SEATINI

Strengthening Africa in World Trade

THE INHERENT DANGER OF THE EU – KENYA ECONOMIC PARTNERSHIP AGREEMENT (EPA) ON THE EAC REGIONAL INTEGRATON AND AfCFTA IMPLEMENTATION

On June 9th, 2023, the European Union (EU) and Kenya announced the political conclusion of the negotiations for an Economic Partnership Agreement (EPA). The Agreement will now undergo legal scrubbing and translation before signature and conclusion by the EU Council, upon which the EU and Kenya can sign and ratify[1].

The EPAs are reciprocal Free Trade Agreements (FTAs) between European Union (EU) and Africa Caribbean Pacific (ACP) states launched in 2002. The stated objectives of the EPAs are namely; to ensure the sustainable development of ACP countries; to promote regional integration; to ensure a smooth and gradual integration of ACP countries into the global economy; and to eradicate poverty. Whereas these were the stated objectives, the actual purpose of the EPAs is to create a Free Trade Area between two economically unequal regions i.e., Africa and Europe.

In a bid to strengthen their regional integration agenda, the then five EAC Partner States (Burundi, Kenya, Rwanda, Tanzania and Uganda) in 2007 decided to reconfigure and negotiate the EPA as a bloc. There were contentious issues in the EPA which made the EAC Partner States reluctant to conclude the pact. However, on 21st May 2013, the EU unilaterally imposed a deadline for concluding the negotiations by revising her Market Access Regulation 1528/2007 to clearly indicate that any ACP country which will not have signed or ratified the EPA by 1st October 2014 will be removed from the list of beneficiaries of the Duty-Free Quota Free market access to the EU market . This decision created tremendous pressure among EAC Partner States as it would imply that with exception of other Partner States who are Least Developed Countries (LDCs) and would continue accessing the EU Market under the Everything But Arms (EBA), Kenya, a non-LDC would cease to access the EU market on a Duty Free and Quota Free provision. The new Market Access Regulation would in effect lead to an imposition of a tariff of 12% (MFN) or 8.5% (GSP) on a number of key products including fresh cut flowers and fish. According to the Kenya Flower Council, this would amount to a loss of 3 million pounds per month (Sh4 billion) on the flower exports. [2]This would have been a huge loss to Kenya's economy.

As a result of this pressure, and the need to maintain its' Duty-Free Market Access, Kenya signed and ratified the EPA on 1st September 2016 and on 20th September 2016 respectively. Burundi did not sign the agreement because it was and still is under EU sanctions. Rwanda signed the agreement on 1st September 2016 but is yet to ratify. With regard to the Tanzanian Government, a decision was made not to sign the EPA pact citing its far-reaching implications on Tanzania's industrialization, revenue collections and on the development of the region at large. This decision was supported by the Tanzanian Parliament. Indeed, in his meeting with the then European Union (EU) Commission President Jean-Claude Juncker on 28th September 2017, H.E President Yoweri K. Museveni reiterated that key among the concerns by the EAC on the EPA was the question of Strategic Industrial Development, Development Agenda, the Rendezvous Clause and Domestic Support.[3] Upon Tanzania's request, the EAC Secretariat commissioned the United Nations Economic Commission for Africa (UNECA) to undertake a study that analyses the impact of the EAC-EU Economic Partnership Agreement on the EAC Economies. In its findings, the study cautions that local industries will not withstand the competitive pressures from EU firms, and the region could get locked even more firmly in its role as a low value-added commodity exporter, coupled by Intra-EAC imports declining by $42 million.[4]

1 https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3323

2 https://www.trademarkea.com/news/kenya-may-lose-sh4b-monthly-if-eu-trade-deal-is-not-signed/

3 http://www.statehouse.go.ug/media/news/2017/09/28/president-museveni-eu-commission-boss-discuss-epas

4 https://www.tralac.org/news/article/11545-un-body-warns-region-against-signing-trade-deal-with-eu.html

The contentious issues raised by the EAC Partner States and their potential implications

