



Implementation of the EAC Common Market Protocol: Proposals for Review of Investment Related Policies, Laws and Regulations

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Introduction

One of the key factors that continue to drive regional integration of the EAC partner states is investment. It not only results into the movement of capital across the region but can also allow for the movement of services, goods, workers and persons, and also foster the fulfillment of the right of entry and right of establishment, further contributing towards increased integration. According to the EAC treaty, Chapter 12, Articles 79 and 80, the five Partner States agreed to co-operate in the areas of Investment with an aim of harnessing the investment potential of the region so as to promote economic growth and development.

However, currently, a number of national laws, policies and regulations in Uganda and other partner states still consist of non-conforming measures to the EAC CMP and thus present barriers to increased cross-border investment in the region. In addition, barriers to the free movement of goods and services also affects cross border investments. Specifically, 67% of identified measures under the free movement of services negatively affects cross border investments in the region. The free movement of goods is also critical as many investors start as traders and then gain confidence in a country' markets before establishing full production in such countries. Therefore, barriers to this free movement affects the confidence of such prospective investors.

Article 24 of the EAC CMP provides for the free movement of capital. The protocol further provides under Articles 5 and 29 for the protection of cross border investments and returns of investors of other Partner States within their territories. The Protocol requires Partner States to provide protection and security of cross border investments of investors of other Partner States; not to discriminate against the investors of the other Partner States, by according to these investors, the same treatment under similar circumstances that is accorded to the nationals of that Partner State. The Protocol further requires that in case of expropriation, any measures taken for the public interest should be non-discriminatory, and in accordance with due process of law, accompanied by prompt payment of reasonable and effective compensation.

Given that the successful implementation of the EAC common market protocol rests within partner states' national laws, policies and regulations, partner states must undertake policy reforms to ensure that their laws, policies and regulations are aligned to their commitment in the EAC CMP.

The figures below provide an analysis of the legal frameworks in Uganda, Kenya and Tanzania that contain non-conforming measures (NCMs), which are provisions that are inconsistent to the commitments made in the EAC common market protocol. For Uganda, it includes the laws, Non-Conforming Measures (NCMs), responsible line MDAs, reform proposals, current status and existing challenges.

UGANDA

Law: The Uganda Investment Code Act, Cap 92

NCMs

This Uganda Investment Code Act Cap 92 discriminates in the treatment and provision of incentives by according Ugandan investors favorable treatment and a range of incentives while setting up businesses in Uganda unlike other investors from other Partner States. The Act also discriminates investors from other partner states through its definition of a foreign investor; and in areas and sectors of investment.

Current status and existing Challenge

The definition of foreign investor in the Investment Code Act has been amended to exclude other EAC partner states under the Amendment Code Bill, 2015.

The Bill was approved by cabinet and sent to the Solicitor General subsequent to which it will be sent to parliament for stakeholder consultation and approval for assent into law by the president.

Reform Proposals

Section 9 (1) should be amended to exclude the other EAC Partner States citizens from the definition of “foreign investor”.

Responsible line MDAs

Ministry of Finance, Planning and Economic Development
Uganda Investment Authority

The Companies Act, 2012

NCMs

This Act provides a less onerous filing process for companies incorporated outside Uganda but in the Common Wealth and therefore discriminates against Burundi, Rwanda and the Republic of South Sudan which are not Common Wealth countries.

Current status and existing Challenge

While the proposals for amendment of the companies Act have been developed by the First parliamentary Counsel and included proposals for the repeal of Section 256 (2), the proposals are not explicit on the amendment of the definition of a “foreign company”. Repealing Section 256(2) would therefore address the Non-Conforming Measure within this Act. However, including other EAC partner states in the definition of foreign company in the Companies Act 2012 under Section 251 is very clear on the definition of “foreign company” as being a company incorporated outside Uganda which has established a place of business in Uganda.

Reform Proposals

Section 256 (2) should be amended to include Burundi, Rwanda and the Republic of South Sudan as EAC member states among the countries exempted from complying with subsection I.

