

**EAST AFRICAN COMMUNITY
EAST AFRICAN LEGISLATIVE ASSEMBLY**



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28th May 2013

The Chairperson,
Committee on Communications, Trade and Investment (CTI)

The Chairperson,
Committee on Legal, Rules and Privileges

**PETITION FROM SEATINI-UGANDA AND OTHER CIVIL SOCIETIES OF
EAST AFRICA**

The Civil Societies in East Africa led by SEATINI-Uganda have presented a Petition to the Speaker EALA, petitioning EALA to raise, object and challenge the EAC/USA Trade and Investment Agreement. The petition states that it is highly tilted in favour of USA creating unfavourable/unequal terms of trade although they may not be envisaged in the Agreement but due to the differential in capacities - unequal partners cannot trade on equal terms. Thus the question of reciprocity does not exist. Concerns were also raised on the MFN clause, the Expropriation clause, the Performance Requirements and on the failure to have a roll-back clause in this EAC/USA Agreement.

Another concern was made on the Intellectual Property Rights Agreements which is already before the TRIPS Governing Council. Concerns over the disparity in levels of development, the refusal of extension time over and above the five years granted are not adequate among others.

I therefore forward to you this petition and request your Committees to study them and make appropriate recommendations to the Assembly.

Margaret Nantongo Zziwa
SPEAKER

CC: ✓ Chair, Council of EAC Ministers
✓ Clerk, EALA

PETITION TO PARLIAMENT OF UGANDA AND EAC:

PROMOTING SUSTAINABLE DEVELOPMENT THROUGH INVESTMENT: RETHINKING THE EAC-US TRADE AND INVESTMENT PARTNERSHIP AGREEMENT.

Mindful of the crucial role investment plays in promoting sustainable development, we the undersigned civil society organizations working on trade-related and development issues in Uganda note with concern the progress and direction of the EAC-US TIP negotiations.

On the 14th June 2012, the Ministers responsible for Trade matters in the EAC Partner States and the United States Trade Representative (USTR) met on the margins of the AGOA Forum in Washington D.C. and agreed to begin consultations on the partnership with Africa Trade and Investment Agreement (PATIA) which seeks to build on the Trade and Investment Framework Agreement and the African Growth and Opportunity Act initiatives. PATIA has four components including a regional investment treaty, Trade Facilitation agreement¹, targeted trade capacity building assistance to address challenges in selected sectors, and a commercial dialogue between the US and EAC private sectors.

Our major concern is with the Regional investment treaty i.e. the **EAC-US TRADE AND INVESTMENT PARTNERSHIP (TIP) NEGOTIATIONS**. We are concerned that the US is negotiating on the basis of a Template (2012 U.S Model Bilateral Investment Treaty) which has already been submitted to the EAC. The template is generally tailored to protect and promote the rights of US investors without addressing their obligations and the rights of the EAC countries. The EAC is therefore entering these negotiations based on the U.S terms. This template includes, inter alia, the following onerous articles:

The Definition of Investment (Article 1)

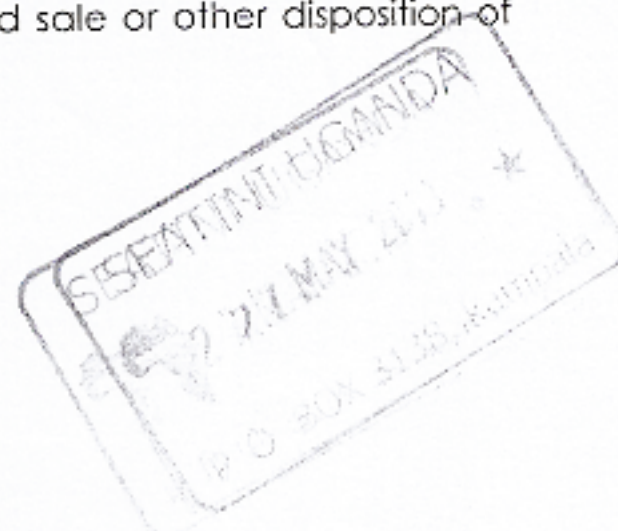
The US BIT defines Investment in a very broad manner, to include every kind of asset that an investor owns or controls, directly or indirectly. These include, inter alia, movable and immovable property and any property rights, such as mortgages, liens and similar rights; Shares in and stocks and debentures of a company and any other form of participation in a company; and other debt instruments and loans; claims to money or to any performance having an economic value (Intellectual property rights and goodwill; Turnkey, construction, management, production, Concessions, (Including exploration and exploitation concessions), revenue sharing and other similar contracts.

