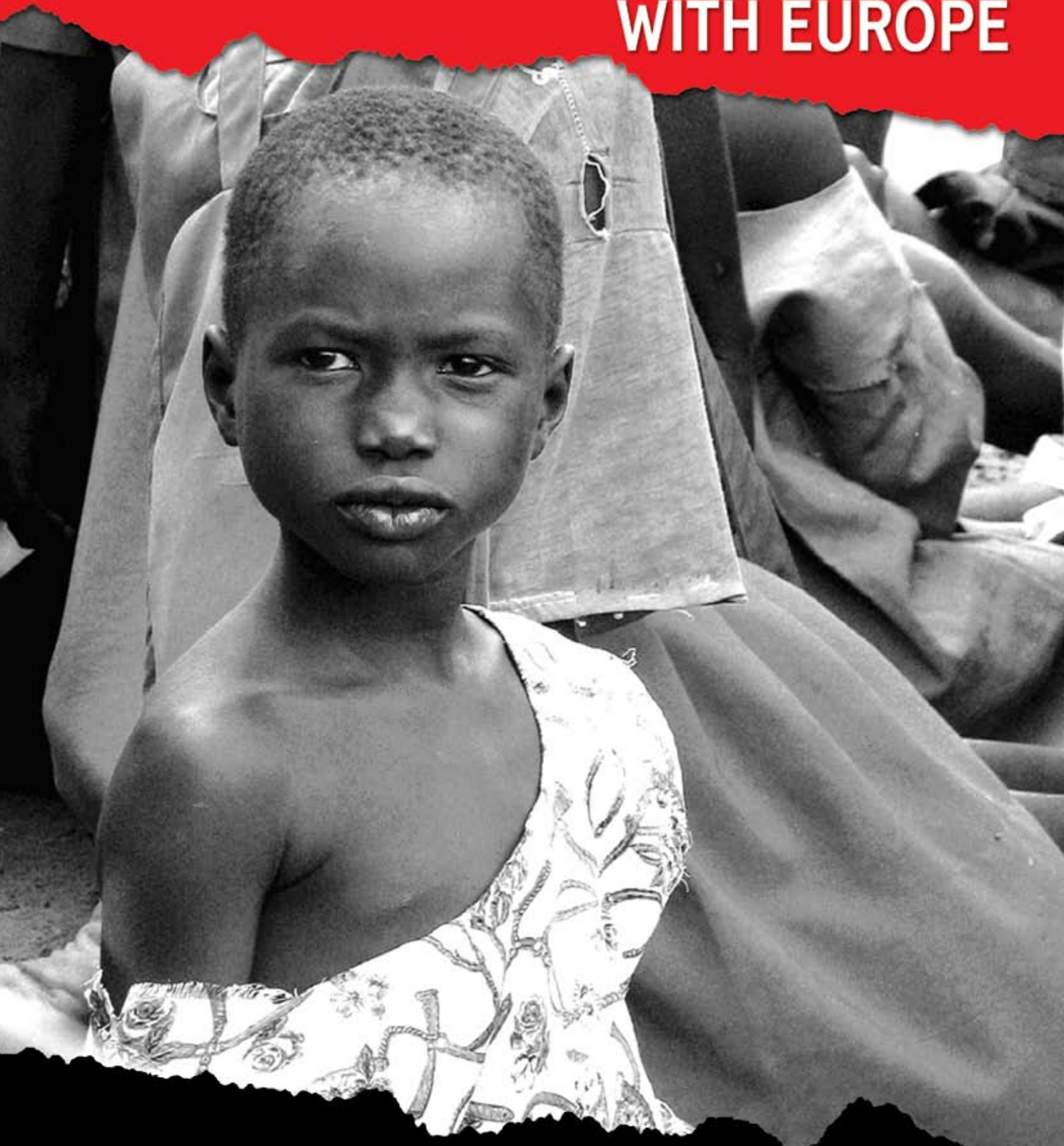
TRADING OUR LIVES WITH EUROPE



POSSIBLE IMPACT ON HUMAN RIGHTS BY THE FRAMEWORK FOR THE ECONOMIC PARTNERSHIP AGREEMENTS (EPAs) BETWEEN THE EAST AFRICAN COMMUNITY (KENYA) AND THE EUROPEAN UNION

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KHRC
KENYA HUMAN RIGHTS COMMISSION

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LIST OF ABBREVIATIONS/ACRONYMS

AAMS	Associated African Malagasy Community
ACHPR	African Commission on Human Peoples' Rights
ACP	African, Caribbean and Pacific
CARIFORUM	Caribbean Forum for Africa Caribbean and Pacific States
CAP	Common Agricultural Policy
CEMAC	Commnauté Đconomique et Monétaire de l'Afrique Centrale (Central African Economic and Monetary Community)
CITES	Convention on International Trade in Endangered Species
COMESA	Common Market for Eastern and Southern Africa
CPA	Cotonou Partnership Agreement
CSOs	Civil Society Organisations
DFQF	Duty Free Quota Free
DVS	Department of Vetinary Services
EAC	East African Community
EALA	East African Legislative Assembly
EC	European Commission
ECDPM	European Centre for Development Policy Management
ECOWAS	Economic Community of West African States
EDF	European Development Fund
EEC	European Economic Community
EPAs	Economic Partnership Agreements
ESA	Eastern and Southern Africa
EU	European Union
EUREPGAP	European Retailers Produce Working Group Good Agricultural Practice
FAO	Food and Agriculture Organisation
FEPA	Framework for an Economic Partnership Agreement
FTA	Free Trade Area
FTAs	Free Trade Agreements
GATT	General Agreement on Tariffs and Trade
GoK	Government of Kenya
GSP	Generalised System of Preferences
HCDA	Horticultural Crops Development Authority
ICESCR	International Covenant on Economic, Social and Cultural Rights
IEPA	Interim Economic Partnership Agreements
IPPC	International Plant Protection Convention
KEBS	Kenya Bureau of Standards
KENYAGAP	Kenya Good Agricultural Practices
KEPHIS	Kenya Plant Health Inspectorate Services

LIST OF ABBREVIATIONS (CONT.)

KIPPRA	Kenya Institute for Public Policy Research and Analysis
KHRC	Kenya Human Rights Commission
LDCs	Least Developed Countries
MFN	Most Favoured Nation
NFIDC	Net Food Importing Developing Countries
OIE	Organisation des epizootes (French acronym for the International World Organisation for Animal Health)
PCPB	Pests Control Products Board
REC	Regional Economic Community
RTA	Regional Trade Agreement
SACU	Southern Africa Customs Union
SADC	Southern Africa Development Community
SPS	Sanitary and Phyto-Sanitary
STABEX	System for the Stabilization of Export Earnings
TBT	Technical Barriers to Trade
TDCA	Trade, Development and Cooperation Agreement
TRIPS	Trade Related aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UEMOA	Union Economique et Monétaire Ouest Africaine (Economic and Monetary Union of West Africa States)
UNCTAD	United Nations Conference on Trade and Development
WAMZ	West African Monetary Zone
WTO	World Trade Organisation

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EXECUTIVE SUMMARY

The development and trade relationship between the African Caribbean and Pacific (ACP) countries and the European Union (EU) is currently regulated by the Cotonou Partnership Agreement which was signed on 23rd June 2000 and came into force on 1st April 2003. It replaced the Lomé Conventions which had regulated the ACP-EU relationship for over 25 years. The Agreement draws a direct link between human rights and development and makes respect for human rights, democratic principles and the rule of law essential elements of the partnership.

The various stages in the development of the relationship between the ACP countries and the European Economic Commission (EEC) shows an inclination to reliance on colonial ties and a long term trade agenda. Under the Treaty of Rome, the EEC ingrained a reciprocal commercial or trade relationship with the developing countries and further intended to create a Free Trade Area (FTA). This drive was cemented after the formation of the World Trade Organization (WTO) and the need of the European Commission (European Commission) to adhere to the principle of non-discrimination. This initiated the negotiations of the Economic Partnership Agreements (EPAs) which was meant to replace the old regime of trade relations based on non-reciprocity. The EPAs are meant to ensure sustainable development in the ACP countries and promote their gradual integration into the world economy. Specifically, EPAs aim at:

i. Promoting sustained growth;
ii. Increasing the production and supply capacity;
iii. Fostering the structural transformation and diversification of ACP economies; and
iv. Supporting regional integration.

The negotiations of the EPAs which commenced in 2004 should have been concluded by 31 December 2007. However, only the Caribbean region was in a position to sign a comprehensive EPA. Countries in the Pacific Rim and in Africa resorted to initial a Framework for an Economic Partnership Agreement (FEPA) in November 2007. Negotiations for a comprehensive agreement are still ongoing. Kenya is currently negotiating the agreement under the auspices of the East African Community (EAC).

Many interest groups, particularly the civil society organizations (CSOs) who have been closely monitoring the EPAs, have raised a number of concerns about the manner of the negotiating process as well as the potential adverse impacts that the agreement could have on human rights. They argue that EPA negotiations should be stopped since EPAs deepens dependency on Europe instead of solving the development challenges facing developing countries. However, many have also argued that the economic merits or demerits of such trade arrangements remain essentially an empirical matter. This study commissioned by the KHRC seeks to evaluate the consequences of EPAs on human rights, including the right to development, in the EAC region generally and

in Kenya specifically. This study offers stakeholders including government, business associations and CSOs, a platform to initiate dialogue on the potential impacts of the EPAs. The main findings of the report were:

Assessment of the suitability of EPAs to the EAC vis a vis the GSP+

Negotiating EPAs is optional and the ACP countries, including EAC Partner States, had the chance to revert to the Generalised System of Preferences (GSP) provided by the EU under the multilateral trading system. Under the GSP, exports from the non Least Developed Countries (LDCs) such as Kenya in the EAC configuration would be treated like those from any other developing country, receiving the same preferential treatment though probably more competitive than Kenya. The use of the GSP as an alternative could have brought complications for Kenya given her position as a developing country with no recourse to the use of the option *Everything-But-Arms,* which is available to other EAC partner states classified as LDCs.

Arguments have been made that an enhanced GSP mechanism (GSP+) could have been used as an alternative to EPAs. Though this is a unilateral mechanism, it is non-reciprocal and thus does not require commitment on the part of developing states on issues like government procurement, competition policy and investment. GSP+ is also compatible to the WTO rules since it is provided on an objective criterion to countries that qualify. The potential net-loss the country might experience under the EPAs could be much higher than what could be experienced under the GSP+ mechanism given the reciprocity aspect of the regime.

Market Access Conditions of FEPA and their Implications

Implementation of EPAs will further complicate the development of ACP countries including Kenya. Potential negative consequences arising from the disparity in the level of development between the ACP and the EU countries are of specific concern to the ACP countries. Many studies indicate that the shift to reciprocity places the bulk of the negotiation and implementation burden on the ACP countries, Kenya among them, the EU having already liberalised most of its markets to ACP imports. There is real concern about the potential impact of increased competition with products of export interest to the EU, especially agricultural and manufactured products. The EU-EAC EPAs is expected to pose serious challenges to Kenya in the processed and semi-processed goods category, in which the country has regional comparative advantage in products such as fertilisers, cement, salt, medicaments, paper and paper products, and insecticides. But significant challenges will also be faced with respect to some of Kenya's major agricultural products including wheat, maize, dairy and dairy products, and meat and meat products in the larger Eastern and Southern African (ESA) region.

Kenya's situation could be further worsened by continued provision of domestic support to the competing products such as dairy, wheat and beef under the EU's Common Agricultural Policy (CAP). Though Kenya and the EAC have excluded from liberalisation commitments those products that are heavily subsidized under the CAP in order to protect these sectors from adverse competition, there has been serious oversight in certain instances such as in the case of frozen cuts of chicken.

Rules of Origin

Although the EAC partner states have initialled the EAC-FEPA, the Protocol on the Rules of Origin, which will be applicable within the EPAs framework is yet to be negotiated by the parties (EAC and EU). The EAC partner states have supported the need for simple rules of origin on the basis that complex ones not only complicate market access for products originating from the EAC region, but also affect investment in value-addition for the EAC members, like the rest of the members of ACP EPAs configurations.

Sanitary and Phyto-Sanitary (SPS), Technical Barriers to Trade and Food Safety Issues and Concerns

Issues related to food safety and the implementations of SPS barriers are becoming increasingly significant in trade between the EU and EAC member states. SPS issues are particularly important to the region because of the nature of exports from the region, which are principally agricultural. There is need for dialogue on the application of various EU standards in order to ensure that food and environmental safety objectives are attained in ways consistent with local production and constraints of human and institutional capacity. Cases abound where SPS measures have been used to constrain market access for EAC products into the European market. These stringent conditions that were developed with the European producer in mind, were impossible for small producers in developing countries to fulfil and posed a threat to Kenya's horticultural exports.

The 2005 impact assessment of the EPAs by the Kenya Institute of Public Policy Research and Analysis (KIPPRA) notes that there is need for concerted efforts to improve service provision by institutions that are responsible for regulation of the horticultural sub-sector and SPS issues such as Kenya Plant Health Inspectorate Services (KEPHIS), Kenya Bureau of Standards (KEBS), Pests Control products Board (PCPB), Horticultural Crops Development Authority (HCDA) and Department of Veterinary Services (DVS). This is important because these institutions are to be held accountable in ensuring SPS and food safety regulations are complied with.

Interim EPAs and Regional Integration

The EAC has maintained some reasonable level of coherence in terms of configuration corresponding to ongoing regional integration efforts. However, given that some EAC member states are also party to other regional integration processes, it is not easy to evaluate the overall impact of interim EPAs. Tanzania is a member of Southern Africa Development Community (SADC) while the rest of the EAC countries are members of the Common Market for Eastern and Southern Africa (COMESA). The plans for the establishment of a common market and custom union among COMESA countries are seriously threatened by the finalisation of a separate agreement by the EAC countries and individual COMESA members.

Under the SADC-EU EPAs, the EC has insisted on a non-negotiable basis for the free movement of goods within the signatory territories of the SADC configuration countries. This is inconsistent with the regional trade arrangements under both the Southern Africa Customs Union (SACU) and SADC arrangements. Allowing free movement of goods within the region would undermine the managed trade

arrangements which exist for the SACU market, a development which would cause serious production and trade disruption. Eventually, it is the local vulnerable farmers in the SACU whose livelihood would be threatened or lost, especially those in the sugar and fruits sub-sectors.

In Central Africa, the EU expects the eight-member configuration to sign the EPAs under the Economic Community of Central Africa States (CEMAC) customs union yet the integration of the parties at institutional level has not been completed. The regional integration for this group of countries remains rather ineffectual and the Common External Tariff (CET) is not effectively applied, since it is applied on certain products depending on the national interests of each individual country.

From the above findings, it is our recommendation that Kenya and other EAC partner states should conduct a thorough human rights impact assessment of EPAs before making commitments that have the potential to violate human rights. The results of the impact assessment could be used to direct the negotiations on the full EPAs. Equally, the EAC-EC EPAs negotiations must respect all aspects of human rights and must conform to the provisions of international human rights instruments the EAC and EU are party to instead of applying such instruments selectively.

Further, the EAC partner states need to continue pressing for EPAs to achieve its development objective. It should adequately address agriculture and rural development, food and livelihood security and poverty reduction and also support regional integration. Having secured WTO compatibility for trade in goods chapters in the FEPA with the EAC and the other African negotiating groups and countries, the focus of the EU may shift to other issues to the detriment of the region. The World Bank, for example, acknowledges that agriculture will be the primary way of reducing poverty in Africa through increased productivity of small scale farmers. This self examination by the Word Bank and the recognition that the challenges of meeting the right to development arise from both the international and national contexts, shows that the challenges of meeting the right to development will need a reconsideration of development policies that stand in the way of the realization of the right to development. The EAC-EC EPAs should make this a reality.

INTRODUCTION

The development and trade relationship between the ACP countries and the EU is currently regulated by the Cotonou Partnership Agreement (CPA) which was signed on 23rd June 2000 and came into force on 1st April 2003. It replaced the Lomé Conventions which had regulated the ACP-EU relationship for over 25 years. This Agreement, described as "the most comprehensive partnership agreement between developing countries and the EU' and "the only one of its kind in the world" (Nwobike J.C, 2005) is based on three pillars: politics, trade and development between the EU and its Member States on the one hand, and the ACP countries on the other.

The primary objective of the Agreement is "to promote and expedite the economic, cultural and social development of the ACP countries, with a view to contributing to peace and security and to promoting a stable and democratic political environment." In order to accomplish the objectives, the partnership "shall be 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. The objectives and the Parties' international commitments shall inform all development strategies and shall be tackled through an integrated approach taking account at the same time of the political, economic, social, cultural and environmental aspects of development. The partnership shall provide a coherent support framework for the development strategies adopted by each ACP countries. Sustained economic growth, developing the private sector, increasing employment and improving access to productive resources shall all be part of this framework. Support shall be given to the respect of the rights of the individual and meeting basic needs, the promotion of social development and the conditions for an equitable distribution of the fruits of growth. The principles of sustainable management of natural resources and the environment shall be applied and integrated at every level of the partnership."

