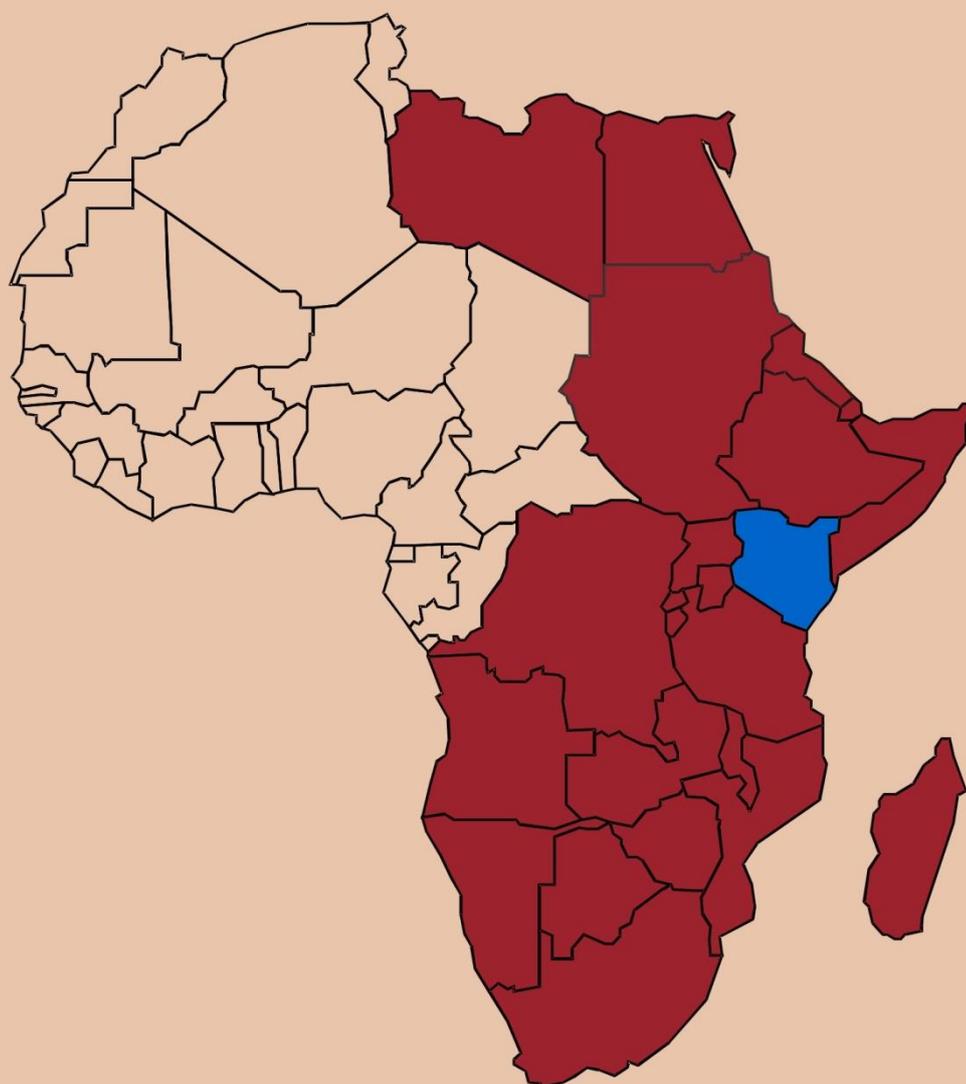


FROM EAC TO TFTA

INTEGRATING THE VOICE OF THE CIVIL SOCIETY IN KENYA



From EAC to TFTA

Integrating the Voice of the Civil Society in Kenya

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Published by



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With the support of



Oxfam Novib

First Published: February 2016

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Acronyms

ACP:	African, Caribbean and Pacific
AGOA:	African Growth and Opportunity Act
APSEA:	Association of Professional Societies in East Africa
CDF:	Consultative Dialogue Committee
CFTA:	Continental Free Trade Area
COMESA:	Common Market for Eastern and Southern Africa
CPA:	Cotonou Partnership Agreement
CSOs:	Civil Society Organisations
EABC:	East Africa Business Council
EAC:	East African Community
EACSOF:	East Africa Civil Society Organisations Forum
EALA:	East African Legislative Assembly
EALGA:	East African Local Governments Association
EALS:	East Africa Law Society
EATUC:	East African Trade Union Confederation
EAYN:	East African Youth Network
EPA:	Economic Partnership Agreement
ESA:	Eastern and Southern Africa
EU:	European Union
FWEA:	Federation of Women Entrepreneurs Association
ICNL:	International Centre for Not-for-Profit Law
ICT:	Information, Communication and Technology
IEA:	Institute of Economic Affairs
IRC:	Inter-Religious Committee
IVORI:	Integrating the Voice of Civil Society Organisation in Regional Integration
KAM:	Kenya Association of Manufacturers
KEPSA:	Kenya Private Sector Alliance
KESSFF:	Kenya Small Scale Farmers Forum
KHRC:	Kenya Human Rights Commission
KNBS:	Kenya National Bureau of Statistics
KNUT:	Kenya National Union of Teachers
KUPPET:	Kenya Union of Post Primary Education Teachers
MOFAIT:	Ministry of Foreign Affairs and International Trade
NCPD:	National Council for Persons with Disabilities
NDC:	National Dialogue Committee
NDF:	National Dialogue Forum

NSAs: Non-State Actors

PRT: Presidential Round Table
PSO: Private Sector

RDC: Regional Dialogue Committee
REC: Regional Economic Community

SADC: Southern Africa Development Community
SDEAA: State Department of EAC Affairs
SEATINI: Southern and Eastern Trade, Information and Negotiations Institute
SGF: Secretary General's Forum

TFTA: Tripartite Free Trade Area
TMEA: TradeMark East Africa

WTO MC10: World Trade Organisation 10th Ministerial Conference

Acknowledgment

This research was conducted and authored by Martha Getachew Bekele, Trade and Development Programme Officer at Consumer Unity and Trust Society (CUTS) Nairobi, Kenya under the overall leadership of Rijit Sengupta, Regional Director, Africa; and Clement Onyango, Director, CUTS Nairobi. Their efforts are acknowledged with gratitude.

Humble acknowledgement is also extended to experts from the civil society, government ministries and State departments, the private sector, media and development practitioners for their time and insights during interviews as well as inception and validation workshops under the 'Integrating the Voice of Civil Society Organisations in Regional Integration in Eastern and Southern Africa'-IVORI III project.

Finally, special thanks go to the project team members Rosebella Oiro, Daniel Asher and Eugene Jernigan.

We at CUTS are grateful to Oxfam Pan Africa Programme for its financial support.

Preface

Tripartite Free Trade Area (TFTA) was officially launched in 2015 to bring 26 African countries from Cairo to Cape Town under one market. While, the grand initiative is noble and in line with the Abuja Treaty that envisages for one African Economic Community, the integration process will have to incorporate the voices of the marginalised as represented by civil society organisations (CSOs) and other non-state actors, for deep and meaningful integration. African regional economic communities are, most often than not, perceived as elitist and government-to-government cooperation, partly because of lack of participation from citizens of Member States. For decades, CUTS has been championing for change in approach where regional integration and trade policy making processes ought to be owned by all for better social and economic benefits.

With the aim of giving voice to the voiceless in the TFTA integration process, CUTS Nairobi implemented the ‘Integrating the Voice of Civil Society Organisations in Regional Integration Process in Eastern and Southern Africa’ (IVORI-ESA) project in Ethiopia, Kenya and Zambia in 2015. Research studies were successfully carried out in the three countries and three regional economic communities (RECs). A forward-looking ‘Engagement Framework and Action Agenda’ for Eastern and Southern African CSOs engagement on the TFTA negotiations and implementation processes has been developed under the project. An e-forum, the Eastern and Southern Africa Civil Society Organisations Network on Integration and Development (ESACSONID) has also been formed as a discussion and information dissemination platform on regional integration, multilateral trade issues and other trade matters.

This research publication presents the state of involvement of Kenyan non-state actors, particularly CSOs, in the East African Community (EAC) and the ongoing TFTA initiative. I believe such documentation can serve as a baseline for upcoming interventions and studies. The main finding of the Kenyan study is that the EAC has a working engagement framework in place with certain gaps both in design and implementation, which can be improved upon for non-state actors’ engagement under the TFTA.

It is my expectation that the findings of ‘From EAC to TFTA: Integrating the Voice of the Civil Society in Kenya’ will generate further dialogue within national trade and regional integration forums; prompt government for an institutionalised and well financed engagement of the civil society in matters of trade; as well as guide the donor community on resource and skills gaps.

Let me conclude by expressing my sincere thanks to all who have been involved in the project, including Oxfam Novib for the financial support, IVORI-ESA partner organisations in the three countries and all national and regional stakeholders for their insights during interviews and project workshops. We at CUTS continue to strive to achieve social justice and economic equality within and across borders.

Pradeep S. Mehta
Secretary General, CUTS International

Executive Summary

Civil society organisations (CSOs) play complementary roles in negotiations and implementation of regional trade agreements through provision of evidence for negotiation positions; sensitisation of potential beneficiaries; monitoring of implementation; and even providing government with alternative ‘politically incorrect’ negotiation positions or monitoring reports that a Partner State may not be able to voice officially as a government for diplomatic reasons.

This report, which is part of a series of country studies under a project dubbed ‘Integrating the Voice of Civil Society Organisations in Regional Integration Processes in Eastern and Southern Africa’ (IVORI-III), examines Kenya’s non-state actors’ engagement in regional integration processes, particularly, that of CSOs, and assesses successes, challenges and gaps in the existing engagement framework including its operationalisation.

While this study report is on Kenya, other country studies under the IVORI-III project were also carried out on Ethiopia and Zambia. The project, implemented in 2015, has three components: a) undertaking country and regional research studies in three countries; b) galvanising a solid network of CSOs in 26 countries in Eastern and Southern Africa; and c) designing of an ‘Engagement Framework and Action Agenda’ for the Tripartite Free Trade Area (TFTA). This particular study and the other two country studies are expected to contribute to the design of an appropriate engagement framework for the Southern and Eastern Africa region under the TFTA. For Kenya, information was gathered through one-on-one interviews using structured questionnaires and discussions which were conducted during project inception and validation workshops.

