

**Reporting
International
Treaties**

**The Cotonou Treaty
Establishing the EU-ACP
Partnership: Its Impact on
the East African Economies**

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Foreword

Formal relationship between states is best established through Treaties. To this end, treaties, being international legal binding instruments are fundamental in contemporary state affairs. The rights and obligations of states more often than not, emanate from established principles in treaty law. Treaties are also used to bestow rights on third party states and citizens. In practice, treaties regulate a wide spectrum of international relationship in the economic, social and political arena.

The idea of writing this handbook arose from the need to simplify for journalists and the ordinary citizens the concept of treaties, the treaty making process and the impact of treaties at various levels. The handbook uses Kenya as a case study. The handbook gives journalists a guide and quick reference to key issues in treaty law and interpretation.

To cover the various treaties in one easy to read book is somehow difficult. The treaties are, therefore, covered in four handbooks namely: Environmental, Human Rights and other Treaties Relevant to Kenya; the World Trade Organisation (WTO) Agreements: Their Impact on Kenya; the East African Community Treaty: Its Impact on Kenya and finally, the Cotonou Treaty Establishing the EU-ACP Partnership: Its impact on the East African Economies.

Journalists are targeted as the primary users and consumers of the information in this book. The focus on journalists emanates from the view that the media is one of the links to ordinary citizens. By raising awareness of the treaty making process and impact amongst journalists, it is expected that frequent reporting and highlighting of treaty issues and impact will find its way in the print and electronic media.

The Friedrich Ebert Stiftung is proud to be associated with this noble objective. The Foundation wishes journalists a good reading and understanding of the concept of treaties.

Dr. Roland Schwartz
Resident Director
Friedrich Ebert Stiftung

*Nairobi Office
July 2002*

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This book is a product of a collaborative exercise that began with the discomfort of a group of Nairobi-based business writers and the patience of Dr. Otieno Odek who graciously shared his wide knowledge on international trade and development issues with them.

We at African Women and Child Features take pride in acknowledging all the business writers and correspondents from *The Nation Media Group*, the *East African Standard*, *The People*, *Kenya Times*, *Kenya Television Network* and *Kenya Broadcasting Corporation*, who actively participated in the workshop on reporting trade. We value our long association with them and our enviable history of a rich professional relationship.

With tonnes of information coming out of the numerous national, regional and international trade bodies, and every shade of opinion from hundreds of lobby groups around the world, reporting trade and development is at once exiting, and a daunting undertaking. There is simply too much to write, analyse and interpret.

In view of the technical nature of this book project, Dr Otieno Odek, a lawyer and expert in this area, co-ordinated the compilation of the data, while we at AWC Feature Service took charge of editing all the material to fit the purposes and specification of this project, that is: initially compilation of a single handbook on reporting key international treaties to serve as a guide to journalists.

The product of this exercise was a huge manuscript which, to our knowledge, could not serve as a handbook. The manuscript was then separated to cover individual treaties for ease of reference. The products are four reader-friendly handbooks under the standing title of "Reporting International Treaties". Each handbook bears the name of the treaty/agreement it covers. They include: The Cotonou Treaty Establishing the EU-ACP Partnership: Its Impact on the East African Economies, The East African Community Treaty: Its Impact on Kenya, World Trade Organization (WTO) Agreements: Their Impact on Kenya and the Environmental, Human Rights & Other Trade Treaties Relevant to Kenya.

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It is our hope that these books will shed to light and promote a better understanding in interpretation, analysis and how to bring out the real issues when writing on issues related to this treaty.

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Introduction

Between 1975 and the year 2000, the trade and development aid ties between Europe and the African Caribbean and Pacific (ACP) states was conducted within the framework of the Lome Conventions. During this period, there were four Conventions. Lome IV expired on 29th February 2000 and since then, a new Partnership Agreement signed at Cotonou-Benin, has been entered into between the European Union (EU) and the ACP states. This new Partnership Agreement, otherwise referred to as the “Cotonou Agreement”, presents opportunities and constraints to the ACP-EU relationship.

The East African states of Kenya, Uganda and Tanzania are all signatories to this treaty. Being a treaty, the partnership agreement has various principles, objectives which if implemented, have an impact to the economies of the East African countries. Before we examine the nature and impact of the Cotonou Agreement to the East African states, it is prudent to discuss the nature, functions and creation of treaties at the international level. To this end, this booklet is divided into two parts. Part One analyses the nature and creation of treaties while part two discusses the impact of the Cotonou Agreement to the East African economies.

Part One: Nature and Creation of Treaties

Meaning of Treaty

A treaty is an agreement establishing a legal relationship between two or more states. The agreement is intended to bind the signatory states and to create rights and obligations. To this end, any kind of instrument or document or any oral exchange between states involving undertakings may constitute a treaty.

Forms and Terminology

There are various forms and terminology employed in the day to day practice of treaty making. The principle forms in which treaties are concluded are:

- (i) **Heads of State form:** In this case, the treaty is drafted as an agreement between sovereign heads of state and the obligations are said to bind them as High Contracting Parties.
- (ii) **Inter-governmental form:** The treaty is drafted as an agreement between governments. This type of treaty is usually employed for technical or non-political agreements.
- (iii) **Inter-state form:** The treaty is drafted expressly or implied as an agreement between states. The signatories are often referred to as the Parties.

The form in which treaties are concluded does not in any way affect their binding character. An oral declaration in the nature of a promise made by the Minister of Foreign Affairs of another and in matter within his competence and authority may be as binding as a formal written treaty. International law does not as yet require established forms of treaties, it is the substance that is of importance.

