Bilateralizing the EU-EAC EPA: An Introductory Legal Analysis of the Kenya-UK Economic Partnership Agreement

By:

Harrison Mbori
James Thuo Gathii

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The Economic Partnership Agreement between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland (Kenya-UK EPA) was signed by both parties on 8th December 2020. Unlike the proposed US-Kenya FTA (whose fate is uncertain under the new Biden administration), this agreement is at an advanced stage and there are many indications that it will enter into force as it has been approved by the Kenyan executive and only awaits parliamentary approval and ratification. We will have to wait and see if the removal of Agreement from the Kenyan National Assembly Order Paper on February 25th, 2021 because not all the annexes were included in the submission to the Assembly will spell a death-knell or only a temporary road-block. For an agreement that will open the Kenyan market to UK companies by

82.6 per cent for up to 25 years, makes the lack of public participation in crafting this agreement painfully obvious. Only after Parliament declined to be rushed to ratify the agreement without all the annexes did the Kenyan government make the annexes (reproduced below) publicly available. A suit in the High Court of Kenya by the Kenya Small Scale Farmers Union and EcoNews Africa seems to have forced the National Assembly Departmental Committee on Trade, Industry and Cooperatives and the Ministry of Trade to invite views from civil society groups.

According to the UK, the Agreement as signed is in effect despite the House of Lords seeking a 21 delay in order to approve it. According to the UK, the EPAs are principally development-focused trade agreement (negotiated on a reciprocal basis) that aim to promote increased trade and investment. They are supposed to contribute to sustainable growth and poverty reduction in developing countries. They are thus the move by the UK after Brexit, to secure continuity and certainty of existing trade relationship. This model does not originate from the UK itself as the EU had already negotiated and concluded another EPA with the East African Community (EAC) member states in 2014. This agreement, the Kenya-UK EPA, was "copied" from the EU-EAC EPA. Both parties to the EPA, Kenya and UK, are careful to add in many of the EPA supporting documents that the EPA would be open for any other EAC members to join at any time. Additionally, Kenya adds in the title of the EPA the words "a member of the EAC" as if to try to sanitize the obvious fact that other EAC members are not part of the Agreement.

Since the Kenya-UK EPA is adopted from the EU-EAC EPA, it is important to recall the origins and the status of this latter agreement. The EPAs are EU blueprint development-oriented Free Trade Agreements (FTA) with African, Caribbean and Pacific (ACP) countries, under the auspices of the Cotonou Partnership Agreement, 2000 which expired in 2020. According to the EU, EPAs are aimed at liberalizing most trade in goods and services – with the exception of sensitive sectors and products – in conformity with WTO rules, especially XXIV of GATT 1994. The reciprocity in the EPAs of ACP countries opening their markets to EU products is accompanied with asymmetry: the EU is supposed to open its market immediately while the opening for ACP countries should be gradual. The Cotonou Agreement was in itself an extension of the Lomé IV Convention (1990-2000) that had granted preferential tariff treatment from the

EU to Sub-Saharan Africa, Caribbean and Pacific (ACP) countries. The EU has thus been negotiating EPAs with African, Caribbean, and Pacific countries (ACP) to fill this void for post 2020 Agreements: CARIFORUM, SADC, ESA (Eastern and Southern Africa-region), Pacific States (Papua New Guinea, Fiji, and Samoa), and the interim EPA with Cameroon, Core d'Iviore, and Ghana. The EAC, as a block, had already begun negotiations with the EU that lead to Framework Economic Partnership Agreement (FEPA) as early as 2007. Then and now, the argument has been a pervasive condemnation by smallholder farmers, civil society organizations, parliamentarians, media and religious groups on the design and structure of the EU-ACP EPAs and the Cotonou Agreement before it. The basic argument is that negotiators of the Agreements had focused too much on commercial interests without adequate consideration of other aspects such as labour standards, human rights, environmental protection, and climate change.

As stated above, this EU-EAC EPA was concluded on 16 October 2014. All the members of the EAC: Kenya, Uganda, Tanzania, Rwanda, and Burundi were involved in the negotiations. Since South Sudan only joined in 2016, it did not participate in the negotiations, but the Agreement is open for S. Sudan to join (accede) after it enters into force (if it ever will). Kenya and Rwanda signed the agreement in September 2016, and Kenya has already ratified it. The EPA has not entered into force because the other EAC members have not yet ratified the Agreement, and have also failed to reach a common position on the EPA. It is important to note that all other EAC members except Kenya (Uganda, Tanzania, Rwanda, Burundi, and South Sudan) are Least Developed Countries (LDCs). Thus, Kenya stands to be the greatest loser if such an Agreement is not concluded as it cannot enjoy the Generalized System of Preferences (GSP) or the Everything but Arms (EBA) which other EAC members enjoy by virtue of being LDCs. Kenya would face an approximated export duties of up US$ 100 million and the UK also accounts for a large chunk of Kenyan exports. So pragmatically and economically speaking, Kenya needed the EPA with EU more desperately than the other EAC members or alternatively with the UK, now with reality of Brexit. Kenya's signing of the EPA with UK is itself a bilteralization of a regional community agreement between the EU and EAC. In more blatant terms, Kenya has circumvented its Partners in the EAC by signing this agreement while for the UK Brexit has allowed it to go solo and negotiate

