The Kenya-United States Free Trade Agreement Violates Article 37 of the Protocol on the Establishment of the East African Customs Union

By:

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Should the Kenya-United States Free Trade Agreement be concluded, it would violate Article 37 of the Protocol on the Establishment of the East African Customs Union. Article 37 requires a Partner State to notify the EAC of a new trade agreement even when there is merely a proposed trade agreement. Article 37 of the Protocol requires that Partner States notify the other Partner States before offering a third-party preferential market access since Partner States share a common Customs territory.

Article 37(4)(a) states that "A Partner State may separately conclude or amend a trade agreement with a foreign country provided that the terms of such an

agreement or amendments are not in conflict with the provisions of this Protocol." Article 37(4)(b) further describes a notification requirement, stating that "Where a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of this Article, with a foreign country the Partner State shall send its proposed agreement or amendment by registered mail to the Secretary General, who shall communicate the proposed agreement by registered mail to the other Partner States within a period of thirty days, for their consideration."

I. Introduction

A trade deal between Kenya and the United States was formally first announced on February 6th, 2020. U.S. President Donald Trump and Kenyan President Uhuru Kenyatta met at the White House to discuss the initial negotiations and the U.S. Embassy in Kenya announced the the Trump administration's intent to proceed with negotiations shortly after this meeting. Key aims of the trade deal included being a model for future agreements between the United States and Africa, as well as building on what the African Growth and Opportunity Act (AGOA) had already accomplished. The agreement was also projected to promote regional integration and increase trade transparency in licensing procedures and aim to prevent trade distortions and monopolies.

One of Kenya's primary negotiating objectives for the trade deal with the United States is to "initiate, negotiate and conclude a WTO compatible Free Trade Area (FTA) Agreement based on the International and WTO General principles that promotes preferential and mutually beneficial trade, investment and economic relations. The negotiations shall also be consistent with GATT 1994 Article XXIV, Part IV on Trade and Development and GATS Article V." This paragraph shows an understanding that must conform to WTO law. However, a lawsuit was filed in the East African Court of Justice on March 6, 2020 against Kenya's Attorney General, Kihara Kariuki, and EAC Secretary-General, Liberat Mfumukeko. The suit was filed by two Kenyan lawyers, Christopher Oyieko and Emily Osiemo. The complaint alleges, among other things, that the Kenya-U.S. free trade agreement violates Article 37 of the Protocol on the Establishment of the East African Customs Union. Article 37, as stated previously, requires that state parties to the EAC Customs Union notify the other Partner States before offering a third-party preferential market access since these Partner States

share a common Customs territory. The legal complaint further alleges violations of the Treaty for the Establishment of the East African Community, the Protocol on the Establishment of the East African Community Common Market, and of the Rules of the East African Court of Justice Rules of the Court 2019.

This paper will argue that the proposed Kenya-U.S. free trade agreement is in violation of WTO law and of Article 37 of the Protocol on the Establishment of the East African Customs Union.

II. Analysis: Why the proposed free trade agreement violates Article 37 of the Protocol on the Establishment of the East African Customs Union.

The suit alleges violations of East African Community Common Market Articles 5, 6, 7, 8, 27(1), 30, 38, 75(7), 76(2), 76(4), 104, 130 and 151. The suit also alleges violations of Protocol on the Establishment of the East African Community Common Market Articles 37(2) and 37(4), and Rules of the East African Court of Justice Rules of the Court 2019 Rules 4 and 25. For the purposes of this paper, only a select number of these alleged violations will be analyzed, chief among them the Protocol on the Establishment of the East African Community Common Market Article 37, which will be analyzed and applied to the proposed free trade agreement between Kenya and the United States.

A. The relationship between the World Trade Organization and the Kenya-U.S. free trade agreement.

World Trade Organization (WTO) Law applies to this free trade agreement and to the Protocol on the Establishment of the East African Customs Union. The Preamble to the Protocol contains a paragraph that reads, “Conscious of their obligations, as contracting parties to the Marrakesh Agreement Establishing the World Trade Organization, 1994 (the WTO Agreement).” The GATT Agreement is the central document outlining the laws and rules of the World Trade Organization.

