International Economic Law Practicum

THE EAC-EU EPA AND BREXIT

Legal and Economic Implications for EAC LDCs

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LIST OF ABBREVIATIONS

ABBREVIATION	FULL FORM
ACP	African, Caribbean and Pacific
Brexit	British exit from EU
CARIFORUM	Caribbean Forum of the African, Caribbean and Pacific States
CEPA	CARIFORUM- European Union Economic Partnership Agreement
CET	Common External Tariff
CFTA	Continental Free Trade Agreement
COMESA	Common Market for Eastern and Southern Africa
CU Protocol	Protocol on the Establishment of the East African Customs Union
DFQF	Duty Free Quota Free
EAC	East African Community
EACJ	East African Court of Justice
EBA	Everything But Arms
EDF	European Development Fund
ELDCs	East African Community Least Developed Countries
EPA	Economic Partnership Agreement
ESA-EPA	Eastern and Southern Africa – European Union Economic Partnership Agreement

EU	European Union
EU GSP	European Union Generalized System of Preferences
EU-27	European Union without the UK
EU-28	European Union with the UK
EU-EAC EPA/ EAC-EU EPA	European Union- East African Community Economic Partnership Agreement
FEPA	Framework Economic Partnership Agreement
FTA	Free Trade Agreement/ Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
IEPA	Interim Economic Partnership Agreement
LDCs	Least Developed Countries
MDGs	Millennium Development Goals
MFN	Most Favoured Nation
ODA	Overseas Development Assistance
RoO	Rules of Origin
RTA	Regional Trade Agreement
RTSP	Road Transport Sector Policy
SADC	Southern African Development Community
SAT	Substantially all trade

SDGs	Sustainable Development Goals
SDT	Special and Differential Treatment
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of European Union
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on Law of Treaties
WTO	World Trade Organization

Executive Summary

INTRODUCTION

After over a decade of negotiations, in 2014 the European Union (EU) and the East African Community (EAC) finalised the text of an Economic Partnership Agreement (EPA) to provide each other with preferential market access. From the EU's perspective, the EPAs' overarching objective is to provide a means for continued duty-free quota-free (DFQF) market access into the EU to the African, Caribbean and Pacific (ACP) groups of countries, consistent with the parties' obligations under the rules of the World Trade Organization (WTO). Although least developed countries (LDCs) currently obtain DFQF access consistent with WTO rules, the EU contends that the only way to continue to provide such access to developing countries, like Kenya (which are not "least developed"), is to enter into the reciprocal EPAs, where both parties undertake to liberalise and reduce their import tariffs under GATT Article XXIV.

The EAC-EU EPA was initially set to be signed in October 2016. Yet, several EAC LDCs (ELDCs) have been reluctant to do so, citing concerns over Brexit – the UK's recent decision to leave the EU – and the adverse economic and developmental impact the EPA might entail. ELDCs are particularly concerned about undertaking greater tariff liberalisation than ever before, especially given the EU's highly competitive and advanced industries. In addition, ELDCs have expressed concern over the EU's agricultural subsidies, the EPA prohibition on export taxes, and how the standstill and most favoured nation (MFN) clauses might constrain their policy space and ability to protect infant industry.

This report presents a legal and economic analysis of the EPA, its relation to the rules of the WTO, and the implications of the UK's departure from the EU on ELDC-EU trade. It considers the obligations of EAC parties under public international law, the WTO, the EAC treaties and under the EPA itself. It suggests that three options are open to the EAC Partner States in relation to the on-going EPA negotiations: withdrawing from the negotiations and the EPA, renegotiate the EPA, or advocate for a change in the WTO rules. The second option, to renegotiate, is recommended as the most fruitful. The third option can be pursued together with either of the other two, but is likely to be difficult.

In addition, the report considers whether EAC members are currently under any obligation to ratify or implement the EPA, and, in its final chapter, presents an analysis of the UK's continuing obligations to EAC Partner States after Brexit. The report offers a series of recommendations of how ELDCs

may best approach the UK to secure their developmental and economic interests.

Who are the Parties to the EU-EAC?

It is important to first ascertain who the parties to the EPA are, especially in light of Brexit. The Preamble of the EPA lists the EAC members (excluding South Sudan), the 28 EU member states individually, and the EU itself as signatories to the EPA agreement. Article 132 of the EPA defines the contracting parties of the EPA to be the contracting parties to the Treaty establishing the East African Community (EAC Treaty), on one side, and the EU, ***or*** its member states, ***or*** the EU ***and*** its Member states, on the other side.

Findings**:**

- South Sudan was not an EAC member during the EPA negotiations. However, by virtue of its accession to the Treaty establishing the EAC in April 2016, it too would become a party to the EU-EAC EPA if the agreement is concluded.
- The territorial application clause of the EPA clarifies that the EPA agreement shall apply only to the territories of the EAC Partner States and territories where the Treaty on the European Union (TEU) and Treaty on the Functioning of European Union (TFEU) apply.
- Therefore, when the UK ceases to be a member of the EU, the TEU and TFEU will no longer apply to the UK, and, consequently, the EU-EAC EPA will no longer be applicable to the territory of the UK.
- A close reading of the preamble suggests that the EAC itself in its institutional capacity is not a signatory to the EPA. Instead each individual EAC Partner State is a signatory.

OPTION A: WITHDRAWING FROM THE EPA NEGOTIATIONS

A straightforward means to deal with the economic and developmental concerns flowing from the EPA is to withdraw from the negotiations. However, as this report highlights, abandoning negotiations poses risks to future EAC integration as well as the potential benefits the EPA may bring.

Ability to withdraw from negotiations under principles of public international law

If they wish to do so, the EAC members are able to withdraw from the EPA negotiations consistent with international law. Since the EPA has not yet entered into force, even Kenya, which has both signed and ratified the EPA, can withdraw without consequence.

Economic and legal reasons provided by Brexit in favour of withdrawal

Looking at the UK market in 2016, approximately €0.4 billion of EAC exports (17% of total EAC-EU exports) were destined for the UK, out of which €0.37 billion (93%) originated from Kenya alone.[1] This means that Brexit will shrink the EU export market for EAC countries by 17% as per last year's figures, while under the EPA, the UK continues to enjoy full access to EAC markets. The UK's departure thus significantly impairs the expected benefits of the EPA and upsets the negotiated balance of concessions. Furthermore, Brexit raises questions regarding the development funds promised to the EAC. The UK is the third largest contributor to the EDF after Germany and France, contributing up to 14% to both the 10th and 11th EDF.[2] Brexit therefore creates uncertainty about continued aid disbursement to the EAC Partner States, and the continuity of EU funded projects such as the EAC Road Transport Sector Policy.

Additionally, it can be argued that Brexit and the consequent imbalance in the negotiated concessions constitutes a "fundamental change in circumstance" under Article 62 of the Vienna Convention on the Law of Treaties (VCLT). This provides an additional legal basis under which the EAC Partner States would be justified to withdraw from the negotiations in good faith.

Possibility of the EPA proceeding without all EAC members

Under Article 12 of the East African Customs Union Protocol (CU Protocol), EAC members are obliged to maintain a Common External Tariff (CET). If some EAC members implement the EPA, and others do not, EAC members will no longer maintain the same external tariffs and thus violate the CET. Any modification of the CET will have to be by unanimous decision, either through "review", contained in Article 37 of the CU Protocol, or through a treaty amendment. However, even if a common position is arrived at, deviating from the CET could severely undermine future integration and cooperation efforts.

Recommendations

- If they wish to, a single member can likely block other EAC members from implementing the EPA. Yet this would severely harm the EAC and may result in members threatening to leave EAC, as it would prompt a choice between EAC membership and EPA market access.
- EAC members can also agree to review or amend the CET to allow some members to implement the EPA while others withdraw from

[1] European Union, *Trade in goods with ACP -- East African Community (EAC)*, February 16, 2017, http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151901.pdf

[2] Alessandro D'Alfonso, "European Development Fund: Joint development cooperation and the EU Budget: out or in?", *European Parliamentary Research Service (EPRS),* November 2014, http://www.europarl.europa.eu/EPRS/EPRS-IDA-542140-European-Development-Fund-FINAL.pdf

negotiations. However, given the benefits of regional integration, and the threat posed to long-term integration efforts if only some EAC members implement the EPA and thereby undermine the CET, withdrawal from the EPA negotiations by any of the EAC partners is not recommended. In our opinion, the most beneficial outcome would be to renegotiate the EPA under Option B below.

OPTION B: RENEGOTIATING THE EPA

Legal justifications for renegotiating the EPA

The same grounds as invoked under Option A are equally valid in the context of renegotiation. In addition, the EPA contains provisions allowing for a review of its terms when another country joins either trading bloc (Articles 144-5). South Sudan's accession to the EAC therefore triggers such a review. By analogy, the departure of a member should also trigger a review, as is the case with the UK. Both of these events thus provide a reason to review the negotiated EPA.

Mandatory WTO requirements for free trade agreements (FTAs)

Under the WTO, developing countries can provide specialized market access between themselves under the Enabling Clause. The EAC is notified under the Enabling Clause. However, trade arrangements which include a developed country, such as the EU, must be notified under Article XXIV of the General Agreement on Tariffs and Trade (GATT). In contrast to the Enabling Clause, Article XXIV requires all FTA parties to liberalise "substantially all the trade" between them. The EU interprets this requirement to mean that 90% of average total trade volumes of all FTA parties must be liberalised. Under the EPA, the EU will therefore liberalise 100% of its trade, and all EAC Partner States 82.6%.

How can the EPA be renegotiated?

Based on a legal analysis of Article XXIV, this liberalisation as well other provisions of the EPA go beyond what is required for an FTA under the WTO. To respond to the developmental concerns that the EAC Partner States have raised regarding the economic impact of the EPA, they could seek better terms within the following areas:

- **Liberalisation commitments**: There is no agreement or accepted legal definition of the exact meaning of "substantially all trade". Looking at caselaw, practice and statements by WTO members, ELDCs should only have to liberalise around 70%, rather than the current 82.6%. Notably, the EU itself has been supportive of differential treatment within Article XXIV, and liberalisation by Mexico under an existing EU-Mexico FTA from 2000

only amounts to 54.1%. However, ELDCs should also consider to what extent a complete exclusion of certain markets, and complete liberalisation of others, locks them into an inflexible development model unable to respond to future market developments.

- **Phase-in periods**: There are no strict timing requirements for liberalisation under GATT Article XXIV. These could be extended from the current 25 years to 35 years or more, and/or more of the trade could be liberalised closer to the end of the liberalisation period. This would afford LDCs a longer time to adjust, lessening any adverse economic impact while maintaining any positive competitive advantage liberalisation may afford.
- **Safeguards**: Safeguards allow for the temporary restriction of imports where injury to the domestic industry can be proven. No strict requirements under Article XXIV exist, as long as measures are temporary. The safeguards currently in the EPA could be made easier to apply and less restrictive, and ELDCs should seek to improve the ability to apply safeguards to infant industry. The causation requirement could be removed, along with the current sunset clause removing infant industry as a ground after ten years. This would help ELDCs to shield their markets from sudden import surges and more competitive European producers more generally.
- **Export taxes**: Export taxes produce revenue and can be used to increase domestic supply by constraining exports, although this may also constrain economic growth and harm cash inflows. Export taxes are prohibited under the EPA, but can be imposed for up to 48 months under relatively flexible conditions in order to protect domestic industry, currency stability, food security etc. However, the WTO does not prohibit export taxes, and there is flexibility under Article XXIV to apply them to at least 20% of trade, especially if applied temporarily. There is thus scope for further flexibility than currently provided for under the EPA, and export taxes can be used as an affordable means to counteract the EU's agricultural subsidies.
- **MFN and standstill clauses**: Most favoured nation (MFN) treatment requires that the EPA parties extend to each other treatment as favourable as that extended to other countries through subsequent trade agreements. The standstill clause means that the *applied* rates of duty, which may be lower than those which are *bound* (fixed) under the terms of the EPA, may not be raised. Neither clause is affected by WTO rules, but do constrain EAC states' policy space. EAC parties could thus press for additional flexibility.
- **Differential treatment for LDCs:** We recommend that ELDCs emphasise that the five out of six EAC states are LDCs, and special considerations must apply. The EU may be open to more generous concessions if they only apply to LDC countries. Since Kenya as a developing country stands

the most to gain from concluding the EPA, it may be willing to take on extra commitments.

Changes within these areas would serve to dampen the economic impact of the EPA on ELDC markets, and leave countries with more flexibility and policy space when formulating economic strategies in the future.

Recommendations

- Based on our overall analysis, we conclude that a renegotiating of the EPA would be in the best interest of ELDCs.
- Ideally, on the basis of Brexit and the other legal and economic reasons outlined in this report, EAC members will be able to find a common position to push in concert for a renegotiation of the EPA in line with the above proposals. A common position would increase EAC bargaining power and avoid undermining future EAC integration and political tension.
- The EU is unlikely to give in readily on liberalisation commitments. However, reluctance to agree to decreased liberalisation commitments may help EAC members secure valuable concessions in other areas.
- ELDCs should emphasise their economic vulnerability and seek differential treatment where possible.
- The EPA can likely push the boundaries of WTO consistency, since unless the EPA commitments are grossly inadequate, a challenge under WTO dispute settlement procedures is unlikely. Five out of six EAC members are LDCs, and FTAs and customs unions have only been formally challenged once before. Even if a challenge was lodged, the EU and EAC would then have an opportunity to amend the EPA at that point.

OPTION C: NEGOTIATING NORTH-SOUTH PROVISIONS AT THE WTO

ACP countries in 2002 sought to submit proposals to the WTO in order to introduce special and differential treatment for north-south agreements between developing and developed countries. Despite support from the EU, WTO members were not receptive. EAC members could seek to renew efforts to have the WTO recognize the developmental value of north-south agreements through more flexible WTO requirements.

Recommendations

- Given previous failures to affect change in this area, seeking to influence the WTO rules would be a highly demanding and drawn out process. However, the stalling of negotiations within the current Doha Round (commenced in 2001), could represent an opportunity for

ELDCs and other ACP countries to promote the recognition of north-south FTAs as a pragmatic and achievable goal, which would help deliver on the Doha Round's developmental aspirations.

- Furthermore, this option, although potentially costly, can be pursued together with either option A or B. If ELDCs decide to withdraw from the current EPA negotiations, this option could lay the ground for future negotiations; whereas if ELDCs choose to renegotiate the EPA, this option can be pursued alongside negotiations with the EU.
- Lastly, the arguments and previous stances taken by the EU in favour of greater flexibility for north-south agreements in the WTO, should be raised within the context of EPA renegotiations.

UK'S CONTINUING OBLIGATIONS POST-BREXIT

Much of EAC exports to the UK are enabled by two preferential arrangements, the EU standard Generalized System of Preferences (EU-GSP) and the EU GSP-based Everything But Arms (EBA) initiative. There are three main variants of the EU-GSP Scheme:

- the "standard/general GSP arrangement", which offers generous tariff reductions to developing countries. Practically, this means partial or entire removal of tariffs on two thirds of all product categories.
- the "GSP+" enhanced preferences mean full removal of tariffs on essentially the same product categories as those covered by the general arrangement. These are granted to countries which ratify and implement core international conventions relating to human and labour rights, environment and good governance;
- "EBA" arrangement for LDCs, which grants duty-free quota-free access to all products, except for arms and ammunitions.

The most significant trading partner of all the EAC Members in the EU bloc is the United Kingdom. Two EAC Member States – Kenya and Rwanda have a disproportionately high dependence on the UK Market. For Kenya, 27.8% of exports to the EU go to the UK, and for Rwanda 17% of exports are destined for the UK. The other three countries all have less than 6% of their total exports to the EU going to the UK.[3] Upon formal exit from the EU, the UK will no longer be bound to extend the EU preferential trade arrangement schemes (EU-GSP and EBA) to the EAC. However, EAC exporters to the UK will have an interest in preserving preferential access to the lucrative UK market. To

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[3]Edwin Laurent, Lorand Bartels, Paul Goodison, Paula Hippolyte, Sindra Sharma, *After Brexit : Securing ACP Economic Interests*, The Ramphal Institute, London, 2017

avoid any immediate adverse outcomes, EAC should advocate that the UK government consider offering a unilateral GSP scheme to the EAC states that would be comparable to market access provisions guaranteed under the EU-GSP or EU-EBA scheme. Moreover, the UK is a signatory to the Cotonou Agreement in its own individual capacity and will still have to adhere to its obligations thereunder towards EAC members. This will ensure that Kenya continues to receive DFQF access to the UK market despite not being an LDC. The UK is one of the few high-income countries that fulfils the UN target of providing 0.7% of gross national income as overseas development assistance and is likely to continue its support to developing and developed countries. The UK is also highly likely to implement its trade reform post-Brexit in support of the Sustainable Development Goals, which call for a significant increase in the exports of developing countries and the realization of timely implementation of DFQF market access on a lasting basis for all LDCs.

Recommendations

- Develop a common position and strategy to be pursued by the EAC collectively, aimed at securing and advancing EAC interests post-Brexit.
- Continue proactive engagement with the UK government to continue unilateral preference for EAC exports and to continue development assistance.
- Establish and support a London/Brussels-based technical advisory group serviced by officials of supportive organizations and selected experts in EAC affairs to provide ongoing technical and strategic advice to the EAC and its campaign effort.
- Focus on active engagement with the media and supportive organizations to help ensure favourable public attitudes to safeguarding EAC interests after Brexit.
- Coordinate with other ACP partner countries in the Pacific and Caribbean, and with Commonwealth nations to shape post-Brexit relations with the UK.

1 Introduction and Background

This part will introduce necessary background and context. It will provide an overview of the EAC and the EU-EAC EPA, analysing the agreement's history, current status and who the parties are based on the agreement's preamble. The report then discusses Brexit, and finally outlines the additional concerns that ELDCs have raised about the current state of the EPA.

1.1 The East African Community (EAC)

The East African Community (EAC) is a Regional Economic Community established under Article 2 of the Treaty for the Establishment of the East African Community (EAC Treaty) that entered into force in July 2000. The membership of the EAC Community comprises the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania, and most recently in 2016, South Sudan.[4] As stated under Article 5(2) of the EAC Treaty, "the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared."

In accordance with Article 9 of the EAC Treaty, the institutional framework of the EAC consists of the Executive, the Legislative and the judicial arms. The Executive arm is composed of the Summit of the Heads of State, tasked with providing overall leadership and vision, the Council as the policy making organ, and the Secretariat as the executive organ of EAC Institutions. The legislative and judicial arms are constituted by the East African Legislative

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[4] EAC, *4TH EAC Development Strategy (2011/12 -2015/16) : Deepening and Accelerating Integration*, August 2011, http://www.eac.int/sites/default/files/docs/strategy_eac_development-v4_2011-2016.pdf

Assembly and the East African Court of Justice (EACJ), respectively. The functions, mandates, and operational frameworks of these organs and institutions are set forth in the EAC Treaty, Protocols, and Rules of Procedures. The vision of the EAC is to attain a prosperous, competitive, secure and politically united East Africa. The EAC's mission is hence to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production, and enhanced trade and investment. To this end, the broad objective of the EAC is stipulated in Article 5 of the EAC Treaty: to develop policies and programmes aimed at widening and deepening cooperation among the Partner States in political, social and cultural fields; research and technology; defence; security; and legal and judicial affairs.[5]

1.2 The EU-EAC EPA

1.2.1 History of EU-EAC Trade Relations

A formal relationship between the EU and the African continent can be traced all the way back to when the Treaty of Rome was signed in 1957. The Treaty included provisions for the 'association' of African colonies, which meant that the founding EU member states could benefit from preferential trading arrangements with their African colonies. As the process of decolonisation spread across Africa, this relationship was renegotiated, resulting in the two Yaoundé Conventions of 1963 and 1969, which ensured a continuation of the preferential trade arrangements. Soon after the UK joined the EU, the trade relationship with what is today the ACP group of states, changed significantly. In 1975, the first Lomé Convention was agreed between the EU and the 46 ACP states. Under Lomé 1, ACP states benefited from non-reciprocal trade preferences, meaning they would receive preferential access to Europe's

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[5] EAC, *4TH EAC Development Strategy (2011/12 -2015/16) : Deepening and Accelerating Integration*, August 2011, http://www.eac.int/sites/default/files/docs/strategy_eac_development-v4_2011-2016.pdf

market but would not be required to liberalise their own imports from Europe. However, during the 1980s economic and development theory shifted in the direction of neoliberalism and a greater emphasis on free markets, calling into question the effectiveness of protective special and differential treatment for developing economies. The EU's relationship with Africa was reflective of this, and by the early 1990s the idea of preferential trade access for ACP states was called into question and a slow shift towards reciprocal trade began. The process culminated in the adoption of the Cotonou Agreement between the EU and ACP states in 2000. While the Cotonou Agreement continued the extension of unilateral preferences by the EU to the ACP countries, it also envisaged and set time frames for negotiations of reciprocal trading agreements in the form of Economic Partnership Agreements (EPAs) whereby both sides, the EU as well as the ACP countries, would have to undertake liberalisation commitments.[6]

The Cotonou Agreement built on twenty-five years of ACP-EU co-operation under four successive Lomé Conventions. While Cotonou initially kept preferential treatment for the ACP countries in place, it set the stage for the negotiation of new reciprocal trading arrangements compatible with World Trade Organisation (WTO) rules, which gradually began to replace the unilateral trade regime that had prevailed previously.[7] Under the pillar of trade cooperation, the Cotonou Agreement in Chapter 2, Article 37 provides for the negotiations of new trading arrangements between the ACP countries and the EU:

> "Economic partnership agreements shall be negotiated during the preparatory period which shall end by 31st December 2007 at the latest. Formal negotiations of the new trading arrangements shall start in September 2002 and the new trading arrangements shall

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[6]All Party Parliamentary Group for Africa*, The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 33.
[7]SEATINI*, An Analysis of the Rendezvous Clause in the EAC-EU-EPA,* 2015, http://www.rosalux.co.tz/wp-content/uploads/2016/03/SEATINIs-assessment-report-of-the-EPA-Rendezvous-clause-2015.pdf

enter into force by 1st January 2008, unless earlier dates are agreed between the parties."

