

South Sudan's EAC Accession: Legal Obligations and Negotiating Options

Ana Frischtak, January 2013

Summary

Accession to the EAC presents both opportunities and challenges for South Sudan. This note highlights key legal provisions of the EAC's main documents. It identifies areas where the Government could potentially benefit from accepting new trade disciplines associated from EAC membership. It also points to areas where South Sudan may wish to negotiate for exceptions or delayed implementation. The note does not attempt to provide an answer whether to join the EAC. This multifaceted decision should be based on informed analysis and political considerations. This note hopes to contribute one piece of analysis in the legal framework of accession with focus on economic underpinnings.

With regard to the Customs Union, these include provisions on internal tariffs, where South Sudan may want to negotiate for phased tariff elimination on a select number of goods until they can be replaced by value added or other efficient taxes at the border so as to avoid any revenue loss. Of particular importance, the Government may also want to negotiate for implementation of the CET without adherence to the SI list – tariffs that are exceptionally high and would otherwise penalize South Sudanese consumers and/or producers. Further, the Government stands to benefit from the elimination of NTBs, although it is likely to need greater technical capacity to adequately participate in region-wide forums to eliminate them.

With regard to the Common Market, by far the most potentially beneficial and politically sensitive provision concerns the free movement of workers. South Sudan needs better access to skilled labor that greater openness can provide. While South Sudan has much to benefit from opening its labour market, it may wish to consider new obligations based upon a diagnosis of its domestic labour markets, and this may require phasing in new commitments in sensitive sectors over a period of

time. Similarly, South Sudan can benefit from implementing the EAC provisions on the free movement of services and capital. Phasing in implementation of EAC disciplines is consistent with Partner States' current practice, as their schedules indicate that implementation is an ongoing process.

Introduction

Among the many challenges and opportunities facing South Sudan as it embarks on its newly found statehood, one is its possible accession to the East African Community ("EAC" or "Community"). Accession to the EAC presents both opportunities and challenges for South Sudan. Significantly, the adoption of EAC certified free market disciplines will reassure and encourage prospective investors and as such provide a strong impetus to foreign investment in the country. Additionally, accession to the Community is likely to contribute toward much needed economic development by promoting trade, pushing the country to adopt important trade facilitation measures, such as the harmonization of standards and laws, and allowing South Sudan to benefit from the Community's shared knowledge in key fields such as industrial development and agriculture. Finally, as with governments entering into trade agreements everywhere, it stands to benefit from the disciplines that accepting the agreement imposes on domestic policy – because private producers know that the government will abide by internationally agreed and enforced rules that convey certainty to the private sector on the rules of the game.

However, conformance with, and implementation of EAC provisions will be a formidable challenge given South Sudan's acute institutional and capacity constraints. South Sudan's ability to take advantage of the opportunities of EAC membership and to deal with its many challenges will in part depend upon on what terms it negotiates its entry into the Community.

As a new nation seeking to establish itself in both the regional and international communities, one of South Sudan's main objectives in joining the EAC is to increase its regional economic and political ties. As with most regional agreements, the impetus behind entering into regional integration agreements are often political—as much as economic—in nature. This is particularly true in the new nation of South Sudan, as it is trying to reorient its political relations to East Africa. Nonetheless, economic factors also play a significant role, and South Sudan, as one of the least developed and urbanized countries in the world, potentially has much to gain from trade and investment-led development as a means to reduce poverty levels and spur economic development. Membership to the EAC will lead to an eventual convergence to EAC norms, including the gradual harmonization of standards across various sectors such as sanitary and phyto-sanitary standards, infrastructure, transportation, ports, customs regulations and telecommunications. Harmonization can help to facilitate regional and global trade, spur both foreign and domestic investment, and further contribute to much needed economic development.

General Provisions

Upon adherence to the EAC, South Sudan would be obligated to accept the Treaty's general conditions for admission, which include, inter alia: acceptance of the Community as set out in the Treaty; adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice; potential contribution to the strengthening of integration within the East African region; establishment and maintenance of a market driven economy; and social and economic policies being compatible with those of the Community (Treaty, Article 3.3).