In terms of terminology, treaties go under a variety of names. Besides the terms "treaty" itself, the following terminologies also refer to a treaty: (i) Convention (ii) Protocol (iii) Agreement (iv) Arrangement (v) Procès verbal (vi) Statute (vii) Declaration (viii) Modus Vivendi (ix) Exchange of Notes or Letters (x) General Act (xi) Final Act. The terminology by which the agreement or treaty is concluded or referred to does not affect its binding character so long as the intention to create a legal binding relationship exists.

Nature and Functions of Treaties

A treaty, being an instrument creating rights and obligations between states has the following functions:

- (i) It is an instrument of international cooperations and can be used to initiate or develop international cooperation.

- (ii) It gives a legal foundation to bilateral and multilateral relations of states.
- (iii) It imposes rights and obligations between and among states.
- (iv) Treaties are a major source of regional or international law.

As a source of international law, there are two kinds of treaties namely law making treaties and treaty contracts.

The law making treaties lay down the rules of universal or general application. Such treaties are a direct source of international law. Examples are the United Nations Charter and the International Convention on Civil and Political Rights (1966) and the Geneva Conventions of 1949.

On the other hand, treaty contracts are agreements between two or a few states dealing with a specific matter exclusive to the signatory states. Such treaties are a contract between the states. For a example, the Agreement between Kenya and Uganda for the purchase and transmission of electric power between the countries is a treaty contract.

Steps in treaty making

There are four basic steps in towards the conclusion of a treaty: Identification of needs and goals, negotiation, adoption and signature and ratification.

(a) Identification of needs

Agreement between countries concern complex issues. Before negotiations begins in earnest, there is need for a country to identify its needs and concerns that warrant negotiation and conclusion of a treaty. Without each country identifying its needs and goals for conclusion of a treaty, there will be no reason or justification for negotiating an agreement.

(b) Negotiation

The process of negotiation depends on the number of states prepared to reach an agreement on the particular issue. In case of bilateral treaties, a state may initiate the treaty making process simply by inviting another state to negotiate on the particular issue. As regards multilateral treaties, the process is more involving. As in the case with bilateral negotiating, a state will usually initiate the process more often by recommending that an

international organization establish a committee or convene an international conference to consider a particular issue. The host organization will then organize a preparatory committee of working or technical grounds to consider the issue. Usually, the organizing body will invite comments from states, scientific unions or other bodies to comment on the issue. During these preliminary discussions, the position of states and parameters of a possible agreement are narrowed and the slow process of building international consensus begins.

Once the parameters for negotiations are clear, a conference of state representatives (plenipotentiaries) is held and the representatives now have the formal and legal authority to negotiate on behalf of their countries. This meeting may come up with a draft of the treaty for further comments, negotiation and discussion between states. A final draft is prepared after the various consultation and a final conference is held resulting in an "authentic text" of the treaty.

(c) Adoption and signature

Once an international agreement has been drafted and agreed upon by the authorised representatives, a number of stages are necessary before it becomes a legal obligation binding upon the parties involved. The steps involved are adoption, signature and ratification.

Adoption means that the parties accept the text of the treaty as the authentic and final version. Once adopted, the treaty is open for signature. By signing, the states affirm their commitment to the treaty and express an intention to enter into a binding legal obligation. The signature identifies the treaty text as the actual text the negotiating states agreed to and establishes that each signing state agrees in principle to its terms. Unless specified, a state's signature does not signify its consent to be bound by the treaty. Ratification is still required.

Ratification

By ratification, the state expresses its intention to be bound by the terms of the treaty. It is the process of ratification that creates a binding obligation. This is done through a variety of ways such as signature and exchange of instruments constituting the treaty, exchange of instruments of ratification,

acceptance, approval or accession to a treaty or any other manner so agreed upon by the parties. Ratification is the authoritative act by which a state declares its intention to be bound by a treaty. In practice, ratification is accomplished by depositing an instrument of ratification with the depository or secretariat of the treaty.

The process of ratification is a domestic matter and varies from country to country. In a majority of states, an international agreement must be approved through domestic political process before it can be ratified. In some countries, the executive arm of government performs ratification without seeking the consent of the legislature. In Kenya, the executive can ratify a treaty without seeking permission from the legislature. In the United States, the executive cannot ratify a treaty without seeking the consent of Congress.

Role of Ambassadors in treaty making

During the last one hundred years, states have increased their interactions in political and economic matters. Due to this, countries evolved a practice of deploying political and business representatives (namely ambassadors and consuls respectively) to other states with a view to securing their political and economic interests. The consul would represent the business interest of the citizens of his state while the ambassador would represent the sending state in political and sovereign matters.

In terms of treaty making, during the negotiation process, unless a country designates a specific person as its chief negotiator, the ambassador will play the role of the negotiator and have full powers to act for and on behalf of his home state. He oversees the entire negotiation process on behalf of his state. This role is played in the host country where negotiations are taking place. In this respect, the ambassador as the chief of mission where he is deployed, he has the responsibility to ensure that he advances in a peaceful manner the interests of his state.

It must be noted that in his role as chief of mission and negotiator, the Ambassador is not the maker of foreign policy but an instrument of foreign policy. He helps in the formulation of policy by collecting the information on which policy makers rely in reaching their decisions. He also helps in negotiating with other diplomats from other countries. His role and the

extent of his powers as regards treaty making and negotiation is to be expressly stated by the home country. He needs specific instructions and mandate to sign or ratify a treaty on behalf of his state.