The EPA negotiations were thus formally launched in September 2002. Negotiations were to be carried out in two phases: initially at the pan-ACP-EU level to agree on principles and approaches to be adopted, the structure and the modalities for the negotiation, and cross cutting issues of common interest for the ACP; and, beginning in September 2003, on a more bilateral basis to advance negotiations on specific regional EPAs.[8] Thus EPAs formed a key pillar of the Cotonou arrangement.[9]

The EU-EAC EPA negotiations were concluded on 16th October 2014 after 12 years of negotiation. Pursuant to the Cotonou Agreement, formal negotiations commenced in September 2002 and were scheduled for conclusion by 31st December 2007. On 27th November 2007, the EU and EAC member States signed an interim framework EPA (FEPA) to provide a transitional period while they continued to make efforts to conclude the full EPA. This also helped to counter the expiration of a WTO waiver obtained as part of the Cotonou Agreement in 2007, which had allowed ACP countries continued DFQF access despite its WTO-inconsistency. Under the provisional application of the FEPA, EAC members were able to continue to export their products on preferential terms while the EPA negotiations continued.[10]

The EAC was also required to harmonize its offer of market access to the EU. EAC states agreed to negotiate outstanding issues and conclude the negotiations before October 1, 2014. The failure to conclude the agreement would mean that Kenya, as a developing country, would have to export on the basis of GSP preferences. This would mean that Kenyan exports to the EU would attract import duties ranging from 5% - 22%, while Uganda, Rwanda, Burundi and Tanzania would continue to qualify for DFQF under the Everything But Arms (EBA) preference scheme, which had been granted to

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[8] *Id.*

[9] Kenya Human Rights Commission, *The ABC Of EAC-EU Economic Partnership Agreements (EPA)*, December 1, 2014, http://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/59-the-abc-of-eac-eu-economic-partnership-agreements-epa/file.html

[10] See further section 2.1.1 below.

LDCs by the EU on 5th of March 2001.[11] The comprehensive EAC–EU EPA negotiations were concluded and initialled on the 16th of October 2014.[12] The texts agreed by the chief negotiators was initialled and checked by EU and EAC lawyers. This "legal scrubbing" process was completed on September 11th 2015. The clean text was then sent to translation in order to pave the way for the signature and ratification of the EPA by October 2016.[13]

1.2.2 Current Status of the EU-EAC EPA

The EAC partner states have been under inordinate pressure to sign and ratify the EPA. On September 1st 2016, Kenya and Rwanda signed the EPA between the EAC and the EU. Kenya also ratified and deposited ratification instruments with the European Union on September 20th 2016. As explained, the major reason for Kenya to sign and ratify the EPA was to avoid being removed from the list of beneficiary countries for DFQF imports into the EU.[14] Following the uncertainty created by the Brexit referendum and citing development concerns, the Tanzanian government signalled it would not be signing the EU-EAC EPA by the proposed October 2016 deadline.[15] Burundi likewise indicated that it would not sign the EPA, citing EU sanctions as a concern,[16] and Uganda has announced it would delay signing the EPA until all EAC members have reached a common position.[17]

1.2.3 Who Are the Parties to the EPA?

The Preamble to the EU-EAC EPA individually lists five EAC members as

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[11]Everything But Arms (EBA) is an initiative of the European Union under which all imports to the EU from LDCs are Duty Free and Quota Free, with the exception of armaments.
[12]SEATINI, *An Analysis of the Rendezvous Clause in the EAC-EU-EPA,* 2015, http://www.rosalux.co.tz/wp-content/uploads/2016/03/SEATINIs-assessment-report-of-the-EPA-Rendezvous-clause-2015.pdf
[13]Economic Partnership Agreement between the EU and the Eastern African Community, European Commission, October 2015, http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142194.pdf
[14] SEATINI, *The EAC-EU EPA: Tanzania is raising pertinent issues*, March 3, 2017, http://www.seatiniuganda.org/media-center/news-highlights/88-the-eac-eu-epa-tanzania-is-raising-pertinent-issues.html
[15]Joseph Burite, *Tanzania Seeks EAC Delay Signing European Union Trade Pact*, Septmeber 7, 2016, https://www.bloomberg.com/news/articles/2016-09-07/tanzania-seeks-eac-delay-signing-european-union-trade-pact
[16] *Id.*
[17]*Tanzanian parliament advises government not to sign EPA with EU*, ICTSD, November 17, 2016, http://www.ictsd.org/bridges-news/bridges-africa/news/tanzanian-parliament-advises-government-not-to-sign-epa-with-eu

signatories: Rwanda, Tanzania, Kenya, Burundi and Uganda. South Sudan is not included as it was not an EAC member when the text was negotiated. The EU is also listed as a signatory, as are the 28 individual EU Members, making both the EU as a whole and its Member States parties. This language raises a number of pertinent questions.

Is South Sudan a Party to the EAC?

Article 132(1) of the EU-EAC Agreement sets out the definition of the parties:

> "Contracting Parties of this Agreement are the Contracting Parties to The Treaty establishing the East African Community, herein referred to as the 'EAC Partner States', on the one part, and the European Union or its Member States or the European Union and its Member States, within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union, herein referred to as the 'EU', of the other part."[18]

According to the first part of the above-cited provision, all the contracting parties to the EAC Treaty will automatically be contracting parties to the EU-EAC EPA. Hence, once South Sudan accedes to the East African Community by signing the EAC Treaty, it also became a signatory to the EU-EAC EPA.

a) Will the UK continue to be a party to the EPA post-Brexit by virtue of having signed the EPA in its own individual capacity?

The second part of Article 132(1) of the EU-EAC EPA relates to the EU and its Member States. The language used raises the question of whether the UK is a party to the EPA in its own right, separate from its status as an EU Member State, and hence whether it will continue to remain a party to the EPA post-Brexit.

One of the reasons provided for the language "EU or its Member States and EU and its Member States is the areas of shared competences between the

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[18]EU EAC EPA Consolidated Text, EUR. COMM. Art. 132, http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf

EU and its Member States as defined in Article 4 of the Treaty on the Functioning of the European Union.[19] When an international agreement covers elements of both exclusively EU and Member State competence, each of the twenty-eight Member States must ratify the agreement alongside the EU, each according to its own constitutional ratification procedures. Because of this, an agreement is concluded between a third party and both the EU and each of its individual Member States.

The only rationale for the UK to have signed the agreement separately is due to the division of competences within the EU system, whereby the sovereignty of the individual Member States is required to give specific consent to the EU Agreements. The status as an EU Member State, therefore, is essential for the UK to continue with these agreements.[20]

Secondly, the territorial application clause in Article 141 of the EU-EAC EPA stipulates:

> *"This Agreement shall apply, on the one hand, to the territories in which the Treaty on the European Union and the Treaty on the Functioning of the European Union are applied and on the other hand, to the territories of the EAC Partner States. References to 'territory' in this Agreement shall be understood in this sense."*[21]

This phrasing demonstrates the intent of the parties to apply the agreement only to those countries governed by the EU Treaties. When the UK ceases to be a member of the EU, this treaty will no longer cover the territory of the UK, and consequently, the EU-EAC EPA will no longer be applicable to the

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[19]Consolidated Version of the Treaty on the Functioning of the European Union art. 4, May 9, 2008, 2008 O.J. (C 115) 47; Section 1 states "The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6." ; Section 2 lays out principal areas of shared competence, while sections 3 and 4 define areas of EU competence that nevertheless do not prevent Member States from exercising theirs.

[20]Katrin Fernekeß, Solveiga Palevičienė and Manu Thadikkaran, *The Future of the United Kingdom in Europe: Exit Scenarios and Their Implications On Trade Relations*, Graduate Institute of International and Development Studies, http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/Memoranda%202013/Group%20A_The%20Future%20of%20the%20United%20Kingdom%20in%20Europe.pdf

[21]EU EAC EPA Consolidated Text, EUR. COMM. Art. 141, http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf

territory of the UK.[22]

b) Is the EAC a party to the EPA, or are the individual EAC member nations party to the EPA?

Article 132(2) of the EU-EAC EPA sets out:

> "For the purposes of this Agreement, the term 'Party' shall refer to the EAC Partner States acting collectively or the EU as the case may be. The term 'Parties' shall refer to the EAC Partner States acting collectively and the EU."[23]

The fact that 'Party' under the EPA refers to the EAC collectively may suggest that the EAC itself is a party to the EU-EAC EPA. However, a close reading of the preamble would suggest that the EAC itself in its institutional capacity is not a signatory to the EPA. Article 132(1) does not define Contracting Parties of the EPA as the EAC itself, but instead defines it to include the Contracting Parties to the EAC Treaty. Hence, it is only in the implementation of the EU-EAC EPA where reference to party would refer to the EAC Partner States acting collectively. That in and of itself does not make the EAC a party to the EU-EAC EPA as such. To reiterate, it is each of the six individual EAC Partner States that is a party to the EPA and not the EAC itself. This argument is further strengthened by the fact the EU itself is listed as a signatory along with its Member States in the preamble, and Article 132 employs the language "EU and its Member States", while it does not do so for the EAC.

Nevertheless, it must be borne in mind that while the EAC itself is not a party to the EU-EAC EPA, Article 37 of the EAC CU Protocol requires all EAC members to maintain a common position on external trade.[24] Moreover, in the EAC summit Decision of 2002 held in Kampala, EAC decided to negotiate the

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[22] Katrin Fernekeß, Solveiga Palevičienė and Manu Thadikkaran, The Future of The United Kingdom In Europe: Exit Scenarios And Their Implications On Trade Relations, Graduate Institute of international and Development Studies, http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/working_papers/CTEI_2013-01_LawClinic_FutureUKinEurope.pdf

[23] EU EAC EPA Consolidated Text, EUR. COMM. Art. 132(2), http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf

[24] See further section 2.3.1: The Common External Tariff (CET) below.

EU-EAC EPA as a bloc with the EU.[25]

1.3 Brexit

Brexit stands for "British exit from the EU", referring to the UK's decision in a referendum on June 23rd 2016 to leave the EU. The British people voted to leave by 51.9% to 48.1%. The referendum turnout was 71.8%, with more than 30 million people voting. Questions have been raised about the Brexit process, in part because Britain's constitution is unwritten and in part because no country has left the EU and invoked Article 50 of the Lisbon Treaty before. It became clear that Britain is likely to face a "hard Brexit" after Prime Minister Theresa May announced that the UK will leave the single market in a speech to EU ambassadors on January 17, 2017. The road to triggering Article 50 was cleared after crossing many hurdles, including a UK Supreme Court ruling that the UK Parliament MPs needed to give the government formal permission to trigger the Article 50 process. Having secured such parliamentary backing, the government invoked Article 50 on March 29, 2017.

The text of Article 50 furthermore contains two important timing elements. Presuming a withdrawal agreement is worked out between the withdrawing state and the EU, the article states that "the Treaties on the European Union shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement. . . ".[26] The reference to the date of entry into force suggests that the UK and the EU could agree upon terms for the UK's exit within two years, while establishing a date of entry into force that is farther down the road, thereby giving both sides a much longer transition period in which to begin implementing their Brexit-related commitments. However, in the absence of a withdrawal agreement, Article 50 holds that the treaties of the EU shall cease to apply to the UK "two years after the notification [of the

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[25] Referenced in the Preamble to the EU-EAC EPA.
[26] Article 50, Paragraph 3, European Union, *Treaty on European Union (Consolidated Version), Treaty of Maastricht* , 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002, http://www.refworld.org/docid/3ae6b39218.html

intent to withdraw] . . . unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period."[27] This provision mandates a "unilateral divorce" in the absence of an agreement, but also provides important flexibility to extend the negotiating time frame beyond two years if both sides determine that additional time to work out the withdrawal agreement is needed. It remains to be seen how accommodating the EU Member States are prepared to be in granting extensions of time as they work toward a mutually agreeable withdrawal agreement. The two-year timetable is widely seen as extremely short, especially given the need for a period of typically six months in which to ratify the deal.[28]

Officials from the U.K.'s Department for International Trade are also investigating the possibility of keeping tariffs between Britain and the EU at zero as part of an interim arrangement that could last up to 10 years, allowing more time for a full trade deal to be negotiated after Britain has left the bloc, according to sources familiar with the discussions that have taken place at the WTO.[29] Under Article XXIV of the GATT, the U.K. and Brussels would be allowed to maintain an interim agreement during a "reasonable length of time" after Brexit to agree upon a free-trade deal before they would have to revert to the same tariffs as offered to everyone else under the WTO.[30] Such a transitional deal would allay fears about an impending cliff edge in March 2019 when Britain would leave the Single Market unless a transitional deal is agreed. However, it is highly unlikely that the remaining EU-27 countries would agree to such an arrangement without significant concessions from the U.K. government on budget contributions and free movement of people.[31]

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[27] *Id.*
[28] Anushka Asthana, Daniel Boffey , Jessica Elgot, *UK to trigger article 50 on 29 March, but faces delay on start of talks*, The Guardian, March 20, 2017, https://www.theguardian.com/politics/2017/mar/20/theresa-may-to-trigger-article-50-on-29-march
[29] Tom McTague, Britain's Brexit Plan B, Politico, March 19, 2017, http://www.politico.eu/article/britain-10-year-interim-zero-for-zero-trade-deal-brexit/
[30] Timing and other the obligations under GATT Article XXIV are further discussed in relation to the EU-EAC EPA in section 3.2.2-4.
[31] Tom McTague, *Britain's Brexit Plan B*, Politico, March 19, 2017, http://www.politico.eu/article/britain-10-year-interim-zero-for-zero-trade-deal-brexit/

These uncertainties surrounding the future EU-UK relationship have a clear and detrimental impact on the ability of concluding the present EPA negotiations.

1.4 EAC LDCs' (ELDCs') Reluctance to Ratify the EPA

As mentioned, after twelve years of negotiation, the EAC-EPA was scheduled to be signed on 18th July, 2016. However, Tanzania announced its decision not to sign the EPA amidst the uncertainty created by the Brexit referendum, as well as the hindrance that the EU-EAC EPA may pose in its ability to industrialize its economy and pursue further regional integration.[32] Burundi has also refused to sign the EPA because the EU has imposed sanctions against it.[33] Rwanda and Kenya are the two members that have signed the agreement, and Kenya is the only EAC member that has also ratified the EPA. The most significant trading partner of all the EAC Members in the EU bloc is the United Kingdom.[34] Therefore, the exit of the UK from the EU has prompted the ELDCs to reassess the benefits under the EU-EAC EPA.

The developmental concerns raised relate to the EAC's industrial development; the effects of the EU's agricultural subsidies; the adequacy of bilateral safeguards; tariff revenue losses resulting from substantial trade liberalisation; elimination of export taxes; implications of the standstill and MFN clauses on future trading arrangements; and the usefulness of the Development Chapter of the EPA, given that the EU has committed to fund only a minor share of the EPA Development Matrix.[35] To provide context to the analysis that follows, some of these issues will be briefly explored below

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[32]Lucas Saronga, *Exploring pros and cons of EAC-EU Economic Partnership Agreemen*t, Daily News, March 8, 2017, http://dailynews.co.tz/index.php/analysis/49011-exploring-pros-and-cons-of-eac-eu-economic-partnership-agreement

[33] Joseph Burite, *Tanzania Seeks EAC Delay Signing European Union Trade Pact*, Septmeber 7, 2016, https://www.bloomberg.com/news/articles/2016-09-07/tanzania-seeks-eac-delay-signing-european-union-trade-pact

[34] See section 2.2.1 below.

[35]Lucas Saronga*, Exploring pros and cons of EAC-EU Economic Partnership Agreemen*t, Daily News, March 8, 2017, http://dailynews.co.tz/index.php/analysis/49011-exploring-pros-and-cons-of-eac-eu-economic-partnership-agreement

and then further considered under Part 3, together with recommendations on how current proposed arrangements may be altered should ELDCs wish to pursue a renegotiation of the EU-EAC EPA. The overarching concern expressed by ELDCs is that they will be constrained in their future policy space, which will impact their ability to encourage domestic development and local and regional integration, as well as the concerns that their own industries will not be able to compete with more advanced European manufacturers, and the lavish subsidies the EU affords its agricultural sector. However, as is further emphasised in Part 3, it is important to also recognise that market liberalisation or the abolition of export taxes can bring important benefits, such as lower consumer prices and increased efficiency and competitiveness among domestic firms.

1.4.1 Liberalisation Commitments

Five out of six EAC countries are designated as LDCs, namely: Burundi, Rwanda, Tanzania, Uganda and South Sudan. In recognition of their economic vulnerability, LDCs were exempted from taking on any additional tariff liberalisation in the latest round of multilateral negotiations in the WTO, the Doha Development Round.[36] However, under the EU-EAC EPA, the EAC must liberalise 82.6 per cent of imports from the EU over a 25 year transition period.[37]

The EU argues that 80 per cent liberalisation by EAC members reflects the requirements of the WTO.[38] However, this requirement, which stems from the need to liberalise "substantially all trade" under GATT Article XXIV, has never been clearly defined. Furthermore, the extensive liberalisation under the EPA may lock the region into a free trade area with Europe which could have an adverse effect on ongoing regional integration efforts, especially in relation to the SADC-COMESA-EAC Tripartite Free Trade Area and the pan-African Continental Free Trade Area (CFTA). Significant liberalisation towards the EU

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[36] *Id.*
[37] See section 3.2.2 below.
[38] See further section 3.2.2-3 below.

could hinder the EAC's ability to offer more preferential rates to regional trading partners.

1.4.2 Export Duties

Export taxes are allowed under the WTO, but, according to Article 14 of the EPA, duties on exports are prohibited for either party.[39] Export taxes can, however, be used to promote value-added processing, hence encouraging diversification and enhanced production capacity. This can also help shield and promote infant industries. Article 14 does allow taxes to be imposed under a limited set of circumstances, but only for a maximum of 48 months.

1.4.3 Rendezvous Clause

Article 3 of the EU-EAC EPA provides that the parties shall conclude negotiations in the 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 EPA. Such time-bound negotiations on non-goods topics are neither a requirement under the Cotonou Agreement nor mandated under the rules of the WTO. It should be noted that these are areas that contain instruments that governments use to direct development, promote local industries, and nurture the private sector. Binding rules in these areas will, therefore, constrain the policy space for governments to promote industrialization and sustainable development. It is for this reason that developing countries, including the EAC Partner States, have long opposed their inclusion in WTO negotiations.[40] For instance disciplines on government procurement would curtail the scope and space for the EAC Partner State's governments to use procurement as an instrument for development, especially in giving preferences to local companies for the supply of goods and services and for the granting of concessions for implementing projects. Similarly, disciplines on investment protection will

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[39] See further discussion at section 3.2.3: Export Taxes below.