The Agreement draws a direct link between human rights and development and makes respect for human rights, democratic principles and the rule of law essential elements of the partnership. It is this link with human rights in the context of the ACP-EU partnership which is seen purely as a trade and development relationship that has raised a lot of concern. Whereas the advocates of this linkage hold that respect for human rights principles will help achieve the objective of the economic, cultural and social development of the ACP countries, the antagonists, on the other hand, see the inclusion of human rights considerations as a pretext for interfering in the internal affairs of the ACP countries and a disguised form of protectionism on the part of the EU and its member states.

The antagonists further argue that human rights considerations by the EU are meant to make the ACP countries to negotiate trade rules on controversial issues such as: intellectual property rights; transparency in public procurement; and environment

and sustainable development, in favour of the EU's private sector corporations and to the detriment of the ACP countries. For example, hidden threats to food sovereignty and biodiversity of the ACP countries have been summarised by the Erosion Technology and Concentration[1] (ETC) Group thus: "instead of challenging or changing the structures that generate poverty and exacerbate inequality, governments are working hand in hand with corporations to reinforce the very institutions and policies that are the root causes of today's agro-industrial food crisis.[2]" Specifically, the concern is that the proliferation of bilateral and multilateral intellectual property right agreements sets new and stronger standards for Intellectual Property Rights (IPR) and increases the ability of IPR holders to protect and enforce their IPRs globally. This will erode the developing countries' flexibility to build their IPR systems in a manner that strikes a balance between protection and access that enhances the welfare and level of development of their societies. In agriculture, the way in which legal systems for protection and enforcement of IPRs continue to evolve is eroding agricultural biodiversity and perpetuating the imbalance in the global food system. The EU is perceived to be pushing for an agreement that will incorporate new intellectual property standards beyond those already incorporated in the WTO Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS). These 'TRIPS-Plus' standards are detrimental to local food security and communities whose livelihoods depend on agriculture as a source of income and who play a key role in the conservation of agricultural biodiversity.

Attracting equal concern is the EU position on development assistance to meet the EPAs-related adjustment costs that the ACP countries will continue to access through the European Development Fund (EDF). Current development assistance is accessed through the EDF 10. Experience has shown that accessing the EDF resources has always been a nightmare to the ACP countries because of the stringent conditions attached to its availability for development, one of which is good governance. While good governance is a fundamental issue to the developing countries, the ACP included, the EU uses it selectively and at times only when their interest is at stake.

It is against this backdrop that many interest groups, particularly the civil society have been up in arms against EPAs. They argue that EPAs negotiations should be stopped since EPAs deepen dependency on Europe instead of solving the development challenges facing developing countries. However, many have also argued that the economic merits or demerits of such trade arrangements remain essentially an empirical matter. This study seeks to evaluate the human rights consequences of EPAs on development in the EAC region generally, in Kenya specifically. This study offers stakeholders from government, business associations and CSOs, a platform to initiate dialogue on the potential impacts of the EPAs.

[1] Action Group on Erosion, Technology and Concentration: for further information please see www.etcgroup.org (accessed 20 June 2010)

[2] UK Food Group (2009), Hidden Threats: An Analysis of the Intellectual Property Rights in the EU – ACP Economic Partnership Agreements: Unveiling the Hidden Threats of Securing Food Supplies and Conserving Agricultural Biodiversity http://www.ukfg.org.uk/docs/HIDDEN_THREATS.pdf (accessed 20 June 2010)

BACKGROUND

Negotiation of EPAs between the EU and the ACP countries is a continuation of pre-existing relations between certain EU member states and the territories which were under their colonial jurisdiction. The integration process has often been seen as twofold: the European economic integration process, and ACP integration process. However, the latter is influenced significantly by the former.

The genesis of this two-fold integration process could be traced to the signing of the Treaty of Rome that established an associational framework amongst some European countries associating as the EEC; and from the Associated African and Malagasy States (AAMS) agreement, an *ad hoc* relationship that symbolised the post independent trade, development and political relationship amongst African states which had gained independence from France.[3]

Being a two tier integration process, the ties between AAMS and the EEC lay in their colonial relationship. France for example, on signing the Treaty of Rome, made it clear to its European partners that a continued special relationship with its African colonies should extend to all members of the EEC as a pre-requisite to its participation in the European Community and subsequent integration process. France further proposed that its partners "share the exclusiveness of her colonial markets if the other members would agree to help meet the market and capital needs (of the colonies) that France could no longer handle."[4] In 1958, the first EDF was established, totalling to 58 million monetary units of account (the forerunner of the Euro), in the form of grants. The bulk of the fund was to be spent on economic and social infrastructure projects in France's overseas territories.

This agreement was succeeded by the Yaoundé Conventions of 1963 and 1969 that aimed at strengthening the economic independence of the 'associated' countries while promoting industrialisation and regional integration. European countries then congregating under the banner of the EEC applied the reciprocity and non discrimination principles of the Treaty of Rome in the commercial regime of the Yaoundé Conventions, to create a relationship comparable to that of a FTA. Despite the negotiations of Yaoundé II, a FTA between EEC and African states did not take off.[5]

[3] Over the years, EEC a grouping of European countries with trade interest in coal and steel, evolved to European Commission (EC) and eventually to European Union (EU)The countries that were signatory to the 1963 Yaoundé Convention I that had its genesis in the 1957 Treaty of Rome included: Benin, Burkina Faso, Burundi, Cameroon, Central African republic, Chad, Congo (Brazzaville), Democratic Republic of Congo, Cote dÐIvoire, Gabon, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Somali and Togo.

[4] Dan Lui & Sanoussi Bilal: "Contentious issues in the interim EPAs: Potential Flexibility in the Negotiations," Discussion paper No. 89 European Centre for Development Policy Management (ECDPM) March 2009.

[5] Signed in 1969 by the Parties to Yaoundé I; Kenya Tanzania and Uganda joined as new members.

When Britain signed the Act of Accession to the Treaty of Rome in 1972, a new impetus in the West-South relations was created. Britain (which had sizeable colonial ties) enhanced the reach of the West-South relations dragnet. Negotiations among African and Caribbean Commonwealth countries and the Yaoundé associated states that formed the ACP countries under the Lomé Conventions were first signed between the respective parties in 1975. Between 1976 and 2000, four successive Lomé Conventions defined trade, development and political relationship between the EU and the ACP countries. However, this relationship allowed for a one-way or unilateral preferential market access into the EU for the ACP countries. The primary benefactors of the relationship were the European countries as they received raw materials for their industries, while the ACP countries development levels stagnated.

Assessment of the Lomé Regime

The various stages in the development of the relationship between the ACP and the EEC shows inclination to reliance on colonial ties rather than a long term trade agenda. Under the Treaty of Rome, the EEC ingrained a reciprocal commercial or trade relationship with the developing countries and further intended to create a FTA with their colonies already agitating for independence. As discussions on the creation of a FTA were ongoing in Europe, only Ghana and Guinea (Conakry) had gained independence. When the Treaty of Rome and the successive treaties that culminated in the Lomé I Convention were being negotiated, African countries which subsequently became members had no institutional capacities to effectively participate in the negotiations and as such, the treaties did not fully incorporate their interests. The newly independent African States were already primed by their former colonial masters to fit into a trade regime based on the core principles of the Treaty of Rome: reciprocity and non-discrimination, which they could least afford. These core principles are now EPAs key drivers.

The Lomé Conventions were considered as a highly innovative model for international cooperation and a pilot scheme for other forms of cooperation. The Conventions provided for:

(a) *Equal partnership* between the two Parties. They gave the ACP countries the responsibility for their own development by entrusting them with a lead role in managing Lomé resources, with the EU playing a supportive role only. This concept of partnership, together with the principles of dialogue, contractuality and predictability, add up to the so-called 'Lomé culture'.

(b) *Aid and trade*. Lomé cooperation not only provided predictable aid flows over a five year period as well as non-reciprocal trade benefits, but it also granted unlimited entry to the EEC market for almost 99 per cent of goods and many other products of export interest

(c) Support to *Commodities*. Lomé I introduced the *System of the Stabilization of Export Earnings* (STABEX), a compensatory finance scheme to stabilise export earnings on a wide number of agricultural products such as cocoa, coffee, groundnuts and tea. Specifically, its objectives are laid down in Article 186 of the fourth Lomé Convention: to remedy the harmful effects of the instability of export earnings and to help to overcome one of the main obstacles of development. Lomé II signed in 1979 and corresponding to the fifth European Development Fund (EDF) (4.542 BECU) created a similar mechanism, the

System of the Stabilization of Export Earnings from Mining Products (SYSMIN) to assist ACP countries which were heavily dependent and which suffered export losses. In many instances however, the STABEX Scheme did not achieve much.[6] The STABEX system was characterized by falling commodity prices in the early 1980s and by a decrease in the rate of coverage for the drop in export revenues.[7] Questions were raised with regard to the STABEX and SYSMIN commodity support arrangements, over their effectiveness. There had been a long-standing opposition to these provisions by the EU member states due to the fact there was a belief that there was no adequate control over how the resources were used. In the early period of both schemes, there were examples of misappropriation of resources. In addition, the EU states were not happy with the allocation arrangements, as they were given no say in the process. More recently, the EU has gained greater influence in regard to the control of funds. This has led to the position that both STABEX and SYSMIN are now criticised for not responding rapidly enough to support export earnings. Furthermore, neither STABEX nor SYSIMIN are sensitive to the degree of poverty in the country that needs assistance.

The failure of the STABEX is further reinforced by the number of modifications it has experienced aimed at improving its design (conditions for compensation) and its performance (financial endowment). Under Lomé IV, stricter conditions concerning the use of funds were introduced. Nevertheless the following shortcomings of the system ought to have been resolved: the partial nature of STABEX (geographical and product coverage); shortage of resources that makes STABEX unable to meet eligible transfer claims, especially during the commodity crisis; slow disbursement; and weak performance with regard to its stabilisation goal (due to its product-by-product approach and delays in disbursement), and redistributive and allocative impacts (due to the "fungible" nature of transfers)

(d) Commodity *Protocols* under which trade on specific commodities was guided. The EU agreed on separate trading protocols on sugar, beef and veal, bananas and rum. The banana protocol, for instance, gave duty-free entry to the EU market for specific quota of bananas and has been a lifeline for many small Caribbean states. Under the sugar protocol, the Community buys a fixed quantity of sugar each year from ACP producers at guaranteed prices, higher than world prices. These preferences were especially helpful in the economic development of certain ACP countries such as the small island states of Mauritius, Fiji, Guyana and Barbados.

(e) *Mutual obligations*. The nature of the Lomé partnership made it possible to break new ground on sensitive matters. Lomé IV became the first development agreement to incorporate a human rights clause under Article 5. It also contained a contractual agreement on structural adjustment, making it the first international text negotiated on this subject.

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[6] Koehler, G., *The Future of STABEX,* a paper prepared for the ACP Heads of State and Government, Libreville, November 6-7, 1997

[7] Stephen Karingi, et al: Assessment of the impact of the Economic Partnership Agreement between the ECOWAS countries and the European Union, Africa Trade Policy Centre, (December 2005): United Nations Economic Commission of Africa

(f) *Joint administration.* The Lomé cooperation embraced dialogue and joint administration of its content. A set of joint institutions ensured permanent dialogue between the two Parties.

While continuity was a key feature of successive Lomé Conventions, the changing nature of ACP-EU cooperation particularly after 1990 brought pressure on the cooperation as follows:

(a) *Dwindling common interests.* When the first Lomé Convention was signed, there were strong historical ties and perceived mutual interdependence between Europe and ACP countries. However, this was no longer the case as the ACP countries were increasingly dropping on the EU's priority list in terms of geopolitical, economic and security concerns.

(b) P*olitics.* Whereas the first three Lomé Conventions were primarily concerned with economic cooperation, the democratization wave that swept across the developing world at the end of the Cold War led to growing 'politicization' of ACP-EU cooperation. Respect for human rights, democratic principles and the rule of law became 'essential elements' whose violation could lead to partial or total suspension of development aid. While these changes reflected legitimate EU concern to ensure proper use of taxpayers' money, many ACP countries felt that the principle of 'equal partnership' had been eroded and replaced by conditional ties.

(c) *Trade liberalisation.* The Lomé trade regime was increasingly being challenged on grounds of effectiveness and political acceptability. Despite preferential access to EU markets, ACP export performance deteriorated in the 1980s and 1990s. ACP share of the EU market declined from 6.7% in 1976 to 3% in 1998. Diversification from traditional products remained limited with 60% of total exports concentrated in only 10 products. In addition, the Lomé trade provisions were seen to be 'incompatible' with the new international rules agreed under the WTO. Principally, the General Agreement on Trade and Tariffs (GATT) Article 1 which provides on the Most Favoured Nation Principle (MFN) was consequently seen to be violated, as the trade preferences provided under the Lomé regime were withheld from other non-ACP developing countries and reserved only to countries selected on the basis of their colonial past.[8]

(d) *The complexity and questionable impact* of the Lomé regime raised questions as to whether it was worth trading under. While the Lomé Convention may have been the finest and most complete framework for North-South co-operation on paper, it evolved into a very complex tool in practice, with too many objectives, instruments and procedures. The result was long delays, bureaucratisation, reduced efficiency and questionable trade and development impact on the ACP countries.

[8] Karel van Hoestenberghe and Hein Roelfsema, *Economic Partnership Agreements between the EU and groups of ACP countries: Will they promote development?,* United Nations University-CRIS, Occasional Papers 0-2006/27.

Towards Cotonou Partnership Agreement: Background to EPAs

With such pressure on the Lomé Partnership, the EC in 1996 launched a broad-based consultation process on the future of ACP-EU cooperation. This process led to the so-called 'Green Paper' (1996) and set the scene for negotiating a successor agreement. Negotiations formally started in September 1998 were concluded in February 2000, culminating in the CPA signed on June 23, 2000 in Cotonou, Benin. The CPA provided for negotiation of EPAs between the EU and ACP countries.

Why Economic Partnership Agreements?

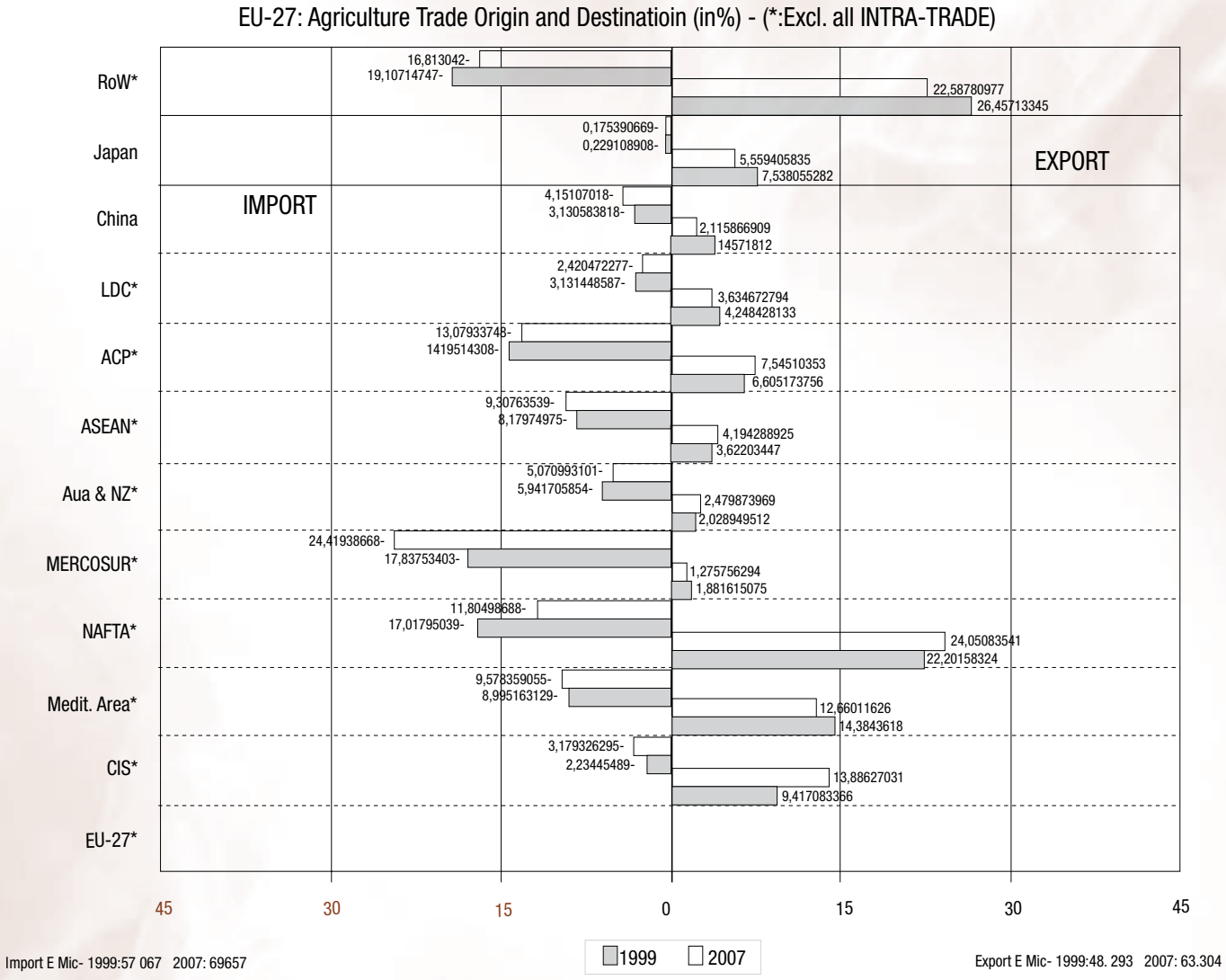
The principal rationale for the EU to negotiate EPAs with the ACP countries was to conform to the WTO rules on non-discrimination. The WTO rules provide for non-discrimination amongst tariffs applicable to trade amongst its members with the exception of trade within Regional Trade Agreements (RTAs), where a waiver has been granted or in case of Special and Differential Treatment (S&D) applicable across the board. The trade and development chapters of the CPA and product protocols thereof did not comply with the WTO rules in three ways:

i. The preferential market access was only applicable to the group of 77 ACP countries and not all WTO members under the same conditions of development.
ii. The ACP countries did not reciprocate by reducing their trade barriers against EU imports therefore failing the RTA exception.
iii. The waiver granted by the WTO was coming to an end on December 31, 2007.