To facilitate the role of ambassadors and to enable them effectively represent their sending states, international law has developed treaties and practices aimed at protecting the person of the ambassador and giving immunity from civil and criminal processes. At the international level, the rights and privileges of the ambassadors are governed by the Vienna Convention on Diplomatic Relations, The Convention was adopted in 1961 and came into force in 1964. The functions and status of Consular Agents are governed by the Vienna Convention on Consular Relations adopted in 1963.

Articles 24 to 30 of the Diplomatic Convention outlines the privileges of a diplomat. For example, all members of the mission shall have freedom of movement and travel and free communication on the part of the mission for all official purposes. The person of the diplomatic agent is inviolable and the diplomatic bag shall not be opened or detained. The private residence of the diplomatic agent as well as the premises of the mission shall be inviolable. The diplomatic agent enjoys immunity from criminal jurisdiction of the receiving state. He also enjoys civil and administrative immunity except in cases of action relating to private immovable property, successions or professional or commercial activity.

Domestication of Treaties

The term domestication of treaties can loosely refer to the adoption of an international treaty by the state as part of its national domestic law. The process and procedure through which a treaty becomes part and parcel of national domestic law varies from country to country.

For example, in the United States of America, under her constitution, once a treaty has been ratified, it becomes part and parcel of the domestic law and citizens can derive rights and enforce the terms of the treaty. In Kenya as in the United Kingdom, even though a treaty can be ratified by the state, the treaty does not become part of the national domestic law until and unless Parliament enacts a statute adopting or incorporating the treaty into the laws of Kenya.

For example, the Treaty creating the East African Community though ratified was not part of Kenya's law until Parliament enacted the East African Community Treaty Act, Chapter 4 of the Laws of Kenya. Similarly, the Vienna Convention on Diplomatic Immunity though ratified was not part of Kenya's domestic law until the Privileges and Immunities Act, Chapter 179 of the Laws of Kenya. Likewise Chapter 198 of the Laws of Kenya titled Geneva Conventions Act, seeks to give effect to the Geneva Conventions of 1949.

Having examined the process of treaty making in international law, it is now prudent to focus on the treaty creating the European Union and African Caribbean Pacific Partnership.

Dispute settlement under treaty law

The expression "international disputes" covers not only disputes between states but also disputes between states and individuals and non state actors.

Broadly speaking, the methods of settling international disputes fall into two categories:

- (i) Peaceful means of settlement and
- (ii) Forcible or coercive means of settlement.

Peaceful or Amicable Means of Settlement

The peaceful or amicable means of settling international disputes are divisible into the following:

- a) Arbitration, (b) Judicial Settlement (c) Negotiation, good offices, mediation, conciliation or inquiry (d) settlement under the auspices of the United Nations Organization.

Arbitration involves the appointment of an arbitrator and submission of legal and factual issues to be determined by the Arbitrator. The arbitrator is freely chosen by the parties and he makes an award without being bound by strict legal considerations. A treaty may contain an arbitration clause whereby the parties agree to submit any dispute to an arbitrator. The Hague Conference of 1899 codified the international law on arbitration and set up The Permanent Court of Arbitration in 1907. This institution is peculiar in that it is not permanent and neither is it a court. Each state appoints four persons with

qualifications in international law to constitute a panel of arbitrators. When a dispute arises which two states desire to submit to arbitration by the Permanent Court, the following procedure is adopted: Each state appoints two arbitrators of whom only one may be its national or chosen from among the person nominated by it as members of the Court panel. These arbitrators then choose an umpire who is a presiding member of the arbitral tribunal. The award is given by majority vote. Each tribunal so created will act pursuant to a special compromise or arbitration agreement specifying the subject of the dispute and the procedure to be followed.

Arbitral procedure is more appropriate than judicial settlement for technical disputes, and less expensive and faster. The procedure is more flexible and strict adherence to legal technicalities is minimized.

Judicial settlement

By judicial settlement is meant settlement brought about by a properly constituted international judicial tribunal applying rules of law.

The only general organ of judicial settlement at present available is the International Court of Justice (ICJ) at the Hague. The Court is a permanent institution and an organ of the United Nations with its own statute and body of rules of procedure binding on all parties having recourse to the Court. It possesses a permanent registry, its proceedings are public and its records and judgements are published.

The Court is open to the states (members or non-members) of the United Nations parties to the statute of the Court and to other states on conditions laid down by the United Nations Security Council. It is ONLY states that can bring action before the court. Individuals are not parties to the ICJ Statute and cannot bring suit before the court. The Court's role is two fold: to decide contentious cases and to give advisory opinion.

The court has compulsory jurisdiction where the parties concerned are bound by treaties or conventions in which they have agreed that the Court should have jurisdiction over certain categories of disputes or where the parties concerned are bound by declarations made under the Optional Clause in paragraph 2 of Article 36. The Optional Clause provides that the parties to the Statute may at any time declare that they recognize as compulsory ipso

facto and without special agreement the jurisdiction of the court in all legal disputes concerning:

(a) interpretation of a treaty (b) any question of international law (c) the existence of any fact which if established would constitute a breach of international obligation (d) the nature or extent of the reparation to be made for the breach of an international obligation. This declaration may be made unconditionally, conditional on reciprocity or for a certain time only.

Negotiation, good offices, mediation, conciliation or inquiry

The above methods of settlement are less formal than the judicial mode. Both good offices and mediation are methods of settlement in which a friendly third state assists in bringing about amicable solution of a dispute. However, the mediating party can also be an individual or international organization. The difference between mediation and good offices is a question of degree. In good offices, a third party tenders its services in order to bring the disputing parties together and to suggest in general terms the making of a settlement without itself actually participating in the negotiations or conducting an exhaustive inquiry into the various aspects of the dispute.

