the ACP countries that did not fulfil these criteria risked the retrieval of the allocated funds. The amendment also introduced a phased programming aimed at increasing flexibility and improving performances from ACP countries giving more attention to decentralised cooperation in the form of a participatory partnership including a great variety of actors from civil society.³⁰

In the years leading to the expiration of the Lomé IV Convention ACP-EU cooperation faced pressure on several fronts. ACP countries felt that the principle of equal partnership had been eroded and replaced with a relationship based on conditionality.³¹ For instance they felt that the EU laid more emphasis on human rights, democratic principles and the rule of law and violation of these 'essential elements' could lead to partial or total suspension of development aid.

Moreover despite preferential access to EU markets, ACP export performance was deteriorating over time. Finally with the emergence of the World Trade Organisation (WTO) the non-reciprocal preferential trade regime provided by the Lomé Convention was increasingly seen as unacceptable and incompatible with international trade rules in the sense of General Agreement on Tariffs and Trade (GATT) Article XXIV.³² All these arguments highlighted the need for a re-appraisal of development cooperation in general and of ACP-EU cooperation and its trade elements in particular.

The overall achievement of the Lomé Conventions era has been viewed with mixed reactions. Some believe that their major achievement is the overall relationship with developing regions, particularly those where many of the world's poorest countries (about 40 ACP countries) are located.³³ However, looking at the other side of the coin a number of ACP countries have reaped positively from the various Lomé Conventions to wit, economic and social infrastructures, technical and financial aid

²⁹David D 'Europe-ACP Relationship' (2000) 4.

³⁰David D 'Europe-ACP Relationship' (2000) 4.

³¹Lionel, Mitaritonna & Laborde 'An Impact Study of the ACP-EU Economic Partnership Agreements in the Six ACP Regions' European Union Report (2008) 37 available at http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138081.pdf (accessed 3 March 2011).

³²Lionel, Mitaritonna & Laborde 'An Impact Study of the ACP-EU Economic Partnership Agreements in the Six ACP Regions' European Union Report (2008) 37 available at http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138081.pdf (accessed 3 March 2011).

³³David D 'Europe-ACP Relationship' (2000) 4.

programmes in various sectors, access to European market for some of their produce, assistance in implementing effective macro-economic policies and support for structural adjustment initiatives.³⁴

However, others think differently insisting for example that half of the ACP countries are ranked as Least Developing Countries (LDCs) despite a quarter of a century of ACP-EU economic and trade cooperation. One would also allude the poor results of the Lomé policy partly to the fact that it emphasised export of agricultural products to the EU without challenging the ACP countries to develop competitive industrial manufacturing. Consequently the result has been that, even with seemingly generous nonreciprocal concessions to ACP countries, their share of the EU market has declined considerably over the years.³⁵

Despite the criticisms the Lomé Conventions achieved much for the ACP countries than the Yaoundé Conventions. This is because the Lomé Conventions were based on equal partnership as a cornerstone for cooperation which vested on the ACP countries with the ownership of their own development. This meant in spite of receiving financial aid from the EU countries, the ACP countries were also expected to contribute towards development of their country especially by ensuring good governance and putting in place policies geared towards development. In this regard the Lomé Conventions focused on two key elements; economic and commercial cooperation and development cooperation. Therefore they contained both aspects of aid and trade.³⁶

2.4 The Cotonou Agreement

The end of the updated Lomé IV Convention in 2000 led to the conclusion of the Cotonou Partnership Agreement in Cotonou, Benin by 77 ACP countries and 15 EU

³⁴Karl K 'From Georgetown to Cotonou: The ACP Group faces up to New Challenges' available at http://ec.europa.eu/development/body/publications/courier/courier_acp/en/en_020.pdf (accessed 24 January 2011).

³⁵Karl K 'From Georgetown to Cotonou: The ACP Group faces up to New Challenges' available at http://ec.europa.eu/development/body/publications/courier/courier_acp/en/en_020.pdf (accessed 24 January 2011).

³⁶David D 'Europe-ACP Relationship' (2000) 4.

member states. The Agreement was set for a 20 year period with a clause allowing it to be revised every five years.³⁷

The partnership is centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.³⁸ The fundamental principles of the Cotonou Agreement are; equality of the partners and ownership of development strategies; participation (central governments as the main partners, partnership open to different kinds of other actors); pivotal role of dialogue and the fulfilment of mutual obligations; differentiation and regionalisation.³⁹

Differing from the Lomé Conventions the Cotonou Agreement enshrines the principle of participatory development. In addition the Cotonou Agreement is keen on strengthening of the political dimensions of the partnership. The strong political foundation of the Agreement which is defined by tight conditionality is evidenced by the fact that the Agreement is underpinned by a set of core values or essential elements such as respect for human rights, democratic principles and rule of law whose violation can lead to suspension of the aid.⁴⁰ By virtue of Article 96 good governance is considered to be a fundamental element of the Cotonou Agreement.⁴¹ Serious cases of corruption including acts of bribery leading to corruption are grounds to suspend cooperation. This is seen as a major step by the EU to encourage the concept of good governance in the trading partners. Moreover the Agreement envisages deepening of the regional integration process between ACP countries, preparation of a new WTO compatible trade policy and a more rationalised performance-based aid management.

³⁷European Centre for Development Policy Management 'The Cotonou Partnership Agreement in Brief' available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Navigation.nsf/index2?readform (accessed 21 January 2011).

³⁸Article 1 of the Cotonou Agreement.

³⁹EuropeAid Development and Cooperation 'Overview of the ACP-EU Partnership Agreement (The Cotonou Agreement)' available at http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm.

⁴⁰Lionel, Mitaritonna & Laborde 'An Impact Study of the CAP-EU Economic Partnership Agreements in the Six ACP Regions' European Union Report (2008) 37 available at http://trade.ec.europa.eu/doclib/docs/2008/march/tradoc_138081.pdf (accessed 3 March 2011).

⁴¹Article 96 of the Cotonou Agreement calls for a thorough examination of the action of a party where there is failure to fulfil an obligation stemming from respect for human rights, democratic principles and rule of law.

The Cotonou Agreement provides ACP countries with an extension of existing nonreciprocal preferential access for certain ACP agricultural and other goods to the EU market for an interim period of 8 years.⁴² This concessionary period was allowed in order to enable ACP countries build their capacities to withstand freer trade. At the end of the transition period (that is to say, commencing in 2008 and ending in 2020) the EU and ACP were supposed begin two way free trade arrangements which are WTO compatible.⁴³

The objectives of the Cotonou Agreement give top priority the struggle against poverty. It affirms the parties' commitment to work together towards the achievement of the objectives of poverty eradication, sustainable development and the gradual integration of the ACP countries into the world economy. To resolve this the parties agree to make through their cooperation a significant contribution to the economic, social and cultural development of the ACP countries and to the greater wellbeing of their population to enable these countries to face the challenges of globalisation and strengthen the ACP-EU partnership in the effort to give the process of globalisation a stronger social dimension.⁴⁴

The Agreement is based on five interdependent pillars; comprehensive political dimension; participatory approaches; strengthened focus on poverty reduction; framework for economic and trade cooperation and a framework for economic trade cooperation.⁴⁵

The first pillar which is the political dimension is recognition of a new level of maturity that the longstanding ACP-EU partnership has reached. This will enhance the two trading partners to engage in transparent political dialogue to address conflict and political tensions as well as peace building policies. This will contribute to peace, security and promote a stable and democratic political environment.

In addition respect for human rights, democratic principles, rule of law and good governance provides the anchor for the dialogue based on the understanding that these principles are part and parcel of the long-term development.

⁴²Why EPA Negotiations? Available at <http://www.acp-eu-trade.org> (accessed 25 September 2010).

⁴³Why EPA Negotiations? Available at <http://www.acp-eu-trade.org> (accessed 25 September 2010).

⁴⁴David D 'Europe-ACP Relationship' (2000) 4.

⁴⁵European Union 'Summaries of EU Legislations: The Cotonou Agreement' available at http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r12101_en.htm (accessed 19 January 2011).

The second pillar is participatory approach; this encourages integration of non-state actors or civil society organisations (CSOs) in Africa in the field of development cooperation. This has come as recognition of the complementary role of and potential for contributions by non-state actors to the development process by ensuring they are accorded the necessary capacity building support.⁴⁶

Development strategies is the third pillar; the Cotonou Agreement focuses on poverty eradication in ACP countries which is intended to guide development strategies.⁴⁷ Development strategies in turn should reflect international commitments to end poverty as enunciated by United Nations conference and Organisation for Economic Cooperation and Development (OECD). These strategies would be tailored to the individual situation of each ACP country and cooperation would promote local ownership of economic and social reforms.

The fourth pillar is the framework for economic and trade cooperation. The objectives of economic and trade cooperation are to promote the smooth and gradual integration of the ACP countries into world economy.⁴⁸ Consequently the Cotonou Agreement provides for negotiations of new WTO compatible trade arrangements removing progressively barriers to trade between them and enhancing cooperation in all areas relevant to trade.⁴⁹ This is the focal point of the Cotonou Agreement which largely differentiates it from the previous Lomé Conventions.

Financial cooperation is the last pillar. The objective of financial cooperation is to support and promote the efforts of the ACP countries to achieve the objectives set out in the Agreement. This support is achieved through the provision of adequate financial resources and appropriate technical assistance.⁵⁰ The financial cooperation is intended to support projects, programmes and other operations in the ACP countries.

⁴⁶David D 'Europe-ACP Relationship' (2000)3.

⁴⁷David D 'Europe-ACP Relationship' (2000)3.

⁴⁸Article 34(1) of the Cotonou Agreement.

⁴⁹Article 36(1) of the Cotonou Agreement.

⁵⁰Article 55 of the Cotonou Agreement.

The language in the Cotonou Agreement has come under criticisms to the effect that it reflects some element of coercion to the ACP countries. This coercion is seen in the EU's presentation of the EPAs as the only viable alternative and also through the implementation of frequent reviews of aid provisions that have attached conditions.⁵¹ Hurt further contends that as much as the Cotonou Agreement is centred on the objective of reducing and eventually eradicating poverty⁵², these words are hollow and their inclusion in the text by no means guarantees their likely achievement.⁵³

The Cotonou Agreement also lacks mechanisms to address transitional problems that could arise from implementation of such regional Agreements such as fiscal reforms and private sector restructuring.⁵⁴ This argument is further buttressed by the fact that Cotonou Agreement being the precursor of the EPAs does not contain mechanisms that will ensure the consistency of the proposed EPAs with different regional integration programs such as those enshrined in the Africa Economic Community Treaty.⁵⁵

The Cotonou Agreement lays the foundation for EPA negotiations which are a result of the expiration of the EU-ACP waiver in 2007. The waiver was granted to allow the EU and ACP countries to continue trading under an Agreement that was discriminatory against other WTO members in the sense that it granted preferential treatment to ACP countries which were not extended to other WTO members. Waivers are governed by the Understanding in Respect of Waivers of Obligations under the GATT 1994.⁵⁶ Article 1 provides that:

⁵¹Some of these conditions attached to aid provisions are such as respect for human rights, democracy and good governance in the ACP countries. These conditions also drew criticisms from the ACP countries during the Lomé Conventions as seen in Section 2.3 of this Thesis. For further reading on this see Hurt SR 'Cooperation and Coercion? The Cotonou Agreement between European Union and ACP States and the end of the Lomé Convention' (2003) 24 *Third World Quarterly* 163.

⁵²Article 34(1) of the Cotonou Agreement envisages economic and trade cooperation between the EU and ACP countries aimed at fostering the smooth and gradual integration of the ACP countries into the world economy which will eventually contribute to poverty eradication in the ACP countries.

⁵³Hurt SR 'Cooperation and Coercion? The Cotonou Agreement between European Union and ACP States and the end of the Lomé Convention' (2003) 24 *Third World Quarterly* 165.

⁵⁴Udombana NJ 'Back to Basics: The ACP-EU Cotonou Trade Agreements and Challenges for the African Union' (2004) 49 *Texas International Law Journal* 22.

⁵⁵See section 3.4 of this Thesis for a detailed a detailed analysis of the regional integration program as enunciated under the Africa Economic Community Treaty.

⁵⁶Available at http://www.wto.org/english/docs_e/legal_e/11-25.pdf (accessed 1 March 2011). For a detailed analysis of the procedure for request for waivers see Paragraphs 3 & 4 of Article IX of the Marrakesh Agreement establishing the WTO.

A request for a waiver or for an extension of an existing waiver shall describe the measures which the member proposes to take, the specific policy objectives which the members seek to pursue and the reasons which prevent the member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.

Upon expiry of this waiver the EU could not continue granting ACP products preferential treatment. In addition the EU is also aware that another waiver is not an option going by the protracted disputes that have been presented before the WTO dispute settlement body. Having been presented with the foregoing scenario the EU and ACP had no option but negotiate a WTO compatible Agreement. In this regard the negotiations for a new Agreement begun in 2002.⁵⁷

2.5 Conclusion

The historical background of trade relations between EU and ACP countries enables one to appreciate the peculiar relationship that exists between these countries especially taking into account the duration of its existence. This relationship has been beneficial to both parties and one can only hope that the new trading arrangement will not compromise that relationship.

In addition the history brings out a key aspect of the need to have a well drafted Agreement which encompasses the needs of all trading partners. It is imperative that as the EU and ACP negotiate a new trading regime the ACP trade negotiators should be keen to ensure that the new Economic Partnership Agreements (EPAs) do not compromise trade development and the spirit of regional integration. As will be clearly exhibited under section 4.4.1 of this Thesis in negotiating EPAs, the EAC countries should take into consideration their specific economic, social, environmental and structural constraints. In addition they should define policies that maximise benefits from further world trade liberalisation and reverse the present trend of marginalisation that EAC countries experience in international trade arena.⁵⁸

⁵⁷See Section 4.2 of this study for a detailed discussion on EPA.

⁵⁸See Section 4.4 of this study for a detailed analysis of the EAC-EU EPA.

CHAPTER THREE

THE PROCESS OF REGIONAL INTEGRATION AND TRADE TRENDS WITHIN THE EAST AFRICAN COMMUNITY

3.1 Introduction

The world has witnessed the flourishing of regional agreements over the past five decades. This is because countries have turned to regional integration in a bid to strengthen their economies. Almost every country in the world is a signatory to at least one Regional Trade Agreement (RTA) and many are parties to multiple agreements.¹ For most countries, regional integration is an avenue to strengthen their economies. However, of these only a few such as the European Union (EU) as seen in Section 2.2 of this study can be considered to have achieved impressive progress in achieving their goals. Some have done better than others in improving regional integration thereby benefitting their citizens.

The establishment of the Africa Economic Community ²(AEC) led to emergence of regional groupings throughout Africa. However, for Africa to reap from the process of regional integration these groups must live up to their objectives and a concrete foundation must be laid for them to succeed.³

The East African Community (EAC) is negotiating the Economic Partnership Agreement (EPA) with European Union (EU) hereinafter EU-EAC EPA as a regional block. This is because the member countries appreciate the strength that countries draw in negotiating as a bloc as opposed to an individual country and particularly where the other party is stronger economically as is the case with the EU. Furthermore critics of EPAs have argued that EPAs will undermine the spirit of regional integration in Africa, it is thus imperative to look at the process of regional integration.

¹The long period taken in multilateral negotiations is said to be a contributing factor for countries to engage in regional trade agreements since negotiations at regional level taken a shorter period.

²The AEC was established in 1991 based on the final Act of Lagos and the Treaty is commonly known as the Abuja Treaty. See 'AEC: History and present status' available at <http://www.dfa.gov.za/foreign/multilateral/africa.aec.htm> (accessed 9 March 2011).

³ See Section 3.3.1 of this study on the benefits of regional integration.

