*THE NATIONAL TREATMENT RULE AND THE REGULATION OF PUBLIC PROCUREMENT UNDER THE EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL**

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ABSTRACT

Public procurement constitutes a significant socio-political and economic tool in the hands of governments as regulators and major consumers. Through it, a government may achieve both national and international goals. Governments, therefore, tend to have a strong incentive to adopt inward-looking policies on public procurement for the benefit of local suppliers, products and services. To mitigate this, the East African Community (EAC) Common Market Protocol makes provision for non-discrimination by prohibiting discrimination against suppliers, products or services from other partner states in public procurement. This article looks at the law and practice in the East African Community and among the partner states relating to the application of the non-discrimination rule in public procurement under article 35 of the EAC Common Market Protocol. From the discussion, it is apparent that both the EAC and the partner states are yet to eliminate discrimination in public procurement through their laws and policies.

Keywords: East African Community Common Market Protocol; public procurement; non-discrimination in procurement; article 35 of the EAC Common Market Protocol

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I INTRODUCTION

In 2010, the East African Community (EAC) adopted the Protocol on the Establishment of the East African Community Common Market (EAC Common Market Protocol) to operationalise the provisions of the EAC Treaty relating to the Common Market. Article 35 of this Protocol prohibits partner states from discriminating against suppliers, products or services from other partner states in public procurement. This article seeks to review the law, policies and practice in the EAC and among the partner states on the application of the non-discrimination rule in public procurement under article 35 of the EAC Common Market Protocol. It argues that the current EAC legal framework on discrimination against suppliers, products and services on the basis of nationality is not sufficient and that its implementation has been unsatisfactory. Proposals on how to alleviate these problems will be advanced.

This article is divided into six sections. This section, section one, provides a general introduction to the issues under discussion. Section two provides a historical context for the arguments made. Section three discusses the World Trade Organization (WTO) and the EAC instruments on public procurement given that all EAC partner states are members of the WTO. Section four reviews the European Union (EU) laws on public procurement and provides a comparative lens on the EAC scheme of things. Section five analyses the law and practice on public procurement at EAC partner states level. It also discusses the extent to which national legislations and policies comply with the non-discrimination rule under article 35 of the EAC Common Market Protocol. Section six outlines the conclusions that may be drawn from the discussion and offers key recommendations.

II BACKGROUND

The East African Community is the regional economic co-operation arrangement involving Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan. It was established in 2000 under article 2(1) of the Treaty for the Establishment of the East African Community (EAC Treaty). The current EAC represents the second time that the East African countries are seeking to integrate. The first attempt ran from 1966 until 1977, when the community was dissolved. Cooperation activities that led to the revival of the EAC started with the signing of the agreement for the establishment of a Permanent Tripartite Commission for East African Co-operation on 30 November 1993. This agreement was later upgraded to the EAC Treaty in 1999, which took effect in 2000.

The main objective of the EAC is to widen and deepen cooperation among the partner states in 'political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs' through the establishment of a Customs Union, a Common Market, a Monetary Union and a Political Federation.[1] These are the four key pillars of integration in the bloc which appear to have been deliberately arranged in a hierarchical order based on priority for implementation. It was envisaged to start with the creation of a Customs Union and a Common Market (short-term goals) followed by a Monetary Union (medium-term goal) and ultimately, a Political Federation as the last stage (long-term goal).[2]

The inclusion of a Political Federation as the ultimate goal of integration in the EAC has been viewed as seeking a very deep extent of integration not envisaged in many other regional integration arrangements in Africa; not even seen in previous cooperation attempts within the East African region.[3]

At present, the first three pillars of integration have been operationalised to varying degrees. The Customs Union and the Common Market are, in terms of setting up the implementing infrastructure, at fairly advanced stages despite constant drawbacks and disputes. The Monetary Union was created through the Protocol on the Establishment of the East African Community Monetary Union (EAC Monetary Union Protocol), which was adopted in 2013. However, implementation of the EAC Monetary Union Protocol remains unsatisfactory, with key institutions having not been formed and the community generally falling behind targets laid down in the roadmap for the creation of the EAC Monetary Union, which was envisaged for full implementation by 2024.[4]

Interestingly, unlike the other three pillars of integration within the EAC, the EAC Treaty does not contain elaborate provisions on the planned Political Federation, which will be the final stage of EAC

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1 Article 5, Treaty for the Establishment of the East African Community.

2 Article 5(2), Treaty for the Establishment of the East African Community; article 5(1), Protocol on the Establishment of the East African Community Monetary Union.

3 Wanyama Masinde & Christopher Otieno Omolo 'The road to East African integration' in Emmanuel Ugirashebuja et al (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) 17–18.

4 Trademark 'EAC Monetary Union realisation hangs in balance', available at *https://www.trademarkea.com/news/eac-monetary-union-realization-hangs-in-balance*, accessed on 6 April 2019.

integration.[5] Progress on this front has also been very slow[6] and, in fact, in 2017, the Summit, which is the highest organ of the EAC, decided that the EAC should instead seek political confederation as a transitional step towards political federation.[7] Earlier attempts to draft and adopt a constitution for the EAC Political Federation were unsuccessful. Notwithstanding this, efforts to create a constitution for the political confederation have not started due to delays by partner states in nominating experts to work on it.[8]

Under article 74, the EAC Treaty establishes the East African Trade Regime made up of a Customs Union[9] and a Common Market.[10] The Common Market is supposed to facilitate free movement of labour, goods, services, capital and the right of establishment while the Customs Union is designed to promote liberalisation of intra-regional trade in goods through eliminating internal taxes and non-tariff barriers and adopting a common external tariff. In 2010, the EAC adopted the Protocol on the Establishment of the East African Community Common Market (EAC Common Market Protocol) to operationalise the provisions of the EAC Treaty relating to the Common Market. Article 35 of the EAC Common Market Protocol prohibits partner states from discriminating against suppliers, products or services from other partner states in public procurement.