[40] SEATINI*, The inherent dangers for the EAC signing the EAC-EU EPA: Some proposals on the way forward*, January 23, 2017, http://www.seatiniuganda.org/publications/downloads/121-seatini-statement-on-epas-inherent-dangers-and-way-forward/file.html

require the EAC to accord EU investors the same treatment with respect to the acquisition of property and the expansion, management, conduct, operation, and sale or other disposition of investments in the EAC territory, like that accorded to the EAC investors. This would constrain the EAC's ability to promote local investors or local industries, which doubtlessly need time to grow in order to be able to compete with foreign companies that are already more established.[41]

1.4.4 Most-Favoured Nation (MFN) Clause

Article 15 of the EU-EAC EPA obliges the EAC to extend to the EU any more favourable treatment resulting from a preferential trade agreement with a major trading economy or developed country. The MFN clause effectively circumscribes the margin of preference that African countries can grant to third parties, rendering any such trade deal redundant and therefore limiting the EAC's integration into the global markets. Restraining the EAC's future trade deals is inimical to the region's development.[42] This will not only circumscribe the EAC's external trade relations but will also undermine the prospects of South-South trade, which the EAC is aspiring to promote. In addition, it has been argued that the clause is contrary to the spirit of the WTO's Enabling Clause that covers Special and Differential Treatment for developing countries and South-South cooperation.[43]

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[41] *Civil society views on the EAC-EU Economic Partnership Agreement (EPA*), TRALAC, August 5,2016, https://www.tralac.org/news/article/10233-civil-society-views-on-the-eac-eu-economic-partnership-agreement-epa.html

[42] All Party Parliamentary Group for Africa*, The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 48.

[43] *Civil society views on the EAC-EU Economic Partnership Agreement (EPA*), TRALAC, August 5,2016, https://www.tralac.org/news/article/10233-civil-society-views-on-the-eac-eu-economic-partnership-agreement-epa.html

2 Option A: Withdrawing from EPA negotiations

The first option open to ELDCs would be to withdraw from the EPA negotiations. This part will first assess the ELDCs' ability to do so, and then consider the position of Rwanda (an ELDC) and Kenya (a developing country), since they have both signed, and in Kenya's case ratified, the EPA. If the remaining ELDCs decide to end the on-going negotiations, they could seek to persuade Kenya and Rwanda to withdraw their signatures and ratification in the interest of EAC unity and the coherence of the EAC Customs Union. However, if Kenya or Rwanda is not interested in withdrawing from the EU-EAC EPA, the final section assesses to what extent the EPA could proceed without the other ELDCs' participation, as well as the implications for their continued EAC membership and future regional integration.

2.1 Ability to Withdraw from the EPA Negotiations under Public International Law

2.1.1 Non-Signatory States Ability to Withdraw from Negotiations

As already mentioned, in November 2007, EAC Partner States initialled a so-called "interim EPA" (IEPA) or "framework EPA" (FEPA) with the EU.[44] This constituted a first draft of the full EPA, which itself was initialled on the 16th of October 2014.[45] However, while initialling may indicate agreement as to the definitiveness and authenticity of a negotiated text,[46] absent specific

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[44] EU Commission, *Proposal for A Council Decision on Framework Economic Partnership Agreement,* 30 September 2008, http://eur-lex.europa.eu/resource.html?uri=cellar:696d4d5c-a56b-4ed4-9989-d4cc376938c4.0004.02/DOC_10&format=PDF, p. 2. See also ECDPM, *Implementing the Economic Partnership Agreement in the East African Community and the CARIFORUM regions: What is in it for the private sector?*, October 2010, http://ecdpm.org/wp-content/uploads/2013/11/DP-104-Economic-Partnership-Agreement-East-Africa-CARIFORUM-2010.pdf, p. 19

[45] EU Commission, *EU strikes a comprehensive trade deal with East African Community*, 16 October 2016, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1163

[46] Article 10(b), United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 http://www.refworld.org/docid/3ae6b3a10.html (VCLT).

agreement, initialling does not constitute consent to be bound.[47] What it did allow was for the European Union to apply the agreement provisionally and unilaterally under Article 45(4) of the FEPA, while still being consistent with its WTO obligations.[48] Although the EU did not state so explicitly, it likely relied on Article XXIV:5(b) of the GATT, allowing countries to establish preferential treatment amongst themselves pursuant to an "interim agreement leading to the formation of a free-trade area". If so this would have allowed the EU to maintain DFQF access to Kenya even after its waiver for the ACP preferential arrangements under the WTO expired at the end of 2007. This provisional application has continued, as the deadline for ratification of the full EPA was extended to October 2016 after the conclusion of negotiations in 2014,[49] and again until January 2017 after protests from Tanzania and Burundi.[50] At the time of writing, agreement has not yet been reached and the political situation and status of the EPA negotiations remain uncertain.

The requirements of GATT Article XXIV will be further explored in the following section. For present purposes, it is sufficient to note that, from a legal perspective, since four of the five ELDCs have neither signed nor ratified the EPA – and are under no obligation to do so – they are free to abandon negotiations if they see fit.[51]

2.1.2 Kenya's and Rwanda's Ability to Withdraw from Negotiations

As mentioned, Rwanda and Kenya are the only EAC members who have

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[47] *Id.* Article 12.2(a). *See Oppenheim's International Law: Volume 1 Peace*, R. Jennings and A. Watts (eds.), 9th edition (2008), n. 2 at p. 1225.
[48] See Council Regulation (EC) No 1528/2007, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:348:0001:0154:EN:PDF
[49] European Commission, *Economic Partnership Agreement between the EU and the Eastern African Community (EAC)*, October 2015, http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142194.pdf
[50] Reuters, *East African Community says will delay signing trade deal with EU,* 8 September 2016, http://www.reuters.com/article/us-africa-trade-idUSKCN11E1UM
[51] During the negotiations of the VCLT, the parties explicitly rejected a provision in the ILC's draft proposal which would have imposed good faith obligations on states during the treaty negotiation stage as well. See *Oppenheim's International Law: Volume 1 Peace*, R. Jennings and A. Watts (eds.), 9th edition (2008), n. 9 at p. 1239.

signed the EPA,[52] and Kenya is so far the only country to have ratified it.[53] This section looks at how Kenya and Rwanda could withdraw their consent to the EPA consistent with their international obligations under general rules of public international law. The following section then considers to what extent Brexit provides both a legal *justification* and an economic *reason* for doing so.

A treaty is only binding upon a party after it has entered into force.[54] The EU-EAC EPA does not enter into force until all parties to the EU-EAC EPA have ratified it.[55] However, prior to entry into force, signature or ratification obliges the state "not to defeat the object or purpose" of the treaty.[56] Yet, in the case of signature, this obligation only lasts until the country "has made its intention clear not to become a party to the treaty".[57] Thus, as soon as a party wishes, it can withdraw its signature without consequence.[58] In the case of ratification, where ratification expresses final consent to be bound, "the obligation only exists provided that such entry into force is not unduly delayed."[59] Precedents on this subject tend to relate to the former situation, where a state has signed but not ratified, but it is suggested that the delay already caused since Kenya's ratification in September 2016 would meet the definition of "unduly delayed".

Therefore, both Rwanda and Kenya appear to be within their full rights to withdraw their signatures and ratification should they wish to do so.

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[52] Government of Rwanda, *Rwanda, Kenya Sign EPA in Brussels*, September 2016, http://www.minicom.gov.rw/index.php?id=24&tx_ttnews%5Btt_news%5D=1105&cHash=d11e0643f67fcf3a090168c5529d4d61

[53] Capital Business, *Four million jobs safeguarded as MPs ratify EPA,* 20 September 2016 http://www.capitalfm.co.ke/business/2016/09/four-million-jobs-safeguarded-mps-ratify-epa/

[54] Article 26 VCLT.

[55] EAC-EU EPA Article 139(2).

[56] Article 18 VCLT.

[57] *Oppenheim's International Law: Volume 1 Peace*, R. Jennings and A. Watts (eds.), 9th edition (2008), p. 1239.

[58] An oft-cited example is President Bush's withdrawal of the United States' signature from the Rome Statute of the International Criminal Court in 2002, and more recently, President Trump's withdrawal from the Trans-Pacific Partnership negotiations.

[59] *Oppenheim's International Law: Volume 1 Peace*, R. Jennings and A. Watts (eds.), 9th edition (2008), p. 1239.

2.2 Legal and Economic Grounds That Brexit Provides for Withdrawal from Negotiations

2.2.1 Economic Impact of Brexit on EPA Benefits and Concessions

After a difficult and more than decade-long difficult negotiation to usher in a new trading relationship with the EU through the EPA, Brexit have unsettled this relationship.[60] The serious divisions within the EAC over the EPA shows how Brexit could reset trade relations between Europe and the EAC as well as between the UK and EAC. This section looks at the economic impact of Brexit and the uncertainties it creates across a wide range of pertinent areas, and the next section then analyses the legal relevance of these changes. Importantly, this section demonstrates how Brexit creates a significant loss in EAC exports and aid disbursements, while the EU maintains full access to the EAC markets, thus upsetting the balance of concessions negotiated under the current EPA.

Trade Patterns and Balance of Concessions Unsettled

In 2016, total trade between the EU and EAC amounted to €6.30 billion, about 0.2% of total EU trade.[61] Total exports from the EAC Customs Union to the EU totalled €2.4 billion, while EAC imports from the EU amounted to €3.9 billion.[62] EAC exports consisted of 90% primary and 9.3% manufactured products, whereas imports from the EU amounted to 16.4% primary and 81.5% manufactured products.[63] The LDCs in the EAC Customs Union contributed 49%, while Kenya (the only developing country) contributed 51% of total EAC-EU trade in 2016[64]. The same trend was

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[60] All Party Parliamentary Group for Africa, *The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 58.
[61] European Union, *Trade in goods with ACP -- East African Community (EAC)*, February 16, 2017, http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151901.pdf
[62] *Id.*
[63] *Id.*
[64] *Id.*

exhibited in 2015, where total EAC exports to the EU28 stood at €2.6 billion, with Kenya contributing €1.3 billion and the rest of the EAC Customs Union €1.3 billion.[65] Looking at the UK market, approximately €0.4 billion of EAC exports (17% of total EAC-EU exports) were destined for the UK in 2016, out of which €0.37 billion (93%) originated from Kenya alone.[66] This implies that only 7% exports to the UK originate from ELDCs.[67]

These statistics show that Kenya contributes the largest share of the EAC-Customs Union's exports to both the EU and UK; and that EAC has a trade deficit with EU. Secondly, since the largest composition of EAC exports to the EU are primary products as opposed to manufactured imports, this presents a case for the need to advance the EAC's industrialisation strategy as an argument for withdrawal from the negotiations.

Finally, and most importantly, it means that Brexit will shrink the EU export market for EAC countries by 17% as per last year's figures, while under the EPA, the UK continues to enjoy full access to the EAC. EAC countries should thus seek compensation for this loss of value.

Smaller EU Single Market

The direct trade effects described above are compounded by the fact that the overall EU Single Market will shrink. The problem is that an *x* per cent tariff levied by the UK and the EU as separate markets is not perfectly equivalent to an *x* per cent tariff by a Single Market comprising the EU27 and the UK. Because of the customs union and the Single Market, a third country facing an x per cent tariff on imports into the EU28 (i.e. including the UK) pays the tariff and then can circulate its goods freely around the

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[65] Calculations by authors based on data from: European Union, Trade in goods with ACP -- East African Community (EAC), EUROPA, February 16,2017, http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151901.pdf

[66] European Union, *Trade in goods with ACP -- East African Community (EAC)*, February 16, 2017, http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151901.pdf

[67] Jacques Berthelot, *EAC duties losses on imports from EU28-UK from 2015 to 2040 if the EPA is signe*d, SOL, December 31, 2016, https://www.sol-asso.fr/wp-content/uploads/2016/06/EAC-duties-losses-on-imports-from-EU28-UK-from-2015-to-2040-if-the-EPA-is-signed-31-12-2016.pdf

whole union. If the UK is not part of the customs union and Single Market, on the other hand, goods cannot flow freely between the UK and the EU27; there may be tariffs to pay or inspections of standards at the border, which would add to costs and uncertainty.

For example, whereas Kenya currently exports its cut flowers to Rotterdam, where they are distributed rapidly to the UK and other EU members, after Brexit they may have to pay UK import duties as they enter the UK or be inspected for pests or disease. The tariff may be the same in the EU and the UK (and so it does not matter to the exporter where she pays it), but after Brexit the market separation would impose more costs on Kenyan exporters, so Kenya may challenge this arguing that its rights under the Uruguay Round are impaired and that it needs to be compensated by a tariff reduction. [68] The position is more complicated for intermediate goods and value chains. Take the case of an intermediate good that is imported into Britain, incorporated into a manufactured good, and then sold in Germany. It pays its x per cent on the way into the UK; prior to Brexit the final good could be sold in Germany with no further questions asked, but once the markets are split the final good may no longer meet the EU Rules of Origin and so may face an additional tariff on entering Germany. In this case, no tariff rate would have changed, but the exporter of the intermediate good would now be disadvantaged.[69]

The EU, taken as a whole, is the UK's largest trading partner. In 2015, UK exports to the EU amounted to £230 billion, 44% of all UK Exports. UK imports from the EU amounted to £290 billion representing 53% of all UK imports. The UK had an overall trade deficit of £61 billion with the EU in 2015, whilst it had a trade surplus of £31 billion with non-EU members.[70] In

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[68] Peter Holmes, Jim Rollo and L. Alan Winters , Negotiating the UK's Post-Brexit Trade Arrangements , National Institute Economic Review, No. 238, November 2016, http://journals.sagepub.com/doi/pdf/10.1177/002795011623800112

[69] *Id.*

[70] Dominic Webb, Matthew Keep. *In Brief, UK-EU Economic Relations , Briefing Paper ,* House of Commons June 13, 2016, http://researchbriefings.files.parliament.uk/documents/SN06091/SN06091.pdf

2015, the UK received 17% of EAC exports to the EU.[71] As a percentage of EAC exports to the European Union (UK imports/EU27 imports), UK imports constitute 20.4%.[72] Brexit thus would constitute a significant reduction in benefit for EAC countries under the EPA, since, as explained in Part 1, the UK would not continue to be party to the EPA when it leaves the EU.

Currency Depreciation

Another factor to consider is the post–Brexit depreciation of the Pound Sterling. The fall in the UK currency will make UK exports cheaper and imports more expensive. This implies that the volume of the exports from UK's trading partners is likely to shrink with the fall in the value of the Pound after Brexit. The distortion in trading patterns should be a matter of concern to the EAC, given the fact that the preferential treatment enjoyed by the EAC Customs Union under the EU can no longer hold in the UK after Brexit.

Higher MFN Tariffs

Most exports from the EAC to the EU are currently under the EBA scheme for LDCs. In the absence of similar treatment post-Brexit, a range of products could face higher MFN duties in the UK, as well as competition from non-EAC developing countries. At a broad level, the products most vulnerable to higher average EU/UK MFN duties include fish and seafood products (11.21 per cent), horticultural products (5.94 per cent), edible vegetables (7 per cent), meat, fish and seafood prepared food products (13.83 per cent), vegetable, fruit and nut prepared food products (13.4 per cent), tobacco and tobacco products (21.46 per cent), carpets (7.38 per cent), clothing (11.6 per cent), footwear (9.95 per cent), aluminium (6.45 per

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[71] Jacques Berthelot, *EAC duties losses on imports from EU28-UK from 2015 to 2040 if the EPA is signe*d, SOL, December 31, 2016, https://www.sol-asso.fr/wp-content/uploads/2016/06/EAC-duties-losses-on-imports-from-EU28-UK-from-2015-to-2040-if-the-EPA-is-signed-31-12-2016.pdf
[72] *Id.*

cent) and vehicles (6.37 per cent).[73] Any reduction in preferences in the UK market for many of these value-added products could have an adverse impact on the continent's plans for structural economic transformation, as outlined in the African Union's development plan, *Agenda 2063*.[74]

Value of Preferences under EU- GSP unsettled

The loss of value of preferences under the EU-GSP scheme stems first from the separation of the EU and UK markets, as explained above, and second from the operation of the graduation clause. Graduation means that imports of particular groups of products, originating in a given GSP beneficiary country, lose GSP preferences under certain conditions. Under the current scheme, graduation applies when average imports of a section from a country exceed 17.5% of GSP imports of the same products from all GSP beneficiary countries during three years (the trigger is 14.5% for textiles and clothing).[75] Given that the percentages would now be calculated in the UK and the EU27 separately, this may disrupt certain existing trade preferences. A third possibility is that if the UK reduces its tariffs vis-a-vis other, developed, countries, the preferences under GSP will be eroded. [76]

As explained above, post-Brexit the EAC will not derive benefits from the EU- EAC EPA to the extent that it had negotiated. With the UK's exit from the EU, the EAC will get from the EU much lesser value than what it had bargained for when earlier negotiations of the EPA were concluded, while the EU, despite its smaller market size, will continue to derive benefits from EAC at the same level as previously agreed.

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[73] Mohammad Razzaque , Brendan Vickers, Post-Brexit UK-ACP Trading Arrangements: Some Reactions, The Commonwealth : Hot Trade Topics, Issue 137, 2016, http://thecommonwealth.org/sites/default/files/news-items/documents/5jln9q109bmr-en.pdf
[74] *Id.*
[75] European Commission, *The EU's New Generalised Scheme of Preferences*, December 2012, http://trade.ec.europa.eu/doclib/docs/2012/december/tradoc_150164.pdf
[76] Peter Holmes, Jim Rollo and L. Alan Winters, "Negotiating the UK's Post-Brexit Trade Arrangements", *National Institute Economic Review,* no. 238 (2016), http://journals.sagepub.com/doi/pdf/10.1177/002795011623800112

Development aid

The third issue to consider with regard to Brexit is related to development aid. Articles 75(4) and 102(3) of the EAC-EU EPA highlight guidelines to development cooperation and obligations of parties to the agreement. The articles stipulate that the financing of development cooperation between the EAC Partner States and EU for the implementation of the EAC-EU EPA in line with the financing gaps identified in the EPA Development Matrix shall be financed through commitment of resources by the EU on a timely and predictable basis under the European Development Fund (EDF), the EU Budget, and any other instrument used to implement the EU's Official Development Assistance (ODA). This in line with the Treaty of Rome which created the EDF in 1957. It was the EU's main instrument for providing development aid to ACP countries and to overseas countries and territories (OCTs) based on the Cotonou agreement of 2000.

Subject to these provisions, the EAC is a significant beneficiary of EU aid channelled through the EDF to support the Road Transport Sector Policy (RTSP), the United Nations High Commissioner for Refugees (UNHCR) and EAC integration. Other support goes to food security, sanitation, and agriculture. In Tanzania alone, €555 million was allocated between 2008-2013, and another 636 million Euro was given under the Tanzania National Indicative Program 2014-2020 to support agriculture, energy and general budget support. All these projects were negotiated with the EU-28. The UK is the third largest contributor to the EDF after Germany and France, contributing up to 14% to both the 10th and 11th EDFs.[77] Therefore, Brexit presents uncertainty about the aid disbursement mechanism to the EAC and consequently the continuity of projects. There is therefore a need to renegotiate proper aid programing between the EU and the EAC, and a

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[77] Alessandro D'Alfonso, "European Development Fund: Joint development cooperation and the EU Budget: out or in?", *European Parliamentary Research Service (EPRS),* November 2014, http://www.europarl.europa.eu/EPRS/EPRS-IDA-542140-European-Development-Fund-FINAL.pdf

need to streamline the Domestic Revenue Mobilization initiatives for the EPA joint co-operation commitments.

Revision of the EAC-CET

The EAC Partner States have initiated a process requiring revision of the Common External Tariff as per the provisions of the EAC Common Market Protocol. The revisions are intended to establish whether the CET has hadthe expected impact on EAC domestic industries in line with the EAC's 2050 strategy. The list of sensitive products and Rules of Origin (ROO) will be revised alongside the CET. This has implications for classification of goods originating from either EU27 or the UK and consequent application of the CET rates. With Brexit, modifications are needed to address the trade relationship with the EU-27 vis-a-vis the UK, which gives EAC Customs Union members grounds for further scrutiny of the EAC-EU EPA before signing.

