EXPANDING BUSINESS OPPORTUNITIES BEYOND BORDERS: BRIDGING THE TRADE GAP BEWEEN KENYA AND TANZANIA

PEER TO PEER DIALOGUE PLATFORM

THE KENYA PRIVATE SECTOR ALLIANCE

AND

THE TANZANIA PRIVATE SECTOR FOUNDATION

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ACKNOWLEDGEMENTS

The Kenya Private Sector Alliance (KEPSA) and the Tanzania Private Sector Foundation (TPSF) would like to acknowledge the support of our Business Member Organizations, Corporates and Partners. KEPSA and TPSF would also like to acknowledge and appreciate the support of the East Africa Trade and Investment Hub.

BACKGROUND

During the Oct 31st – Nov 1st 2016 State Visit by H.E John Pombe Magufuli of the United Republic of Tanzania to Kenya, H.E. President Uhuru Kenyatta of the Republic of Kenya and H.E. Magufuli agreed to strengthen trade ties and address any trade bottlenecks between the two countries through bilateral negotiations.

Following the state visit, the two Heads of State agreed to revive meetings under the Joint Cooperation Commission (JCC) after a four year hiatus to boost trade and development ties between Kenya and Tanzania immediately with the first meeting held in December 2016. The role of the Private Sector in these bilateral negotiations cannot be understated.

Further, it was identified that there was a need to form a Joint Business Council (JBC) which shall be instrumental in ironing out priority private sector issues between the two States. This would allow for private sector through their respective umbrella organizations in each parter state will engage with their counterparts to identify issues, develop mutually beneficial solutions and where possible iron out issues that do not require Government intervention. The Kenya Private Sector Alliance and the Tanzania Private Sector Foundation have signed a Memorandum of Understanding to guide this engagement.

INTRODUCTION

Kenya and Tanzania are some of the fastest growing economies in Sub-Saharan Africa with 5.8% and 7.2% growth rates respectively recorded in 2016. Both countries are richly endowed with natural resources and connected to the sea which makes their position strategic as the gateway to the EAC and Central Africa region.

As President Magufuli noted during his state visit, Kenya is key partner for Tanzania and is the largest source of African Foreign Direct Investment into Tanzania. As of 2016, 529 Kenyan companies had set base in Tanzania and invested $ 1.7 billion (over Ksh 170 billion), creating more than 56,260 jobs for the people of Tanzania.

However, instead of focusing on cooperation to boost trade and regional growth, the two countries continue to compete, and historical rivalries have seen strong barriers imposed against doing business across the borders despite the countries being signatories to the EAC Common Market Protocol (CMP) which guarantees free movement of goods, services, capital and investments.

These measures that have been an obstacle to movement of goods, services and capital between the two countries not only hinder cross-border trade but also repels investment and slows regional development and integration. Tanzania is the only SADC member among the EAC partner states and is not a member of COMESA, therefore much of its preference is directed to trade with the SADC States and in particular South Africa while imposing trade barriers against EAC partner states.

Further, according to Common Market Scorecard 2016 (CMS 2016), Kenya's use of NTBs doubled from 10 to 23 in 2016, and Tanzania's more than tripled, from 7 to 24, pointing to a significant impediment to regional integration.

The Joint Business Council (JBC) will be instrumental in ironing out priority private sector issues between the two States. The Kenya Private Sector Alliance (KEPSA) and the Tanzania Private Sector Foundation (TPSF) have already signed a Memorandum of Understanding to guide this engagement. This allows for the private sector through their respective umbrella organizations toengage with their counterparts to identify issues, develop mutually beneficial solutions and where possible iron out issues that do not require Government intervention.

In line with this, KEPSA and TPSF are planning to organize a meeting under a peer to peer framework to further this engagement.

The objectives of the Peer to peer dialogue meeting

- ⇒ To identify the policy and regulatory restrictions that undermine the free movement of goods, services, capital and investment between Kenya and Tanzania.
- ⇒ To identify response measures that are crucial to resolving the restrictions and the private sector role.
- ⇒ To deliberate on possible ways to incorporate the issues into the Private Sectors' advocacy agendas, and realign them to ensure successful implementation of the CMP.