Therefore, to comply with the multilateral trading regime, ACP countries had to substantially liberalise all their import trade with the EU. The Fourth Lomé Convention (replaced by the CPA in 2000) was expected to run for twenty (20) years. The old regime of trade relations based on non-reciprocity were to carry on until the end of December 2008, after which the parties (the ACP and the EU) were to comply with the principles of the multilateral trading regime through the negotiation of EPAs. It was on this basis that replacing the non-reciprocal trading arrangements under the CPA with the WTO-compatible EPAs between the EU and the group of 77 developing and least developed ACP countries was a proposal for negotiation under Article 34 and Article 36 of the CPA.

Another major rationale concerned the impact of the Lomé regime's. The impact of the non-reciprocal preferences provided by the Lomé Conventions to the ACP countries remained disappointing as the preferential trade did not translate into increased export for products, both in terms of quantity and value addition. The ACP countries remained primary exporters of primary products such as coffee, tea, timber, oil, cocoa and metals, whose terms of trade and share in the EU market had been declining over time. As indicated in Figure 1 below, the percentage imports of agricultural products from the ACP countries declined from about 15% in 1999 to 11% in 2007 (Đ1,419,514,308 to Đ1,307,933,748). Tariff escalation on value addition, for instance, discouraged ACP countries from developing processing industries. This reduced economic growth in the manufacturing sector, hindered economic diversification through value addition of products, and slowed product diversification in the ACP countries.

Figure 1: EU-27-Agricultural trade by origin and destination



Source: European Commission, Trade statistics 2008 from Comtrade

Among other important reasons for negotiating EPAs was the *politics* that came with the democratization wave that swept across the developing world at the end of the Cold War, which put a premium on respect for human rights, democratic principles and the rule of law.

Negotiating the EPAs

After signing the CPA, ACP countries continued to enjoy non-reciprocal preferential market access to the EU irrespective of their incompatibility with the WTO rules, due

to a WTO waiver granted under Article XXV of GATT 1994.[9] The waiver was to last for eight years until December 31, 2007. Within this period, the parties were supposed to have negotiated EPAs. It is worth noting that at this point in time, not all of the ACP countries were members of the WTO. However, the mere fact that the EU, a member of the WTO, already had a special trade arrangement with them meant that they were all bound to comply with the provisions of GATT (1994) under the new bilateral trade agreement. The choices presented by the CPA to enable ACP countries pursue with the EU were stark and limited to the following three options:

a) The ACP countries and the EU were to conform their trade relationship within the WTO rules. This arrangement obliged the ACP countries to liberalise their markets to the EU by progressively removing barriers to trade through the formation of WTO compliant trading blocs;[10]
b) The ACP countries were to revert to the less favourable GSP[11] (categorised into: (i) standard GSP; (ii) the special incentive arrangement for sustainable development popularly known as the GSP-Plus, and (iii) the Everything-But-Arms scheme for the LDCs) provided by the EU under the multilateral trading system;
c) The ACP countries and the EU were to seek an extension of the WTO waiver for a period of time.[12]

Out of the three possible alternatives, the ACP and the EU pooled their efforts to make their trade relationship compliant with the WTO rules and the process of the EPAs negotiations kicked off in September 2002.[13] The initial negotiations at the ACP-EU level aimed at drawing out the objectives and principles of the EPAs as well as the issues of common interest to ACP countries. They were followed by national and regional level negotiations which began in 2003. The negotiations at the national and regional levels targeted tariff liberalisation and other binding commitments. The CPA obligated ACP governments to widely consult with stakeholders in building consensus at the national level, and between the countries forming an EPAs configuration where the agreement would eventually be signed.[14] Ironically, where they existed, such consultations were minimal and the different stakeholders were treated differently. For instance, Kenyan CSOs were thrown out of the EPAs negotiations process by the Ministry of Trade and Industrialisation when Kenya was still part of the Eastern and Southern Africa configurations, and were never consulted when Kenya pulled out of ESA and joined the EAC configuration[15].

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[9] In exceptional circumstances not elsewhere provided for in this Agreement, the contracting parties may waive an obligation imposed upon a contracting party by this Agreement.

[10] The ACP and EU would therefore enter into Free Trade Agreements (FTA) according to the requirements of Article XXIV of GATT 94, whereby trade between the two blocs would be liberalised.

[11] GSP is a formal system of exemption from the more general rules of the WTO. This exemption allows WTO members to establish systems of trade preferences for other countries, with the caveat that these systems have to be generalised, non-discriminatory and non-reciprocal with respect to the countries they benefited. Countries are not supposed to set up GSP programmes that benefited just a few of their 'friends.'

[12] GATT 94 Article XXV. 5 provides 'In exceptional circumstances not elsewhere provided for in [GATT 94], the contracting parties may waive an obligation imposed upon a contracting party by this Agreement; provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties….'

[13] See the process of EPA negotiations on http://ec.europa.eu/trade (Accessed on 12/02/2008).

[14] Cotonou Agreement, Section 6.

[15] Please letter from the Ministry of Trade in the Annex

Commencement of the EPAs Negotiations

The EC started negotiating the EPAs with the ACP on September 27, 2002 in order to implement the commitment made at the multilateral level. From the EU perspective and prevailing circumstances, the imperatives were to: apply greater aid selectivity and differentiation in the treatment of ACP countries; link aid and performance; make the trade régime 'compatible' with the requirements of the WTO; ensure a closer involvement of civil society, the private sector and the economic and social actors, as well as to rationalise Lomé cooperation instruments.

The first phase, the all-ACP level, began in September 2002 with the launch of negotiations on the objectives and the principles of the EPAs as well as issues of common interest to all ACP States. This phase was concluded in 2003. The second phase, which began in 2003, is conducted at the regional level and principally deals with market access, development, trade in services, agriculture, fisheries and trade related issues such as intellectual property rights.

For the purpose of negotiating EPAs with the EU, the ACP region was configured into six distinct regional groups: East and Southern Africa (ESA) which was further split to have the EAC-EU EPAs configuration in 2007; Southern Africa Development Cooperation (SADC); Economic Community of West African States (ECOWAS); Central Africa Monetary Union (CEMAC); the Caribbean and the Pacific.

These configurations exposed the soft under-belly of the African integration process where a 'spaghetti bowl' scenario is witnessed with one country belonging to several regional grouping. The ESA configuration was specifically affected as it could not negotiate an EPAs as COMESA because some countries within ESA were also members of SADC, e.g. Malawi and Zimbabwe or CEMAC (D.R. Congo). Others, like the EAC countries, were in different configurations in spite of belonging to one regional grouping and having a Customs Union (CU) – Burundi, Kenya and Rwanda in COMESA and the United Republic of Tanzania in SADC.

Objectives of EPAs

According to the Cotonou Partnership Agreement (CPA), EPAs are meant to ensure sustainable development in the ACP countries and promote their gradual integration into the world economy. Specifically, EPAs aim at:

i. Promoting sustained growth;
ii. Increasing the production and supply capacity;
iii. Fostering the structural transformation and diversification of ACP economies; and
iv. Supporting regional integration.

Although these objectives are noble on paper, a lot needs to be done to achieve them. Failure to establish consensus amongst the EPAs stakeholders particularly within Kenya, and the subsequent opposition that the process has established could erode the intended objectives.

The EAC – EU – EPAs

The EAC partner states initially developed an interim EPAs: the FEPA with the EC on November 27, 2007, and set July 31, 2009 as the deadline to negotiate a comprehensive EPAs. The deadline has since passed without the finalisation of the comprehensive EPAs between the EAC and the EC.

Since the launch of the EPAs negotiations in 2002, Kenya along with Burundi, Rwanda and Uganda were negotiating an EPAs under the ESA configuration, whose then membership of 16 countries (Burundi, Comoros, DR Congo, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Uganda, Zambia, and Zimbabwe) was largely drawn from the COMESA. The United Republic of Tanzania, on the other hand, was pursuing EPAs negotiations under the SADC configuration.

Negotiating EPAs under different configurations posed a challenge to EAC countries as they were bound by the EAC Customs Union Protocol and the EAC Customs Union Management Act to sign EPAs as one customs territory. In January 2005, the EAC became a Customs Union and as the negotiations for the EPAs progressed, it became apparent that they could not be concluded under different configurations without compromising the new customs union. To address this complex situation, the EAC Heads of State Summit in August 2007decided that the EAC would conclude an EPAs with the EU as a bloc on the understanding that this was to build on the work already done by the Partner States in their previous configurations. Taking a cue from the Heads of State, the EAC Ministers of Trade on October 13, 2007 directed the EAC partner states to harmonise their EPAs position and submit a harmonised market access offer to the EC. A strong collaboration between EAC and ESA was recommended to ensure that positions pursued at EAC were in tandem with COMESA and SADC regional integration processes. Based on the foregoing, Kenya is now negotiating EPAs under EAC-EU EPAs arrangement as it maintains close collaboration with ESA in view of the need to advance the course for harmonised positions between EAC and COMESA.

The EAC-FEPA outlines the general objectives of the EPAs as provided in the Cotonou Agreement and also differentiates EAC-FEPA's general objectives from its specific objectives. EAC-FEPA's objectives include:

i. To ensure that FEPA is consistent with the objectives and principles of the Cotonou Agreement outlined under Articles 34 and 35.
ii. To establish an agreement consistent with Article XXIV of "GATT 1994";
iii. To facilitate continuation of trade by EAC partner states under terms no less favourable than those under the Cotonou Agreement;
iv. To establish the framework, scope and principles for further negotiation on trade, rules of origin, trade defence instruments, custom cooperation and trade facilitation, sanitary and phyto-sanitary (SPS) measures, technical barriers to trade, as well as agriculture and economic development cooperation; and
v. To establish a framework and scope for potential negotiation in relation to other issues including trade in services, trade related issues as identified in the Cotonou Agreement and any other areas of interest to both Parties.

The EAC-EC FEPA, considered as a transitional agreement to serve both Parties

for the interim period before the conclusion of negotiations and commencement of the comprehensive EPAs was not successful. This was principally due to the little progress made by both Parties in settling outstanding market access issues and economic and development-related issues that were supposed to be addressed in the comprehensive EPAs as identified in the Rendezvous Clause. [16]

Assessment of the suitability of EPAs to the EAC vis a vis the GSP+

Negotiating EPAs is optional and the ACP countries, including EAC Partner States, had the chance to revert to the GSP[17] provided by the EU under the multilateral trading system, if they did not wish to commence an interim EPAs. Under the GSP, exports from the non LDCs such as Kenya in the EAC configuration would be treated like those from any other developing country, receiving the same preferential treatment though probably more competitive than Kenya: for example, Brazil, India and South Africa among others. Therefore, in the case of the EAC region, the use of the GSP as an alternative could have brought complications for Kenya given her position as a developing country with no recourse to the use of the *Everything-But-Arms* option available to other EAC partner states classified as LDCs.

Arguments have been made that an enhanced GSP mechanism or the GSP+ could have been used as an alternative to EPAs. Though this is a unilateral mechanism, it is non-reciprocal and thus does not require commitment on the part of developing states on issues like government procurement, competition policy and investment. GSP+ is also compatible to the rules of the WTO since it is provided on an objective criterion to countries that qualify. However, it has a down side to it and EU could unilaterally withdraw or suspend it like in the case of Sri Lanka. [18]

Nonetheless, the potential net loss the country might experience under the EPAs could be much higher than what could be experienced under the GSP+ mechanism given the reciprocity aspect of the EPAs regime. Enhanced market access conditions under reciprocal trade between the two regions will make it possible for increased import surges of the subsidised EU agricultural products into the EAC and neighbouring regions. Such import surges, if they occur, will not only negatively affect local agricultural production but might also lead to trade diversion for the EAC.

An argument that the GSP+ arrangement can easily be revoked due to non-compliance with certain human rights issues has been watered down by counter-arguments. A country such as Colombia which already trades under the GSP+ mechanism has a worse human rights track record than countries such as Kenya. In Colombia, trade union officials are killed indiscriminately but the country still trades with the EU without hindrance. The argument that the EU can revoke a GSP+ trade arrangement if the

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[16] Article 37 of the FEPA establishes the Rendezvous Clause (the Singapore Issues) which states: Building on the Cotonou Agreement and taking into account the progress made in the negotiations of a comprehensive EPA text, the parties agree to continue negotiations in the following areas…….. (d) trade in services; (e) trade related issues namely: (i) competition policy, (ii) investment and private sector development,……. (iv) intellectual property rights, (v) transparency in public procurement.

[17] GSP is a formal system of exemption from the more general rules of the WTO. This exemption allows WTO members to establish systems of trade preferences for other countries, with the caveat that these systems have to be, generalised, non-discriminatory and non-reciprocal with respect to the countries they benefited. Countries are not supposed to set up GSP programs that benefited just a few of their 'friends'.

[18] See EC Council Regulation No. 732/2008.

country and the region were to opt for it instead of the EPAs, might not hold much ground.

It is self defeating for one to argue that any Government could front respect of human rights as a reason not to explore a trading regime beneficial to its people. Governments ought to respect human rights without being implored by threats of trade sanctions. The nature of trading relationships with the developed countries fosters a culture of impunity amongst some leaders in developing countries. For example mining and trade in '*blood diamonds*', indiscriminate logging at the expense of future generations and pollution of water bodies is the reason for inserting such human rights provisions in trade agreements.

SECTION ONE

HUMAN RIGHTS IMPLICATIONS OF THE EAC-FEPA

1.1 Introduction

The FEPA was initialled on November 27, 2007 signalled the realisation by both parties that concluding a comprehensive EPAs was not going to be feasible by December 31, 2007 deadline as stipulated in the CPA.[19] It is expected that the comprehensive EAC-EPAs will govern trade relations between the EU and EAC partner states in compliance with the WTO rules. In the interim, the EAC-FEPA provides for market access for trade in goods and ensures uninterrupted market access for goods from the EAC partner states.

1.2 Legal Implications of EAC-FEPA

At the moment, EAC-FEPA is just an initialled document. As such, *does it bind the parties? Is it a legal document?* Initialling is the approval of a contractual text by appending initials. Negotiators provisionally draw up the negotiated contractual text of the agreements based on international law. Unless otherwise indicated, initialling signifies only provisional assent to the text of a treaty by delegates following a negotiation. Article 10 (b) of the Vienna Convention on the Law of Treaties provides that initialling demonstrates that the text is authentic and definitive, ready for signature or, although unusual, ready for provisional application. In the case of the initialled EAC-FEPA, initialling has to some extent been interpreted to mean that the agreement is ready for provisional application.

Indeed, the granting of unilateral preferences by the EU under the EPAs Regulation (Council Regulation 1528/2007 of December 2007 [2007] OJ L348/1, in force since January 1, 2008) led to a provisional application of the initialled text by EU. However, it must be emphasised that an initialled document does not in itself impose any obligations on the parties. The parties to an agreement are only under obligation to implement its terms once it has entered into force, which takes place upon ratification or after ratification, if this is specified in the treaty as it is in the FEPA.

On signature (but not on initialling) a country enters into an obligation not to defeat its objective and purpose prior to its entry into force. This keeps with the interpretation of the 1969 United Nations Vienna Convention on the Law of Treaties (Vienna Convention) which is widely accepted as Customary International Law. Moreover, the Vienna Convention provides that initialling of a text (documents made between or amongst countries or regions in international relations) constitutes a signature of a treaty when

[19] See Article 37 (1) of the CPA: Economic Partnership Agreements shall be negotiated during the preparatory period which shall end by

it is established that the negotiating states so agreed.[20] In this case however, it is apparent that the initialling of the EAC-FEPA did not constitute a signature as the parties have on several occasions set dates when the signing would take place, 31st July 2009, but this is yet to materialise.

In the legal sense, therefore, the significance of initialling documents made between (or amongst) countries or regions in international relations implies no legal or political commitment on the part of parties to the initialled. The legal significance of this step however, is that the authentic text is the only one to which appeal may be made to correct any inaccuracies of translation or reproduction.[21] To claim that the initialling of the EAC-FEPA had the significance of initialling as is known in law would be inaccurate. Similarly, it would be inaccurate to claim that it has the significance of signing since there would be no need to sign in future.

1.3 Legal Implications of the EAC-FEPA assessed against Human Rights

The cooperation between the EU and the ACP countries has built a longstanding record in integrating development, human rights, and more recently, governance concerns.[22] While this record is strong and fairly clear in the sphere of development aid and the EDF, the trade part of the cooperation has not shown equal sensitivity to human rights concerns.