In light of the foregoing, this Chapter seeks to examine the process of regional integration and its benefits. The history of the EAC will be examined and the last section will seek to discuss the effects of regional integration on intra-African trade.⁴

3.2 Definitions of Regional Integration

Various definitions of regional integration have been fronted by many scholars. Carim describes regional integration as follows;

A condition (or process) wherein separate national economies maintain (or progressively) lower barriers to mutual trade while sustaining relatively higher barriers to third parties.⁵

Bischoff defines regional integration as;

A process where a group of states voluntarily and to various extent get access to each other's markets and establish mechanisms and techniques that minimise and maximise the internal market and external economic, social, political and cultural profits of their co-operation.⁶

On the other hand World Trade Organisation (WTO) envisages regional integration to occur in instances where an RTA is undertaken by countries located within a defined geographical area whereby the participating countries align themselves with each other for the purpose of achieving a pre-determined form of economic integration.⁷

However while this is the case, there have been instances where countries not belonging to the same region enter into a regional agreement a case in point being the EPAs with the African Caribbean and Pacific (ACP) countries. This seems to be the scenario propelled by Parthapratim when he defined RTAs as groupings of countries which are formed with the objective of reducing barriers to trade with member countries. Parthapratim contends that contrary to what the name suggests,

⁴Intra-African trade is trade conducted amongst the African countries and more so within the various regional blocs in Africa for example trade between the East African Community (EAC) and Common Market for East and Southern Africa (COMESA) can be describes as intra-African trade.

⁵Carim X 'Multilateral Trading, Regional Integration and Southern African Development Community' (2005) 65 *The South Africa Journal of Economics* 336.

⁶Karlsson C 'Regionalism from Outside: The EU Foreign Aid Policy and Regional Integration' (2006) 12 available at <http://www.accord.org.za/ct/1992-2/ct2> (accessed 15 January 2011).

⁷See http://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 2 February 2011).

these groupings or unions may be concluded between countries not necessarily belonging to the same geographical region.⁸

Going by the various definitions it would seem that elimination of trade barriers amongst trading partners is very vital in deepening trade relations for purposes of regional integration. Integration measures have extended their reach beyond traditional free trade in goods to a number of domestic regulatory sphere including services, investments and intellectual property rights with a view to deepening the integration among member countries. Regional integration has gained a renewed dynamism and is no doubt here to stay as an element of the broader trading system.

3.3 Stages of Regional Integration

Regional integration arrangements take different forms. A common method used for classifying different types of regional integration is to focus on the degree of integration.⁹

Preferential Trade Area: This is an arrangement in which members impose lower tariffs on imports produced by members than to imports produced by non-members. Members can determine tariffs on imports from non-members.¹⁰

Free Trade Area: This is usually the second stage of integration. This is a preferential trade area where parties agree to remove trade barriers between themselves with each party maintaining its own external tariff. Parties choose this mode where their economic structures are complimentary. An example of this in Africa is the Southern Africa Development Community (SADC).¹¹

Customs Union: Here members remove barriers to trade between themselves, have a common external tariff for non-members and may cede sovereignty to a single customs administration. This is often adopted by parties that are competitive. The EAC is a good reference on this since its customs union is in full force.¹²

⁸Parthapratim, P 'Regional Trade Agreements in a Multilateral Trade Regime: An Overview' available at http://www.networkideas.org/feathm/may2004/survey_paper_RTA.pdf (accessed 1 February 2011).

⁹United Nations Economic Commission for Africa 'Assessing Regional Integration in Africa' (2004) 22 (hereafter UNECA).

¹⁰UNECA (2004) 22.

¹¹UNECA (2004) 22.

¹²UNECA (2004) 22.

Common Market: This is a customs union that allows free movement of factors of production such as capital and labour across national borders within the integration area. The common market for the EAC was launched on 30th June 2010 though the member countries are still working on harmonising laws especially with regard to free movement of persons across national borders to make it fully functional. However, much progress has been reported by the member countries.¹³

Economic and Monetary Union: This is a common market with unified monetary and fiscal policies, including a common currency and economic policies are integrated into the member countries. EU would be the best example of such a union.¹⁴

Political Union: This is the ultimate stage of integration in which members become one nation. National governments cede sovereignty over economic and social policies to a supranational authority establishing common institutions and judicial and legislative processes including a common parliament.¹⁵ In Africa none of the current regional block has attained this level of integration. Again the EU is a good example of a successful political union.

Countries can start with any of these arrangements but most begin by removing impediments to trade amongst themselves and then introduce deeper and wider integration mechanisms. The United Nations Economic Commission for Africa (UNECA) lists eight regional blocks¹⁶ of the African Economic Community (AEC) which are at different levels of integration however, this is not without consideration of the many regional blocks already in existence.

3.3.1 Benefits of Regional Integration

With increased proliferation in the number of regional integration arrangements the natural question that follows is why do countries join regional integration

¹³ 'Accessing the Progress in the Common Market' *Jumuiya News* 15 September 2010 issue No. 15 available at <http://www.meac.go.ke> (accessed 8 February 2011).

¹⁴ UNECA (2004) 22.

¹⁵ UNECA (2004) 22.

¹⁶ The eight regional blocks of the African Economic Community are: Economic Community of Western Africa (ECOWAS), Common Market for Eastern and Southern Africa (COMESA), Economic Community for Central African States (ECCAS), Southern Africa Development Community (SADC), The East African Community (EAC), Intergovernmental Authority Development (IGAD), Arab Maghreb Union (AMU) and Community of Sahel-Saharan States (CEN-SAD).

arrangements? And to what extent do such arrangements achieve their goals? According to study by UNECA among the benefits that countries derive from regional integration are gains from new trade opportunities, larger markets and increased competition.¹⁷ In essence it would thus be true to conclude that the process of regional integration enhances trade amongst the member partners as a result of increased market access.

Regional integration has the effect of creating trade as well as diverting trade. The EU has demonstrated that if managed well regional integration arrangements can lead to income convergence. For instance countries like Ireland, Portugal and Spain have made progress closing the gap with richer EU members. In the mid-1980s per capita incomes in these three countries ranged from 27 per cent to 61 per cent of the average income of large EU countries. By the late 1990s they ranged from 38 per cent to 91 per cent.¹⁸

In addition regional integration makes it easier for countries to achieve their set trade goals as they are faster to negotiate since they usually involve a few number of participant countries unlike in the multilateral negotiations where the number of countries involved is large and there must be consensus.¹⁹

Regional integration enhances power bargaining of the member countries. Increase in power bargaining as a result of banding together through regional integration is indisputable. This has clearly been demonstrated by the Least Developed Countries (LDCs) and developing countries at the multilateral level. A good example in this regard is the Caribbean Community (CARICOM) which has attained a degree of visibility that no single member could have hoped to attain individually.²⁰

Regional integrations have also helped to reduce conflicts between its members. This is because when countries agree to form a regional bloc element of trust comes into play which in turn facilitates cooperation. A case in point is the conflict between Kenya and Uganda over Migingo Island in Lake Victoria which is at the border of Kenya and Uganda. Both countries opted to sort out the conflict amicably for the

¹⁷UNECA (2004) 22.

¹⁸UNECA (2004) 23.

¹⁹As seen in Section 3.1 of this study this has led to proliferation of regional trade agreements.

²⁰Schiff M 'Regional Integration and Development in Small States' Development Research Group, The World Bank available at <http://www.worldbank.org> (accessed 12 January 2011).

sake of the EAC integration.²¹ A World Bank report suggests that increased trade between two countries lowers the risk of conflict between them by about 17 per cent.²² This analogy could be true especially having regard to the reason behind the formation of the European Community (now EU) which was formed to end war between the community members.

Lastly, as a result of regional integration countries tend to specialise where they have comparative advantage in different areas of production. This is especially where countries have vastly different economic structures. Specialisation enables countries to concentrate in production of one or more types of goods and this leads to enhanced quality of goods as well as low prices which benefits the member countries.

3.3.2 Disadvantages of Regional Integration

However, much as regional integration seems to offer the most incredible strategy for tackling Africa's development challenges, internally and externally the same has not been without reproach. One of the glaring disadvantages is the multiplicity of the RTAs. According to UNECA out of the 53 African countries, 26 are members of two regional economic communities and 20 are members of three regional economic communities.²³ One country (Democratic Republic of Congo) belongs to four communities and only six countries maintain membership in just one regional community.²⁴ This has resulted to overlapping membership which further results in counterproductive competition.

As a result various conflicting regimes of rules for example rules of origin are initiated and this creates obstacles to trade facilitation by increasing administrative cost of doing business in any one nation as businessmen may find themselves having to comply with different requirements depending on where they are exporting goods to.²⁵ Oduro observes that "it is difficult to envisage how SADC and COMESA given

²¹Ministry of East African Community Kenya 'Misingo Conflict and what it means to EAC Integration' *Jumuiya News* Issue 15 July-September (2009) 16.

²²Schiff M & Alan W 'Regional Integration and Development' World Bank Report (2003) available at <http://www.worldbank.org> (accessed 24 February 2011).

²³UNECA (2004) 50.

²⁴UNECA (2004) 50.

²⁵Commission on Trade and Investment Policy Report 'Regional Trade Agreements and the Multilateral Trade System' (2002) available at <http://www.icc.org> (accessed 4 February 2011).

their convergence to both sectoral and trade integration can live and prosper with the overlapping membership of the Southern African countries.”²⁶

Moreover in the process of eliminating trade barriers amongst trading partners for example eliminating or reducing tariffs in a Free Trade Area (FTA), this can lead to substantial loss of revenue especially for countries that heavily depend on customs revenue as a major source of income.²⁷

RTAs are an exception to the most favoured nation principle of the WTO and as such are by their very nature discriminatory agreements. Viner challenges the view that RTAs can only lead to trade creation and asserts that they can also lead to trade diversion. This can happen where members switch imports from low cost producers in non-members to high cost producers. He observes that;

....where the trade diverting effect is predominant one at least of the members is bound to be injured, the two combined will suffer net injury and there will be injury to the outside world at large.²⁸

3.4 Development of Regional Economic Integration in Africa

The establishment of the AEC²⁹ marked the beginning of regional groupings in Africa. Throughout this process regional groupings emerged through Africa. According to a study by UNECA integration in Africa was as a result of several reasons;³⁰ First that the integration was politically motivated. The African continent like other continents has had its share of political tension. The need for countries to appease the situation and end conflicts amongst countries led to the need for integration.

The second reason was for economic appraisal in most countries. Regional integration was seen as an avenue to strengthen economies in the member countries. An economically powerful country could uplift the economy of a weaker member by pooling resources and share in benefits. Lastly geographical positioning

²⁶UNECA (2004) 50.

²⁷See Section 4.5 of this study on how the intended free trade area which will be created as a result of the EAC-EU EPA will lead to loss of revenue for EAC countries upon elimination of trade barriers.

²⁸Viner J*The Customs Union Issue* (1950) 4.

²⁹The AEC was established in 1991 based on the Final Act of Lagos and the commonly referred to as the Abuja Treaty. ‘AEC: History and Present Status’ available at <http://www.dfa.gov.za/foreign/Multilateral/africa/aec.htm> (Accessed 8 February 2011).

³⁰United Nations Economic Commission for Africa ‘Assessing Regional Integration in Africa IV: Intra-African Trade (2010) 14 (hereafter UNECA IV).

played a major role in regional integration. Most countries that belong to a certain regional bloc more often share common geographical boundaries. This can be seen in regional blocs such as EAC, Common Market for Eastern and Southern Africa (COMESA) and SADC.

Article 6 of the AEC Treaty outlines the objectives of the AEC while highlighting the six stages of integration over a period of 34 years.³¹ These stages incorporate existing Regional Economic Communities (RECs) and provide for the establishment of any future REC. The stages are as follows:

Stage One: This was slated for five years and during this stage the AEC aimed to strengthen the existing RECs and establish new RECs.³²

Stage Two: During this stage, eight years were set aside to establish tariff and non-tariff barriers, customs duties and internal taxes at the level of each REC. In addition at this stage AEC was to harmonize the activities of the REC and strengthen integration in various sectors. This stage was completed in 2007.³³

Stage Three: This stage was slated for ten years in which AEC aimed to set up free trade areas for the gradual removal of tariffs and non-tariff barriers and a custom union in the RECs by means of adopting a common external tariff. This stage is set to be completed in 2017.³⁴

Stage Four: This stage was scheduled for two years and the main goal here was to coordinate and harmonise tariff and non-tariff barriers among the RECs with the ultimate goal of establishing a continental customs union.³⁵

Stage Five: Stage five was given four years and the main goal was to establish an African common market.³⁶

Stage Six: This being the final stage consisted of establishing a single domestic market, a central bank, currency and parliament. The vision here was end up with a fully integrated block like what the EU has become today.³⁷

³¹UNECA IV (2010) 16.

³²UNECA IV (2010) 16.

³³UNECA IV (2010) 16.

³⁴UNECA IV (2010) 16.

³⁵UNECA IV (2010) 16.

³⁶UNECA IV (2010) 16.

However the pace of implementing the six stages of integration as highlighted in Article 6 of the AEC Treaty varies from one REC to another. All the RECs in Africa have launched FTA with the exception of the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union (AMU) and the Community of Sahel-Saharan States (CEN-SAD).³⁸

Having looked at the process and development of regional economic integration in Africa the next section hereunder will examine the history of the EAC which is the main focus of this study.

3.5 History of the EAC

3.5.1 From Co-operation to Community

One of the earliest attempts at integration on the African continent occurred in East Africa.³⁹ The roots of the EAC have been traced as far back as 1902 when an administrative organisation was established to foster British interests in Tanganyika and the Zanzibar Protectorate (now Tanzania), the Uganda Protectorate and the Colony of Kenya.⁴⁰ The British used this early version of the EAC to regulate trade, transportation, and communication within Kenya. In 1948, the British colonial administration created the East African High Commission (EAHC) to serve largely the same ends.⁴¹ These early common market structures enabled Great Britain to easily exploit the colonies.⁴² The colonial administration gave Kenya a position of predominance, and most of the major industries in East Africa were located in Nairobi.⁴³ This led to uneven levels of development not only in the industrial sector, but in the service and trade sectors as well.⁴⁴ Thus Kenya became the "centre of the periphery" in East Africa, while the economic structures of Kenya, Uganda, and

³⁷UNECA IV (2010) 16.

³⁸UNECA IV (2010) 16.

³⁹Fitzke S 'The Treaty for East African Co-operation: Can East Africa Successfully Revive one of Africa's Most Infamous Economic Groupings?' (1999) 8 *Minnesota Journal of Global Trade* 127.

⁴⁰Aggrey A 'Seeking Regional Economic Co-operation in Africa' (1992) 46 *Journal of Internal Affairs* 119, 120.

⁴¹The Treaty establishing East African Co-operation 1967 available at <http://www.eac.int/organs> (accessed 3 February 2011)

⁴²Okoth PG 'The Foreign Policy of Uganda since Independence towards Kenya and Tanzania in Politics and Administration in East Africa 3 ed (1994) 359,361 (hereafter *The Foreign Policy of Uganda*).

⁴³Okoth PG 'The Foreign Policy of Uganda' (1994) 365.

⁴⁴Adar KG & Ngunyi M 'The Politics of Integration in East Africa since Independence in Politics and Administration in East Africa' (1996) 395, 412.

Tanzania became intertwined and interdependent.⁴⁵

In the post-colonial era, the close ties between Kenya, Uganda, and Tanzania remained intact because the countries' leaders realized that losing the common market structures that had been built during the colonial period would be costly.⁴⁶ In 1967, the three countries entered into a Treaty formally establishing the EAC.⁴⁷ Although the main focus of the Treaty was economic, it went further than all previous Agreements in the area by undertaking to integrate the politics, as well as the common services, of the member countries.⁴⁸

The stated goal of the Treaty for East African Co-operation was regional integration and Kenya, Uganda, and Tanzania all publicly espoused the notion that they entered the Treaty for mutual gain. However, in truth, Kenya, Uganda, and Tanzania were all seeking to protect their own varying national interests. While administered by Great Britain, the Kenyan economy had become dependent on foreign capital.⁴⁹

Therefore, after independence, in order to maintain its prominence within the region, Kenya needed to retain export outlets for its goods and services. Tanzania, which viewed itself as a net loser under the previous trading scheme, sought to achieve a more balanced division of the gains from trade within the region. Tanzania also had an ideological commitment to African unity⁵⁰ and saw the EAC as a stepping stone toward pan-Africanism.⁵¹ Finally Uganda supported the EAC because it wanted to formalize its relationship with Kenya. Due to its landlocked position, Uganda was dependent on Kenyan ports and Uganda wanted freer access to the Kenyan market for its agricultural products. In addition, Uganda, like Tanzania, wanted to improve its

⁴⁵Okoth PG *'The Foreign Policy of Uganda'* (1994) 36.