Under the EAC-EU EPA, the EAC was to liberalize 82.6% of her imports from the EU over a 25-year transition period by initially liberalizing 65.4% on entry into force of the agreement. The rationale was that some of these products were zero rated because they were either industrial inputs or capital goods i.e., machinery and pharmaceuticals. Only 17.4% (1432 tariff lines) were to be excluded from liberalization to cater for the protection of the sensitive products and infant industries. The potential impacts of this extensive liberalization visà- vis a very competitive partner would include;

a) **Loss of revenue:** According to UNECA (2005) [1], the EPA would have resulted into revenue shortfalls 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. This revenue shortfall would have had serious implications on the EAC Partner States' ability to mobilize resources for their development and would have led to EAC's continued reliance on aid and increased indebtedness estimated by the IMF (as a proportion of GDP) to be 55.4% for Kenya, 42.4% for Tanzania, 41.5% for Rwanda and 37.9% for Uganda as of May 2016[2].[5]

b) EAC's Industrialization at risk:

EAC's existing local industries would be put in jeopardy, and this would discourage the development of new industries. Furthermore, with such a liberalization schedule, promoting value addition through agro-processing would be very much constrained and will also compromise food security given the supportive linkages between agriculture and manufacturing.

c) EAC's Agricultural production and food security at risk:

Article 105 EAC Treaty stressed that the Partner State will cooperate to achieve food security and rational agricultural production within the Community. However, the EPAs would threaten this endeavour once it enters into force. Indeed, the combination of the extensive liberalization, the contradictions within the schedules, the weak multilateral, and bilateral safeguards on the one hand; and the domestic subsidies in the EU on the other, would further negatively impact on Agricultural production and food security in the EAC region, by making EU Agricultural products cheaper than those of the EAC. Notwithstanding Article 68(2) whereby the EU undertook not to grant export subsidies to all agricultural exports to EAC Partner States, the real challenge to the EAC's agricultural production and industrialization are the ever-increasing domestic subsidies in the EU, which issue the EU has declined to discuss both in the EPA and in the WTO.

d) Undermining South-South Cooperation:

Article 15 of the EAC-EU EPA obliged the EAC to extend to the EU any more favorable treatment resulting from a preferential trade agreement with a major trading economy/country. This would not only circumscribe the EAC's external trade relations but would also undermine the prospects of South- South trade which the EAC was and is still aspiring to promote. In addition, that Article was and is still contrary to the spirit of the World Trade Organization's (WTO's) Enabling Clause that promotes Special and Differential Treatment for developing countries and South- South cooperation.

e) Undermining regional integration through balkanization of Africa

Although the ostensible objective of the EPA is to promote regional integration, they have in fact largely balkanized the region. For example, Kenya and Rwanda signed with the former ratifying and currently engaged in the process of concluding the EPA with the EU to unilaterally implement the EPA. This is likely to have far reaching implications on sub- regional and continental integration prospects. It also has far reaching implications on the African Continental Free Trade Area (AfCFTA), as it prescribes the kind of AfCFTA Africa we will have in place. This is because it was envisaged that the RECs will be the building blocks of the AfCFTA. The EPAs would have and will deepen divisions between African countries, making African trade policy harmonization even more difficult.

f) Rendez-vous Clause (Article 3)

Under this clause, the EAC and EU undertook to conclude the negotiations in areas of services, investment, government procurement, trade and sustainable development, intellectual property rights and competition policy within five years upon entry into force of the EPAs. It should be noted that the EAC is yet to put joint frameworks for some of these issues. For example, government procurement and intellectual property rights.

The above contentious issues raised by President Yoweri Museveni and by the Government of Tanzania which have led to the dragging on of the EU-EAC-EPA negotiations for more than two decades and are yet to be resolved. These contentious issues are still valid today given the poly crisis (debt, climate change and economic crises) facing the region and given the fact that the EU-EAC EPA is still the same other than the addition of a sustainability chapter.