SOBERING EAC TRADE STATISTICS

As Dr. Kituyi, Secretary General of the United Nations Conference on Trade (UNCTAD) has noted severally, " there is no part of the world which has been successful in trading globally without learning first to trade with its neighbours". Despite the promises offered through regional integration efforts, the EAC continues to lag behind with low levels of intra-regional trade. While intra-regional trade in the EAC is close to 26%, this level is relatively low compared to other blocs across the world.

In spite of the growth in trade and investment across the region, trade among the EAC partner states has been falling recently. Intra-EAC trade fell by 13 per cent in three years, with total value dipping from $5.8 billion in 2013 to $5.06 billion in 2015. Between 2014 and 2015, intra-EAC trade shrank by 10 per cent, from $ 5.6 billion to $5.1 billion with intra-EAC exports amounting to 19.6 per cent of total exports.

Figure 1:Destination of EAC Partner States' exports (primary and manufactured goods), 2014

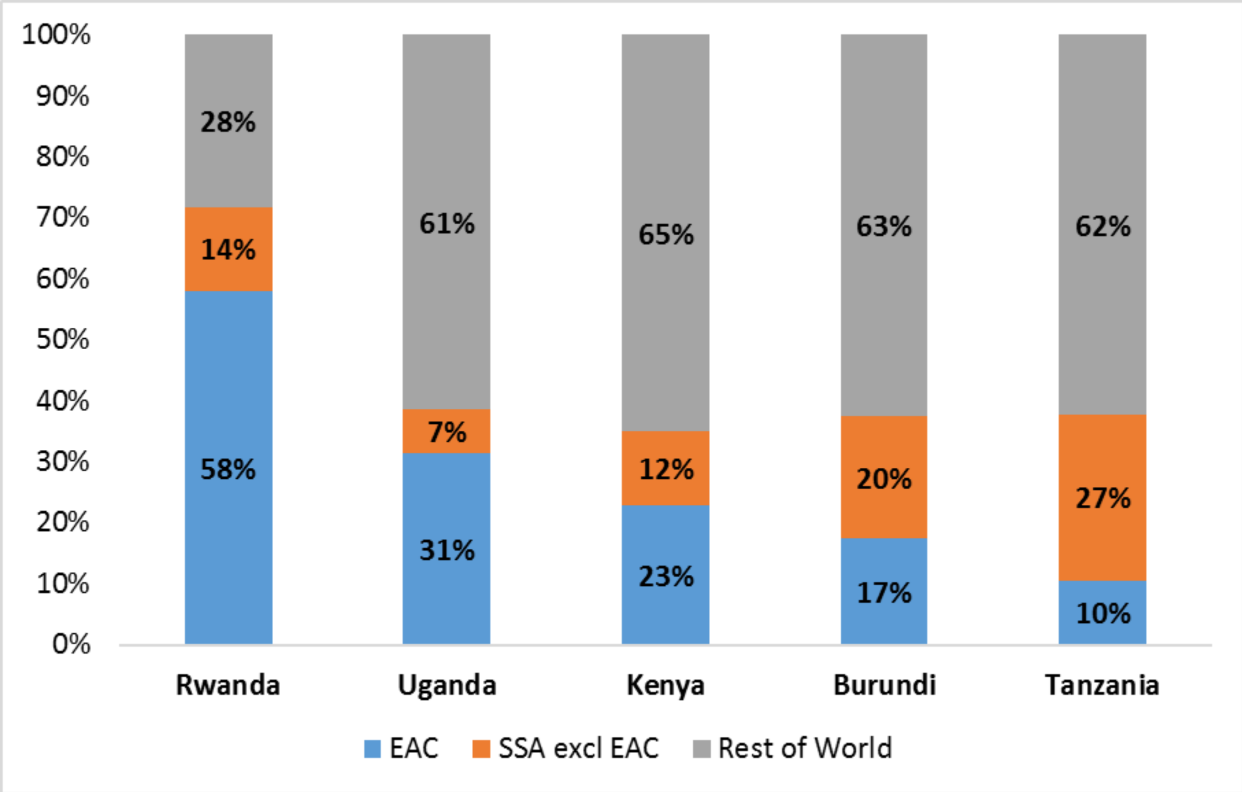


Figure 2: Comparative Imports Kenya

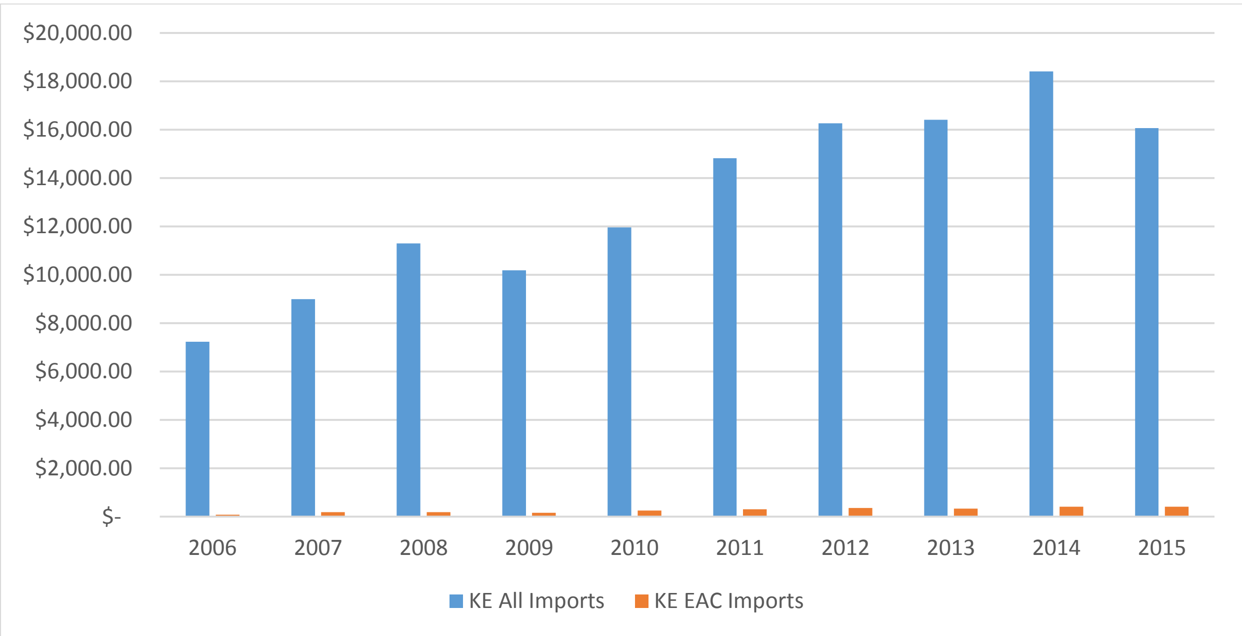
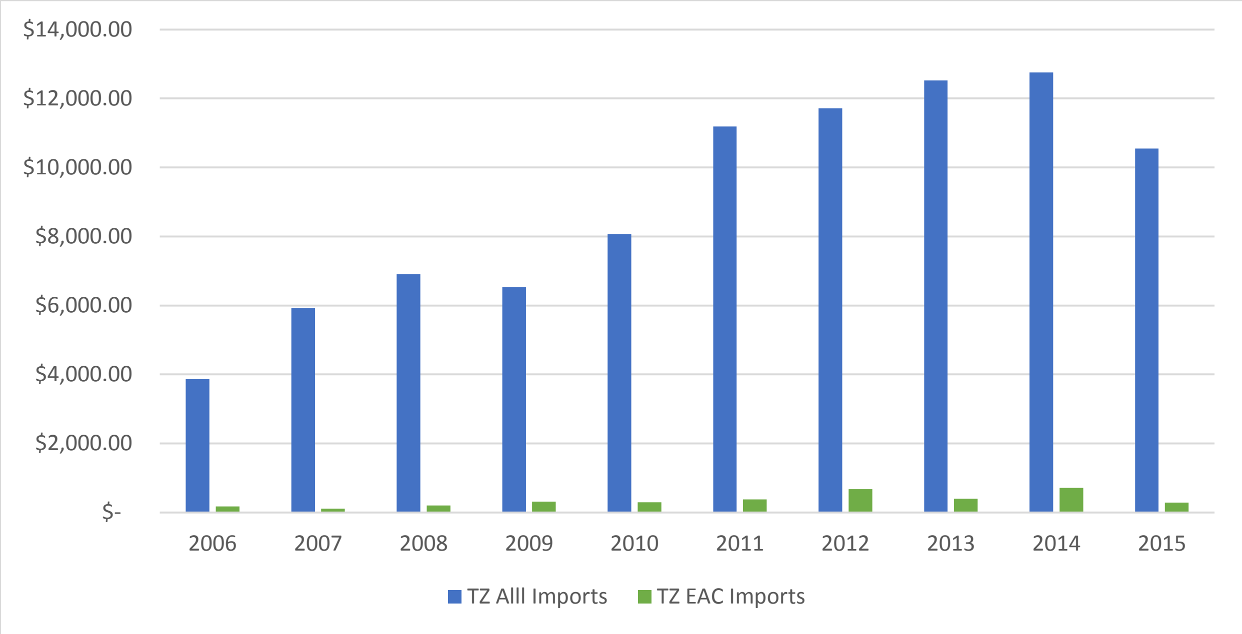