Regional integration is important to Kenya, given that 45 to 48 per cent of its exports remain within Africa, out of which more than 53 per cent is destined to the EAC. According to Kenya’s Regional Integration draft strategy, there is need to deepen regional integration and to increase product diversification to encourage more Kenyan exports into Africa, particularly, the East African market. The study has found that many of the CSOs working on trade issues are involved in the EAC affairs through the EAC Consultative Dialogue Framework (CDF), which culminates into an annual Secretary General’s Forum (SGF). Yet, despite being a great tool of engagement, the CDF has gaps that are either inherent in its design or its operationalisation. The identified challenges include:

- *Lack of inclusivity* owing to the fact that marginalised groups such as cross border traders, majority of whom are women; micro, small and medium enterprises; and rural/grassroots organisations engaged in such issues are hardly included in the Kenyan national dialogue framework (NDF). This lack of

inclusivity puts into question the NDF's credibility in integrating the 'voice of the voiceless' into the important regional integration processes.

- *Lack of sufficient and sustainable funding* raises questions on the sustainability and ownership of the entire engagement process. The national dialogue process, for instance, is 100 per cent financed by TradeMark East Africa.
- Stringent requirement on the umbrella body of CSOs to be registered in each of the Partner States before acquiring 'Observer Status' at the EAC. Interviewed Kenyan stakeholders wonder why there should be such a laborious requirement for 'such little benefit' when it could suffice to have a three-quarters registration criteria, for instance.
- National Dialogue Committee (NDC) meetings are organised purely to prepare for the SGF without any allowance for engagement on other trade and development issues that may not be part of the SGF agenda
- Absolute focus on EAC Secretary General's office and no representation of other EAC organs in the CDF for instance the East African Legislative Assembly, which increases the possibility of issues forwarded by non-state actors not to be taken up by the Secretariat.
- Many of the CSOs engaged in the national dialogue meetings are Nairobi based, which could be tied to insufficient funds. It also violates the principle of inclusivity and diversity embedded in the operationalisation of CDF itself.

With regard to the TFTA process, national findings indicate that, the process is shrouded in secrecy where none of the interviewees were consulted about the ongoing TFTA negotiations, neither were they informed formally about the progress nor given any indication they will be involved in the near future.

The report challenges TFTA Partner States to ensure that the TFTA Treaty includes the participation of non-state actors, akin to Article 127 of the EAC Treaty. A good engagement framework exists at the EAC, dubbed the EAC Consultative Dialogue Framework, which can be improved upon by plugging the identified gaps and designed or tailor-made for the TFTA. It is through such a cogent strategy that valid concerns and interests of citizens such as trade and climate change; agro-based trade; trade and women's empowerment amongst others could be addressed.

Some of the practicable recommendations proposed in this study for a possible TFTA Engagement Framework include:

Separate engagement framework for the private sector and civil society: Despite both considered as non-state actors, the private sector and civil society have differences in interests (profit versus social concerns), differences in time bound outcomes (low-hanging fruits versus long term results); and time bound levels of integration (Free Trade Area/Customs Union vs. Common Market). Therefore, there is need for a separate engagement framework for the two parties that will consider their interests and capacities.

Funding Basket for Facilitation of Engagement: There is need for stronger lobby for inter-governmental organisations, the State and development partners to set aside a funding basket to address *inclusivity and representation of marginalised stakeholders*

and to allow meaningful engagement of CSOs/non-state actors in regional integration processes, including a CSO delegate in national negotiation teams.

Extrapolate Engagement Framework for Trade and Development Issues: There is need for improved and better consultative dialogue framework(s) to be put in place for the TFTA and CFTA regional integration initiatives, multilateral trading arrangements; and development policy discourses at the national level.

Over and above the three top recommendations, the report contains recommendations including setting up thematic groups of stakeholders; proactive engagement of the media; CSO engagement in income generating activities; and more that taken together could sufficiently change for the better the current landscape of CSO engagement in regional integration.

Regional Integration and the Civil Society

Regional integration process driven by governments may have a shorter shelf life as was evident from the collapse of the EAC in 1977. In addition to lack of strong political will and disproportionate sharing of benefits, one key reason cited for the dissolution of the Treaty for East African Cooperation was lack of participation of the private sector and civil society in the Co-operation's activities. The realisation that firstly, it is people that integrate and not governments; and secondly sustainable socio-economic and political development is achieved through enhanced and strong partnerships with the private sector and civil society resulted in a 'people-centred and market-driven co-operation' principle governing the practical achievement of the EAC objectives.

Partner States agreed under Article 127 of the EAC Treaty to create an enabling environment for the private sector and the civil society and more specifically under Article 127(3) to promote enabling environment for the participation of the civil society in the development activities within the Community.

Issues of interest to the private sector along with level and outcome of regional integration are not necessarily similar to that of the civil society. The private sector is interested solely in potential economic gains from business activities such as selling goods and providing services across borders, which are catered in the first stage of regional integration negotiations and somewhat easier to agree on. The civil society, on the other hand, is interested in social issues affecting citizens and marginalised groups such as employment implications, product quality concerns, environment, governance and other issues, of which outcomes are long term, mostly unquantifiable and require intense lobbying.

Therefore, though both considered as non-state actors, the private sector and civil society have somewhat differences in interests (profit versus social concerns), differences in time bound outcomes (low-hanging fruits versus long term results); and time bound levels of integration (Free Trade Area/Customs Union versus Common Market), perhaps explaining the proactive role of the private sector in regional integration activities within the Community.

From EAC To TFTA

Kenya is the founding member of the EAC and a signatory to the TFTA. The EAC was first formed in 1967 as a 'Cooperation' framework but due to differences in ideology and inequitable distribution of benefits, it was officially dissolved in 1977. Kenya, Uganda and Tanzania later agreed on the Treaty for the re-establishment of the EAC, which came into force in 2000 to pursue cooperation among Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit.

The Treaty provides for the establishment of a Customs Union, a Common Market, and subsequently a Monetary Union and ultimately a Political Federation. Currently, the EAC regional integration serves as a Common Market among Burundi, Kenya, Rwanda, Tanzania and Uganda. Partner States signed the Monetary Union Protocol in 2013, which has given Member States ten years to put in place the necessary institutions and mechanisms and implement activities to achieve the East African common currency area.

Economic integration is a cornerstone of the various regional economic communities in Africa. Reducing intra-African trade barriers and harmonising policies on matters of trade is seen as a means towards creating a predictable and more competitive environment that will benefit producers and consumers alike in these regions. Nonetheless, there are also chronic and well-documented challenges to deeper integration and effective transformation, and these are largely shared with the whole continent. These include undiversified markets with low value addition; overdependence on raw material exports; numerous trade and non-trade barriers that increase transaction costs; inadequate trade infrastructure networks; regional food insecurity; and conflicts and political instability in some countries. More importantly, the challenges also hinge on demands of overlapping REC membership and special attention is being given to addressing this specific and other bottlenecks.

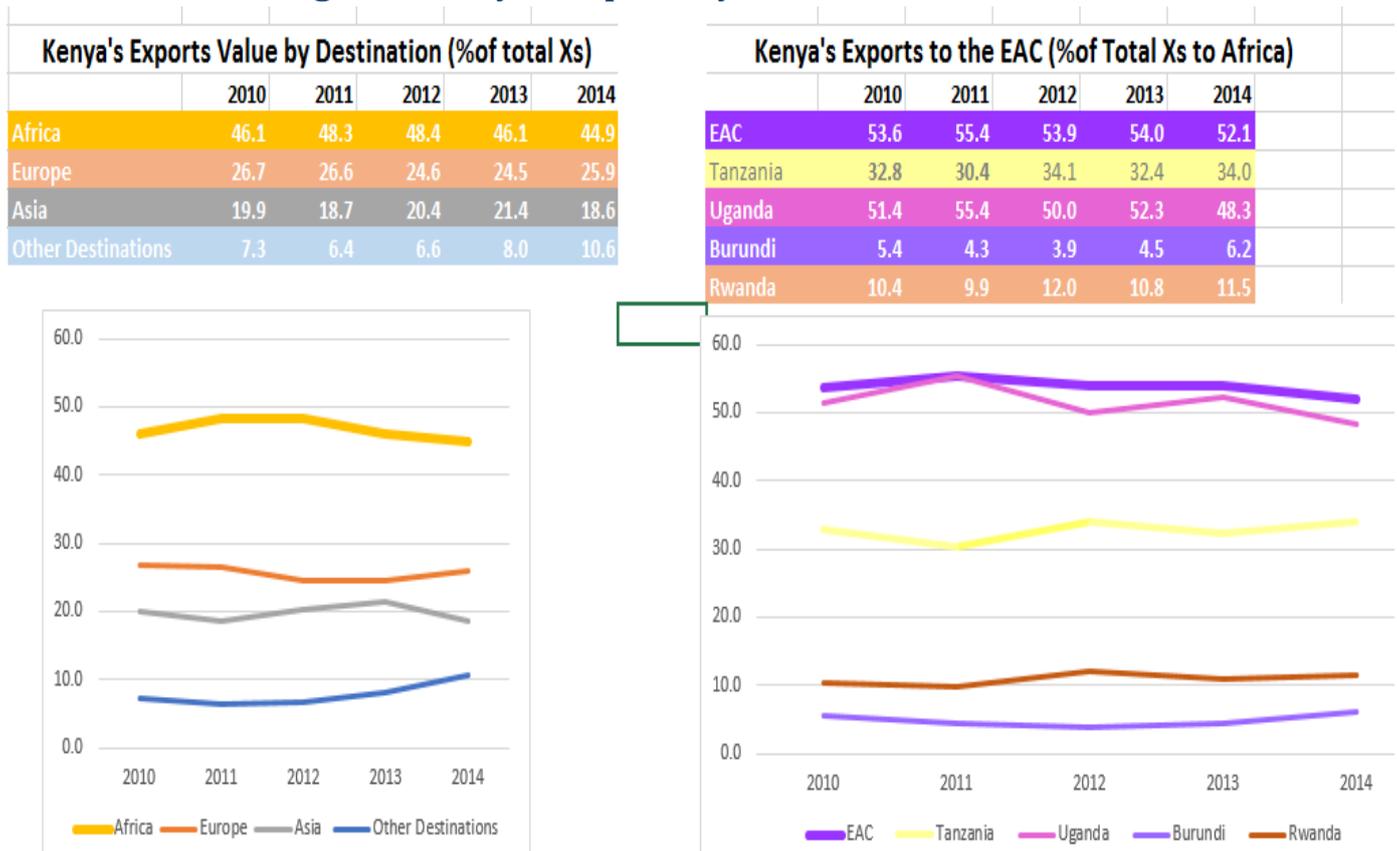
The TFTA brings about 26 African countries belonging to the Common Market for Eastern and Southern Africa (COMESA), Southern Africa Development Community (SADC) and the EAC, of which the latter's members, belong to either COMESA or SADC. In the context of the various challenges resulting from overlapping membership, the three RECs through respective Heads of State signed a declaration on the June 12, 2011 paving the way for negotiations to establish the COMESA-EAC-SADC FTA. On June 10, 2015 the TFTA was officially signed at the 3rd Meeting of the Tripartite Summit of Heads of State and Government held in Sharm El Sheikh, Egypt. The signing marked the official launch of the COMESA-EAC-SADC TFTA.