⁴⁶Green RH *'The East African Community: A Valediction Forbidding Mourning'* (1978) 8.

⁴⁷The Treaty for East African Co-operation 1967 available at <http://www.eac.int/> (accessed 12 February 2011).

⁴⁸See the Treaty for East African Co-operation, the preamble of the Treaty states that 'in their desire for the wider unity of Africa (the three countries) are resolved to co-operate with one another and with other African countries in the economic, political and cultural fields'. However despite this broad policy statement, the leaders of Kenya, Uganda and Tanzania could not reach an agreement on political federation and nothing further was discussed in the Treaty about how the three countries planned to integrate their politics beyond the proposed economic co-operation.

⁴⁹Okoth PG *'The Foreign Policy of Uganda'* (1994) 364.

⁵⁰Okoth PG *'The Foreign Policy of Uganda'* (1994) 364.

⁵¹Green RH *'The East African Community: A Valediction Forbidding Mourning'* (1978) 3.

overall position within the region and achieve more equality in the distribution of benefits from trade and industry within the region.⁵²

However unfortunately this co-operation only lasted for ten years and in 1977 the community collapsed. Several reasons have been fronted as the root cause for the collapse. A report⁵³ by the EAC Secretariat identifies such reasons to include; intra-community political differences; differences on the sharing from jointly owned common services organisations and lack of policy to redress the situation; low private sector and civil society input in the running of the then community; the then west/east divide polarising the world into capitalist and socialists which resulted in disparate economic systems of socialism in Tanzania and capitalism in Kenya. In addition others have observed that demands by Kenya for more seats than Uganda and Tanzania in decision making organs could have caused the collapse as well as persistent disagreements with Ugandan dictator Idi Amin with the other Heads of States.⁵⁴



3.5.2 Revival of the Community

Following the dissolution of the former EAC in 1977, the member states negotiated a Mediation Agreement for the division of assets and liabilities which they signed in 1984. However as one of the provisions of the Mediation Agreement, the three states agreed to explore areas for future co-operation and to make concrete arrangements for such co-operation.⁵⁵

Subsequent meetings of the three Heads of States led to the signing of the Agreement for the Establishment of the Permanent Tripartite Commission for East African Co-operation on 30 November 1993. Full East African Co-operation operations started on 14 March 1996 when the Secretariat of the Permanent Tripartite Commission was launched at the headquarters of the EAC in Arusha, Tanzania.

⁵²Fitzke S 'The Treaty for East African Co-operation' (1999) 8 *Minnesota Journal of Global Trade* 136.

⁵³East African Community Secretariat 'Present and Future Trends of the East African Community' (2005) 7 available at <http://www.eac.int> (accessed 3 February 2011).

⁵⁴Peterson TL 'Born in Anonymity' *Mshikamano Magazine* 10 April 2005.

⁵⁵History of the East African Community available at <http://www.eac.int/about-eac/eac-history.html> (accessed 9 February 2011).

Considering the need to consolidate regional co-operation, the East African Heads of State at their 2nd Summit in Arusha on 29 April 1997, directed the Permanent Tripartite Commission to start the process of upgrading the Agreement establishing the Permanent Tripartite Commission for East African Co-operation into a Treaty.⁵⁶

The Treaty-making process, which involved negotiations among the member countries as well as wide participation of the public, was successfully concluded within three years.⁵⁷ The Treaty for Establishment of the EAC was signed on 30 November 1999 and entered into force on 7 July 2000 following its ratification with the Secretary General by the original three Partner States – Kenya, Uganda and Tanzania. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18 June 2007 and became full Members of the Community with effect from 1 July 2007. Upon the entry into force of the Treaty, the EAC came into being.⁵⁸

3.5.3 The Newly Integrated EAC

The main goal of the EAC as an economic and political entity is to improve the standard of living of the population through increased competitiveness value-added production, trade and investment. It tends to promote sustainable development and foster a prosperous internationally competitive, stable and politically united region.⁵⁹

The vision of the EAC is a prosperous, competitive, secure, stable and politically united East Africa. Its mission is to widen and deepen Economic, Political, Social and Culture integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, trade and investments.⁶⁰

The EAC's core values are: professionalism; accountability; transparency; teamwork; unity in diversity; allegiance to the EAC ideals.

⁵⁶History of the East African Community available at <http://www.eac.int/about-eac/eac-history.html> (accessed 9 February 2011).

⁵⁷Green RH 'The East African Community: A Valediction Forbidding Mourning' (1978) 2.

⁵⁸History of the East African Community available at <http://www.eac.int/about-eac/eac-history.html> (accessed 9 February 2011).

⁵⁹UNECA IV (2010) 16.

⁶⁰East African Community Secretariat 'Present and Future Trends of the East African Community' (2005) 7 available at <http://www.eac.int> (accessed 3 February 2011).

The EAC's objectives are provided for in Article 3 of the EAC Treaty.⁶¹ They are as follows:

- a) Attainment of sustainable growth and development of the partner states by the promotion of a more balanced and harmonious development of the Partner States;
- b) Strengthening and consolidation of co-operation in agreed fields that enhance equitable economic development within the Partner States;
- c) Promotion of sustainable utilisation of the natural resources of the partner states and effective protection of the natural environment;
- d) Strengthening and consolidation of the long standing political, economic, social, cultural and traditional ties and association among the people of the Region;
- e) Mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development;
- f) Promotion of peace, security and stability within the region;
- g) Enhancement and strengthening of partnerships with the private sector and civil society for sustainable socio-economic and political development;
- h) Undertaking of such other activities calculated to further the objectives of the Community as the Partner States may from time to time decide to undertake in common.

The EAC aims at widening and deepening co-operation among the partner States in, among others, political, economic and social fields for their mutual benefit.⁶² To this end in 2005 the EAC countries established a Customs Union⁶³. On 30 June 2010 the EAC launched its Common Market in 2010 and is now working towards a Monetary Union which is scheduled for 2012 and ultimately a Political Federation of the East African States.⁶⁴

⁶¹ Available at <http://www.eac.int/organs.html> (accessed 3 February 2011).

⁶² About EAC available at <http://www.eac.int/about-eac.html> (accessed 3 February 2011).

⁶³ The Customs Union was established pursuant to Article 75 of the Treaty establishing the East African Community.

⁶⁴ About EAC available at <http://www.eac.int/about-eac.html> (accessed 3 February 2011).

The realisation of a large regional economic bloc encompassing Burundi, Kenya, Rwanda, Tanzania and Uganda with a combined population of more than 125 million people, land area of 1.82 million sq. kilometres and a combined Gross Domestic Product (GDP) of \$73 billion (2009), bears great strategic and geopolitical significance and prospects of a renewed and reinvigorated EAC.⁶⁵

The regional integration process is at a high pitch at the moment as reflected by the encouraging progress of the East African Customs Union, the signing in November 2009 and ratification in 2010 of the Common Market Protocol by all the Partner States.⁶⁶

3.5.4 The EAC in the Trading Sphere

The EU continues to be the EAC's largest trading partner accounting for 19.9 per cent in 2009 compared with 18.4 per cent recorded in 2008.⁶⁷ Regional trade integration is a cornerstone of EAC Partner States' trade policies. To this end the EAC has been involved in strengthening of public institutions and private sector organisations involved in export promotion. Private sector has been at the forefront of enhancing economic growth and has absorbed most of low-income earners population thereby creating employment opportunities especially for the youth. In Kenya the horticultural sector has greatly boosted the economy and has been hailed as one of the key drivers of the economy after tourism sector.⁶⁸

Burundi, Rwanda, Tanzania and Uganda are covered by the EU's Everything But Arms⁶⁹ (EBA) initiative, under which all products from LDCs except arms and ammunitions have preferential access to the EU market. Together with other sub-Saharan African countries, the EAC partner states also qualify for duty-free access to the United States' market under the African Growth and Opportunity Act

⁶⁵See Section 4.3 of this study on the trade statistics between the EU and the EAC. Also available at <http://www.eac.int/about-eac.html> (accessed 3 February 2011).

⁶⁶About EAC available at <http://www.eac.int/about-eac.html> (accessed 3 February 2011).

⁶⁷EAC trade statistics available at <http://www.eac.int/trade/index> (accessed 5 February 2011).

⁶⁸Export Processing Zone Report 'Horticulture Industry in Kenya' (2005) available at <http://www.epzakenya.com/UserFiles/File/Horticulture.pdf> (accessed 10 February 2011).

⁶⁹EBA Regulation grants duty-free access to imports of all products from LDCs to the EU market, except arms and ammunitions without any quantitative restrictions (with the exception of sugar, bananas and rice for a limited period). Available at <http://www.ec.europa.eu/trade> (accessed 19 October 2010).

(AGOA).⁷⁰

Products from EAC countries can access various markets in the developed world through the Generalised System of Preferences (GSP)⁷¹ which offers preferential treatment to a wide range of products originating in developing countries. However the EAC has not been without challenges and much needs to be done especially by encouraging other players such as private sector in the trading sphere.

3.5.5 Trade challenges within the EAC

Like most African and developing world the EAC has not been spared by the harrowing effects of the prevailing unfavourable terms of trade.⁷² The EAC is a net importer that is, it imports twice as much as it exports or consumes twice as much as it produces in trade value terms. EAC countries export mainly primary unprocessed products and imports mainly finished consumer and capital goods.⁷³

The leading economic activities of the EAC member states today are agriculture which contributes an average of 39 per cent of GDP and provides employment to 85 per cent of the population; tourism which contributes an average of 14 per cent of GDP with investments worth US \$ 3 230 million and manufacturing which contributes an average of 10.4 per cent of GDP with investments worth US \$ 2 131 million.⁷⁴

Going by the foregoing statics it is clear that agriculture is the major economic activity within the EAC accounting for three quarters of the employment level and hence cautious steps must be taken especially while liberalising this sector to major trading partners as will be seen in the Section 4.5 of this study. In addition the EAC needs to explore other areas in the service sector which can enhance the tourism sector. It is thus evident that a great deal more effort must be applied to boost the region's industrial and manufacturing sector as well as the service sector so as to enhance trade development within the EAC. Moreover EAC needs to move away

⁷⁰EAC trade statistics available at <http://www.eac.int/trade/index> (accessed 5 February 2011).

⁷¹The Generalized System of Preferences (GSP) is a scheme whereby selected products originating in developing countries are granted reduced or zero tariff rates over the most favoured nation rates. The least developed countries (LDCs) receive special and preferential treatment for a wider coverage of products and deeper tariff cuts. The objectives of the GSP scheme are to increase export earning, promote industrialization and accelerate rates of economic growth of these countries. Available at <http://www.unctad.org/Templates/Page.asp?intltemID=2309&lang=1> (accessed 9 February 2011).

⁷²UNECA IV (2010) 17.

⁷³EAC trade statistics available at <http://www.eac.int/trade/index> (accessed 5 February 2011).

⁷⁴EAC trade statistics available at <http://www.eac.int/trade/index> (accessed 5 February 2011).

from the cocoon of agriculture sector for it to compete effectively in international trading sphere.

3.5.6 Trade Development within the EAC

According to a trade report by the EAC secretariat there has been steady level of growth in trade within EAC since 2005.⁷⁵ This has been attributed to commitment by member countries in implementation of the trade reforms nationally and within the region. However, the member countries are at consensus that much is needed to improve the level of trade within the EAC for the region to compete globally. To this end the EAC countries have come up with a number of initiatives to enhance trade and these include the following:

The first initiative is with regard to ratification of the Protocol establishing the East African Customs Union which was signed in March 2004.⁷⁶ The Protocol came into force upon ratification by the then three EAC member countries and became effective on 1 January 2005. The objectives of the Customs Union include furthering the liberalisation of intra-regional trade in goods; promoting production efficiency in the Community; enhancing domestic, cross-border and foreign investment; and promoting economic development and industrial diversification.

The Protocol establishing the EAC guides the implementation process of the customs union along with other instruments. The underpinning role of the Protocol establishing the East African Customs Union includes removal of the customs duties and charges of equivalent effects on internal trade, elimination of all non-tariff barriers⁷⁷ to trade (NTBs) and establishment and maintaining a common external tariff (CET).

The implementation of the customs union has resulted in the harmonisation and uniform application of the EAC customs laws in the member countries, uniform application of the CET, asymmetrical reduction of internal tariff as envisaged in the

⁷⁵EAC Trade Report (2009) 12 available at <http://www.eac.int/statistics/> (accessed 12 February 2011).

⁷⁶Wolfe B *Regional Integration in Africa: Lessons from the East African Community* (2008) 63 South African Institute of International Affairs (SAIIA).

⁷⁷Article 13 of the Protocol for the establishment of the East African Community Customs Union defines NTBs as quantitative restrictions and specific limitations that act as obstacles to trade other than tariffs. These barriers may be embedded in laws, regulations, practices and requirements at the national level mostly applied at the customs border for various legitimate levels like revenue collection, safeguarding health and environment.

Protocol as well as progressive removal of the NTBs which has remained a major challenge to trade within the EAC. This has greatly contributed towards intra-regional trade especially with regard to investment and this has boosted the level of trade in the member countries.

Secondly the member countries have greatly improved in trade facilitation.⁷⁸ The member countries have agreed to cooperate in simplifying, standardising and harmonising trade information and documentation so as to facilitate trade in goods. One of the improved areas is in relation to anti-dumping measures where the Community has developed anti-dumping regulations, as elaborately highlighted in the EAC Customs Union Protocol.⁷⁹

Enactment of Competition Policy and Law⁸⁰ is another initiative that has greatly improved the level of trade within EAC. The enacted EAC Competition Policy and Law which is already being implemented by the member countries aims to deter any malpractice that adversely affects free trade within the Community. This is to ensure that the countries engage in fair competition with each other which is vital for economic growth.

Fourthly all goods that are re-exported are to be exempted from the payment of import or export duties. This initiative is geared towards encouraging members to re-export goods and this has subsequently increased intra-regional trade.⁸¹

Another step is towards removal of non-tariff barriers to trade.⁸² Under Article 13 of the Customs Union Protocol, the EAC member countries have agreed to remove all existing non-tariff barriers to trade and not to impose any new ones.

Lastly member countries have taken an initiative in the area of standards and

⁷⁸UNECA IV (2010) 203.

⁷⁹EAC Trade Report (2009) 12 available at <http://www.eac.int/statistics/> (accessed 12 February 2011).

⁸⁰The East African Community Competition Act of 2001 was enacted to promote and protect fair competition, provide consumer welfare and to establish the EAC Competition Authority. Full text of the Act is available at <http://www.eac.int/trade/> (accessed 10 February 2011).

⁸¹Market Size, Access and Trade Policies within East African Community available at http://www.eac.int/trade/index.php?option=com_content&view=article&id=50:trade-info&catid=36:ntbs (accessed 3 February 2011).

⁸²Article 13 of the Protocol for the establishment of East African Community Customs Union defines non-tariff barriers as quantitative restrictions and specific limitations that act as obstacles to trade, other tariffs. These barriers may be in form of laws, regulations, practices and requirements mostly applied at the borders. These barriers are often for various legitimate reasons like revenue collection, safeguarding health and environment.

measures. Under Article 81 of the Treaty Establishing the Community, the EAC member countries recognise the importance of standardisation, quality assurance, metrology and testing for the promotion of trade and investment and consumer protection, among other things. The development of East African Standards has been necessitated by the need for harmonising requirements governing quality of products and services in the EAC.⁸³ It is envisaged that through harmonised standardisation, trade barriers which are encountered when goods and services are exchanged within the community will be removed.

3.6 Intra-African Trade

With the proliferation of the number in regional integration, it therefore follows that the level of intra-African trade is elevated. In this regard it is imperative to look at intra-trade with regard to Africa.

Intra-regional trade flows in Africa have been generally low compared with other regions, primarily because of poor infrastructural development, maintenance and connectivity, conflicts and security issues among the regions and the presence of trade barriers. Poor infrastructure has contributed to low trade, internal airways are insufficiently exploited and in most cases underdeveloped, making it difficult to conduct intra-continental business. Therefore there is need to develop linkage among African regions in order to improve movement of goods and services.