Conciliation is a term that covers a great variety of methods whereby a dispute is amicably settled with the aid of other states or impartial bodies. In another sense, conciliation signifies the reference of a dispute to a commission or committee to make a report with the proposals to the parties for settlement. It is a process of formulating proposals of settlement after an investigation of the facts and an effort to reconcile opposing contentions, the parties to the dispute being left free to accept or reject the proposals formulated. In contrast, the object of inquiry is, without making specific recommendations, to establish the fact which may be in dispute and thereby prepare way for negotiated adjustment.

Settlement of disputes under the auspices of the United Nations Organization

The United Nations has a the responsibility for adjusting international disputes. One of the fundamental objects of the Organization is the peaceful settlement of differences between states and by Article 2 of the UN Charter,

Members of the Organization have undertaken to settle their disputes by peaceful means and to refrain from threats of war or the use of force.

In this connection, important responsibilities devolve on the General Assembly and the Security Council. The Assembly is given authority, subject to the peace enforcement powers of the Security Council, to recommend measures for the peaceful adjustment of any situation which is likely to impair general welfare or friendly relations among nations. (Article 24 of the Charter). More extensive powers have been conferred on the Security Council. The Council may at any state recommend appropriate procedures and measures or methods of adjustment for settling such disputes. Under Articles 41 to 47 of the Charter, the Security Council has the right to give effect to its decisions not only by coercive measures but also by use of armed force against states which decline to be bound by these decisions.

The UN Charter Article 2 (4) prohibits the use of force in settling international disputes.

Part Two: Nature and Impact of the Cotonou Agreement

The European Union-African Caribbean-Pacific relationship is based on a partnership principle. The partnership is centred on the objective of reducing and eventually eradicating poverty consistent with the aims of sustainable development and the gradual integration of the ACP countries into the world economy.

The Cotonou partnership is based on the notion of *equality of the partners* and ownership of the development strategies. The partnership seeks to encourage *ownership of the development strategies* by the countries and populations concerned (Article 2 of the Agreement). The Agreement reinforces the political foundations of the ACP-EU cooperation. *Political dialogue* is supposed to be deeper and wider. It will cover a broad range of political issues that fall outside traditional development cooperation including areas such as peace building and conflict prevention.

Extension of Partnership to New Actors

A new feature of the Cotonou Agreement over and above the previous Lome Conventions is the participation by non-state actors. Previous Lome Conventions gave these actors few opportunities to influence policies or gain access to resources.

Apart from the central government as the main partner, the partnership is open to different kinds of other actors in order to encourage the integration of all sections of society including the private sector and civil society organizations. In this participatory approach, dialogue is the pivotal mode of fulfilment of the mutual obligations.

Article 6 of the Partnership Agreement states that the actors of cooperation shall include:

- (a) State (local, national and regional) and
- (b) Non-state actors namely; private sector, economic and social partners including trade union organizations and civil society in all its forms according to national characteristics.

The new actors, where appropriate, will be informed and consulted on cooperation policies and strategies. They will also be provided with financial resources to support local development process and be involved in the implementation of projects and programmes that concern them or where they have a comparative advantage. The actors will also be provided with capacity building support in critical areas in order to reinforce their capabilities particularly as regards organization and representation and establishment of consultation mechanisms.

The new spirit of democratisation and popular participation of the civil society embodied in the Cotonou Agreement underscores a new role for governments being that of a facilitator and not that of controller or regulator. However, the Agreement still leaves considerable power in the hands of individual ACP states in determining which non state actors are to be involved in the ACP-EU cooperation activities and the basis upon which they are to become involved.

It is worth noting that although both Parties to the Partnership Agreement have committed themselves to establishing a more pluralist partnership, the text is vague on the precise ways to implement it. For example, how will the new actors be involved in dialogue and programming? Who will decide on which non state actors will be involved in future ACP-EU cooperation? To what extent will the non state actors be able to gain access to resources? How can civil society and private sector organization be strengthened so that they can achieve greater legitimacy and become more representative? These and other conceptual matters need to be operationalized within the context of the Partnership Agreement.

It suffices to observe that the extent to which participation in the ACP-EU cooperation will actually be broadened out to bring in representative non-state actors will in large part be determined by:

- the extent to which individual ACP governments are open to involving non-state actors;
- the extent to which non state actors are adequately equipped to meaningfully participate in the ACP-EU cooperation process and
- the specific arrangements to be set in place for drawing non -state actors into the ACP-EU cooperation process.

Recognizing that the representative of the European Union in the ACP state is the EU Delegate, it is recommended that non state actors should collectively seek a meeting with the EU Delegate to discuss how non state actors, on a practical level, can be drawn into ACP-EU cooperation activities.

Conceptually, the non state actors can be involved at two levels: (i) an initial involvement in the national debate on development priorities in an organized and constructive manner and (ii) the actual involvement of non-state bodies in the design and implementation of specific development cooperation activities.

A practical constraint is that involving non state actors into the process of drawing up the Country Support Strategy, the indicative programme and the

annual reviews will require a significant level of financial and logistical assistance. As a consequence, bringing non state actors at the initial stages might prove difficult and a painful process and considerable time will be needed.

Differentiation and regionalisation

The EU-ACP relationship recognizes that cooperation arrangements and priorities vary according to a partner's level of development, its needs, performance and its long term development strategy. Emphasis is placed on the regional dimension and special treatment is given to the least-developed countries. The vulnerability of landlocked and island countries is also taken into account.

