

# BlogDUE

## The Economic Partnership Agreement between the European Union and the Republic of Kenya: an example of “variable geometry” approach

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SUMMARY: 1. Introduction: preliminary remarks and aims of the contribution. – 2. Overview of EU trade agreements, with particular reference to Economic Partnership Agreements (EPAs). – 3. Trade relationships between the EU and Kenya and their mutual interest in concluding an EPA. – 4. The failure of the EU-EAC EPA, an example of “bloc-to-bloc” agreement. – 5. The “variable geometry” approach and the negotiations of the EU-Kenya EPA. – 6. The main provisions of the EU-Kenya EPA. – 7. Concluding remarks: the limits of “bloc-to-bloc” agreements and the (possible) advantages of the “variable geometry” approach.

1. On Monday 18 December 2023, an Economic Partnership Agreement (EPA) was signed between the European Union and the Republic of Kenya, in the framework of an official ceremony in Nairobi involving European Commission President Ursula von der Leyen and Kenyan President Dr. William Samoei Ruto. Such agreement was enthusiastically defined by the European Commission itself as “the most ambitious trade deal ever signed by the EU with a developing country when it comes to sustainability provisions such as climate and environmental protection, labour rights and gender equality” ([European Commission, Press Release – EU and Kenya sign ambitious Economic Partnership Agreement with strong sustainability provisions, 18 December 2023](#)).

Given the above, this contribution will try to investigate the most relevant aspects of the EU-Kenya EPA, which can be defined as a perfect example of “variable geometry” approach: this means that the perimeter of its application can change, since it is designed to accept other countries which want to subsequently join on the same terms, as we will see (on the “variable geometry” approach, see for instance: [P. LLOYD, The Variable Geometry Approach to International Economic Integration, in International Journal of Business and Development Studies, 2009, pp. 51-66](#)). For a better

understanding of the EPA, however, we must preliminarily recall some key elements of EU trade agreements, in general, and of EU trade relationships with Kenya, in particular. Then, we must retrace the key moments of the process that led to the signature of the agreement at stake: more specifically, the failure of a previous instrument, the EU-EAC EPA, an example of “bloc-to-bloc” agreement (i.e. between two regional organisations in their entirety); and the decision of the EU and Kenya to adopt a new model, the “variable geometry” approach, and to negotiate a different EPA between them. Only then will it be possible to analyse in detail the content of the agreement and some of its key provisions. Finally, some concluding considerations will be made.

2. As well known, while the earliest EU trade agreements were almost exclusively focused on the removal (or at least on the reduction) of tariff barriers to trade, the latest pacts are much more ambitious: the movement of goods and services among the signatories through tariff elimination is no longer the one and only *raison d'être* of the agreements; besides that, the aim of the EU is also to promote sustainable development, implementing values such as the protection of the environment (including the climate change policy) and of workers, intellectual property rights, inclusive growth, research and development and the protection of human rights (L. PASQUALI, *The EU-MERCOSUR Agreement as Source of Development of Specific Global Norms and Standards*, in C. GARCÍA SEGURA, J. IBÁÑEZ, P. PAREJA (dirs.), *Actores Regionales y Normas Globales: la Unión Europea y los BRICS como Actores Normativos*, Valencia, 2021, pp. 131-142, at p. 133; on the point see also: I. BARTHESAGHI, N. DE MARIA CALVELO, N. MELGAR ALASSIO, M. A. PEREIRA, *La nueva generación de acuerdos de la Unión Europea y sus implicancias en el sistema internacional*, in E. TREMOLADA ALVAREZ (dir.), *Gobernanza, cooperación internacional y valores democráticos comunes*, Bogotá, 2019, pp. 445-478).