Under CPA, Article 1, all states involved in the EPAs negotiations have explicitly committed themselves to the promotion of "the economic, social and cultural development of the ACP states." This includes respect for and fulfilment of human rights norms and goals. Additionally, the Treaty on the European Union and the Treaty Establishing a Constitution for Europe, the EU member states have specifically pledged to strive for consistency in the Union's external activities in general. The combination of these two factors thus makes the human rights-based approach to EPAs imperative.

However, the commitment to mainstream human rights perspectives into the EAC-EPAs are lopsided: The EU for example, made a text offer on 'trade, environment and sustainable development' comprising strict labour standards that possibly aimed at excluding EAC products with elements of child labour from market access. EAC member states rejected this stand arguing that use of child labour in the production process is not only part of training a child to grow up as a responsible citizen but is also part of a culture which cannot be changed over-night through an agreement. The EU's efforts can be said to be lopsided since such mainstreaming of human rights perspectives has not been experienced in all areas of the EAC-EPAs negotiations.

Given that EPAs are increasingly seen as having the potential of bringing about significant erosion of the terms of ACP-EU trade beyond the Lomé regime, for the EAC partner states, the human rights aspects of EPAs should be integrated in a way that positively contributes to the economic development of the region. Moreover,

[20] See United Nations Vienna Convention on the Law of Treaties (Vienna Convention), Article12 (2) (a).

[21] See simplified definitions of commonly-found terms in treaty law http://www.intfish.net/glossary/treaty.htm accessed on June 3, 2008.

[22] Karin Arts (2007): Human Rights Approach to the ACP EU Economic Partnership Agreements: Issues and Implications.

EPAs should move beyond market access and partnership rhetoric, and address real development challenges faced in the EAC region such as: framing development as a right; emphasising the role of states as both duty bearers and rights holders; non-discrimination; participation; accountability; and seeing ACP-EU relations and the Cotonou Agreement as serving the realisation of all human rights obligations that rest on ACP and EU members.

1.3.1 The right to development

The ACP countries are at a much lower level of development compared to their EU counterparts. At least, 40 of the ACP countries are LDCs.[23] Subsequently; ACP countries have weaker economies compared to the EU members who are not only rich but also have a high Human Development Index (HDI).

The contribution to world trade by the ACP countries, Kenya included, is very low. The disparity in development between the two parties is one of the main concerns for human rights analysts in the EPAs negotiation process. The weakness of the ACP economies and institutions naturally predisposes them to unequal competition with the more industrialised EU members. Reciprocity in trade with the EU means that like-products from the EAC region and the EU, for example - except for sensitive products which have some level of protection with respect to liberalisation - meet at the market but the subsidised EU products out-competes those originating from the EAC both in the EAC and in the EU markets. This not only affects the national incomes and personal incomes but human rights of millions of people.

The Declaration on the Right to Development[24] provides that the human person is "the central subject of development" and an "active participant and beneficiary of the right to development'[25] both individually and collectively.[26] It makes the right to development an 'inalienable human right' through which all persons can enjoy "all human rights and fundamental freedoms"[27] as well as "the right of peoples to self-determination," including "the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."[28] The Declaration also provides that the promotion, implementation, and protection of the right to development shall not justify "the denial of other human rights and fundamental freedoms."[29] The Declaration places significance on removing barriers of a civil, political, economic, social and cultural nature both in the international and national contexts to the realization of human rights, self determination and clean environment. In addition, the Declaration is based on achieving these human rights objectives within the principles of equity, non-discrimination, participation, transparency and accountability.

The Millennium Declaration Goals explicitly acknowledge a commitment to "making the right to development a reality for everyone and to freeing the entire human

[23] International Federation of Human Rights (2007). Economic Partnership Agreements (EPAs) and Human Rights

[24] The Declaration on the Right to Development, G.A. Res. 128 G.A.O.R., 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53(1986).

[25] Id. Article 2(1).

[26] Id. Article 2(2).

[27] Id. Article 1(1).

[28] Id. Article 1(2).

[29] Id. at 10th preamble paragraph.

race from want."[30] The goals which include the elimination of poverty, disease, illiteracy, discrimination against women and environmental degradation demonstrate that States accept the responsibilities set out in the Declaration of the Right to Development; to "have the primary responsibility for the creation of national and international conditions favourable for the realization of the right to development,"[31] to take steps "individually or collectively to formulate international development policies with a view to facilitating the full realization of the right to development,"[32] as well as formulate, adopt and implement "policy, legislative and other measures at the national and international levels" to realize the "progressive development of the right to development."[33]

On the contrary, the EAC-FEPA inhibits the right of the EAC partner states to freely pursue their economic, social and cultural development. Article 16.2 on More Favourable Treatment resulting from Economic Integration Agreement obliges the EAC party to accord the EC Party any more favourable treatment applicable as a result of EAC party becoming party to an economic integration agreement with any major trading country after the signature of the EAC-FEPA. The EAC member states hold that the MFN clause should not undermine the provisions of the WTO 1979 Enabling Clause that allows bilateral preferences between developing countries in promoting South-South trade. The EU on the other hand holds that by giving in to the provisions of the Enabling Clause, ACP countries would give further concessions to their competitors, the major emerging economies such as China, Brazil and India, on products that have already been excluded from liberalisation under EPAs. Unfortunately, such an obstinate stance by the EC will only deny the EAC member states the right to use this multilateral provision and the right to alternative routes for development. It not only inhibits the EAC partner states from exercising their right to freely associate with other regions of the world on terms that would bring economic, social and cultural development to their people, but also inhibits the prospects of growth in South-South trade and integration. Despite the fact that the EAC partner states have raised their concern with the EC at technical and senior officials' level negotiations, the EC has studiously remained adamant on its position.

Further, the EAC member states, being party to EPAs, will have to undertake the necessary reforms in the regional tax regime in order to compensate for loss of revenue in the aftermath of market liberalisation under the EPAs regime. Under such circumstances, there will be a significant fall in the EAC and ACP country budgets, with states capacity to finance public policies such as health and education, decreasing significantly. This may impinge on the EAC partner states' ability and right to economic development. Indeed, the loss of state incomes with the implementation of EAC-EPAs will prevent the EAC governments from effectively addressing economic growth and poverty reduction. Consequently, the trade agreement's effect on the

[30] G.A. res. 55/2, UN GAOR, 55th Sess., 8th plen. Mtg., Agenda Item 60(b), Para. 11, U.N. Doc. A/RES/55/2(2000).

[31] The Declaration on the Right to Development at Article 3 (1).

[32] World Bank Id. Article 4(1). See also Article 5 obliging States to "take steps to eliminate the massive and flagrant violation of the human rights of peoples and human beings" in certain circumstances; Article 6 seeking States to promote all rights on the basis of equality; Article 7 obliging States to cooperate in the 'establishment, maintenance and strengthening of international peace and security'; Article 8 obliging States to ensure rights to 'basic resources, education, health services, food, housing, employment and the fair distribution of income."

[33] Id. Article 10.

lives and human rights of East Africans cannot be compensated even by the EDF resources which are currently (10th EDF) insufficient and inaccessible.

Further, under the EAC-FEPA, the EU is committed to provide quota-free duty-free market access to goods originating from the EAC partner states. Specifically, the EU is committed to liberalise 100% of its imports from the EAC party while the EAC will liberalise 82.6% of its imports from the EU. The balance is left for the sensitive products where duties could be maintained to protect specific sectors. For the agricultural sector, trade liberalisation constitutes an important risk for agricultural and food products. Local agricultural and food products can hardly compete with the highly subsidised EU products which are also produced through better technology. The competitiveness of EU products (such as cereals, dairy and dairy products and fruits) naturally facilitates their market penetration not only in the EAC region but in the entire ACP countries to the detriment of the human rights position of the EAC agricultural communities when the EPAs implementation process fully comes to bear, considering the fact that the EAC Partner States' economies are driven and sustained by agriculture which on average contributes 36 % to the Gross Domestic Product (GDP).

1.3.2 The right to food and the right to life

The right to food and life are intractably linked. An assessment of the nature, scope and the potential extent of human rights violations as a result of trade and investment liberalization through the EAC-FEPA must start with the effect the Agreement will have on the ability of the citizens to meet their basic daily needs. The right to food is the basis for the fulfilment of human dignity and life. The ability to provide access to food is a core component of every government's agenda and mandate. Governments must ensure the availability of and access to food for their citizens - over and above any other national, regional or international obligations. Any measures, agreements, pacts, treaties or undertakings by a government should not compromise the duty and the inherent obligation of a country to meet its citizens' food needs.

The right to food and role of the state in ensuring this is captured in a number of international human rights instruments. International human rights laws oblige states to respect, protect and fulfil this right, like any other basic human right. Articles 11 and 24(2)(c) of the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child respectively, capture the obligation of the world states to comply with their obligations related to the right to adequate food. The African Charter for Human and People's Rights (African Charter) also guarantees this obligation. The Constitution Kenya under economic and social rights guarantees the right to adequate food, "every person has the right to be free from hunger, and the right to adequate food of acceptable quality" (article 43c).

In a General Comment issued in 1999, the UN Committee on Economic, Social and Cultural Rights opined that states must immediately tackle hunger and progressively ensure that 'every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its

[34] General Comment No. 12, The Right to Adequate Food, UN Doc. E/C. 12/1999/5, para. 6.

procurement.'[34] Further, it stressed that for the states to meet their obligations on the right to food, the key components of the definition of the right should encompass the following:

a) Availability: Possibilities either for feeding oneself directly from productive land, other natural resources, or from well-functioning distribution, processing and market systems. This includes obligations of the state when acting internationally to ensure respect for the right to food in other countries, to protect that right, to facilitate access to food, and to provide the necessary aid when required.

b) Accessibility: This includes both economic accessibility (through economic activity, appropriate subsidies or aid) and physical accessibility (in particular for vulnerable groups). The socially vulnerable or otherwise disadvantaged may need attention through special programmes. They include victims of natural disasters and people living in disaster-prone areas.

c) Acceptability: "The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture."[35]

The African Commission on Human and Peoples' Rights (ACHPR) made great strides in giving judicial recognition to the right to food in Social and Economic Rights Action Centre and Centre for Economic and Social Rights vs. Nigeria.[36] This communication involved abuses surrounding oil exploration in Ogoniland in Nigeria. The African Commission noted that the African Charter and international law require and bind [states] to protect and improve existing food sources and to ensure access to adequate food for all. The right to food requires that governments should neither destroy or contaminate food sources, allow private entities to destroy or contaminate food sources nor prevent peoples' efforts to feed themselves.

In light of the above discussions, international trade and investment liberalization agreements have thus both direct and indirect implications for food security in their interaction with the agricultural sector and by extension to the right to life, particularly in developing countries where agriculture plays such a vital role in the national economy. Agriculture accounts for over 50% of total employment in the third world[37]. In food insecure countries such as the EAC member states, however, the role of agriculture is far more critical, comprising 30% of GDP and employing nearly two thirds of the work force.[38] Given the human rights definition of the right to food, governments have an obligation to protect the livelihoods of farmers, especially the small-scale farmers, majority of whom are women, enabling them to produce food for their local community and ensuring that they gain a fair share in the commodity chain if they are engaged in production for the export market.

The EAC partner states have similar obligations to protect the livelihoods of small scale farmers who may suffer from relatively cheaper agricultural imports from the

[35] Ibid.

[36] ACHPR, Communication No. 155/96 (October, 2001).

[37] Food and Agriculture Organization (FAO) 2003: Impact of International Agriculture trade and Gender Equity: Selected country case studies

[38] FAO, 2003b, p. 16.

EU with the implementation of FEPA. Trade liberalisation of agricultural and food products, therefore, creates an important risk for the EAC member states which are already classified as Net Food Importing Developing Countries (NFIDC's) under WTO. Competition with the European agricultural products will not be easy for the region despite the safeguard measures and other provisions already enshrined in the initialled FEPA. This is best understood when assessment is made on Article 11 on customs duty on imports of products originating from EC. EAC member states will have to eliminate duty on 65.4% of all European goods imported into the region within two years after initialling of the FEPA. By January 2010, Kenya and the rest of the EAC Partner States were already duty-bound to open their markets to more than half of all traded goods originating from the EU, including agricultural and food products. Unregulated opening the EAC market has the potential to affect local production and processing of like and/or similar food products.

Moreover, Article 18.2 on National Treatment on Internal Taxation and Regulation explicitly provides that "imported products originating in the either party shall be accorded treatment no less favourable than that accorded to like national products in respect of the laws, regulations and requirements affecting their internal sale, purchase, transportation, distribution or use..." Though sub-article 4 of the same provision allows both Parties to subsidize their products, this will mainly apply to the EU Party which has the resources to heavily subsidise its agricultural sector as opposed to the EAC members states which are too poor to guarantee continuous payment of subsidises to their farmers. This provision not only operates as a market barrier to EAC goods exported to the EU market thus affecting local farm incomes, but promotes surplus production in the EU with the main objective of exporting them to the EAC region. These factors mean that the EAC countries will face unfair competition – both in the EU market and in their own domestic markets.

Similarly, the EAC-FEPA does not address itself effectively to the issues of real market access other than tariff cuts. For example, although SPS measures and Technical Barriers to Trade (TBT) have been negotiated, specific provisions to address capacity constraints in the EAC member states, and rules of origin are being negotiated. Experience from the Lomé and Cotonou agreements may still haunt these agreements. Studies on the governance of commodity chains do not point to "equal gains for all." In fact, green beans farmers in Kenya can attest to this since they have steadily become poorer or have lost their livelihoods altogether, because of the concentration of agents further upstream (branded merchandisers, international traders and supermarkets) and more stringent standards applied by the EU traders.[39]

1.3.3 The right to participate in public affairs/ right to information

The right to participate in public affairs is captured and affirmed in a number of international human rights instruments and inferred from the national constitutions and/or statutes of the countries concerned.

Article 13(1) of the African Charter, Article 6 of the CPA and Article 21 of the UDHR alongside other instruments, require that citizens of a country be involved in the decision making processes and any other activities that affect their lives. The

[39] F. Linda and J. Andre (2006): Private Voluntary Standards and Developing Country Access to Global Chains. Paper presented in the International Food and Agribusiness Management Association Conference.

negotiation and initialling of the EAC-FEPA was shrouded with uncertainty and secrecy that completely blocked the participation of citizens and CSOs. Despite these guarantees, citizens are seldom consulted or informed on the developments in the trade and investment front. This has denied citizens information, leaving them to speculate on the impacts of the trade and investment measures. For instance, CSOs activists were arrested while trying to present a memorandum to WTO Ministers of Trade consultations held in Mombasa in 2005 in the run-up to the 6th WTO Ministerial Conference which was scheduled to be held in Hong Kong, China in December of that year.

In the contemporary trade and investment undertakings in African countries, non-involvement of the citizenry in the process has alienated them from governments' trade policy making processes that sometimes lead to conflict as the citizens attempt to assert their rights, on the one hand, and the government seeks to implement the unpopular policies. One such attempt by the citizenry was made in Kenya in 2007 when an unexpected challenge was directed at the EPAs negotiation between the then ESA and the EU on the basis of human rights violation. The case pitted the Government of Kenya and the KHRC. In the suit filed in the High Court of Kenya on October 25, 2007, they took on the Ministries of Trade and Industry, Planning and National Development and the Attorney General for what they regarded as a contravention of the fundamental human rights and the freedoms in Kenya's Constitution. However, such cases though representative of the desires of many people, continue to drag in court for years without being heard conclusively.

1.3.4 The right to work

The right to work stems from every individual's entitlement to earn a living through decent, freely elected and lawful means. It includes the opportunity to earn a living under just and equitable conditions and protection from unemployment. Ample treatment is given to the right to work in articles 23(1) of the UDHR, article 6 of the ICESCR, and Article 15 of the African Charter. Trade and investment liberalization can cause massive job losses in developing countries. In the subsistence production systems in the EAC region, the commercialization of agriculture and opening up of markets to agricultural imports would lead to stiff competition. Most subsistent and small scale farmers would subsequently be forced to sell their products below the production costs and eventually be pushed out of the production chain because of cheap imports. Countries like Tanzania with a budding extractive industry dominated by small players would experience the replacement of the small scale and traditional extraction patterns with commercial extractors hence depriving those dependent on the latter of their means of survival.

Commercialization of what are traditionally subsistence activities is followed by evictions, involuntary resettlement of inhabitants and loss of means of earning a living. In the agriculture sector, most small scale farmers and livestock producers cannot cope with the effects of liberalization and would abandon their traditional chores. In sum, whereas room has been created for international market oriented production, citizens would loose their places of work.

The performance of Kenya's industrial sector has been poor. There has been a decline in its growth (from 10% in 1973-79 to 2% in 1999-2001); export growth (from 17% in 1965-71 to 2.1% in the 1990s); and stagnation in its output, productivity and

employment.[40] Nonetheless the manufacturing employment represents 13.1% of total wage employment, and about 25% of private sector employment. This sector is likely to be adversely affected by the EAC-FEPA.