Articles 29 and 30 of the Partnership Agreement focuses on regional issues in the EU-ACP cooperation. One aim is to foster the participation of LDC ACP states in the establishment of regional markets and sharing the benefits derived therefrom. Account shall also be taken of net transitional costs of regional integration on budget revenue and balance of payments.

Political dimensions

In the Cotonou Agreement, political dimension in the EU-ACP relationship is a recent phenomena and a positive strength in deepening the partnership. The cooperating parties undertake to engage in comprehensive, balanced and deep political dialogue.

The aim of the dialogue is to exchange information, foster mutual understanding and facilitate the establishment of agreed priorities and shared agendas (Article 8 of the Partnership Agreement). Broadly based policies to promote peace and to prevent, manage and resolve violent conflicts shall play a prominent role in this dialogue. The dialogue is geared to be formal or informal according to the need. The flexibility built in the dialogue process is a major strength to the EU-ACP relationship. Regional and sub-regional organisations as well as representatives of civil society are to be associated with the dialogue.

Essential element clause

As an essential element, respect for human rights, democratic principles and the rule of law underpin the EU-ACP relationship. In the context of the democratic principles and rule of law, good governance and transparency and critical.

Good governance is defined to entail clear decision making procedures at the level of public authorities, transparent and accountable institutions, primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming at preventing and combating corruption.

Peace-building policies, conflict prevention and resolution

For the first time in the formal EU-ACP relationship, peace building and conflict prevention have been taken aboard as items for cooperation. The parties shall pursue an active, comprehensive and integrated policy of peace-building and conflict prevention. This policy is based on the principle of ownership. It focuses on building regional, sub-regional and national capacities and on preventing violent conflicts at an early stage by addressing their root causes in a targeted manner (Article 11.1 of the Partnership Agreement).

The activities in the field of peace building and conflict prevention shall include support for balancing political, economic, social and cultural opportunities among all segments of society for strengthening the democratic legitimacy and effectiveness of governance and for establishing effective mechanisms for the peaceful conciliation of group interests for bridging dividing lines among different segments of society. Support for mediation, negotiation and reconciliation efforts shall be given.

In cases of violent conflict, the parties shall take suitable action to prevent intensification, limit territorial spread and facilitate peaceful settlement of disputes. In post-conflict situations, action shall be taken to facilitate return to a non-violent, stable and self-sustainable situation.

Youth and Gender Issues

The Partnership Agreement seeks to foster cooperation in the support and establishment of a coherent and comprehensive policy for realizing the potential of youth so that they are better integrated into society to achieve their full potential. In this context, the cooperation shall support policies, measures and operations aimed at protecting the rights of children and youth particularly the girl child, promoting skills, energy and innovation among the youth and helping community based institutions to give children the opportunity to develop their physical, psychological, social and economic potential and re-integrating society children in post conflict situations through rehabilitation programs.

As regards gender issues, the EU-ACP cooperation shall strengthen policies and programmes that improve, ensure and broaden the equal participation of men and women in all spheres of political, social economic and cultural life. Cooperation shall improve access of women to all resources required for the full exercise of their fundamental rights.

Capacity building

A further strength of EU-ACP partnership cooperation pertains to capacity building initiatives. The cooperation seeks to develop and strengthen structures, institutions and procedures to help in sustaining human dignity and democracy, social justice and pluralism and ensure a transparent and accountable governance and administration in all public institutions. The parties shall work to fight against bribery and corruption in all their societies. The cooperation shall also assist to restore and/or enhance critical public sector capacity; to develop legal and regulatory capabilities needed to cope with the operation of a market economy, improving capacity to analyze, plan, formulate and implement policies and modernising, strengthening and reforming financial and monetary institutions.

Of significance is the aim to develop capacity in critical areas such as international negotiations and management and coordination of external aid.

Openings for the Private Sector

The new Partnership Agreement explicitly recognises the role of the private sector as an engine for development. A comprehensive and integrated

programme of action to support the business sector is outlined at the macro, meso and micro levels. For the first time, the private sector will have access to funds from the European Investment Bank (EIB) without requiring a State guarantee. A new facility aims to stimulate regional and international investment and to strengthen the capacity of local financial institutions. It will also encourage foreign investment and contribute to private sector development through project financing and support for commercially viable enterprises.

Article 58 of the Partnership Agreement delineates entities eligible for financial support. Agents of decentralized cooperation and other non state actors are eligible. In addition, companies, firms and other private organizations and private operators are qualified. Also included in the list are national and/or regional public or semi public agencies, departments or local authorities of the ACP states and in particular their financial institutions and development banks.

Stabex and Sysmin

One of the immediate changes introduced by the Partnership Agreement is the abolition of the Stabex and Sysmin Scheme and the Rum Protocol. However, Article 68 makes provision for a system of support to mitigate adverse effects of any instability in export earnings. Such support is now within the financial envelop for support to long term development. Support shall also be extended for market based insurance schemes designed to protect ACP states against risk of fluctuations in export earnings. (Article 68.5 of the Partnership Agreement).

Trade Cooperation

In the area of trade cooperation, the new Cotonou ACP-EU agreement is essentially an agreement to maintain the status-quo temporarily while negotiating future trade arrangements.

Notwithstanding that the Lome IV trade arrangements have been maintained temporarily, the new agreement remains a difficult and complex agreement for ACP economic operators to be able to effectively utilize. The Cotonou Agreement does not define the new trade relations between the EU and the

ACP states. Thus there is no specific post Lome ACP-EU Trade regime.