Significantly, South Sudan will have one year from the date it signs the EAC Treaty to approve and implement legislation that gives the EAC laws, regulations and the like as provided for in the Treaty force of law as well as giving effect to the Treaty itself. Both Rwanda and Burundi's Treaties of Accession provide the same (Treaties of Accession, Article 2). Given South Sudan's limited implementation capacity due to lack of technocratic expertise, it is likely to need more time to fully implement EAC rules. If the Government deems this necessary, this should be requested and accordingly reflected in South Sudan's Treaty of Accession.

The Treaty's provisions on the sharing, exchange and transfer of technology in the context of the Community's industrial development could be a potential benefit and development enhancing consequence of EAC membership for South Sudan, given its low level of development and the fact that there is virtually no industrial development in the country. The same may

also be true with regard to the harmonization and coordination measures envisioned by the Treaty in the areas of transport and communications (Article 89); railways (Article 91); civil aviation and air transport (Article 92); maritime transport and ports (Article 93); inland waterways transport (Article 94); and others. In particular, these harmonization measures may help to attract much needed investment in transportation infrastructure, given that South Sudan only has an estimated 300 km of paved roads in a country the size of France.

Further, South Sudan could benefit from the provisions on agriculture and food security found in the Treaty. Given the underdevelopment of agriculture in South Sudan and the vast potential for its commercial development, sharing in the Community's agricultural knowledge and converging to common standards is an important step to spur development in this sector. However, the main challenge for South Sudan in reaping the potential benefits from the harmonization of standards and adoption of EAC programs and policies is its ability to properly implement these given its young institutions, limited human resources capacity and a lack of harmonization among its domestic laws.

Customs Union

The Treaty and the Protocol provide that implementation of the Customs Union shall be progressive over a transitional period of five years. This indicates that South Sudan will be able to phase in its commitments over time, making adoption of the Customs Union a gradual process. This is important because of both the Government's limited implementation capacity and, as will be discussed below, potential country specific sensitivities with regard to the Protocol's requirements.

The internal and external tariff provisions under the CU Protocol are likely to be some of the most relevant legal obligations South Sudan will need to comply with upon joining the EAC. With regard to internal tariffs, customs duties and other charges of equivalent effect imposed on imports have to be removed. The only exceptions are listed in Article 11. Article 11.2 provides that goods to and from Uganda and Tanzania shall be duty free and goods to and from Uganda and Tanzania into Kenya shall be duty free. However, because of concerns from Tanzania and Uganda regarding goods coming in from Kenya, the most developed country of the Community, Article 11 also provides that certain goods, classified as "category B" goods, exported from Kenya into Uganda and Tanzania would be provided a phase out tariff reduction period of five years (Article 11.3-11.5). Other goods, classified as "category A goods" would be eligible for immediate duty free treatment.

Accordingly, Article 11 provides some insight as to what kind of exceptions South Sudan may be able to negotiate under the CU. If South Sudan had any significant domestic industry that it wanted to protect from an increase in imports from the region, it might consider specifying a list of certain goods that would be eligible for phased out tariff reduction. However, this is not the situation for South Sudan. Since it has virtually no other domestic industry apart from oil, and is indeed dependent on food imports from the region, there may be greater value in eliminating internal tariffs on intra-EAC trade rather than maintaining them. Indeed, eliminating internal tariffs could help reduce the price of imports to South Sudanese consumers and producers, and thereby make food and other goods less expensive for its population. Further, while for other EAC countries, eliminating all tariffs on intra-EAC trade might well have decreased revenue, for South Sudan, this loss is not likely to be significant since oil exports account for the vast majority (98%) of the Government's revenue.