Article 35 of the EAC Common Market Protocol does not, however, represent the first attempt to establish an EAC public procurement

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5 East African Community Legislative Assembly, Report of the Committee on Legal, Rules and Privileges on the Assessment of Adherence to Good Governance in the EAC and the Status of the EAC Political Federation, 2–29 January 2014, available at *http://www.eala.org/documents/view/adherence-to-good-governance-in-the-eac-and-the-status-of-the-eac-political*, accessed on 6 April 2019.

6 EAC 'Political federation', available at *https://www.eac.int/political-federation*, accessed on 6 April 2019.

7 EAC Joint Communiqué: 18th Ordinary Summit of Heads of State of the East African Community 20 May 2017, available at *https://www.eac.int/communique/847-jointcommuniqu%C3%A9-18th-ordinary-summit-of-heads-of-state-of-the-east-african-community*, accessed on 7 April 2019; EAC 'Political federation' op cit note 6.

8 Trademark 'EAC Political Federation Agenda on Drawing Table', available at *https://www.trademarkea.com/news/eac-political-federation-agenda-on-drawing-table*, accessed on 6 April 2019; EAC 'Towards political federation in the East African Community: Achievements and challenges', available at *http://eacgermany.org/wp-content/uploads/2015/03/Achievements-and-Challenges-Towards-EAC-Politcal-Federation.pdf*, accessed on 6 April 2019; EAC Joint Communiqué: 19th Ordinary Summit of Heads of State of the East African Community 23 February 2018, available at *https://www.eac.int/communique/1001-joint-communiqu%C3%A9-19th-ordinary-summit-of-heads-of-state-of-the-east-african-community*, accessed on 7 April 2019; TRALAC '20th Ordinary Summit of Heads of State of the East African Community: Joint Communiqué' 1 February 2019, available at *https://www.tralac.org/news/article/13879-20th-ordinary-summit-of-heads-of-state-of-the-east-african-community-joint-communique.html*, accessed on 7 April 2019.

9 Article 75, Treaty for the Establishment of the East African Community.

10 Article 76, Treaty for the Establishment of the East African Community.

law. Under the defunct EAC (1966-1977), Kenya, Uganda and Tanzania had adopted the use of the East African Supplies Manual.[11] The Manual detailed procedures to be applied by the public sector when purchasing goods and services: its use was terminated by the collapse of the EAC in 1977.[12]

Public/government procurement refers to the purchasing or hiring of goods and services by the public sector through contractual means.[13] Public procurement constitutes a significant share of total government expenditure. In developing countries, like the EAC partner states, it might make up the largest domestic market.[14] Consequently, the management of public procurement has significant socio-economic and political roles to play in a country or region. For example, a government can use its public procurement policies to bolster strategic sectors of the economy and to achieve national political goals[15] so as to promote domestic industry or enhance provision of essential services to the masses. This partly political role of public procurement provides an incentive to governments to adopt inward-looking policies.

Discrimination in public procurement, typically, involves situations where governments, in acquiring goods and services, grant more favourable treatment to domestic suppliers, products and services compared to foreign suppliers, products and services. The discrimination may be direct or indirect. Direct discrimination occurs where the procuring entity discriminates outright against foreign suppliers, products and services. This could take the form of 'preferential price margin schemes' or 'local content requirements'. Through a 'preferential price margin scheme', a procuring entity would

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11 W Odhiambo & P Kamau 'Public procurement: Lessons from Kenya, Tanzania and Uganda' (2003) 208 Working Paper.

12 Ibid.

13 Robert E Lloyd & Clifford P McCue 'What is public procurement? Definitional problems and implications' (2004) 3 International Public Procurement Conference Proceedings, available at *https://www.researchgate.net/publication/237538383_WHAT_IS_PUBLIC_PROCUREMENT_DEFINITIONAL_PROBLEMS_AND_IMPLICATIONS*, accessed on 7 April 2019; Sue Arrowsmith 'Public procurement: Basic concepts and the coverage of procurement rules' in Sue Arrowsmith (ed) *Public Procurement Regulation,* EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation report July 2010, available at *https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf*, accessed on 7 April 2019.

14 Megan A Kinsey 'Transparency in government procurement: An international consensus?' (2004) 34 *Public Contract Journal* 155 at 156; J M Migai Akech 'Development partners and governance of public procurement in Kenya: Enhancing democracy in the administration of aid' (2005) 37 *New York University Journal of International Law* 829 at 830.

15 Victor Mosoti 'The WTO Agreement on Government Procurement: A necessary evil in the legal strategy for development in the poor world?' (2004) 29 *University of Pennsylvania Journal of International Law* 593 at 599.

consider a bid by a local supplier over a foreign supplier where the local supplier's prices, though higher, do not exceed a stated margin.[16] The effect of this is to devalue prices as provided by local suppliers to enable them to qualify for tenders. 'Local content requirements', on the other hand, would obligate suppliers, products and services to incorporate a percentage of local products or participation. The local content may be a requirement for a supplier to purchase some goods locally, to employ locals or to enlist local shareholding based on a provided threshold for determining localness.

Indirect discrimination mostly takes subtle approaches and may arise from various administrative practices or other factors that make it more onerous for foreign suppliers and products to fairly compete with local ones.[17] Examples of this could include technical specifications that have an inevitable regional or local bias or unreasonably short timelines that make participation of foreign suppliers impractical. The national treatment rule prohibits discrimination between local and foreign goods, services, products and suppliers once they have complied with customs and border control measures.[18] It also prohibits discrimination against goods and services on account of nationality or local affiliation to ensure fairness in international trade relations. It contributes to the elimination of restraints to international trade by limiting the manner in which states can apply their internal regulations to cross-border trade. This rule has been incorporated into a number of regional and international legal instruments,[19] including those that make up the EAC legal framework.