The Partnership Agreement states that the Parties agree that the new trading arrangement shall be introduced gradually and recognize the need for a preparatory period. *The Agreement has new trade provisions covering two areas. Firstly, the basis for the ACP-EU trade relations for the coming 8 years. Secondly, the basis for negotiation of longer-term WTO compatible trade arrangements.* The first component extends the existing non reciprocal trade preferences until 1st January 2008. The second component includes a commitment to introduce wherever possible, moves towards the establishment of a reciprocal trade preferences between the EU and the ACP states.

The non-reciprocal trade preferences under the 4th Lome Convention is to be maintained during the preparatory period for all the ACP countries (Article 36.3 of the Agreement). However, several issues that will affect the new trade regime stand out clear in the Partnership Agreement.

- (i) The all-ACP preferential regime will be *split into several trade and economic cooperation agreements*. In each of these, the different ACP countries and regions will be treated differently by the EU.
- (ii) The new regime shall be *WTO compliant*. The Partnership Agreement makes the rules of the WTO part and parcel of any new trade regime. For example, the parties agree to review the new trading arrangement to be compatible with the WTO (Article 36.4). Cooperation under the international fora shall also be in line with the WTO rules.
- (iii) *Reciprocity and non discrimination* principles will paly a major role in the new trade regime.
- (iv) *A preparatory period* whereby the current all ACP non-reciprocal tariff preferences is to be maintained until 31st December 2007 (Article 37.1 of the Agreement). Formal negotiations of the new trading arrangement shall start in September 2002 and new trading arrangement to enter into force by 1st January 2008 (Article 37.1). These Economic Partnership Agreements (EPA) will be reciprocal and WTO compatible.

However, not all ACP countries will have to open their own markets to EU products after 2008. The least developed (LDCs) are entitled to keep

Lome or even a slightly improved version of it. Non LDC's who do not enter into Economic Partnership Agreements could be transferred to the EU Generalised System of Preferences, a non-reciprocal set of preference less generous than Lome.

From the foregoing, the opportunity presented to the ACP states under the Cotonou trade arrangement is thus two fold; namely maintenance of status quo till January 2008 and the chance to negotiate new reciprocal trade preferences after 2007. The ACP states should thus maximize their preferential trade gains before the expiry of the status quo period. While it is difficult to see how these provisions could be given precedence over the commitment to full conformity with the WTO, it nevertheless provides some leeway for ACP governments to negotiate with the EU over the basis upon which future trade relations are to be established.

One area in which the Cotonou Agreement maintains the status quo with modification relates to the transition trade arrangements. The status quo arrangement is that until January 2008, the ACP exporters will continue to enjoy duty free access for exports to the EU market of all goods deemed to originate in ACP countries. *The modification introduced deals with issues of cumulation and administrative procedures. This per se is an opportunity for East Africa. The cumulation provisions allow a good produced (originating) in one ACP country to be treated as if it were a good produced (originating) in any ACP country. This allows one ACP state to use inputs produced in a second ACP country. This encourages trade and cooperation between ACP states with different resource endowments.*

As regards the Commodity Protocols, the Cotonou Agreement re-affirms the importance attached to the protocols *but there is need to review them as regards their compatibility with WTO rules and with a view to safeguarding the benefits derived therefrom, bearing in mind the special legal status of the sugar protocol. This is a challenge to the East African States particularly Kenya that has a beef and sugar quota.*

New Trade Arrangement to be defined

The Cotonou Agreement is premised on the basis that a new trade arrangement between the EU and ACP states shall be in place in January 2008. Specifically,

Economic Partnership Agreements will be negotiated with ACP countries which consider themselves in a position to do so. The EPA shall be WTO compatible. The process of negotiating EPA shall take account of the level of development and the socio-economic impact of trade measures on ACP countries and their capacity to adapt and adjust their economies to the liberalisation process.

The constraint and challenge for the ACP states is to initiate establishment of a unique and innovative free trade agreement with the EU that addresses development concerns. This arrangement should recognize the centrality of Agriculture in ACP countries in terms of poverty alleviation and meeting basic needs. There should not be an arrangement that distorts agricultural products and to this end, the ACP states should start identifying products that are very sensitive. The rules of origin should also be relaxed to stimulate ACP exports to the EU. The financial development and aid issues should be made integral to the EPA.

Integration of TRIPS, GATS and Phytosanitary issues into the Partnership Agreement

The Partnership Agreement in efforts to be WTO compliant has incorporated the WTO regime on trade in services and trade related intellectual property rights into its system. Articles 41 and 46 blend the GATS and TRIPS Agreements into the Partnership Agreement. Issues related to competition policy, maritime transport and the WTO phytosanitary rules are also integrated into the Agreement. The integration of these new issues is a constraint and challenge to ACP states. A new set of legislations and regulatory mechanism must be enacted by ACP states that this translates into a huge financial technical and financial burden to these countries. It has been argued that multilateral discipline in these areas shall enhance global trade. No empirical evidence is available to prove or disprove this assertion.

Financial and technical cooperation

Under the Lome IV, funds were made available through a range of cooperation instruments and a number of joint institutions. The instruments fell into three broad categories:

- programmable assistance;

- non-programmable assistance;
- loan financing.

Programmable resources were allocated geographically at the beginning of each five year financing cycle. How the money allocated for development co-operation activities in each ACP country was to be used, was the subject of joint discussion between the European Commission and the government of each country. This discussion came to be known as the indicative program. Once the indicative program was agreed and approved, it became known as the National Indicative Program. In contrast, non-programmable resources were allocated not on a geographical basis, but on issue specific basis. While programmable aid was intended to support long term development, non-programmable assistance was intended to assist ACP states in addressing short term problems which could drive long term development efforts off course.