Bringing African countries under one big economic community in line with the vision of the Abuja Treaty (1999) for one African market is commendable. The grand integration process will expand and facilitate market access for the about 625 million people of the region that make up more than half of the total African population and half of the Africa Union membership. Moreover, it is expected to enhance intra-regional trade, which stands at a meagre 12 per cent; and boost the economy of the region from its present level of US\$ 1.6 trillion Gross Domestic Product. The launch of the TFTA will build on the efforts being made coming up with a Continental Free Trade Area (CFTA) by 2017.

Importance of Regional Integration to Kenya

That regional integration is important to Kenya is indisputable. Kenya is a classic case of debunking the myth uttered by some that *African countries cannot trade with each other because their trade profiles are similar*. In fact, Kenya trades more with its neighbours than the rest of the world.

Figure 1: Kenya's Exports by Destination 2010-2014



Data Source: Economic Survey, 2015 (KNBS)

As depicted in the left side of Figure 1, Kenya's 45 to 48 per cent of exports remain within Africa while Europe and Asia take the majority of the rest of exports. Within Africa, more than half of the country's exports are absorbed by EAC Partner States, Uganda being the biggest export destination followed by Tanzania.

It is in the interest of the country to fully commit its energy and resources to ensure deeper EAC integration as well as expand market opportunities for itself within the Southern and Eastern Africa region. Supporting full engagement of integration drivers, that is the private sector, and encouraging the complementary role of the civil society should be one of the main ingredients to ensure deeper economic integration with neighbours.

Public Participation in Trade Policy Making Process

Regulative rules are part of trade regimes but they need to also have constitutive rules which address concerns on the need, extent and purpose of such regimes as well as define each actor's role. The political economy of trade has not been thoroughly studied

and understood particularly in the context of African countries¹. However, there have been few efforts to narrow this gap such as CUTS' project dubbed 'Fostering Equity and Accountability in the Trading System' (FEATS) that assessed trade policy making processes in five project countries: Kenya, Malawi, Tanzania, Uganda and Zambia.

The study reviewed varying levels of appreciation at country level about the importance and benefits of involving multi-stakeholders in trade policy formulation and implementation. For example, it elucidates that the ministries responsible for trade issues need more resources to establish and ensure effective functioning of stakeholder consultative mechanisms. The list of challenges faced by CSOs, on the other hand, are shown to be much longer in all the five countries when compared to the list of challenges faced by other groups of stakeholders. CSOs, unlike other groups of stakeholders are often confronted with issues of representation and legitimacy. Their response is that they draw their mandate from the needs and aspirations of the people and the later will ignore them if they are found to be working against their needs and aspirations.

Similarly, in mid-2013, CUTS interviewed non-state actors as part of an evaluation exercise of a past project dubbed 'Building an Inclusive East Africa Community' (BIEAC)². Results indicated that the private sector, as represented by the East Africa Business Council (EABC), had been quite active in the process of negotiations, such as the EU-EAC Economic Partnership Agreement (EPA) on a new trade regime, through consultations as well as forwarding position papers.

In contrast, CSOs' contributions was considered dismal since their specific role in the EPA negotiation process was not institutionalised in any engagement framework – although the Cotonou Partnership Agreement on which the negotiations for EPAs were curved out provided for mandatory inclusion of all the non-state actors in their shades and forms. There was a general census among stakeholders that the civil society was viewed as anti-establishment by state functionaries in the region. The civil society also felt some sort of mutual distrust and suspicion of the state to deliver effectively and in an inclusive manner for the people.

That was then, how about now? This particular study presents efforts that have been underway to involve non-state actors, both CSOs and the private sector, in the EAC integration process facilitated by a consultative dialogue framework.

About the Study

Like any African society, community members coming together to strengthen social ties and support one another is deeply rooted in Kenya. The concept of 'all for one' or *Harambee*, a commonly used Kiswahili word, is religiously practiced by ordinary Kenyans as they make collective efforts towards, for instance, construction of a school or a church, organising weddings or funeral ceremonies; or taking care of orphans. The culture of *Harambee* is closely tied to the origin of the civil society movement for social

¹ See: CUTS 2010: Towards More Inclusive Trade Policy Making: Process and Role of Stakeholders in Select African Countries www.cuts-geneva.org/FEATS.html

² <http://www.cuts-geneva.org/pdf/BIEAC%20-%202014%20Evaluation%20Report.pdf>

transformation and economic welfare. From rural based activities to policy advocacy work, Kenya's vibrant civil society sector has evolved and positioned itself to become vital and integral part of the political, social and economic development of the country.

Thousands of groups of the civil society operate in the country in the form of non-governmental organisations (NGOs), faith-based organisations, research institutions, think tanks, trusts, foundations, forums, charities, and networks among others. Some of these groups are engaged in providing hard services such as building schools, clinics, installation of water pipes, provision of medicines and food relief while others provide soft services, mainly by engaging in policy and advocacy, often supported by research and evidence articulation. This particular study considered organisations in the latter category those providing soft services- more specifically those organisations working on trade and development issues.

This report is part of a series of country studies set out to examine civil society engagement mechanisms in regional integration in EAC and the TFTA. In addition to making an inquiry on existing mechanisms, the study establishes recent developments with regard to the civic space in the country, challenges and opportunities. Stakeholders were engaged in this process and interviews conducted with CSOs, ministries responsible for trade and regional integration, prominent development practitioners, the private sector and media. Group discussions in project inception and validation workshops were also used to enrich the report.

The report provides a brief background note on the study is presented and takes the reader for a short ride on the historical lane of the civil society sector movement in Kenya; and presents legal provisions and agreements related to public participation. It further analyses recent developments in the country in relation to the new Act and amendments targeting 'Public Benefit Organisations' and certain concerns of the civil society fraternity.

It also presents various ways civil society and private sector alliances engage in regional integration processes and perspectives of stakeholders on success and challenges as well as gaps in relation to the EAC consultative dialogue framework and national dialogue processes; as well as perspective on the TFTA. The concluding section gives a brief summary of major insights and presents the way forward in the quest for effective and meaningful participation in regional integration dialogue.

Kenyan Civil Society

Trends in Space and Legal Provision

This section presents the historical background of the civil society movement in Kenya, which is closely tied to the political landscape of the country. It also gives background to public participation in relation to regional and international agreements and presents a case whereby the Government of Kenya found itself in court for lack of transparency and failure to take into account the concerns of CSOs in trade negotiations. The section ends with an analysis of a recent development of the new Public Benefits Organisation Act 2013, which is yet to be operationalised two years down the line yet amendments have been proposed even before its operationalisation that some view as an attempt to adulterate the Act and stifle the space the civil society operates in.

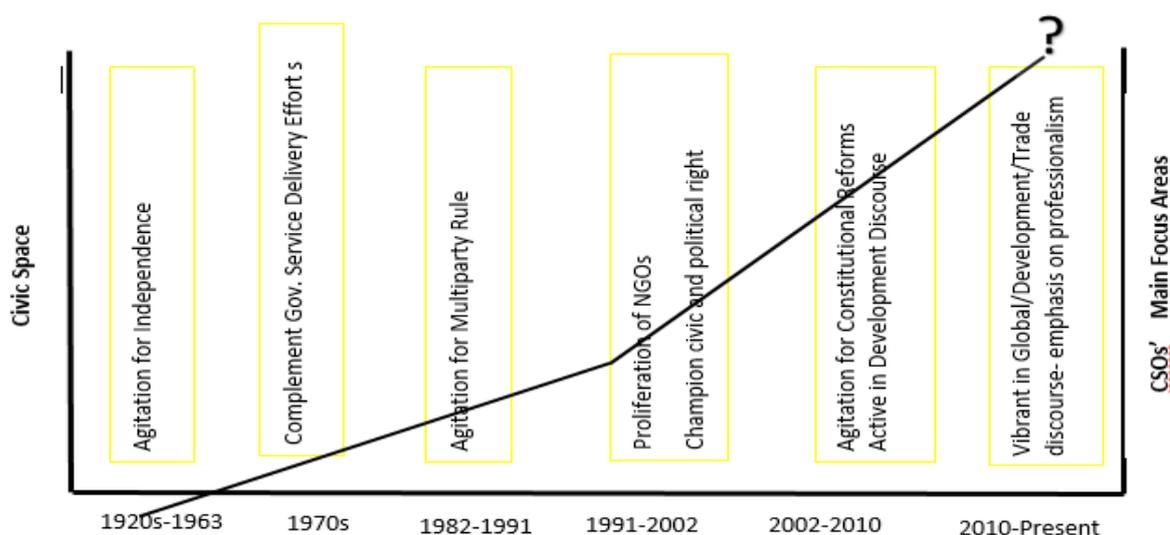
Brief Journey in history Lane

Reports indicate that from the early 1920s until 1963, CSOs, albeit loosely defined, played a crucial role in the struggle for independence while in the 1970s they worked closely with the government to complement its service delivery efforts (ICNL, 2015). In the 1980s and 1990s, however, the movement of Kenya's civil society started being affixed to the country's political dynamics.

In June 1982, Kenya was declared a One-Party-State by the National Assembly and the Constitution was amended accordingly. The one-party rule section of the Constitution was later annulled in December 1991 by Parliament. Kenyan CSOs, both in the 'rights based' and 'participatory development' categories were tremendously vibrant during the 1990s, following the demise of the one-party rule.

As documented by Musembi and Musyoki (2004), in the 1970s the rights advocacy camp consisted mostly of underground movements that used clandestine distribution of literature to relay messages while the participatory development camp used 'people's participation' initiative using platforms or forums provided by church organisations, which was the only political space that the 'one party state' did not overtly clamp down.

Figure 2: Evolution of CSOs and Civic Space in Kenya



Source: Author's own depiction

In the 1980s, the visibility of rights based movement was heightened through agitation for multi-party system, which was also favoured by the wind of change blowing in global politics together with pressure from development partners and international financial institutions.