To be even more specific, according to the European Commission, EU trade agreements can be divided into four categories: “first generation” agreements, negotiated before 2006, that focus on tariff elimination (as mentioned above); “second generation” agreements, which extend to new areas, including intellectual property rights, services and sustainable development; “Deep and Comprehensive Free Trade Areas” (DCFTAs) that create stronger economic links between the EU and its neighbouring countries; and “Economic Partnership Agreements” (EPAs) focusing on development needs of African, Caribbean and Pacific (ACP) regions ([European Commission, Press Release – EU trade agreements: delivering new opportunities in time of global economic uncertainties, 14 October 2019](#)).

Obviously, the agreement with Kenya falls in the fourth category, as part of the trade relationships of the EU with ACP countries, regulated at first by the 1975 Lomé Convention (“[ACP-EEC Convention of Lomé](#)”, signed on 28 February 1975), then by the 2000 Cotonou Agreement (“[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”), and finally by the Samoa Agreement (“Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of the African, Caribbean and Pacific States, of the other part”), that was signed on the 15<sup>th</sup> November 2023 and that is provisionally applicable since the 1<sup>st</sup> January 2024. While the Cotonou Agreement (according to its Article 34, para. 1) aimed to reduce and eventually eradicate poverty and contribute to the gradual integration of the ACP countries into the world economy (on the point see, for instance: F. MARTINES, *La Cooperazione tra l’Unione Europea e i Paesi ACP: il lascito dell’Accordo di Cotonou e le sfide per un (nuovo?) partenariato*, in A. DI STASI, G. FAUCEGLIA, G. MARTINO, P. PENNETTA (a cura di), *Liber Amicorum per Massimo Panebianco*, Napoli, 2020, pp. 383-403), the Samoa Agreement aims to strengthen the capacity of the EU and the ACP countries to address global challenges together and lays down common principles in the following six priority areas: democracy and human rights (with particular attention to gender equality); sustainable economic growth and development; climate change; human and social development; peace and security; migration and mobility (according to its Article 4, para. 3).

The EU-Kenya EPA, indeed, must be analysed in such framework: its aims are defined by Article 2, para. 2, as “consistent” with the objectives of both the Cotonou Agreement and what is referred to as “its successor agreement”, i.e. the Samoa Agreement. The two treaties are mentioned in several other provisions as well (such as Article 4, devoted to “Principles”). This allows us to better understand why the EU-Kenya EPA gives particular attention to matters such as sustainability, labour, gender equality, environment and the fight against climate change.

**3.** With regard to Kenya, it should be preliminarily noted that such country is the ninth largest economy on the African continent and is East Africa’s main economic hub. Its economy achieved broad-based growth, averaging 4.8% per year between 2015 and 2019, significantly reducing poverty, from 36.5% in 2005 to 27.2% in 2019. The economy experienced a reasonably strong recovery after the Covid-19 pandemic, albeit the country’s economy is currently affected by high inflation. GDP growth remained robust at 4.8% in 2022 ([World Bank, Kenya Overview, last updated: 19 September 2023](#)).

As far as trade relationships between the EU and Kenya are concerned, on the one hand, the latter considers the former its second largest trading partner: notably, the EU is Kenya’s first export destination, with 16% of its total exports in 2022, followed by Uganda (12%) and USA (8%); with respect to imports, instead, the EU is ranked in third place (10% of total Kenyan imports), behind China (20%) and India (11%). Total trade between the EU and Kenya reached €3.3 billion in 2022, with an increase of 27% compared to 2018.

On the other hand, in the EU’s view, Kenya represents a major ally in Africa, in the current economic and political context. According to the

European Commission, such country is “one of the most stable democracies in the continent, with a growing political role in the region and internationally” and can be defined as a key partner in Sub-Saharan Africa in order to “pursue an agenda of shared values and interests, promote peace and security, prosperity, and democratic stability in the region, as well as multilateralism” ([European Commission, \*The EU-Kenya agreement explained\*](#)).

Given the above, it becomes clear that the EU-Kenya EPA meets important commercial and strategic needs of both parties. In order to fully comprehend the relevance of the agreement, however, there are some antecedents that must be duly highlighted.