Responsible line MDAs

Uganda Registration Services Bureau

First parliamentary Counsel, Ministry of Justice and Constitutional Affairs

The Companies fees rules SI 57 of 2005

NCMs

The 2nd Schedule Head C (I) provides that for a foreign company, the fees payable on registering a certified copy of the charter, statute or memorandum and articles of the company or other instrument constituting or defining the constitution of the company, for registering any other document required to be delivered to the registrar under part X of the Act shall be payable in United States Dollars. Local companies are not required to pay in Uganda shillings.

Current status and existing Challenge

Amendment of these rules has yet to be undertaken.

Consultation with stakeholders by the URSB indicated that stakeholders such as the legal fraternity rejected the amendment of the definition of foreign company to exclude other EAC Partner States. This is a clear indication that there still remains a lot to be done on sensitization regarding the commitments Uganda made to remove restrictions on the free movement of capital. The commitments made in the CMP are binding and must be implemented.

Reform Proposals

The 2nd Schedule Head C (I) be amended to make companies incorporated in the other EAC Partner States pay the same fees and in the same currency as companies incorporated in Uganda. In the alternative it is proposed that the Rule be amended to include definition of “foreign company” to exclude EAC Partner States.

Responsible line MDAs

Uganda Registration Services Bureau (URSB)

The Business Names Registration Act, Cap 109

NCMs

This Act discriminates against firms incorporated in the other EAC Partner States by requiring such firms to have a place of business in Uganda to be registered under this Act.

Current status and existing Challenge

Progress for amendment of this Act is yet to be undertaken; plans by the URSB are underway. The rejection of the proposals to exclude other EAC partner states from the definition of foreign company inevitably affects progress of amendment of this Act. See comment above

Reform Proposals

The Act should be amended to recognize and allow for registration of businesses incorporated in the EAC region whether or not they maintain a place of business in Uganda.

Responsible line MDAs

Uganda Registration Services Bureau

The Public Procurement and Disposal of Assets Act, 2003

NCMs

The Act limits the participation of other EAC partner states in some procurement processes.

Current status and existing Challenge

A consultant was commissioned by all the EAC Partner States to review and harmonize their national laws. This assignment is to be concluded by June 2017.

While there is an ongoing process to amend this Act, the proposals for amendment of the Act make no provision for addressing the NCMs that exist in the legal framework. It remains uncertain as to what extent the regional consultative report for harmonization of the Act will be used to inform this amendment process.

The attention of the stakeholders should be drawn to the provisions of Article 35 of the CMP which provides that Partner States shall not discriminate against suppliers, products or services originating from other Partner States for purposes of achieving the benefits of free competition in the field of public procurement.

Reform Proposals

Article 4 and Article 50 should be amended to provide for the same treatment for both Ugandans and other EAC partner states

Responsible line MDAs

Public Procurement and Disposal of Assets Authority

The Insurance Bill, 2016

NCMs

The Insurance Bill restricts investment of insurance funds to assets classes in Uganda and restricts the types of investments including prescribing percentages of total funds to be invested in government securities and any other investments as shall be approved by the Authority. It provides no guidance on the approval process for other investments that insurers may wish to undertake.

Current status and existing Challenge

Proposals for amendments were submitted to the Parliamentary committee on Finance, Planning and Economic Development for their consideration. It has now been passed into law and currently awaits assent by the President.

The proposals for amendment if adopted will facilitate implementation of the CMP in Uganda in the area of the free movement of capital.

It was noted that fast tracking of the Regional Insurance Act would further ensure full enjoyment of the free movement of capital in the region.

Reform Proposals

Clause 36 (2) (a) should be amended to allow insurers invest paid up capital in any of the EAC Partner States.

Clause 50 (1) should be amended to allow for investment of insurance funds in asset classes situated in the other EAC Partner States.

Responsible line MDAs

Insurance Regulatory Authority of Uganda

Ministry of Finance, Planning and Economic Development

The Insurance (Paid up capital and insurance funds) Regulation, 2008 (Investment of Paid Up Capital and Insurance Funds)

NCMs

The Regulations 7 and 8 restrict investment of insurance funds and paid up capital to Uganda, while Regulation 13 provides that retained earnings may be invested off shore with the approval of the commissioner.