Article 18.4 of the EAC-EC FEPA makes provision on National Treatment, Internal Taxation and Regulation and allows payment of domestic subsidies. Subsidies by the EU party to their manufacturing sector will negatively affect the EAC party. For instance, Kenya's long term strategy Vision 2030 envisages revamping the manufacturing sector for major employment creation. Cheap imports from the EU would lead to collapse of the manufacturing sector in the EAC region. This would affect the places of work for millions of East Africans.

[40] Kenya Institute for Public Policy Research and Analysis (2005): *Assessment of the Impact of Economic Partnership Agreements on Kenyan Economy.*

MARKET ACCESS CONDITIONS OF FEPA AND THEIR IMPLICATIONS

2.1 Introduction

The EAC-FEPA reiterates the general objectives and principles of the EPAs as provided for in the CPA[41] that is: reciprocal trade, gradual liberalisation (formulation of exclusion lists) and strengthening of regional economic integration efforts. Until January 2008, CPA applied to trade relations between the ACP and EU. Under the CPA regime, it was well understood that substantial raw commodities originating from ACP countries, including Kenya, would access the EU market duty free. There were no reciprocity requirements for the imports from the EU. However, there were import quotas on specific commodities which actually narrowed the export quantities on such specific products from the ACP countries. Specific quotas were imposed on quantities of exports into the EU on products such as sugar, beef and veal and bananas.

Implementation of EPAs will further complicate the development of ACP countries including Kenya. Potential negative consequences arising from the disparity in the level of development between the ACP and the EU party in the EPAs are of specific concern to the ACP countries. Many studies indicate that the shift to reciprocity places the bulk of the negotiation and implementation burden on the ACP countries, Kenya among them, the EU having already liberalised most of its markets to ACP imports.[42]

There is real concern about the potential impact of increased competition with products of export interest to the EU, especially agricultural and manufactured products. The EU-EAC EPAs is expected to pose serious challenges to Kenya in the processed and semi-processed goods category, in which the country has regional comparative advantage in products such as fertilisers, cement, salt, medicaments, paper and paper products, and insecticides. But significant challenges will also be faced with respect to some of Kenya's major agricultural products including wheat, maize, dairy and dairy products, and meat and meat products in the larger ESA region.[43] The real impacts for the agricultural sector in Kenya and the greater EAC region could be enormous given the high production costs, limited scale of production and low productivity experienced by most farmers, agro-processors and other participants in the value chain. The food security and livelihood security impacts of such a situation can never be over-emphasised.

Kenya's situation could be further worsened by continued provision of domestic support to the competing products such as dairy, wheat and beef under the EU's

[41] Article 2 EAC-FEPA.

[42] South Centre, 2008.

[43] KIPPRA, 2005.

Common Agricultural Policy (CAP). Though Kenya and the EAC have excluded from liberalisation commitments those products that are heavily subsidized under the CAP[44] in order to protect these sectors from adverse competition, there has been serious oversight in certain instances. For example, some serious oversight seems to occur in the cuts of frozen chicken (tariff lines 020713 and 020714) which were slated to be removed from the EAC sensitive list offer to the EU. This serious oversight on the part of EAC-EPAs negotiators illustrates that the sensitive list is rushed and ill conceived. Furthermore, negotiators have forgotten to protect frozen cuts of sheep and other fowls (020442, 020714, 020733, and 020736) as well as some processed beef and pork (021019 and 021020) from EU competition[45].

This approach has been suggested for Kenya under the multilateral (WTO) trade negotiations on tariff liberalisation in "Special Products." One strategy has suggested that the EAC parties undertake negative listing of those products which are considered vital for the food and livelihood security for the region. Such products will face lower liberalisation commitments.

Another challenge is how to improve market access for agricultural products that continue to face considerable market access barriers in the EU markets. To ensure compatibility with the multilateral trade rules under the WTO, there must be reciprocity, where the EU grants Duty Free Quota Free (DFQF) access to its markets for the EAC exports while the EAC provides DFQF markets for EU exports into the region.

EU is a very important trading partner for the EAC member countries, particularly in agricultural products, the most important source of food security, livelihood and foreign exchange for the EAC. The agro-processing industry depends on it for raw materials.

Indeed, for the EAC in general, and Kenya in particular, the new trading arrangement is quite significant in view of the country's long development relationship with the EU from the colonial period and the post-Lomé Conventions. EU has been one of Kenya's major trading partners after EAC (31% of imports, 35% of exports) although this trade is in favour of the EU. Not much has been achieved from it with respect to increased exports. Agricultural exports have experienced severe restrictive market access conditions in the EU, despite the preferential tariffs guaranteed under the Lomé Conventions. Kenya relies on a few agricultural products (such as tea, coffee and hides and skins) that are mostly exported in unprocessed or semi-processed forms because tariff escalation discourages local value-addition. Agricultural products that do not compete with EU's domestic production tend to face lower tariffs than products that are produced within the EU.

It has been problematic for most of the agricultural exports from the EAC region to access the EU market despite the preferences granted. This is because the agricultural sector in the EU has the highest and most complex tariff system and in combination with non-tariff barriers such as the rules of origin and different product standards, limits trade and development for Kenya, the EAC and the wider ACP region.

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[44] See for example products that have been scheduled for exclusion under the sensitive products' list include: dairy and dairy products, which are on the sensitive list.

[45] The EAC Exclusion List

The DFQF has been put forward as one way of improving market access to the EAC members. The EAC-FEPA initialled in November 2007 states under Article 3 (b) that one of its specific objectives is "to facilitate continuation of trade by the EAC partner states under terms no less favourable than those under the Cotonou Agreement." Questions have however been raised as to whether this time round, the agreement will guarantee improved market access opportunity to the EAC countries as compared to the situation under the Cotonou regime given the non-tariff barriers such as the SPS measures EAC exporters face in the EU market. These are genuine concerns among many ACP members that DFQF may not improve market access.

Although the EAC-FEPA appears to be very generous to the EAC Partner States, it still retains a number of important possible restrictions on EAC exports through fees and charges on a range of products of importance to the region, thus limiting the EAC's ability to export more products to the EU. This is true for products such as cut flowers, sugar, and a range of fruits like avocados, vegetables and beef.

2.2 Elimination of all Residual Tariff Barriers

The EAC parties have been granted DFQF access in all areas with the exception of sugar and rice.[46] For these two products, DFQF treatment would be phased over a transition period.

Sugar is not included as the EU wants to protect the balance in its domestic market, while CAP reforms are underway, which is in the interests of its producers. Under the EU's market access proposal, quotas and tariffs for 'substantially all' ACP products - including beef, dairy, cereals, fruits, and vegetables - would be immediately lifted upon the signing of an EPAs except for rice and sugar. The duty and quota import regime for sugar would be phased out through 2015, with volume-based safeguards for exports from the relatively richer ACP countries. After 2015, unrestricted access would be subject to a standard safeguard "adjusted to take account of the sensitivity of sugar."[47] This effectively removes all quantitative restriction on duty-free market access, which is equally extended to the removal of all special duties on food and agricultural products, but with the possible exception of high-sugar-content products during the transitional period. Such products with high sugar content include biscuits and chocolates. For products such as chocolates, this exemption would retard the development of cocoa processing in countries such as Ghana.

In the case of the EAC, 82% of volume of imports from the EU into the region will be progressively liberalised in 25 years. By 2010, 66% of all trade was expected to have been liberalised while 15% will liberalised within 15 years. The remaining 2% will eventually be liberalised by 2033 to bring the total liberalisation to the agreed level of "substantially all trade" of 83%[48] with flexibility on the transition period for liberalization of the sensitive products such as dairy products, among others. At the multilateral level, the term "substantially all trade" defined by the WTO is not agreed upon.. The interpretation of Article XXIV of GATT (1994) provides that regional trade agreements must eliminate duties on "substantially all trade" within a "reasonable length of time" should exceed 10 years only in "exceptional cases." There has never been an interpretation of what is "substantially all trade" means and countries have interpreted according to their interests (ICTSD, 2008). In the EPAs negotiations, the

[48] Calculation by the Kenya Post-Lomé Trade (KEPLOTRADE) Programme, 2008.

EU has been asking the ACP to liberalise up to 80% of their trade. Liberalisation in this sense is understood to mean bringing tariff lines to zero rather than the WTO's concept of liberalising tariffs from the Uruguay Round bound rates (which may or may not lead to cuts into countries' real applied tariff rates). Many analysts and a large number of developing countries, including the ACP countries hold that Article XXIV must be revised to reflect the realities of the current time. In fact, it is noted that this Article on whose basis the EU is pushing the ACP countries for liberalisation of substantially all trade between them has a deficiency in the legal structure of WTO rules applying to RTAs (CTSD, 2008). On this understanding therefore, the 82% level of trade liberalisation under the EAC – EC FEPA is a figure which cannot be backed on the basis of legal interpretation of Article XXIV of GATT (1994). In any case, the Enabling Clause, negotiated as part of the Tokyo Round Agreements and concluded in 1979, makes central the development concerns of the developing countries.

In the EAC, Kenya is considered the principal beneficiary of the elimination of residual duties and import restrictions on fruit and vegetable exports formerly enshrined in declaration XXII[49] being of potential significance in investment flows in the horticulture sub-sector. Indeed, this is significant considering that in recent years, the more favourable tariff treatment accorded to the EAC LDCs (all parties except Kenya) combined with the EU's importers' need to ensure a diversity of supply in order to guarantee continuity, has seen new investments concentrated outside Kenya. According to Agri-trade, the equalisation of tariff treatment across EAC members could well serve to attract further investment into Kenya given its superior infrastructure relative to the other EAC members. This would be a boon to the economy and to the horticulture sub-sector, especially the small-scale farmers who derive their food and livelihood securities from growing fruits and vegetables for export.

With respect to the transitional arrangements for sugar, under the EAC-FEPA, an additional tariff-rate quota with zero duty of 15,000 tonnes was to be opened for the 2008/2009 marketing year, with guarantee of prices equivalent to those paid under the Sugar Protocol. Kenya is favoured by this provision, being the only non LDC member of the EAC configuration, and could benefit significantly. This provides additional opportunity for the country to export more sugar with the possibility that at the farm level, farmers' food security, livelihoods and poverty levels could be partly addressed as bringing more land into production of sugarcane to meet increased demand for exports by the millers with additional income at the farm level. This however, depends on other factors such as availability of land, prices of substitute crops and availability of additional capital such as credit to farmers to buy farm inputs and meet the cost of labour.

Total sugar imports into the EU from all ACP countries, including Kenya, was expected to be subject to safeguard arrangements from October 2009 and duty free access granted subject to the application of "dual trigger" safeguard provisions applicable to all ACP sugar exports. The safeguard period has since elapsed without sugar exports

[49] Declaration XXII the 'Joint declaration concerning agricultural products referred to in Article 1(2) (a) of Annex V' and a series of commodity-specific protocols for sugar, beef and bananas of the Cotonou Agreement set special market-access arrangements. They establish various duty-free quotas, seasonal duties and import 'ceilings'. These special market-access arrangements are set out in annex V and Declaration XXII of the Cotonou Agreement and a series of commodity-specific protocols for sugar, beef and bananas. These establish various duty-free quotas, seasonal duties and import 'ceilings'. Agritrade, July 2005.

from the ACP. The EU has not liberalised its sugar sector to imports originating from the non-ACP countries as was expected. The reason behind such policy move is to safeguard the EU sugar sector and for monitoring the market dynamics. Lack of such safeguards will definitely affect exports of local sugar which is uncompetitive produced and therefore it cannot compete with other exports in the EU market.

To understand the dual trigger mechanism in market access into the EU for sugar, one needs to know that subsequent to the denunciation of the Sugar Protocol, the ACP-sugar trade relations with the EU were incorporated into the interim and comprehensive EPAs. While the EPAs arrangements nominally removed all remaining duties on exports to the EU, sugar was an exception with special transitional arrangements being set in place. These arrangements are a hybrid comprising regionally-specific quotas and moves to DFQF access within ACP-wide safeguard provisions.

This has created three phases of operation at the ACP level phased as follows:

Phase 1: January 1, 2008- September 30, 2009

- Continuation of the Sugar Protocol until September 30, 2009 with guaranteed prices equivalent to those obtained under the Sugar Protocol;
- Substantial improvement of LDC market-access for the marketing year 2008/09; and
- Additional market access for ACP non-LDCs both party and not party to the Sugar Protocol.

Phase 2: October 1, 2009- September 30, 2015

- Free access for ACP sugar subject to an automatic volume-safeguard applicable first to ACP non-LDCs;
- An automatic safeguard with a 'dual trigger' (3.5 million tonnes for the ACP as a whole with the following ceilings for non-LDCs: 1.38 million tonnes in 2009/10; 1.45 million tonnes in 2010/11; 1.6 million tonnes from 2011/2012 and the following four seasons);
- Until September 2012, importers of ACP sugar would be required to pay not less than 90% of the reference price for the relevant marketing year. After 2012, a price-information system based upon the current system would be used to provide for transparency of the market, with prices being determined by the market; and
- Enhanced surveillance mechanism will be applied for a limited number of processed agricultural products with high sugar content in order to prevent circumvention of the basic sugar-import regime.

It, however, remains unclear which import quantity level would trigger the application of the safeguard. According to a study by the South Centre (2007), it might be difficult to grasp the conceptual difference between an automatic safeguard based on volumes and mere quota limitations. Moreover, the study concludes that, to be sure, the non-LDC ACP exports, of which Kenyan sugar exports are part, would remain limited. Under largely unrestricted competition for market access, large suppliers frequently tend to drive out small-scale competitors by means of low or below-cost price competition. As these conditions would apply to the vulnerable economies of

the world, such a scenario can only be deemed to be the worst case for the EAC generally and Kenya specifically.

Phase 3: From October 1, 2015

During the third phase, from 1st October 2015, sugar originating from any ACP country would be granted quota and duty free access into the EU market subject to a special safeguard clause which is based on the EPAs safeguard, but adjusted for the "sensitivity of sugar" for the EU

This ACP-wide arrangement, which is designed to minimise market disruptions in the EU during the transitional period in the sugar sector, provides the framework for the region-specific sugar arrangements which have been established.[50]

Subsequent to these broad commitments, the additional ACP market access for 2008/09 (230,000 tonnes w.s.e.) was set out in the EPAs implementing regulation. It appears as if country level allocations of these additional regional quotas will be left to the regions concerned. It is not clear how this will be reconciled with the existing division between increased LDC and non-LDC supplies which the EC has in mind.

2.3 The Rules of Origin

The rules of origin determine where goods originate, that is, the country where the products are deemed to have been manufactured or produced.[51] They do not consider the point at which products have been shipped from. For example, an Italian trawler fishing on Kenya's territorial waters sells its products as Italian even though the point of origin is Kenya. The rules are used to distinguish between goods that are produced by members of a given trade bloc entitled to preferential tariff treatment from those that are produced by non-members that attract full import duties when traded. In this context, the rules are a policy instrument that members of a FTA use to grant preferential market access to each other. The origination criterion determines product and sufficient working conditions for access (extent of value addition in the originating country). Therefore, an analysis of rules of origin is an examination of policy choices that countries have negotiated for accessing markets among themselves.

Although the EAC partner states have initialled the EAC-FEPA, the Protocol on the rules of origin which will be applicable within the EPAs framework is yet to be negotiated by the parties (EAC and EU). Article 12 of the EAC-FEPA on the rules of origin states: *"… For the purpose of the comprehensive EPAs, and during the period between the entry into force of this agreement and entry into force of the comprehensive EPAs, the Parties shall review the provisions of this Protocol with a view to their further simplification. In such a review, the Parties shall take into account the development needs of the EAC Party and development technologies, production processes and all other factors, including ongoing reforms of rules of origin, which may require modifications to the provisions of this protocol. Any such modifications shall be effected by a decision of the EPAs Council."* All these are yet to be done by the parties even as the EC pressurises the EAC partner states to sign the initialled FEPA.

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[50] Brief No. 4: ACP-EU Sugar-sector Issues – "EU Reform Measures and the primary impact on ACP countries, Sunday 22 June 2008."

[51] Otieno O. (2005): *Analytical Study on Rules of Origin*, a study commissioned by Ministry of Trade and Industry under the Kenya Post-Lome Trade (KEPLOTRADE) Programme to inform Kenya's negotiation position with respect to Rules of Origin in the ESA-EC EPAs negotiations.

The EAC partner states have supported the need for simple rules of origin on the basis that complex ones not only complicate market access for products originating from the EAC region, but also affect investment in value-addition for the EAC members, like the rest of the members of ACP EPAs configurations. A good example is the horticultural sub-sector where Kenya and other EAC members are major exporters of cut-flowers but not in already prepared bouquets (prepared in Europe as non-originating blooms). Indeed, in the case of EAC member States, prepared bouquets utilise packaging materials such as plastics and other materials which may originate from countries like China which is outside the FTA and consequently the bouquets originating from Kenya will attract a duty.

This raises specific rules of origin issues, which if not constructively addressed could inhibit movement up the value chain in East Africa, particularly in Kenya, a dominant exporter of cut-flowers from the region. In both the interim EAC and interim ESA EPAs, there is commitment to review the provisions of the rules of origin Protocol 'with a view to their further simplification' and taking into account 'the development needs of the EAC party and development of technologies, production processes and all other factors, including ongoing reforms of rules of origin, which may require modifications to the provisions of this protocol.' This could offer opportunities to constructively address sub-sector-specific rules of origin, possibly through simplified derogation provisions and pan-African cumulation provisions. This should therefore be addressed in the future areas of negotiations such as negotiations in agriculture and rules of origin.