Supporters of discrimination in public procurement argue that discrimination by governments in favour of local suppliers, local goods and local services is mainly based on the desire by governments to use their influence as major consumers and regulators to achieve nationalistic goals. These goals may include industrial, social, economic and political objectives.[20] Industrial objectives may include a government's desire to promote growth in local industries or particular sectors, such as support for small and

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16 Simon Evenett & Bernard Hoekman 'Government procurement: How does discrimination matter?', available at *https://www.iatp.org/sites/default/files/Government_Procurement_How_Does_Discrimination.htm*, accessed on 1 April 2019; Francis Ssennoga 'Examining discriminatory procurement practices in developing countries' (2006) 6(3) *Journal of Public Procurement* 218 at 219.

17 Evenett & Hoekman op cit note 16.

18 John H Jackson 'National treatment obligations and non-tariff barriers' (1989) 10 *Michigan Journal of International Law* 207 at 209.

19 Ibid.

20 Ssennoga op cit note 16.

medium-sized enterprises (SMEs).[21] Social objectives may include economic empowerment of disadvantaged groups like women, ethnic minorities, the youth and persons with a disability. Economic objectives may include the desire to reduce expenditure on imports, promote export trade, create jobs and promote confidence in local supplies and suppliers.[22]

Governments have a political role to play in their territories. Public procurement is not solely motivated by the desire to procure goods and services as is generally the case in private procurement. There are other secondary but equally important considerations that come into play.[23] Through public procurement, governments use public resources to meet developmental goals like the development of infrastructure and the provision of health care.[24] It is also argued that preference for local suppliers may be used as a tool by governments to force foreign suppliers to lower prices so as to be more attractive and thereby deliver more value for money for taxpayers.[25] This strategy might, however, prove costly where the proliferation of cheap imports drives local products and services out of the market based on pricing.

The use of public funds and the multifaceted nature of interests in public procurement, naturally, attract more scrutiny to public procurement as there is a higher demand for accountability and efficiency.

Similarly, there are a number of arguments against discrimination in public procurement. Firstly, discrimination against foreign supplies and suppliers in public procurement is considered to be a restriction to free trade.[26] The distortive effect of discrimination limits choice while increasing prices through inefficient allocation and utilisation of resources.[27] Second, offering protection to local firms allows them to have a false sense of security as they operate in an artificial environment where they are insulated from competition.[28] This

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[21] F Naegelen & M Mougeot 'Discriminatory public procurement policy and cost reduction incentives' (1998) 67(7) *Journal of Public Economics* 349 at 367.

[22] S J Evenett & B M Hoekman 'Government procurement: Market access, transparency, and multilateral trade rules'. (2004) 3195 *World Bank Policy Working Paper*; see David Collie & Morten Hviid 'International procurement as a signal of export quality' (2001) 111 *The Economic Journal* 374–390.

[23] M R H Utley & K Hartley 'Public procurement in the single European market: Policy and prospects'. (1994) 94(2) *European Business Review* 3–7.

[24] Mosoti op cit note 15.

[25] Ssennoga op cit note 16 at 226.

[26] Z U Ahmed, J P Johnson, C P Ling et al 'Country of origin and brand effects on consumers' (2002) 19(3) *Evaluations of Cruise Lines International Marketing Review* 279 at 302.

[27] Ibid at 297.

[28] See A Cox & P Furlong 'Cross-border trade and contract awards: The intellectual myopia at the heart of the EU procurement rules' (1997) 3(1) *European Journal of*

leads to weak firms with no motivation to innovate and expand.[29] Furthermore, with competition eliminated, local suppliers may arbitrarily increase prices, thereby causing governments to incur higher costs in purchases as quality suffers.[30]

Third, in relation to developing countries with weak institutions, some scholars have argued that discriminating against foreign suppliers leads to more harm as contracts are awarded to well-connected local businessmen who have close relationships with corrupt government officials, thereby leading to the wastage of public funds.[31] In the context of the EAC, partner states have committed themselves to the creation of a single market through the establishment of a Common Market. Consequently, it should not be open to the partner states to argue for discrimination in public procurement beyond the safeguards provided in the EAC law for dealing with distortions and disadvantages that may arise as a result of application of the law.

III THE LEGAL FRAMEWORK ON PUBLIC PROCUREMENT

At the international level, efforts towards developing a multilateral framework on public procurement can be traced to the activities of the Organisation for Economic Co-operation and Development (OECD) in the 1960s, which led to the development of a Draft Instrument on Government Purchasing Policies, Procedures and Practices in 1974.[32] This draft later influenced discussions on public procurement in the context of the General Agreement on Tariffs and Trade (GATT), leading to the adoption of a Plurilateral Agreement on Government Procurement in 1979 (GPA 1979) at the conclusion of the Tokyo Round of Multilateral Trade Negotiations.[33] The GPA 1979 did not attract popular endorsement and, as such, had limited impact in eliminating discrimination in public procurement. In any case, it only related to the procurement of goods by central governments.[34] The GPA 1979 was replaced by the Agreement on Government Procurement in 1994 (GPA 1994) as a result of the Uruguay Round of Multilateral Trade Negotiations. The GPA 1994

Purchasing and Supply Management 9 at 20.