Figure 3: Comparative Imports - Tanzania



EXPECTED OUTCOMES OF THE PEER TO PEER MEETING

To mitigate this unfavourable trade position in the EAC, steps need to be taken to boost and facilitate bilateral trade at bilateral and EAC levels. These efforts need to include the elimination all barriers and impediments to trade and investment and reducing the cost of doing business in order to boost exports and investments.

The peer to peer engagement is expected to see:

⇒ Increased private sector engagement in the bilateral JCC framework to deal with issues pertinent to doing business in the region and spearhead implementation of the CMP.

⇒ Develop joint strategies to tackle Non-Conforming Measures, Tariff and Non-Tariff Barriers including SPS and TBTs to increase Inter & Intra regional trade and boost Investment and growth.

CHALLENGES AND BARRIERS TO BILATERAL PRIVATE SECTOR BUSINESS AND TRADE

The East African Community (EAC) was founded by the partner states to work together in order to become more competitive in the global market and improve the conditions for domestic industries, increasing trade and investment in the region.

As Kenya and Tanzania seek to grow their economies and improve the livelihoods for their citizens, a thriving private sector is critical. A key pillar to enabling and developing a thriving private sector are clear and coherent rules that allow them to establish and operate their businesses and to provide their goods and services to their customers in both domestic and external markets. With globalization and improved access and linkages to international markets, the competiveness of domestic producers in domestic, regional and global markets have increasingly become critical factors for success.

Following are the issues that have been identified by the private sector in Kenya as issues restricting their access to Tanzania markets for business and trade and by the private sector in Tanzania as issues restricting their access to Kenyan markets for business and trade. The continuing existence of these barriers and challenges both undermine the joint interest to grow bilateral trade and investment and also hurts the ability in both countries for their respective private sectors to compete within their internal and in regional markets against imports from outside the EAC.

GAPS IN FULFILLMENT OF COMMITMENTS AND OBLIGATIONS TO EAC PROTOCOLS

Two key milestones in the EAC economic integration process were the adoption of the Customs Union (CU) Protocol in 2005 and the Common Market Protocol (CMP) in 2010.

- The CU eliminates all internal tariffs and other similar charges on trade between the Partner States.
- In negotiating the Common Market Protocol, the EAC partner states committed to eliminate all internal tariffs and other similar charges on trade between the Partner States. The CMP provides for the free movement of goods, services, capital, persons and labour. It is aimed at the removal of all non-tariff barriers (NTBs).