3.6.1 Benefits of Intra-African Trade

It is without doubt that many African countries have greatly benefited and continue to benefit from intra-African trade.⁸⁴ Intra-African trade contributes to enlarged regional markets providing incentives for private cross-border investments and region foreign direct investment. In addition expanded intra-African trade should generate faster growth and income convergence in regional economic communities.

⁸³The East African Standards are prepared by the East African Standards Committee (EASC) established in accordance with Section 4 of the East African Community Standardisation, Quality Assurance, Metrology and Testing Act of 2006. The committee brings together the national bureaux of standards of the EAC member countries that is Bureau Burundais de Normalisation et Contrôle de la Qualité (BBN), Kenya Bureau of Standards (KEBS), Rwanda Bureau of Standards (RBS), Tanzania Bureau of Standards (TBS) and Uganda National Bureau of Standards (UNBS).

⁸⁴UNECA IV (2010) 89.

As result of intra-African trade many countries have become economically dependent in that the trade weakens the long-term dependence of African countries on developed market economies for manufacturers.⁸⁵ This is because as a result of intra-African trade production structures are diversified away from production and trade of primary commodities.

Facilitating and promoting trade requires not only removing tariffs and non-tariff barriers but also simplifying trade and lowering the cost of doing business. Such efforts also promote competitiveness in regional and global markets because they shorten delivery times and cut costs, lowering the price of goods. The theory that trade is positively correlated with economic growth seeks to embrace arguments by Adam Smith who observed that trade allows for increased specialisation.⁸⁶ A country's abundant means of production also is fully exploited through trade. The experience of China and India in the past two decades has been resoundingly consistent with the diagnosis that opening trade to the world economy fosters productivity and economic growth.⁸⁷ In this regard one can only hope that Africa will continue to further liberalise its market both in the goods and services sector which will in turn foster economic growth.

However, it is paramount for governments to understand how trade policies work including non-tariff barriers such as licenses and permits affect the economy. Policy makers should understand the structure of the tariff including its dispersion, exemptions and rebates; revenues derived from tariffs; what export goods must be taxed or subsidised, whether trade related institutions such as standard organisations, export finance and marketing facilities are adequate to support export expansion and the protectionist policies that favour and assist the poor during transition.⁸⁸

3.7 Conclusion

The process of establishing regional integration is a steady process that requires cooperation and contribution by all partner states for good results to be achieved. Developing and least developed countries in Africa have become active participants

⁸⁵UNECA IV (2010) 39.

⁸⁶UNECA IV (2010) 40.

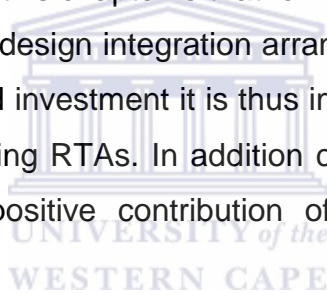
⁸⁷Bilal S 'Redefining ACP-EU Trade Relations: Economic Partnership Agreements' (2006) 12.

⁸⁸UNECA IV (2010) 42.

in the regional integration process. These countries see regional integration as an essential avenue towards economic growth, development and poverty alleviation. Regional integration if properly structured can be a tool for promoting economic growth and sustainable development and improving the living standards of the African people. In addition Regional integration accomplishes common objectives that encourage economic transformation in areas such as trade, customs union, common markets and economic union. However, the same can result in counterproductive competition in cases of overlapping memberships.

Intra-African trade holds the key to unlocking Africa's potential growth and if highly encouraged the continent can seize the opportunity to become economically stable. More so intra-African trade is necessary for Africa to sustain the growth that is being fuelled by rapidly increasing exposure to other emerging markets

One of the emerging issues in this chapter is that for African countries to benefit from regional integration they must design integration arrangements suited to their needs. To increase regional trade and investment it is thus imperative that African countries liberalise and streamline existing RTAs. In addition countries need to work on their policy issues to ensure a positive contribution of regional integration to their economic development.



CHAPTER FOUR

ECONOMIC PARTNERSHIP AGREEMENT BETWEEN THE EAST AFRICAN COMMUNITY AND THE EUROPEAN UNION

4.1 Introduction

As noted in Section 2.2 of this study Economic Partnership Agreements¹ (EPAs) are an evolution of long historical ties between Europe and African Caribbean and Pacific (ACP) countries.² In June 2000 the 77 ACP countries and the 15 member states of the European Union (EU) signed a new Partnership Agreement the Cotonou Agreement establishing a new framework for the relationship between ACP countries and the EU. The Cotonou Agreement establishes a clear departure in ACP-EU economic relations from the previous 25 years of non-reciprocal preferential trade relations under four successful Lomé Conventions.

Every country regardless of its size, ideology or state of development participates in international trade because every country can gain from international trade. The advantages of trade are so compelling that even countries with a strong ideology favouring autarky actively participate in world markets. However, what determines whether the country gets to gain from such trade are the terms of the trade Agreement and the negotiating capacity of the country. These two factors enable the trade negotiators to couch the Agreement in a way that reflects the interest of its country. Herein lays the fear amongst East African Community member countries that some of the provisions of the EAC-EU EPA do not reflect best interest of the EAC as far as its trade development is concerned.

The history of trade relations between EU and ACP countries in Sections 2.2, 2.3 and 2.4 of this study highlighted key issue on the need capture trade issues of a country by drafting trade Agreements properly. In this regard this Chapter will seek to

¹EPAs are Economic Partnership Agreements which the EU is currently negotiating with the 77 of its former colonies in Africa, the Caribbean and Pacific (ACP). EPAs are essentially free trade agreements (FTA) that envisage the creation of a free trade area between the EU and the ACP countries in which there are no duties on goods imported and exported between these countries. South Centre 'Understanding the Economic Partnership Agreements' Analytical Note SC/AN/TDP/EPA/1 (2007) 3 available at <http://www.southcentre.org> (3 February 2011).

²Bilal S 'Redefining ACP-EU Trade Relations: Economic Partnership Agreements' (2006) 5 available at http://www.delbrb.ec.europa.eu/en/epa/epa_docs/epa_ECDPM_EPA_Dec06.pdf (accessed 3 February 2011) (hereinafter Redefining ACP-EU Trade Relations).

address the research questions by analysing the provisions of the EAC-EU EPA to determine if the same hinders or accelerates trade development within the EAC.

4.2 Overview of the ACP-EU EPA

Part III of the Cotonou Agreement on economic and trade co-operation sets the path for replacing the current non-reciprocal preferential market access for the ACP group with World Trade Organisation (WTO) compatible new trade arrangements which were due to enter into force by 2008.³

As response and efforts or compliance with the WTO rules, in September 2002, phase I of the negotiations were launched in Brussels and involved all ACP countries. Negotiations in this phase involved objectives and principles of the EPAs as well as issues of common interest to all ACP countries. This phase was concluded in 2003.⁴

The second phase was at the regional level. The EU put a demand that the ACP countries form themselves into compatible regional configurations in order to hasten the negotiations and to enable countries negotiate Agreements that suited their varied needs.⁵ This phase begun in 2004 and is dealing with market access issues, development, trade in services, agriculture, fisheries and trade related issues such as intellectual property rights.⁶ It is in this phase that the negotiations devolved to the regional level with ACP splitting into six regional negotiating groups⁷ namely; the Eastern and Southern Africa (ESA), Economic Community of West African States (ECOWAS), Central Africa Monetary Union (CEMAC), Southern Africa Development Community (SADC), Caribbean (CARIFORUM) and the pacific (PACP). Later

³See Sections 1.1 and 2.4 of this study for a detailed analysis on the basis of which EPAs came to be negotiated.

⁴Ministry of trade, policy brief 'background to EPAs: why Kenya needs to conclude EPAs with the EU: and EAC-EPA negotiations progress' (2008) 4 available at http://www.trade.go.ke/index.php?option=com_content&task=view&id=87&Itemid=121 (accessed 3 March 2011).

⁵Bilal S 'Redefining ACP-EU Trade Relations' (2006) 3.

⁶Ministry of trade, Kenya 'Background to EPAs: Why Kenya needs to conclude EPAs with the EU' Policy Brief (2008) 4 available at http://www.trade.go.ke/index.php?option=com_content&task=view&id=87&Itemid=121 (accessed 3 March 2011).

⁷Mayne M 'Economic Partnership Agreements: a 'Historic Step' Towards a Partnership of Equals?' (2008) 523 ODI Working Paper available at <http://www.odi.org.uk> (accessed 9 March 2011).

towards the end of 2007 as the deadline culminated another sub-group emerged from both ESA and SADC configurations comprising of the EAC countries.⁸

The table below highlights the ACP configurations in terms of the current seven regional groupings.

Table 1: ACP configuration and EPA signatories.

Configuration	Members	Signatory states in December 2009	Countries falling into EBA/Standard GSP	Proportion of signatory countries (%)	Number of liberalisation schedules
ESA EPA	Comoros Djibouti Ethiopia Madagascar Malawi Mauritius Seychelles Sudan Zambia Zimbabwe	Comoros Madagascar Mauritius Seychelles Zimbabwe	Djibouti Eritrea Ethiopia Malawi Sudan Zambia	45	5
EAC EPA	Burundi Kenya Rwanda Tanzania Uganda	Burundi Kenya Rwanda Tanzania Uganda		100	1
SADC EPA	Angola Botswana Lesotho Mozambique Namibia South Africa Swaziland	Botswana Lesotho Mozambique Namibia Swaziland	Angola	71	2
CEMAC EPA	Cameroon Chad Central African Rep. Congo Congo DR Congo Eq. Guinea Gabon S. Tome`/`	Cameroon	Chad Central African Rep. Congo DR Congo Eq. Guinea S. Tome`/` Principe	12.5	1

⁸Mayne M 'Economic Partnership Agreements: a 'Historic Step' Towards a Partnership of Equals?' (2008) ODI Working Paper available at <http://www.odi.org.uk> (accessed 9 March 2011).

	Principe				
ECOWAS EPA	Benin Burkina Faso Cape Verde Cote d'Ivoire Gambia Ghana Guinea Bissau Liberia Mali Mauritania Niger Nigeria Senegal Sierra Leone Togo	Cote d'Ivoire Ghana	Benin Burkina Faso Cape Verde Gambia Guinea Bissau Liberia Mali Mauritania Niger Nigeria Senegal Sierra Leone Togo	13	2
PACP EPA	Cook Islands Fed. Micronesia Fiji Kiribati Marshall Islands Nauru Niue Palau Papua New Guinea Samoa Solomon Islands Togo Tuvalu Vanuatu	Fiji Papua New Guinea	Cook Islands Fed. Micronesia Kiribati Marshall Islands Nauru Niue Palau Samoa Solomon Islands Togo Tuvalu Vanuatu	14	2
CARIFORUM	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana Haiti Jamaica St. Kitts/Nevis St. Lucia St. Vincent/Grenadine s Suriname Trinidad/Tobago	Antigua/Barbuda Bahamas Barbados Belize Dominica Dominican Rep. Grenada Guyana Haiti Jamaica St. Kitts/Nevis St. Lucia St. Vincent/Grenadin es Suriname Trinidad/Tobago	-	100	1

Source: Mayne M 'Economic Partnership Agreements: A 'Historic Step' Towards a Partnership of Equals?' (2008).

The Cotonou Agreement sets out the following main principles of the EPAs; First principle is reciprocity: One of the main objectives of the EPAs is the establishment of a free trade area by liberalising trade through gradual elimination of all trade barriers between ACP-EU countries⁹ as enunciated under Article XXIV of the General Agreement on Tariffs and Trade (GATT) 1994. This is a radically new element in the new ACP-EU trade relations and also a necessary principle to ensure that EPAs are WTO compatible. For the first time the ACP countries will have to open up on a reciprocal basis their own markets to EU products in order to retain their preferential access to the EU market.

The second principle is development oriented:¹⁰ EPAs are meant to promote sustainable development and ultimately help in poverty reduction by enhancing the integration of ACP countries into the world trading system and supporting ACP regional economic integration. Therefore to the benefit of the ACP countries EPAs must be economically meaningful, politically sustainable and socially acceptable.¹¹

Regionalism is the third principle:¹² EPA negotiations are taking place within seven regional groupings. These groupings are intended to strengthen regional integration which is seen as a first step towards integration into the world economy as well as a main instrument to stimulate investment and to lock in the necessary trade reforms.¹³

Lastly the EPAs are supposed to embrace the principle of differentiation:¹⁴ EPAs should provide sufficient scope for flexibility, special and differential treatment and asymmetry so as to take into account the different levels of development of the contracting parties. In particular the Least Developed Countries (LDCs), small and vulnerable economies, landlocked countries and small islands should be able to benefit from special and differential treatment.

These principles are replicated in Chapter 1 of the EAC-EU EPA. However, of importance to this study is the EAC-EU EPA and the subsequent sections of this study shall focus on reviewing its provisions in order to reveal if the same will hinder or accelerate trade development within the EAC.

⁹Article 37.7 of the Cotonou Agreement.

¹⁰Article 34 of the Cotonou Agreement.

¹¹Bilal S 'Redefining ACP-EU Trade Relations' (2006) 5.

¹²Article 35.2 of the Cotonou Agreement.

¹³Bilal S 'Redefining ACP-EU Trade Relations' (2006) 5.

¹⁴Article 35.3 of the Cotonou Agreement.

4.3 The EAC-EU EPA

The EU is the EAC's largest trading partner accounting for 19.9 per cent in 2009 compared with 18.4 per cent recorded in 2008.¹⁵ In 2008 trade between EU and EAC amounted to €4.8 billion. EAC's main exports to EU are agricultural (coffee, tea, spices, plants, fish and fish products) and horticultural products. While EAC's main imports from EU comprise of machinery (mechanical and electrical), pharmaceuticals and vehicles. Tables 1 and 2 below show the level of trade between the EU and EAC in 2008.¹⁶

Table 1: EAC main exports to the EU (2008).

Coffee and spices	27 %
Plants and flowers	24%
Fish products	11%
Vegetables	10%

Table 2: EAC main imports from the EU (2008).

Mechanical machinery	23 %
Electrical machinery	22%
Pharmaceutical products	8%
Vehicles	7%

The EAC member countries are among the African, Caribbean and Pacific (ACP) group of countries engaged in a trade relationship with the EU. One of the core objectives of the EAC is to promote free trade with an ultimate aim of forming a political union.¹⁷ There has been a speedy progress in integration of the region that

¹⁵Briefing on EAC-EU EPA Negotiations available at http://www.eac.int/trade/index.php?option=com_content&view=article&id=121&Itemid=105 (accessed 3 March 2011).

¹⁶European Commission 'Economic Partnership Agreements' available at <http://www.ec.europa.eu/trade/wider-agenda/development/economic> (accessed 3 March 2011).

¹⁷Article 5 of the Treaty Establishing the East African Community available at <http://www.eac.int> (accessed 5 February 2011).

culminated in a customs union in 2005 and a common market which was launched in June 2010. Thus negotiations of the EPA are in tandem with the objectives of the EAC as set out in the EAC Treaty.

In the on-going EAC-EU EPA negotiations, the EAC countries are negotiating as a bloc despite their divergent interests internationally and the fact that they are all at different levels of development.¹⁸ One of the rationales for the EAC countries to negotiate EPA was that EPAs unlike the Generalised System of Preferences (GSP)¹⁹ are said to offer the option of a contractually secure trade regime which the EAC countries can use to stimulate investments targeting the EU market.

In addition the Everything But Arms (EBA) initiative provided for LDCs is a non-binding unilateral measure and accordingly the EU reserves the right to withdraw or modify it at any time thus rendering the measure highly insecure.²⁰ Strict rules of origin is another daunting challenge which the EBA beneficiaries face.²¹ In addition the LDCs within the EAC face huge structural and supply incapacities hence cannot meet the rules of origin requirements for exports of importance to them such as industrial and agricultural products which are of economic importance to these LDCs. Consequently these LDCs cannot fully utilise the EU's duty free quota free offer. Having evaluated the aforementioned reasons the EAC countries therefore decided to negotiate EPA.