Conclusion

Since the EPA was negotiated on the premise that duty free access would be granted to the full EU market in return for access to EAC markets, it is in the interest of all EAC members to reassess the terms of the EPA and the extent of the concessions granted by EAC members. As earlier alluded to, the integration processes of the EAC were in part supported by financial aid from the EU28.

Two main concerns arise. Firstly, the EAC countries will lose valuable preferential access to a major part of their expected market, and, hence, the balance of concessions negotiated with the EU-28 will change dramatically. Secondly, the UK's exit from the EU will arguably remove the British influence as a counterbalance to the less development-oriented forces in the EU. Although the French and Spanish are sure to push the EU to maintain a pro-development agenda, there is a risk that Brexit will lead to a diminution in the

EU's support for developing countries [78] In essence, the concessions negotiated by the EAC side in the EU-EAC EPA will, due to the changed circumstances, turn out to have been made in exchange for benefits that are significantly reduced in value from what was initially expected from the EU and would be realised post-Brexit.

Re-negotiating the EPA further entails increased commitment of resources to facilitate the potentially protracted process. The EAC Partner States have relatively weak structures in place to support this process, hence the renegotiation process could prove costly. This is a consideration favouring full withdrawal from negotiations.

2.2.2 Legal Grounds for Withdrawal Provided by Brexit

As was explained in Section 2.1.2, since the EAC-EPA has not yet entered into force, none of the EAC Partner States are bound to implement it, even if they have ratified it. The economic impact outlined in the previous section, however, adds a further legal reason under public international law as to why withdrawal from the agreement would have been possible even had the EU-EAC EPA come into force.

Fundamental change in circumstances

The Vienna Convention on the Law of Treaties ('VCLT') provides the means for exiting a treaty if there is a 'fundamental change of circumstances'. Article 62 stipulates:

> "1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

[78] Erroll Humpfrey, *How will BREXIT affect the Caribbean : Overview and Indicative Recommendations*, ECDM, August 2016, http://ecdpm.org/wp-content/uploads/ECDPM-Discussion-Paper-199-BREXIT-affect-Caribbean-2016.pdf, p. 7.

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." [79]

Brexit may be invoked as a "fundamental change in circumstances" as set out in Article 62(1)(a).[80] This would provide a further legal arguments as to why EAC Partner States like Rwanda and Kenya, despite having signed and ratified the EU-EAC EPA respectively, may in good faith withdraw their ratification and signature.[81] It is important to note that the UK has been an active and committed member of the EU in the area of trade and development, particularly in negotiations with African countries. Many of the development dimensions of the EPA negotiations, such as the links between poverty, trade and governance, were raised and pushed by the UK. [82] Therefore, when the EAC Partner States consented to negotiate the EPA with the EU at its 2002 Summit in Kampala,[83] the UK being an integral part of the EU formed the basis of that consent. Now that the UK has formally triggered Article 50 of the Lisbon Treaty to exit the EU, the circumstances under which the EAC Partner States (including Kenya and Rwanda) had given its consent to negotiate the EPA with the EU have been altered.

Noting the language of the International Court of Justice that "the stability of treaty relations requires that the plea of fundamental circumstances be

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[79]Article 62, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, http://www.refworld.org/docid/3ae6b3a10.html

[80]Fionnuala Ní Aoláin, *Brexit: Implications of International Treaty Law Obligations and Customary International Law, 'Brexiting and Rights: Discussion seminar on the human rights and equality implications of the EU referendum',* MAC Belfast, September 27, 2016, http://www.caj.org.uk/files/2016/11/03/2_Brexiting_and_Rights_-_Fionnuala_N%C3%AD_Aol%C3%A1in_CAJ-TJI_2016.pdf

[81]Edwin Laurent, Lorand Bartels, Paul Goodison, Paula Hippolyte and Sindra Sharma*, After Brexit : Securing ACP Economic Interests*, The Ramphal Institute, 2017, http://www.ramphalinstitute.org/uploads/2/3/9/9/23993131/brexit_book_ramphalinst.pdf

[82]All Party Parliamentary Group for Africa*, The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 54.

[83] Referred to in the preamble to the EU-EAC EPA.

applied only in exceptional cases"[84], it is unlikely that the EU will refrain from challenging the application of Article 62 of the VCLT in this situation. To invoke Article 62, it is required that the change in circumstances should have been unforeseen at the time of concluding the treaty. The EU may argue that the presence of Article 50 in the Lisbon Treaty that allows for a member to withdraw from the EU was known to the EAC Partner States throughout negotiations and, therefore, Brexit was not unforeseen.

Hence, although we note that Article 62(1)(a) may be difficult to invoke, it nevertheless represents an additional argument as to why the EAC Partner States may withdraw from the EPA negotiations in good faith, and which can be made alongside the principal argument already set out in Section 2.1.2; that the EPA has not yet entered into force, meaning neither signature nor ratification is binding.

2.3 The Ability of the EPA to Proceed Without All EAC Members

Even if all EAC members are able to withdraw from the EPA negotiations, some may be unwilling to do so. This section explores whether some EAC members can proceed with the EPA while others do not. This question encompasses both a legal and a policy aspect. The former relates to whether such a move would be legally permissible, as different members would be applying different tariffs to imports from the EU, which would undermine the EAC CET. The latter aspect relates to the extent to which this would undermine African integration and the EAC both politically and economically.

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[84] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7. para. 104.

2.3.1 Obligations under the EAC Treaty

<u>The Common External Tariff (CET)</u>

The CET is set out in Article 12 of the Protocol on the Establishment of the East African Customs Union (CU Protocol), requiring a "common external tariff". Furthermore, Article 37 of the Protocol reads in relevant parts:

> "1. The Partner States shall honour their commitments in respect of other multilateral and international organisations to which they belong.
>
> 2. The Community shall co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade. [...]
>
> 4. (a) 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."

Paragraph 4(a) explicitly allows for separate trade agreements; however, they must not conflict with the provisions of the CU Protocol. As mentioned, there is arguably a *prima facie* conflict between the CET in Article 12 and the EAC EPA if not pursued by all Partner States in concert.[85] The question is thus whether there is flexibility elsewhere in the Protocol, including in Article 12 itself.

Looking first to the other provisions of Article 37, paragraph 2 requires co-ordination to facilitate "a common policy". Arguably, within the scope of a

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[85] To clarify, the CET means that all EAC members will apply the same import tariffs to the same goods. It does not mean that all goods have the same tariff. There is a list of Sensitive Products which receive different tariff treatment (see Isaac M.B. Shinyekwa and M. Katunze, *Assessment of the Effect of the EAC Common External Tariff Sensitive Products List on the Performance Of Domestic Industries, Welfare, Trade and Revenue*, EPRC, October 2016, http://dspace.africaportal.org/jspui/bitstream/123456789/36158/1/129%20Assessment%20of%20the%20Effect%20of%20the%20EAC.pdf?1). However, if only some EAC Partner States implement the EPA, it would require different treatment for the *same goods*, which would run counter to the CET.

common policy, members can take on different responsibilities and priorities. However, while there is little here to suggest that further obligations exist beyond Article 12 except for the need to coordinate, Article 37(2) also does not provide any means to *override* Article 12. Turning instead to paragraph 1, Kenya could argue that concluding the EPA is necessary in order for Kenya to honour its commitments under the WTO. However, Kenya is not *required* to enter into an EPA under the WTO, although it might suffer economic loss otherwise.

This argument brings the analysis back to Article 12. Paragraph 3 reads:

> "3. The Council may review the common external tariff structure and approve measures designed to remedy any adverse effects which any of the Partner States may experience by reason of the implementation of this part of the Protocol or, in exceptional circumstances, to safeguard Community interests."

The loss of DFQF treatment for Kenya's exports to the EU would seem to fall within the scope of "adverse effects", which – unless the members can agree on joint EPA ratification – would be suffered by Kenya "by reason of the implementation" of the CET. Furthermore, the EPA negotiations and the different needs and positions taken by EAC members can also be seen to amount to "exceptional circumstances" requiring alteration of the CET "to safeguard Community interests". Continued differences between members as to the EAC-EU EPA may indeed threaten the viability of the EAC itself.

<u>Review or amendment</u>

The review in Article 12(3) has to be undertaken by the EAC Council, which decides by consensus.[86] However, in an advisory opinion in 2010, the East African Court of Justice (EACJ) held that "consensus does not mean

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[86] Article 15(4) of the EAC Treaty.

unanimity", which had been the supposition in practice.[87] However, finding no definition in the treaties whatsoever, the EACJ refused to define the term based on "guesswork".[88] Thus, beyond holding that consensus did *not* mean unanimity, the EACJ not suggest a definition if its own, but declared that the definition would have to be established through "amending the relevant instruments."[89] Nevertheless, Article 15(3) of the Treaty allows any state delegation to lodge an objection to a proposal submitted for a Council decision, and, unless withdrawn, the matter must be referred to the EAC Summit for decision. Therefore, in practice this amounts to an unanimity requirement, but since the EAC Summit decides by consensus,[90] the meaning of consensus would once again be an issue.[91]

Absent proper guidance from the EACJ, it can probably be assumed that the enduring practice of treating consensus as unanimity would allow any member to block a review of the CET pursuant to Article 12(3); certainly at the Council level, but also at the Summit level. Any EAC member could therefore, by using its veto, force the others to choose between ratifying the EPA or remaining a part of the EAC.

However, as long as unanimous agreement is reached on how to proceed among EAC governments, some EAC members could go ahead with the EPA while others decide not to. In its Advisory Opinion, the EACJ recognized that the principle of "variable geometry" allow members to proceed at different speeds at the implementation stage.[92] This is consonant with the "principle of asymmetry" which applies to the EAC Treaty by virtue of Article 75, and is imported into the CU Protocol through Article 5.

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[87] East African Court of Justice, Application No. 1 Of 2008, *In The Matter Of A Request By The Council Of Ministers Of The East African Community For An Advisory Opinion*, 2010, pp. 36-7.
[88] *Id.* p.37.
[89] *Id.*
[90] Article 12(3) of the EAC Treaty.
[91] Indeed, the Court rejected the argument that the procedure in Article 15(3) informed the meaning of "consensus" in Article 15(4) for that very reason (East African Court of Justice, Application No. 1 Of 2008, *In The Matter Of A Request By The Council Of Ministers Of The East African Community For An Advisory Opinion*, 2010, p. 38).
[92] *Id.* p. 34.

Of course, as an alternative to review, the same effect could also be achieved through amendment of the CU Protocol. Article 42.1 of the Protocol allows for amendment by the procedure laid down in Article 150 of the EAC Treaty, requiring "agreement of all the Partner States". This provision expresses a clear unanimity requirement, and hence the principal difference between review in Article 12(3) of the CU Protocol and amendment is that the former uses the more unclear concept of "consensus", although, as argued, in practice they are likely to have the same meaning.

Conclusion: three alternatives

EAC members are thus faced with three alternatives:

i. Block a decision in the Council or Summit to review the CET under Article 12.3 of the CU Protocol, or amend the Protocol pursuant to Article 42. This would force EAC members to choose between remaining in the EAC or becoming members to the EPA.

ii. Agree on a decision to amend or review the CET, allowing some members to implement the EPA while others do not.

iii. Agree to ratify or renegotiate the EPA, allowing all members to implement the EPA while remaining members of the EAC.

Alternative (iii) will be further explored in Part 3 of this memorandum under the heading of Option B. As will be explained, this will still allow for differentiation in implementation and in commitments among the members.

Alternatives (i) and (ii) raise important policy consideration which are considered in the next section.

2.3.2 Considerations Affecting Future EAC Integration

Alternatives (i) and (ii) would both risk undermining the EAC CET and the EAC as whole. They thus raise important policy questions meriting detailed consideration and scrutiny. Within the scope of the present report, this section

cannot hope to undertake a full analysis, but will seek to lay out some of the important considerations requiring further analysis. Furthermore, each ELDC must apply this analysis in relation to their own particular circumstances. Three main areas of concern will be highlighted for ELDCs to consider: the benefits of the EAC, the benefits of the EPA, and the costs of the EPA for ELDCs.

Benefits of regional integration

The EAC has brought considerable economic growth and wealth to its members since its reconstitution in 2000. Furthermore, it has been a model for other regional associations, achieving greater levels of integration and cooperation than many of its African peers.[93] This has contributed to both economic and political stability. For example, in the first four years after the Customs Union was established in 2005, intra-regional trade grew by an impressive 40%.[94]

Furthermore, despite years of DFQF access for African countries to the European market, their import shares have not grown, which may suggest that industries have not increased their competitiveness over time – at least not relative to other parts of the world. By boosting inter-regional trade instead, African countries can create a virtuous circle of development and increased trade among themselves, as this will spur their economies, in turn leading to even greater trade.

The Benefits of the EPA

As mentioned, market shares of ELDCs exports into the EU has not grown. This may be because of insufficient pressure for industries to modernize and become more competitive since they are shielded by high tariffs. A growing

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[93] EAC, *East African Common Market Scorecard 2016: Tracking EAC Compliance in the Movement of Capital, Services and Goods*, March 2016, http://www.eac.int/sites/default/files/docs/ifc_report_2016_1st_march_web_0.pdf, p. 2.
[94] EAC, *4TH EAC Development Strategy (2011/12 -2015/16) : Deepening and Accelerating Integration*, August 2011, http://www.eac.int/sites/default/files/docs/strategy_eac_development-v4_2011-2016.pdf, p. 9.

body of literature has come to criticize special and differential treatment for developing countries as inefficient on this basis.[95] As Page and Kleen point out, it is important to assess whether the maintenance of high tariffs in effect spur domestic industry, or whether it merely increases economic rents, i.e. the price producers can charge.[96] If the latter is the case, then industries, such as agriculture, will not modernize production and continue to produce lower yields while charging consumers higher prices. This means that the long-term growth of the country is undermined, as it is consigned to the status quo.

Whether this is the case must be determined on a case by case basis looking at each individual country and the conditions affecting each industry. A recent report from the EU Directorate-General for Trade seeks to assess the economic impact of trade liberalisation on EAC economies. Looking solely at the effect of tariff-liberalisation, which is the most readily quantifiable, the report concludes that the EU-EAC EPA will have a positive overall average impact on EAC GDP by 0.3% in 2042.[97] Total exports will increase by 1.1% and imports by 0.9%.[98] Tariff liberalisation will also benefit consumers by reducing the price of imports.

Moreover, taking into account the less certain metrics of non-tariff barriers, such as more favourable rules of origin, trade facilitation and development cooperation, average GDP growth is expected to rise 0.6% overall, with

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[95] For a good overview of the literature, see B. Hoekman and C. Özden (eds.), *Trade Preferences and Differential Treatment of Developing Countries*, 2005, http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3566; especially their introductory chapter. In response to the question whether "preferences are good for development", the authors summarize by stating that "the jury is still out, in that there is no consensus in the literature" but that ", the majority view seems to be that they are at best a marginal benefit." (*id.* p. 29). In another paper, reviewing 154 countries over 24 years, Özden and Reinhardt conclude that the benefit is in fact negative, see "The perversity of preferences: GSP and developing country trade policies, 1976–2000*", Journal of Development Economics,* vol. 78:1 2005, pp. 1-24.

[96] Peter Kleen and Sheila Page, *Special and Differential Treatment of Developing Countries in the World Trade Organization*, Overseas Development Institute, 2005, https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3320.pdf, pp. 25-7.

[97] EU Commission Directorate for Trade, *The Economic Impact Of The Economic Partnership Agreement Between The EU And The East African Community*, March 2017, http://www.trade.ec.europa.eu/doclib/html/155363.htm, p. 4.

[98] *Id.*

+0.3% in Rwanda and up to +0.7% in Tanzania and Uganda.[99]

Furthermore, as already noted, in accordance with Article 75.3 of the EU-EAC EPA, the EU undertakes to provide both financial and non-financial aid in accordance with the provisions of Annex III (a) and (b) to the EPA.

In addition, the EPAs will ensure the WTO-consistency of current DFQF treatment of Kenya, and will also contribute to predictability and legal certainty. Some ELDCs have stated policies that they are seeking to graduate from LDC status in the 2020s, at which point DFQF under the EBA scheme with the EU would be withdrawn. Hence an argument could be made that ELDCs should conclude the EPA at this point when their leverage may be greater rather than at a point when they may stand to lose DFQF status.

Finally, consumers of course benefits from lower tariffs on imports, as does producers for imported inputs and machinery.

In conclusion, it is important to recognize that even though the removal of tariffs does forego state revenue, it has substantial benefits for not only consumers but the long-term health of the economy.

Disadvantages of the EU-EAC EPA

As will be highlighted in Part 3 below, the EPAs go further than what WTO consistency likely requires. Furthermore, since ELDCs currently already benefit from DFQF, access gains would be minimal. The above quoted figures from the Directorate for Trade, extending over a 15-year period, are not very high – even if gains from the more uncertain non-tariff barriers are considered. In particular, the abovementioned report finds that in terms of revenue, only Kenya is able to offset the losses from excise taxes and duties, with gains from increased taxes and VAT consumption linked to increases in GDP, but only by 0.2%.[100] For other EAC members, revenues decrease by up to

[99] *Id.* p. 5.
[100] *Id.* pp. 4-5.

1.09%.[101]

This echoes concerns brought forward by former Tanzanian President Benjamin William Mkapa. He estimates that overall tariff revenue losses for the EAC will amount to US$251 million a year by the end of the EPA's implementation period, with cumulative losses of US$2.9 billion in its first 25 years.[102] Mkapa also points out that the EU has only pledged US$3.49 million in financial aid so far.[103]

As already highlighted, African civil society organizations have also put forward concerns about the impact on EAC industrialization and agricultural development.[104] In the latter case, the EU has under Article 68(2) of the EU-EAC EPA undertaken not to grant export subsidies to agricultural products exported to EAC Partner States, as from the entry into force of the EPA. However, this prohibition will be reviewed by the EPA Council after 48 months, and subsidies could thus be re-implemented.

As explained, increased openness will bring beneficial competitive pressure, but the existing asymmetries in subsidies, technology, and development between the EU and EAC means that greater openness may have an outsize effect on domestic producers. Safeguards and infant industry protection can be used to shield the domestic market, and will be considered in the next part, but it must be emphasised that north-south FTAs carry different risks than FTAs between equal trading partners.

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[101] *Id.*

[102] Benjamin William Mkapa. *The Economic Partnership Agreement has Never Made Much Sense for Tanzania*, IPS News, July 2016, http://www.ipsnews.net/2016/08/the-economic-partnership-agreement-has-never-made-much-sense-for-tanzania/

[103] *Id.* Mkapa also cites the total amount of the development matrix funds promised to amount to US$70 billion. However, this figure is hard to verify. According to the EU, development aid to all ACP countries in the period 2014-2020 only amounted to €29.1 billion (http://eeas.europa.eu/archives/delegations/kenya/documents/press_corner/trade_between_the_eu_and_kenya_2105.pdf , p. 17). US $70 billion thus appears extraordinarily large.

[104] See e.g. *Civil society views on the EAC-EU Economic Partnership Agreement (EPA),* TRALAC, August 5,2016, https://www.tralac.org/news/article/10233-civil-society-views-on-the-eac-eu-economic-partnership-agreement-epa.html; Kenya Human Rights Commission, *The ABC Of EAC-EU Economic Partnership Agreements (EPA)*, December 1, 2014, http://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/59-the-abc-of-eac-eu-economic-partnership-agreements-epa/file.html; Prof Lucas N Saronga, *Exploring pros and cons of EAC-EU Economic Partnership Agreement*, March 8, 2017, http://dailynews.co.tz/index.php/analysis/49011-exploring-pros-and-cons-of-eac-eu-economic-partnership-agreement

Implications for further EAC integration

Given the success of the EAC and the clear benefits it has brought to its Partner States, the growing tensions created by the EPA negotiations are unfortunate. The foregoing legal analysis suggests that even if the current EU-EAC EPA is narrowed to come into force with only one a few EAC members as parties, any of the other EAC members could block its implementation by virtue of the EAC CET. However, forcing a member to leave the EAC or to abandon the EPA could severely undermine the prospects for further regional integration. Political tensions would rise, undermining the cohesiveness of the Regional Economic Community, and may spill over into other areas of cooperation.

Yet many of the same concerns would remain even if the parties agreed that some members would be able to proceed, while others choose not to. Undermining the CET and regional integration to such a severe extent as the EPA would necessitate, would bode ill for future cooperation and set a negative precedent. It would also weaken the EAC's bargaining power, and future trading partners might seek similarly differentiated agreements.