29 Utley & Hartley op cit note 23 at 5.

30 Ssennoga op cit note 16 at 219

31 Mosoti op cit note 15 at 597.

32 Victor Mosoti 'Reforming the laws on public procurement in the developing world: The example of Kenya' (2005) 54 *The International and Comparative Law Quarterly* 621 at 638.

33 Ibid.

34 Ibid

is part of the Plurilateral Trade Agreements that emanated from this round of trade negotiations.[35]

(a) The World Trade Organization framework

All the EAC partner states are members of the World Trade Organization (WTO).[36] The WTO seeks to ensure fairness and equality in international trade. Among other measures, it does this through its rules on non-discrimination. The WTO rules on non-discrimination are twofold: the national treatment rule and the most-favoured-nation rule.[37] The national treatment rule prohibits the application of domestic regulations in such a way as to grant favour to products and services that have domestic affiliation.[38] The most-favoured-nation rule, on the other hand, requires that any advantage, favour, privilege or immunity granted to any particular nation must be immediately and unconditionally granted to other WTO members for like products and services.[39]

As provided for in the General Agreement on Tariffs and Trade (GATT, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the rules on non-discrimination, save for limited exceptions, apply to all members of the WTO.[40] These three agreements are part of the WTO's Multilateral Trade Agreements which are subject to the single undertaking principle together with the Understanding on Rules and Procedures Governing the Settlement of Disputes and the Trade Policy Review Mechanism.[41]

However, in relation to public procurement, the Multilateral Trade Agreements have provided for exceptions to the application of the non-discrimination rules. The GATT excludes the applicability of the national treatment rule to public procurement in article III(8), the GATS excludes the application of both the national treatment rule

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35 Article II(3), Agreement Establishing the World Trade Organisation.

36 WTO 'Members and Observers', available at *https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm*, accessed on 1 April 2019.

37 Mitsuo Matsushita 'Basic principles of the WTO and the role of competition policy' (2004) 3 *Washington University Global Student Law Review* 363, available at *http://openscholarship.wustledu/law_globalstudies/vol3/iss2/10*, accessed on 17 August 2017.

38 Article III, General Agreement on Tariffs and Trade; Article XVII, General Agreement on Trade in Services; and Article 3, Agreement on Trade-Related Aspects of Intellectual Property Rights.

39 Article I, General Agreement on Tariffs and Trade; Article II, General Agreement on Trade in Services; Article 4, Agreement on Trade-Related Aspects of Intellectual Property Rights.

40 Article II, Agreement Establishing the World Trade Organisation.

41 Ibid.

and the most-favoured-nation rule in its article XIII, whereas the TRIPS does not make express provisions on discrimination in public procurement. Under the WTO framework, public procurement is regulated by the GPA 1994. Adopted as part of the Uruguay Round of Multilateral Trade Negotiations package, the GPA 1994 applies to 'any law, regulation, procedure or practice regarding any procurement by entities' identified in the GPA as central government entities, subcentral government entities and other entities that procure in accordance with the provisions of the agreement (public utilities).[42] The GPA 1994 incorporates the national treatment rule and the most-favoured-nation rule in its article III. It applies to the procurement of goods, services and construction services[43] conducted by various procuring entities identified by signatories and only where their values are above thresholds declared by those signatories.[44]

At present, less than half the number of WTO members are signatories to the 1994 GPA. Of the entire WTO membership, only 47 member states are party to the GPA. Not any of the EAC partner states are signatories and, as such, the partner states are not bound by the 1994 GPA.[45]

In March 2012, the GPA 1994 signatories adopted a new Agreement on Government Procurement (the Revised GPA). The Revised GPA represented a significant step towards expanding the reach and scope of the regulations on government procurement for the benefit of international trade. In the estimation of some scholars, adoption of the Revised GPA led to the addition of approximately $80–100 billion value of market access commitments by WTO members.[46] Effectively, the Revised GPA now covers approximately $1.7 trillion in government procurement annually.[47] The Revised GPA constitutes an amendment to the GPA 1994 but is only binding on members of the WTO who have ratified it. Members who are only signatories to the GPA 1994 remain bound by that agreement and the Revised GPA remains a plurilateral agreement. At present, the Revised GPA has only 35 signatories. Not any of the EAC partner states are signatories and, as such, the partner states are not bound by it.[48]

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42 Article I, Agreement on Government Procurement, 1994.
43 Ibid.
44 Ibid; Robert D Anderson & Anna Caroline Müller 'The revised WTO Agreement on Government Procurement as an emerging pillar of the world trading system: Recent developments' (2015) 7(1) *Trade Law & Development* 42 at 45.
45 WTO 'Agreement on Government Procurement: Parties, observers and accessions', available at *https://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm*, accessed on 2 March 2019.
46 Anderson & Müller op cit note 44.
47 Ibid.
48 WTO op cit note 45.

The Revised GPA has non-discrimination as one of its general principles on both national treatment and most-favoured-nation basis.[49] It applies to covered procurement, which it defines as procurement of goods and/or services (including construction services) by procuring entities, as per thresholds and lists of inclusion or exclusion contained in each party's commitments under Appendix I.[50] It also covers procurement undertaken by electronic means.[51] Appendix I has seven annexes, which deal with minimum thresholds for: covered central government entities; covered subcentral government entities; other entities whose procurement is covered, like utilities; covered goods; covered services; covered construction services; and general notes relating to a party's commitments under the agreement.[52]

(b) The Treaty for the Establishment of the East African Community

The EAC Treaty provides for the establishment of the East African Community Customs Union and Common Market[53] to strengthen integration within the region by promoting trade liberalisation and free movement of labour, goods, services, capital and the right of establishment. The provisions of the treaty relating to the Customs Union and the Common Market have been operationalised by the Protocol on the Establishment of the East African Community Customs Union (EAC Customs Union Protocol) and the EAC Common Market Protocol respectively. The two protocols have provisions that prohibit discrimination based on nationality.[54]

In *British American Tobacco (U) Ltd v AG, Uganda*[55] British American Tobacco Limited challenged the legality of section 2*(a)* and *(b)* of the Republic of Uganda's Excise Duty (Amendment) Act 11 of 2017 as being in conflict with the EAC Treaty, the EAC Customs Union Protocol and the EAC Common Market Protocol. The applicant was a company incorporated and domiciled in Uganda. In its business model, it sourced cigarettes from its sister company in Kenya, British American Tobacco Kenya Limited, for sale in Uganda. The cigarettes were manufactured in Kenya then exported to Uganda for sale.