There has been varying levels of success in the implementation of the CMP across the partner states as characterized by the continuing existence of non-aligned domestic laws, policies, and regulations which need to be changed to align them to the commitments in the CMP if the EAC is to meet its goals for a globally competitive private sector in both domestic and external markets, leveraging the opportunities availed by the EAC to achieve the efficiencys of scale.

CONTINUING EXISTENCE OF AND INTRODUCTION OF NEW LEGISLATION AND BILLS INCONSISTENT WITH THE CMP THAT UNDERMINE THE FREE MOVEMENT OF SERVICES, CAPITAL AND GOODS

THE ISSUES

ISSUES REPORTED BY KENYAN PRIVATE SECTOR

i. **Immigration (Amendment) Regulations 2016 (Tanzania)** requires EAC nationals to obtain business passes to engage in business, profession or assignment at $250.

ii. Under **Engineers Registration (Registration of Independent Consulting Engineer) Rules 2016 (Tanzania),** EAC nationals are not eligible for registration as independent consulting engineers.

iii. **The Petroleum (Local Content) Regulations, 2016 (Tanzania)** requires contractors to retain local engineering firm services unless exemption from CRB is granted, based on a needs test. **The regulations also** Prioritize the use of TZ financial institutions, operators to maintain accounts with TZ banks, execute transactions through TZ banks.

iv. **Procurement Amendment Act 2016 (Tanzania)**: The Act tightens participation by EAC-domiciled firms in public procurement by requiring inclusion of local experts and local firms in consultancy assignments.

v. **Public Procurement and Disposal of Public Assets Act 2016 (Zanzibar)**: Clause 8(2)(d) proposes output and input VATs of taxable non-Zanzibaris and denies input tax credit unless the foreigner accounts for the output tax in the same VAT return in which the imput tax is claimed. Thus it gives Zanzibar firms preference and also mandates local Zanzibar content and partnership.

vi. **Media Services Act 2016 (Tanzania),** Empowers the minister to prescribe shareholding of foreign firms. EAC firms are also considered foreignunder S. 3. **Media Services Regulations, 2017Reg. 4 (1) (b)**requires a local shareholding quota of 51% for print media licensing.

vii. **Chemist Professionals Act (2016) (Tanzania):**Mandates the Chemist Professional Council to **only register, enroll and enlist foreign medical professionals temporarily** and allows registration only if the persons are already engaged in the exercise. Upon ceasing to be engaged or after expiration of the period, the registration ceases to be effective. This locks out chemist professionals from free entry to seek job opportunities in Tanzania.

viii. **Valuers Registration Bill (2016) (Tanzania):**Article 28(d) of the Bill enforces temporary registration for non-citizen valuers for a period not exceeding 1 year and registration can only be done while the person is engaged on the specifassignement. Upon expiration of the period or the assignment renders the person's registration ineffective. This is an obstacle to free movement of labour as only applicants already engaged in valuation are allowed entry and even so for a short time

ix. **Fisheries Research InstituteAct (2016) (Tanzania)** Introduces additional registration procedures including prior application for clearance by Commission of Science and Technology. This is contrary to Article 16 of the CMP that provides for free movement of service suppliers within the EAC.

x. **The Agricultural Research Institute Act (2016) (Tanzania)** denies approval for research proposals submitted by foreign researchers unless they have local partnerships with local co-researchers (Mandatory partnerships). This is contrary to Article 16 of the CMP that provides for free movement of service suppliers within the EAC.

xi. **Medical, Dental and Allied Health Professional Bill 2016 (Tanzania)**: Requires additional clearance by Medical Council and proposes a limited practice license.

xii. **Tanzania Food, Drugs & Cosmetics (Importation & exportation of food) Regulations, 2006** mandates that Imported food must be certified by a Tanzanian inspector "No imported food shall be removed from the customs area before it is inspected or examined, as the case may be and certified as fit for human consumption in writing by the inspector."In addition, each imported consignment must beaccompanied by a health certificate issuedby a competent authority in countryof origin. Even then, they are regularly subjected to further inspections.