Because of the inability to conclude the full EPA negotiations by 31 December 2007 to counter the expiration of the Cotonou Agreement, the EU proposed the initialling of interim/framework EPAs to provide a bridge until the conclusion of the full EPAs.²²

¹⁸Four of the EAC countries, Burundi, Rwanda, Uganda and Tanzania are least developed countries while Kenya is a developing country.

¹⁹The Generalised System of Preferences (GSP) are schemes of preferences under which selected products originating in developing countries are granted reduced or zero tariff rates over the MFN rates. The objectives of the GSP regimes is to increase export earnings in developing countries, promoting their industrialisation and accelerating rates of economic growth in these countries. The key down side of these trade regimes is that they are unilateral trade preferences and are not contractual hence granted at the whims of the EU thus making them unreliable.

²⁰Ukpe A 'Will EPAs Foster the Integration of Africa Into World Trade?' (2010) 54 *Journal of African Law* 215.

²¹Ukpe A 'Will EPAs Foster the Integration of Africa Into World Trade?' (2010) 54 *Journal of African Law* 215.

²²Status of EAC-EU EPA Negotiations held in Dar es Salaam in Tanzania on 9 June 2010, available at <http://www.eac.int/news> (accessed 25 August 2010).

The interim/framework EPAs contain a WTO compatible market access offer as well as a commitment to negotiate outstanding issues in the EPA.

On 27 November 2007 in Kampala, Uganda the EAC countries and the EU initialled an Interim Economic Partnership Agreement (IEPA) that consisted of the following sections:²³

- General Provisions (scope, objectives and principles).
- Trade in Goods.
- Fisheries.
- Economic and Development Cooperation.
- Provisions on areas for future negotiations.
- Institutional & Final Provisions.
- Annexes and Protocols (Customs duties on originating products, Rules of origin and Administrative matters).

However, though having initialled an IEPA in 2007 none of the EAC countries has signed the final EPA despite parties setting dates for the signing of the same. On June 2010 at a meeting held in Dar es Salaam, Tanzania the EAC member countries and the EU agreed to accelerate the negotiations towards a final EPA by the end of November 2010²⁴ however, this meeting never came to be and the EAC secretariat has alluded this to lack of funds on the part of EAC countries to fund further preparatory efforts.²⁵

The EAC-EU EPA negotiations seem to be taking a rather slow pace with only a single EAC EPA experts' meeting having been convened since the June 2010 meeting. In response the EU delegations in the five EAC countries have agreed to provide funds to enable the technical level EAC negotiators to meet with the EU.²⁶ However, the efforts by EU delegations to provide funds seems to have hit a snag following an objection by the East African Legislative Assembly (EALA) to the use of

²³Briefing on EAC-EU EPA Negotiations available at <http://www.eac.int> (accessed 3 March 2011).

²⁴Status of EAC-EU EPA Negotiations held in Dar es Salaam in Tanzania on 9 June 2010, available at <http://www.eac.int/news> (accessed 25 August 2010).

²⁵Bilal S & Ramdoo I 'Riding out the Storm: Will the EPAs Sink?' (2010) 14 available at http://www.acp-eu-trade.org/library/files/tni_en_9-9.pdf (accessed 3 March 2011).

²⁶Bilal S & Ramdoo I 'Riding out the Storm: Will the EPAs Sink?' (2010) 14 available at http://www.acp-eu-trade.org/library/files/tni_en_9-9.pdf (accessed 3 March 2011).

funds mobilised by the Secretariat from a development partner to facilitate the process.²⁷ This seems to have taken the EAC-EU EPA negotiations to the drawing board until the EALA either approves use of the funds or the EAC countries obtain funds from another source.

One of the challenges in concluding the negotiations is lack of consensus on the contentious issues such as export taxes and the Most Favoured Nation (MFN) clause among other clauses. On services the EAC countries have focused on expediting regional integration in the context of the EAC common market. As such discussions on services have not taken prominence with significant work outstanding on advancing a joint legal text as well as the preparation of possible requests and offers.²⁸

4.3.1 The EAC-EU EPA Market Access Offer

The EU market access offer consists of duty free and quota free access for all EAC exports to the EU, except for arms and ammunitions for which the most favoured nation rates apply.²⁹

The EAC market access offer is based on reductions from the EAC Common External Tariffs (CET) and reductions of the tariffs will start in 2015. The EAC market access offer consists of liberalisation of 82.6 per cent of imports from the EU over a 25 year transition period but 80 per cent will be liberalised over the next 15 years.³⁰

Liberalisation will occur in three tranches. The first tranche was slated for 2010 and involves only products with a CET of zero per cent that is, products covered in this phase do not attract any import taxes under the EAC Customs Union CET. Products

²⁷The EALA argues that using a grant from Swedish Development Agency (Sida) to finance the negotiations would not only compromise negotiations to the partner states' detriment but would as well prejudice and weaken stronger stance the EAC countries may adopt. Ubwani Z 'EAC Economic Partnership Agreement Trade Talks Stall' *Daily Nation* 3 April 2011. Also available at <http://www.tralac.org>.

²⁸Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations: Seeking Political Leadership to Address Bottlenecks' (2010) 8 available at <http://www.ecdpm.org/dp100> (accessed 28 February 2011 (hereafter Which Way Forward in the EPA Negotiations)).

²⁹Briefing on EAC-EU EPA negotiations. Available at <http://www.eac.int/trade> (accessed 3 March 2011).

³⁰Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 8.

falling under this category include raw materials or capital goods. These constitute 65.4 per cent of EAC's imports from the EU.³¹

The second phase will be between 2015 and 2023, where EAC countries will liberalise a further 14.6 per cent. Products in this category are intermediate inputs³² and attract 10 per cent duty.³³

The third phase will be between 2020 and 2033, where the EAC countries will liberalise a further 2.6 per cent of her imports from the EU. Included in this phase are 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.³⁴

About one-fifth accounting for 17.4 per cent of EAC imports from the EU is excluded from liberalisation commitments under the EPA.³⁵ These products constitute the EAC exclusion list or list of sensitive products. Criteria for including products on this list included contribution to rural development, employment, livelihood sustainability, promotion of food security, fostering infant industries, contribution to government revenues. All products subsidised by EU are also on this list. Therefore imports of these products from the EU under the EPA will face same import duties as imports coming from all other countries.

The exclusion list consists of products which are deemed to contribute or to have a potential to contribute to increased production and trade competitiveness.³⁶

³¹Briefing on EAC-EU EPA negotiations. Available at <http://www.eac.int/trade/> (accessed 3 March 2011).

³²These are goods and services other than fixed assets used as inputs into the production process of an establishment that are produced somewhere in the economy or are imported. A good example of such goods is car engines.

³³Briefing on EAC-EU EPA negotiations. Available at <http://www.eac.int/trade/> (accessed 3 March 2011).

³⁴Briefing on EAC-EU EPA negotiations. Available at <http://www.eac.int/trade/> (accessed 3 March 2011).

³⁵ Briefing on EAC-EU EPA negotiations. Available at <http://www.eac.int/trade/> (accessed 3 March 2011).

³⁶ For further reading on the EAC exclusion list see 'Briefing on EAC-EU EPA negotiations' available at <http://www.eac.int/trade>

4.3.2 Negotiating Structures for the EAC-EU EPA

At the initial stages of the negotiations four of the EAC countries (Burundi, Kenya, Uganda and Rwanda) were negotiating EPA under the ESA configuration while Republic of Tanzania was negotiating under SADC.³⁷ Negotiating EPAs under different configurations posed a challenge for the EAC countries. This is due to the fact that by virtue of belonging to a customs union the EAC countries were bound by the EAC Customs Union Protocol and the EAC Customs Union Management Act to sign EPA as one customs territory.³⁸

In addition being a customs union means that the countries have a common external tariff policy hence this would have posed a problem within the EAC and more specifically for Tanzania which would be torn between applying two different tariffs rates under the auspices of EAC and SADC. In this regard on 13 October 2007 the EAC countries agreed to harmonise their market access offer to the EU under one bloc.

The EAC negotiating structure comprises of the EAC ministers of trade, EAC senior officials (permanent secretaries in the trade ministries) and the National Development and Trade Policy Forum (NDTPF) which is a multi-sectoral forum (dealing with agriculture, trade, investment, services and other trade areas) comprising of representatives from the public and private sector organisations and the civil society organisations in the trade sector.³⁹

On the EU side negotiations are led by the spokesperson who is either a commissioner-director general trade or a director general of trade.⁴⁰

³⁷Ukpe A 'Will EPAs Foster the Integration of Africa Into World Trade?' (2010) 54 *Journal of African Law* 214.

³⁸Ministry of trade, Kenya 'Background to EPAS: Why Kenya needs to conclude EPAs with the EU' Policy Brief (2008) 4 available at http://www.trade.go.ke/index.php?option=com_content&task=view&id=87&Itemid=121 (accessed 3 March 2011).

³⁹Ministry of trade, Kenya 'Background to EPAS: Why Kenya needs to conclude EPAs with the EU' Policy Brief (2008) 5 available at http://www.trade.go.ke/index.php?option=com_content&task=view&id=87&Itemid=121 (accessed 3 March 2011).

⁴⁰Ministry of trade, Kenya 'Background to EPAS: Why Kenya needs to conclude EPAs with the EU' Policy Brief (2008) 5 available at http://www.trade.go.ke/index.php?option=com_content&task=view&id=87&Itemid=121 (accessed 3 March 2011).

4.4 Current Status of the EAC-EU EPA

The EAC-EU EPA negotiations are taking a rather slow pace despite the parties' assurance of their commitments towards finalising the negotiations. Lack of consensus on the key outstanding issues has contributed to this low pace. On 9 June 2010 trade ministers for the EAC countries and the commissioner for trade from the EU held a meeting in Dar es Salaam to come up with a solution on the outstanding issues in the IEPA. However, parties could not agree and the contentious issues were not fully addressed hence, it was not feasible to sign the IEPA as had been expected. As a way forward, both parties while issuing a joint communiqué agreed to finalize the comprehensive EPA Negotiations by end of November 2010.

On 3 June 2010 the EALA Assembly passed a resolution urging the EAC countries to halt the signing of the EPA until the contentious issues in the IEPA are resolved.⁴¹ Some of these issues are on the MFN clause, export taxes and the clause on economic and development cooperation.

Negotiations for the comprehensive EPA are to cover:⁴² Customs and Trade Facilitation; Agriculture; Dispute Settlement Mechanism; Economic and Development Co-operation; Rules of Origin; Technical Barriers to Trade, Sanitary and Phytosanitary Measures; Trade in Services; Trade Related Issues – i) Competition policy ii) Investment and private sector development iii) Trade, environment and sustainable development iv) Intellectual Property Rights and lastly v) Transparency in Public Procurement. Parties also agreed to negotiate and any other areas that the parties find necessary. It is evident that the comprehensive EAC-EU EPA is quite extensive compared to the IEPA as highlighted under Section 4.3 of this study.

4.4.1 Contentious Issues in the EAC-EU EPA

Upon initialling the IEPA on 27th November 2007, the EAC countries and the European Commission reviewed various articles of the IEPA. Most of these articles,

⁴¹Resolution of the East African Community Legislative Assembly is available at <http://www.eac.int> (accessed 3 March 2011).

⁴²Briefing on EAC-EU EPA negotiations. Available at <http://www.eac.int/trade/> (accessed 3 March 2011).

known as the “contentious” issues, have been the subject of extensive debate between both parties and still remain outstanding. These issues include:

a) Export Taxes

Article 15 of the EAC-EU EPA is to the effect that parties to this Agreement should not institute any new duties on goods exported to the other party. The decision on whether to allow the use of export tax on the conditions specified under Article 15 (2) is to be made by the EPA Council, which will also review its effects after 24 months.

The EAC’s concern with this Article is the impact that this restriction will have on its policy space in the use of export taxes as a trade policy instrument. The EAC Customs Management Act, 2004 provides for prohibited and restricted goods and it is to this effect that export of certain goods may be prohibited or restricted under the Act.⁴³ In addition Section 82 the EAC Customs Management Act allows levying of export duties and hence if the EAC-EU EPA becomes binding the EAC countries will not be in a position to levy such taxes again.

Although compatibility with the WTO rules remains the key issue in the EPAs, the GATT (1994) does not explicitly prevent countries from applying export taxes although implicitly, export taxes are also part of the regime of ‘customs duties’. So far at the WTO, most countries have taken commitments to reduce duties only with regard to imports. However, several recently acceded WTO members including China, Mongolia, Saudi Arabia, Ukraine and Vietnam have committed in their accession negotiations to eliminate at least some export taxes with varying scope and economic effect of commitments.⁴⁴

Until now export taxes have remained a fairly under-regulated area of the WTO laws. In the recent years, it has become increasingly important and many countries have been imposing various forms of export restrictions on staple food in order to maintain domestic food security and contain rising food prices. In Kenya for example in 2008 the government imposed export restrictions on maize to curb the food crisis as a

⁴³Article 70 of the East African Community Customs Management Act, 2004 (as amended in 2009). Full text available at <http://www.revenue.go.ke/customs> (accessed 12 March 2011).

⁴⁴Crosby D ‘WTO Legal Status and Evolving Practice of Export Taxes’ International Centre for Trade and Sustainable Development (2008) available at <http://ictsd.org/i/news/bridges/32741/> (accessed 9 February 2011).

result of the post-election violence. In this regard it would be imperative to leave export taxes to be matter of a policy choice to be invoked by parties when deemed appropriate for their future development rather than being restricted as in the case with EPA.

Under the WTO, there are no rules prohibiting the use of export taxes. WTO rules do not expressly require countries to prohibit the use of export taxes. Therefore, there is no obligation to have a clause on export restrictions in the EPA and in case the parties agree to include it a simple reference to WTO rules could suffice. In addition the discipline on export taxes/restrictions could be left out of the EPA and be left to be resolved at the WTO. The EAC countries should negotiate the right to introduce temporary measures under specific circumstances in particular in cases of specific revenue needs and in cases of critical food shortage or for purposes of ensuring food security.

Article 15(2) of the EAC-EU EPA allows EAC countries to impose export duties or taxes under two circumstances only; first in order to foster development of domestic industry and secondly to maintain currency value stability. These two instances are too few compared to flexibilities proposed in the SADC-EU EPA where temporary export duties can be introduced in cases of specific revenue needs; protection of infant industries; protection of environment; in case of critical food shortage or to ensure food security and where a country can justify industrial development needs.

The EAC countries should consider reviewing this Article and add more flexibility especially with regard to enhancing industrial development needs and cases of critical food shortage taking into account that EAC countries are net food importers.⁴⁵

b) Most Favoured Nation Treatment (MFN) Clause.

MFN Clause is another highly debated clause in the EAC-EU EPA negotiations. The clause requires EAC countries to extend to the EU any more favourable treatment that they might give in the future to a 'major trading economy'. The MFN principle does not only cover tariffs but also rules of origin.

⁴⁵Net food importer is a country or a territory whose value of imported goods is higher than its value of exported goods over a given period of time. See FAO briefs on import surges available at <ftp://ftp.fao.org/docrep/fao/009/j8671e/j8671e00.pdf> (accessed 12 February 2011).

Article 16 (1) and (2) of the EAC-EU EPA is to the effect that for future free trade Agreements, if the EU gives preferential treatment for example deeper market access to a third country the same treatment should be extended to the EAC. Consequently where EAC countries give preferential treatment to a developed country or any country accounting for more than 1 per cent or regional entities (such as customs union) accounting for over 1.5 per cent of world merchandise trade, the EAC countries should extend the same treatment to the EU.

The EAC's concern is that the current provision would have an impact on EAC countries' possible bilateral negotiations, since any preference would be automatically extended to the EU. The WTO rules allow for bilateral preferences between developing countries in promoting South-South trade. This provision constrains the EAC countries' future trade Agreements with third parties.