2.4 Conclusion: Withdrawing from the EPA Negotiations

None of the EAC members face any impediments under international law to withdrawing from the EU-EAC EPA negotiations, since the agreement has not yet come into force under its Article 139(2). Furthermore, Brexit provides sound legal and economic justifications for why the EAC members would be entitled to either withdraw from or reconsider the EPA even if it had come into force. Based on an analysis of EAC obligations, in particular Articles 12 and 37 of the EAC Customs Union Protocol relating to the CET, the following three alternatives are open to EAC members in light of Brexit, and the concerns expressed by ELDCs regarding the severe economic impact of the EPA as it currently stands:

i. Block a decision in the EAC Council or Summit to review the CET under Article 12.3 of the CU Protocol, or to amend the Protocol pursuant to Article 42, and thereby force members to choose between remaining within the EAC or becoming parties to the EPA.
ii. Agree on a decision to amend or review the CET, allowing some EAC Partner States to implement the EPA while others do not.
iii. Agree to ratify or renegotiate the EPA, allowing all EAC Partner States to implement the EPA while remaining members of the EAC.

Alternative (iii) will be considered in Part 3, and is titled Option B. Given the damage either alternative (i) or (ii) would potentially inflict upon long-term integration and cooperation efforts within the EAC, alternative (iii) would be preferable, followed by alternative (ii).

3 Option B: Renegotiating the EU-EAC EPA

This part will suggest ways that the concerns identified by ELDCs and outlined in Part 1 can be addressed through a renegotiation of the EPA. The report does not seek to offer a detailed recommendations of what level of concessions or specific tariff lines ELDCs should be seeking to liberalise or not. Instead, since the EU has frequently invoked WTO-compatibility as an obstacle to greater concessions and as one of the purposes for pursuing the EPA negotiations, this part focusses on which concessions can be legally granted within the WTO framework. It concludes that greater flexibility is indeed possible in relation to most of the concerns identified by the ELDCs, such as the extent of liberalisation, its pace of implementation and export duties. However, first some legal arguments as to why renegotiation is justified are proposed, in addition to those already given under Part 2.

3.1 Additional Legal Justification for Renegotiation the EPA

3.1.1 EPA Review Due to Change in Membership

The legal and economic arguments in favour of withdrawal from the EPA negotiations, enumerated in section 2.2 above, also apply to justify renegotiation. In addition, as explained below, renegotiation is further justified by the accession of South Sudan and the departure of the UK as parties to the EPA, under Articles 142, 144 and 145.

<u>Accession of South Sudan to the EAC in 2016</u>

The Treaty of Accession of the Republic of South Sudan into the East African Community was signed on Friday 15th April 2016 in Dar es Salaam, Tanzania.[105] Thereafter, South Sudan deposited its instrument of ratification to the Secretary General of the East African Community on September 5,

[105] East African Community, *Signing Ceremony of the Treaty of Accession of the Republic of South Sudan in to the East African Community*, September 5, 2016, http://www.eac.int/news-and-media/press-releases/20160905/republic-south-sudan-deposits-instruments-ratification-accession-treaty-establishment-east-african

2016 in Arusha.[106] The process of integration of South Sudan into the EAC is still underway. As part of the EAC, South Sudan will also be a part of the EPA if the agreement is concluded, as all countries within a Customs Union must have identical external tariffs. Article 144 of the EU-EAC EPA provides that any new Partner State of the EAC shall accede to the agreement from the date of its accession to the EAC by means of a clause to that effect in the country's EAC act of accession. Since the EU-EAC EPA negotiations were completed in 2014 when South Sudan was not an EAC Member, South Sudan did not participate in the negotiation process. As a consequence, the South Sudanese government has not had any significant exposure to EPA-related issues, in contrast to other EAC governments.[107]

Article 144(2) of the EU-EAC EPA provides that "[t]he Parties shall review the effects of the accession of new EAC Partner States on this Agreement. The EPA Council may decide on any transitional or amending measures that might be necessary."

Moreover, Article 142(2) states that, "As regards the implementation of this Agreement, a Party may make suggestions oriented towards adjusting trade related cooperation, taking into account the experience acquired during the implementation of this Agreement."

Thus, the accession of South Sudan to the EAC can be advanced as one of the reasons to reassess the EU-EAC EPA and make necessary adjustments, and the argument can be strengthened by citing Article 144(2) read with Article 142(2) of the EU-EAC EPA.

The UK's Exit from the EU

Article 145(2) of the EU-EAC EPA provides: "[t]he Parties shall review the

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[106] East African Community, *Republic of South Sudan deposits Instruments of Ratification on the accession of the Treaty for the establishment of the East African Community to the Secretary General*, September 5, 2016, http://www.eac.int/news-and-media/press-releases/20160905/republic-south-sudan-deposits-instruments-ratification-accession-treaty-establishment-east-african

[107] Aggrey Tisa Sabuni, *Opinion: Reforms, reforms, reforms: the most important benefit of RSS membership in EAC*, Sudan News Gazette, April 23, 2016, http://sudannewsgazette.com/opinion-reforms-reforms-reforms-the-most-important-benefit-of-rss-membership-in-eac/

effects of the accession of new EU Member States on this Agreement. The EPA Council may decide on any transitional or amending measures that might be necessary."

The rationale behind Article 145(2), just as under Article 144 above, is that the addition of a new member to the European Union or the EAC will upset the balance of negotiated commitments, and that the agreement will no longer reflect the bargain that was entered into. Hence the treaty must be reviewed. The same logic can be extended to the situation in which a member leaves the European Union. The EAC can, therefore, make an additional argument that a good faith interpretation of Article 145(2) of the EPA requires a review of the EPA in light of the UK's exit from the EU.

3.1.2 EPA Review because of the Expiry of the Cotonou Agreement

Article 142(3) of the EU-EAC EPA allows the EPA to be reviewed in light of the expiration of the Cotonou Agreement. The Cotonou Agreement is set to expire in 2020. Considering that the expiry of the Cotonou arrangement is only three years removed, the EAC might persuade the EU to review the EPA immediately. Moreover, South Sudan is not a party to the Cotonou Agreement and, therefore, a review of the EPA at this date would be more effective to account for South Sudan's concerns instead of waiting until 2020.

3.2 How can the EPA be Renegotiated?

3.2.1 Introduction

As mentioned in Part 1, the Cotonou Agreement between the EU and ACP countries, originally signed in 2000 and revised in 2005 and 2010, states in Article 37 that the EU will establish trade agreements with the signatories consistent with the rules of the WTO. Under the previous 1975 Lomé Convention, which provided preferential treatment to Europe's former colonial

states, these arrangements were successfully challenged by other WTO members as discriminatory under the GATT, in a long series of cases referred to as the *EC-Bananas* disputes. In conjunction with the Cotonou Agreement, the EU obtained a waiver in the WTO to continue to offer preferential treatment until the end of 2007, so as to allow time for negotiation of the new EPA regime with ACP countries. Despite the lapse of the waiver, only the CARIFORUM-EU EPA (CEPA) met this deadline and was signed in 2008, whereas EPA negotiations with several African regions, including the EAC, continue. Current preferential arrangements are being maintained on an interim basis, further explained below.

WTO consistency in the EU's arrangements with the ACP countries is thus a core objective of the EPA regime, as well as an overriding requirement arising from the parties' membership in the WTO. This section will look at what WTO consistency means in practice and explore the controversies around its interpretation, as well as the definitions favoured by the EU. The objective is to provide WTO-consistent means through which the concerns raised by ELDCs and identified in Parts 1 and 2 above can best be addressed.

Note that this section does not seek to exhaustively elucidate all areas where ELDCs may seek renegotiation of the EU-EAC EPA. Several of these have already been examined in Part 1, and this section focuses specifically on areas where the EU may argue that greater flexibility may be incompatible with WTO rules. It concludes that greater flexibility is indeed allowed under all areas examined. Before a detailed examination of each area, the report offers a general introduction to how FTAs are considered under the GATT.

3.2.2 FTA Requirements under the GATT

Under the GATT, there are two ways in which a reciprocal trade arrangement can obtain an exception from the general MFN requirement and consequently allow parties to reduce tariffs and other restrictions on trade between themselves. Such arrangements can be notified either under the Enabling Clause, paragraph 2(c), or under Article XXIV of the GATT. Both provisions

require that such an arrangement does not raise external barriers to trade.[108] However, the Enabling Clause is only available for south-south arrangements between developing countries (such as the EAC),[109] and, therefore, in order to comply with WTO obligations, any other free trade agreement must be notified pursuant to Article XXIV.

Article XXIV imposes additional requirements that the Enabling Clause does not contain for south-south agreements, mandating that parties to a free trade area or a customs union undertake to liberalise "substantially all trade" (SAT) between them.[110] Additionally, there is a generally adopted but less stringent requirement that the timeline for liberalisation exceed ten years "only in exceptional cases."[111]

How these requirements should be interpreted has been contentious and never properly clarified within the WTO. In 2007, then European Trade Commissioner Peter Mandelson stated that SAT "is generally taken to mean 90% of all trade liberalised over 10 years".[112] As will be discussed below, other countries have supported a 90% measurement as well. Under the EPAs, while the EU would liberalise 100% of trade, ACP countries would liberalise on average 80% of trade over 15 years.[113]

This interpretation has been incorporated into the only full EPA concluded so far between the EU and the CARIFORUM states, which was notified to the WTO under Article XXIV.[114] The CARIFORUM-EU EPA (CEPA) covers 92% of total bilateral trade.[115] For CARIFORUM, this amounts to liberalisation of 82.7% of imports within fifteen years and 86.9% within twenty-five years. CARIFORUM LDCs, such as Belize, Saint Vincent and Grenadines or

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[108] Paragraph 3 of the Enabling Clause; Article XXIV:5 of the GATT.
[109] Paras 1 and 2(c) of the Enabling Clause. The EAC's notification under the Enabling Clause can be viewed at: http://rtais.wto.org/UI/PublicShowRTAIDCard.aspx?rtaid=94
[110] GATT Article XXIV:8(a) and (b).
[111] Paragraph 3 of the *Understanding on the Interpretation of Article XXIV* 1994.
[112] *Statement by Commissioner Peter Mandelson following the General Affairs and External Relations Council (GAERC)*, Brussels, 10 December 2007.
[113] *Id.*
[114] WTO, *List of All RTAs Currently in Force*: http://rtais.wto.org/UI/PublicAllRTAList.aspx
[115] A.P. Gonzales, "EPA WTO Compatibility: A View from a WTO Perspective" in *The CARIFORUM-EU Economic Partnership Agreement: A Practitioners' Analysis*, A.B. Zampetti (ed.), 2010, 217-238, 224

Suriname, take on lesser commitments (61%, 63% and 72% liberalisation respectively), but this is compensated by greater commitments by the Dominican Republic (95%), Trinidad and Tobago (94%), Bahamas (87%) and Jamaica (87%). Their larger economies and greater trade flows can sufficiently offset the reduced commitment by their smaller and less developed peers. Differentiation is also found in the Eastern and Southern Africa EPA (ESA-EU EPA), although all six states liberalise over 80% of trade, with the Seychelles and Mauritius both liberalizing over 90%.[116] They have, however, sought more lenient terms (70% over 25 years) for their LDC members.[117]

In total, the EU-EAC EPA liberalises 82.6 % of the EAC's trade with the EU, based on total trade volume in 2004-6.[118] Beyond the imports already offered duty-free treatment to EAC trading partners worldwide, the EPA commitments will be phased in in accordance with the following timetable:[119]

Years after EPA enters into force	**Amount of total trade value offered duty-free**
Currently offered to all trading partners	64.4 %
7th-15th year	15.3 %
12th-25th year	2.9 %
Total	**82.6 %**

The following sections analyse the legal requirements of Article XXIV and steps that the ELDCs may take consistent within the rules of the WTO to lessen any adverse impact the EPA may entail. The following sections will discuss each of the above identified requirements of Article XXIV: SAT, time-

[116] S. Bilal and I. Ramdoo, *Which way forward in EPA negotiations? Seeking political leadership to address bottlenecks,* ECDPM, November 2010, www.ecdpm.org/dp100, 15.
[117] *Id.*
[118] EU Commission Directorate for Trade, *The Economic Impact Of The Economic Partnership Agreement Between The EU And The East African Community*, March 2017, http://www.trade.ec.europa.eu/doclib/html/155363.htm, p. 12.
[119] *Id.*

limits, and to what extent safeguards, export taxes and differential treatment is permitted.

3.2.3 Meaning of "Substantially All Trade" (SAT)

Background

As mentioned, the meaning of SAT under Article XXIV has never been clearly defined. Although WTO parties sought to clarify the ambit of Article XXIV in the 1994 *Understanding of the Interpretation of Article XXIV*, included in the Uruguay Round, the only reference to Article XXIV:8 or SAT is found in one of the preambles: "[r]ecognizing [that the contribution of free trade areas to world trade] is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded". This expresses a preference for a "qualitative approach" of calculating SAT, in contrast to a "quantitative approach" which only takes into account total trade volume.[120]

However, this does not amount to a strict rule, and the quantitative approach is the EU's preferred way of calculating SAT,[121] as seen through its insistence that EPAs liberalise 90% of total trade volumes. Since this allows for complete exclusion of 17.4% of EAC imports from the EU, ELDCs can shield sensitive industries. As discussed below, those industries are also exempt from the standstill clause.[122] However, their exemption also means that ELDCs must decide immediately which industries to protect, and if their developmental or industrial needs shift in the future, all other markets are locked into much lower rates. This may become inefficient in the future and preclude developing countries from developing new industries in other sectors, diversify and build competitive advantages in new sectors, in particular in response or

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[120] See J.H. Mathis, *Regional Trade Agreements in the WTO: Article XXIV and the Internal Trade Requirement* (2002), pp. 234-5, and discussion in the next section under WTO Panels and Appellate Body.
[121] A.P. Gonzales, "EPA WTO Compatibility: A View from a WTO Perspective" in *The CARIFORUM-EU Economic Partnership Agreement: A Practitioners' Analysis*, A.B. Zampetti (ed.), 2010, 217-238, 224. This would seem to be the general approach. See further discussion in Section 3.2.3: WTO Panels and Appellate Body below.
[122] See section 3.2.7 below.

anticipation of shifting global demand and innovation. However, many African LDCs have shown a preference for exempting certain sensitive industries completely, and for this to be possible the quantitative approach suggested by the EU is a necessity. The EU approach has therefore had support from African LDCs, but countries should keep in mind the consequences the lack of flexibility for their long-term growth strategy that this entails.

The following sections will look at how the SAT requirement has been approached both by the WTO's own bodies and by the EU-EAC EPA parties themselves. Firstly, the legal basis will be considered from the perspective of the treaty text and its interpretation by WTO panels and the Appellate Body, as well as from the perspective of WTO members in their arguments before these bodies. Secondly, and importantly, the probability of a challenge actually being brought to the dispute resolution body will also be considered. Both can be persuasive in making the EU agree to changes to the EPA.

WTO Panels and Appellate Body

Turkey-Textiles is the only dispute thus far where the WTO panels or the Appellate Body have sought to elucidate the meaning of SAT in Article XXIV:8:

> "Neither the GATT CONTRACTING PARTIES nor the WTO Members have ever reached an agreement on the interpretation of the term "substantially" in this provision. It is clear, though, that 'substantially all the trade' is not the same as all the trade, and also that 'substantially all the trade' is something considerably more than merely some of the trade. We note also that the terms of sub-paragraph 8(a)(i) provide that members of a customs union may maintain, where necessary, in their internal trade, certain restrictive regulations of commerce that are otherwise permitted under Articles XI through XV and under Article XX of the GATT 1994. Thus, we agree with the Panel that the terms of sub-paragraph 8(a)(i) offer 'some flexibility' to the constituent members of a customs union when liberalizing their internal trade in accordance

with this sub-paragraph. Yet we caution that the degree of 'flexibility' that sub-paragraph 8(a)(i) allows is limited by the requirement that 'duties and other restrictive regulations of commerce' be 'eliminated with respect to substantially all' internal trade.'"[123]

The Appellate Body also agreed with the panel that SAT "would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasised in relation to duties."[124] This confirms that both the quantitative and qualitative approaches should be considered, but it also signals that in relation to tariff liberalisation, a quantitative approach – as taken in the EPA – is permissible.

Considerations by the Contracting Parties under XXIV:7(b)

Under Article XXIV:7(a) a WTO member "deciding to enter into" an FTA is obliged to notify it to the WTO. Under paragraph 7(b), the WTO members shall then issue recommendations, which the parties to the FTA are obliged to implement. However, a failure to implement recommendations has never been challenged in the WTO, and it is not even clear whether such a failure could be challenged before a WTO panel.[125]

Moreover, the 1993 Czech-Slovak Customs Union is the only trade arrangement to have been explicitly approved as WTO-compatible pursuant to the Article XXIV:7(b) procedure.[126] Standard practice is otherwise for the parties considering an FTA or customs union to reserve their opinion as to its compatibility in order to not prescribe their rights to challenge it in the future.[127] Hence, while some would argue that the absence of a negative

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[123] *Turkey – Textiles,* Appellate Body Report, para 48
[124] *Turkey – Textiles,* Appellate Body Report, para 49
[125] The panel had held that it was "arguable" that it did not have jurisdiction to consider such matters. However, the Appellate Body, without having to decide the question, expressed clear doubts as to whether the panel was correct (*Turkey – Textiles,* Appellate Body Report, para 60).
[126] A.P. Gonzales, "EPA WTO Compatibility: A View from a WTO Perspective" in *The CARIFORUM-EU Economic Partnership Agreement: A Practitioners' Analysis*, A.B. Zampetti (ed.), 217-238, 2010, 221. See Working Party on the Customs Union Between the Czech Republic and the Slovak Republic, *Report*, GATT Doc. L/7501 (1994), para 17.
[127] The Chairperson of the Committee on Regional Trade Arrangements' 2001 report noted this reason (WT/GC/W/43).

opinion implies that an agreement's is compatible, there is probably little of legal value which can be gleaned from the Article XXIV:7(b) consideration procedures and reports.

Debates Among WTO Members

The lack of conclusive consideration, scarcity of caselaw, and the open-ended interpretation offered by *Turkey-Textiles* have thus done little to settle the precise definition of SAT. In one of the earliest attempts to define the term within a WTO working group, the parties to the 1957 Treaty of Rome – the EU's foundational treaty – suggested that 80% liberalisation would be sufficient.[128] However, this approach was rejected by the Working Group considering the matter.[129] In examining the European Free Trade Area the following year, parties seemed to be considering 90% as a more appropriate benchmark, but they were clear that they also considered a qualitative or sectoral aspect to be involved.[130]

Given continued uncertainties, the question of SAT was put on the official agenda during the latest round of multilateral negotiations. Yet progress remains elusive. In 2005, Australia suggested a purely quantitative approach requiring 95% of all trade to be liberalised,[131] but its proposal was met with criticism.[132] Prior to that, the ACP countries – in reaction to the EU's launch of EPA negotiations under the Cotonou Agreement in 2001 – submitted a proposal to the WTO suggesting that SDT be introduced for north-south FTAs under Article XXIV.[133] The EU in part lent its support to this proposal in a

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[128] *Report Submitted by The Committee on Treaty of Rome to the Contracting Parties on 29 November 1957*, Annex IV Q 34, L/778 (29 November, 1957)
[129] *Id.*
[130] *European Free Trade Association: Examination of Stockholm Convention*, GATT B.I.S.D. (9th Supp.) (June 4 1960), para. 70. *See* Hafez, Zakir, "Weak discipline: GATT Article XXIV and The Emerging WTO Jurisprudence on RTAs", *North Dakota Law Review*, vol. 79:4 (2004), pp. 879-920.
[131] *See e.g.* Japan, *Submission on Regional Trade Agreements,* TN/RL/W/190, 28 October 2005.
[132] Australia, *Submission on Regional Trade Agreements,* TN/RL/W/15, 9 July 2002.
[133] ACP, *Developmental Aspects of Regional Trade Agreements and Special And Differential Treatment In WTO Rules: GATT 1994 Article Xxiv And The Enabling Clause*, TN/RL/W/155, 28 April 2004.

subsequent submission.[134] However, Anthony Gonzales reports that none of these proposals received enough backing to be "even seriously considered."[135] The author notes that the proposals "were advanced in a context where, while there was some search for flexibility, there were even stronger efforts by the broader membership to tighten [regional trade agreement (RTA)] disciplines which many felt were running counter to multilateralism and have been too lax."[136]

The failure of the ACP's submission in the WTO would seem to strengthen the EU's interpretation. However, Lui and Bilal point out that no FTA has ever been challenged in the WTO, and *Turkey-Textiles* is the only instance in which a customs union has been challenged.[137] Yet this was in the context of highly peculiar facts. It is therefore unlikely that a new case would be brought at this time. The authors also point out that a successful challenge would merely *increase* trade diversion and thereby the harmful effects of the FTA from the perspective of the challenger, and it could trigger a war of litigation among the 130 RTAs currently in force.[138] Furthermore, as will be shown in the next section, several current FTAs notified under Article XXIV liberalise to a lesser degree than 90%. In another paper, Bilal and Ramdoo further attest:

> "According to many WTO insiders, in the current context, any FTA that would cover 70-plus percent of trade over a 15-20 years period is most likely to pass this WTO test. Even more so if one the parties is an LDC or vulnerable economy, as in many ACP regions."[139]

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[134]See European Communities, *Coverage, Liberalisation Process and Transitional Provisions in Regional Trade* Agreements, TN/RL/W/179, 12 May 2005. This built on its earlier submission, TN/RL/W/14, 9 July 2002.
[135] A.P. Gonzales, "EPA WTO Compatibility: A View from a WTO Perspective" in *The CARIFORUM-EU Economic Partnership Agreement: A Practitioners' Analysis*, A.B. Zampetti (ed.), 2010, 217-238, 220.
[136] *Id.*
[137] D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, note 27 at p. 10.
[138] WTO, *List of All RTAs Currently in Force*: http://rtais.wto.org/UI/PublicAllRTAList.aspx
[139] S. Bilal and I. Ramdoo, *Which way forward in EPA negotiations? Seeking political leadership to address bottlenecks,* ECDPM, November 2010, www.ecdpm.org/dp100, p. 16.