xiii. **Tanzania Insurance Act, 2009S. 44 (3)** provides that except with the prior consent in writing ofthe Commissioner, no insurer shall invest or otherwise lend insurance fund moneys outside Tanzania.

xiv. Tanzania **restricts outward direct and portfolio investments, foreign lending favoring non-residents, acquisition of foreign real estate**, operation of offshore foreign currency accounts by residents, and participation by non-residents in domestic money markets and capital markets. For **example:**EAC investors were blocked from participating in the $213m Vodacom IPO. This was a violation of Tanzania's forex reforms of May 2014 which allows EAC residents to acquire 40% of securities issued.

xv. The **Electronic and Postal Communications (Licensing) Regulations of 2011 (Tanzania)** require applicants for a broadcasting license to submit a list of shareholders with a minimum of 51% local ownership. The regulations also require that prior to transfer of shares, a licensee shall be required to submit to the authority proof that the minimum local shareholding requirement is maintained.

xvi. **Electronic Transactions (Cryptographic and Certification Services Provider) Regulations, 2016 (Tanzania)** bars suppliers not incorporated or registered in TZ from providing cryptographic and certification services.

ISSUES REPORTED BY TANZANIAN PRIVATE SECTOR

i. **Mining act 2016 (Kenya) restricts** Mineral rights only for Kenya companies, minerals dearship 60% by Kenya artisal mining companies owned by Kenya for 60%.

ii. **The Public Procurement and Assets Disposal act 2015 (Kenya)** has restricted and discriminated the participation of other EAC Partner states by defining a citizen contractors to mean firm wholly owned or controlled by the persons who are the citizen of Kenya. It also reserves 21% of total score in procurement evaluation for the citizen contractors.

iii. **Local content Bill 2016 (Kenya)** provide preference to Kenya firms operating in the extractive sectors. It also provides prefential treatment to Kenyan suppliers in mining mandatory skills transfer

iv. **Energy and Petroleum Bills 2015 (Kenya)** make mandatory local goods,services, labor, training and Financing

v. **Engineers act ,cap 530 A,Section 20 (1) (c)** require a person may register an engineering consulting firm if at least 51% of the shares in the firm are held by the Kenyan citizens

vi. **Advocate act cap 16 r**esticts advocates from other EAC Partners States from Kenya courts unless instructed by and if appearing in court has to appear with a Kenyan advocate. They also can not sign or file any pleading in the court

vii. **Engineering Technologists and Technicians act 2016,s 18(1)(b)** requires Kenyan residency and working permit for registrations for firms,local incorporations and at least 51% of the shares must be held by Kenyan citizens

viii. **ICT Practitioners bill 2016** requires Kenyan registration and certification to engage in ICT-services

ix. **Income Tax Act**: In case of of non resident company having a permanent establishment in Kenya----- High rate

x. **Civil Aviation Act 2013,section 4(1)(a) civil aviation (aircraft nationality and registration marks) regulations 2013:** eligibility for registration; if it is (a) the Government of Kenya, (b) citizens of kenya or persons bonafide resident in kenya

xi. **Private securities regulations act 2016,S.29(2)** Companies seeking to be registered to offer private security should have at least 25% of its shareholders held by Kenyans

xii. **Capital markets (Derivatives markets) Regulations 2015: the Regulation 17 (1)** Provides that at least 15% of the paid up share capital of a derivative exchange shall be held by a Kenyan entity.

xiii. **Investment promotion act 2004**: guides that an Applicant shall be entitled to an investment certificate if :- the amount to be investment by a foreign investor is at least one hundrend thousand USD or equivalent in any currency,; EAC Partner states are considered Foreigners.

xiv. **Companies act 2015, S.975 (2) (b)** the registra shall approve the application for registration and register the company by entering its name and other particulars in the foreign companies register if the application:- demonstrates that atleast 30% of the company shareholding is held by Kenyan citizens by birth.