In addition the provision leaves very little policy space for EAC countries to negotiate ambitious trade Agreements in particular with other developed countries such as US and Australia and major trading economies⁴⁶ for example China, India and Brazil or with other major regional groupings such as Mercado Comun del Sur (MERCOSUR) and Association of South East Asian Nations (ASEAN). Should the EAC countries commit to extend to the EU preferences they might accord to other major trading partners in the future, they will weaken their negotiating power vis-à-vis any important trading partner in particular given the increasing importance of new trading partners from the South.⁴⁷

This provision is thus tantamount to asking the EAC countries to bind themselves to the EU on future trade agreements whose terms are not yet known. The EU views it as a matter of 'fairness' given its generous concessions under the EPA by providing duty free quota free market access to all products originating from EAC countries. Bilal & Ramdoo are of the opinion that the MFN clause is a political issue and as such a technical compromise would be most applicable by explicitly narrowing the scope of its application and relaxing the trigger mechanisms (in terms of joint

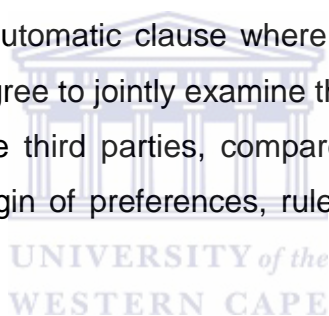
⁴⁶Article 16 (6) EAC-EU IEPA defines a major trading economy to be any developed country or a country accounting for a share of world merchandise exports above 1 per cent or any group of countries accounting collectively for a share of world merchandise exports above 1.5 per cent in the year before the entry into force of the preferential trade agreement in question.

⁴⁷Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 18.

decision-making process and thresholds) for its application.⁴⁸ In addition they shed some ideas on how to couch this clause to an extent that it is not constraining to both parties. First that the negotiating countries could raise the threshold (in terms of share of world trade) of what constitutes a major trading partner to such a level (for instance at 2.5 per cent) so that it excludes most developing countries from the potential application of the MFN principle.

Secondly by including a 'grand-fathering provision'⁴⁹ that would also extend any more favourable treatment given by the EU to Agreements it has concluded before the EPA to all EPA signatories. Knowing that the EU is currently engaged in a number of FTAs with many large developing countries, some of which are likely to be concluded before EPAs, this could be a 'win-win' proposal if accepted by parties especially the EU.

Lastly by agreeing to a non-automatic clause where before deciding to extend the treatment to the EU, parties agree to jointly examine the balance of benefits obtained under the Agreement with the third parties, compared to the EPA by considering such issues such as the margin of preferences, rules of origin and accompanying measures.⁵⁰



The MFN clause in the CARIFORUM EPA⁵¹ or the Pacific States interim EPA⁵² could be of good guidance to the EAC EPA negotiators. In the two regions the parties have committed to implement the MFN provision only after consultation, therefore removing any automatic and potentially arbitrary application of the MFN treatment. Article 19 (5) of the CARIFORUM-EU EPA states that:

Where any signatory CARIFORUM state becomes party to a free trade agreement with a third party referred to in paragraph 2 and such a free trade agreement provides for more favourable treatment to such third party than that granted by the signatory CARIFORUM State to the EC Party pursuant to this Agreement, the Parties shall enter into consultations. The Parties may decide whether the concerned signatory CARIFORUM State may deny the more favourable treatment contained in

⁴⁸Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 18.

⁴⁹A grandfather clause is an exception that allows an old rule to continue to apply to some existing situations while a new rule will apply to all future situations.

⁵⁰Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 20.

⁵¹Article 19(5) of the CARIFORUM-EU EPA.

⁵²Articles 16 (3) &(4) of the Pacific States-EU IEPA.

the free trade agreement to the EC Party. The joint CARIFORUM-EC Council may adopt any necessary measures to adjust the provisions of this Agreement.

On the other hand Article 16 (3) & (4) of the Pacific States-EU IEPA states that:

(3) Where a Pacific State or the Pacific States can demonstrate that they have been offered by a third Party a substantially more favourable treatment in goods including rules of origin, than that offered by the EC Party, the Parties will consult and may jointly decide how best to implement the provisions of Paragraph 2.

(4) The provisions of this Chapter shall not be so construed as to oblige the EC Party or any Pacific State to extend reciprocally any preferential treatment applicable as a result of the EC Party or any Pacific State being party to a free trade agreement with third parties on the date of signature of this Agreement.

Accordingly these clauses prevent a scenario where neither of the parties can invoke the MFN provisions without consulting the other party. This is a strategy which should be adopted by the EAC negotiators and would play a major role in enhancing trade development within the EAC as far as engaging in trade with other major trading partners is concerned.

Bilal & Ramdoo further observe that, the main problem of the MFN clause relates more to a question of principle, including on the negative precedent it would set. This is because the clause appears to lower the negotiating capacity of the EAC countries with other trading partners, since other parties would not agree to receive less favourable treatment than the EU.⁵³ This is a very probable incident which the EAC negotiators ought to be very wary of because if they allow the current MFN clause in the EAC-EU EPA to remain as it is the EAC countries will never be in a position to grant less favourable concessions to other trading partners than those granted to the EU. In this regard this clause as currently drafted has the potential of hindering trade development within EAC with other major trading partners.

c) Economic & Development Cooperation.

The development cooperation provisions are part of the EPAs in recognition of the fact that changes to the trade regime will entail certain costs for the EAC in the short to medium term. Costs can be linked to institutional implementation of new rules as

⁵³Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 20.

well as to the adjustment of economic operators to the new regulatory framework. EAC countries just like other African countries have been insisting that EAC-EU EPA should be accompanied by a robust development package which can help these countries to cope with the negative effects⁵⁴ of implementing the EPA. However, the EU is adamant on this issue and does not want to bind these commitments beyond the current European Development Fund (EDF) five year cycle.⁵⁵ This can be deduced from the wording of Article 36 EAC-EU EPA which does not seem to offer anything over and above the current EDF. The Article states that;

The EC Party confirms it will contribute towards the resources required for development under the 10th EDF Regional Indicative Programme, Aid for Trade and the EU budget.

It therefore seems that African countries will have to look for alternatives to curb the negative effects of the EPAs especially with regard to fiscal losses. It is thus imperative that the EAC countries ensure that additional resources are made available to assist them in taking advantage of opportunities stemming from implementation of the EPA.

d) Stand Still Clause

This is another contentious issue in the EAC-EU EPA. Stand still clause appears under Article 13 of the EAC-EU EPA and is to the effect that parties agree not to increase their applied customs duties in their mutual trade. In essence this means that the EAC-EU EPA framework does not provide any possibility for the parties to increase their applied tariffs⁵⁶ up to the bound tariffs⁵⁷ taking into account the other duties and charges.

This clause contradicts the WTO rules since under multilateral trading system parties can only commit with regard to bound tariff rates and not on applied tariff rates. This clause thus implies that the EAC members cannot change their applied rates within the limits of their bound tariffs. This is quite limiting and inconsistent with the WTO

⁵⁴Some of the likely negative effects include loss of tariff revenue as well as deindustrialisation as result of increased EU imports into African markets.

⁵⁵South Centre 'EPAs: The Wrong Development Model for Africa and Options for the Future' Analytical Note (2010) 7 available at <http://www.southcentre.org> (accessed 25 August 2010) hereafter 'EPAs).

⁵⁶These are duties that are actually charged on imports and can be below the bound rates.

⁵⁷These are tariffs applied on imports and which a country has committed not to increase beyond the rate of duty beyond an agreed level. Once a rate has been bound it can only be raised if all affected parties are suitably compensated. Available at <http://www.wto.org> (accessed 23 February 2011).

rule that members' commitments concern their bound tariffs and not their applied tariffs.⁵⁸ Consequently the water level⁵⁹ in the tariffs is constrained and this puts EAC countries at a vulnerable state because water plays a very crucial role in setting up policy tools to balance the loss in fiscal revenue or to react in circumstances that need state intervention.⁶⁰

Accordingly trade experts have observed that the more the water between applied tariff rates and the bound tariff rates the less the chances of parties invoking safeguard measures such as dumping and subsidies. The reason behind this logic being that such countries have the option of increasing applied tariffs up to their bound tariff level before applying safeguard measures. This in turn has led to reduced number of disputes at the WTO.⁶¹

Furthermore the provisions of Article 13 of the EAC-EU EPA which ensure that EAC members stick to their applied rates deny them the use of policy space which is available to them within the spheres of the WTO. This clause undermines the spirit of the provisions of the Cotonou Agreement⁶² which is to the effect that economic and trade cooperation shall be implemented in full conformity with the parties' obligations in the WTO. One is therefore left to wonder if Article 13 is really not inconsistent with the EAC countries' obligations to the WTO.

The CARIFORUM, SADC and Pacific interim EPAs exhibit limited flexibility in their standstill clauses as the provision are applicable even to products which are not subject to tariff liberalisation commitments. This further raises questions about consistency and coherence of EU policy.⁶³

⁵⁸Lecture notes on Doha Development Agenda by Dr.Edwini Kessie Legal Officer C-NTC Division World Trade Organisation. Lectures delivered from 30 August -2 September 2010 at the University of the Western Cape.

⁵⁹Water is the difference between bound tariff rates and applied tariff rates of a country. This is a tariffication method used by developing and least developed countries in the multilateral trading system. For further reading see Kerr WA & Gaisford JD '*Handbook on International Trade Policy*' (2008) 220.

⁶⁰Lecture notes on Doha Development Agenda by Dr.Edwini Kessie Legal Officer C-NTC Division World Trade Organisation. Lectures delivered from 30 August -2 September 2010 at the University of the Western Cape.

⁶¹Lecture notes by Dr. Edwini Kessie.

⁶² Article 34 of the Cotonou Agreement.

⁶³Lui D & Bilal S 'Contentious Issues in the EPA: Potential Flexibility in the Negotiations' available at <http://www.ecdpm.org> (accessed 8 February 2011).

e) Rules of Origin

Rules of Origin (RoO) define what an importing country considers the amount of value added in a good or service in a given exporting country sufficient for it to be counted as an export from that country.⁶⁴ RoO can restrict the number of countries from which an exporting country may source its non-originating raw materials or components while still having its products defined as originating.⁶⁵ The RoO under the Cotonou Agreement have been criticised as being very stringent and the LDCs within the EAC have not been able to take advantage of them even under the EBA initiative.⁶⁶

Article 37(b) of the EAC-EU EPA provides that parties shall continue to negotiate in outstanding trade and market access issues including RoO. The Interim EAC-EU EPA maintains the same RoO during the period of negotiations for the comprehensive EPA. One of the significant improvements is in the area of apparels and textiles. The EAC and the EU have agreed on simplification of the RoO to allow the EAC industries to source fabric from anywhere in the world and still export the garments made into the EU duty free and quota free.⁶⁷ Alavi *et al* are of the opinion that is a great milestone in enhancing trade between EAC and other countries. In addition this will eventually boost intra-African trade as well as regional integration.⁶⁸

It is therefore vital that the EU and EAC negotiators agree on RoO that promote use of production inputs including raw materials within the ACP countries.

f) Technical Barriers to Trade and Sanitary and Phytosanitary Standards.

Sanitary and Phytosanitary (SPS) standards are measures applied by a country to protect humans, animals and plants from diseases, pests or contaminations.⁶⁹ Technical Barriers to Trade (NTB) on the other hand are non-tariff barriers to trade

⁶⁴Alavi A, Gibbon P & Mortensein J 'EU-ACP Economic Partnership Agreements: Institutional and Substantive Issues' (2007) 39 available at <http://www.djis.dk> (accessed 20 April 2011) (hereafter EU-ACP Economic Partnership Agreements).

⁶⁵Alavi A, Gibbon P & Mortensein J 'EU-ACP Economic Partnership Agreements' (2007) 42.

⁶⁶Charles Yegella, Trade in Services Fellow with the East African Business Council in an interview with the Trade Negotiations Insight. Further reading on RoO see South Centre 'Market Access for Trade in Goods in Economic Partnership Agreements (EPAs) (2008) 12 analytical note SC/AN/TDP/EPA/14 available at <http://www.southcentre.org> (accessed 11 April 2011).

⁶⁷Alavi A, Gibbon P & Mortensein J 'EU-ACP Economic Partnership Agreements' (2007) 42.

⁶⁸See Section 3.6.1 of this study for deeper analysis of benefits of intra-African trade.

⁶⁹ For detailed analysis of SPS measures see Agreement on Sanitary and Phytosanitary Measures available at <http://www.wto.org>.

which are used by countries to regulate markets, protect their consumers or preserve their natural resources.⁷⁰ The prominence of the SPS measures has been due to increasing level of concern regarding food safety among European and other consumers about the presence of chemicals and various additives in their food. The EAC countries have always viewed that EU standards on food safety are very strict and such have been a hindrance for EAC exporters to access the EU market.⁷¹

Article 37(c) of the EAC-EU EPA provides that parties agree to continue negotiations in the area of SPS measures and TBT. SPS provisions on the Cotonou Agreement are based on the WTO SPS Agreement⁷² and hence there is high likelihood of the EAC-EU EPA provisions on SPS being based on WTO SPS Agreement. According to Doherty the EU SPS measures are higher than the minimum standards set by the WTO hence a hindrance to the EAC exporters who lack capacity to meet such standards.⁷³ In addition the EU keeps on changing these standards often within the course of a few months hence unpredictable.

It is thus likely that the EAC exporters will continue to face stringent RoO which will limit the number of exports that can receive preferential treatment over increasing SPS standards which makes it difficult for the EAC exporters to access the EU market.

f) Trade Related Issues

With respect to trade related areas, the EU negotiating mandate appears to be more ambitious in terms of its demand on African countries than the Doha negotiations and the provisions of the Cotonou Agreement. Thus while it has been agreed to exclude negotiations on such issues as trade and investment, competition policy and government procurement from the Doha negotiations the EU mandate for the EPA negotiations contains explicit liberalisation on these trade related areas along with trade facilitation.

⁷⁰For further reading see Agreement on Technical Barriers to Trade available at <http://www.wto.org>.

⁷¹Doherty M 'Is SPS the Silver Lining? Economic Partnership Agreements' (2008) 7 Trade Negotiations Insights available at <http://www.ecdpm.org/inbrief> (accessed 20 April 2011).

⁷²Article 48 of the Cotonou Agreement.

⁷³Doherty M 'negotiating economic partnership agreements: sanitary and Phytosanitary measures (2009) 6 trade negotiations insights available at <http://www.ecdpm.org/inbrief13a> (accessed 20 April 2011).

In addition Cotonou Agreement makes no reference to public procurement but the EU negotiating mandate demands progressive liberalisation of procurement markets. Cotonou Agreement calls for cooperation in creating a favourable, predictable and secure climate for investments, the EU on the other hand asks for establishment of a regulatory framework. The fact that African countries were opposed to the inclusion of these issues in the Doha negotiations suggest that similar demands by the EU in the EPA negotiations are viewed with so much suspicion and hence not received so well. Furthermore the fact that a new multilateral agreement on trade facilitation is currently under negotiations in the Doha negotiations this may well render the EPA related regional initiatives on the same issues redundant.

4.5 Reciprocity in the EAC-EU EPA

Reciprocity is defined as a fundamental rule by which parties maintain the balance of treatment by means of granting the same or equivalent rights and benefits and or undertaking obligations to each other.⁷⁴ In the EPAs reciprocity entails that the ACP countries reduce their tariffs in return for market access to the EU.

The key feature of the EPAs is reciprocity.⁷⁵ Preference for reciprocity by the EU is also exhibited by the fact that substantial alternatives to EPAs which seem to differ with reciprocity principle such as the GSP plus regime for the ACP countries or the negotiations for a new WTO waiver.⁷⁶

The ACP countries are not quite comfortable with this concept of reciprocity. A statement by the former President of Botswana Festus Mogae in 2004 stated this in a joint parliamentary assembly at Brussels with regard to liberalisation confirms this. He stated as follows;

We fear that our economies will not be able to withstand the pressure associated with liberalisation as prescribed by the World Trade Organisation. This therefore challenges us all as partners to ensure that the outcome of the on-going EPA

⁷⁴Yanai A 'Reciprocity in Trade Liberalisation' (2001) 1 APEC Study Centre, working paper series 00/01 available at <http://www.ide.go.jp/English/Publish/Download> (accessed 6 April 2011).