separate agreements without the burden of common positioning with other EU countries. While this negotiation and signing of the EPA with Kenya is lawful and within the rights of the UK, Kenya is proceeding in a way that violates its commitments under regional community law and national law. For the remaining EU member states, the UK is enjoying the fruits of their long labour in negotiating this EPA while she divorced the EU. For Kenya, as stated above, the pragmatic argument of being left in limbo alone in the EAC has to be squared with its obligations under both EAC law and national law.

EAC Regional Community Law

Kenya is bound at the regional level by EAC law. On paper, the EAC became a common market when the EAC Common Market Protocol was operationalized in 2010. In practice, the EAC is still struggling with economic implementation that is more related to FTAs. The Common Market Protocol (CMP), which entered into force in 2010 guarantees free movement of goods, free movement of persons, free movement of labour/workers, right of establishment, right of residence, free movement of services, and free movement of capital. Importantly, the EAC members have agreed to remove tariff and non-tariff barriers as well as to harmonize and mutually recognize standards. They have also agreed to implement a common trade policy and to eventually adopt a common employment policy, ease cross-border movement of persons, ease restrictions on the right to establishment, and remove barriers to free movement of capital and services in the community. For purposes of this post, the EAC members also agreed under Article 3(a) of the CMP to coordinate their trade relations to govern international trade and trade relations between the Community and third parties. Though the EAC Customs Union (CU) was set up in 2005, it has implementation challenges and the aims of Common Market above have not been achieved uniformly even though the EAC fairs much better as compared to other African Regional Communities (RECs). Despite these challenges, the EAC members signed Monetary Union Protocol 2011 and in two years from now the EAC should be a monetary union. As James Gathii argued in 2011, these commitments have not had and do not need any scrupulous compliance. And indeed as Clair Gammage has also argued in support of Gathii's Flexible Legal Regimes Theory that African regionalism is complex and should not only be assessed from traditional rationalist theories or compared with the neo-functionalism approach of the EU. She argues that

African countries are already marginalized in the multilateral system and the neutral language of Article XXIV of GATT 1994, coupled with the formalism of the EPAs, merely enables economically stronger countries to exploit African markets under the guise of WTO 'complaint legal' regimes.

This means we have to assess Kenya's move to negotiate and conclude its EPA with the UK not only from a legal formalistic perspective but also with the appropriate political, economic, cultural, and ethnic factors that affect Kenya's view of regionalism in place. This deep diving and nuanced approach, James Gathii has referred to as legal thick description in his 2020 book. The EAC Common Market Protocol obliges Kenya to develop a common market policy with the other EAC members. Article 37 of the EAC Common Market Protocol require partner states to coordinate their trade relations and to promote international trade and trade relations between the community and third parties. The EAC Council is tasked with establishing the mechanisms of such co-ordination of trade relations through the following actions: adoption of common negotiating positions in the development of mutually beneficial trade agreements with third parties; and the promotion of participation and joint representation in international trade negotiations. Since 2010, different bodies and commentators have strongly suggested the continuation of negotiation processes with third parties individually is unsustainable and self-defeatist. This position is now currently unravelling, and Kenya is at the forefront of spear heading individual negotiations. Some authors have described Kenya as an economic regional hegemon in eastern Africa and this might explain this current stance of abandoning the EAC common negotiations.