THE RECOMMENDATIONS

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UNRESOLVED NON-TARIFF BARRIERS AND TECHNICAL BARRIERS AND INTRODUCTION OF NEW NTBS AND TBTS

THE ISSUES

ISSUES REPORTED BY KENYAN PRIVATE SECTOR

i. Denial of Prefential Treatment for goods manufactured in Kenya: Example edible oil products, automotive products (Reported by Toyota), Plastic stripping products, textiles, cement, tobacco etc.

ii. Multiple institutions involved in imposing levies and inspecting goods – Tanzania Dairy Board, Weights and Measures, TFDA, Veterinary Department, Tanzania Atomic and Radiation, Longindo and Arusha Municipal Councils

iii. High cost of regulation

   a. SCT document processing in Tanzania takes longer, up to 10 days to be cleared instead of the expected 3 days.

   b. Requirement to pay USD $300/year transit licence by Kenyan registered trucks;

   c. Business Permit charges of USD 200 on Kenyan business people;

iv. Issues with Standards verification

   a. Kenyan exports to Tanzania are subjected to verifications at manufacturers premises, yet it is also compulsory for trucks to pass through ICDs for full verification at the border.
   b. Certificates of analysis and health certificates are required even after the products have KEBS authorization.
   c. Tanzania requires mandatory refumigation of wooden pallets entering Tanzania even when they have been treated in Kenya. This is a major SPS challenge.

v. Challenges with the Tanzania Food and Drugs Authority (TFDA)

   a. TFDA product registration is double other countries' charge of $1,000, demands renewal at same price every 5 years, annual retention fee of USD 300;This is much high thus discouraging traders.
   b. Requirement by Tanzania Food and Drugs Authority (TFDA) for companies exporting to Tanzania to register, re-label, and retesting of certified EAC Partner States. E.g. TFDA labeling requirement by TRA on salt and dairy products imported into Tanzania.

   c. TFDA registers injectables as per pack size and treats each product by itself rendering retaining licences for the product very expensive;

d. Delays in verification of perishables especially milk and other restrictions imposed for exports of dairy products to Tanzania.

vi. Restriction of Petroleum products from Kenya to Tanzania through Isebania and Sirare customs borders;

vii. Reduction of validity period for Veterinary products from 30 days to 15 days;

ISSUES REPORTED BY TANZANIAN PRIVATE SECTOR

i. Kenya denies preferential Treatment for wheat flour and gas products from Tanzania

ii. Hurdles encountered by the Tanzania milk companies to penetrate in Kenya market

THE RECOMMENDATIONS

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CHALLENGES IN TRADE FACILITATION DUE TO NON HARMONIZED SYSTEMS ACROSS THE EAC PARTNER STATES

i. Customs (border management Institutions) working hours are not harmonized by all EAC Revenue Authorities. i.e. TRA offices close earlier (3pm) than KRA offices hindering verification at Nairobi Inland Container Depot(ICD).

ii. Non-harmonized road user charges / road tolls. This brings about difference in charges when transporting to different regions hence varying costs.

iii. Numerous monetary charges required by various agencies in the EAC Partner States for export of milk and other dairy products

THE RECOMMENDATIONS

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OTHER IMPEDIMENTS TO BUSINESS AND TRADE

1.1 ISSUES REPORTED BY KENYAN BUSINESSES TRADING WITH TZ

i. Non-recognition of EAC certificates of origin.

ii. High government interference in business which makes it hard to establish local production.

iii. Goods and services entering TZ from Kenya and the EAC region are subjected to numerous trade barriers compared to goods from the SADC region. This causes unfair competition for Kenyan products exported into Tanzania. Compared to Kenya which imposes duty on its imports, the goods from Tanzania are much cheaper and they find their way into Kenya creating unfair competition.

iv. Bureaucratic and time consuming requirements by TFDA including import permits for both food and non-food products: the products require samples testing and approval takes 2-3 months at an annual fee of USD200 per food product. Approval for cosmetics, beverages etc. take 3 months and the process is tedious, taking longer in some cases.

v. Sometimes, the TFDA disputes the quality of goods from the EAC region.