⁷⁵ Articles 36 (1) and 37 97) of the Cotonou Agreement clearly articulate this concept.

⁷⁶Lui D & Bilal S 'Contentious Issues in the EPA: Potential Flexibility in the Negotiations' (2009) available at <http://www.ecdpm.org> (accessed 8 February 2011).

negotiations do not leave ACP countries more vulnerable to the vagaries of globalisation and liberalisation, thus further marginalising their economies.⁷⁷

According to the EAC-EU EPA which is still awaiting signature, over the next 25 years, the EAC will liberalise 82.6 per cent of the imports from the EU by value (including 80 per cent over the first 15 years).⁷⁸ This level of liberalisation is too high for a region that is still struggling economically and with a high level of infant industries. This has been a major borne of contention with the LDCs in the EAC asking for greater flexibility.

The contention of the meaning of substantial liberalisation stems from the interpretation of Article XXIV GATT (1994) for which no pertinent jurisprudence exist. Interpretation of this article was first brought at the WTO dispute settlement body (DSU) in the Turkey case⁷⁹ where the panel did not give a clear indication of what constitutes substantially all trade. The objective is not to arbitrarily interpret the WTO rule but to consider what level of market opening is both politically acceptable and defensible at the WTO.

The meaning of phrases 'substantially all trade' and 'reasonable length of time' has been a subject of protracted debate and controversy not just between EU and ACP countries but also within WTO. The EU has always held the view that a liberalisation of 90 per cent of the trade between the parties to the EPAs is sufficient to meet the requirement of substantially all trade.⁸⁰

The problem is that there has never been an affirmative legal interpretation of what constitutes substantially all trade for example the Trade, Development and Cooperation Agreement (TDCA) signed between the EU and South Africa provides for liberalisation of 95 per cent by the EU and 86 per cent by South Africa achieving liberalisation of 90 per cent of trade between the parties.⁸¹ The EU has floated this Agreement as a precedent for the EU-ACP EPAs. However, a common view by many analysts concludes that the TDCA cannot be equated to EPAs. This is in the

⁷⁷Christian Aid 'For Richer or Poorer: Transforming Economic Partnership Agreements between Europe and Africa' (2005) 5 available at <http://www.christianaid.org.uk> (accessed 12 March 2011).

⁷⁸Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 15.

⁷⁹Turkey-restriction on imports of textiles and clothing products case WT/DS34/AB/R, DSR 1991: VI.

⁸⁰Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 14.

⁸¹Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 16.

light of the fact that South Africa is at a higher level of economic development than most if not all of the ACP countries.⁸²

According to many trade experts in the current context, any free trade agreement that would cover 70 per cent or more of trade over 15-20 years period is most likely to pass this WTO test and even so if one of the parties is an LDC or vulnerable economy.⁸³ This study thus recommends that the EAC countries should strive to renegotiate for trade liberalisation within the range of 70-75 per cent.

In 2005 the United Nations Commission for Africa (UNECA) forecasted that as a result of market liberalisation by African countries in the EPAs the EU firms will increase their exports by more than 20 per cent. Although consumer welfare will increase by US\$509 million, fiscal losses amount to almost US\$2 billion for Africa.⁸⁴ According to the UNECA simulations the EAC member countries will lose close to US\$ 162 518 014 as a result of market liberalisation.⁸⁵ This is such a huge loss which will have a negative effect on the level of trade within the EAC and as such if the region is set to sign the EPA there is need to come up with options to counteract the effects of these fiscal losses.

The level of liberalisation as well the schedule of tariff dismantlement provided for in the EAC EPA will seriously impede on the member countries' ability to use fiscal revenue to finance development. This is because while the share of import duties in fiscal revenues had declined over time for most countries, poorer countries continue to depend more heavily on trade taxes as a source of revenue.⁸⁶ A country like Burundi heavily depends on export taxes as a source of revenue and when all that is taken away as a result of liberalisation the country's development level is worst hit.⁸⁷

In addition to revenue losses the EAC countries will have to contend with high costs of structural adjustments while implementing the EAC-EU EPA. A study by the World Bank and International Monetary Fund over the last three decades makes an

⁸²Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010)18.

⁸³Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010)16.

⁸⁴UNECA 2005, 'Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements' Africa Trade Policy Centre Paper No. 10.

⁸⁵UNECA 2005, 'Economic and Welfare Impacts of the EU-Africa Economic Partnership Agreements' Africa Trade Policy Centre Paper No. 10.

⁸⁶Bilal S & Vincent R 'Addressing the Fiscal Effect of an EPA' available at <http://www.ecdpm.org> (accessed 1 March 2011).

⁸⁷South Centre 'EPAs' (2010) 3.

observation that structural adjustment policies imposing liberalisation have brought stagnation and even deindustrialisation in much of sub-Saharan Africa. The study makes reference to certain countries and with specificity to the EAC countries, in Tanzania and Uganda imports displaced local production of consumer goods causing large-scale unemployment. In Kenya this resulted in closure of industries in sectors such as beverages, tobacco, textiles, sugar, leather, cement and glass.⁸⁸

Another risk posed by increased EU imports into the EAC market is the likelihood of displacing local and regional suppliers of goods and services. According to Kenyan ministry of trade assessment 65 per cent of Kenyan industries are vulnerable to unfair competition with the EU.⁸⁹ They include food processing, textiles, paper and printing companies. These firms employ more than 100 000 people. Furthermore, in East Africa, statistics show that the regional market for manufacturing is much more important for local producers than any other market. Kenya exports 67 per cent of its manufactured exports (which includes products like chocolates, soap and plastics) to the Common Market for Eastern and Southern Africa (COMESA). Only nine per cent goes to the EU.⁹⁰ More EU imports will mean displacement of the domestic and regional producers and lead to deindustrialisation which negatively impacts on trade development within EAC as well as regional integration.

With regard to timeframe set for liberalisation, 15 years is such a short time for the EAC to liberalise 80 per cent of its market in addition the timeframe is not flexible enough as envisaged under Article 37.7 Cotonou Agreement which states that EPA negotiations would be as flexible as possible in establishing the duration of a sufficient transitional period, the final product coverage, taking into account sensitive sectors and the degree of asymmetry in the timetable for dismantling tariffs. Going by the wording of this article it is clear that the request by EU that the EAC countries liberalise 80 per cent of their market within 15 years is too constraining on the EAC

⁸⁸South Centre 'EPAs' (2010) 4.

⁸⁹ Kenya Institute for Public Policy Research and Analysis (KIPPRA) 'Assessment of the Potential Impact of Economic Partnership Agreements (EPAs) on the Kenyan Economy, on behalf of the Kenyan Ministry of Trade and Industry (2005).

⁹⁰Poultry farmers set to lose in EAC EPA deal-CSO analysis of possible EU-ECA EPA deal' November 2007.

countries. Even developed countries have not religiously applied a 15 years' time frame as shown in the following five examples;⁹¹

- Agreement between US and Morocco: 24 years for Morocco and 18 years for US.⁹²
- Agreement between Thailand and Australia: 20 years for Thailand and five years for Australia.⁹³
- Agreement between Thailand and New Zealand: 20 years for Thailand and 15 years for New Zealand.
- Agreement between United States (US) and Australia: 18 years for US and 25 years for Australia.⁹⁴
- Agreement between Canada and Chile: 18 years for Chile and Canada 12 years.

Furthermore it should also be borne in mind that when the EAC countries sign the EPA granting EU such wide market access, the US and other countries are likely to ask the EAC countries for similar market access terms. It is unlikely that the US for instance will continue to provide the African Growth Opportunity Act⁹⁵ (AGOA) but will also ask for an EPA-type Agreement requiring EAC countries to also liberalise.

From the analysis above it is evident that reciprocity in EAC-EU EPA will have adverse effects on the EAC countries. This is due to the fact that the asymmetrical size in economic size between the EAC and the EU means that the EAC will have to make relatively larger concessions and bear disproportionate high costs of

⁹¹Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 15.

⁹²Upon entry into force of the Agreement in 2006 Morocco was to liberalise 94.2 per cent of its imports from the US within 24 years while US is to liberalise 95.5 per cent of its market within 18 years.

⁹³The Agreement entered into force in 2005 where Thailand is to liberalise 100 per cent of its tariff lines by 2025.

⁹⁴This should be noted that it is an Agreement between two developed countries and yet granted US 18 years to liberalise its market.

⁹⁵AGOA is a unilateral preferential trade scheme by US for quota and duty free entry for certain goods from the sub-Saharan African countries. This scheme expands the benefits under the Generalised System of Preferences (GSP) program. Notably AGOA expanded market access for textiles and apparel goods into the US for eligible countries. However, one of the shortcomings of AGOA is that it is an Act of Parliament and not an Agreement hence at the whims of the US which has the power to choose which countries enjoy the benefits under AGOA. In addition the African countries are required to make so many commitments in order to enjoy the trade benefits under AGOA. Such commitments include respecting international relations with the US and respecting US intellectual property rights. In this regard AGOA has been criticised as a scheme that does not encourage investments. Lecture notes on EU relations with Africa by Dr. Patricia Lenaghan, Lecturer University of the Western Cape. Lecture delivered on 16 September 2010 at the University of the Western Cape.

adjustments than the EU. It is thus imperative that the EAC negotiators clearly analyse whether this level of liberalisation will accelerate or undermine trade and economic development within the EAC region and if it is not whether it is worthy going ahead with the negotiations.

4.6 The Effects of EAC-EU EPA on Regional Integration

Regional integration process as clearly observed in Section 3.3 of this study is emphasised as an important factor when considering regional groupings for EPA negotiations. Since the early 1970s, promotion of regional integration has been a central component of the EU's political and economic agenda in relation to developing countries.⁹⁶ Regional integration is one of the key features in the EPAs. Article 2 of the Cotonou Agreement states in part that 'particular emphasis should be placed on the regional dimensions'. This same spirit of regional integration is emphasised in Article 35.2 Cotonou Agreement.⁹⁷

The debate about regional integration is interlinked to EPAs due to the fact that EPAs will have obvious consequences for existing regional blocs in Africa.⁹⁸ Taking into account the existing regional groupings in ACP countries, the EU Commission was aware of the possibility of creating overlapping EPAs and therefore insisted that the ACP countries which are members of more than one regional grouping should commit to one regional grouping for the purpose of negotiating EPAs.⁹⁹ This is the reason why Tanzania which was negotiating EPA under SADC opted to come back and negotiate under EAC.

The SADC region is already experiencing some disintegration by virtue of the SADC-EU EPA negotiations with some members (Mauritius, Malawi, Zambia and Zimbabwe) choosing to be part of the ESA group while Tanzania on the other hand opting to join the EAC group.¹⁰⁰ This division is particularly alarming to the SADC

⁹⁶Alavi A, Gibbon P and Mortensen N 'EU-ACP Economic Partnership Agreements' (2007) 26.

⁹⁷Article 35.2 of the Cotonou Agreement states that 'economic and trade cooperation should build on regional integration initiatives of ACP States bearing in mind that regional integration is a key instrument for the integration of ACP countries into the world economy'.

⁹⁸Erasmus G 'Deeper Regional Integration in SADC: Do the EPAs Undermine the Process?' Tralac Trade Brief (2011) 7 available at <http://www.tralac.org> (accessed 8 March 2011) (hereafter Deeper Integration in SADC).

⁹⁹Bilal S 'The Future of ACP-EU Trade Relations: An Overview of Forthcoming Negotiations' (2002)10 ECDPM Discussion Paper 21.

¹⁰⁰Alavi A, Gibbon P & Mortensen N 'EU-ACP Economic Partnership Agreements' (2006) 26.

which is currently working on the implementation of its Trade Protocol with the aim of liberalising all trade amongst and coming up with a CET by the year 2012.¹⁰¹

In SADC the actual implementation of the trade regime of the SADC EPA might have a certain fragmenting effect on the arrangement among the 15 members. According to Erasmus these countries will in future trade with the EU in about five different arrangements as follows: the TDCA, the SADC-EU EPA, the EBA initiative by virtue of the LDCs in SADC, the EAC by virtue of Tanzania's membership and ESA Group which comprises of three members of SADC as highlighted above.¹⁰²

On the other hand though EAC is negotiating EPA as a bloc however, just like SADC the members will also be affected by the SADC EPA terms by virtue of Tanzania's membership in SADC. As such most scholars are of the view that EU through EPAs has no sinister motive of dividing Africa and that the problem lies with Africa's integration schemes which are often in flux and have not matured to the point of clear and firm rules-based arrangements.¹⁰³

The southern and the eastern bloc seems to have to this realisation through the on-going process of creating a tripartite FTA involving EAC, COMESA and SADC which will go a long way in solving the obstacles of regional integration as far as EPAs are concerned.¹⁰⁴

Another looming issue on regional integration as far as EPAs are concerned is the impact of TDCA on the (Botswana, Lesotho, Namibia and Swaziland) BLNS who are effectively '*de facto*' parties to the TDCA. Because of the CET in SACU the BLNS will be forced to reduce their tariffs on imports from the EU at the rate agreed upon by South Africa in the TDCA. This will have an impact on the tariff revenue for the BLNS which has been estimated to be around 21 per cent decrease. Botswana is said will experience loss of around 10 per cent of its total national income as a result of the TDCA.¹⁰⁵ In addition to the rules of origin provisions in the TDCA the BLNS will not be in a position to take advantage of the preferential access to the EU market

¹⁰¹SADC Profile available at <http://www.sadc.int/> (accessed 8 March 2011).

¹⁰²Erasmus G 'Deeper Regional Integration in SADC' (2011) 6.

¹⁰³Erasmus G 'Deeper Regional Integration in SADC' (2011) 6.

¹⁰⁴'COMESA-EAC-SADC Tripartite Framework: State of Play' available at <http://www.eac.int/tripartite-summit.html> (accessed 12 March 2011).

¹⁰⁵Erasmus G 'Deeper Regional Integration in SADC' (2011) 7.

provided for South Africa. This is because most of these countries lack the capacity to meet stringent rules of origin under the TDCA.

Erasmus observes that the wording of the many texts indicate that EPAs are designed to bolster the bilateral trade relationship between the parties within the rules of the multilateral system.¹⁰⁶ Hence EPAs are not vehicles for actively pursuing and promoting the agenda underpinning the regional economic communities.

4.7 Alternatives to the EPAS

The justification for alternative to the EPAs is founded upon the provisions of Article 37(6) of the Cotonou Agreement which states that;

should non-LDC African, Caribbean and pacific (ACP) countries decide that they are not in a position to enter into economic partnership agreements.....(the European Community) will examine all alternative possibilities, in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with the WTO rules.

In essence by virtue of this provision the EU is legally bound to help non-LDC African countries seek an alternative trade arrangement other than the EPA. This alternative should provide them market access to the EU comparable to what they have received under Cotonou Agreement.¹⁰⁷ Below are some of the alternatives that the EAC countries can adopt should a deal not be reached in the EAC-EU EPA negotiations.

a) Moldova Treatment

One of the alternatives to the EPAs available to Kenya being a non-LDC is a Moldova equivalent treatment. In January 2008 Moldova unilaterally received autonomous trade preferences from the EU.¹⁰⁸ This arrangement gives Moldova almost similar market access under EBA preference scheme given to the LDCs. In justifying this action the EU commission in an explanatory memorandum stated that 'Moldova is the poorest country on the European continent and to offer Moldova an improved access to the EU market would support the development of its economy

¹⁰⁶ Erasmus G 'Deeper Regional Integration in SADC' (2011) 6.

¹⁰⁷ South Centre 'EPAs' (2010) 4.