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[49] Article IV(1) and (2), Revised Agreement on Government Procurement.
[50] Article II, Revised Agreement on Government Procurement.
[51] Article II, Revised Agreement on Government Procurement.
[52] Article II(4), Revised Agreement on Government Procurement.
[53] Articles 75 and 76, Treaty for the Establishment of the East African Community.
[54] Article 15, EAC Customs Union Protocol; Article 17, EAC Common Market Protocol.
[55] Reference No 7 of 2017.

Through the Excise Duty (Amendment) Act 11 of 2017, Uganda sought to create differential treatment between 'goods locally manufactured in Uganda' and 'imported goods' whereby imported goods attracted higher excise duty. Acting on the basis of the amended law, the Uganda Revenue Authority issued the applicant with tax assessment notices which reclassified its cigarettes sourced from Kenya as imported goods attracting higher excise duty. The applicant successfully applied for a temporary injunction against the application of the amended law pending the determination of the reference.

The applicant's case was, among other grounds, that the new law was contrary to the EAC Treaty and the EAC Common Market Protocol for treating goods from Kenya as goods from a foreign country, thereby undermining the national treatment rule. The court, in its final determination, agreed with the applicant that the amended law was discriminatory and contradicted the definition of the term 'import' and 'foreign country' as contained in article 1 of the EAC Treaty. The EAC Treaty defines 'import' as '… to bring or cause to be brought into the territories of the Partner States from a foreign country' while a 'foreign country'[56] is defined as ' ... any country other than a Partner State'.[57]

(c) The Protocol on the Establishment of the East African Community Customs Union

The EAC Customs Union Protocol established the Customs Union after coming into effect in 2005. Through the establishment of the EAC Customs Union, the EAC sought to promote intra-regional trade by eliminating internal tariffs and non-tariff barriers and creating a common external tariff for trade in goods. It is estimated that the creation of the Customs Union led to the expansion of intra-EAC trade from 'US$4,483.64 million in 2011 to US$5,069.7 million in 2015, representing a 13 per cent growth'.[58]

The Protocol provides that goods will only be eligible for EAC tariff treatment if those goods have originated from a partner state as determined using the EAC's rules of origin.[59] The rules of origin were

[56] Article 1, Treaty for the Establishment of the East African Community.
[57] Ibid.
[58] KEPSA 'Towards the Comprehensive Review of the EAC CET: A Perspective of Kenya's Private Sector', Policy Brief, PB02/2017.
[59] Article 14, EAC Customs Union Protocol.

first adopted as Annex III to the EAC Customs Union Protocol[60] and revised in 2015.[61]

The EAC Customs Union Protocol provides for the elimination of internal tariffs,[62] a three-band common external tariff[63] and the elimination of non-tariff barriers.[64] In its article 15, the EAC Customs Union Protocol provides for the national treatment rule. It prohibits discrimination against the same or like products of other partner states. Although the implementation of the EAC Customs Union Protocol was only subject to a five-year transition period from 2005 for the elimination of internal tariffs,[65] the EAC is yet to fully implement the Protocol. According to the EAC Customs Union Protocol, trade liberalisation was to be implemented in an asymmetrical way so that imports from Tanzania and Uganda were duty free while imports of selected goods from Kenya were to continue attracting duty until 2010.[66] Despite the lapse of the transition period, the partner states have not fully eliminated internal tariffs, leading to constant trade disputes.

Despite efforts to eliminate non-tariff barriers within the EAC, a good number of them remains unresolved and new ones keep emerging.[67] Implementation of the common external tariff has also been undermined by the insulation of sensitive items (goods capable of being produced within the EAC) to the application of the common external tariff.[68] The current list of sensitive items represents one per cent (59 out of 5 688 lines) of all tariff lines under the EAC Customs Union Protocol.[69] These items are subject to higher rates of tariffs and are presently listed in the second schedule to Annex 1 to the EAC Customs Union Protocol. Moreover, partner states have also continuously applied for stay of application of the common external tariff to sensitive items, thereby compounding the problem of distortion of the EAC's tariff regime.[70]

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60 EAC Customs Union (Rules of Origin) Rules, 2005.
61 EAC Customs Union (Rules of Origin) Rules, 2015.
62 Article 10, EAC Customs Union Protocol.
63 Article 12, EAC Customs Union Protocol; the three bands are: a minimum rate of 0% (raw materials and capital goods), middle rate of 10% (intermediate goods) and a maximum rate of 25% (finished goods.
64 Article 13, EAC Customs Union Protocol.
65 Article 11(1), EAC Customs Union Protocol.
66 Article 11, EAC Customs Union Protocol; WTO, Trade Policy Review, EAC, WT/TPR/S/171.
67 Rosebela Oiro et al 'Non-tariff barriers and "complaints" in the East African Community's reporting process', Policy Briefing, March 2017.
68 International Growth Center 'Reform of the EAC Common External Tariff: Evidence from Trade Costs' Policy Brief, November 2017 at 24.
69 Annex 1, EAC Customs Union Protocol.
70 KEPSA op cit note 58 at 5; Tadashi Yasui 'Customs administration operating under customs union systems', WCO Research Paper No 29, January 2014 at 5 and 9.