After the annulment of the one-party state section (2A) of the Constitution in December 1991, the decade of 1990s witnessed proliferation of non-governmental organizations working on civil and political rights though according to Musembi and Musyoki (2004) many of them 'rely[ed] exclusively on external funding and with tenuous connection to grass-roots constituencies'.

Nonetheless, Kenyan CSOs are credited for contributing immensely to change in regime from an authoritarian to a democratic rule in 2002 as well as for contributing immensely to constitutional reform and good governance dialogue, which led to a constitutional reform in 2010.

Legal Provisions and Agreements for Public Participation

Through time, CSOs seem to have gained recognition of their important role in international trade, regional integration and in the general development discourse, which is evident by the inclusion of 'public participation' in major international, regional and national laws and/or structures that provide for consultation and negotiated processes involving the state, CSOs and other non-state actors including the private sector.

Agreements signed and ratified by a country are binding and become part of the country's legal system. This section presents agreements and legal provisions that call on public participation, violation of which even landed the Government of Kenya in court as.

EAC Treaty

By defining the civil society to mean *a realm of organised social life that is voluntary, self-generating, self-supporting, autonomous from the state, and bound by a legal set of shared rules*, the 1999 Treaty Establishing the EAC obliges Partner States to provide an enabling environment for the private sector and the civil society to take full advantage of the Community. Article 127 (3) specifically states that Partner States agreed to *promote enabling environment for the participation of civil society in the development activities within the Community*; and that the Secretary General to *provide the forum for consultations between the private sector, CSOs, other interest groups and appropriate institutions of the Community (Article 127 (4))*. The EAC Secretariat was directed to formalise the forum mentioned under Article 127(4) at the 19th Meeting of the Council of Ministers of the EAC.

The region, therefore, has a working CDF in place for the EAC Secretariat, Partner States, CSOs, private sector and other interest groups at the national and regional levels. The national dialogue is being coordinated by the State Department of East African Affairs (SDEAA) whereas the East African Civil Society Organisations Forum (EACSOFF)-Kenyan chapter is recognised as the current national representative of the civil society in Kenya. Detailed engagement at national level is further explained in the next chapter.

Government of Kenya in the Dock – The Cotonou Agreement

Kenya ratified the Cotonou Partnership Agreement (CPA), which was signed on 23 June 2000 in Cotonou Benin. CPA laid out a comprehensive aid and trade agreement between 77 African, Caribbean and Pacific (ACP) Member States and the European Union (EU). It provides the framework for the Economic Partnership Agreement (EPA) negotiations between ACP and EU parties. The EPA negotiations were done in three phases with the first phase (2002-2003) being on the general issues and principles of EPA; second phase (2003-2007) on substantive negotiations at regional levels; and third phase (from 2009) on finalisation of the negotiations.

Despite the CPA requiring for the State party to consult before signing of the EPA³, Kenya's civil society did not find this to be the case and was more concerned about the process in which the EPA negotiations were taking place with 'no real or effective consultation with the non-state actors' and felt that the private sector was consulted more than the civil sector. Moreover, Kenyan CSOs contented that the Government of Kenya had not been furnishing them with the required information to enable the common person, particularly small scale farmers, to input into the negotiations. As a result, they lacked the requisite information and were 'in the dark' on the state of the negotiations.

³ *"Non-State actors, ACP national parliaments and local decentralized authorities, shall, where appropriate be informed and involved in consultation on cooperation policies and strategies, on priorities for cooperation especially in areas that concern or directly affect them, and on the political dialogue; be provided with capacity-building support in critical areas in order to reinforce the capabilities of these actors, particularly as regards organisation and representation, and the establishment of consultation mechanisms including channels of communication and dialogue, and to promote strategic alliances."*

In the year 2007, the Kenya Small Scale Farmers Forum (KSSFF)⁴ joined by six other Petitioners and Kenya Human Rights Commission (KHRC) as the interested party sued the Government of Kenya under Section 84(1) of the Repealed Constitution related to the State's obligation in facilitating public involvement in public governance, formulation of public policy, legislative processes. Their lawsuit was mainly in relation to the formulation and conclusion of international agreements and treaties, particularly EPA. Kenya was then part of the Eastern and Southern Africa (ESA) group of countries whose negotiations with the EU were being conducted under the ESA geographical configuration comprising of 16 countries.

During the time of the suit, the petitioners argued that the negative impact of EPA was shown by two studies⁵ on the general welfare of the Kenyan economy; and that '*...their [EPA's] coming into force will lead to massive losses in agricultural produce and could push a large number of farmers out of work and extirpate their means of livelihood owing to the heavy subsidization of agricultural produce by the EU.*'

Beyond potential effects of the Agreement, the non-state actor Petitioners faulted the negotiation processes as well. At paragraph 24 of the Petition, their complaint stated '*Contrary to the declared principles and basis for negotiations, the EPA process has been solely driven by the Government of Kenya with selective and discriminative admission of participants, thereby excluding the Petitioners or their representatives from participation in the negotiations.*'

KHRC as an Interested Party complained that '*[The government] refused to institute a mechanism that would ensure that the people, not drawn only from the private sector, have access to information and the opportunity to express their opinion at all stages of the negotiations.*'

In the Petition dated October 24, 2007, the Petitioners sought, among others, '*A declaration that the Petitioners have a right to participate in the on-going EPA negotiations*'; '*An order directing the respondents [Republic of Kenya and the Attorney General] to establish a mechanism for involving stakeholders including the Petitioners in the on-going EPA negotiations*'; and '*An order directing the First Respondent [Republic of Kenya] to make available to the Petitioners and other stakeholders all the relevant information on the on-going negotiations on EPAs.*'

In its ruling in favour of the case against the Government of Kenya for its failure to involve the Petitioners to consult them on the status of the negotiations or on the consequential, adverse or beneficial effects therefrom, the High Court of Kenya recognised the argument that a one-off consultation over a span of five years could not be said to be effective participation as the stakeholders had not met since then. It was further recognised that failure by the State to provide the requisite information regarding the negotiations curtailed their ability and right to put forth their views.

⁴ "KSSFF" is a society registered under the **Societies Act, Chapter 108 of the Laws of Kenya**. Its goal is to empower small-scale farmers with capacities at all levels to enhance equal partnerships for sustainable and dignified livelihoods.

⁵ "Assessment of the Potential Impact of Economic Partnership Agreements (EPAs) on the Kenyan Economy" (2005) carried out by the Kenya Institute for Public Policy Research and Analysis (KIPPRA); and "Economic and Welfare Impacts of the EU-African Economic Partnership Agreement" and Analysis and published by the Africa Trade Policy Centre

In the case 'Kenya Small Scale Farmers Forum & 6 others v Republic of Kenya & 2 others' Petition No. 1174 of 2007, the High Court ruled in favour of the Petitioners in 2013 stating that the *[Petitioners should] have full access to the information relating to the negotiations so as to make appropriate contributions if they so wish in fulfilment of Article 4 of the Cotonou Protocol* and orders:

i) Respondents *[Republic of Kenya and the Attorney General]* in consultation with the Petitioners within Thirty days to **establish a mechanism** for involving stakeholders including the Petitioners in the on-going EPA negotiations.

ii) That the Respondents *[Republic of Kenya and the Attorney General]* **publishes information** within Thirty days regarding the negotiations in particular, but not limited to publishing in at least two dailies and other official communication the progress of the negotiations for public awareness and in order to stimulate public debate.

Constitution of Kenya, 2010

Prior to the 2010 Constitution, the repealed constitution did not contain provisions requiring the State to ensure public participation in public policy decisions. The 2010 Constitution is unequivocal on public participation in public services as well as the right to have information. Under the values and principles of public service, Article 232 (1) (d) directs for the *involvement of the people in the process of policy making*. The Constitution further states that the values and principles of public service apply to public service in *all State Organs in both levels of government* according to Article 232 (2) (a); and *all State corporations* [Article 232 (2) (b)].

In terms of access to information Article 35 (1) (a) states every citizen has the right of access to information held by the State and the information should be transparent and accurate as indicated in Article 232 (1) (f) that directs for *transparency and provision to the public of timely, accurate information*. Article 35 (3) further directs the State to *publish and publicise any important information affecting the nation*.

In conclusion, the supreme law of the country is clear in the participation of the public and provision of timely information but is that what is actually happening with regard to regional integration, particularly in the TFTA?

Current Civic Space: Recent Developments

Public Benefit Organisations Act 2013

In Kenya, the term CSO (NGO) refers to an organisation that operates in the realm between individual and the state (ICNL, 2015). NGOs are registered by the NGOs Co-ordination Board, which is a State Corporation established by the NGOs Co-ordination Act (Cap 19) of 1990. The Board has the responsibility of registering, regulating and enabling the NGO sector in Kenya. Under the NGO Coordination Act of 1990, NGOs are formed for the benefits of the public at large for the promotion of social welfare, development, charity or research on various areas/sectors.

Upon commencement, the Public Benefit Organisations Act 2013 No. 18 of 2013 will repeal the NGO Coordination Act 1990. Assented on January 14, 2013, the Public Benefit Organisation (PBO) Act defines 'public benefit activity' as an activity that supports or

promotes public benefit by enhancing or promoting the economic, environmental, social or cultural development or protecting the environment or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a category of individuals or organizations. Upon operationalisation, the PBO Act (2013) will be the legal instrument to register, regulate operations, board and tribunal formation, finances and dissolution.

The Act calls for the establishment of the PBO Authority as a new regulatory body for non-profit organisations engaged in public benefit activities. The Authority is expected to execute registration and de-registration of PBOs; advise Government on activities and roles of PBOs in Kenya's development; and monitor compliance with statutory obligations law.

The PBO Act (2013) directs the government and public benefit organisations to comply with the *principles of effective collaboration* for the purpose of, *inter alia*, strengthening collaboration between the government and CSOs; and reinforcing complementary efforts of the government and CSOs and their contribution in enhancing the country's development among others.

The Act 2013 has not become operational awaiting for the Cabinet Secretary of Devolution and Planning to publish a date of its commencement but curiously it has been subjected to miscellaneous amendments before its implementation, which some argue is unconstitutional.⁶

The civil society fraternity continues to demand for the implementation of the PBO Act 2013 without amendments or with amendments that are in line with the spirit of the Act though experience shows so far the proposed substantial changes are seen as an attempt to stifle the growth and threaten the very existence of the civil society in Kenya.