Nonetheless, given that oil exports are currently stalled and the importance of increasing Government revenue from all sources, South Sudan may wish to introduce a VAT or selected excise taxes (not restricted to imports) that can be levied at the border to replace any lost tariff revenues from accepting EAC disciplines. In the meantime, it may wish to negotiate for a phased out tariff elimination under Article 11 on those few goods that account for the largest import tariff revenues from the region until other taxes are in place to compensate losses. South Sudan is likely to experience greater benefits by immediately eliminating tariffs on intra-EAC trade rather than maintaining them given the non-existence of competing domestic industries.

Common External Tariff

The CU Protocol establishes a three band common external tariff (CET) with minimum rate of 0% on raw materials, 10% rate on intermediate products and maximum rate of 25% for all finished products imported into Community (Article 12.1). After five years, the highest CET band of 25% is to be reassessed with a view to reducing it to 20% subject to approval from partner states. The CET could be a benefit to South Sudan so long as its current effective external tariffs are not lower than the CET. However, the CET has an important exception for "sensitive items list" ("SI") items. For SI items, the majority of which are food staples and consumed disproportionately by the poor, including milk, cream, wheat, meslin, maize, rice, flour, sugar, among others, tariffs are higher than 25%. In Rwanda, the increased tariff rate on SI items lowered the income level of poor households by almost 4%. Accordingly, given that South Sudan does not currently have any significant production of food products and is a net importer of

food, it may want to negotiate for implementation of the CET without adherence to the exceptions for SI items.

South Sudan can benefit from the experience of other EAC countries in order to craft the optimal accession plan for its development goals. In particular, given South Sudan's dependence on food imports, adherence to the SI list neither conforms with its development goals nor, more importantly for purposes of the EAC, with the fundamental principles of the Treaty, which call for the "equitable distribution of benefits" (Treaty, Article 6(f) and 7(f)). This is so because the SI list as devised is most likely benefitting at least some Partner States whose domestic industry would likely be harmed by lowering external tariffs on particular items (i.e., those on the SI list), whereas the same list is injuring other Partner States, in this case Rwanda and most likely South Sudan if it were to accede to the EAC, therefore resulting in an inequitable distribution of the benefits of the Treaty and its Protocols. Accordingly, South Sudan could request a form of special and differentiated treatment based on Articles 6 and 7 of the Treaty given its relatively low level of development and the likely harm that application of the SI list would pose to its economy.

Alternatively, South Sudan could accept provisions on the CET as they are but once it has acceded to the EAC, it could enact measures (e.g., the non-application of SI list) to prevent likely economic harm from application of the SI list. Notably, Article 12.3 allows Partner States to take preventative measures to protect their economies resulting from implementation of the CET. However, Partner States need to obtain approval from the Council for any measures they decide to enact. Accordingly, before accession, and as part of its negotiation strategy, South Sudan might try to obtain some a priori indication from the EAC that the Council would approve or be willing to consider approval of non-adherence to the SI list as a "safeguard measure" under the Protocol, or any other safeguard measure designed to protect South Sudan from the adverse effects of the CET.

One concern that may arise from South Sudan's non-adherence to the SI list would be the possibility of re-export of SI list goods entering into South Sudan at CET levels to other Partner States tariff free. This seems unlikely on economic grounds because the transportation costs would make it uneconomic. In addition, however, the Community's provisions on Rules of Origin would likely bar the re-export of SI list goods. Goods on the SI list that enter South Sudan at CET levels could not be re-exported to other Partner States tariff free unless they were only used as inputs to produce other goods in a manner that "substantially transformed" them in accordance with Rule 5. Under Rule 5, a "substantial transformation of those materials" must result in a c.i.f. value that does not exceed sixty percent of the total costs of the materials used in the production of goods, the value added resulting from the process of

production must account for at least thirty percent of the ex-factory cost of the goods, and the goods must be classified or become classified under a different tariff heading from the one under which they were imported.

Non-tariff barriers

The provisions on non-tariff barriers ("NTBs") are laid out in Articles 2 and 13 of the CU Protocol. These provide for the removal of all NTBs to trade among the Partner States. Unlike the CU's tariff provisions, the provisions on the removal of NTBs are to have immediate effect within the Partner States (CU Protocol, Article 13.1). As stated above, given the underdevelopment of South Sudan's domestic non-oil industry and its need to import food products from the region, elimination of NTBs should have a positive effect on the country since it is likely to facilitate the entry of imports into South Sudan and, in the future, South Sudanese exports into the region.