(d) The Protocol on the Establishment of the East African Community Common Market

The EAC Common Market Protocol came into force on 1 July 2010 following its ratification by all five EAC partner states. The protocol provides for free movement of goods, persons, labour, services and capital and the rights of establishment and residence and is to be implemented in a progressive manner.[71] The Protocol provides for non-discrimination as one of the principles of the EAC Common Market[72] and has an express provision on government procurement. In article 35, the Protocol prohibits partner states from discriminating against suppliers, products or services originating from within the Common Market. The purpose of this prohibition is to ensure free and fair competition in public procurement for suppliers, goods and services originating from within the EAC. Despite the coming into effect of the EAC Common Market Protocol on 1 July 2010 and the creation of the EAC Common Market, the operationalisation of the Protocol is supposed to be progressive and in accordance with schedules approved by the Council of Ministers.[73] However, implementation of the EAC Common Market Protocol remains wanting.[74]

(e) The East African Community Competition Act

In 2006, the East African Legislative Assembly enacted the East African Community Competition Act to promote and protect fair competition, provide for consumer welfare and establish the East African Community Competition Authority. Part VI of the Act provides for public procurement.

Section 18 of the Act requires partner states to extend non-discriminatory treatment to all suppliers, products or services originating from or affiliated with other partner states. Other than non-discrimination, the EAC Competition Act also deals with three other aspects of public procurement: technical specifications as obstacles to trade,[75] transparency and accessibility of tendering procedures,[76] and enforcement through the East African Competition Authority.[77] Other aspects of public procurement like the value of

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71 Article 2, EAC Common Market Protocol.
72 Article 3, EAC Common Market Protocol.
73 Article 76(2), Treaty for the Establishment of the EAC; Article 2(4), Protocol on the Establishment of the East African Community Common Market.
74 Kennedy Gastorn & Wanyama Masinde 'The EAC Common Market' in Emmanuel Ugirashebuja et al (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) at 289.
75 Section 18(2), EAC Competition Act.
76 Section 19, EAC Competition Act.
77 Section 20, EAC Competition Act.

procurement that would be subject to the EAC laws, the manner in which valuation of contracts should be done under EAC laws, the entities whose procurement would be subject to EAC laws, and accepted exceptions to the EAC laws on public procurement are not covered. Oddly, the East African Community Competition Regulations, 2010, enacted under section 49 of the EAC Competition Act to give effect to the provisions of the Act, also have no provisions on public procurement.

The East African Community Competition Authority is the institution created under the EAC Competition Act to implement and enforce the Act. The Authority was only established in 2016, 10 years after the EAC Competition Act was enacted and two years after the Act came into force.[78] The Authority is not yet fully constituted beyond the appointment of commissioners as it needs technical staff to enable it to carry out its activities. The perennial funding challenges in the EAC are likely to slow down its activities.[79]

IV COMPARISON WITH THE EUROPEAN UNION

Given that the EAC is built on the model of integration employed in the European Union (EU)[80] and considering the latter's deeper extent of integration, a comparison between the manner in which the two blocs regulate government procurement is apt. It is estimated that, annually, public authorities within the EU spend 14 per cent of their GDP on procurement and that in many sectors such as energy, transport, waste management, social protection and the provision of health or education services, public authorities are the principal buyers.[81]

Within the EU, public procurement is mainly governed by three instruments which member countries are required to incorporate into their national laws. These are: Directive 2014/24/EU on Public Procurement;[82] Directive 2014/25/EU on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors;[83] and Directive 2014/23/EU on the Award of Concession

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78 EAC 'Five Commissioners of the EAC Competition Authority sworn in at the EAC', available at *https://www.eac.int/press-releases/605-1048-346-five-commissioners-of-the-eac-competition-authority-sworn-in-at-the-eac*, accessed on 30 Mach 2019.

79 Joyce Karanja-Ng'ang'a 'EAC Competition Law' in Emmanuel Ugirashebuja et al (eds) *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017) at 434.

80 Masinde & Omolo op cit note 3 at 18.

81 EU Public Procurement, available at *https://ec.europa.eu/growth/single-market/public-procurement_nn*, accessed on 20 March 2019.

82 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on Public Procurement.

83 Directive 2014/25/EU of the European Parliament and of the Council of 26

Contracts.[84] Directive 2014/24/EU constitutes the general law on public procurement for the EU while Directive 2014/25/EU and Directive 2014/23/EU deal with public procurement in particular sectors and procurement by way of concessions respectively.

The application of these three instruments is subject to a minimum threshold.[85] For procurement with values lower than the thresholds in the three directives, national laws apply. However, these national laws must conform with the EU's general principles.[86] All three directives provide for non-discrimination in public procurement.[87] In addition, article 18 of the Treaty on the Functioning of the European Union prohibits discrimination on the basis of nationality. Other than non-discrimination, the three EU directives on public procurement contain prescriptions for many other issues, including the nature of contracts to which they apply,[88] the different levels of governments whose procurement falls under the directives,[89] minimum thresholds for their application,[90] methods for calculating contract values,[91] procurement by electronic means,[92] circumstances where the application of the directives may be excluded[93] and the general management of the procurement process, among other matters.

The EAC's legal framework on public procurement is extremely lean and lacks details compared to the EU approach. Given the incipient nature of integration efforts in the EAC, as compared to the EU, one would have expected to find more elaborate provisions on public procurement within the EAC so as to minimise incidences of non-compliance. This minimalist approach is surprising, given

February 2014 on Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors.

84 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the Award of Concession Contracts.