The civic space seems to be closing [for those working on human rights issues]. The fact that Kenyan CSOs seem to have evolved and moved away from activism and put more emphasize on professionalism has given the State a chance to interpret this as complacency. Therefore, we need to strike a balance between professionalism and activism.

Morris Odhiambo, National Congress of Civil Societies President

One of the strongly resisted amendments is the proposal to cap the amount of funding NGOs can receive from external donors at 15 per cent of their budget under the Statue Law Miscellaneous Amendments Bill, 2013 (October 30, 2013), which was later defeated during the Second Reading in Parliament. Still trying to put at risk the civil society's ability to operate independently, the government on May 30, 2014 proposed another amendment, albeit without the contentious proposal of restricting foreign funding but still widely perceived as an attempt to limit the space that NGOs operate in.

⁶ Harun Ndubi, a constitutional lawyer, argued it is unconstitutional to think of making changes to a law that was passed but never implemented. Read more at http://www.standardmedia.co.ke/article/2000146693/ngo-taskforce-report-will-make-or-break-kenya-s-civil-society?articleID=2000146693&story_title=ngo-taskforce-report-will-make-or-break-kenya-s-civil-society&pageNo=3

The Statute Law Miscellaneous Amendments Bill, 2014 is replete with 54 proposed amendments that many recognise are mostly in line with the enabling-environment-spirit of the ACT but concerns still remain that it sought to give the PBO Regulatory Authority discretionary power to impose terms upon registration; have not only greater say in the appointment of the Authority's board but also reduce the number of CSO representatives to the board. The Statute Law (Miscellaneous Amendments) Bill, 2014 was later withdrawn due to strong resistance and lobby from the civil society.

Mass Deregistration NGOs

In yet another apparent message to the civil society that the Government of Kenya is somehow reigning on the sector, the NGO Coordination Board deregistered 540 NGOs in December 2014 for what the Board termed as *non-compliance with the law* and some 15 of the 540 *for using their charitable status as a front for raising funds for terrorism*. Many others were accused of failing to file their audited accounts. Almost a year later, in October 2015, the Board announced its intention of deregistering 957 NGOs for what it termed as financial malpractice.

That there might be unscrupulous organisations using their legal registration status to fund terrorism, fail to disclose financial status or employ workers without work permits is undisputed. However, a blanket condemnation of the sector and the recent adversarial attitude from government towards the civil society and media⁷ is contrary to Chapter Four of the Bill of Rights of the 2010 Constitution. There is need from all parties to comply with the law of the land. CSOs play crucial roles in health, education, environment, agriculture and many other vital sectors to complement the State's effort for social and economic justice.

⁷ On February 15, 2015, the Government of Kenya switched off the analogue signals of four private television channels that account for more than 90 per cent of viewership for failing to switch to digital signals despite the media owners' insistence that they needed more time to get the necessary equipment.

Non-State Actors' Participation in Regional Integration Process

There exist engagement platforms in the country for the civil society and private sector on EAC regional integration processes, though the private sector has more avenues as well as the financial muscle to hold and be part of a series of meetings and lobbying. The private sector represented by the KEPSA has even access to the President of Kenya through the biannual Presidential round-table discussions chaired by the President himself. Such platforms are used to discuss matters of concern on regional integration such as non-tariff barriers. The civil society, however, has only one avenue as provided by the EAC CDF. Media, which is part of the civil society, are also engaged dismally and at the tail end of regional integration discussions with little to no inputs into the processes whatsoever.

Non-State Actors Engagement Platforms

Civil Society Engagement Platform

EAC 19th Council of Ministers Meeting directed the Secretary General to operationalise the 'Secretary General Forum' (SGF) as stipulated in Article 127(4) of the EAC Treaty. The directive led to the development and adoption of the EAC CDF that envisages *regular* and *continuous* dialogue between EAC Secretariat, Partner States, CSOs, PSOs and other interest groups both at national and regional levels. The directive also noted the limited involvement of the civil society and the private sector in the EAC integration process in which they should be granted 'observer' status.

The EACSOE is the apex body for CSOs in East Africa, recognised under the CDF. At national level, EACSOE Kenyan Chapter works closely with the State Department of East African Affairs (SDEAA), which is in charge of institutionalising and giving life to National Dialogue Forums (NDFs) as provided in the EAC CDF.

Private Sector Engagement Platforms

Kenyan experience shows that the private sector, under the umbrella body KEPSA, has been more proactive and aggressive in organising itself around lobby themes to engage government. Unlike the civil society that has one major engagement platform, the private sector uses additional formal structures and partnerships put in place including the biannual *Presidential Round Table (PRT)* whereby private sector players meet the President of the Republic of Kenya together with his cabinet and various arms of government bi-annually to discuss matters of concern to the private sector and the economy that require direct intervention of the President as Head of State.

Thereafter, implementation of the PRT resolutions and commitments are cascaded down to the respective implementing authorities and the other arms of government. In that respect, KEPSA has established other formidable advocacy platforms both to follow

on implementation of PRT resolutions as well as dialogue on emerging issues specific to the respective platforms. Thus, there are, among others:

- ⇒ The **Council of Governors (CoG) Forum** whereby the private sector engages with county governors through the CoG held once a year. The forum provides a platform of dialogue and stocktaking on devolution matters affecting private sector besides establishing mechanisms for better interaction and coordination between the Private Sector and Council of Governor.
- ⇒ The **Ministerial Stakeholders' Forums (MSFs)**, which is a bi-monthly sectoral dialogue platform for line ministries and sector boards of KEPSA to address sector specific priority issues relating to policy, administrative and operational issues affecting private sector;
- ⇒ The **Speaker's Roundtable** at which the private sector engages parliament (both the National Assembly and the Senate) annually on matters of interest to the business sector to enhance private sector participation in the legislative processes after which the sector boards engage various departmental committees and special parliamentary committees on priority Bills and policies;
- ⇒ The **Attorney General's Forum** – a partnership with the State Law office that provides an opportunity for the private sector to use the office to petition and inform the AG on the Bills stuck in his Office for fast tracking and for publishing;
- ⇒ The **Chief Justice Forum**– forum aimed at improving the Commercial Justice process in a manner that ensures efficient resolution of Commercial and Industrial Relations Disputes as well as discuss other ways the Judiciary can facilitate an enabling business environment;
- ⇒ **The Development Partners' Roundtable** – this is an engagement that provides an opportunity for the private sector to inform and partner on the development agenda and priorities for the country's national development and private sector development;
- ⇒ **EAC Regional Ministerial Forum** – an engagement with the EAC Council of Ministers aimed at highlighting the issues to be forwarded to the Heads of State Summit. The platform offers an opportunity for the participation of the private sector in the formulation of regional policy.

In terms of monitoring or tracking commitments, the State established in 2015 both the Presidential Delivery Unit (PDU) and Business Environment Delivery Unit (BEDU) to ensure that commitments are delivered within stipulated timeframes. Furthermore, KEPSA uses Speaker's Roundtable meetings to track pending bills and assists relevant committees to expedite relevant bills.

In conclusion, the private sector goes that extra mile to ensure that regional integration benefits are preserved and opportunities expanded, which explains the keen interest and proactive involvement of the private sector in different dialogues since stakes of regional integration in terms of profit are much higher.

Media Engagement Platforms

The media, the ones that are not state-owned, can be viewed as part of the civil society, in the category of Information, Communication and Technology (ICT)-oriented CSOs (Wanyande 2010). The Fourth Estate, the Press, could help in sensitisation of agreements and benefits as well as breaking down information in a digestible manner in local languages to reach all corners of the country. It could also be used to relay information to government from the ground as it has the ability as well as the means to source information from locals, particularly living around borders.

Presently, the media is involved at the last stage of regional integration processes, which is only reporting events, either during agreements or hyped negotiations, with little analysis of impacts on livelihoods of people and businesses. The mechanism of engaging the media so far has been through invitations from the government often just before the launch of an agreement to sensitise reporters on how to report on the issue or for press conferences to present communiqués.

Non-State Actors' Contribution to the Integration Process

Concerted efforts by CSOs and PSOs have tremendously contributed towards the goals of the EAC integration. The region's civil society has been acknowledged for their contribution towards the development and advocacy of the following Bills/Policies:

- HIV/AIDS Prevention and Management Bill
- Gender Equality Bill
- Youth Policy
- Persons with Disabilities Policy

National CSOs represented by their regional apex body have also managed to champion for the promotion of Cross-Border Legal practice; extended jurisdiction of the East African Court of Justice; development of the East African Bribery Index (2013); in addition to sensitisation of constituencies on integration process.

The private sector, on the other hand, has played vital role in terms of advocating for harmonisation of product standards, free movement of services and labour; highlighting trade barriers against women traders and small and medium scale traders; monitoring, tracking and eliminating non-tariff barriers and enhancing competitiveness.