Removing NTBs are in South Sudan's interest for many of the same reasons that lowering tariffs is: reducing these barriers to competition would lower prices to South Sudanese consumers. Indeed, current EAC Partner States are still working towards eliminating NTBs. South Sudan should therefore seek to mobilize assistance from EAC members and donors at large to develop the technical capacity to represent South Sudanese interests in EAC forums to reduce and eliminate NTBs.

Safeguards

Finally, in addition to the safeguard measures designed to remedy adverse effects from the implementation of the CET in Article 12.3, the CU Protocol contains two additional provisions on safeguard measures (Article 19 and Article 36) to prevent harm to the domestic economy. As discussed previously, apart from using safeguard measures to protect itself from the imposition of the CET with regard to the SI list, once South Sudan begins to develop its domestic industry, it may find these provisions useful in protecting itself from a possible influx of imports that harms or threatens to harm its import competing industries, resulting from either application of the CET more generally or resulting from any other provision of the CU Protocol.

Common Market

Article 76 of the Treaty provides for the establishment of a Common Market among the Partner States. The objectives of the Common Market are to accelerate economic growth through the free movement of goods, persons and labor; the rights of establishment and residence; and the free movement of services and capital.

Free Movement of Labour

Of most relevance and of particular political sensitivity for South Sudan, the CM Protocol provides for the free movement of workers within the EAC. The free movement of workers is a politically sensitive issue in South Sudan given the high unemployment rates among South Sudanese citizens and the relatively large number of foreign citizens already working in the country. Nonetheless, given the dire need not only for skilled labour, but also for labour with higher skills than those that South Sudanese citizens currently possess, implementing the free movement of worker provisions will help attract much needed investment in the country. Indeed, enacting restrictions will only work to dampen growth that will create job opportunities for all South Sudanese. The appropriate policy response from the Government is to focus on education and education policy. Nonetheless, in order to better understand the current structure of the South Sudanese labour market, the Government may want to conduct a labor market study. Based on this assessment, South Sudan could become an advocate for free movement of selected categories of labor, while negotiating for delayed implementation in particular sectors if need be. Indeed, all Partner States delayed implementation of the free movement of workers for a period of time, although Tanzania has been by far the most reluctant Partner State to move forward on implementation. Specifically, Tanzania has delayed implementation until 2015 for the free movement of workers in specific professions, including secondary school teachers, doctors, agricultural field officers and land surveyors. It also delayed until 2012 implementation for specific categories of engineers. (CM Protocol, Annex II, Schedule for Tanzania). In South Sudan's case, staged implementation may be best for low-skilled workers, where South Sudanese citizens would be most likely to fill such positions in the short-term and immediate implementation might be better for those sectors where the need for skilled labor is high and the domestic supply is low and likely to remain so in the short term.

Right for Establishment

The CM Protocol also guarantees the right of establishment. Given South Sudan's need for foreign investment and the possibility of job creation by allowing foreign businesses to establish themselves in the country, South Sudan may benefit from this provision. In general, at its level of development, South Sudan should be as welcoming of foreign investment as possible on the grounds that it will contribute to economic activity and employment creation.

The main areas where South Sudan may wish to develop special regimes are for oil and mineral exploitation. This can be negotiated under the protocol and other EAC states have special provisions.

South Sudan is likely to have capacity constraints implementing the nuts and bolts of this provision such as those involving the removal of administrative practices and procedures that form obstacles or restrict the right of establishment, as well as others that require Partner States to coordinate safeguard measures for the protection of foreign firms and to ensure that these are similar throughout the Community (CM Protocol, Article 11(d)). Notably, there is no schedule for the right of establishment under the CM Protocol, indicating that Partner States opted for immediate implementation of these provisions.