The potential implications of Kenya – EU EPA

It is paramount to understand the reasons for Kenya's signing of the EPA with the EU. The 21st Ordinary Summit of the East African Community Heads of State decided that Partner States that wish to do so may commence

5 *[1] Stephen Karingi, Rémi Lang, Nassim Oulmane, Romain Perez, Mustapha Sadni Jallab & Hakim Ben Hammouda (2005): Economic and Welfare Impacts of the EU-Africa EPAs. Published by UNECA.*
[2]http://www.theeastafrican.co.ke/business/Debt-levels-push-East-African-economies-to-financial-crisis/-/2560/3269716/-/1joxflz/-/index.html

engagements with the EU with a view to starting the EU-EAC-EPA implementation under the Principle of Variable Geometry.[6] The principle of Variable Geometry is provided for in Article 7.1(e) of the EAC Treaty. It states that: *"the Principle of Variable Geometry allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds".*

The proposal to evoke Variable Geometry in the EPAs is a misapplication of this principle. There is no doubt that this principle applies to integration within the EAC and does not apply to third parties. If wrongly evoked as recently applied by Kenya, it will lead to unintended consequences of fusing the EAC in the EU Free Trade Area. This is because if Kenya implements the EPA, it will be part of the Free Trade Area with the EU and by default the entire region will be in the EU given the fact that the EAC has a Common External Tariff.

Proposals on a way forward

There is an urgent need to rethink the EPAs in order to make them address Africa's quest for structural transformation and longstanding challenges and aspirations for structural transformation.

Therefore, we the EAC CSOs working on trade and trade related issues wish to register a number of recommendations to the Government of the Republic of Kenya, EAC Partner States, Members of Parliament for both Kenya and the East African Legislative Assembly, African Union (AU) and the EU.

1. The Government of the Republic of Kenya

We appreciate the position of Kenya given that failure to conclude the EPAs would lock the country out of the EU market. It should be noted that Kenya mainly exports vegetables, fruits and flowers to the EU to the tune of $1.3bn (£1bn), while importing mineral and chemical products, as well as machinery worth $2.2bn.[7] However, EAC is the biggest market for Kenya's value-added products such as Cement, Palm oil, Coated Flat-rolled Iron, Soap, Machinery. In 2021, Kenya Exports with EAC states stood at USD 2.05billion with imports amounting to 837M USD providing a trade balance of $1.2bn.

Therefore, Kenya should prioritize the EAC regional integration because the EAC trade provides prospects for industrial development and structural transformation.

2. East African Community (EAC)

It would appear that by acquiescing with Kenya's proposal to evoke the variable geometry principle, the EAC Summit prioritize trading with the EU over EAC integration and the African Continental Free Trade Area (AfCFTA) implementation. This should be avoided in order to preserve, widen and deepen EAC Integration and promote intra Africa trade and investment as envisaged under the AfCFTA. Therefore, the EAC and other RECs should not misapply the principle of Variable Geometry for purposes of concluding extra-regional FTAs. While Kenya has used this principle to justify concluding the EPA with the EU, this action will set a very dangerous precedent, undermining regional integration on the continent.

In the context of the polycrisis, the EAC through the Secretariat should undertake a cost benefit analysis of the impact of the EPA on EAC Economies. This will enable EAC Partner States to rationalize the decision on whether to sign/ratify or not from an informed point of view. Moreover, this had earlier been requested by the Government of Tanzania in 2017.

The EAC Partner States should reconsider and follow up on the African Union's proposal to the EU entitled "Common and Enhanced Trade Preference System for LDCs and Low-Income Countries". [8]Under this proposal, the AU recommends that the EAC region should be treated by the EU as an LDC region which should benefit from Duty Free Quota Free Market Access given the fact that the region is predominantly an LDC with only Kenya designated as a developing country.

3. Members of Parliament for Kenya and EALA:

As noted in **the press release by the European Commission**, the EU-Kenya EPA will upon legal scrubbing and translation be presented for signing and ratification and that thereafter other Member States may join. As the representatives of the people, Members of Parliament for Kenya should play their oversight role by debating this agreement and consulting their constituencies to ensure that the interests of the people they represent are catered for in the EPA before it is signed and ratified and before other EAC Partner States are stampeded into joining.

4. African Union (AU)

The AU should boldly pursue its agenda of promoting structural transformation through focusing on regional integration and the AfCFTA, beginning from the RECs as building blocks, as envisioned in the Lagos Plan of Action. In its current form, the EU-Kenya EPA undermines this important vision. Africa should not rush to integrate with other continents but should instead look inwards and consolidate her regional integration.