: This broad definition is problematic as the privileges in the agreement will apply to all these aspects of the investment. The definition should be narrowed and made more specific and in line with the property rights of Uganda and EAC as a whole

National Treatment (NT) (Article 3)

Under this article, US investors in the EAC are to be accorded the same treatment with respect to acquisition of property, expansion, management, conduct, operation, and sale or other disposition of investments in the EAC territory, like that accorded to the EAC Investors.

¹ We will table a separate petition on Trade Facilitation



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With such a provision, EAC Governments will be constrained to promote local investors or local industries, which doubtlessly need assistance to grow in order to be able to compete with foreign companies which are already more established. The principle of National Treatment is meant to apply to Trade in goods, and is thus inappropriate when applied to Investment.

Most Favored Nation (MFN) (Article 4)

Under this article, the US requires EAC countries to accord to US investors and their investments treatment that is no less favourable than the treatment accorded to investors of any third party

This provision limits EAC governments' ability to choose which countries they would like to give preferences these two articles i.e National Treatment and MFN should be retracted from the agreement.

Minimum Standard of Treatment (Article 5)

Under this Article, each Party shall accord to covered investments treatment in accordance with customary international law, including "fair and equitable treatment and full protection and security".

The term 'fair and equitable' treatment has recently become controversial in view of the debate on its precise scope, making the scope of commitments uncertain for EAC countries. EAC may be obliged to reach high standards of treatment of US investors or risking losing disputes. The EAC should be specific on what amounts to "fair and equitable treatment"

Expropriation and Compensation (Article 6)

This article stipulates that Investments of investors of each contracting party shall not be nationalized expropriated or subjected to measures having effect equivalent to nationalization or expropriation except for expropriations made for public use or in the interest of defense, public safety, public order, public morality or public health.

It should be noted that a wide definition is given to the term "expropriation" to include the loss of goodwill and future revenue/profits of a company or an investor, as a result of a government measure or policy. Investors have often used "Expropriation" provisions to challenge government regulatory measures.

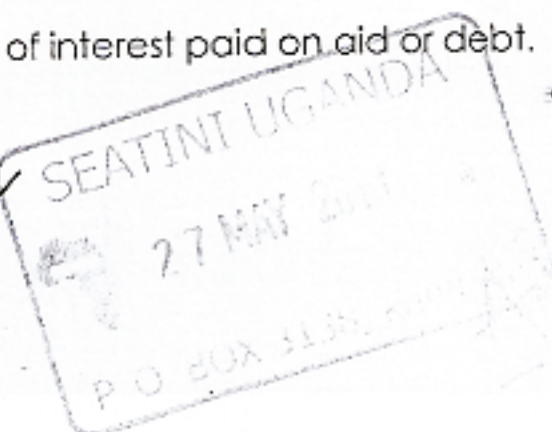
Uganda and the EAC in general should clearly stipulate and make a clear distinction between legitimate state regulatory activity in the public interest and those state measures that are to be deemed expropriatory and therefore liable to the payment of compensation under the investment agreement.

Transfers (Article 7)

This article demands that each party permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: contributions to capital, profits, dividends, capital gains, interests, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment.

The outflows of profit and other investment income will have a negative effect on the balance of payments. The financial outflows increases through time as the stock of foreign capital rises leading to "decapitalisation"

"Because of the much higher rate of return of FDI compared to the rate of interest paid on aid or debt."



Given that profits have to be re-invested in order for development to take place, EAC states should retain the right to regulate transfers of profits by foreign investors.

Performance requirements (Article 8)

This article prohibits host states from imposing performance requirements on the foreign investor or investment i.e. regulation on limits and conditions on equity, obligations for technology transfer, measures for using local materials; for increasing imports or limiting exports and requirements to employ locally.

This article erodes the ability of EAC states to impose obligations on foreign investors to act in a way that is beneficial to the EAC economy and its people. This includes requirements to employ or source locally, minimum levels of exports, maximum levels of imports, or to transfer technology. Therefore, Uganda and the EAC in general should retain the right to impose obligations on foreign investments to act in a way that is beneficial to her economy and people.

Dispute Settlement (Article 37)

This article stipulates that dispute settlement will be undertaken in designated international courts (ICSID Convention or the New York Convention (or the Inter-American Convention). It also allows investors to bring cases against host states in the designated international courts.

This provision causes a bias in terms of unfair treatment in foreign courts in addition to the obvious cost implications. This provision is also contrary to International Law as it erodes the sovereignty of EAC states. We propose that any disputes that arise in any EAC country as a result of this agreement should be resolved within that local jurisdiction.