2.4 SPS, TBT and Food Safety Issues and Concerns

Issues related to food safety and the implementations of SPS barriers are becoming increasingly significant in trade between the EU and EAC member states. SPS issues are particularly important to the region because of the nature of exports from the region, which are principally agricultural. There is need for dialogue on the application of various EU standards in order to ensure that food and environmental safety objectives are attained in ways consistent with local production and constraints of human and institutional capacity. Local producers of agricultural products face constraints such as: high costs of production, unfavourable weather conditions, high incidences of pests and diseases, and inadequate institutions that lack accomplished human capacity in terms of skills, the right infrastructure and regulations. For Kenya and the other EAC members, establishing institutional mechanisms for dialogue on the application of official regulations is a critical factor in minimizing the cost-increasing effects of SPS and food-safety regulations, while at the same time fully respecting EU standards in order to ensure sustainable market access for local products.

Cases abound where SPS measures have been used to constrain market access for EAC products into the European market. A case in point was Kenya's experience with the European Retailers Produce Working Group Good Agricultural Practice (EUREGAP), a code of practise that was developed in 2003 by European retailers to protect consumers from food related risks. The code spelt out requirements for farmers to adopt production systems which protect the environment and criteria for labour standards. The code initially had 210 conditions which producers had to meet. These stringent conditions developed with the European producer in mind, were impossible for small producers in developing countries to fulfil and posed a threat to Kenya's horticultural exports. To mitigate this threat, the horticultural industry

stakeholders with the EUREPGAP promoters in the EU worked together to address the production and market requirements which culminated in the development and implementation of the Kenya Good Agricultural Practices (KENYAGAP) where procedures relevant to local circumstances were established in ways which respected EU food-safety requirements.

The potential impact of non-compliance with the EUREPGAP standards could be best understood when the role of Kenya's horticulture sub-sector in Kenya's economy and its linkage with food security, poverty alleviation and livelihood security is considered. The horticulture sub-sector in Kenya is a source of livelihood for over 2 million people. Of this total, approximately 200,000 are small scale producers. About 85,000 smallholder producers significantly derive their livelihood from export horticulture. The sub-sector is also a major source of income thereby contributing to access to health care, including access to Anti-Retroviral (ARVs) to affected farming population. This sub-sector has also contributed to empowering women who make up over 70% of the employees.[52]

In the EAC-FEPA there are no specific provisions on food-safety and SPS issues unlike in the SADC text. The SADC text, for example, in Article 1 on Multilateral Safeguards under the chapter on Sanitary and Phytosanitary Measures states "the Parties reaffirm their rights and obligations under the WTO SPS Agreement. The Parties also reaffirm their rights and obligations under International Plant Protection Convention (IPPC), Codex Alimentarius[53], the World Animal Health Organisation and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). These rights and obligations shall underline the activities of the Parties under this Chapter."

Equally, there are no explicit provisions for aid-for-trade support in the areas of food-safety compliance and verification. While the ESA text on 'Economic and development cooperation' (Chapter IV) lists specific areas for cooperation in the sphere of private-sector development, infrastructure, natural resources and the environment, no explicit reference is made to cooperation in the sphere of food-safety and SPS compliance. This case is similar to other areas which will be negotiated in future by the Parties.

KIPPRA (2005) in its impact assessment of the EPAs, noted that there is need for concerted efforts to improve service provision by institutions that are responsible for regulation of the horticultural sub-sector and SPS issues such as Kenya Plant Health Inspectorate Services (KEPHIS), Kenya Bureau of Standards (KEBS), Pests Control Products Board (PCPB), Horticultural Crops Development Authority (HCDA) and Department of Veterinary Services (DVS). This is important because these institutions are to be held accountable in ensuring SPS and food safety regulations are complied with.

On dispute settlement with regard to SPS issues, there are general provisions which commit the parties to dispute avoidance through consultations. Such consultations should take place through a written request and held within 40 days following the

[52] Karuga, S. (2005): *Study on Horticultural Exports to the EU under Economic Partnership Agreement and proposals for EPA Negotiations*. KEPLOTRADE.

[53] The Codex Alimentarius Commission was created in 1963 by FAO and WHO to develop food standards, guidelines and related texts such as codes of practice under the Joint FAO/WHO Food Standards Programme. The main aim of this Programme is to protect the health of consumers and to ensure fair trade practice in food trade.

submission and be concluded within 60 days of submission of the request (unless both parties agree on a continuation). Particularly urgent matters can be taken up and addressed within 15 and 30 days respectively. It is however not clear whether these provisions apply to SPS and food-safety disputes, since the general exception clause excludes the application of these provisions where measures taken 'are necessary to protect human, animal or plant life or health'. This would appear to exclude SPS and food-safety issues from the scope of these provisions.

There is need for detailed provisions to be included on consultations and dispute settlement in the implementation of SPS and food-safety measures under any moves towards comprehensive EPAs. Agreements on the basic institutional mechanisms for consultations on the application of SPS and food-safety measures (where the experience of private-sector codes could be built on), and the establishment of binding arbitration arrangements with clear timelines for the conclusion of the consultations and arbitration processes need to be included. This could be based on an extended version of the existing SADC-EC EPAs[54] text (Part II, Title II, and Chapter 5). This would provide a much more solid basis for investment in food and agricultural-product export sectors in both EAC and ESA countries and would prevent any waste of investment resources as a result of misunderstandings on the nature of the SPS and food-safety measures to be enforced.

As the negotiations proceed from an interim agreement to a comprehensive one, serious dialogue is needed on the application of various EU standards in order to ensure food safety objectives for the EU are attained in ways consistent with local production and human and institutional capacity constraints. Moreover, in the face of stringent rules of origin and preference erosion, the continued implementation of SPS measures above the international standards level only act as an impediment to the right to development for all ACP countries.

Establishing and developing institutional capacity for application of official regulations on - EAC and EU is critical in minimizing the cost-increasing effects of SPS, TBT and food-safety regulations to the resource-poor local producers and meeting the market access conditions by fully respecting the EU standards. This will require development assistance to address the supply-side constraints, including support geared towards achieving food-safety compliance and verification in ACP countries during and after the transition period. This should also result in a binding dispute settlement arrangement over application of SPS rules.

5.5 Safeguard Provisions

The EAC-EC FEPA captures trade defence measures under Title IV of the Agreement and covers: anti-dumping and countervailing measures (Article 19); multilateral safeguards (Article 20); and bilateral safeguards (article 21). Article 20 (1) of the multilateral safeguards states *"subject to the provisions of this Article, nothing in this Agreement shall prevent the EAC Partner States and the EC Party from adopting measures in accordance with Article XIX of the General Agreement on Tariffs and*

[54] The [Joint Committee on Sanitary and Phytosanitary Measures], hereafter called the [SPS Committee], shall meet within the first year, after the entry into force of this Chapter, and on request of either Party thereafter, not exceeding however a frequency of one meeting a year. Meetings shall be arranged with a view to optimise the use of resources, i.e. taking advantage, where possible, of other multilateral or bilateral events attended by the Parties. If agreed by the Parties, a meeting of the [SPS Committee] may be held by video or audio-conference. The [SPS Committee] may also address issues out of session, by correspondence.

Trade 1994, the Agreement on Safeguards, and Article 5 of the Agreement on Agriculture. For the purpose of this Article, origin shall be determined in accordance with the non-preferential rules of origin of the Parties."

The parties have therefore agreed to adopt anti-dumping and countervailing measures as stipulated in GATT Article XIX.[55] Additionally, before imposing definitive anti-dumping or countervailing duties in respect of products imported from the EAC, the agreement obliges the EC to consider the possibility of constructive remedies provided in the relevant WTO agreements. This means that the multilateral safeguards under Article 20 (2) provide for the EC to exclude imports from any EAC partner state from dispute settlement on the basis of the development needs and the small size of the economies of the EAC partner states. This leeway will only be available to the EAC party for a period of five years from the date of entry into force of the EPAs. However, there is still a way out for the EAC partner states under the provision that, not later than 120 days before the end of this period, the EPAs Council is supposed to review the operation of those provisions in the light of the development needs of the EAC, with a view of determining whether to extend their application.

During the 5th Negotiations Session of technical officials of the EAC and EC held in November 2008, the parties agreed to reformulate Article 20 (4) of the FEPA to read "The provisions of paragraph 1 shall be subject to the WTO rules on dispute settlement." Initially, Article 20 (4) of FEPA stated that "The provisions of paragraph 1 shall not be subject to the Dispute Settlement provisions of this Agreement" which could have been unfavourable to the EAC party in case of a dispute with the EU.

Under the 'bilateral safeguard' provisions of the EAC interim agreement, provision has been made for 'suspension of further reduction of the rate of import duty' or an increase of the customs duty up to the WTO bound level or the 'introduction of tariff quotas on the product concerned'. These provisions can be invoked where imports occur in such increased volumes as to "cause or threaten to cause… serious injury to the domestic industry producing like or directly competitive products." These safeguard provisions are available for 10 years (up to 2018), but can only be applied for two years (in exceptional circumstances such measures may be extended for a further two years). However, where they are applied for more than one year, the measure must 'contain clear elements progressively leading to their elimination at the end of the set period'.

Before safeguard measures are implemented, they must be considered by the 'EPAs Council, which has 30 days to decide if alternative remedies are possible.' If no decision is forthcoming from the EPAs Council within 30 days, then 'the importing party may adopt the appropriate measures.' Once safeguard measures have been applied, they cannot be re-imposed until at least one year has lapsed (i.e. they simply cannot be rolled over beyond the two, or in exceptional circumstances, four years allowed, without a break in their application of at least one year).' However, in exceptional circumstances, such measures may be immediately applied on a provisional basis for up to 200 days where 'delay would cause damage'. The time limit of two years for application of the safeguard should be understood in the context of remedy to serious injury caused to the domestic industry producing like products and the time limit of two years proposed under bilateral safeguards is assumed to be reasonable to address the injury.

[55] Agreement on Anti-dumping and Countervailing Measures, Agreement on Safeguards, and incomplete.

Safeguard measures are only maintained for such a time as may be necessary to prevent or remedy serious injury or disturbances in an economy. The potential inadequacy of such a time period to address injury is addressed under Article 21 (6b) which provides an extension of such measures for a further period of no more than two years and a further period not exceeding fours years by the EAC party or an EAC partner state (The EAC Party means all the EAC member countries considered together as one legal entity while an EAC Partner States means exactly that – a partner state, e.g. Kenya as a country party to the agreement) and a measure limited to the territory of one or more of the outermost regions of the EC party. Such a measure may, however, be applied for a period not exceeding another four years by the Parties where the circumstances warranting imposition of safeguard measures continue to exist.

The EAC's proposed amendments to FEPA (Articles 19(7), 20(4) and 21(5) (b) of these safeguard provisions have since been agreed upon by both parties during their 8th Negotiations Session of Technical Officials of theEAC and the EC on EPAs held on February 23-24, 2010 in Brussels, Belgium. Specifically on Article 19(7) "the WTO rules on dispute settlement will apply to any disputes related to anti-dumping or countervailing measures," Article 20(4) "The provisions of paragraph 1 shall be subject to WTO rules on Dispute Settlement," and Article 21 (5) (b), the Parties agreed to add the text before the last sentence of the paragraph: "... this period may be extended by the EPAs Council for a period of five years." This amendment on the application of Article 21 (5)(b) of the Bilateral Safeguards now offers the EAC party a further maximum of five years during which it can apply safeguards to protect infant industries that are injured or are threatened as a result of surges in imports of like products originating from the EU. It is hoped that these amendment will, indeed, provide enough room for remedy to any serious injury, disturbance in a sector of the economy and disturbance in the markets, especially the agricultural sector. The reality, however, is that the developmental challenges facing the EAC party may not allow for allocation of adequate resources, financial and/or otherwise, to address competitiveness of domestic sectors with those of the EU which benefit from sustained subsides, particularly within the proposed duration.

One other critical issue for Kenya and the other EAC partner states relates to the territorial application of the safeguard measures. Kenya's exports to fellow EAC partner states matter as much as its exports to the EU market. Kenyan companies therefore have considerable interest in averting import surges of products from the EU which might directly compete with them in the neighbouring regional (EAC) markets. For example, the emerging intra-regional trade and therefore South-South trade, in prepared vegetables and dairy products such as processed milk and butter and livestock products, may face serious competition from EU exports. This is one area of concern to the EAC partner states and members of the civil society who have noted that "because of liberalisation, for example the European meat exports to ACP countries are expected to shoot up by 100%, while those from ACP countries to Europe will decline by 30%. We will have to eat meat from supermarkets."[56]

The question that these measures raise is whether the current safeguards accommodate this critical concern, which could become of wider regional relevance as intra-regional trade grows. Currently the FEPA states that where imports are taking place in such a quantity as to cause or threaten to cause serious injury, 'the EAC partner state

[56] New Vision (2008): *Ugandan Civil Society Organisations & Parliamentarians on EAC Interim EPAs*, Kampala.

concerned may take surveillance or safeguard measures limited to its territory.' The key question here is, how is 'territory' defined? Does it refer to an individual EAC signatory State or the EAC customs territory which is inclusive of the five EAC Partner States?

In our understanding, the EAC being a single customs territory and free-trade-area, agreements such as EPAs are concluded between customs territories. Kenya, for example, can invoke a safeguard measure in response to an import surge into a fellow EAC Partner State, where import surges 'threaten to cause…serious injury to Kenya's domestic industry producing like or directly competitive goods originating from the EU.' If this is not the case, then the provision will limit Kenya's ability to lay claim on averting the potentially dangerous import surges experienced in the other EAC partner states' territories where it has export interests under the intra-regional trade, a situation which could pose serious repercussions to the domestic industries. Manufacturing and value-added agricultural products could suffer major losses with considerable threat to the livelihoods of many smallholder farmers, especially those in vegetable production and dairy farmers and processors.

In the SADC region, it is likely to be an area of some controversy within the SADC-EU EPAs agreement, where the reference to 'signatory SADC EPAs state concerned' appears to refer to individual member states' political territories. This parallels the provision in the ESA-EU EPAs, but raises the question whether the slightly different formulation in the EAC-EU EPAs is intended to accommodate Kenyan concerns. If not, and safeguard measures were to be restricted to the political territory of the state invoking the measure, then the safeguard provisions as currently formulated would fail to address a major issue of concern to Kenya, namely averting import surges from the EU in those food and agricultural product areas where intra-regional trade is developing. This is an issue which should be clarified in the negotiations towards a comprehensive EPAs.

2.6 Dispute Settlement

Trade disputes constrain market access conditions. EAC-FEPA has general dispute settlement provisions which commit parties to dispute avoidance through consultations. Kenya as a party to the agreement is bound by the provisions. According to the provisions, such consultations should take place through a written request, be held within 40 days of submission of the request and be concluded within 60 days of submission of the request.[57] However, if the disputes may not be solved quickly, both parties have room to agree on continuation or engage an arbitrator. The FEPA provides no clear rules for the conduct of such arbitration in terms of timeline. There is commitment, however, that "each party to the dispute shall be bound to take the measures necessary to carry out the decision of the arbitrators."

2.7 Preference Erosion

The granting of full DFQF access for all products, except sugar and certain sugar-based products provides one element of the response to preference erosion, with particular benefits in the meat, fruit and vegetable sectors in Kenya. However, the exclusion of DFQF access in the sugar sector in the interim EPAs will affect the non-LDCs in the EPAs configurations. In the EAC context, the impact may be limited, given

[57] EAC-FEPA 2007, Agritrade, 2008.

that the EAC members are not major exporters of sugar to the EU market. In the ESA context however, Zimbabwe will be considerably affected with the result that this could affect regional private-sector investment patterns and inhibit the rehabilitation of value-added processing of sugar in Zimbabwe.[58] Ensuring effective support for movement up the value chain constitutes an important part of the policy response to preference erosion in basic agricultural commodities. The EC's somewhat restrictive approach to rules of origin, particularly regional cumulation provisions, undermines the effectiveness of the EPAs regimes in facilitating movement up the value chain in response to preference erosion.

Finally, lack of any clear elaboration of targeted aid-for-trade instruments designed to support marketing initiatives to target EU niche markets for products originating from the ACP countries, including Kenya, and support trade and production adjustments to enable the efficient supply of these products, represents a significant loophole in the agreement. In any case, aid-for-trade should only be considered as additional funding above some dedicated fund for EPAs implementation as being proposed by many ACP configurations against the wishes of the EC party. Extending effective support to improved marketing to target expanding niche markets in the EU represents one of the critical avenues of any effective policy response to preference erosion. Potential areas of support include assistance to smallholder sugar, coffee and tea farmers in developing production arrangements in ways which enable them to target the expanding and more highly remunerated 'fair trade' sugar market in the EU.

These issues should be dealt with under the outstanding EPAs-related issues of concern to ACP countries in the course of negotiating the comprehensive EPAs. In this context, the programming of the 10th European Development Fund (EDF), the operationalisation of member states' expanding aid-for-trade commitments and the elaboration of the interim EPAs into a full and comprehensive EPAs, will all need to be responsive to the reality of preference erosion.