Practice Among WTO Members

Looking towards actual practice, Bilal and Ramdoo highlight several examples of Article XXIV FTAs where liberalisation is lower than 90% overall.[140] For example, an FTA between India and Singapore from 2005 saw total liberalisation by India reach 75.1%, while Singapore liberalised 100%. In a 1977 agreement between Papua New Guinea (PNG) and Australia which is still in force, the latter liberalised 99% while PNG made no commitments at all given the disparity in their respective levels of development. Notably, in an agreement that entered into force in 2000 between the EU and Mexico, the former liberalised 98.1% of its trade, but Mexico only liberalised 54.1% of trade.

Inter-EPA Differentiation

The text of Article XXIV:8(b) does not require that liberalisation by both parties is identical,[141] and, as noted, the CEPA as well as EU-ESA EPA has taken a highly differentiated approach to liberalisation among its constituent members.[142] Similarly, it would be possible for some EAC countries to take on greater commitments to allow others to lower their commitments. As the sole developing country with the most to lose if the EPA does not enter into force, Kenya may be persuaded to shoulder a greater share of the burden. The ELDCs could also reallocate burdens among themselves. Success will ultimately depend on political considerations and possible inter-EAC rivalry, but the EAC members could convene talks among themselves to agree on a differentiated position. Differentiation in liberalisation commitments for LDCs is further discussed in section 3.2.8 below.

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[140] *Id.* 16-7. The authors rely on D. Lagande, J.P Rolland, A. Alpha, *Etude comparative des accords de libre échange impliquant des PED ou des PMA*, GRET, October 2009, http://www.gret.org/publication/etude-comparative-des-accords-de-libre-echange-impliquant-les-ped-ou-des-pma-rapport-final/

[141] See J.H. Mathis, *Regional Trade Agreements in the WTO: Article XXIV and the Internal Trade Requirement* (2002), pp. 87-100.

[142] See section 3.2.3: Background above.

Development Flexibility

Finally, an aspect that should also be considered when debating to what extent import liberalisation should be allowed, is the degree to which a complete exclusion of certain industries, and full inclusion of others, locks ELDCs into a rigid and inflexible development plan. Should ELDCs wish to change their industrial policy in the future in response to global demand and market developments, it will be difficult to develop new industries in those areas where full liberalisation is undertaken. ELDCs may thus want to consider whether they may want to undertake some liberalisation in areas where they have industry, and maintain some tariffs in areas where they have industry, to give them a greater ability to develop infant industries in those sectors, should the opportunity arise.

Conclusion SAT

If the EU's interpretation of SAT is accepted, with European liberalisation of 100%, total EAC liberalisation of at least 80% would be required to give a total weighted average of 90% or more. This would mean that the scope for further reductions in the EAC's commitments within the EPA would be minimal, given their current level of 82.6%.

However, three strong arguments speak in favour of a less stringent requirement:

1. Simply put, there is **no agreement or consensus on the meaning of SAT**. Agreement has not materialized despite ongoing debates among WTO members. The closest legal definition available is that offered by the Appellate Body in *Turkey-Textiles*: "considerably more than merely some of the trade" but less than "all the trade". To assert a definitive and inflexible requirement of 90% therefore lacks solid legal justification.

2. **Current and past FTAs,** including the one between the EU and Mexico, **do not reach 90% liberalisation.** These have so far not been

challenged.

3. It is equally **unlikely that the EPAs, should they fail to liberalise 90% of trade, would be challenged** in dispute settlement, although they would do well to attain around 80% of overall liberalisation. In addition, a successful challenge would be expected to increase trade diversion for the challenger because it would lead to higher integration among the FTA partners. Therefore, unless the challenger were able to retaliate with high duties of their own in a substantial manner, a successful dispute would in fact damage the challenger's own trade interests. Lastly, given that five EAC members are LDCs, the likelihood of a challenge is low.

The above arguments would suggest that liberalisation of above 70% of EAC imports from the EU should be sufficient. But ELDCs should also consider the abovementioned inflexibility which would be the consequence of fully excluding certain sectors, and fully liberalising others. Furthermore, there are also potent arguments as to why the EU might resist any reconsideration of the SAT requirement and current level of 82.6%:

I. **From the outset of the EPA process, the EU has argued that the WTO rules require 90% overall liberalisation.** Furthermore, it has already ratified and put into force both full and interim EPAs on this basis, and the EU continue to negotiate with several partners on the premise that 90% is a WTO requirement. Ceding ground in the EU-EAC EPA negotiations would open the EU to potential renegotiations across all of its EPAs, including those which have already come into force.

II. **Other EPA parties may be opposed.** Although parties to other EPAs may support an effort to lower liberalisation commitments, those who are party to an EPA that has already been ratified and is in the implementation stage, such as the CARIFORUM countries, may be opposed to special treatment of the EAC. Since they are already

locked into commitments and an on-going relationship with the EU, they may see it as in their interest to support the EU and oppose EAC demands for more lenient treatment.

III. **Explicit proposals to introduce SDT into Article XXIV have been unsuccessful.** As noted, the ACP countries' proposal to the WTO to interpret Article XXIV to include special and differential treatment was met with resistance from other WTO members, even with EU support, and failed to generate substantive discussions.

ELDCs should emphasise the unique nature of the EAC and the fact that five out of six members are LDCs. Special treatment of LDCs is also further discussed in section 3.2.8 below. If the EU refuses to cede ground on liberalisation, it might cede ground in one of the other areas discussed below. As mentioned, liberalisation of the economies of ELDCs holds risk, but also potential benefits in greater competitiveness, productivity and gains for consumers, and phase-in periods or safeguards offer a more flexible approach than outright exclusion. It should also be emphasised that by choosing to completely exclude 18% or more of its industry from liberalisation, ELDCs lock themselves into

Furthermore, there may be some room for differentiation within the EAC with Kenya, as the sole developed country, or with the more able of the other LDCs taking on further commitments. As explored further below, if considered fruitful, the EAC should convene talks on this issue. However, in terms of seeking further concessions from the EU, the areas presented below are likely to be the most promising avenues within which progress can be achieved.

3.2.4 Phase-in Periods

<u>"Reasonable length of time"</u>

The 1994 *Understanding* clarified that the "reasonable length of time" during which an interim agreement leading to an FTA or customs union must be formed in accordance with GATT Article XXIV:5(c) and "should exceed 10

years only in exceptional cases."[143] However, the ten-year period is usually taken to apply to the general transition period of any FTA or customs union.[144]

A 2002 study by the WTO Secretariat found that "only in rare cases do transition periods exceed ten years."[145] However, in 2005, the EU asserted that "[i]n the recent surge of RTAs ... transition periods have been known to go well beyond ten years."[146] It also added that the EU was "open to consider separate and differentiated, i.e. lower, thresholds for developing countries and least developed countries", as well as departures "where necessary, from the general rule of ten years maximum."[147] In practice, this has been the case for several Article XXIV FTAs. In two recent agreements with New Zealand and Australia, Thailand is allowed to liberalise over 20 years.[148] Another FTA between Morocco and the US, which entered into force in 2006, provided for 24 and 18 years of transition respectively, and the US reserved for itself the same period in an agreement with Australia.[149] This is remarkable since the US is a developed country.

"Exceptional Cases"

The term "exceptional cases" has been discussed but never clearly defined. It can readily be argued that a north-south FTA involving several LDCs would in itself qualify as exceptional. In addition, as rgued Brexit introduces unprecedented uncertainty as to future trading arrangements and the configuration of the single market, and would thus also qualify as exceptional.

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[143] Paragraph 3 of the *Understanding on the Interpretation of Article XXIV* 1994.
[144] A.P. Gonzales, "EPA WTO Compatibility: A View from a WTO Perspective" in *The CARIFORUM-EU Economic Partnership Agreement: A Practitioners' Analysis*, A.B. Zampetti (ed.), 2010, pp. 217-238, p. 277.
[145] WTO Secretariat, *Coverage, Liberalisation Process And Transitional Provisions In Regional Trade Agreements,* WT/REG/W/46 (2002), para 56.
[146] European Communities, *Coverage, Liberalisation Process and Transitional Provisions in Regional Trade* Agreements, TN/RL/W/179 (2005), para 11. See also Bonapas Onguglo and Taisuke Ito, *How to Make EPAs WTO Compatible?*, ECDPM, July 2003, http://ecdpm.org/wp-content/uploads/2013/11/DP-40-Make-EPAs-WTO-Compatible-Reforming-Rules-Regional-Trade-Agreements1.pdf, p. 39 (noting several North-South FTA examples).
[147] European Communities, *Coverage, Liberalisation Process and Transitional Provisions in Regional Trade* Agreements, TN/RL/W/179 (2005), para 18 (supporting a proposal (TN/RL/W/155) submitted by the ACP countries).
[148] S. Bilal and I. Ramdoo, *Which way forward in EPA negotiations? Seeking political leadership to address bottlenecks,* ECDPM, November 2010, www.ecdpm.org/dp100, p. 15.
[149] *Id.* pp. 15-16.

Since CEPA provided up to 25 years for full implementation, there are good grounds to go further in the EU-EAC EPA. This could be achieved either by extending phase-in periods even further, e.g. from 15 and 25 years to 20 and 30 years or more, or by transferring a percentage of products from the shorter 15 year schedule to the 25 year schedule.

Such phase-in periods could also be differentiated between the EPA members under the EAC doctrine of variable geometry,[150] allowing for differences in the pace of implementation once an agreement has been reached by consensus. Temporary differences between EAC members in their external duties would thus seem to be compatible with the common external tariff requirement in Article 12 of the EAC Customs Union Protocol.

Conclusion Phase-in

The scope for differential treatment with regard to phase-in periods appears to be much greater than in relation to the amount of liberalisation under the SAT requirement referred to in the previous section. Consistent with both the EAC's doctrine of variable geometry and the requirements of Article XXIV, ELDCs can argue for a much longer phase-in period than presently afforded within the EPA. In particular, given the precedent of differential treatment of LDCs within CEPA and in light of the recent Brexit vote, phase-in periods could be extended up to 30 or 35 years – especially for vulnerable industries.

3.2.5 Safeguards

Another area where ELDCs may be able to obtain concessions is through more powerful safeguards, allowing ELDCs to enhance the protection of their domestic industry where injury can be proven. This section will discuss what flexibility is allowed under Article XXIV, and then which safeguard clauses are currently contained in the EAC EPA.

[150] See Section 2.3.1: Review or Amendment above.

Permissibility of Safeguards under Article XXIV

The EU has sought to limit the flexibility of safeguards, citing Article XXIV as a concern.[151] However, as with many aspects of Article XXIV, the ability of FTA parties to implement safeguards among themselves is not settled. The requirements of a WTO-consistent FTA were discussed in relation to the SAT requirement above and are contained in paragraph 8(b) of Article XXIV:

> "A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories."

It would appear that the only exceptions to the requirement to "eliminate" all duties and restrictions on commerce between the FTA parties are those contained within the parenthesis. However, safeguards, which are administered under Article XIX, are not included among the enumerated exceptions. The question is thus whether safeguards could be considered contrary to the requirement to "eliminate" restrictions on SAT.

The only WTO panel to have considered the issue was *Argentina – Footwear (EC),* which considered that temporary restrictions such as safeguards were not prevented by the language in Article XXIV:8(b).[152] However, on appeal the Appellate Body voided the panel's findings, since Article XXIV had not been invoked by the parties.[153] In *US-Line Pipe*[154] and *US-Steel Safeguards*[155] the WTO Appellate Body did state that it was not permissible to *exempt* FTA parties from safeguard measures while imposing them on other countries, unless the products from those FTA parties were also exempted from the

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[151] D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, p. 25.
[152] *Argentina – Footwear (EC),* Panel report, paras 8.93-8.102.
[153] *Argentina – Footwear (EC),* Appellate Body report, para 110.
[154] *US – Line Pipe,* Appellate Body report, para 193
[155] *US – Steel Safeguards,* Appellate Body report, paras 449-452

initial injury determination that justified those safeguards. However, the Appellate Body did not express an opinion about whether safeguards applied *within* FTAs were compatible with Article XXIV.

The answer thus remains unclear. In a paper from 2003, Professor Joost Pauwelyn rejects the notion that safeguards are prohibited.[156] It has often been argued by the WTO members themselves that the parenthesis in Article XXIV:8(b) is not exhaustive, since apart from Article XIX, it also does not contain the national security exception (XXI) and balance-of-payment safeguards intended for developing countries (XVIII:B).[157] The GATT negotiators could not have intended to sign away their national security rights, and hence a strict interpretation is unreasonable.[158] In addition, Pauwelyn points to the temporary nature of safeguards and the fact that the requirement to eliminate extends to SAT, and that unless they applied to significant amounts of trade over an extended period, they should be permitted.[159]

However, Gary Horlick and Angela Estrella points out that under a VCLT analysis of the plain language of Article XXIV:8(b), nothing indicates that the parenthesis should not be read strictly – i.e. as excluding non-mentioned trade remedies such as safeguards and dumping measures.[160] Furthermore, the authors suggest that the word “eliminate” means the complete removal of all such trade remedies, as it is different from the mere “are not applied”.[161]

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[156] “The Puzzle of WTO Safeguards and Regional Trade Agreements”, *Journal of International Economic Law*, vol. 7:1 2004, pp. 109-142, pp. 125-8.

[157] *See e.g.* Committee on Regional Trade Agreements, *Synopsis Of "Systemic" Issues Related To Regional Trade Agreements*, WT/REG/W/37 (2000), 23-4: arguments put forward by Japan in *US – Line Pipe*, Appellate Body report, para 72.

[158] Joost Pauwelyn “The Puzzle of WTO Safeguards and Regional Trade Agreements”, *Journal of International Economic Law*, vol. 7:1 2004, pp. 109-142, pp. 126-7. *See also* S. Lester, B. Mercurio and A. Davies, *World Trade Law: Text, Materials and Commentary*, 2012 (2nd ed.), 348-9 (concurring).

[159] “The Puzzle of WTO Safeguards and Regional Trade Agreements”, *Journal of International Economic Law*, vol. 7:1 2004, pp. 109-142, pp. 127-8.

[160] “Mandatory Abolition of Anti-dumping, Countervailing Duties and Safeguards in Customs Unions and Free-Trade Areas of Constituted Between World Trade Organization Members Revisiting a Long-standing Discussion in Light of the Appellate Body’s *Turkey-Textiles* Ruling”, *Journal of World Trade*, vol. 40(5) 2006, pp. 909-944.

[161] *Id.* 934-6. The authors also offer an intriguing explanation as to why Article XXI is missing (*id.* 940). Since the Article XXIV provision was originally contained in the Charter of the International Trade Organisation (ITO), it had not mentioned the corresponding ITO national security provision because that provision was contained in a chapter separate from that containing the original Article XXIV, entitled

Horlick and Estrella's argument, well grounded in the language of Article XXIV, is the most persuasive from a strict legal perspective, taking into account that WTO dispute resolutions panels are required to apply the VCLT in their interpretation and may not "add to or diminish the rights or obligations" provided for in the GATT.[162] However, as the above quoted cases show, the Appellate Body has assiduously sought to avoid interpreting Article XXIV, especially in relation to safeguards, and many FTAs today include safeguard clauses between the parties, including all EPAs.[163] It is highly unlikely that the panels or the Appellate Body would seek to upset what has become established practice on the basis of strict technicalities, especially as safeguards between the parties would seem to benefit, not injure, other WTO members as they decrease trade diversion. Therefore, as long as they remain temporary, and not applied so broadly as to impinge on the requirement to liberalise SAT, they should be permissible under Article XXIV. In either case, it can be presumed that the Appellate Body will do its utmost to avoid ruling on the issue.

"General Exceptions". On the other hand, the exceptions which are mentioned in Article XXIV were commercial policy exceptions contained in the same chapter. Therefore, Article XXIV would only have mentioned the exceptions in its own chapter, and the national security exception would have applied regardless. However, research reveals that drafts of GATT Article XXIV contained Article XXI among its listed exceptions (GATT Doc. 1/53/Add.2, 22 Mar. 1948). Only the very last draft, approved after an additional clause was inserted, no longer contained Article XXI (GATT Doc. 1/62, 24 Mar. 1948). The negotiation history does not indicate any discussion on the subject, and the omission of Article XXI may thus be a simple typo. As multiple corrigenda to the negotiation history attest, typos were not uncommon when clauses or minutes were retyped on typewriters.

[162] Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* 1994. As highlighted in n. 161 *supra*, the exclusion of Article XXI may be a typo, but it is uncertain whether a panel would consider such an explanation absent definitive evidence. In relation to the omission of Article XVIII, it can be speculated that it likewise was omitted due to mistake. Article XVIII did not contain balance-of-payment measures whatsoever until it was amended together with Article XII in 1955, where more lenient provisions in Article XII:3 were revised and moved to Article XVIII:B (*see* GATT Doc. L/332/Rev.1, 26 Feb. 1955 and L/332/Add.1, 2 Mar. 1955). The WTO parties likely omitted to amend Article XXIV accordingly, although it is possible that the parties intentionally sought to narrow the exceptions within Article XXIV.

[163] This applies to CEPA, the EU-EAC EPA (see next section), as well as other draft agreements currently being negotiated. The aforementioned Czech-Slovak Customs Union (*supra* n. 126), the only agreement to be declared WTO-compatible under Article XXIV:7(b) review procedures, contained a broad and general safeguard clause (*see* GATT Doc. L/7212, 30 April 1993). Yet Horlick and Estrella argues that since safeguards were not discussed during the review, the report carries little substantive weight (*supra* n. 160, pp. 943-4). Similarly, the panel in *US-Line Pipe* accepted that NAFTA, including its safeguard clauses, did meet the requirements of Article XXIV, but seeing no need to address this issue, its conclusions were declared moot and without legal effect on appeal (*US-Line Pipe,* Appellate Body report, para 199). Hence there is a tendency to allow safeguards, but no definitive legal authority.

Safeguards in the EAC-EU EPA

Bilateral safeguard measures between the EPA parties are contained in Article 50 of the EU-EAC EPA. In CEPA, corresponding safeguards are found in Article 25. In both treaties, whereas the EAC or CARIFORUM countries can also implement multilateral safeguards under GATT Article XIX,[164] the EU waives its right to apply Article XIX safeguards (Articles 49 and 24 respectively). However, this concession is not of much value. WTO safeguards are notoriously difficult to invoke, and none has so far survived challenge in the WTO.[165] The EU also maintains the ability to impose anti-dumping duties against EAC products and countervailing measures against subsidies.[166]

The EPA safeguards can be invoked more easily than WTO safeguards,[167] but they have still been criticized. Safeguards can only be applied in the event of an import surge.[168] In the case of domestic industry, the increase in imports must cause "serious injury".[169] Both these requirements are imported from GATT Article XIX and the WTO *Safeguard Agreement* governing its application. To establish serious injury, Article 4.2 of the *Safeguard Agreement* requires countries to:

> "evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment."