National Level Consultative Framework

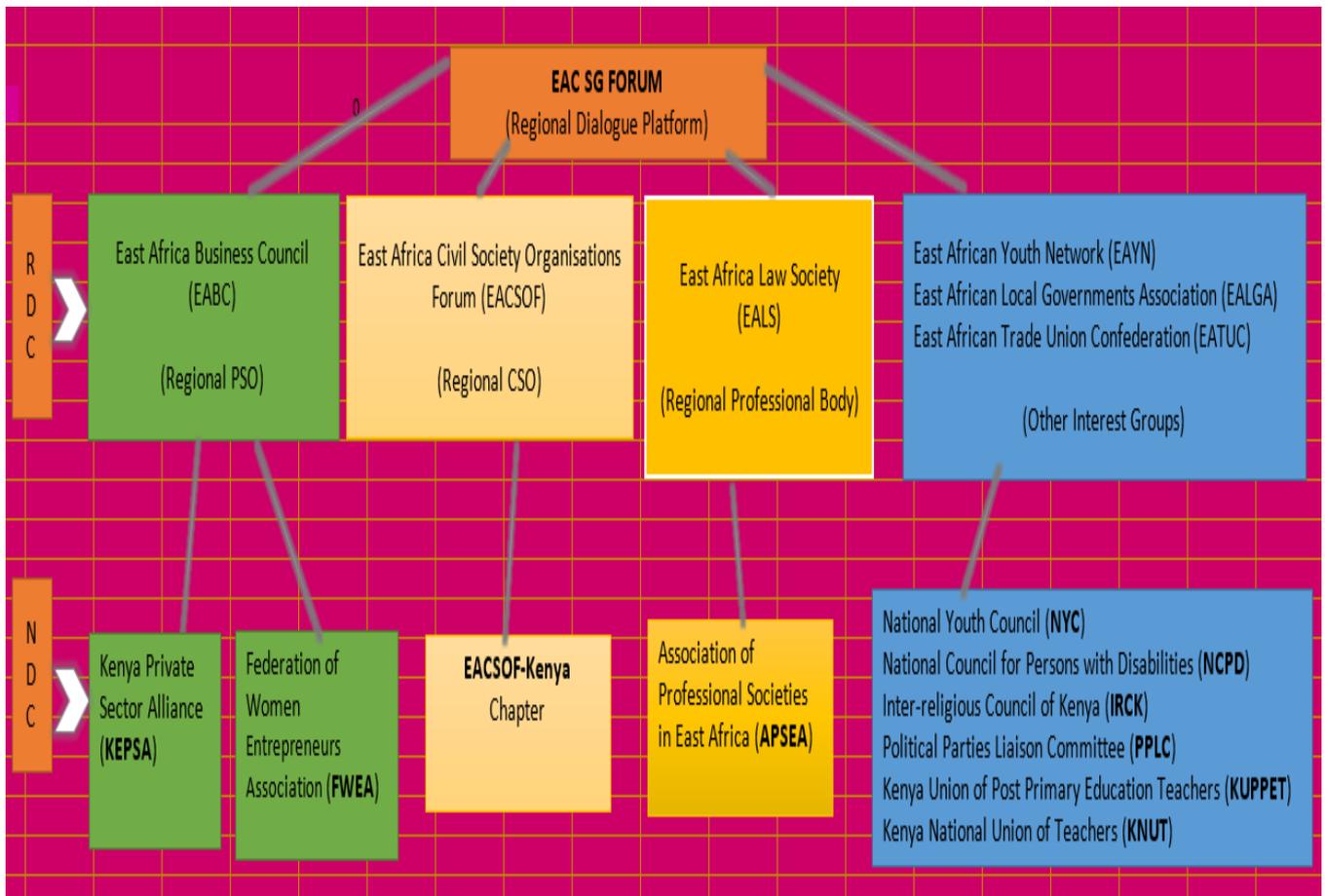
Kenya is part of the EAC, which is arguably the most integrated REC in Africa. As mentioned in earlier sections, the Secretariat gives an opportunity to CSOs, PSOs and other interest groups to engage in discussions on issues of interest and opportunities resulting from the integration process at the regional level. Regional positions are developed after consultations in each of the five Partner States and consolidated under cross-cutting issues and priorities whereby they are presented at the presence of the chief guest, the EAC SG.

For instance, themes identified under the CDF for 2016 are (i) constitutionalism and good governance in the EAC; (ii) protection of civic space and human rights defenders in the EAC and (iii) the role of marginalised communities in the extractive industry. SGF is

the culmination of an year-long sector-wide consultations and is carried out based on the EAC calendar of activities.

The CDF envisages two levels of dialogue, national and regional levels, in which the structure depicted below is expected to capture the views of all stakeholders, CSO, PSO and other interest parties, as represented by their respective apex bodies.

Figure 3: CDF Structure for Consultations of Kenya’s National CSO, PSO and other Interest Groups



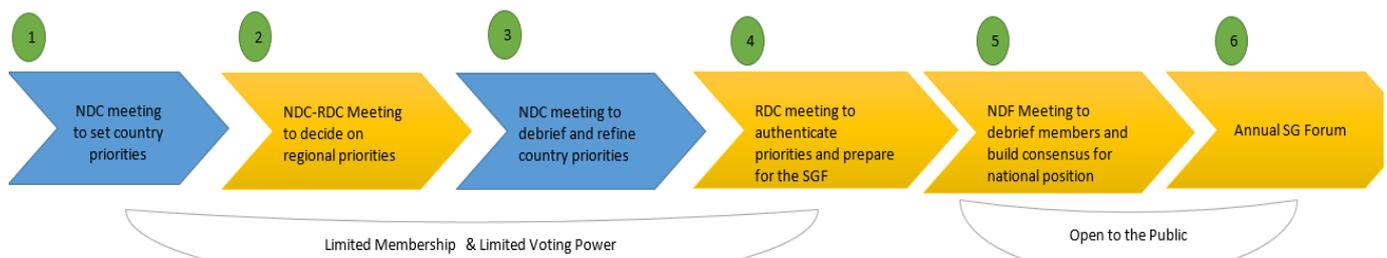
Source: Author’s own depiction

Regional Dialogue Committee (RDC) has membership from the private sector represented by the region’s private sector apex body, the East Africa Business Council (EABC); the civil society as represented by EACSOFF; the region’s professional body, East Africa Law Society (EALS); and other interest groups represented by the East African Youth Network (EAYN), East African Local Governments Association (EALGA); and East African Trade Union Confederation (EATUC). Only EABC and EALS have observer status at the EAC meetings while EACSOFF is yet to gain this status after all its members in the five Partner States have been officially recognised and registered by their respective governments. So far, only EACSOFF-Kenya and EACSOFF Tanzania have been registered as the apex organisations for respective national CSOs.

EAC CDF allows national and regional dialogue committees to co-opt new interest groups. Kenya's National Dialogue Committee for instance has managed to co-opt Kenya Union of Post Primary Education Teachers (KUPPET), Kenya National Union of Teachers (KNUT), Inter-Religious Committee (IRC); whereas the RDC has co-opted the East African Youth Network (EAYN).

Kenya's NDC constitutes KEPSA, EACSOE-Kenya Chapter, Federation of Women Entrepreneurs Association (FWEA), IRC of Kenya, KUPPET, KNUT, Political Parties Liaison Committee, National Youth Council- Kenya; National Council for Persons with Disabilities (NCPD); and Association of Professional Societies in East Africa (APSEA).

Figure 4: Kenya's National Dialogue Process



Source: Author's own depiction

An amorphous group used to meet to prepare for the SG's annual forum in 2013 and 2014 before the NDC was established and launched in June 2015 after consultation with all committee members. EACSOE - Kenya has been elected as the chair of the NDC until June 2017 while FWEA serve as the rapporteur.

With limited membership and voting power, the NDC enables Kenya's private sector, civil society and other interest groups to develop national policy resolutions for the Annual Secretary General's Forum. National preparatory meetings are held as many times as needed, usually four times in a year, though it has not been indicated in the rules of procedure.

Assessment of Kenyan NDFs' Successes Against EAC CDF Principles

Sections above addressed the structure of national and regional dialogues but one is inclined to ask: how representative are the NDC and RDC? Do organisations like KEPSA, EABC, FEWA represent the marginalised groups like those poor business women engaged in informal cross border trade? Will dialogues sustain if donors stopped supporting the framework? To answer these questions, we examined Kenya's regional integration dialogue against the EAC CDF principles.

The EAC CDF sets out eight principles which can be used to measure the success rate of the national dialogue in Kenya. Based on these principles, we establish that the NDF process for Kenya has been fairly satisfactory given that it has met half of the principles and failed in the two.

Table 1: Measuring Kenya's National Dialogue against EAC CDF Principles

Principles of the Dialogue	Kenya's National Dialogue	
	Success	Fail
1. Cooperation for mutual benefit	X	
2. Mutual respect, trust and goodwill	X	
3. Active and constructive participation		X
4. Inclusivity		X
5. Unity in diversity	?	
6. Accountability and feedback to stakeholders	X	
7. Evidence-based dialogue with a focus on results	?	
8. Consensus building approach	X	

Source: Based on Author's own Analysis

National dialogues under EAC NDF in Kenya are aligned to the spirit of EAC integration and strive to deepen regional integration and *cooperation for mutual benefit*. Discussions with interviewed stakeholders revealed that they have confidence in the dialogue structure, which is based on *mutual respect, trust and goodwill* as well as on the fact that decision is reached based on *consensus*. In terms of *accountability and feed back to stakeholders*, the SDEAA organises debriefing and feedback sessions to national stakeholders.

However, in terms of *active and constructive participation*, national dialogue parties tend to present inadequate capacities and specialisation on various integration issues for substantive dialogue. So far, there has not been an effort to build the expertise of dialogue parties, either by development partners or SDEAA.

In spite of being direct beneficiaries/losers of regional integration, our assessment reveals that marginalised groups such as cross border traders, majority of whom are women; micro, small and medium business, grassroots organisations are not included in the Kenyan NDF. This lack of *inclusivity* puts into question the NDF's credibility in integrating the 'voice of the voiceless'.

Our assessment acknowledges that the dialogue process in Kenya does not lead to antagonistic roles of parties although it could not confirm that each dialogue party's role complement each other. Apart from *unity in diversity*, another principle that our assessment could not definitely establish the success of the NDF is that of *evidence based dialogue focused on results*. Even though the national dialogue process allows for internal consultations among stakeholders prior to developing national positions, there is no evidence that research and capacity building have been offered in the process for generating evidence where it was lacking.

Stakeholders' Views on Public Participation in Trade Agreements

To gather perspectives from direct beneficiaries on public participation in trade agreements in general and the EAC engagement framework in particular, the study held one-on-one interviews with ten stakeholders from the State Department of EAC Affairs, the Civil Society (SEATINI, IEA, KESSAF, EACSOFF) and the media (Nation Media). Project inception and validation workshops were also used to have roundtable discussions with experts drawn from the private sector (Kenya Association of Manufacturers and KEPSA), government (MOFAIT, Parliamentarians, Micro and Small Enterprise Authority) and CSOs that work on trade, development and regional integration issues.

What is Working?

Respondents agreed that participation of CSOs in the recent past has been improving. Unlike in the past where they would have to seek appointments at the ministry responsible for trade, some respondents indicated the latter is reaching out to CSOs to give views for broader consultation.

There is improvement in the involvement of non-state actors not only in regional integration but also multilateral trade issues, although with the latter, it seems to be still on selective basis for reasons only known to the International Trade Department of Ministry of Foreign Affairs and International Trade.

Substantive involvement has been reported whereby for instance SEATINI-Kenya was invited to be part of the legal scrubbing for the EAC-EU Economic Partnership Agreement (EPA) draft text; whereas some of the interviewed CSOs indicated they are members of various national committees on Trade Facilitation, AGOA, WTO MC10 Task Force, EAC Strategic Plan for AGOA; and so forth. Invitations to meetings are usually through e-mails, phone calls and word of mouth.