¹⁰⁸ Council Regulation (EC) No. 55/2008.

through increased export performance. The Commission further observed that it was clear that entering into negotiations on a free trade agreement with Moldova is not an option as Moldova does not possess the competitive strength to take on reciprocal obligations of such an arrangement with the EU'.¹⁰⁹

This preferential treatment provided by the EU was approved by the WTO members without problems in March 2008. Kenya has a lower level of development (measured by per capita GDP) than Moldova and therefore deserving even better treatment than Moldova.

b) European AGOA or financial crisis package for EAC

The EAC countries should request the EU to provide an AGOA for them which can be achieved by providing a duty free access to the EU market for key tariff lines on which they are currently exporting to the EU.¹¹⁰ Calculations by the South Centre shows that such a package for Africa (the non-LDCs since the LDCs already enjoy the EBA) amounts to only about 100 tariff lines. The total amount of African exports to EU on these lines is US\$6 billion a year. The import revenue foregone by the EU, assuming that the average duty on the US\$6 billion is 10 per cent is only US\$600 million a year.¹¹¹ This is a very meagre amount to the EU and if foregone can a financial contribution to Africa which has and is still suffering the effects of the financial crisis.

c) Renegotiate Article XXIV at the WTO

Article XXIV of the GATT (1994) relating to regional trade agreements and free trade agreements calls for the liberalisation of 'substantially all the trade' in FTAs. Article XXIV is currently being renegotiated in the Doha Round. Paragraph 29 of the Doha

¹⁰⁹Commission of the European communities 'proposal for a council regulation introducing autonomous trade preferences for Moldova and amending Regulation (EC) No. 980/2005 and Commission Decision 2005/924 EC' available at <http://eurlex.europa.eu> (accessed 28 February 2011).

¹¹⁰South Centre 'EPAs' (2010) 4.

¹¹¹South Centre 'EPAs and Benchmarking Development' Analytical Note SC/AN/TDP/EPA/20 (2009) 8 available at <http://www.southcentre.org> (accessed 28 February 2011).

Declaration notes that 'the negotiations shall take into account the development aspects of regional trade agreements'.¹¹²

In this regard the EAC countries and specifically Kenya (being the only developing country) should propose amendments to this article to ensure that as developing countries negotiate FTAs with developed countries, they are not required to liberalise 'substantially all trade' (which the EU has interpreted to mean 80 per cent tariff liberalisation) but liberalisation which is asymmetrical whereby developing countries liberalise in accordance to their development needs.

d) Negotiate for a goods-only EPA pegged to development benchmarks.

Since the EAC countries have not yet signed the EPA they should ensure that it is strictly a goods-only EPA with no built-in clauses about future negotiations on services and a whole set of trade related issues. This is not needed for compliance with the WTO. The EU accepted this principle for Economic Community of West African States in June 2009 and thus should extend the same flexibility to EAC.¹¹³

Importantly, liberalisation in goods should be done in keeping with development benchmarks that is only when the region has attained a certain level of development for example measured in terms of re capita GDP; per capita manufactured exports. The EAC countries should strive to ensure that the level of liberalisation is commensurate to the development level of the EAC this will also enhance economic growth within the region. Pegging liberalisation to development benchmarks is the only way to ensure that liberalisation is paced appropriately and is not fixed to an arbitrary and artificial timeline such as 15 years.

4.8 Conclusion

The analysis in this chapter concludes that EAC trade negotiators need to be vigilant in ensuring that the provisions of the EAC-EU EPA are geared towards trade development within the EAC. This is because though the EAC-EU EPA seems to be a better option than the GSP scheme it however contains some provisions that are

¹¹²WTO Doha Ministerial Declaration, WT/MIN (0)/DEC/1 of 14 December 2001 available at <http://www.wto.org> (accessed 2 March 2011).

¹¹³Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations' (2010) 10.

more stringent than those under the WTO.¹¹⁴ It is in this regard that the trade negotiators must ensure there are greater flexibilities in these provisions for EPA to foster trade development within the EAC.

The preamble of the EAC-EU EPA is alive to the need for trade development within the EAC. Trade within the EAC is meagre, unable to develop and hampered by foreign market obstacles thereby causing substantial stagnation. It is no doubt that the EAC-EU EPA will contribute to enlarge the market for these countries. However, this enlarged market must be governed by a predictable and fair framework for trade which will enhance trade development within the region. It is against this background that this chapter involved a critical analysis of the provisions of the EAC-EU EPA.

One of the key concerns is on the issue of compatibility of regional integration process in Africa and the EPA. Phasing down tariffs in favour of the EU before the elimination of intra-African trade barriers could disrupt the programme of regional integration under the AEC Treaty as it may not only lead to a continued reduction in intra-African trade but also reduce the concept of regional integration to mean the mere establishment of a CET by an EPA regional group vis à vis the EU. Thus for regional integration to be enhanced through EPAs regional blocs must harmonise their CETs, lists of sensitive products and rules of origin. To this end EAC has been able to offer a harmonised CET and list of sensitive products. Rules of origin are still being negotiated.

Moreover the level of trade liberalisation in the EAC-EU EPA is quite high bearing in mind that four of the five EAC countries are LDCs. It is therefore suggested that this level of liberalisation may not necessarily be good for EAC trade development to the extent that the benefits of liberalisation are not automatic and there are likely to be significant effects from opening up poor country's market to import from more developed economies without first building their export supply response and trade capacity. Thus for the EPA to accelerate trade development within the EAC, the trade interests must be well articulated in the final EAC-EU EPA.

¹¹⁴Clauses like on export taxes, MFN clause and stand still clause as discussed under contentious issues in EAC-EU EPA in this chapter reveal that EAC-EU EPA restricts on the policy space of the EAC countries which is very vital for trade development of these countries.

CHAPTER FIVE

5.1 Conclusion and Recommendations

This Chapter will attempt to mark out ways in which the challenges posed by the provisions of the Economic Partnership Agreement (EPA) between the East African Community (EAC) and the European Union (EU) may be addressed. A critical analysis of the EAC-EU EPA reveals that the Agreement as it is will hinder trade development within the EAC.¹ The numerous calls from African governments, the African union, the African Caribbean and Pacific (ACP) countries and the European civil society groups for a revision of the EPA texts are a clear indication that most countries are not satisfied with the provisions of the EPAs.² The EAC countries are among these countries that have exhibited dissatisfactions in the EPA provisions.

The EAC-EU EPA is still in its initialled state implying that the parties have not signed the final Agreement. The EAC-EU final EPA was scheduled to be signed by end of November 2010.³ However, the same has not been signed with EAC countries citing financial constraints as the major reason.

The contentious issues in the EAC-EU EPA reflect that these clauses are in dire need for renegotiations so as to capture the trade needs of the EAC countries.⁴ To this end this study proposes the following recommendations to these issues;

- a) Renegotiations on the contentious issues in the EAC-EU EPA.

The EAC countries should renegotiate for a non-automatic Most Favoured Nation (MFN) clause⁵ whereby before deciding to extend the treatment to the EU, parties agree to jointly examine the balance of benefits obtained under the Agreement with

¹See Sections 4.4.1 and 4.8 of this study.

²The African Union for instance called for the review of the interim EPAs in line with the concerns raised by African Heads of States during the second African –EU Summit. A communiqué on the summit is available at <http://au.int/en/dp/ti/news> (accessed 12 April 2010).

³See Section 4.4 of this study on current status of the EAC-EU EPA negotiations. Further details on the same available at <http://www.eac.int/trade> (accessed 9 March 2011).

⁴See Section 4.4.1 of this study for analysis of the contentious issues in the EAC-EU EPA.

⁵Article 16 of the EAC-EU EPA. Section 4.4.1 of this study for a detailed discussion on the MFN clause.

the third parties, compared to the EPA by considering such issues such as the margin of preferences, rules of origin and accompanying measures.⁶

The MFN clause in the Caribbean Forum (CARIFORUM) EPA⁷ or the Pacific States interim EPA⁸ could be of good guidance to the EAC EPA negotiators.⁹ In the two regions the parties have committed to implement the MFN provision only after consultation, therefore removing any automatic and potentially arbitrary application of the MFN treatment. If couched that way such the MFN clause in the EAC-EU EPA would play a major role in enhancing trade development within the EAC since it would not hinder EAC countries from concluding trade Agreements with other major trading partners is concerned.

Further suggestions would be explicitly narrowing the scope of MFN clause's application and relaxing the trigger mechanisms (in terms of joint decision-making process and thresholds) for its application.¹⁰ In this regard the EAC countries could propose to raise the threshold (in terms of share of world trade) of what constitutes a major trading partner to such a level (for instance at 2.5 per cent) so that it excludes most developing countries from the potential application of the MFN clause. This would see many of the major economic countries falling outside the provisions of this clause meaning that any more favourable treatment accorded to them by the EAC countries would not be accorded to the EU. This study also proposes that deleting this clause from the EAC-EU EPA would be the best option.

The standstill clause¹¹ essentially freezes increase of applied customs duties on all products traded between the EU and the EAC whether or not these products have been excluded from liberalisation. It is the proposition of this study that the EAC negotiators aim at achieving a clear distinction as to which products the provision applies to. This is because the clause as it is now does not specify whether it applies to liberalised products and or on those on the exclusion list such as agricultural

⁶For further reading see Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations: Seeking Political Leadership to address bottlenecks' (2010) 20 available at <http://www.ecdpm.org> .

⁷Article 19(5) of the CARIFORUM-EU EPA.

⁸Articles 16 (3) &(4) of the Pacific States-EU IEPA.

⁹ See Section 4.4.1 of this study.

¹⁰For further reading see Bilal S & Ramdoo I 'Which Way Forward in the EPA Negotiations: seeking political leadership to address bottlenecks (2010) available at <http://www.ecdpm.org>.

¹¹See Section 4.4.1 of this study for a detailed analysis of the standstill clause.

products. In the CARIFORUM and Southern Africa Development Community (SADC) EPAs, the standstill clause applies only to liberalised products. This flexibility should also be extended to the EAC countries. However, the better option would be to remove the clause from the Agreement since EAC countries are net food importers and as such there is need to safeguard food security and the agricultural sector in the region.

Export taxes clause is another contentious clause which prohibits parties to the EAC-EU EPA from instituting any new duties or taxes on goods exported to the other party. Article 15 of the EAC-EU EPA allows EAC countries to impose export duties or taxes under two circumstances only; first in order to foster development of domestic industry and secondly to maintain currency value stability. These two instances are too few compared to flexibilities proposed in the SADC-EU EPA¹² where temporary export duties can be introduced in cases of specific revenue needs; protection of infant industries; protection of environment; in case of critical food shortage or to ensure food security and where a country can justify industrial development needs.

The EAC countries should consider reviewing this Article and add more flexibility especially with regard to enhancing industrial development needs and cases of critical food shortage taking into account that EAC countries are net food importers.

Further under the World Trade Organisation (WTO), there are no rules prohibiting the use of export taxes. Therefore, there is no obligation to have a clause on export restrictions in the EPA however should the EAC and the EU agree to include this study proposes that a simple reference to the WTO rules could suffice. In addition the discipline on export taxes restrictions could be left out of the EPA's mandate and remain to be resolved at the WTO.

Article 36 of EAC-EU EPA on economic and development cooperation is another clause which calls for renegotiations. As highlighted in Section 4.4.1 of this study this clause is meant to caution costs related to implementation of the EAC-EU EPA for example the regulatory reforms that the EAC will have to undertake which will lead to fiscal losses. This study therefore recommends that the EAC countries insist that this clause includes a robust development package which can help these countries to

¹²See Section 4.4.1 of this study on how the SADC-EU EPA provides for export taxes.

cope with the negative effects¹³ of implementing the EPA. The EAC countries should also ensure that in addition to the European Development Fund (EDF) and Aid for Trade more resources are made available to assist them in taking advantage of opportunities stemming from implementation of the EPA.

This study has revealed that the level of liberalisation requested by the EU from EAC is quite ambitious taking into consideration the economic level of the EAC countries.¹⁴ In the EAC-EU EPA, EAC countries are supposed to liberalise 82.6 per cent of the imports from the EU within 25 years (however, 80 per cent will be liberalised over the first 15 years). Section 4.5 of this study has pointed out examples of Agreements entered into between developed countries and have longer time frame for liberalisation. This study thus recommends the EAC countries make a case for renegotiating for a longer period of liberalisation to enable the infant industries in the region to prepare adequately and adjust to competition by goods from the EU market.

The Least Developed Countries (LDCs) within the EAC should continue to enjoy the Everything But Arms (EBA) initiative whether or not EAC-EU EPA is concluded. To this end these LDCs should not have to reciprocate any EU concessions in line with the WTO rules and under the Doha Work Programme. This study observes that reciprocity if any should be subject to fairly long transition periods and attainment of certain levels of competitiveness in given sectors. Thus the requirements of Article XXIV GATT (1994) on elimination of duties on substantially all trade can be met without reciprocity from the LDCs.

This study clearly shows that EAC-EU EPA will have a distorting effect on regional integration process within the EAC more so due to the fact that the tariff elimination schedules in the EAC-EU EPA are inconsistent with the three tier band system for common external tariff applied under the EAC Customs Union.¹⁵ To this end there should be harmonisation of the tariff elimination schedules to avoid conflict of the elimination schedules under the EAC-EU EPA and in the EAC Customs Union.

¹³Some of the likely negative effects include loss of tariff revenue as well as deindustrialisation as result of increased EU imports into African markets.

¹⁴See Section 4.3.1 of this study on the level and phases of liberalisation by the EAC countries. See also Section 4.5 of this study on effects of reciprocity on EAC's trade development.

¹⁵See Sections 3.6 and 4.6 of this study on effects of EPA on regional integration and intra-African trade.

The EAC-EU EPA should have comprehensive clauses on regional integration clearly providing for the precedence of regional integration over EPAs. This will enable review of the EAC-EU EPA at the attainment of landmark stages such as the formation of regional and continental customs union and monetary union. This is because EAC is still in the process of realising its regional integration levels and as such the EAC-EU EPA should take cognisance of such facts.

This study commends the on-going process of creating a tripartite Free Trade Area (FTA) involving EAC, Common Market for Eastern and Southern Africa (COMESA) and SADC which will be a major step in harmonising the tariff levels in these regions hence an appraisal to regional integration efforts. This will go a long way in solving the obstacles of regional integration as far as EPAs are concerned.

Lastly should the EAC and the EU fail to reach an agreement on EPA negotiations it is recommended that the EAC countries pursue other alternatives to EPAs as discussed in this study. These alternatives are: Moldova treatment,¹⁶ European African Growth and Opportunity Act (AGOA),¹⁷ renegotiate article XXIV at the World Trade Organisation (WTO)¹⁸ and negotiate for goods-only EPA.¹⁹

Critical analysis of the provisions of EAC-EU EPA clearly demonstrates that for an Agreement to be reached there must be concessions from both the EAC and the EU. In addition political goodwill will play a major role in concluding the negotiations.²⁰

In conclusion this study analysed the provisions of the EAC-EU EPA with a view to establishing whether the same hinders or accelerates trade development within the EAC. Most of the clauses as seen in section 4.4.1 of this study have serious negative implications for EAC's trade development. It has been demonstrated that most clauses are too demanding and have more restrictions than those in the WTO and as such EAC countries have a great task ahead of them to seek renegotiations of these clauses.

¹⁶See Section 4.7 of this study.

¹⁷See Section 4.7 of this study.

¹⁸See Section 4.7 of this study.

¹⁹See Section 4.7 of this study.

²⁰For further reading on political goodwill in EPAs see Lui D & Bilal S 'Contentious Issues in the EPA: Potential Flexibility in the Negotiations' (2010) 13 available at <http://www.ecdpm.org> (accessed 8 February 2011).

However, the importance of concluding the EAC-EU EPA cannot be underscored especially with regard to Kenya which is a non-LDC would face tariffs on its key exports to the EU market if it does not sign the EPA. However, for reasons illustrated above and after having examined the contentious clauses most provisions in the EAC-EU EPA would be detrimental to the EAC's trade development. The likelihood that those provisions undermine potential trade development within the EAC cannot be underscored and hence the EAC trade negotiators must be vigilant in ensuring those contentious issues are renegotiated and reflect best interest of the EAC countries as far as trade development is concerned.

In light of the foregoing it is also imperative that the EAC trade negotiators keep in mind that resolving the contentious issues only in the EAC-EU EPA will not itself solve the challenges encountered by EAC exporters to the EU market. In this regard in order to harness benefits of EPA to the EAC countries, both the EU and the EAC countries need to address other related issues such as supply-side constraints, technical regulations and standards to trade imposed by the EU countries and trade facilitation.²¹



²¹For further reading see United Nations Economic Commission for Africa 'Assessing Regional Integration in Africa IV: Intra-African Trade (2010) 14 also available at <http://www.uneca.org/>.

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