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[164] Article 49.1 of the EAC-EU EPA.
[165] The reason is that Article XIX can only be invoked due to "unforeseen development", which is a high threshold to overcome (see *US – Lamb,* Appellate Body report, paras 68-72). The EAC-EU EPA safeguard clause contain no such language.
[166] Article 48 of the EAC-EU EPA.
[167] *See* n. 165 *supra*.
[168] Article 50.1 of the EAC-EU EPA.
[169] Article 50.2(a) of the EAC-EU EPA.

At a minimum, all of the listed factors need to be considered[170] and a "causal link" must also be established between the increase in imports and the serious injury, ensuring that the injury is not attributable to other factors.[171] Such exacting data gathering requirements, mandating industry input and questionnaires, may not be readily available to LDCs, whereas they are to the EU.[172] The power imbalance between the parties thus bleeds into the safeguards clause itself.

Safeguards can also be taken in case of "disturbances in a sector of the economy, particularly where these disturbances produce major social problems, or difficulties which could bring about serious deterioration in the economic situation of the importing Party," or "disturbances in the markets of like or directly competitive agricultural products or in the mechanisms regulating those markets."[173] The wording comes from the Cotonou Agreement but "has virtually never been used".[174] It would appear to be a lower standard than "serious injury", which is welcome. Given the EU's subsidies, the inclusion of agriculture here is also positive. Presumably, the main determinant of market disturbance would be price fluctuations, which would require less data gathering than serious injury.[175] However, the meaning of "disturbances in a sector of the economy" is vaguely worded, and the tests required to meet this provision unclear. The words "major" and "serious" suggest that the threshold may be quite high.

Paragraph 6 imposes a maximum time limitation of 8 years, provided the

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[170] *Argentina – Footwear (EC)*, Appellate Body report, para 136.

[171] Article 4.3 of the Safeguards Agreement.

[172] D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, p. 25.

[173] EAC-EU EPA Article 50.2(b) and (c).

[174] L. Bartels, *The European Journal of International Law*, vol. 18 no. 4 (2007), 734 (citing Commission Decision 236/93 from 1993, increasing the duties on ACP bananas, as the last time a Cotonou safeguards measure was used.) See also D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, p. 25 (Pointing to the same language used in EU GSP regulations, see *Council regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences* [2005] OJ L 169/1, Art 22. (available: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005R0980&from=EN))

[175] D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, p. 25.

measure remains justified. This is in line with WTO practice.[176]

Infant industry protection

The domestic industry safeguards in Article 50.2(a) could also be used to protect infant industry. However, apart from difficulties of implementation, the increase in imports requirement means it would be hard to use safeguards to allow an infant domestic industry to expand its market base absent such an event.[177] It would also be impossible to aid in the establishment of new industries, since serious injury cannot be proven absent existing production.[178]

For this reason, paragraph 5(b) provides an explicit reference to infant industry. However, it suffers from the same deficiency as identified above of requiring an increase in imports, and is even further circumscribed by the requirement that such increase "result" from the reduction of duties. It is also only applicable ten years from the date of entry into force, although it may be extended for another five. Further infant industry protection is provided for within the EU-EAC EPA in relation to export duties, discussed below.

Conclusion: Safeguards

ELDCs should require the EU to clarify in the EPA which conditions need to be met in order to prove "serious injury" in the case of a safeguards action, and these should be reduced from the long list in Article 4.2 of the *Safeguards Agreement.* Similarly, a definition and factors to take into account for "serious disturbance" would be helpful and could ensure that data gathering would be manageable for LDCs. It is clear that as the clause currently stands, safeguard actions would be highly burdensome for ELDCs to initiate, especially relative to the EU's greater institutional capacity, knowledge and

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[176] See Article 7.3 of the *Safeguards Agreement.*
[177] D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, p. 26.
[178] H. Asche, *Europe, Africa, and the Transatlantic: The North – South Challenge for Development-Friendly Trade Policy,* October 2015*, https://www.boell.de/sites/default/files/web_151022_e-paper_europe_africa_transatlantic.pdf*, p. 17.

resources.

ACP countries have argued for a stand-alone infant industry protection clause, but the EU has responded that sufficient flexibility can be found elsewhere and that the EPAs risk being WTO-incompatible.[179] As the above analysis shows, as long as measures would remain limited and temporary, the risk of WTO-incompatibility should not materialise. Therefore, an option could be to remove both the sunset clause excluding infant industry as a ground after ten years, as well as the causation requirements, since the time limits in Article 50(6) of the EU-EAC EPA would still apply. A more rigorous definition of infant industry may have to be introduced alongside such a change, and a limited exception is ultimately in the EAC's interest so as to avoid promoting rent-seeking behaviour and inefficient domestic industries. Although it must also be noted, as is explained next, that EAC members can currently use export taxes to promote infant industries, and ELDCs may consider this as sufficiently flexible.

3.2.6 Export Taxes

There is an ongoing debate among experts and scholars as to the merits of export taxes. It is argued that they are less efficient than import taxes, since countries have an interest in expanding their exports, and that they restrict supply and production of the targeted products. The EU's commitment to seek to remove other countries' export taxes was set out in 2006,[180] and it has since carried this policy into the EPA negotiations. The EU-EAC EPA therefore contains a general prohibition on export taxes in Article 14, subject to some flexibility discussed below.

Proponents of export taxes argue that the taxes can help promote infant industry by favouring domestic production if imposed upon commodities, and more generally produce a subsidy effect by increasing domestic supply and

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[179] D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, pp. 24-5.
[180] European Commission*, Global Europe: Competing in the World: A Contribution to EU's Growth and Job Strategy*, , October 2006, http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf.

thus lowering domestic prices in an affordable manner. One author points to the specific example of Mozambique's export duty on raw cashews, which was abolished pursuant to requirements from the IMF and World Bank, causing the processing industry to relocate abroad.[181] Furthermore, some developing countries responded to the 2007-8 food crisis by imposing export taxes and even outright bans, although this was criticized.[182] Finally, it could be argued that since the EU has refused to abolish or alter its agricultural subsidies except for the first 48 months after entry into force, and EAC members normally would not be able to afford subsidies of their own, export taxes on agriculture could serve as a cheaper alternative for ELDCs to achieve a comparable effect on prices and products.

Permissibility under Article XXIV

The WTO itself does not prohibit export taxes, even though the EU has put forward WTO proposals to this effect.[183] It is relatively clear, however, that the requirement under Article XXIV:8(b) to "eliminate duties and other restrictions on commerce" on SAT also applies to export taxes. Just like tariffs, export taxes are "duties". To date, there has been no consideration whether export duties should be considered together with import duties when calculating the elimination of SAT. Presumably, since proposals discussing the SAT requirement only refer to tariffs,[184] export taxes should be considered separately. Adopting the same definition of SAT as above, permanent export duties should therefore not cover more than about 20% of total trade value.

However, temporary export duties taken in response to a specific threat may be more permissible. Furthermore, the elimination of duties in Article XXIV:8(b) is subject to exceptions taken pursuant to GATT Article XX. Article

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[181] . Asche, *Europe, Africa, and the Transatlantic: The North – South Challenge for Development-Friendly Trade Policy,* October 2015, https://www.boell.de/sites/default/files/web_151022_e-paper_europe_africa_transatlantic.pdf, p. 5.
[182] D. Lui and S. Bilal, *Contentious issues in the interim EPAs Potential flexibility in the negotiations,* ECDPM, March 2009, www.ecdpm.org/dp89, pp. 14-16.
[183] European Communities, *Revised Submission on Export Taxes,* TM/MA/W/101 (2008) http://trade.ec.europa.eu/doclib/docs/2008/september/tradoc_140491.pdf
[184] See above section 3.2.3.

XX allows for measures "necessary to protect human, animal or plant life or health" and measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". Although the tests for these provisions are notoriously hard to satisfy, good faith efforts to combine sustainable development efforts with export taxes may help deter a WTO challenge and weaken EU opposition. Most promisingly, under Article XX(g), profits from an export tax could be ring-fenced for sustainability initiatives for the sector concerned. This may help satisfy Article XX(g)'s requirement of concurrent "restrictions on domestic production and consumption", since the intent of an export tax is otherwise often to increase, not decrease, domestic supply.[185]

Export duties in the EAC-EU EPA

The EU-EAC EPA does in fact modify the general prohibition and allows for temporary export duties in Article 14(2):

> "EAC Partner States can impose, after notifying the EU, a temporary duty or tax in connection with the exportation of goods under the following circumstances:
>
> (a) to foster the development of domestic industry;
>
> (b) to maintain currency stability, when the increase in the world price of an export commodity creates the risk of a currency overvaluation; or
>
> (c) to protect revenue, food security and environment."

The duties must be reviewed for renewal by the EPA Council after 48 months, but they still offer significant flexibility. There is a further limitation in that the

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[185] China has sought to invoke Article XX(g) to justify an export tax on rare earths and metals, but the measure was rejected by the Appellate Body since China had failed to curb domestic production – see *China – Rare Earths*, Appellate Body report.

temporary tax may only be applied to "a limited number of products for a limited period of time".[186] EAC members may wish to soften this language. Already, the 48 months time-span is relatively generous as are the categories under which temporary export duties can be applied. Furthermore, if EAC members are currently applying export duties, they could ask for a specific exemption under an annex to the agreement.

Conclusion export taxes

Export taxes provide additional policy space for LDCs. If they are a preferred policy tool, EAC members could seek to remove the requirement to eliminate them, but countries would still only be able to apply them on a permanent basis on up to 20% of the value of goods exported to the EU under Article XXIV. Already, there is significant flexibility to respond to threats to domestic industry, currency stability, revenue, food security, and the environment via temporary duties under Article 14(2) of the EU-EAC EPA.

3.2.7 MFN and Standstill Clauses

The MFN and standstill clauses do not raise issues as to WTO compatibility and can be negotiated however the parties choose. They are discussed here simply because they have been of concern to EAC members, and in order to highlight their potential for renegotiation.

Articles 14.4 and 15 of the EPA require the EAC to extend any more favourable treatment offered to another "major trading economy" to the EU as well, granting the EU so-called MFN treatment. Major trading economy is defined in Article 14.5 as "any developed country" or "any country accounting for a share of world merchandise exports above 1 percent". The EAC could seek to either abolish the MFN clause, which the EU is unlikely to agree to, or raise the percentage threshold. Currently, the EAC is limited in its ability to offer even more favourable terms to other trading partners if they meet the definition of major trading economy, should they wish to do so. However, it is

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[186] Article 14(3) of the EAC-EU EPA.

questionable whether the EAC will be seeking more trade agreements which would provide for even greater liberalisation than that provided for under the EU-EAC EPA anytime soon. EAC members may wish to investigate which trading partners would meet the current threshold of "merchandise exports above 1 percent", and seek to raise the requirements sufficiently to exclude potential trading partner it may wishes to give more preferential treatment.

Article 12 contains a "standstill" clause, requiring that *applied* duties (as opposed to "bound" or negotiated rates) are not increased. This provides for economic certainty between the trading parties, but does constrain the EAC beyond what is the case for WTO rates. In the WTO applied can be lowered and raised within the bound rates as the parties see fit. However, in the EU-EAC EPA, the clause only applies to the products subject to liberalisation; hence there is flexibility to raise or lower non-liberalised goods within the scope of their WTO-bound rates. To achieve further flexibility even among products subject to liberalisation, a compromise might to allow for fluctuations of applied rates within a narrow band subject to notice and limits on the permitted frequency of alteration.

3.2.8 Differential Treatment for LDCs

Although already discussed in relation to some of the specific issues above, this section gives brief consideration to the benefits of and opportunities for a differentiated approach between the ELDCs and Kenya, the only developed country within the EAC.

Existing Differential Treatment in the EU-EAC EPA

The preamble to the EU-EAC EPA states:

> "REITERATING the need to ensure that particular emphasis shall be placed on regional integration and the provision of special and differential treatment to all EAC Partner States, while maintaining special treatment for least developed EAC Partner States . . . "

However, except for a minor mention in Annex I of the treaty, no special consideration is given to LDCs. The considerable differentiation in liberalisation among CEPA countries has already been discussed above. Article 17 of the CEPA also allows the parties to agree to modify customs duties on products "[i]n the light of the special development needs" of CARIFORUM LDCs. Whereas the EU may be unwilling to extend most of the abovementioned concessions to the entire EAC, it may be more willing to offer them to ELDCs only. Since Kenya already stands to gain more from the EPA than the ELDCs, Kenya should be open to compromise.

Compatibility with the EAC

As already discussed,[187] in relation to the SAT and phase-in requirements, although tariff differentiation would undermine the Common External Tariff provided for in Article 12 of the CU Protocol, the agreement likely contains sufficient flexibility in the principle of asymmetry and under the doctrine of variable geometry to allow for this. With regard to non-tariff measures, such as safeguards, the EAC treaties do not appear to pose any problems.

Conclusion: Differentiated Liberalisation

As a means to resolve differences between the incentives of LDCs and non-LDC members of the EAC to sign and ratify the current EPA, special and differentiated treatment for LDCs is a promising way forward. Any commitments only extending to LDCs should be easier for the EU to accept.

3.3 Conclusion: Renegotiating the EPA

Brexit provides sound legal and economic justifications for ELDCs to seek to renegotiate the EU-EAC EPA, and there are numerous ways in which the treaty might be renegotiated to respond to the concerns of ELDCs. This part of the report has assessed several of the agreement's most contentious

[187] See section 3.2.1 above.

provisions in relation to their compatibility with GATT Article XXIV. It has concluded that the general liberalisation commitments, phase-in periods, safeguards, export duties, and MFN and standstill clauses all contain additional flexibility which ELDCs can seek to bargain for without violating WTO rules. In particular, above 70% liberalisation from EAC Partner States should be sufficient, and phase-in periods could be extended further. A current FTA concluded in 2000 between the EU and Mexico only requires Mexico to liberalise by 54.1%, and the EU has in the past been supportive of greater recognition of special and differential treatment within GATT Article XXIV.

It is also important to note that since the requirements of Article XXIV are so poorly defined, understood and articulated, and given that an FTA has never before been directly challenged under Article XXIV, it is unlikely that the EPAs will be challenged unless grossly inadequate. Furthermore, even should this occur, WTO dispute resolution is a slow and cumbersome process. During such a process the EAC and the EU, with greater guidance from a panel or Appellate Body, would at that point have an opportunity to renegotiate the terms of the EPA. In addition, if a challenger would be successful in bringing a dispute, the FTA would increase the negative trade diversion effect because of increased integration between the FTA parties, with a negative economic impact on the trade of the challenger itself.

In addition, ELDCs should invoke their development status to obtain special and differential treatment, both within the EAC and in relation to the EU and other EPA negotiations that have either been concluded or are currently being negotiated. Since five out of six EAC members are LDCs, the EAC has an extraordinarily high proportion of LDC members.

In conclusion, given the flexibility present within the parameters of the WTO, and the negative consequences of withdrawal from the EPA negotiations on regional integration and politics, this report recommends renegotiating the EPA on the basis of the above proposals. It is also important to reiterate that

there is both data and literature to support that reciprocal liberalisation may in the long run be more beneficial than seeking to rely on unilateral tariff preferences in perpetuity, as emphasised in section 2.3.2 (The Benefits of the EPA).

4 Option C: Negotiating North-South Provisions at the WTO

This part will briefly analyse a third option available to ELDCs. ELDCs could bypass the EU and seek recourse at the WTO by launching a renewed effort to seek recognition and greater accommodation of north-south FTAs, either within Article XXIV as an interpretive statement or amendment, or as part of a new legal instrument akin to the Enabling Clause.[188] Either of these options are likely to be time-consuming and speculative in nature, but with substantial commitment could bear fruit. This option could also be pursued alongside either Option A or B.

4.1 Arguments in Favour of Renewed WTO Engagement

There is an abundance of literature on the need for greater recognition of north-south trade arrangements and, as noted, in 2002 the ACP countries sought to formally introduce such ideas for consideration by the WTO parties.[189] As the EU remarked in its supporting proposal: “North-South RTAs can have at least as high a developmental impact as any of those falling under the Enabling Clause, and it is difficult to see why the substantive requirements should be radically different.”[190] Although ACP countries failed to engender substantive discussion or gain support from other WTO members at the time, there were lessons learned that could be looked at afresh. ELDCs could either propose reinterpreting or amending Article XXIV, or they could propose to issue a new type of legal instrument akin to the Enabling Clause. Such an instrument could offer explicit recognition of north-south agreements

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[188] The EU has in the past sought waivers for its unilateral preferential programs afforded to the ACP countries, beginning with the Lomé Convention 1975. The last waiver expired in 2007/2008, and has been extended to countries like Kenya with the anticipation that the EPAs will come into force at this time. As noted, since Kenya is a non-LDC, it cannot receive DFQF under the EU’s EBA program, which applies to the ELDCs. The EU has stated that it will not try to seek and would not be granted a new waiver at the WTO. Whether this is so is unclear, but it is likely too late to seek to press the EU on this issue now given that EPA negotiations have already been concluded. The more fruitful option is therefore to adopt one of the three options outlined in this memorandum, with Option B being the recommended course of action.

[189] See section 3.2.3: Debates Among WTO Members.

[190] European Communities, *Coverage, Liberalisation Process and Transitional Provisions in Regional Trade Agreements*, TN/RL/W/179 (2005), para 16(a).

and set forth the modalities of more lenient treatment within such agreements.

An Opportunity to Revitalise the Doha Development Agenda

The Doha Round is the latest round of multilateral negotiations among WTO Members, and was launched at the Fourth Ministerial Conference in November 2001. It covers a wide range of issues, but is often referred to as the Doha Development Agenda because of its focus on improving the trade prospects of developing countries.[191] Unfortunately, as commentators have long lamented, progress have stalled due to irreconcilable differences between developing and developed countries. Yet this may represent an opportunity for ELDCs to reintroduce the issue of north-south FTAs, and emphasise how it represents a practical and achievable goal through which the Doha Round can live up to its initial aspirations in aiding developing countries. Recognition of north-south FTAs could thus provide a suitable focal point on which to achieve agreement and achieve tangible progress. The world, and thereby the conditions of success, have certainly changed in the 15 years since the proposal was last introduced by the ACP countries.

Coordinating with the ACP Group of States would be a priority, and to then build a broad coalition with other developing countries and groupings, as well as NGOs and think tanks. The issue should be raised through outreach, publications and events hosted in different WTO fora. The upcoming Eleventh Session of the Ministerial Conference in Argentina, in December this year, represents a formidable opportunity to being this work and to seek to formally incorporate the issue as part of the WTO agenda.

4.2 Arguments Against Renewed WTO Engagement

Despite the above arguments, there could be significant drawbacks to seeking to clarify or amend the rules of the WTO. First, it would require considerable amounts of time. Second, it would require resources in drawing up proposals,

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[191] *See* WTO, *The Doha Round*, https://www.wto.org/english/tratop_e/dda_e/dda_e.htm; WTO, *Ministerial Declaration of 14 November 2001*, WT/MIN(01)/DEC/1 (November 2001), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

incorporating feedback, and assemble the necessary coalition at the WTO. It must be a sustained effort to bear fruit. Third, despite the intervening years, the fact that FTAs and the requirements of Article XXIV have already been raised as part of the agenda once before, makes it less likely that WTO members will be interested in reconsidering the issue.

4.3 Conclusion: Negotiating North-South Provisions at the WTO

Launching a renewed effort for greater recognition of north-south FTAs in the WTO would likely be difficult. It would be time-consuming, resource-intensive, and the issue has already been rejected within the current round of multilateral negotiations. However, there is an opportunity to frame the issue as a practical and achievable means which will help to deliver on the original ambitions of the Doha Development Agenda. There would be an opportunity to launch such a strategy at the WTO Ministerial Conference later this year.