1.2 ISSUES REPORTED BY TANZANIAN PRIVATE SECTOR

i. **Non recognition of EAC Certificate of origin**

ii. Establishing of Business in Kenya for Tanzanians has always reportedly been encountering hurdles from the public and even specific private players.

iii. There is always high intervenition from the government. For example It has always been too difficult for Tanzania local beer to penetrate in Kenya market. You can hardly find Tanzania beers in Kenya

SELECT SECTORAL CHALLENGES

CHALLENGES TO THE TOURISM SECTOR

The Economic Road Map and Visions of all the EAC Partner States views developing the tourisms sector as not only as a key pillar for national development.However most tourism revenues in the region have been generated through narrow tourism products, primarily beach and wildlife. There are challenges affecting the tourism sector both in individual partner states and across region. EAC partner states have agreed to jointly market the region as a tourist destination and to as much as possible ease and better facilitate the ability of tourists to come to the EAC and easily travel in the region.

THE ISSUES

i. ***The 1985 Agreement*** signed between Kenya and Tanzania stipulated that each country would hand over tourists to the other at designated border crossings. The idea seemed to be to allow growth at an “even pace”. The private sector in Kenya expected that the Common Market Protocol would supersede this agreement.

ii. This has led to a number of “nontariff” barriers that impact adversely on the cost of safaris to tourists.

iii. For the Kenya private sector, there remain several key issues that we would like to see improvements in the legal and regulatory environment impacting the sector including requirements for work permits for tour drivers, extra fees for vehicles crossing over the border, limitations in access points for Kenya tour operators,

THE RECOMMENDATIONS

⇒ As East Africa competes globally to attract tourists to the region, it behoves all the EAC partner states to strengthen efforts to attract international visitors as a region. Further to enhance the experience for EAC domestic and international visitors, encourage Tanzania to join the EAC visa program and adoption of identity cards as a valid travel document for EAC citizens.

⇒ Urge Kenya and Tanzania to move beyond the 1985 accord and engage the tourism private sector ina both partner states to identify a relationship that supports and facilitates the sector for the 21st century. Further allow the 1985 accord to be superceded by the commitments in the EAC Common Market Protocols.

⇒ It is important to note that the tourism private sector in Kenya seeks to engender a mutually beneficial environment that allows and supports bilateral tourism investments and enables them to provide their services to their clients. However, this framework needs to also be inherently fair and the private sector can only advocate to the Kenyan government for greater fairness the relationship.

TRADE IN STAPLE FOODS / GRAINS

While the partner states in the EAC have wrestled with managing food insecurity in the midst of national and regional droughts and other challenges, we have seen the trade in staple foods particularly maize subjected to various exports and import bans. While there is critical public interests at stake in the decisions to ban the exportation or importation of the various staple food products, these bans may not be reflective of the supply / demand status as seen by the private sector and may be undermining the efforts under the EAC framework to build regional food security.

THE ISSUES

i. we also have issues with regard to trade in staple foods, particularly maize which is subjected to export and import bans of staple foods

ii. Burdensome requirements to process permits for import and exports of grains despite the EAC being a common market subject to the CET

THE RECOMMENDATIONS

CONFLICTS IN MULTILATERAL ENGAGMENTS

The East African Community has undertaken to jointly negotiate trading arrangements with external parties and to develop a joint approach to various trade related issues. Over the recent past, differences in the approach to external agreements and issues have gained signifant prominence and show divergence in approaches between the 2 countries.

Deeper engagement between the private sectors in both partner states is needed in this regard.

ISSUES REPORTED BY KENYAN PRIVATE SECTOR

i. Tanzania's failure to ratify the EPA's deal.
ii. Delays in signing the Mutual Recognition Agreement which allows cross border practice of Architects from other EA Countries

ISSUES REPORTED BY TANZANIAN PRIVATE SECTOR

i. Kenya's signing of EPA's deal without consensus of EAC member states
ii. Kenya violation of EAC Summit resolution on second hand clothes and shoes (Mitumba) in favour of AGOA preferential Treament

RESOLUTIONS