Why Kenya's Parliament Must Reject the UK-Kenya EPA

By:

James Thuo Gathii
Harrison Mbori

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There are no two ways about this. Kenya's Parliament must reject the UK-Kenya Economic Partnership Agreement (EPA). Kenya and the UK must from scratch renegotiate a new agreement that reflects Kenya's interests. The current agreement is heavily tilted towards the interests of the United Kingdom and its multinationals stationed in Kenya. There are three major reasons why Parliament must reject and renegotiate this agreement.

First, it is clear that Kenya was not involved in drafting the UK-Kenya EPA. It is a replica of an agreement that the European Union foisted on East African Community (EAC) States a couple of years ago. East African states except for Kenya and Rwanda rejected the agreement then because it did not represent their interests. Perhaps it is not surprising that Kenya has now put its signature on the dotted line and brought it to Parliament for ratification. The fact that the government is now inviting suggestions to amend the trade deal confirms that it is not in Kenya's best interests. It was not negotiated with Kenya's interests

as its driving force. Instead, it represents the lopsided nature of the UK's interest in the Kenyan economy.

Therefore, a piecemeal approach to amending it will not work. Amending the agreement at the edges is a band aid approach that does not get to the root of the heavily uneven trade agreement that the UK is imposing on Kenya. The hurried and secret manner in which this agreement was brought to Parliament has unfortunate historical echoes. It sounds to us like the Kenyan government is behaving like colonial era chiefs who signed off our lands and territories to White missionaries, merchants, explorers and colonial officials with nothing in return to show. Kenyans must remember the infamous Maasai Agreement of 1904 that was subsequently amended in 1911. That amendment did not change the fact that the British government had already been granted title to some of Kenya's most valuable lands. Similarly, amending the UK-Kenya EPA that gives major concessions to the UK is unacceptable. In the twenty first century we know better. Kenya does not lack the expertise to do better. Kenya must discontinue its long history of one-sided deals that only benefit Kenya's multinationals and a few very wealthy Kenyan elites.

Second, the fact that the National Assembly is now paying attention to the details of a trade agreement with a developed economy is an opening to negotiate, from the ground-up, the kind of agreement it can use as a template with its developed country partners. Such an agreement would safeguard policies designed to work for a majority of like the Big Four, while identifying the market opening and investment opportunities abroad that trade agreements are useful for. All major trading countries have template trade and investment agreements. They are rule makers. Developing countries like Kenya must stop being rule-takers. They must do the painstaking work of building trade and investment agreements complete with non-negotiable values. Examples of such non-negotiable values could include making sure that trade and investment agreements do not further undermine Kenya's clearly articulated goals as embodied in Vision 2030. The UK Kenya trade agreement would undermine rather than transform Kenya into as envisioned in Vision 2030.

Unless Kenya designs trade and investment agreements that match the country's vision of becoming a newly industrializing, the Vision 2030 goal of

becoming middle-income country with a high quality of life for all its citizens by 2030 will remain a pipe dream. Designing such an agreement falls within the scope of Parliament's mandate, working with other government agencies in full consultation with the public, civil society groups, the private sector as well as those with the necessary expertise. In the United States, for example, the President's hands are tied. There are certain non-negotiable values that the US President cannot undermine in negotiating a trade or investment agreement. To avoid the UK-Kenya EPA fiasco, we need to pre-agree on those red lines. Without those red lines and without identifying the market opening and investment opportunities abroad, trade and investment agreements will continue to be giveaways to other countries.

Third, the UK/Kenya EPA will undermine the pan-African goals of the East African Community and the African Continental Free Trade Agreement. East Africa and Africa are more likely to get better trade and investment agreements from developed countries when they negotiate as a bloc and in one voice. They have more bargaining power that way. This way, they are more likely to promote rather than to undermine the progress they have made in promoting the very important goal of increased intra-African trade. This is not just our idea. This was the position of the current Kenyan Cabinet Secretary for Trade Betty Maina in 2016. While defending the prior incarnation of the UK-Kenya EPA currently being debated in Parliament, then referred to as the EU-East African Community EPA, Betty Maina wrote in the Daily Nation, on September 3, 2016: "The EAC partner states, following a decision of the Heads of States Summit in 2007, have been negotiating the EPA as one block, in order to safeguard the [EAC] Customs Union." Then, Betty Maina was the Principal Secretary in Kenya's State Department of East African Community Integration. So what has changed now? Why is safeguarding the East African Customs Union not an imperative any more? Why is Kenya breaking away from the East African Community to sign this agreement in haste now?

There are many innocuous provisions in the UK Kenya EPA that are demonstrably negative for Kenya. To give just one example, Title III of the Agreement commits Kenya to extensive commitments on trade facilitation that go well beyond those available under World Trade Organization, (WTO), rules. These trade facilitation rules that will be extremely beneficial to UK businesses are not conditioned to Kenya's ability to implement them as is the case with

similar rules under the WTO's trade facilitation rules. Unlike the UK-Kenya EPA, the WTO's Trade Facilitation Agreement, (TFA), is predicated on matching implementation capacity with its obligations. The TFA allows developing countries to implement their obligations at a pace suited to their individual situations and to revise those timelines in light of changing circumstances. Further, this WTO agreement is based on the very important principle that new commitments should be matched to the capacity to implement. The TFA is a development friendly treaty because it recognizes differences in implementation capacities among WTO member states. Unlike the TFA, the UK-Kenya EPA creates multiple obligations and confers discretion on officials to administratively resolve implementation difficulties without any parliamentary oversight. Binding arbitration outside of Kenya's judicial system is the dispute settlement mechanism in the agreement. Even more, the agreement commits Kenya to negotiate even more intrusive commitments on services, intellectual property, investment trade and environment within five years. There is no justification to committing to provide further giveaways in five years as experience elsewhere has shown.

Finally, we note the opportunity to negotiate a new trade and economic relationship with the United Kingdom is presented by the fact that the UK does not have the same influence on Kenya or Africa as it did before Brexit or even a couple of decades ago. The fact that several British multinationals operating in Kenya are super-interested in this agreement is the opportunity to level the playing field between Kenya and the UK. To avoid the continued spectre of European countries continuing to undermine Kenya's development, a new type of trade and investment agreement must be formulated. Such an agreement cannot be fashioned out of an agreement that is highly and unfairly titled in favor of the UK. Instead, the type of UK-Kenya trade agreement that must be renegotiated afresh must be an instrument of Kenyan development. Further, such an agreement unlike the current EPA must subordinate the UK's commercial interests to Kenya's development interests. Parliament must firmly reject any trade agreement that provides tariff-free access to the Kenyan market for UK exports. In the past, the UK has argued that African countries must sign such give-away agreements because that is required by the rules of the World Trade Organization. Nothing can be further from the truth.

Parliament must not be rushed through the narrow path of a trade agreement that has not received widespread public consultation and input. It must instead use this opportunity to craft an agreement that works for all Kenyans, and not only for Kenyan multinationals and Kenya’s super-rich elite.

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