Furthermore, it should also be noted that even though WTO negotiations may be expensive and protracted, this option can be pursued alongside either Option A or B. If ELDCs choose to withdraw from the EPA negotiations, changed WTO rules could lay the basis for a better agreement in the future. If ELDCs instead choose to renegotiate the EPA, WTO negotiations can be pursued as a means of adding further impetus to the demands pursued within the EPA context. This would help emphasise that the strict 90% of total trade definition of SAT in GATT Article XXIV is a contested and still unsettled matter.

Finally, even if this option is not pursued, ELDCs should raise and hold EU to its arguments pursued within the WTO, favouring greater flexibility under Article XXIV.[192]

[192] See section 3.2.3: Debates Among WTO Members, above.

5. Analysis of UK's Obligations to the EAC After Brexit

5.1 Introduction

Upon the UK's formal exit from the EU, all rights and obligations under the EU's various agreements will cease to apply to the UK, which will have to devise its own trade policy.[193]

As the UK goes forward with Brexit, it is very likely that some sort of transitional trade arrangements will be required. The UK will have many negotiating priorities during Brexit, and such transitional arrangements must bridge the gap to a more comprehensive and progressive trade agreement, which is likely to take more time.[194] It is important that Africa be proactive in the process leading up to a likely changed trade regime with the UK and also anticipate any challenges and opportunities.[195]

Of the EAC countries that negotiated the EPA – Kenya, Tanzania, Uganda, Burundi, and Rwanda – two have a disproportionate dependence on the UK Market. For Kenya, 27.8% of exports to the EU go to the UK, and for Rwanda 17% of exports are destined for the UK. The other three countries all have less than 6% of their total exports to the EU going to the UK.[196] This has implications for negotiations and the negotiation strategy to be adopted by the EAC, since the full group will be a stronger and more credible partner than any individual Partner State or region. UK exporters will undoubtedly have an interest in preserving and expanding preferential access to what for them have been lucrative markets.

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[193] All Party Parliamentary Group for Africa, *The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 59

[194] *Id.*, p. 53

[195] *Id.*, p. 51

[196] Edwin Laurent, Lorand Bartels, Paul Goodison, Paula Hippolyte, Sindra Sharma, *After Brexit : Securing ACP Economic Interests*, The Ramphal Institute, London, 2017

5.2 Transitional Arrangements Through Grandfathering of the EPA

The easiest option for the UK is to incorporate transitional arrangements into its EU exit agreement, such that it temporarily continues to participate in EU–Africa trade arrangements. This is a procedure commonly referred to as 'grandfathering', which will require current parties to EU trade agreements to agree to temporarily maintain the current trade arrangements. Effectively the UK would retain transitional participation in certain EU agreements, providing legal certainty and assurance for African exporters and investors, and continuity for African businesses. However, the House of Common's International Trade Committee's Report on UK Trade Options beyond 2019 expresses reservations about grandfathering or replicating EPAs negotiated by the EU because of their perceived unpopularity.[197] Hence, there is no clarity on whether the UK will replicate an EU-EAC EPA like arrangement with the EAC.

5.3 Continuing Unilateral Preferences

Much of EAC exports to the UK are enabled by two preferential arrangements, the EU standard GSP program and the EU GSP-based EBA initiative. The preferential arrangements have helped keep many EAC exports viable and competitive because they eliminate high tariffs on imports for beneficiary countries. In the absence of equivalent treatment post-Brexit, products entering the UK market would face MFN duties. Although the current EU-UK MFN duty rates are generally low, certain product categories, including those where EAC countries have export interests, reflect considerably higher rates. These products include among others, fish, meat, seafood and floricultural products, vegetables, and clothing. New tariff rates, therefore, could severely compromise the EAC's export competitiveness and

[197]House of Commons International Trade Committee, *UK trade options beyond 2019*, First Report of Session 2016–17, March 7, 2017, p. 52, https://www.publications.parliament.uk/pa/cm201617/cmselect/cmintrade/817/817.pdf

expose exporters to greater competition in the UK market.[198]

Many of the tariffs and non-tariff measures which provide EAC exporters with preferences are intimately linked to the EU's common agricultural policy. This makes the future trajectory of the UK's agricultural policy and agricultural trade policy a matter of considerable importance to the EAC, as it will strongly influence the future value of EAC trade preferences.[199]

The disruption of normal trade relations is not ideal for either the UK or Africa, and efforts should be made to maintain the status quo until a new regime is in place. [200] To avoid any immediate adverse outcomes, the EAC should advocate that the UK government consider offering a unilateral (non-reciprocal) GSP and/or EBA scheme to the EAC states that would be comparable to market access provisions guaranteed under the EU-GSP scheme. There are WTO requirements for GSP schemes, which fall under the Enabling Clause, but the guidelines are quite broad and could accommodate a suitable design.[201] If required, the UK could be persuaded to also request waivers at the WTO to grant non-generalized, region-specific preferences. There are precedents for such arrangements. The USA has obtained WTO waivers for its trade preference initiatives with the Caribbean (the Caribbean Basin Initiative) and Africa (the African Growth and Opportunity Act, AGOA).[202] However, absent a waiver, the problem underlying the current EPA controversy, namely the granting of equal access to Kenya – a developing country – to that given to LDCs, would persist.

Since the EU has stated that a waiver in the WTO would be impossible, the EU may itself block such a waiver. Hence, although LDCs should be able to

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[198]All Party Parliamentary Group for Africa*, The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 59, See discussion on Higher MFN tariffs under Section 2.2.1 on p.19.

[199]Edwin Laurent, Lorand Bartels, Paul Goodison, Paula Hippolyte, Sindra Sharma, *After Brexit : Securing ACP Economic Interests*, The Ramphal Institute, London, 2017

[200]All Party Parliamentary Group for Africa*, The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 51

[201]*Id.* p. 60

[202]*Id.*

obtain preferential access under a scheme similar to the DFQF access under the EU-EBA scheme, Kenya may face higher barriers under a GSP-like scheme. For LDCs the Commonwealth Secretariat has already suggested that "one straightforward option would be for the UK to devise its own GSP for developing countries and LDCs, providing duty-free and quota-free market access for all goods originating in LDCs, similar to that of the EU."[203]

Since, according to WTO rules, the duty and quota-free access under the EBA scheme provided to LDCs is a unilateral measure, the UK could grant the preferences on its own. However, agreement with the EU-27 may be needed to allow the UK to implement a regulation granting LDCs free access to the UK market from day one of Brexit, in advance of their formal departure from the EU. Given the UK's longstanding political support for LDCs and its role in getting the measure adopted by the EU, it would seem safe to assume that the UK would be willing to continue such an arrangement post-Brexit.[204]

The UK could also go further than the EU by formulating its own autonomous GSP and/or EBA scheme, with deeper levels of tariff preferences. However, such a scheme would take some time to design and implement fully. It can be presumed that for various products, the UK's domestic concerns would be different from those of the EU. Whilst the schemes are informed by certain objective economic criteria, GSP schemes in particular are also influenced by the policies, interests, and domestic concerns of the developed country providing the preferences. The UK might well switch political focus in favour of some developing countries and categories that do not precisely reflect the EU's traditional focus. Secondly, the UK's domestic economic interests are likely to have implications for the design of its GSP scheme. For both reasons, EAC countries have an interest in making representations to the UK government as soon as possible on these points.[205]

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[203]House of Commons International Trade Committee, *UK trade options beyond 2019*, First Report of Session 2016–17, March 7, 2017, https://www.publications.parliament.uk/pa/cm201617/cmselect/cmintrade/817/817.pdf
[204]Edwin Laurent, Lorand Bartels, Paul Goodison, Paula Hippolyte, Sindra Sharma, *After Brexit : Securing ACP Economic Interests*, The Ramphal Institute, London, 2017
[205]*Id.*

The UK's commitment to promoting trade and development is indisputable. It has always recognised and championed the special needs and challenges facing groups such as the LDCs, sub-Saharan Africa, and small states.[206] It is in this spirit that the UK should be willing to continue to extend preferential treatment to EAC Members under schemes similar to the EU-GSP and EU-EBA Scheme.

However, a case must be established as to why the UK should accept and continue its 'inherited' trade obligations towards developing countries and LDCs, and whether the UK is under any legal obligation to do so.

5.3.1 Obligations under the Cotonou Agreement

The UK is a party to the Cotonou Agreement in its own individual capacity, and so are the five EAC Members that negotiated the EU-EAC EPA: Kenya, Tanzania, Rwanda, Burundi and Uganda. Sudan, and by extension South Sudan, is not a party to the Cotonou Agreement. If, and only if the UK continues to be a party Cotonou agreement after Brexit, then the trade and development relations between the UK and EAC Members, except for South Sudan, will fall back on the provisions contained in the Cotonou Agreement. However, it is unclear at this point of time if UK will be continue to be bound by Cotonou Agreement once it formally exits the UK.

The language in the EU-EAC EPA where *'EU **or** its Member States'* **and** *'EU **and** its Member States'* are designated as parties reflects the shared competence between EU and its Member states according to the Treaty of Lisbon. However, the language in Cotonou Agreement is different. The *'EU **and** its Member States'* followed by all of the EU member states listed individually, have been designated as parties. This raises questions of how party to the Cotonou Agreement will be interpreted after Brexit. It is unclear whether the UK will be considered as a party to the Cotonou Agreement on its

[206] All Party Parliamentary Group for Africa, *The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 61.

own right after Brexit, especially given the territorial application clause in Cotonou Agreement.[207] The situation is further complicated by the stipulation in Article 91 of the Cotonou Agreement. It states that "No treaty, convention, agreement or arrangement of any kind between one or more Member States of the Community and one or more ACP States may impede the implementation of this Agreement." [208] If Brexit is considered to be an arrangement between the EU and UK, then the post-Brexit developments between the EU-27 and the UK should not hamper the implementation of the Cotonou Agreement. Hence, it is extremely unclear whether the UK will retain its status as a party to Cotonou Agreement after Brexit. Assuming it does so, the UK will have to continue extending all its obligations under Cotonou to the EAC States, except to South Sudan.

It should be recalled that at the outset of the EU-EAC EPA negotiations, it was promised that as per the Lomé *acquis*, that no country will be worse off whether or not it signs an EPA.[209] The Cotonou Agreement 2000 Article 37(6) provided that "[i]n 2004, the Community will assess the situation of the non-LDC which, after consultations with the Community decide that they are not in a position to enter into EPAs and will examine alternative possibilities, in order to provide these countries with a new framework for trade which is equivalent to their existing situation and in conformity with WTO rules".[210] The Cotonou Agreement was revised in 2010. Article 2(2)(b) of the EU-EAC EPA states that the EPA aims to facilitate continuation of trade by the EAC Partner States under terms no less favourable than those under the Cotonou Agreement, consistent with Articles 34 and 35 of the Cotonou Agreement 2010.

For the UK to fulfil its commitments under the above provisions of the

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[207] Article 92, Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, 2000/483/EC, (OJ L 317, 15.12.2000, pp. 3-353); Successive amendments to Partnership agreement 2000/483/EC have been incorporated into the original text. (hereinafter "Cotonou Agreement").
[208] Article 91, Cotonou Agreement
[209] SEATINI, *The inherent dangers for the EAC signing the EAC-EU EPA*, August 15, 2016, https://www.tralac.org/images/docs/10269/seatini-statement-on-inherent-dangers-of-signing-the-eac-eu-epa-august-2016.pdf
[210] *Id.*

Cotonou Agreement, it must continue to trade with EAC members at a level no less favourable than that guaranteed to the EAC as of today. This means that the UK will have to continue to give preferential DFQF access to EAC exports at a level similar to what it guarantees now through the EU's GSP and EBA Schemes.

However, EAC Members must keep in mind that the Cotonou Agreement will expire in 2020. This means that once the UK formally exits the EU in March, 2019, even if it continues to be a Party under the Cotonou Agreement, it is obligated to continue preferential treatment only until 2020. Therefore, the EAC members cannot solely rely on the Cotonou Agreement but must proactively engage with the UK government for a new long-term arrangement, possibly a trade preference program or Free Trade Agreement, that secures their interests including regional integration and other development concerns.

5.3.2 Commitments under the UN Sustainable Development Goals and Millennium Development Goals

The UK would also likely seek to implement trade reform in a manner that does not undermine its support for the Sustainable Development Goals of the United Nations (SDGs) or the Millennium Development Goals (MDGs). Goal 17 of the SDGs, on trade relationships, enjoins the UK to "..significantly increase the exports of developing countries, in particular with a view to doubling the least developed countries' share of global exports by 2020"[211] and "to realize timely implementation of duty-free and quota-free market access on a lasting basis for all least developed countries, consistent with World Trade Organization decisions, including by ensuring that preferential rules of origin applicable to imports from least developed countries are transparent and simple, and contribute to facilitating market access.[212]

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[211]Goal 17.11, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the United Nations General Assembly on 25 September 2015, A/RES/70/1, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1
[212] Goal 17.12, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the United Nations General Assembly on September 25, 2015, A/RES/70/1, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1

Goal 8, Target 14 of the MDGs addresses the LDCs' needs, including tariff- and quota-free access for their exports, enhanced programs of debt relief for heavily indebted poor countries and cancellation of official bilateral debt, and more generous official development assistance for countries committed to poverty reduction.[213] Article 1 of the Cotonou Agreement, to which the UK is a party, reiterates the support of the parties for the Millennium Development Goals.

Reviving global trade flows while mitigating any consequences of Brexit for developing countries is an important issue to keep the SDG implementation process on track. In the above context, the UK and EU should work together constructively to mitigate post-Brexit risks and manage the related economic uncertainties. This should include continuity of the trade preferences that developing countries currently enjoy in Europe (including the UK).[214] A combined reading of SDG Goal 17, MDG Goal 8, and Article 1 of the Cotonou Agreement should provide a suitable legal basis for EAC countries to ask the UK to continue preferential treatment of EAC exports.

The European Commission's Joint Communication to the European Parliament and the Council on A Renewed Partnership with the ACP countries, after the expiry of the Cotonou Agreement in 2020, envisages that the new partnership be built on three pillars - Global Strategy for the EU's Foreign and Security Policy, Coherence with the European Consensus on Development and, most importantly, the UN 2030 Agenda which sets out the UN SDGs. If the EU is committed to achieving the sustainable development goals through its trading relations with the ACP countries post 2020, a post-Brexit UK would also be well advised to shape its trade policy in line with the UN SDGs because it will be in the UK's interest to not appear less committed to the SDGs than the EU and its Member States.

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[213] Goal 8, Target 14, United Nations Millennium Declaration, Resolution adopted the United Nations General Assembly on September 8, 2000, A/55/L.2, http://www.unmillenniumproject.org/goals/gti.htm#goal8

[214] Mohammad Razzaque, Brendan Vickers, Poorvi Goel, "Brexit and Commonwealth Trade, SDGs and a Lost Decade of Trade Gains :What Commonwealth Role Post-Brexit?", *Commonwealth Trade Policy Briefing*, November 2016, http://thecommonwealth.org/sites/default/files/news-items/documents/BrexitPolicyBrief18112016.PDF

5.4 Continuing Development Assistance

It is important to note that the UK has been a very active and committed member of the EU in the area of trade and development, in particular, in negotiations with African countries. Many of the development dimensions of the EPA negotiations, such as the links between poverty, trade and governance, were raised and pushed by the UK. [215] It is one of the few high-income countries that fulfils the UN target of providing 0.7% of gross national income as overseas development assistance. [216] Theresa May recently clarified that the commitment to earmark 0.7% of national income a year on foreign aid, "remains and will remain".[217]

With regard to development assistance, the EAC would wish to ensure that the quantum of funding received is at least as much as would have been disbursed in the absence of Brexit and that it is in line with ACP countries' priorities. For this purpose, it would be necessary that:

1. The EU does not change, because of Brexit, its development cooperation commitments to the EAC, particularly those under the EDF.
2. UK contributions intended for the EAC which were transmitted via the European Development budget and EDF will now be diverted principally to the EAC and its countries and regions, as opposed to going via other donor agencies.
3. The UK supports EAC interests in multilateral fora where policies relevant to development cooperation are debated and determined. These include the UN and its agencies, OECD, World Bank, G7, and

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[215] All Party Parliamentary Group for Africa, *The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 54.

[216] *Id.* pg.61

[217] Jessica Elgot and Peter Walker, *Foreign aid 0.7% pledge will remain, says Theresa May*, The Guardian, April 21, 2017, https://www.theguardian.com/politics/2017/apr/21/uk-aid-pledge-remains-and-will-remain-says-theresa-may

others. [218]

The EAC should push the UK to demonstrate the trade dimension of their development policy. One way the UK could reroute some of its ODA formerly channelled through the EU would be by supporting new aid for trade initiatives in collaboration with the new Department for International Trade. These could, for example, bolster trade negotiating capacity for African regional negotiations and also support trade and development initiatives that increase African governments' capacity to mobilize revenues from trade, and support entrepreneurship, investment and innovation that can help African traders move up the value chain. Re-channelled ODA could catalyse important regional priorities, including more intra-African trade, increased value added and technological upgrading, and stronger regional value chains. [219]

5.5 EAC's Post Brexit Strategy towards the UK

The UK's trading relations are now open to whoever is able to seize the initiative. Kenya has already sought a pact to guarantee Kenyan exports accessed the UK market on a duty-free quota-free basis after the country exits from the European Union. [220] However, instead of the EAC nations individually fighting for a share of Post Brexit UK's new trade offer to the African countries, the EAC should advance its' interests with the UK as a bloc. The head of the ACP group of nations has ruled out a free trade deal with the UK until at least six years after Brexit and expressed fear that the UK may be angling for "quasi-protectionist" bilateral deals with selected countries, after Brexit. Informal UK-ACP trade talks have already begun, with a focus on non-

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[218] Edwin Laurent, Lorand Bartels, Paul Goodison, Paula Hippolyte, Sindra Sharma, *After Brexit : Securing ACP Economic Interests*, The Ramphal Institute, London, 2017

[219] All Party Parliamentary Group for Africa, *The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p. 54.

[220] *President Uhuru Kenyatta seeks trade pact with UK after Brexit*, Daily Nation, May 11, 2017, http://www.nation.co.ke/news/Uhuru-seeks-trade-pact-with-UK-after-Brexit/1056-3922750-rmhcamz/

tariff barriers and regulatory harmonisation, and the Department of International Trade is considering a joint working group.[221]

As the post-Brexit landscape emerges, there is an opportunity – indeed an imperative – for the UK to deepen trade relations with Africa, with which Britain has had a strong and positive relationship. Across Africa, the UK is held in high esteem for its economic and cultural achievements, both of which have been cemented by longstanding family and investment ties between the UK and Africa.[222] A prerequisite of a successful Brexit strategy would include enhancing the effectiveness and coherence of the EAC's position. To this effect, EAC Members are recommended to undertake the following:

1. Arrive at a common position and strategy to be pursued, aimed at securing and advancing EAC interests post-Brexit. This should be used as a background brief by governments for engaging with the UK and as a means for instructing their representatives, especially in London and with EU officials in Brussels.
2. Ensure that this policy includes clarification from the UK government regarding the abovementioned issues, such as its continued aid and trade preference schemes.
3. Actively engage with and lobby the UK government not only in formal government-to-government meetings but also in other interactions with parliamentarians and officials.
4. Encourage and support a London/Brussels-based technical advisory group serviced by officials of supportive organizations and selected experts. This could provide ongoing technical and strategic advice to the EAC.
5. Actively engage with the media and supportive organizations to help ensure favourable public attitudes to safeguarding EAC interests, post-

[221] Arthur Nelson, *Tories' 'imperial vision' for post-Brexit trade branded disruptive and deluded*, The Guardian, April 28, 2017, https://www.theguardian.com/global-development/2017/apr/28/tories-imperial-vision-post-brexit-trade-deal-disruptive-deluded
[222] All Party Parliamentary Group for Africa*, The Future of Africa – UK Trade and Development Cooperation Relations in the transitional and Post-Brexit Period*, Royal African Society, February 2017, http://www.royalafricansociety.org/sites/default/files/files/APPG%20report%202017-%20Future%20of%20Africa%20UK%20Relations%20Post%20Brexit%20v2.pdf, p .65.

Brexit. Further, the EAC group would be well advised to coordinate with their ACP partner countries in the Pacific and Caribbean.[223]

[223] Edwin Laurent, Lorand Bartels, Paul Goodison, Paula Hippolyte, Sindra Sharma, *After Brexit : Securing ACP Economic Interests*, The Ramphal Institute, London, 2017

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