Current status and existing Challenge

The amendment of these regulations presents an opportunity for insurance companies operating in Uganda to benefit from a wider market which could deepen their penetration capacity.

According to Uganda Insurance Regulatory Authority, (IRA), plans to review the regulations are underway. However, the outcomes of the amendment of the Insurance Bill, 2016 will to a larger extent inform the outcomes of the review of the Regulations.

Reform Proposals

Regulation 8 (1) (a) should be amended to allow investing of life insurance funds of an insurance company in government securities issued by the governments of the other EAC Partner States.

Regulation 8 (2) (a) should be amend to allow investing of non-life insurance funds of an insurance company or a re-assurance company carrying on non-life insurance business in government securities issued by the governments of the other EAC Partner States

Responsible line MDAs

Insurance Regulatory Authority of Uganda

Ministry of Finance, Planning and Economic Development

OTHER PARTNER STATES

KENYA

The Public Procurement and Assets Disposal Act, 2015 of Kenya

NCMs

The definition of “Citizen Contractor” in Section 2 of the Act sets the stage for discrimination against other EAC Partner States citizens wishing to participate in public procurement business. The Act under Section 157(8) b also discriminates against other EAC Partner States citizens by offering preferential treatment in public procurement in Kenya to candidates offering goods manufactured, mined, extracted and grown in Kenya; or works, goods and services. A Preference shall be applied depending on the percentage of shareholding of Kenyan citizens on a graduating scale as prescribed. In addition, Section 157(9), discriminates against other EAC Partner States citizens by requiring that a procuring entity shall have in its tender documents a mandatory requirement as preliminary evaluation criteria for all foreign tenderers participating in international tenders to source at least 40% of their supplies from citizen contractors prior to submitting a tender.

“Foreigners” in this case include the citizens of the other EAC Partner States.

Section 86 (2) For the avoidance of doubt, citizen contractors, or those entities in which

Kenyan citizens own at least fifty-one per cent shares, shall be entitled to twenty percent of

their total score in the evaluation, provided the entities or contractors have attained the minimum technical score.

Reform Proposals

Section 2 should be amended to include other EAC partner states in the definition of citizen contractor.

Section 157 (8) and (9) should be amended to extend participation in public procurement in Kenya to other EAC partner states.

Challenge

The desire by the Kenyan government to promote local content including the provision of preferential treatment to their citizens’ local companies and businesses.

The challenge in this area is rather the fact that partner states have not taken on board the provisions of Article 35 of the Common Market Protocol.

Kenya Local Content Act, 2016

NCMs

The proposed Act discriminates under Section 2 against other EAC partner states companies through the definition of “company” where it states that a company is a firm or entity whose business enterprise is incorporated or otherwise organized under the Laws of Kenya and whose principal place of business is in Kenya and which is effectively owned and controlled by nationals of Kenya. In its definition of a “local person” i.e. a person, firm or entity performing works, services or supplying goods and materials to an operator, whether as a subcontractor or otherwise, whose business enterprise is incorporated under the Laws of Kenya and whose principal place of business is in Kenya and which is effectively owned and controlled by a Kenyan national, it discriminates against persons from other partner states.

The Act further discriminates against other partner states under Section 39(3c) by giving preference to local persons where the price differentiation does not exceed 10% of the bidding prices quoted by a foreign entity and in Section 40 by giving first preference to local companies in the grant of a license or award of a contract.

Reform Proposals

Section 2 should be reviewed to include other EAC partner states in the definition of a “company” and “local person” under this Bill.

Section 39 and 40 should also be amended to include other EAC partner states as beneficiaries of the preferences awarded.

Challenge

There is a policy aimed at facilitating the local ownership (Kenyan citizen), control and financing of activities connected with the exploitation of gas, oil and other mineral resources; to provide a framework to increase the local value capture along the value chain in the exploration of gas, oil and other mineral resources; and for connected purposes.

There is a current wave of local current legislation in the region with Tanzania and Uganda also having local content provisions in the energy sector.