2.8 Commodity Issues and Supply-side Constraints

The EAC-EU interim EPAs text has no specific provisions dealing with commodity issues. The closest we have on addressing commodity issues is mentioned in Chapter V on Development Cooperation. The general provision on economic and development cooperation in Chapter IV contains one article of two paragraphs, committing the parties to work together to 'define and address the development needs associated with the EPAs in order to promote sustained growth, strengthen regional integration and foster structural transformation and competitiveness, to increase production and supply-capacity and value-addition of the countries concerned'. While the EU confirms that in pursuit of this, it will contribute towards the resources required for development under the 10th EDF regional indicative programme, aid for trade and the EU budget, it may be difficult to imagine given the difficulties the ACP countries have experienced in accessing the EDF funds.

According to the EAC configuration and the greater ESA region, this provision falls short of the 'comprehensive and targeted programmes of assistance to address supply-side constraints,' the region had collectively hoped to see enshrined in the formal provisions of an EPAs. The region hopes to see whether these provisions will

[58] Agritrade, 2008.

be elaborated in a substantive and targeted manner as an integral part of moves towards a comprehensive EPAs.

The interim EPAs is however committed to establishing an EPAs fund. Despite the commitment, how to deliver multi-annual support to production and trade-adjustment processes in the EAC and the broader ESA region still needs to be addressed. Here, the trust-fund approach to aid delivery used extensively in Kenya which involves bringing sector stakeholders into a substantive role in setting priorities, developing targeted programmes of support and managing aid resources, could be further utilised in addressing such critical issues as strengthening food-safety and SPS compliance and enforcement capacity and in supporting sector-based restructuring.

2.9 Exclusion of Products from Sensitive List

The sensitive product lists outline goods excluded for full liberalization. The main challenge that faced the EAC and ESA countries was how to come up with a regional list of products to be excluded from liberalisation, which would be compatible with the principle of "substantially all trade" under Article XXIV of the WTO. The EU interprets the term "substantially all trade" to mean that 90% of trade ought to be gradually liberalised between the negotiating Parties over an agreed transitional period.

The EAC states have compiled a list of sensitive goods, including agricultural and non-agricultural products that need special protection. The FEPA grants DFQF market access to 100% of the EAC exports, but with quantitative ceilings and safeguard restrictions during the transition period for the EAC sugar exports. The EAC countries will not be expected to liberalise 100% of all trade for imports from the EU as some sensitive products will need continued protection. About 82% of EAC imports from the EU will be subject to liberalisation and this will ensure DFQF access for about 64% of EU exports to the EAC market within two years, 80% within 15 years and the rest in over twenty five years. In terms of coverage, food and agricultural products represent the main category of products to be excluded from tariff elimination commitments although other non agricultural sensitive products that are also excluded from such commitments.

In identifying sensitive products, the main criteria used includes: revenue contribution; importance of the sector to the country's economy (contribution to employment and GDP, value-addition, export earnings, foreign exchange saving, current production levels and capacity utilization, food security and protection of livelihoods, stage of sector's development/infant industry); potential of the sector to regional economic development (existing market size, potential market size, current production/ potential production, provisions of preference agreement; trade policies of other trading partners; and social, health, cultural and religious reasons).

There are concerns that the flooding of EU exports in the EAC and greater ESA region, especially in agriculture, will destroy local capacity. This is partly true as can be ascertained by different studies. However, according to the FEPA, the EAC will open its markets fully and immediately. EPAs involve gradual liberalisation for periods up to 25 years. They also allow for up to 20% of sectors to be excluded from any liberalisation. Certain sensitive products will thus be always protected. EPAs further allow for the application of safeguards (short term measures) on EU goods when they cause injury to their local industries. Increased imports can also lead to cheaper

products and inputs and more variety for both consumers and producers. Access to cheap food products in poor countries can help improve health by enabling availability of nourishing and nutritious foods at affordable prices.

Products to be excluded from immediate tariff elimination under the EAC-FEPA include agricultural products, wines and spirits, wood-based paper, textiles and clothing, footwear, chemicals, plastics and glassware. In almost all cases, the infant industry is the main rationale for exclusion.

SECTION THREE

COMPARATIVE ANALYSIS OF FEPAS

3.1 Elimination of all Residual Tariff Barriers

In the Agreements, EAC, ESA and SADC have been granted DFQF access in all areas with the exception of sugar. This effectively removes all quantitative restrictions and special duties on food and agricultural products but with the exception of high-sugar-content products during the transitional period.

With respect to the transitional arrangements for sugar, under the EAC-FEPA, an additional tariff-rate quota with zero duty of 15,000 tonnes was to be opened for the marketing year 2008/09, with the guarantee of prices equivalent to those paid under the Sugar Protocol. The ESA members similarly will benefit from additional quota of 75,000 tonnes made available. How this will be allocated at the national level is not clear. In the SADC configuration, additional 50,000 tonnes of sugar quota will be granted, with Mozambique getting 20,000 tonnes and Swaziland 30,000 tonnes.

Another issue with respect to sugar under the interim SADC - EU EPAs was the need to adjust the provisions of the EU - South Africa Trade Development and Cooperation Agreement (TDCA) to take into account Swaziland's concerns on the sugar value-chain. The South African Customs Union (SACU) market for sugar-based processing industries in Swaziland is concerned about the application of safeguard measures which are limited to the territory of the State applying for the application.

In the ECOWAS configuration, only Ghana and Cote d'Ivoire signed an interim EPAs in December 2007. This region is marked with peculiarities in that it has different tariff liberalization commitments and monetary unions. Cote d'Ivoire is a member of the UEMOA which was established to promote economic integration. This Union is primarily dominated by former French colonies and has adopted the CFA Franc as the common currency. On the other hand, Ghana is a member of the West African Monetary Zone (WAMZ) which is dominated by Anglophone countries with the exception of Mauritania and Guinea. The Union was established to develop a common currency, the ECO, to rival the CFA Franc whose exchange rate is tied to the Euro and is guaranteed by the French Treasury.

In Central Africa, only Cameroon had initialled an EPAs with the EU before the deadline of December 31, 2007 while in before the December 2007 deadline lapsed, all states parties of the CARIFORUM with the exception of Guyana and Haiti[59] had initialled an EPAs with the EU. The region like the EAC received DFQF in all areas except sugar and rice. Special duties levied on exports from the region to the EU will also be removed. This will particularly benefit exports of agricultural products like

[59] Guyana initialled the agreement on October 20, 2008 in Brussels after a lot of pressure was exerted by the EU.

bananas, rice and sugar. In the transitional period, the region will also benefit from a sugar quota of 145,000 tonnes before the conclusion of the comprehensive EPAs. This quota was expected to rise to 250,000 tonnes by 2009. Guyana and Surinam will also have their rice quota expanded prior to the abolition of quantitative restriction.

3.1.1 Safeguard Provisions

Under the 'bilateral safeguard' provision of both the EAC and ESA agreements, provision is made for 'suspension of further reduction of the rate of import duty' or an increase of the customs duty up to the WTO bound level or the 'introduction of tariff quotas on the product concerned.' These provisions can be invoked where imports occur in such increased volumes as to "cause or threaten to cause…serious injury to the domestic industry producing like or directly competitive products." These safeguard provisions are available for 10 years (up to 2018), but can only be applied for two years (within exceptional circumstances such measures being extended for a further two years). This provision is also similar to the CARIFORUM EPAs.

In the EAC context, a critical issue relates to the territorial basis for the invocation of the safeguard measures agreed. It is not clear whether the current safeguard provisions accommodate concerns on the growth of intra-regional trade. The text states that where imports are taking place in such a quantity as to cause or threaten to cause serious injury, 'the EAC partner state concerned may take surveillance or safeguard measures limited to its territory.' The key issue here is how 'its territory' is defined: Does it refer to the territory of individual EAC signatory states or the customs union as whole? This situation is also faced by the SADC-EU EPAs parties, where the reference to 'signatory SADC EPAs state concerned' appears to refer to individual member states' territory as opposed to the EPAs territory. Similarly, the CARIFORUM members are confronted with a similar situation where safeguard measures are limited to the territories of the state applying for their application. For these Caribbean states, it appears that a member cannot request the application of safeguard measures in the face of a surge arising from EU exports of sugar-based value-added food products to the domestic markets in another CARIFORUM member State.

This situation does not address Kenya's (EAC, ESA) concern and that of the wider ACP membership to develop production value-added products for exports to both the regional markets and to the EU, as safeguard measures are limited to the territory of the state applying for their application. In any case, in the establishment and application of safeguard provisions, the ACP members and the EU should recognise that regional producers have an interest in regional markets which should be safeguarded. This is an issue which could usefully be clarified in favour of Parties and configurations, including EAC, ESA and CARIFORUM members by the EC and specifically taken care of in the negotiations towards a comprehensive EPAs. It could also be taken up in the context of routine review of the application of the comprehensive EPAs.

3.1.2 Dispute settlement

In both the EAC-EU and ESA-EU FEPAs, there are general dispute settlement provisions which commit parties to dispute avoidance through consultations. According to the provisions, such consultations should be requested in written, held within 40 days of submission of the request and be concluded within 60 days of

submission of the request. For the EAC and probably other ACP-EPAs configurations, what would seriously concern them is whether these provisions apply to SPS and food safety disputes, since the general exception clause excludes the application of these measures taken "are necessary to protect human, animal or plant life or health."

3.1.3 The Rules of Origin

In both the interim EAC and interim ESA EPAs, there is commitment to review the provisions of the rules of origin protocol 'with a view to their further simplification' and taking into account 'the development needs of the EAC/ESA party and development of technologies, production processes and all other factors, including ongoing reforms of rules of origin, which may require modifications to the provisions of this protocol'. This could offer opportunities to constructively address sub-sector specific rules of origin.

In the SADC interim EPAs, there is the problem of differentiated market access with respect to the trade treatment accorded to South Africa and its neighbours under the rules of origin. The provisions of the rules of origin in the SADC-EU interim EPAs do not allow greater use of South African inputs in the SADC – EU interim EPAs parties' goods destined for export to the EU, thereby creating a trade gap for South Africa and her SACU neighbours. Such unfavourable rules of origin do not foster new patterns of intra-regional investment. Efforts to secure greater flexibility on the use of non-originating content in the countries which face serious constraints on agricultural production have faced little response from the EC.

However, in the Caribbean, greater progress has been made. The EU has extended differential treatment to CARIFORUM members by allowing regional cumulation to be included in the rules of origin. This flexibility on the use of non-originating content is premised on the idea that these countries face serious constraints on their agricultural production. Moreover, special regional cumulation provisions are included in the rules of origin, allowing derogations in the context of hemispheric economic cooperation and integration, ostensibly on the basis that the Caribbean Island economies have limited production base.

3.1.4 Food safety and SPS issues and concerns

In the EAC-EU and ESA-EU interim EPAs, there are no specific provisions on food-safety and SPS issues unlike in the SADC text. In the SADC-EU interim EPAs, there is a full chapter on SPS measures (Chapter V, Articles 56 to 64). The Agreement also has general commitment on cooperation to facilitate trade and strengthen regional capacities though without specific provisions dealing with the operationalisation of these commitments. A similar situation is faced by the CARFORUM. While there is a full chapter on food-safety and SPS issues which also identifies challenges faced by the region, there are no specific commitments by the EU to extend assistance to address them. However, a window has been provided for the Caribbean states under development cooperation component on agriculture and fisheries, where the EC commits to "facilitate support" to "compliance with and adoption of quality standards relating to food production and marketing, including standards relating to environmentally and socially sound agricultural practices and organic and non-genetically modified foods." If this commitment could be effectively operationalised, it could assist the Caribbean exporters of food and agricultural products realise the

full commercial value of high-quality food-product exports. However, it is evident that the text has very little in the area of extending effective assistance to the establishment of the necessary capacities in the area of food safety and SPS compliance.

3.1.5 Preference erosion

The concern that preferences extended by the EU to the ACP countries are getting eroded is due to granting DFQF market access for all products except sugar and certain sugar-based products. But in all the configurations, there is no clear elaboration of targeted "aid-for-trade" instruments designed to support marketing initiatives that target the EU niche markets. The removal of the special duties potentially offers increased scope for attracting investment in value-addition through agro-processing. Supporting movement up the value chain constitutes a critical part of an effective policy response to preference erosion, which Kenya and the EAC partners might benefit from.

3.1.6 Commodity issues and supply-side constraints

The four configurations (EAC, ESA, SADC and CARIFORUM,) have no specific provisions dealing with commodity issues. In the SADC-EPAs text, however, there is a general provision dealing with "supply-side competitiveness" which commits the parties to cooperating to enhance the competitiveness of SADC EPAs states and remove supply-side constraints in different areas. Comparatively, provisions on economic and development cooperation are more fully elaborated in the ESA-EU EPAs with areas of cooperation listed and a commitment made to mobilize additional resources outside the EDF, existing EU budget provisions and expanding aid for trade commitment, "relating specifically to EPAs support requirements and adjustment costs."

IIn the Caribbean-EU EPAs text, reference is made to the main commodities exported to the EU under the Chapter on Agriculture and Fisheries. Commitment is made to: "undertake prior consultations on trade policy development that may impact on the competitive positions of traditional agricultural products, including bananas, rum, rice and sugar, in the market of the EC party." On the general provisions on Development Cooperation issues, including infrastructure and human and institutional capacity development, the EU has made commitment to support a regional fund for such programmes. However, it is not clear to what extent such provisions will be able to effectively support targeted programmes aimed at addressing critical supply-side constraints. In a nutshell, provisions dealing with supply-side constraints fall short of comprehensive and targeted programmes of assistance needed to address the supply side challenges faced by many ACP countries.

3.2 Interim EPAs and Regional Integration

As far as the EAC is concerned under the EAC-EU EPAs framework, it has maintained some reasonable level of coherence in terms of configuration corresponding to ongoing regional integration efforts. However, given that some EAC member states are also party to other regional integration processes, it is not easy to evaluate the overall impact of interim EPAs. Tanzania is a member of SADC while the rest of the EAC membership is in COMESA. The plans for the establishment of a common market and custom union among COMESA countries are seriously threatened by the

finalisation of a separate agreement by the EAC countries and individual COMESA members. In any case, the EAC countries with the exception of Tanzania have been negotiating the EPAs for the last four years under the ESA configuration.

Under the SADC-EU EPAs for example, the EC has insisted on a non-negotiable basis for the free movement of goods within the signatory territories of the SADC configuration countries. This is inconsistent with the regional trade arrangements under both the SACU and SADC arrangements. Allowing free movement of goods within the region would undermine the managed trade arrangements which exist for the SACU market, a development which would cause serious production and trade disruption. Eventually, it is the local vulnerable farmers in the SACU whose livelihood would be threatened or lost, especially those in the sugar and fruits sub-sectors.

As noted earlier, both Cote d' Ivoire and Ghana (members of ECOWAS) signed Interim EPAs which had different tariff liberalization levels. Both countries are also members of different customs and monetary union (UEMOA for Cote d' Ivoire and WAMZ for Ghana). This is another example of how EPAs may be incompatible with the regional integration process and is a major concern for a number of regions.

In Central Africa, the EU expects the eight-member configuration to sign an EPAs under the CEMAC customs union yet the integration of the parties at institutional level has not been completed. The regional integration for this group of countries remains rather ineffectual and the CET is not effectively applied, since it is applied on certain products depending on the national interests of each individual party. This could also be understood from the background that for a long time, the Democratic Republic of Congo initially participated in the EPAs negotiations as part of the ESA configuration and not as part of CEMAC. For this configuration, only Cameroon signed an EPAs before the December 2007 deadline.

SINGAPORE ISSUES: COMPETITION AND PROCUREMENT

The "Singapore issues" basically refer to four working groups set up during the 2nd WTO Ministerial Conference of 1996 in Singapore tasked to deal with: transparency in government procurement, trade facilitation (customs issues), trade and investment liberalization, and trade and competition policy. The above have dominated successive WTO Ministerial discussions and have been advocated for by most notably the European Union, Japan and Korea, and opposed by most developing countries, including those in the ACP grouping. The United States, however, was lukewarm about the inclusion of these issues, indicating that it could accept some or all of them at various times, but preferring to focus on market access.[60] Disagreements between largely developed and developing economies prevented a resolution in these issues, despite repeated attempts to revisit them, notably during the 2003 Ministerial Conference in Cancún, Mexico, where no progress was made.

African countries' position on these issues was articulated in a workshop on the WTO organised by the Southern and Eastern African Trade Negotiations Institute (SEATINI) held in Arusha, Tanzania on April 7, 2003 where the representatives stated that, "negotiations [in the WTO Ministerial Conference in Cancun, Mexico later that year] should not start with the four 'Singapore issues' but instead the process of clarification of each of the issues should continue in the respective working groups." Tracing the background of the issues, they said that: "before Doha, most developing countries were resistant to the developed countries' push on the new issues." This position was further evidenced by the decisions and declarations of the LDCs Ministerial Conference in Zanzibar and the African Trade Ministers Meeting in Abuja. However, these views were ignored in successive Doha Declaration texts. However, a decision was made in Doha that negotiations would begin on the four Singapore issues after the Fifth Ministerial Conference, but only on the basis of an explicit consensus on modalities.