4. It cannot be omitted the fact that the EU-Kenya EPA was preceded by another EPA: the “bloc-to-bloc” EPA concluded on 16 October 2014 between the European Union and the East African Community (EAC). The latter is a regional (*rectius* sub-regional) international organisation founded in 1999 that includes countries located in the Eastern part of the African continent. At the time of the conclusion of the agreement, besides the Republic of Kenya, the other EAC Member States were the Republic of Burundi, the Republic of Rwanda, the Republic of Uganda and the United Republic of Tanzania; instead, the Republic of South Sudan, the Democratic Republic of Congo and the Federal Republic of Somalia joined later, respectively in 2016, 2022 and 2024.

The EU-EAC EPA comprised 147 articles, complemented by roughly 500 pages of annexes. After the “General Provisions” (Part I), it embodied provisions on trade in goods, customs cooperation and trade facilitation (Part II), fisheries (Part III), agriculture (Part IV) and economic and development cooperation (Part V). It also included “Institutional Provisions” (Part VI), articles on dispute avoidance and settlement (Part VII), “General Exceptions” (Part VIII) and “General and Final Provisions” (Part IX). The main attempt of the agreement was to ban unjustified or discriminatory restrictions on imports and exports ([European Commission, \*EU trade relations with the East African Community. Facts, figures and latest developments\*](#)).

To fully enter into force, the EU-EAC EPA had to be signed and ratified by each party: the EU, the EAC, and their respective Member States, according to their national ratification procedures. However, while all EU MSs, and the EU itself, signed the EU-EAC EPA, only Kenya and Rwanda have done so on the EAC side; moreover, Kenya is the only EAC state to have ratified the agreement. The latter, consequently, did not enter into force.

One of the main reasons behind the discomfort of the EAC countries was the fact that the agreement limited the imposition of new export taxes on raw materials and non-processed foods. Traditionally, EAC countries heavily rely on export taxes to curb the export of raw materials and import of processed goods, in order to foster the development of a domestic industry. To make up for losses of government revenue from the elimination or substantial reduction of tariffs, the EU agreed to transitionally provide financial resources to the Partner States (Art. 100, para. 1, let. c). Yet, these payments were unlikely to

cover the costs of the forgone industrialization incurred by exporting cheap raw materials rather than processing them within the region.

Moreover, there were also other motivations concerning the individual EAC countries. In particular, Burundi, which was sanctioned by the EU after political unrest when President Pierre Nkurunziza ran for a controversial third term in 2015, bound the signature of the EPA to the lifting of sanctions on behalf of the European Union. Tanzania feared that agricultural products like maize bran, cotton seed oil cake and shelled groundnuts, but also several non-agriculture products, would have been at risk of elimination from the domestic market. Uganda, instead, allegedly waited for the bloc to take a common stance.

In brief, it was clear that not all EAC Member States had the same level of incentive to join the EU-EAC EPA, and the disagreements among them resulted in a standstill ([A. MAURER, C. MAGIS, J. TAMMELLEO, \*Kenya and its role in intra-Africa regional trade. The prospects of the EU-Kenya EPA – Briefing requested by the INTA committee, Brussels, 13 July 2023\*, pp. 13-17](#)).

5. For the reasons mentioned above, however, Kenya was still interested in concluding an EPA with the EU and searched a solution to break the deadlock. Upon request of such country, therefore, EAC heads of States declared at their 21st ordinary summit in February 2021 that the EAC shall explore a different strategy: no longer a “bloc-to-bloc” agreement, but a “variable geometry” approach (on the point see: [E. PICHON, \*Economic Partnership Agreement with Kenya \(East African Community\) – Briefing by the European Parliamentary Research Service\*, February 2024](#)). The latter implied the conclusion of a different EPA with the EU, only involving Kenya, but open for other EAC countries to join later.