Commitment shown by the State Department of East African Affairs has been applauded by stakeholders involved in the NDF. The Principal Secretary was present to officially launch the NDF while the Department does all invitations duly signed by the Principal Secretary for all NDC meetings. SDEAA also volunteered to chair and rapporteur from 2013 to May 2015, until EACSOFF was officially elected as the Chair and FWEA rapporteur of the NDC. Stakeholders also appreciated the commitment of the SDEAA staff from the Principal Secretary down to Directors for participating actively in the NDF.

For organisations working on trade and development issues, our finding shows the civic space has been expanding owing to the following factors:

- The country's 2010 Constitution that specifically calls for public participation in development and policy dialogues;
- Growing global emphasis on inclusive trade policy development and discourse;
- Availability of a Treaty binding forum, that is, the EAC CDF.
- Shrinking role of government in service provision following the 1980s Structural Adjustment Programme, which naturally enlarged the size, role and power of the private sector.
- Keen interest of development partners to have public participation in development and policy making discourse.

What is not Working?

Based on mainly interviews conducted with Kenyan stakeholders and literature review, the following have been identified as inherent gaps and implementation challenges of the EAC CDF in Kenya:

Little inclusivity and representation of marginalised groups in the NDF

- There is minimal, if any, inclusion and representation of micro, small and medium enterprises and cross border traders in the dialogue framework despite these stakeholders remaining vulnerable or potential beneficiaries of regional integration agreements. Information gathered from KEPISA indicated that it represents both small scale and big businesses, the truth of the matter is small business owners are found to be either not able to financially facilitate themselves to attend meetings or usually lack interest while 'medium and large corporates use every meeting as an opportunity to network'.
- Many of the CSOs engaged in the CDF are Nairobi based. The lack of participation from rural and grassroots organisations could be tied to lack of sufficient funds..

Stringent requirements on grant of 'Observer Status' at the regional level

- Stringent Treaty requirements to grant EACSOFF 'observer status' at the Secretariat which requires that EACSOFF must be legally registered in all Partner States through national chapters. Currently EACSOFF national chapters have been legally registered in Kenya and Tanzania only. The stakeholders interviewed wondered why there should be such a laborious and stringent requirement for 'such little benefit', referring to the fact that observer status is simply that, observing proceedings without being part of negotiations and discussions.

Negative Perception tags on CSOs

Some view civil societies as *agents of foreigners*, others as *unnecessary noise makers with unsubstantiated but heavy political statements* while some say *CSOs think they have only dissent, not complementary, role to play*. Such perception has proved difficult to shrug off particularly when some attempt to weigh on negotiation issues that are likely to have negative direct impact on livelihoods.

'In a typical two-day conference for state and non-state actors, heavy weights are given day 1 while CSOs often are slotted the last session on day 2 when most of the participants have already left, which shows the little weight the latter's views are given'

Jason Braganza, Development Practitioner

Capacity gaps within CSOs

- Many CSOs have lean staff to run their activities, whereby at times staff turnover utterly disrupts the organisation's vibrant engagement in regional integration and trade issues. This was evident particularly during the 2010 constitution drafting process where exodus of experts from the civil society was witnessed.
- Losing steam along the way or being derailed by donors' whims is a clear indication that certain CSOs are not strongly founded based on the principles of the organisation's existence beyond mission and vision statements. Absolute reliance on donor funding puts into question the credibility of organisations-whether CSOs are interest or issue driven.
- In spite of availability of various platforms to engage with policy makers, many CSOs simply do not have the capacity to articulate their position to fit in the bigger integration picture.

Organisational gaps within CSOs

- Duplication of efforts and lack of united voice majorly due to competition for limited donor funding.
- Wrangles within and rivalry among CSOs; and corruption and financial malpractice are common in public benefit organisations.
- Wanting communication skill on the part of CSOs while engaging policy makers.

What you say is not the problem but how you say it. Confrontational language will never inspire a partnership but mutual distrust between government and CSOs.

Victor Ogalo, Development Practitioner

Tripartite Free Trade Area and the Role of CSOs

The study finds that there is limited information in the public domain on the TFTA process, issues agreed and those outstanding or contentious; and virtually no engagement of the civil society in the grand integration process. This is the primary responsibility of the MOFAIT.

All interviewees and workshop participants revealed that none was consulted about the ongoing TFTA negotiations, neither were they informed formally about the progress nor given any indication they will be involved in the future. Some of the stakeholders indicated that the first time they learnt about TFTA negotiations was during the IVORI-III project inception meeting when a presentation was made by the MOFAIT. Others indicated that they had to put some extra effort to get information informally as none was forthcoming from the government or REC Secretariats. Many CSO stakeholders

continue to get information from the newswire and informal interaction with ministry officials.

Kenyan stakeholders acknowledge the TFTA initiative to be a step in the right direction to boost intra-Africa trade, create bigger markets, simplify trade rules, increase access to technology and better standards and quality of goods and services, and to have better investment and employment opportunities. All consulted experts lauded the initiative for being in line with the narrative that *our problems should be solved by ourselves as a region/continent*. However, all agree that there needs to be a solid way of addressing valid concerns of citizens such as prospects of business displacement of small/border trade and consideration of issues that are important to the region including trade and climate change; agro-based trade; and trade and women's empowerment.

Article 127 of the EAC Treaty explicitly makes reference to the private sector and civil society and puts obligations on Partner States to create an enabling environment for these stakeholders to allow them take full advantage of the Community, which the TFTA Treaty must also include. EAC has a tested and tried framework to effectively engage CSO, PSO and other interest groups in the regional integration process, albeit with certain gaps and operational challenges, but it could still be taken as the best practice and inspire the TFTA Secretariat to include such a framework for non-state actors in Southern and Eastern Africa.

In short, a good engagement frame work exists at the EAC, dubbed the EAC Consultative Dialogue Framework, but a better version of the EAC CDF could be tailor-made for the TFTA, improving on its inherent gaps and operationalisation challenges identified in this report.

Conclusions and Recommendations

Non-state actors, CSOs, media and the private sector can play greater roles in shaping trade policy, offering additional information for negotiation positions, providing alternative perspective and interpretation of positions, producing shadow reports, and ultimately hastening deeper regional integration is indisputable. CSOs play complementary roles in negotiations and implementation of regional trade agreements through provision of evidence for negotiation positions; sensitisation of potential beneficiaries; monitoring of implementation; and even providing government with alternative 'politically incorrect' negotiation positions or monitoring reports that a Partner State may not be able to voice officially as a government for diplomatic purposes.

CSOs by *de facto* are expected to be the *voice of the voiceless* in the socio-economic and political policy space, which includes regional integration negotiations and implementation processes because of their proximity to and representation of the grassroots/marginalised groups. Their effective involvement and contribution, however, largely depend on access to information on regional deals. It also largely depends on how well they organise themselves and articulate views in a unified manner.

In terms of the civic space in Kenya, the study concludes that for CSOs involved in agitation for political rights, the space seems to be closing for them while for those involved in economic justice, the civic space has been expanding through multi-stakeholder engagement.

Majority of the interviewed CSO respondents indicated that there was improvement in consultation on the part of the Kenyan government on matters of trade. The Ministry of EAC Affairs was praised for consistently coordinating the national consultative dialogues under the EAC CDF. The same view was held of the Ministry of Foreign Affairs and International Trade in terms of consulting CSOs, even if in a selective manner. The private sector seems to have various avenues and opportunities for consultation on a consistent manner, which was evident in the various platforms business players use such the presidential breakfast roundtable, the speaker's meeting and sector meetings, among others.

On the part of CSOs, the stark differences with private sector in consultation opportunities are mainly due to the limited mechanisms of engagement, their lack of capacity, limited financial resources, divided interests, and confrontational approach towards government on the part of CSOs, among others.

Given the huge number of CSOs operating in the country and the region as a whole, CSOs organising themselves under an apex body both at national (EACSOFF-Kenya Chapter) and regional (EACSOFF) levels is commendable for efficiency purposes.

Sustainability and vulnerability issues stand out as enigmatic challenges of the CDF. Weak financial position is cited as the main cause for CSOs' feeble sustainability and vulnerability to donor interest, putting their credibility under question with regard to reflecting their constituencies' interests.

The study findings show there is total information blackout on the TFTA initiative, process and outstanding issues. So far, there has been no engagement of non-state actors on the TFTA and no indication that the TFTA Treaty or Secretariat will allow for an engagement framework for non-state actors.

Recommendations

Incorporating the voice of all stakeholders, including those that do not have deep pockets to influence processes and create engagement platform, through an institutionalised engagement framework is indeed a sign of good governance and basically a mechanism to strike a balance between private and public interests.

Given the importance and complexity of the nature of partnership between the national government and CSOs, both parties need to set out engagement strategies that are sustainable and can be owned by each party for the public good.

Separate engagement framework for the private sector and civil society: Having one engagement framework for the private sector and civil society is tricky, despite both being considered as non-state actors. There is stark difference in interests (profit versus social concerns), differences in time bound outcomes (low-hanging fruits versus long term results); and time bound levels of integration (Free Trade Area/Customs Union versus Common Market). Therefore, there is need for a separate engagement for the two parties that will consider their interests and capacities.

Funding Basket for Facilitation of Engagement: There is need for stronger lobby for inter-governmental organisations, the State and development partners to set aside a funding basket to address *inclusivity and representation of marginalised stakeholders*; as well as allow meaningful engagement of CSOs/non-state actors in regional integration processes, including a CSO delegate in national negotiation teams.

Thematic Grouping of Stakeholders: Within the civil society, there is difference in capacity and expertise. To have more substantive contribution in an organised manner, stakeholders should be organised under certain groups such as those working on or with cross border traders, farmers, arid and semi-arid land, Lake Basin and so forth and included in thematic work groups such as trade facilitation, regulatory, non-tariff barriers and so forth. This is closely tied to membership in the national CSO apex body *whereby members should be theme based networks* and not individual organisations. Moreover, more efforts need to be made by EACSOFF to include rural based and grassroots organisations.

Simplification of 'Observer Status' Requirement: the laborious and stringent requirement of registering CSO apex bodies in all the Partner States has been found to be challenging particularly in certain countries where there is complete mistrust of the

civil society. We recommend that introducing a three-quarters registration requirement to suffice to acquire an 'observer's status' at the regional level.

Opt-in Media in NDC: The study has established that the EAC CDF is a useful forum for engaging Kenyan non-state actors in regional integration matters and advocacy. The study on the other hand found out that the media is engaged marginally in regional integration matters through reporting events. These ICT-oriented CSO can be a powerful tool to ensure that citizens are active agents in regional integration matters and, therefore, should be 'opted-in' the NDC.