The process:

We are further concerned that the process of negotiating this treaty is undemocratic and haphazard. The US has presented its template on a "Take or leave it" as opposed to round table negotiations aimed at benefiting both parties. Considering the fact that, the Members of Parliament (MPs) at national and EAC level, who are the representatives of the people have neither been consulted nor informed about the ongoing process.

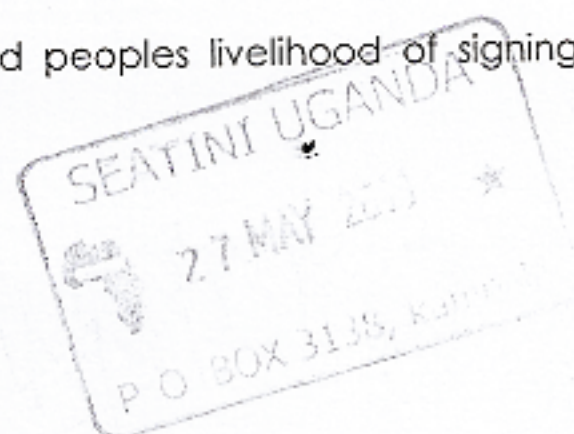
We have noted with concern that the Uganda investment code is still work in progress and that the EAC does not have in place a joint investment policy to use as a basis to advance EAC's interests during the negotiations.

Furthermore, it should be noted that Rwanda already being a signatory to the US investment Treaty poses a challenge which should be addressed to ensure that EAC speaks with one voice in the negotiations.

The negotiations are undertaken on the erroneous assumption that the two parties i.e. US and the EAC, are equal. In the case of EAC, reciprocity is academic as it is unlikely that the EAC will be investing in the U.S.

Bearing in mind the above concerns,

Noting the far reaching implications on the EAC economy and peoples livelihood of signing such binding and unfair treaties,



Aware that there is no correlation between signing Bilateral Investment Agreement and the flow of FDI;
Noting that a number of countries including South Africa are reviewing their investment agreement due to their perceived implications

Recognizing that with appropriate policies in place, investment can be a powerful tool for poverty eradication and the fostering of sustainable development;

Appreciating the vital role of Members of Parliament as representatives of the people with an oversight role of the policies and laws in the country,

We pray;

- **THAT** Members of Parliament as representatives of the people should ensure that the interests of the nation are protected and promoted in the TIPA negotiations,
- **THAT** Members of Parliament should play a more proactive role by discussing analytically and in a non-partisan manner Uganda & EAC position in the TIPA negotiations in line with national development objectives and regional development policies.
- **THAT** MPs should monitor development and request for updates on the TIPA negotiations from the responsible ministries in order to ensure transparency in the negotiations and accountability to their constituencies in particular and the nation in general
- **THAT** the negotiation process is participatory, and includes all stakeholders including CSOs, business community, religious affiliations, academia and farmers
- **THAT** Uganda and EAC should have their own investment model that is anchored in their development objectives and priorities to enable the EAC to negotiate with US from an informed point of view.

We support the promotion of investment but this should be in the context of a win-win situation whereby there is a balance between the rights and obligations of both the investors and the host countries.
The EAC and the Uganda government in particular should asserts its right to promote and protect the economy and livelihoods of East Africans/Ugandans which right should not be undermined by the US self-serving interests.



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THE UNDERSIGNED CIVIL SOCIETY ORGANIZATIONS:

1. African Youth Peace Initiatives - Uganda
2. Center for Information Policy in Africa
3. Faculty of Humanity - Makerere University, Kampala
4. Participatory Ecological Land Use Management (PELUM)-Uganda
5. Jenga Afrika
6. Uganda Joint Christian Council (UJCC)
7. Volunteer Efforts for Development Concerns (VEDCO)
8. Food Rights Alliance (FRA)
9. First African Bicycle Information Organisation (FABIO)
10. Consumer Education Trust (CONSENT)
11. Centre for Trade and Development Network (CENTADEN)
12. Centre for Development Initiatives (CDI)
13. Pan African Movement (PAM)
14. VECO - Uganda
15. Development Network of Indigenous Voluntary Associations (DENIVA)
16. African Centre for research and Development (ACRD)
17. Building East African Community Network (BEACON)
18. Uganda Coalition for Sustainable Development (UCSD)
19. Environmental Alert
20. East and Southern African Farmers' Forum (ESAFF)
21. Action Aid International Uganda (AAIU)
22. Southern and Eastern African Trade Information and Negotiations Institute (SEATINI)-Uganda