Partner States in enacting new legislation or reviewing / amending the already existing legislation, are not conducting CMP compliance analysis. The CMP is clear on Partner States commitments under free movement of capital and right of establishment.

Kenya Capital Markets (Derivative Markets) Regulations (2015)

NCMs

Regulation 17(1) provides that at least fifteen per cent of the paid up share capital of a derivative exchange shall be held by a Kenyan entity.

Reform Proposals

This regulation should be amended to remove the requirement to have 15% of equity in a derivatives exchange to be held by a Kenyan entity.

Challenge

There is so far no ongoing initiative to amend this provision.

Kenya Private Securities Regulations Act, 2016

NCMs

The Act discriminates against other partner states by requiring that companies seeking to be registered to offer private security services to have at least 25% of their shareholding held by Kenyans. This Act impedes fair competition among the EAC partner states by providing preferential treatment to Kenyans over the other partner states.

Reform Proposals

This Act should be amended not to restrict the 25% shareholding held in a company seeking to register to offer private security services to only Kenya, but to include other EAC partner states.

Challenge

Kenya, Like other EAC Partner States has continued to enact legislation that contravenes the national treatment obligations in the Common Market Protocol.

While proposals have been made for the development of a regional local content framework, such a regional framework would be in contravention of the provisions of the CMP which provides for non-discrimination between Partner States citizens.

Kenya Mining Act 2016

NCMs

The Act grants mineral rights only for Kenyan companies. It requires that 60% of mineral dealerships are to be owned by Kenyans and 60% by Kenyan artisanal mining companies.

Reform Proposals

This Act should be amended to increase the percentage available for other EAC partner states for purposes of facilitating intra-regional investment in Kenya's mineral sector.

Challenge

Partner states continue to enact laws that conflict with the commitments they made in the common market protocol on investments and right of establishment.

TANZANIA

Tanzania Public Procurement Act 2016

NCMs

The Act discriminates against other partner states in its definition of a local firm under Section 2 (d) and under 16(55E). Under these Sections, the Act provides that a local firm is a firm whose majority share capital is owned by citizens of the United Republic of Tanzania. These provisions impede fair competition among the EAC partner states by providing preferential treatment to Tanzanians over the other partner states.

Reform Proposals

Section 2 should be amended to include other EAC partner states' firms in the definition of local firm.

Challenge

The desire by the Tanzanian government to protect their local content including the provision of preferential treatment to their citizens'/ local companies and businesses.

This however contravenes Article 35 of the Common Market Protocol on Public Procurement which provides that the Partner States shall not discriminate against suppliers, products or services originating from other Partner States, for purposes of achieving the benefits of free competition in the field of public procurement.

Public Procurement and Disposal of Public Assets Act 2016 (Zanzibar)

NCMs

The Act discriminates against other EAC partner states and gives Zanzibar firms preference and mandates local Zanzibar content.

Reform Proposals

The Act should be amended to include other EAC partner states in the preferential treatment offered under this Act..

Challenge

Zanzibar's policy in public procurement is to promote local content including the provision of preferential treatment to their citizens'/ local companies and businesses in public procurement.

This however contravenes Article 35 of the Common Market Protocol on Public Procurement which provides that the Partner States shall not discriminate against suppliers, products or services originating from other Partner States, for purposes of achieving the benefits of free competition in the field of public procurement.

Tanzania Companies Act, 2002

NCMs

The Act requires that a company must have a place of business in Tanzania to be registered and discriminates against companies established outside Tanzania. It refers to such companies as companies outside Tanzania thereby discriminating against Companies of other EAC partner states that do not have a place of business in Tanzania.

Reform Proposals

The Act should be amended to allow for companies established in other EAC partner states to be registered under this Act

Challenge

There is currently no progress being made towards addressing this anomaly.

The absence of an agreed, harmonized and recognized definition of what constitutes a domestic investor in the EAC region is another challenge.

Tanzania Media Services Act, 2016

NCMs

The Act discriminates against other EAC partner states through the definition of foreign citizen and foreign company as provided for under the Act.

Reform Proposals

The Act should be amended to include other EAC partner states in the definition of foreign citizen and foreign company under this Act.