Under Lome IV, the aid instruments were:

Programmable Instruments: National indicative programme and Regional Indicative Programme.

Non-programmable Instruments: Stabex, Sysmin, Structural Adjustment Support, Emergency Aid and Aid to Refugees and Returnees.

Loan Instruments: Interest Rate Subsidies; Risk Capital Loans, and Own Resources Loans;

Joint Institutions: Centre for the Development of Industry (CDI) and Centre for Technical Cooperation in Agriculture (CTA).

In the Cotonou Agreement, the above Lome IV system for aid instruments were felt to be too cumbersome and distorting the aid process. As a consequence, *the new Cotonou Agreement establishes only 2 basic aid instruments: a facility for long term development cooperation and an investment facility.* Under the long term facility, each country will receive a country allocation in two parts: *a base case* element which will cover projects and programmes similar to those available under the earlier Lome programmable aid and structural adjustment support and *a high case* which will cover unforeseen needs and provide addition funding to countries which are successfully implementing cooperation activities.

Performance-based Aid management

An innovation of the Cotonou Agreement is that future aid will be allocated according to assessment of each country's needs and performance, combined with regular adjustments through a system of "rolling programming". The needs of each country will be based on:

- per capita income;
- population size;
- social indicators;
- level of indebtedness;
- concentration of dependence on export earnings;
- export earning losses.

The criteria for performance is open. It will be assessed in an objective and transparent manner on the basis of progress in implementing institutional reforms, performance in the use of resources, and macroeconomic and sectoral policy performance. For example, Article 61.2 of the Agreement notes that direct budgetary assistance shall be granted where public expenditure management is transparent, accountable and effective and public procurement is open and transparent. In terms of projects and programs, regard shall be paid to its economic and financial return as well as its social and cultural impact.

Under the new agreement, a system of rolling programming has been introduced. This involves the identification of specific activities to be financed in 2 year blocs, within a 5 year rolling programme for the deployment of EU assistance. Each year, the two-year planning horizon will move forward one year with the possible modification of areas of activity and resources made available. Every two to three years, there will be a strategic performance review which could change the direction of the programme and the volume of aid.

The Investment Facility under Cotonou will replace the Lome Risk Capital and Own Resource Loans which was administered by the EIB under Lome IV. It will not compete with existing financial institutions rather it is hoped that the new facility could provide funds which would act as leverage in mobilizing other forms of investment. The main purpose of the facility will be to directly finance enterprises, indirectly finance enterprises through local financial institutions, support privatization process and provide private infrastructure financing.

Food security

Article 54 of the Partnership Agreement makes provisions for food security as an item of cooperation between EU and the ACP states. The Community undertakes to ensure that export refunds can be fixed further in advance for all ACP states in respect of a range of products drawn up in the light of the food requirements expressed by those states. Specific agreements may be concluded with those ACP states which so request in the context of their food security policies.

Consultation, corruption procedure and Dispute settlement

Under the Partnership Agreement, when the Community is a significant partner in terms of financial support to economic and sectoral policies and programmes, serious cases of corruption should give rise to consultations between parties.

If consultations do not lead to a solution acceptable to both parties or if consultation is refused, the Parties shall take appropriate measures. In selection of appropriate measures, priority is to be given to those measures that least disrupt the application of the Partnership Agreement and suspension would be a measure of last resort (Article 97.3 of the Agreement).

The Partnership Agreement has come up with a dispute settlement mechanism within the EU-ACP relationship. Any dispute arising from the interpretation or application of the Agreement is to be submitted to the Council of Ministers. If a dispute exists between meetings of the Council of Ministers, such disputes shall be submitted to the Committee of Ambassadors. If the Council of Ministers does not succeed in settling the dispute, either party may request the settlement of the dispute by arbitration.

Duration of the Agreement and Denunciation clause

Article 95 stipulates that the Partnership Agreement shall be in force for 20 years. Financial protocols shall be defined for each five-year period. Under Article 99, a party may denounce the Agreement.

Challenges to the EU-ACP Relationship

Whereas the EU-ACP relationship has been in existence for decades, the continued prosperity and beneficial impact of the relationship is faced with various challenges. Some of the challenges that lie ahead are international

in character while others are national. Some indeed are political yet others are socio-economic. Of cardinal importance, the thrust is how to ensure that the relationship is mutually beneficial and positive to the cooperating partner states.

(i) Integrating Non-state-actors

Recognizing that the non state actors are now partners in cooperation, one of the challenges is how to integrate these actors and make Partnership resources available to them. This challenge extends to how to draw up the Country Support Strategy with input from non state actors and how to ensure a transparent, comprehensive and realistic criteria for choosing participating NGOs.

(ii) Administrative burdens

The policy dialogue embodied in the Cotonou Agreement is likely to impose a considerable administrative burden on ACP states. The implementation of review, needs and performance criteria all have technical and fiscal implications which developing ACP states may not have.

(iii) Challenge of Enhancing East African Competitiveness

The trade provisions of the Cotonou Agreement permit the introduction of reciprocal trade relations with the EU at the end of the transitional period. To this end, the East African countries should be ready to enhance their competitiveness with other developing country products for access to the EU market. This is the challenge in the trade area. Against this background, it is an open question whether the deployment of declining volume of EDF resources (in real terms) will prove sufficient to enhance ACP competitiveness to such a degree to enable individual ACP enterprises to be able to compete with far larger EU enterprises under conditions of free trade.

(iv) Uncertain impact of Economic Partnership Agreements (EPA)

The other challenge relates to the future of Economic Partnership Agreements between the EU and the ACP states.