We therefore propose that the EU-Kenya EPA be discontinued and those which have been signed be withdrawn. This will allow for the much-needed policy space for the East African region and African countries to use the regional integration process and the AfCFTA for industrialization and structural transformation and develop competitive regional value chains. Moreover, the multiple crises faced by African countries have put into question the efficacy of the neoliberal paradigm that has governed Free Trade Agreements like the EPAs. It is also therefore opportune for us to reassess, review and restructure the EU-Africa trade and investment relations in order for Africa to achieve her development aspirations.

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6 https://www.eac.int/communique/1942-communiqu%C3%A9-of-the-21st-ordinary-summit-of-the-east-african-community-heads-of-state

7 https://www.bbc.com/news/world-africa-65962772

8 https://au.int/en/documents/20120515/proposal-common-and-enhanced-trade-preference-system-least-developedcountries

It should also be recalled that during the 31st AU Summit held Mauritania (2018), Heads of State and Government urged Member States to abstain from entering into bilateral trading arrangements until the conclusion of the AfCFTA negotiations.[9]

5. European Union:

We wish to reiterate that it is unfair for the EU to be negotiating separate Free Trade Agreements (FTAs) with individual countries within a Regional Economic Community. Yet it is unthinkable that one EU member state can enter into a Free Trade arrangement with the EAC while remaining in the EU.

Therefore, the EU should address its fragmented trade policy towards Africa. Given the decreasing share of Africa's exports to EU especially in value added products (in 2020, over 61 % of goods imported to the EU from Africa were primary goods (food and drink, raw materials and energy), coupled with the challenges arising from the multiple crises, the EU should grant unilateral Duty Free and Quota Free Market Access to all African countries with a unified Rule of Origin. The parties can review the earlier EU preferential offer to ACP Countries which granted preferential tariff treatment for products originating in ACP States.

The EU should also treat the EAC region as a Least Developed Country (LDC) region which should benefit from Duty Free Quota Free Market Access. This is given the fact that the region is predominantly an LDC region with only one developing country (Kenya). This is in line with the African Union proposal for a common and Enhanced Trade Preference System for LDCs and Low-Income Countries

One of the stated objectives of the EPAs is to promote regional integration. However, experiences from the EPA negotiations indicate that the EU has been using underhand methods to put African Countries under undue pressure to choose between Africa/Regional Unity and solidarity on the one hand and access to EU Market on the other.

The EU-Kenya EPA if individually signed, ratified and implemented by Kenya will deepen divisions between African countries, subsequently making the African trade policy harmonization even more difficult.

Therefore, in pursuit of its global trade policy of prioritizing access to raw materials as evidenced by the EU Raw Materials Initiative of 2008 [10]and the EU Critical Raw Materials Act, [11]the European Union should desist from underhand technics to put countries in untenable situations where they have to choose between their regional integration aspirations and market access to EU. Access to raw materials from Africa has become a critical issue given the imperative for clean energy transition.

Conclusion

The Kenya – EU EPA presents a litmus test for the EAC Partner States i.e., whether their priority is to promote regional integration or whether this should be subordinated to integration with the EU. We wish to recall the late H.E Benjamin Mkapa's (former President of Tanzania) advice that, before concluding a comprehensive EPA, we should ask ourselves the following questions: i.e. Will the EPAs:

- Help us increase domestic production capacities?
- Encourage diversification and industrialization?
- Increase food security?
- Provide quality employment?
- Will these trade agreements support our move from being largely raw natural resource exporters, towards being producers of more sophisticated products?

The answers to these questions should determine whether or not both the Kenya – EU EPA and the EAC-EU EPA Negotiation outcomes are acceptable for the EAC, and whether Kenya and other Partner States should sign, ratify and implement the EPAs.

It is our considered view that there is an urgent need to rethink the EU-Africa trade relationship in order to make it mutually beneficial while addressing the longstanding challenges and Africa's quest for aspirations for structural transformation.

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9 https://au.int/sites/default/files/decisions/36130-assembly_au_dec_690_-_712_xxxi_e.pdf

10 https://www.iea.org/policies/15696-european-raw-materials-initiative#:~:text=The%20European%20Raw%20Materials%20Initiative,and%20materials%20used%20as%20fuel.

11 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1661

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