Free Movement of Services

The CM Protocol also calls for the free movement of services and service suppliers within the Community (Article 16). Given the need and desirability for investment in the services sector in South Sudan, the Government is likely to benefit from opening its borders to services investment from the region. While South Sudan will have difficulty competing in trade in services, it could use trade and investment policy to import services (like mobile communication) and their attendant infrastructure from EAC partners.

Nonetheless, the liberalization of services for all EAC countries is progressive and Partner States have accordingly made some reservations, the majority of which are in the telecommunications sector and in the air transport sector. South Sudan may want to consider a different approach: maximizing competition in the South Sudan market by avoiding restrictions that confer domestic monopolies to foreign companies and drive up prices to South Sudanese consumers. Accordingly, this may require negotiating exemptions to selected market restricting arrangements in partner countries on a case by case basis.

Free Movement of Capital

The CM Protocol also provides for the free movement of capital. As is the case with services, the implementation of the provisions on the free movement of capital shall be progressive and may be restricted for "justified reasons". With regard to the Partner States' schedules, there are a modest number of reservations spanning categories such as equity and portfolio investments (e.g., some countries require that purchase of foreign securities by residents be approved by the Central Bank and either restrict or prohibit the participation of residents in IPOs), direct investments, and other transfers and payments relating to investment flows. While South Sudan will be able to negotiate for delayed implementation dates of a similar nature where and if it deems such action necessary, South Sudan should welcome these disciplines on the free movement of capital given their potential to contribute to the country's economic development. Specifically, maintaining an open capital account will help South Sudan

and other EAC countries attract desperately needed financial resources that are essential for their development.

Finally, the CM Protocol also contains some provisions that may help protect South Sudan from any negative effects it may experience as a result of the operation of the Protocol that it may be unable to address through its schedules. South Sudan should take note of these provisions so that it may seek recourse to them if necessary as a result of the provisions of the CM Protocol.

Conclusion

Based on the EAC's main Treaty and Protocols, this note sought to provide an overview of what South Sudan's main legal obligations would be upon joining the EAC, including the potential benefits of EAC membership. The overview identified certain areas where South Sudan can use the negotiations to mitigate risks from full implementation of the protocols. With regard to the Customs Union, the Government may want to negotiate for implementation of the CET without adherence to the SI list. Further, the Government stands to benefit from the elimination of NTBs, although it is likely to need some additional time and greater technical capacity to adequately eliminate them. With regard to the Common Market, by far the most politically sensitive provision concerns the free movement of workers. South Sudan has much to benefit from opening its labour market because it desperately needs access to new skills to drive domestic learning and technological adaptations. It may opt to phase in its commitments in a few sensitive sectors over a period of time based on a careful study of the domestic labour market. Similarly, South Sudan can benefit from implementing the EAC provisions on the free movement of services and capital. Phasing in implementation of EAC disciplines is consistent with Partner States' current practice, as their schedules indicate that implementation is an ongoing process.

About the Author

Ana Frischtak is an attorney with Debevoise & Plimpton LLP, where her areas of practice include international arbitration, advice pertaining to the Foreign Corrupt Practices Act, and intellectual property rights and media-related issues. Her research interests are in international trade law, international investment law, and intellectual property rights. Prior to joining Debevoise, Ms. Frischtak was a judicial clerk for the U.S. Federal Court of the Eastern District of California, Associate Editor for the Michigan Journal of International Law, and also worked at the World Bank. She received a J.D. from the University of Michigan Law School and a B.A. in Government from Cornell University.

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The country team for South Sudan includes Utz Pape, Economist; Peter Ajak, Deputy Country Director; Nada Eissa, Lead Academic; and Richard Newfarmer, Country Director.

Contact IGC in South Sudan

For enquiries about this note and general enquiries about IGC, please contact Dr Utz J Pape (+211 954 158 978, utz.pape@theigc.org).

Contact IGC in London

International Growth Centre
The London School of Economics and Political Science
Houghton Street, 4th Floor, Tower Two
London WC2A 2AE
United Kingdom
www.theigc.org