Extrapolate Engagement Framework for Trade and Development Issues: Improved and better consultative dialogue framework(s) should be used for the Tripartite FTA and Continental FTA regional integration initiatives, multilateral trading arrangements; and development discourses at the national level.

CSO's Engagement in Economic Activities: With external donor money dwindling by the day, particularly after the global financial crisis and resulting emphasis on value-for-money, the civil society should strategise to find ways of generating funds locally, which is also allowed by the new Act. The soon to be operationalised PBO Act 2013 allows a public benefit organisation to engage in lawful economic activities provided that the income is used solely to support purposes for which the organisation was established [Section 65 (1)] undertaken with its property and resources [Section 65 (2)]; as well as may own and manage property and assets for the accomplishment of its not-for-profit purposes [Section 65(3)].

Strong financial situation is a crucial component of keeping an organisation's integrity to fulfil its organisational aspiration and to be issue driven. CSOs need to think outside the box and be creative and diversify funding sources.

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Annex I: List of Respondents

Type of Organisation	Organisation	Respondent	Designation
Think-tank/ Company	Institute of Economic Affairs (IEA)	Leon Ong'onge	Research consultant – Trade and Development
Association	Kenya Small Scale Farmers Forum (KESSFF)	Justus Lavi	General Secretary
Civil Society Organisations	Southern and Eastern Africa Trade, Information and Negotiations Institute (SEATINI)	Jill Juma	Senior Programme Officer
	East African CSO Forum (EACSOFF) Kenya Chapter	John Owegi	Ag. Coordinator
	Congress of Civil Societies /East African CSO Forum (EACSOFF) Kenya Chapter	Morris Odhimbo	President of Congress of Civil Societies and EACSOFF Chairman
	Kenya Human Rights Commission	Fred Njehu	Programme Advisor, Trade Justice
Ministry	State Department of EAC Affairs	Samuel Kahenu	Senior Assistant Director
Development Practitioner	Personal Capacity	Jason Braganza	
Former Development Practitioner/Private Sector	Personal Capacity	Victor Ogalo	
Media	Nation Media	Christabel Ligami	Reporter

Annex II: Questionnaires

I. Civil Society

(Community Based Organisations, Micro-Small-Medium Enterprises Associations, Farmers' Federation/Associations, Cross Border Associations, CSO/NGOs working on Trade and Development)

Introduction

CUTS Nairobi, with financial support from Oxfam-Novib Pan Africa Programme, is implementing a project dubbed 'Integrating the Voice of Civil Society Organisations in Regional Integration Processes in Eastern and Southern' (IVORI-III) in Ethiopia, Kenya and Zambia. The project has three components *viz.*, country and regional research studies in the three countries; a solid network of CSOs in the 26 countries of Eastern and Southern Africa; and design of an 'Engagement Framework and Action Points'.

You have been chosen as one of the stakeholders to solicit views on the roles, contributions, opportunities and challenges of non-state-actors in regional integration processes. We appreciate your cooperation.

Name of Organisation	
Name of Interviewee	
Designation of Interviewee	
Contact Details; Phone Number; E-mail Address	

1. What is the mandate of the organisation?
2. Has your organisation (and/or others in the civil sector) been involved in trade/development dialogue with the national government? Yes No [If yes, ask questions 3 to 5; if no, proceed to question 6]
3. What were the mechanisms (e.g., **invitation** from government or own initiative; Involvement in national trade **committees**; Channels of **communication**)?
4. How was such involvement facilitated (e.g., finance from government or particular donor/organisation)?
5. Are contributions/inputs from CSOs often taken on board as they are?

6. If no, can you think of any reasons why? How can this be improved?
7. Is there a public-private dialogue structure with legal backing in the country?
 - a. If yes, is it working? Why or why not?
 - b. If no, would you prefer to have one institutionalised?
8. On a scale of 1-3, how would you rate CSOs' participation in trade policy making at national and regional integration processes in the recent past?

1. Decline in CSOs' participation	2. Not so much change in the recent past	3. CSOs' participation has been improving impressively
What are the constraints ? How can their participation be Strengthened?	Reason	To what extent have they been strengthened ? What are the success factors ?

9. Has the space under which non-governmental organisations (NGOs)/CSOs operate been expanding or shrinking in the recent past? Give **concrete examples**.
10. Do you think the civil sector has been empowered to further take an active and vibrant role in national trade policy making or regional integration?
 - a. If yes, give examples.
 - b. If no, can you think of any reasons? How can this be improved
11. Has there been any institutional support for your organisations or other CSOs to be involved in regional integration or trade policy making?
 - c. If yes, in what form? Which funds were made available for the support?
 - d. If not, what do you think could be the reason?
12. Are you aware of the Tripartite Free Trade Area initiative that aims to bring 26 countries under one market? [If response is yes, ask questions 13 and 14; if no, proceed to 15]
13. Are you aware of the status of the Tripartite Free Trade Area (TFTA)?
 - e. Has there been a status update on the TFTA? By whom? Which mechanism was used?
 - f. Has there been consultation on the part of the government to solicit ideas on the TFTA negotiations? If yes, what were the mechanisms, including facilitation? If no, can you think of any reason? How can this be improved?
14. Do you perceive the TFTA to be a positive initiative?
 - g. If yes, in what ways would you say it is beneficial?
 - h. If no, why not? What should be different?
15. What do you think are some of the challenges in the TFTA negotiations and implementation process?

16. What CSO engagement framework can you propose under the TFTA? How should this engagement process be conceived? What measures should be put in place to sustain it?

17. Please provide any remarks you may have

II. Government

(Ministry responsible for Regional Integration; Ministry responsible for Trade Policy making)

CUTS Nairobi, with financial support from Oxfam-Novib Pan Africa Programme, is implementing a project dubbed 'Integrating the Voice of Civil Society Organisations in Regional Integration Processes in Eastern and Southern' (IVORI-III) in Ethiopia, Kenya and Zambia. The project has three components *viz.*, country and regional research studies in the three countries; a solid network of CSOs in the 26 countries of Eastern and Southern Africa; and design of an 'Engagement Framework and Action Points'.

You have been chosen as one of the stakeholders to solicit views on the roles, contributions, opportunities and challenges of non-state-actors in regional integration processes. We appreciate your co-operation.

Name of Organisation	
Name of Interviewee	
Designation of Interviewee	
Contact Details; Phone Number; E-mail Address	

1. What mechanisms are put in place to involve CSOs in national trade policy making processes, regional, bilateral and multilateral trade negotiations? Does it have legal backing?
2. Have efforts been made to prepare adequate empirical and research-based papers feeding into TFTA negotiations?
 - a. If yes, which issues?
 - b. If not, why?
3. Were national non-state actors sensitised regarding TFTA negotiations and the status of the negotiations?
 - a. If yes, which sector (private or civil)?
 - b. To what extent have the private sector made inputs to TFTA negotiations?
4. Are there channels of communication through which non-state actors are informed on TFTA negotiations?
 - a. If yes, what are the mechanisms?
 - b. If not, why?

5. What do you think are the main challenges of CSOs that hamper their effective participation and contribution to national trade policy making, trade negotiations and regional integration?
6. What are your expectations from CSOs?
7. How best would you want to engage CSOs in the Tripartite process?
8. At what level or what platforms can CSOs be engaged in the TFTA process?
9. Do you think an engagement framework of CSOs in the TFTA process will be acceptable by the REC and TFTA Secretariat?
10. What should be the components of this engagement framework?
11. Please provide any remarks you may have.

III. Private Sector Alliances

CUTS Nairobi, with financial support from Oxfam-Novib Pan Africa Programme, is implementing a project dubbed 'Integrating the Voice of Civil Society Organisations in Regional Integration Processes in Eastern and Southern' (IVORI-III) in Ethiopia, Kenya and Zambia. The project has three components *viz.*, country and regional research studies in the three countries; a solid network of CSOs in the 26 countries of Eastern and Southern Africa; and design of an 'Engagement Framework and Action Points'.

You have been chosen as one of the stakeholders to solicit views on the roles, contributions, opportunities and challenges of non-state-actors in regional integration processes. We appreciate your co-operation.

Name of Organisation	
Name of Interviewee	
Designation of Interviewee	
Contact Details; Phone Number; E-mail Address	

1. What is the mandate of the Association/Alliance?
2. Has your organisation (and/or others in the private sector) been involved in trade/development dialogue with the national government? Yes No [If yes, ask questions 3 to 5; if no, proceed to question 6]
3. What were the mechanisms (e.g., **invitation** from government or own initiative; Involvement in national trade **committees**; Channels of **communication**)?
4. How was such involvement facilitated (e.g., finance from government or particular donor/organisation)?

5. Are contributions/inputs from PSOs often taken on board as they are?
6. If no, can you think of any reasons why? How can this be improved?
7. Is there a public-private dialogue structure with legal backing in the country/region?
 - a. If yes, is it working? Why or why not?
 - b. If no, would you prefer to have one institutionalised?
8. On a scale of 1-3, how would you rate PSOs' participation in trade policy making at national and regional integration processes in the recent past?

2. Decline in PSOs' participation	2. Not so much change in the recent past	3. Participation of PSOs' has improved impressively
What are the constraints? How can their participation be Strengthened?	Reason	To what extent have they been strengthened? What are the success factors?

9. Do you think the private sector has been empowered to further take an active and vibrant role in national trade policy making or regional integration?
 - a. If yes, give examples.
 - b. If no, can you think of any reasons? How can this be improved
10. Has there been any institutional support for your organisations or other PSOs to be involved in regional integration or trade policy making?
 - a. If yes, in what form? Which funds were made available for the support?
 - b. If not, what do you think could be the reason?
11. Are you aware of the Tripartite Free Trade Area initiative that aims to bring 26 countries under one market? [If response is yes, ask questions 12 and 13; if no, proceed to 14]
12. Are you aware of the status of the Tripartite Free Trade Area (TFTA)?
 - a. Has there been a status update on the TFTA? By whom? Which mechanism was used?
13. Has there been consultation on the part of the government to solicit ideas on the TFTA negotiations? If yes, what were the mechanisms, including facilitation? If no, can you think of any reason? How can this be improved?
14. Do you perceive the TFTA to be a positive initiative?
 - a. If yes, in what ways would you say it is beneficial?
 - b. If no, why not? What should be different?
15. What do you think are some of the challenges in the TFTA negotiations and implementation process?

16. What non-state actors engagement framework can you propose under the TFTA?
How should this engagement process be conceived? What measures should be put in place to sustain it?

17. Please provide any remarks you may have

Thank you!