The Most Favored Nation (MFN) Principle of WTO Law comes into play with free trade agreements. Under GATT Article I, “any advantage, favor, or privilege

granted to any products of one Member shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.” However, there is an exception to this under GATT Article XXIV, which permits preferential trade agreements to deviate from the MFN principle set out in Article I. A free trade area, which is an elimination of tariffs and other trade restrictions on "substantially all trade" within the free trade agreement falls under the protection of Article XXIV:8(b). GATT Article XXIV:4 states that “WTO Members recognize the desirability of increasing freedom to trade by the development, through voluntary agreements of closer integration between the economies of the countries parties to such agreements” and that “They also recognize that the purpose of a customs union or a free trade area should be to facilitate trade between constituent territories not to raise barriers to the trade of other contracting parties with such territories.”

Article XXIV 5(b) of GATT provides that the GATT Agreement "shall not prevent" the formation of a customs union or free trade area, provided certain requirements are met: For a free trade area, duties and other regulations applicable to imports from WTO members not part of the free trade area must not be 'higher or more trade restrictive' under the free trade area than they were before. However, if a WTO member state decides to enter into a free trade agreement with another country, GATT Article XXIV:7(a) provides that the WTO must be notified of all free trade areas and customs unions and are then examined for consistency with Article XXIV.

B. The proposed Kenya-U.S. free trade agreement violates Article 37 of the Protocol on the Establishment of the East African Customs Union.

As introduced in the beginning of this paper, Article 37 of the Protocol requires that member states notify the other partner states before offering a third-party preferential market access since member states share a common Customs territory. Section 4(a) of Article 37 provides that “A Partner State may separately conclude or amend a trade agreement with a foreign country provided that the terms of such an agreement or amendments are not in conflict with the provisions of this Protocol.” A Partner State is required under section 4(b) to send the proposed agreement or amendment to the Secretary General of the East African Community (EAC) to be sent to the other Partner States to consider. The other states are then allowed to comment and make

other proposals under Article 37(4)(c-d), and then the Secretary General is required to hold a meeting to consider these comments and proposals. If Partner States do not comment or otherwise bring forth a proposal within the time allowed, the Partner State negotiating a free trade agreement is allowed to conclude the agreement under Article 37(4)(e).

C. Kenya's actions to date.

Kenya did not notify the Secretary General of the EAC about its negotiations with the United States on a free trade agreement. As early as April of 2019, Kenyan officials were meeting with United States government officials on several occasions to hammer out trade deal details and negotiation objectives. A Working Group was formed for these purposes and the first official meeting of the Working Group was held April 3-8 of 2019. Representatives at this Working Group meeting included United States Trade Representative Robert Lighthizer and Peter Munya, Cabinet Secretary for Trade and Industry. The Working Group also discussed the African Growth and Opportunity Act (AGOA) and developing "short-term solutions to reduce barriers to trade and investment." The plans to negotiation the agreement were first officially announced on February 6th, 2020. The Working Group for the trade deal met from February 3-7, 2020 to discuss the trade deal and to craft a new "trading arrangement that guarantees continued market access for Kenya's products in the U.S. market after the African Growth and Opportunity Act (AGOA) comes to an end in 2025."

Since the lawsuit was filed on Marth 6th, 2020, there has been no news about the Kenyan government officially notifying the EAC about their intent to conclude a free trade agreement with the United States.

D. Proposed trade deals or amendments trigger the notification requirement of Article 37 of the Protocol on the Establishment of the East African Customs Union.

Kenya's former Trade Cabinet Secretary, Peter Munya has defended Kenya's actions, stating on February 16th, 2020 that "The rules and guidelines of the EAC Customs Union Protocol require that we formally notify the EAC states of our intentions. There hasn't been any signing of a trade deal. We will notify the EAC once the deal is in place." But this is not how Article 37 works. Under section 4(b) of Article 37 of the Protocol, a Partner State is required to send any

proposed agreement or amendment to the Secretary General of the East African Community (EAC) to be sent to the other Partner States to consider. The language of the Article is very clear. It does not state that a Partner State must notify the EAC and subsequently the other Partner States of a concluded or finalized deal or amendment. A proposed deal or amendment is enough to trigger the notification requirement under Article 37. Peter Munya was incorrect when he stated that Kenya did not need to notify the EAC until it had officially concluded a trade deal with the United States.

III. Conclusion

The Kenya-United States Free Trade Agreement violates Article 37 of the Protocol on the Establishment of the East African Customs Union because Article 37 requires the Partner State to notify the EAC even when there is a proposed trade agreement. Article 37 of the Protocol requires that member states notify other partner states before offering a third-party preferential market access since member states share a common Customs territory.

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