Challenge

The desire by the Tanzanian government to promote local content in public procurement including the provision of preferential treatment to their citizens'/ local companies and businesses.

This however contravenes Article 35 of the Common Market Protocol on Public Procurement which provides that the Partner States shall not discriminate against suppliers, products or services originating from other Partner States, for purposes of achieving the benefits of free competition in the field of public procurement.

Tanzania Insurance Act Cap 394 and the Micro insurance Regulations 2013

NCMs

The former discriminates against other partner states in that it excludes other EAC partner states from the definition for a domestic company thereby impeding such companies from investing into provision of micro insurance in Tanzania. The legal framework requires an individual or a person must be a citizen and resident of Tanzania to qualify to register as a micro-insurance agent.

Reform Proposals

The Act should be amended to include other partner states so as to conform to the CMP.

Challenge

There is currently no progress being made towards addressing this anomaly.

The absence of an agreed, harmonized and recognized definition of what constitutes a domestic investor in the EAC region is another challenge.

Tanzania Insurance Regulations, 2009

NCMs

The Insurance Regulations 2009 discriminates against other partner states entering into or maintaining an insurance agency agreement with an insurer or a broker unless he/she is a citizen or resident of Tanzania

Reform Proposals

The Act should be amended to allow brokers and insurers from other partner states to also enter into insurance agency agreements in Tanzania.

Challenge

The harmonization of insurance legal and regulatory frameworks across the EAC region is currently awaiting final decisions from the ongoing process to develop and adopt common regulatory standards. East African countries are seeking to harmonize rules to supervise companies in areas such as corporate governance, capitalization, investment, stress testing, supervision and winding up of insurance firms[1].

Conclusion

The pace of harmonization of laws, policies and regulations within the EAC can be described as slow. Presently, while Partner States are reforming their laws, policies and regulations to address the non-conforming measures, they have also continued to enact legislations that are not aligned to their Common Market protocol obligation.

The realization of increased intra-EAC investment lies within the implementation of the Partner States' commitments on free movement of capital, free movement of services and the free movement of goods. Therefore, addressing the non-conforming measures within legal frameworks is imperative.

Recommendations

In order to facilitate full implementation of the CMP, there is need to take the following recommendations into consideration:

- A certificate of compliance with regional commitments should be a requirement for all Bills placed before Cabinet and Parliament for discussion and approval. This should be pursued by the Ministry of EAC Affairs with support from the relevant government line ministries, departments and agencies and with support from the private sector to ensure compliance with regional commitments such as the EAC Common Market Protocol for increased intra-regional trade and investment. However in cases where compliance of a given legal framework could undermine the realization of a partner states' development interests, justification should be provided to the Ministry in charge of EAC Affairs to inform further discussion with other partner states for a way forward at the regional level.
- Stronger institutional coordination in the implementation of the EAC Common Market protocol should be pursued. While the Ministry of EAC Affairs in Uganda is the institution responsible for overseeing implementation of the provisions of the protocol, there is need for more deliberate effort and commitment to be made by other Ministries, Departments and Agencies. This will however require close engagements between the MEACA and the other relevant MDAs to increase their understanding and appreciation of the benefits that the private sector can accrue from the EAC.
- Comparative studies should also be undertaken and reports disseminated highlighting the progress that other partner states are making in reforming their laws to conform to the EAC CMP and other regional frameworks.
- The Sectoral Council on Trade, Industry, Finance and Investment together with the relevant MDAs at partner states' level should fast track the process of harmonization of various laws and frameworks.

This will help address the anomaly that arises from for example the existence of varying thresholds for the promotion of national local content especially in public procurement and participation in the partner states' mining sector, insurance sector and capital markets, among others. Regional harmonization of laws for especially these sectors will go a long way in facilitating greater implementation of the CMP for increased intra-regional investment.

- Fast tracking the implementation and utilization of the Monetary Union that came into force in 2015 is also critical for the full implementation of the CMP commitments on free movement of capital.

[1] <http://www.businessdailyafrica.com/markets/news/EAC-insurance-regulators-to-discuss-common-rules/3815534-4057378-pibp24/index.html>

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