With respect to EPAs, Africa stated its position during the 3rd Ordinary Session of the African Union Conference of Ministers of Trade held in June 2005 in Cairo, Egypt. The Ministers reaffirmed the position of African countries that, except for trade facilitation, the other three Singapore issues of investment, competition policy and transparency in government procurement, should remain outside the ambit of the WTO Doha Work Programme and EPAs negotiations.

While there is nothing in the FEPA made with regard to the negotiations of a full EPAs that makes binding commitments in this area (it is simply stated that "the objective of the EPAs is: improving EAC capacity in trade policy and trade-related issues," the EAC Partner States have taken a very clear stand that they are not going to negotiate

[60] Fergusson, Ian F. (2008). *World Trade Organisation Negotiations: The Doha Development Agenda*. Aug 18.

rules (binding commitments) on Trade Related Issues (Singapore Issues). During the EAC meeting of the Sectoral Council on Trade, Industry, Finance and Investment held on April 9, 2009 in Kampala, Uganda, the EAC Partner States observed that the Trade Related Issues under Article 37 of the EAC-EC FEPA (competition policy; investment; private sector development; trade, environment and sustainable development; intellectual property rights; and transparency in public procurement) are for purposes of capacity and infrastructure building. It was agreed that the position of the EAC partner states on Singapore issues should be as follows:

i. On Competition policy, the EAC position is to develop a framework of cooperation and technical assistance with the EU to support the partner states in the following areas:
   - Developing their regimes through enactment of national competition laws and developing institutional arrangements for competition authorities;
   - Establishing and reinforcing existing competition authorities; and
   - Operationalising the regional competition authority through the development of institutional framework which could subsequently facilitate exchange of information and staff training in the region.

ii. On transparency in public procurement, the EAC position is that the negotiations should only be confined to information exchange and capacity building.

iii. On intellectual property rights, the Sectoral Council took a position that the EPAs negotiations with the EC be confined to the current commitments under the WTO TRIPs Agreement, capacity building and technical assistance to the EAC partner states to become TRIPs-compliant.

iv. With regard to Trade Environment and Sustainable Development (TESD) the Sectoral Council holds the view that TESD is of cross-cutting nature and in EPAs negotiations, partner states will have to negotiate though the provisions of the CPA should be referred to with regard to giving directions on how the ACP countries and the EU should approach the issue.

It is therefore clear that the EAC-EU cooperation on the so-called Singapore Issues is limited to strengthening regional capacity and negotiating rules (commitments) will only be tenable once adequate regional capacities have been built. Any introduction of these issues for further liberalization under EPAs negotiations would simply be outside what has since been agreed upon in the WTO framework.

Specific consequences of the various provisions could mean a lot for the development of the agricultural and food-product value chain in the EAC and the wider ESA region. Stakeholders in the EAC region are rightly concerned that the EC may use the provisions to benefit EU exports of goods and services to the regional market. A similar situation manifests in CARIFORUM-EU EPAs where no specific assessment has been made to bring to the fore the specific consequences of the various provisions on competition and procurement for the development of the food and agricultural product value chains in the Caribbean.

In the SADC-EU EPAs, there are agricultural-related concerns over the possible scope of a number of trade-related area provisions which the EU would like to be included

[60] Fergusson, Ian F. (2008). *World Trade Organisation Negotiations: The Doha Development Agenda*. Aug 18.

in the comprehensive EPAs with regard to competition policy and government procurement. In the case of competition policy, fears are that the provisions of such a policy could be used to dismantle the single marketing channels for major commodities like sugar, where such bodies play a critical role in the development of the sugar sector and support many ordinary farmers to meet their livelihood obligations. With respect to procurement, the concerns relate to the possible implications of provisions for government purchasing arrangements in some major cereal products where government institutional purchases are the major players in creating a market for the crops, the cornerstones of food security for the people of the region.

There is nothing in the current text of the interim SADC-EU EPAs or arrangement to have it negotiated under the comprehensive EPAs that makes binding commitments in government procurement. It is only stated that *"the EC party agrees to cooperate with a view to strengthening regional capacity in these areas. Negotiations will only be envisaged once adequate regional capacities have been built (Title IV, Article 67)."* However, like in other regions, there are concerns in the SADC on how the EC may use such provisions within the framework of its 'market-access partnership' strategy, which was designed to use international and bilateral obligations included in international treaties to systematically identify and remove obstacles to EU exports of goods and services to those markets targeted under the initiative.

As it were, there is a general concern in all ACP EPAs configurations that the issues of competition and government procurement belong to the multilateral/WTO level and should not be imposed in the EPAs negotiations.[61]

[61] Southern African Civil Society Organisations, 2007.

SECTION FIVE

CONCLUSION AND RECOMMENDATIONS

Very little has happened under the EAC-EC EPAs negotiations to bring comfort to the EAC partner states in terms of its right to development as the EC seeks to gain maximum advantage in the negotiations process. Therefore, signing of the FEPA before it is comprehensively negotiated may have some negative consequences on the human rights of East Africans. EPAs negotiations must therefore take into account the full development needs of the region and also respect the provisions of the WTO GATT (1994) on special and differential treatment and Article 34 of the Cotonou Agreement which states that "economic and trade cooperation shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking into account of the Parties' mutual interests and their respective levels of development."

Kenya and other EAC partner states should conduct a thorough human rights impact assessment of EPAs before making commitments that have the potential to violate human rights implications, so that the results thereof can be used to direct the negotiations on the full EPAs. Equally, the EAC-EC EPAs negotiations must respect all aspects of human rights and must conform to the provisions of international human rights instruments the EAC and EU are party to instead of applying such instruments selectively.

There should be specific provisions on extending assistance to the establishment of capacities in the area of food safety and SPS compliance. The two parties should address themselves to the rules of origin, ideally before the signing of the FEPA given their singular importance in facilitating market access, especially for products originating from the EAC region. Of equal importance is that the rules of origin should be negotiated with their simplification and regional cumulation being the key outcomes in order to foster development in the EAC region and to also allow for regional cumulation in the wider ESA region.

The comprehensive CARIFORUM-EC EPAs signed between the Caribbean States and EC is a pointer to what the EC envisages of what should constitute the negotiations of a comprehensive EPAs between them and the EAC. The EC intends that the negotiations cover controversial issues that Kenya and the other EAC partner states, African and majority of the developing countries have had considerable discomfort at the multilateral level. In particular, the "Singapore Issues" on competition policy, transparency in public procurement, and investment and intellectual property rights will come into sharp focus. Negotiations of trade and sustainable development attempt to bring issues on labour standards, trade data protection, liberalization of the capital account, and trade in services are areas that are not fully agreed and need to be negotiated at the multilateral level.

The EAC should not be rail-roaded into negotiating binding rules on them. Some of these controversial areas have been included in the full CARIFORUM-EU EPAs, and in the SADC-EU EPAs. This is likely to be a source of pressure on the African groups, including the EAC, to adopt extensive or substantive commitments different from the positions adopted by developing countries including Africa at the WTO negotiations and during the earlier phases of EPAs negotiations.

The EAC partner states must not accept any negotiations of the Singapore Issues and if such negotiations take place, they should be confined to cooperation between the two Parties and capacity building of the EAC Party and detailed negotiations of rules and commitment must be left for negotiations at the multilateral/WTO level.

EPAs should support regional integration. The comprehensive EPAs must have provisions dealing with supply-side constraints that are comprehensive to include targeted programmes of assistance needed to address the supply side challenges faced by many ACP countries.

The EAC partner states need to continue pressing for EPAs to achieve its development objective. It should adequately address agriculture and rural development, food and livelihood security and poverty reduction and also support regional integration. Having secured WTO compatible trade in goods chapters in the Interim Agreements with the EAC and the other African negotiating groups and countries, the focus of the EU may shift to other issues to the detriment of the region. The World Bank, for example, acknowledges that agriculture will be the primary way of reducing poverty in Africa through increased productivity of small scale farmers.[62] This self examination by the Word Bank and the recognition that the challenges of meeting the right to development arise from both the international and national contexts, shows that the challenges of meeting the Right to Development will need a reconsideration of development policies that stand in the way of the realization of the Right to Development. The EAC-EC EPAs should make this a reality.

[62] Ibid.

ANNEXURE I

REPUBLIC OF KENYA

Ministry of Trade and Industry

OFFICE OF THE PERMANENT SECRETARY

Telegrams "TRADE", Nairobi
Telephone: Nairobi 331030
Fax: 3]0983
When replying please quote

Ref. No. DET/48/218/01/1

TELPOS1A TOWERS
KENYATTA AVENUE
PO. BOX 30430 - 00100
G.P.O. NAIROBI – KENYA

Date: 26th July 2005

Ms Grace Githaiga
Executive Director
EcoNews Africa

Mr. Munaweza Muleji
Director
Action Aid International Kenya

Mr. Gezahegn Kebede
Country Program Manager
Oxfam GB

Dear Gezahegn

RE: PARTICIPATION OF CIVIL SOCIETY ORGANIZATIONS IN KEPLOTRADE CLUSTERS

This refers to your letter of 14th July, 2005 which sought clarification on participation of Civil Society in deliberations of KEPLOTRADE and its clusters.

Let me start by assuring you that this Ministry appreciates and values the complimentary role that Civil Society can play in implementing the provisions of the Cotonou Partnership Agreement including negotiation for an Economic Partnership Agreement Indeed, it is because of this

position that we have hitherto freely interacted and included Civil Society in KEPLOTRADE cluster activities. The decision to leave out Civil Society from the cluster activities was therefore reluctantly taken by the KEPLOTRADE Project Steering Committee after careful consideration and discussion of factors that can be attributed to the Civil Society itself.

For one, despite our open invitation to Civil Society in all the clusters, we have seen very limited representation and participation from them. EPAs are likely to impact on Kenyan citizenry in wide ranging areas and we therefore would like to see wider grassroots representation from Civil Society than at present.

Secondly, we have noted with regret, the habit of some NGOs to distribute unsanctioned leaflets at meetings which we have arranged, even when we have given them prior opportunity to discuss and contribute to the agenda. Such "ambush" tactics are not only disruptive but send confusing signals to our negotiation partners, both in the ESA region as well as the ED. This is embarrassing to the country, to say the least.

Elsewhere, some Civil Society organizations have quoted KEPLOTRADE researched material prematurely, if not out of context. An example at hand is a recent statement by Econews entitled 'EPAs-threats to development in Africa - A statement by EcoNews' that was presented at a London roundtable meeting on trade in Africa, organized by Traidcraft, one of EcoNews NGO partners in UK.

From the above, it can be seen that our current working relationship with Civil Society needs to be reviewed in order for us to effectively negotiate an EPA. This is what has prompted the PSC to seek a new approach to cooperating with it. We are of the view that Civil Society organizations' views need to be harnessed through tailored sessions where the organizations will have ample time to elaborate on their research findings and afford the stake holder's an opportunity to interrogate conclusions, positions and strategies being advocated. This may be difficult to achieve in scheduled cluster meetings, which have now moved from general issues to development of negotiation positions, taking threats of EPAs and opportunities into account.

KEPLOTRADE has an open door policy and therefore, in final analysis, the challenge is upon the Civil Society to input their views into the national position in the spirit of the Cotonou Agreement without appearing to be antagonistic or one sided.

I appreciate your views and welcome suggestions on how we can work as a cohesive group to advance a Kenyan agenda that takes into account the interests of all stakeholders.

Yours sincerely

Dr. N.K Ng'eno, HSC
PERMANENT SECRETARY & CHAIRMAN
KEPLOTRADE PROJECT STEERING COMMITTEE

ANNEXURE II

From: JOSHUA MUTUNGA
Sent: Tuesday, September 09, 2008 8:10 PM
To: admin@khrc.or.ke

Subject: AGRICULTURE & MARKET ACCESS CLUSTER MEETING ON THUR. 11TH SEPT. 2008

Dear,

Please find attached draft report of the Study on Rules of Origin for your familiarization in readiness to its presentation at the Cluster meeting scheduled for Thursday 11th September.

Regards,

Joshua Mutunga
KEPLOTRADE COMMUNICATIONS

ANNEXURE III

The Rt Hon PETER MANDELSON PC
MEM8ER OF THE EUROPEAN COMMISSION

8-1049 8RUSSELS
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Brussels, 12 September 2007
CAB24/PM/PTHlmsID 1132

MTJoe Baidoo-Ansah
Minister of Trade
Ghana

Dear Minister,

It was a pleasure to speak to you last week and I look forward to working together over the coming months. I would like to take this opportunity to follow up on some of the issues we discussed conceming the Economie Partnership Agreement (EPA) negotiations, particularly relating to the EU trade preference regimes availableto Ghana next year.

As you know, the current Cotonou trade preferences are incompatible with our joint commitment at the WTO that ACP and non-ACP countries are treated equally in EU preference schemes. This is why we agreed an explicit legal expiry date of 31st December 2007 in the Cotonou Agreement for these preferences. This gave the basis for other WTO members to grant us a waiver from WTO law allowing us to continue preferences until that date while we conclude EPA negotiations.

The first implication of this is that from 1st January 2008 we have no legal basis to continue the Cotonou preferences. The next is that, even if we did, we would never obtain a further waiver from the WTO. Such a waiver requires consensus of all WTO members and, as our experience with bananas shows, other developing countries resentful of ACP privileges in EU markets will not hesitate to challenge any extension of preferences. Unless we have an EPA in place by 1st January this means the European Commission has no other legal mandate than to charge Ghanaian exporters the tariff rates applicable under the General System of Preferences (GSP). Given the absence of any possibility to extend the Cotonou regime, this is the automatic default option.

In such a scenario, tariffs would apply to Ghanaian pineapples, canned tuna, cocoa products, aluminium and vegetables - around 25% of your exports to the EU These exports are worth some 250 million euros per year and from lst January 2008 Ghanaian industry would have to pay around 20 million euros for them to enter EU markets - equivalent to an average tariff of 8.4%. The situation is even worse for your neighbour, Ivory Coast, where 36% of their exports, particularly bananas, would be badly affected. Any decline in banana exports would of course have a knock on effect on the refrigerated shipping costs for the region and affect other exports.

As I said on the phone, our priority is to avoid this kind of trade disruption but the only way to do so is if we have.a WTO-compatible market access offer from the West Afiican region. The EU bas already offered duty-free quota-free access to our markets from 1st January 2008 but we need an offer from both sides in order to notify a WTO-compatible agreement and establish an EPA trade regime. This would then not only preserve but improve current preferences, removing restrictions such as quotas on banana exports. This is on top of the other development benefits such as improved rules of origin, simpler trade-related rules, the opening up of services trade and a series of accompanying measures - such as a programme to upgrade West African industries and absorb the net fiscal impact of the trade reform.

But the real deadtine is not 31st December - it is much earlier, as I have indicated before. There are a series of legal and procedural steps we need for our Member States to put in place a new trade regime. To agree an EPA on time, it is essential that we hold an EPA chief negotiators' meeting at Ministerial level on 5th October in Abuja and another in Bmssels in the week of 22nd October. I was very concerned at suggestions by Dr. Chambas, the President of the ECOWAS Commission and Chief negotiator for West Aftica, that these dates were being brought into question by his member states.

In these two meetings, the most important aspect to agree on is a WTO-compatible market access schedule for the EPA This doesn't mean opening West Aftican markets either fully or immediately to EU products. On the contrary, you can use the considerable flexibility built into WTO rules to allow you to continue to protect sensitive products. My technical teams are ready to work on this issue with ECOWAS experts, and Ghanaian experts specifically if needed, to help us move forward.

I'm aftaid that there is no easy message on alternatives if we do not manage to reach this agreement- our multilateral commitments are binding and other developing countries expect us to abide by them. It is particularly important that you are fully aware of the realities of the GSP+ scheme. This is not an option, even for a short transitory period, to maintain Ghanaian preferences in 2008.

The GSP+ is based on offering improved preferences to countries that meet criteria linked to sustainable development and good governance. It is an exception to WTO principles subject to constant review within the WTO and the EU has to assure its full WTO compatibility. We cannot therefore apply flexibility on eligibility or the application process for countries like Ghana that do not meet the full criteria of GSP+ without undermining the principles of the scheme. The EU is bound under the mies of GSP+ to verify and justify that ail beneficiaries meet GSP+ criteria on an ongoing basis.

Other WTO members will be very sensitive to the use of the GSP+ as a means to continue Cotonou preferences. Moreover some of them are candidate countries for GSP+ and have been through a long procedural and legal process to qualify. The list of candidate countries bas been officially published following a full scrutiny procedure and written report including recommendations provided by relevant international organisations. These countries would challenge any attempt to exact less stringent entry requirements from ACP countries or attempt fast track procedures - which would devalue their commitments and the principles of this preference scheme.

You will also know that the GSP+ does not provide equivalence to the Cotonou preferences as some claim. Bananas, for example, are not covered and preferences are less generous for canned tuna. There is also no opportunity to benefit from the improved rules of origin which will be on offer under the EPA. Moreover, the GSP+ does not provide for improved market access in trade in services, nor for co-operation in trade related areas such as standards or links to development finance. Nor does the GSP+ includeprovisions to build regional markets.

These are flot easy messages to detiver but, given the time left to us to conclude, it is important our exchanges are open as we will have to work together to find solutions. I can reassure you that with progress on a market access offer, I and my technical staff will do aUwe can to find a way forward. I hope we can continue our collaboration to provide Ghanaian traders and exporters the access they need to European markets.

Peter Mandelson

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