On 17 February 2022, the EU and Kenya signed a Joint Statement at the margins of the EU-AU Summit agreeing to advance negotiations on the EU-Kenya EPA. Such agreement was meant to reflect the previous EPA, but to be complemented by binding commitments on environmental protection, climate and labour right, in the form of Trade and Sustainable Development (TSD) provisions ([European Commission, News Article – EU and Kenya advance talks on interim Economic Partnership Agreement with sustainability provisions, 17 February 2022](#)), in line with the aims of the new Samoa agreement.

Negotiations were concluded on 24 May 2023 at technical level, and on 19 June 2023 at political level. On 12 December 2023, the Council adopted its Decision on the signature ([Council of the European Union, Press Release – The EU and Kenya sign a landmark Economic Partnership Agreement, 19 December 2023](#)). Finally, as anticipated, on 18 December 2023 the Economic Partnership Agreement between the European Union and the Republic of Kenya was signed. The EPA will enter into force after ratification by the parties according to their own internal legal procedures ([European Parliament, Legislative Train Schedule – Economic partnership agreement with Kenya, 20 February 2024](#)).

6. The content of the EU-Kenya EPA is broadly similar to that of the EU-EAC EPA. This is unsurprising: as stated in its preamble, the EU-Kenya EPA “aims to implement the provisions of the EU-EAC EPA”, given the failure of such agreement. As a result, also in this case, the text comprises 147 articles and, after the “General Provisions” (Part I), it embodies provisions on trade in goods, customs cooperation and trade facilitation (Part II), fisheries (Part III), agriculture (Part IV) and economic and development cooperation (Part V); once again, there are also “Institutional Provisions” (Part VI), articles on dispute avoidance and settlement (Part VII), “General Exceptions” (Part VIII) and “General and Final Provisions” (Part IX).

The main objective of the EPA is obviously to liberalise EU-Kenya trade. However, as in other EPAs, the agreement in question provides for an asymmetric removal of tariffs: on the one hand, the EU will fully liberalise access to its market immediately upon application of the EPA, and all goods from Kenya (except arms) will enter the EU market without tariffs or quotas; on the other hand, Kenya will open its market gradually to imports from the EU, benefitting from transitional periods (Article 27); in addition, Kenya will be able to exclude sensitive products from liberalisation (more specifically, Kenya decided to exclude from liberalisation various agricultural products, wines and spirits, chemicals, plastics, wood-based paper, textiles and clothing, footwear, ceramic products, glassware, articles of base metal and vehicles). Finally, Kenya may also benefit from other provisions that take into account its development needs such as special safeguards for agriculture, measures on food security and infant industry protection (Article 50) ([European Commission, \*The EU-Kenya agreement explained\*](#)).

With specific reference to disputes, Part VII of the EPA establishes efficient mechanisms. Its Title I is devoted to “Dispute Avoidance”, and provides for “Consultations” (Article 110) and “Mediation” (Article 111). Its Title II, instead, concerns “Dispute Settlement” and includes the establishment of an arbitration panel (Article 113) that adopts a ruling (Article 115); there is also the possibility of “Temporary Remedies in case of Non-Compliance”, such as compensation or retaliatory measures: in this regard, “the complaining party shall endeavour to select measures that least affects the attainment of the objectives of this Agreement and shall take into consideration their impact on the economy of the Party complained against”; moreover, the measures “shall be temporary and shall be applied only until any measure found to violate the provisions of this Agreement have been withdrawn or amended so as to bring it into conformity with those provisions or until the Parties have agreed to settle the dispute” (Article 117). It should be noted that the provisions of Part VII are also broadly similar to the ones included in the previous EU-EAC EPA. Moreover, similar dispute avoidance and settlement mechanisms exist also in other agreements between the EU and African countries: for example, in Part III of the EPA between the European Union and the Southern African Development Community (SADC) EPA Group (i.e., Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland; on the point see, for



instance: [European Commission, EPA SADC – Southern African Development Community](#)).