85 Articles 1 and 4, Directive 2014/24/EU; articles 1 and 15, Directive 2014/25/EU; and articles 1 and 8, Directive 2014/23/EU.

86 EU Legal rules and implementation, available at *https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation_en*, accessed on 20 March 2019.

87 Article 18, Directive 2014/24/EU; article 36, Directive 2014/25/EU; and article 3, Directive 2014/23/EU.

88 Article 1, Directive 2014/24/EU; article 1, Directive 2014/25/EU; and article 1, Directive 2014/23/EU.

89 Article 2, Directive 2014/24/EU; article 3, Directive 2014/25/EU; and article 6, Directive 2014/23/EU.

90 Article 4, Directive 2014/24/EU; article 15, Directive 2014/25/EU; and article 8, Directive 2014/23/EU.

91 Article 5, Directive 2014/24/EU; article 16, Directive 2014/25/EU; and article 8, Directive 2014/23/EU.

92 Chapter II, Directive 2014/24/EU; chapter II, Directive 2014/25/EU; and article 34, Directive 2014/23/EU.

93 Section 3 and 4, Directive 2014/24/EU; section 2, Directive 2014/25/EU; and section ii, Directive 2014/23/EU.

that most of the EAC partner states have national laws that were modelled on the UNCITRAL Model Law on public procurement,[94] which contains elaborate rules on public procurement.

V THE LAW AND PRACTICE ON PUBLIC PROCUREMENT IN THE EAC PARTNER STATES

This section discusses the provisions of various municipal laws and policies in some of the EAC partner states relating to public procurement. The laws of Burundi and South Sudan were not easily available and have not been included in the discussion in this section.

(a) Kenya

Article 227 of the Constitution of Kenya requires state organs and other public entities entering into contracts for goods or services to do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective. The fine details of the laws regulating government procurement are contained in the Public Procurement and Asset Disposal Act, 2015. In the context of compliance with the EAC Treaty, the EAC Common Market Protocol and the EAC Competition Act, the Act does not have any special provisions for EAC partner states. In fact, one of the guiding principles under the Act is the promotion of citizen contractors.[95] A citizen contractor is defined as a person or a firm wholly owned and controlled by persons who are citizens of Kenya.[96] In its Part XII, the Act provides for preferential treatment for articles, materials or supplies partially or wholly mined and produced or assembled in Kenya and for firms where Kenyans make up 51 per cent of the shareholding.

For tenders of KSh500 million and below that are 100 per cent funded by the Kenyan government, exclusive preference is given to citizens. Where their participation is allowed, foreign tenderers are required to commit to source, at least, 40 per cent of their supplies from citizen contractors. Provided that a citizen contractor or a firm with at least 51 per cent Kenyan shareholding has met the minimum technical score, they would be entitled to a 20 per cent score in their evaluation. The preferential procurement scheme as set out in Part XII of the Act clearly favours Kenyan citizens and firms, as well as

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[94] S de la Harpe 'Procurement under the UNCITRAL Model Law: A Southern Africa Perspective' 2015 (18)5 *Potchefstroom Electronic Law Journal* 1572 at 1573 available at *https://www.researchgate.net/publication/297653193_Procurement_under_the_Uncitral_Model_Law_A_Southern_Africa_perspective*, accessed on 5 October 2019.

[95] Section 3(j), Public Procurement and Asset Disposal Act.

[96] Section 2(1), Public Procurement and Asset Disposal Act.

goods and services mined, produced or assembled in Kenya. The definition of a citizen contractor and the place of manufacture or assembly do not recognise the composition of the EAC Common Market for the purposes of public procurement.

The provisions of the Public Procurement and Asset Disposal Act of Kenya, discussed above, are in conflict with article 35 of the EAC Common Market Protocol, which prohibits discrimination against suppliers, products or services from other partner states in public procurement. Section 6(1) of the Act, however, appears to offer a cure to the conflict with EAC laws. The section provides that, where there exists a conflict between the provisions of the Act with any treaty, agreement or convention ratified by Kenya and to which Kenya is a party, then such an international instrument must prevail. However, observance of the EAC laws on public procurement does not seem to be the government of Kenya's priority policy as reflected in the 'Buy Kenya Build Kenya Strategy',[97] which seeks to promote the consumption of locally (in Kenya) produced goods and services.

(b) Uganda

Public procurement in Uganda is done under the Public Procurement and Disposal of Public Assets Act. The Act prohibits discrimination on the basis of nationality, race, religion and gender.[98] It requires that public procurement and disposals should be done in a transparent, accountable, fair, competitive, economical and efficient way.[99] In section 50, the Act provides an exception to the non-discrimination rule set out in section 44. Section 50 allows a procuring or disposing authority to limit the participation of certain bidders on the basis of nationality where it deems it necessary. This limitation must be done according to the law. The Act defines a 'national provider', a 'foreign provider' and a 'resident provider'. A 'national provider' is defined as a provider registered in Uganda and wholly owned and controlled by Ugandans; a 'foreign provider' is defined as a provider whose business is not registered in Uganda; while a resident provider is one who is registered in Uganda but who is not a national provider.[100]

So far as section 50 of the Act authorises discrimination on the basis of nationality (referring to Ugandan nationality), the Act contravenes article 35 of the EAC Common Market Protocol. However, like the Kenyan Act, the Act in section 4 provides that international agreements must take precedence over the Ugandan Act.

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[97] Republic of Kenya, 'Buy Kenya-Build Kenya Strategy', 19 June 2017.
[98] Section 44, Public Procurement and Disposal of Public Assets Act.
[99] Sections 45, 46 and 48, Public Procurement and Disposal of Public Assets Act.
[100] Section 2, Public Procurement and Disposal of Public Assets Act.