Kenya has acted inconsistently with the provisions of Article 37 of the EAC Common Market Protocol by negotiating and signing the Kenya-UK EPA individually. As indicated above, the economic anxiety of missing out on the GSP, All but Arms tariff treatment, and the UK market once it effectively left the EU can explain Kenya's apparent rush. It is, however, important to note that before the coming in of the Biden Administration this year Kenya was also willing to sign another agreement with a third party in contravention of the common negotiation position rule in Article 37 of the Common Market Protocol. The explanation for this was that the African Growth and Opportunity Act (AGOA) would expire in 2025 and Kenya would again be left in limbo. There is therefore an increasingly isolationist stance that Kenya is taking as against its

EAC partners. James Gathii already dealt with the US's selection of Kenya under the Trump regime in this platform. He questioned the choice of Kenya as compared to Rwanda that has consistently done well in the World Bank's Ease of Doing Business Reports Rankings. Kenya has entered into the UK EPA while arguing that it does not violate the EAC Community law. This position is difficult to legally uphold even while seeing the economic and political realities that Kenya is facing. One of these political realities has been Tanzania's relentless opposition to sign the EPAs citing the lack of assessment of Brexit implications, conditions set under the EPA that would hinder Tanzania's industrial development since the EPA's make it impossible to impose new export duties on raw materials and phasing out of import tariffs over only 25 years would not allow Tanzania's to develop a competitive processing industry. So opposed is Tanzania to the EPA with the EU that Tanzania's former head of state Benjamin Mkapa (who is also the immediate former chairperson of the South Centre) penned an article in the Tanzania dailies in 2016 to strongly oppose the EAC-EU EPA. Without claiming that Kenya's foreign policies and priorities should be in sync with Tanzania, or that individual negotiations are lawful/unlawful under EAC Community law, it is difficult to see why Kenya is not approaching these negotiations with similar circumspection as Tanzania and demanding a better deal individually. Infact, as a block, the EAC is in a better position to extract better and more sustainable development-based agreements than the solo missions Kenya has embarked on.

The economics data analysis for purposes of industrialization for EAC members even Kenya is skewed heavily in favour of the EU generally and the UK specifically. While Kenya will enjoy duty free and quota free access to the UK for a market that accounts for 31% of Kenya's exports, it is important to note that Kenya exports mainly low value agricultural products like coffee, tea, spices, edible vegetables, and lives tree plants. On the other hand, for the UK, Kenya is its 73rd largest trading partner accounting for 0.1% of total trade that amounts to £ 1.4 billion in 2019. This is of course a small percentage for the UK but the goods they export are high value products such as vehicles machinery and mechanical appliances, and pharmaceutical products that support and sustain industrialization and quality employment. It makes sense that even with Kenya offering to open 82.6% in value to trade in the UK over an extended transition period of up to 25 years with a 7-year moratorium, Kenya will gain

little industrialization and protection of infant industries for the generation of high value products that would spur economic development. This is the argument that Tanzania is making when it argues that EPAs cannot spur economic growth and development in Africa. Additionally, the EAC stands to lose approximately $ 251 million a year of tariff revenue by the end of the EPA's implementation. Thus, even if Kenya argues that Tanzania would still enjoy its GSP and EBA tariff benefits, there is a strong economic argument to be made that the Kenya-UK EPA would hurt Kenya more than it would benefit it. Of course, Kenya's government of the day does not see it this way. It argues that through the market access assured under the Kenya-UK EPA, Kenya has a potential of exporting an estimated $205 billion against Kenya's current level of exports. But this is only that, potential. And factoring the low value agricultural products that Kenya is leveraging on, it is unlikely that Kenya will see the promise of tangible and transformational economic development from this EPA.

Furthermore, East African civil society organization (CSOs) have also criticized the EPAs (i.e EU-EAC EPA), which the Kenya-UK EPA is a replica of. At the tail end of the negotiation process in 2016, civil society organizations called upon the EAC members not to sign the EU-EAC EPA. Like Tanzania, these CSOs pointed out the loss of revenue issue estimating that the EPA would result in a loss estimated at US $ 32,490,659 for Tanzania; $ 9,458,170 for Uganda; $ 5,622,946 for Rwanda; $ 107,281,328 for Kenya and $ 7,664,911 for Burundi. Remember that as of 2019, Kenya exports to the UK were valued at approximately $ 900,000 and even with a loss of $ 107, 000,000 Kenya might still possibly have positive balance of trade with the UK. But if you consider that for this Kenya losses the opportunity of infant industry nurturing, possibility of trade diversion with EAC members, alienation and possible disruption in the African Continental Free Trade Agreement (AfCFTA) implementation process, the undermining of South-South cooperation, and the possibility of even more asymmetry in services, investment, government procurement, intellectual property due to the *rendezvous clause* in the EPA, the balance against the EPA tilts heavily against signing. Yet the EPA finalized text was presented to the Kenyan parliament for ratification on 19th February 2020. A development which may not only be termed as inconsistent with EAC Community law but which economically, politically, culturally and socially will not benefit Kenya as marketed.