The impact of EPA remains uncertain. Supporters of EPA's stress their expected positive impact on:

- attracting EU foreign direct investment into ACP;
- "locking in" the process of trade liberalisation; and
- helping restructure ACP economies by a combination of trade-induced incentives and financial and technical support.

It is unclear whether EPA's will:

- generate extra profit margins for European exporters instead of lower prices for ACP importers;
- cause sharp drops in tariff revenues, difficult to offset by diversification of fiscal revenues in the short to medium term;
- push ACP countries to liberalise their trade at a pace and to an extent less optimal than could be achieved unilaterally;
- make regional integration among the ACP more complicated due to differential treatment of states by the EU to LDC's and non-LDC's; and
- keep ACP attention focused on bilateral, power-driven trade relations, rather than on the rule based multilateral WTO system.

(v) Redefining Liberalisation:

Markets must work within a viable regulatory framework, including selective and time-bound protection (particularly for infant industry and agriculture), investment controls, measures against dumping and import surges, and competition policy. EU countries are currently at the forefront of advocating the Multilateral Agreement on Investment (MAI) which would strip ACP countries of regulatory discretion with regard to foreign investment. The impact of such an Agreement on the ACP states should carefully be noted.

(vi) Investment in Human Capital:

The presence of an adequate, skilled, competent and effective human resource base is one of the key ingredients to development. Access to information and technology by the human resource sector is crucial. The challenge of the EU-ACP relationship is to ensure that trade development should not be seen as end in itself but a means to complement social investment in primary education by providing funds for relevant vocational and on-the-job training. In particular, support should be given to education and vocational training measures specifically designed to equip women to compete for skilled vocational training measures specifically designed so that they may favourably compete in the employment market.

(vii) Diversification:

ACP countries need investment to promote growth and comparative advantage in higher value-added sector. Diversification of products and processes should seriously be considered. In addition, the value added processing mechanisms and issues of technology transfer need to be addressed.

(viii) Commodity Stabilisation Mechanisms:

Given the high level of dependence of the ACP states on particular commodities coupled with the worsened conditions of commodity markets, there is need to examine the Partnership provisions on stabilization of exports.

(ix) Technology:

Technologically backwards countries of the ACP states risk becoming chronic under-performers as technology is a key determinant of the future of productive employment and income distribution. The trade-related intellectual property rights (TRIPS) measures at the WTO seem designed to open up all kinds of technological innovations, including indigenous knowledge and traditional coping mechanisms to appropriation by transnational corporations as well as shielding self-same TNCs from any responsibility to respond to the needs for application of such technology and knowledge. The challenge of the ACP-EU partnership is to build a mutual resolve to challenge this at the WTO, and support the ACP countries in demand for fair and appropriate technology transfer.

(x) Environment

Cooperation between the EU and ACP states would not be complete without due regard to the issue of environmental protection. As new technologies are introduced in agricultural production and as protective measures continue to be dismantled, allowing foreign investors more accessibility to market and natural resources, we are likely to witness further environmental degradation. Consequently, one of the challenges ahead is to ensure that the cooperation between the EU and ACP states is sensitive to environmental issues. The Partnership Agreement on Sanitary and Phytosanitary measures as well as the provisions on Consumer Protection go along way in addressing this concern. In particular, the challenge is how to implement and effectively operationalize the provisions of Article 49 of the Agreement that seeks to promote international trade in such a way as to ensure sustainable and sound management of the environment in accordance with international conventions and undertakings.

Challenges for East Africa on specific issues

In addition to the above referred to challenges, for the East African states, the EU-ACP relationship is braced to face hurdles on specific issues. These can be enumerated as follows:

1. Recognising that REPA may be the way forward in a EU-ACP trade regime, it is important to take stock of the net transitional costs of regional integration and equitable distribution of benefits emanating from REPAs. The challenge is how to ensure equitable distribution of benefits.
2. The East African Governments, as potential partners in a EAC-EU REPA, need to maintain a conducive environment for production and export of goods and services. Constraints affecting the supply side require urgent attention.
3. The private sector needs to be integrated into the negotiation forums and be included in the negotiating delegations. Consultations with the private sector is not enough.
4. East African states need to improve their competitiveness in global markets. Focus should be on improving the quality, packaging, presentation and value added of export products.
5. Producers and exporters need to address the increasing market concerns on issues such as environment, labour and business ethics through establishment and adherence to Codes of Conduct and Practice.
6. Opening up an economy is painful in the short run. There are economic, social and political implications to consider. In the long run, there are gains to be attained.
7. The East African countries effort in trade liberalization should be done within the framework of the WTO trade arrangement.
8. A challenge facing the Post Lome system is how to make the new arrangement WTO compliant. If RTA or REPA is formed, this would easily fit in line with the WTO Customs Union exception. A REPA system is feasible if there is a high degree of integration between the states and a pre-condition for this is the establishment of a Free Trade Area amongst the integrating states.
9. A critical analysis should be done to examine the consequences of introducing a REPA between the EU and EAC states. A preliminary finding indicates that:

- (a) REPA is likely to reduce inter-EAC Kenyan exports since it is a major exporter of processed products within the region.
- (b) With REPA, Uganda and Tanzania as LDCs would continue to enjoy access to European markets on the current preferential terms.
- (c) Maintenance of Kenya's current preferential terms can only be guaranteed under a REPA. Therefore the cost of non-participation by other EAC states would be borne disproportionately by Kenya.
- (d) If Kenya is not able to negotiate a REPA, its exports will access the EU under the GSP preferences at slightly higher prices leading to reduced competitiveness and possible loss of market.