Unfortunately, like Kenya, Uganda's policy on public procurement is betrayed by its 'Buy Uganda Build Uganda Policy'[101] which calls for consumption of local (Ugandan) goods and services.

(c) Tanzania

In Tanzania, public procurement is governed by the Public Procurement Act, 2011. Section 54 of the Act prohibits discrimination against tenderers on the basis of nationality other than in cases of limited participation. Where preference is justified, procuring entities are required to grant a margin of preference to local producers and suppliers.[102] To qualify for preferential treatment, the contractors or suppliers must be companies registered or incorporated in Tanzania with majority shareholding by Tanzanians.[103] Where finances for a tender are exclusively provided by a Tanzanian public body, then, subject to a threshold set in the regulations, the tender must be reserved for local (Tanzanian) persons and firms. So far as Tanzanian citizenship is used to determine local affiliation, the provisions of the Public Procurement Act are in contravention of article 35 of the EAC Common Market Protocol as it discriminates against suppliers, goods, products and services from other partner states in public procurement. Section 4 of the Act, however, provides that if there is a conflict between the provisions of the Act and a treaty or international agreement, then the provisions of the treaty or international agreement must prevail.

(d) Rwanda

In Rwanda, public procurement is governed by Law 12 of 2007 on Public Procurement. Under article 41, the Law allows for preferential treatment for companies registered in Rwanda, for Rwandan nationals and other bidders from member states of regional integration bodies. This preference should not exceed 10 per cent of the cost of the tender. This provision, though in a weak way, appears to lay a platform for equal treatment between Rwandan bidders and bidders from other EAC partner states. Article 3 of the Law also gives preference to international instruments in cases of conflict.

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[101] Ministry of Trade, Industry and Cooperatives 'Buy Uganda Build Uganda Policy' September 2014.
[102] Section 54, Procurement Act.
[103] Ibid.

VI CONCLUSION AND RECOMMENDATIONS

From the discussion above, the following conclusions can be drawn. Firstly, progress on integration activities within the EAC remains unsatisfactory. From a subjective viewpoint, the EAC integration project set very high ambitions for itself in terms of the depth of integration, with the ultimate goal being to create a political federation (not a common goal among most regional integration projects). This calls for a higher degree of cooperation and commitment from partner states, which appears to be lacking. From an objective viewpoint, the implementation of the EAC's four pillars of integration, being the creation of a Customs Union, a Common Market, a Monetary Union and a Political Federation, remains unsteadfast and uneven.

Second, despite the importance of public procurement as a socio-political and economic policy tool, the EAC legal framework on public procurement is scanty. Article 35 of the EAC Common Market Protocol simply outlaws discrimination against suppliers, products and services originating from partner states without saying anything more. Similarly, the EAC Competition Act deals with only limited aspects of public procurement. Without a comprehensive code on the additional aspects of public procurement, it would be difficult to apply and monitor the effective application of the non-discrimination rule to public procurement within the EAC and the partner states.

Third, given the unsatisfactory status of the implementation of integration activities within the EAC, the operationalisation of the national treatment rule suffers the same fate both at the EAC and at partner states level. At the EAC level, the East African Community Competition Authority, which is the institution in charge of implementation and enforcement, has not been fully constituted and is likely to face funding constraints just like other EAC institutions. At the partner states level, the national laws are at odds with the EAC laws on public procurement, with some partner states treating suppliers, products and services from other partner states as foreign. Although the national procurement laws of some partner states provide that, where there is a conflict between the national procurement laws and any international instruments on public procurement, then the international instruments shall prevail, vague language of this nature is not germane to the implementation of the commitments of the partner states to the EAC legal framework. The lack of commitment of the EAC partner states to non-discrimination on public procurement is also betrayed by the 'buy local' policies adopted and implemented by the major EAC partner states.

Fourthly, although Kenya, Uganda, Tanzania and Rwanda have laws that could be used to regulate public procurement at present, the laws are diverse and cannot be relied on to guide public procurement

within the EAC in a harmonious manner. This diversity could actually be taken as a non-tariff barrier to trade within the EAC. This divergence is also surprising because the national laws were influenced by the UNCITRAL Model Law on public procurement.

We make the following recommendations:

- The current EAC is now approximately nineteen years old and represents the second time the region has made wide-scale integration efforts, the first having come to nought in the year 1977. There is an urgent need for the institutions of the EAC, particularly the Summit, to recommit themselves to the goals of integration as laid down in the EAC Treaty. This could be done through investment of meaningful and genuine political goodwill based on a shared regional vision. At present there appears to be a lacklustre attitude within the EAC towards the achievement of its goals and a sense of indifference to emerging conflicts among partner states. While conflicts and fatigue would be inevitable in the integration enterprise, the lack of proper responses, particularly by the highest organ of the EAC, would certainly yield failure. Perhaps it is time for the EAC to take stock of its achievements and failures so far to devise a way to fortify the successes while ameliorating the failures.
- There is need for the EAC Common Market Protocol to be amended to expand the scope of the provisions on public procurement beyond what article 35 provides for at the moment. The amendments should introduce a comprehensive framework which should include, at the minimum, the definition of covered procurement entities; the various levels of government units to which the laws apply; the thresholds for application of community laws; the manner in which valuation of contracts should be carried out; and permissible exceptions. Without provisions on these additional matters, the provision on non-discrimination would not have any meaning.
- Once the EAC Common Market Protocol is amended as proposed above, the laws of the partner states should be amended in line with it. The amendments should also explicitly eliminate discrimination within the community by adopting the definitions of 'imports' and 'foreign country' as provided for in the EAC Treaty. The 'buy local' policies must also only be understood and implemented according to these definitions.