Kenya National Laws and Policy

At the domestic level, there is quite a lot to be desired with the process of negotiating, signing, and ratifying the EPA. First, there is the thorny issue of public participation. Kenya 2010 Constitution requires public participation as a national value and principle and in various chapters including in process of enacting legislation. The 2010 Constitution additionally provides that any treaty that is ratified by Kenya shall form part of the law of Kenya. The Treaty Making and Ratification Act, No. 18 of 2018 requires Parliamentary (National Assembly) approval and public participation in the ratification process. The process of negotiating the EPA did not include public participation and that insofar as we can tell, corporate actors who stand to benefit most from this agreement are the ones that have shaped it to the exclusion of Kenyans. This should not be confused with public participation at the Parliamentary approval stage where three parties participated: the Kenya Private Sector Alliance (KEPSA), Ms. Laura Naliaka, and Econews Africa, who all generally endorsed the EPA. Despite the Parliamentary Committee on Trade, Industry, and Cooperatives approving the treaty, the members of the Kenyan parliament recently refused to ratify the treaty accusing unknown officials of sneaking in documents that had not been tabled in parliament.

Secondly and curiously, the earlier version of the EPA submitted to parliament last week (18th January 2021) did not contain any annexures containing the details of the specific goods and the customs duties and rules of origin details negotiated. The Executive arm of the Kenyan government simply assumed that the National Assembly will not be concerned about the details and that the treaty would easily sail through without any questions raised. The fact that the Treaty did not come to parliament with the annexes that would disclose the specific concessions that Kenya gave the UK suggests that this treaty was negotiated (at the pre parliamentary stage) without any transparency and now the National Assembly is being unnecessarily rushed to pass a deal that it is unclear what interests shaped it – or at least we now know was not shaped in the best interest of the majority of Kenyans. Now those annexes have been made public for the first time and you can find them embedded here on the Afronomicslaw.org website. Many thanks for the leadership of civil society groups in Kenya lead by leaders like Edgar Odari who worked with Parliament to make sure the Kenyan government released all this information.

- Economic Partnership Agreement between the Kenya and the UK - 25 February 2021
- Economic Partnership Agreement between the UK and Kenya - 8 December 2020,
- Annex 1 + Annex 3 + Protocol 1 + Protocol 2.pdf,
- Annex 2 - Customs Duties on Products Originating from UK, and
- Trade Investment and Cooperatives Committee Report

At the domestic policy level, the Kenyan Presidency has been implementing what it has called Agenda 4 and the government has been implementing ambitious economic blueprint called the Vision 2030. The four pints of Actions under Agenda 4 are the following: Enhancing Manufacturing, Food Security and Nutrition, Universal Health Coverage, and Affordable Housing. Yet, it is unclear why the Kenyan government is giving such generous concessions under the EPA. Questions still linger whether the government conducted any cost benefit analysis to justify those concessions to UK companies? How does this relate to the Big 4 agenda especially on industrialization and jobs (Agenda 1) – what about Vision 2030? Interestingly, as the unravelling of the resistance to the EPA is emerging and greater disagreements are voiced from Kenyans, the government is now offering clarifications. The public communications office of the Department for Trade and Enterprise development is blaming stakeholders and the media for misrepresenting facts. While repeating the same benefits of the EPA for Kenya, the Ministry of Industrialization, Trade and Enterprise Development does not take seriously the history, political economy, and social implications of the EPA and why many Kenyans and East Africans might want it rejected rather than accepted.

Conclusion

In assessing the South African regionalism, Clair Gammage argues that African countries face challenges when trading with Western countries. This is because each North-South RTAs operate under a different political paradigm and development is not homogenous either between regions or individual countries. And while she adopts James Gathii's African Regional Trade Agreements as "flexible regimes" theory, she argues that African regionalism may be a façade giving a false impression of political and economic stability of African states. Such a façade does work for African RTAs, Gamamage argues, but things are

radically different for North-South RTAs with a stronger western economy on the other side of the negotiation table with a stronger capability and willingness to enforce the terms of the RTAs. She views the idea that EU in the framework of its EPA's with the ACP is a "norm exporter" lays itself open to accusations of economic imperialism and neocolonial practices. This view can be easily transplanted to the Kenya-UK EPA. The CSOs that opposed the EU-EAC EPA asked the following pertinent questions on the EPA: how will the EPA,

- Help our countries to increase their production capacities?
- Encourage diversification?
- Increase food security?
- Provide quality employment?
- Move us from being largely raw natural resource exporters towards being producers of more sophisticated products?

The same questions are also relevant for the Kenya-UK EPA. While EcKenya will continue its tariff free and quota free access to the UK, it opens up its economy to more than 80% in value of UK high value products while it exports to the UK low value agricultural products. The cycle of unemployment, underdevelopment, poverty will thus continue unabated for another 25 years just as much as the Lomé Convention and Cotonou Agreements did not change the status quo.

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