The text of the EPA is complemented by several annexes entitled as follows: “Customs duties on products originating in the EAC Partner State(s)” (Annex I); “Customs duties on products originating in the EU” (Annex II); “EPA Development Matrix” (Annex III); “Joint Declaration regarding countries which have established a Customs Union with the European Union” (Annex IV); “Trade and Sustainable Development” (Annex V); “Joint Declaration of the European Union and the Republic of Kenya on the Economic and Development Cooperation under this Agreement” (Annex VI); the agreement is also complemented by a specific Protocol on mutual administrative assistance in customs matters, and two Joint Statements on Rules of Origin and on Trade and Sustainable Development respectively.

Particular attention should be paid to Annex V on “Trade and Sustainable Development”, which is the reason why the European Commission defines the EU-Kenya EPA as “the most ambitious trade deal ever signed by the EU with a developing country when it comes to sustainability provisions such as climate and environmental protection, labour rights and gender equality”. Such Annex, indeed, represents an innovation of this agreement, since nothing similar was included in the EU-EAC EPA; furthermore, even if there are TSD provisions also in other agreements (for example, in Part I, Chapter II, of EPA between the EU and the SADC EPA Group), the ones at stake are undoubtedly the most complete and advanced.

Going into detail, Annex V prohibits parties to reduce labour and environmental standards to attract trade or investment (Article 2), and contains obligatory provisions on the implementation in the parties’ legal systems of multilateral labour standards and agreements (Article 3), on trade and gender equality (Article 4), on multilateral environmental governance and agreements (Article 5), on trade and climate change (Article 6), on trade and biological diversity (Article 7), on trade and forests (Article 8), on trade and sustainable management of marine biological resources and aquaculture (Article 9), on trade and investment supporting sustainable development (Article 10), on trade and responsible business conduct and supply chain management (Article 11). Among the obligations deriving from such provisions, it must be highlighted that, *inter alia*, the parties shall ratify and implement relevant multilateral international agreements concerning the fields at stake, such as the fundamental ILO Conventions (in the field of labour), the Convention on the Elimination of all Forms of Discrimination Against Women (in the field of gender equality) and the Paris agreement (in the field of climate change).

In the case of a breach of the obligations of Annex V by one of the parties, Article 17 on “Consultations and Mediation” states that both the articles of Part VII, Title I, of the EPA (i.e. 110 and 111), concerning “Dispute Avoidance”, shall apply. Article 18 of the Annex, instead, regards “Dispute Settlement” and establishes that several articles of Part VII, Title II, of the EPA shall apply; among such articles, however, there is no reference to Article 117 of the EPA, devoted to “Temporary Remedies in case of Non-

Compliance” (such as temporary compensation or retaliatory measures; on the point, see above). Therefore, as in many other EU trade agreements, in case TSD provisions are violated, not all the rules concerning regular dispute settlement are applicable: a feature that, according to some scholars, represents one of the main weaknesses of the provisions at stake (on the point see, for instance: M. BRONCKERS, G. GRUNI, *Taking the enforcement of labour standards in the EU’s free trade agreements seriously*, in *Common Market Law Review*, 2019, pp. 1591-1622).

Finally, it is also worth mentioning Article 144 of the EU-Kenya EPA: according to its para. 1, “This Agreement shall be open to accession by any State that is a contracting party to the Treaty for the Establishment of the East African Community [...]”. This means that, as anticipated, the other EAC countries, that currently do not have the same level of incentive of Kenya to conclude an agreement with the EU, are free to join later, in accordance with the “variable geometry” approach.

7. Given the above, it is now possible to make some concluding remarks. Undoubtedly, what has been illustrated shows certain limits of “bloc-to-bloc” agreements negotiated by the EU: when the States that are part of a region or a sub-region – such as East Africa – do not have the same level of incentive to join a treaty, also due to the disparities in the degrees of development among such countries, the result can be a stalemate in the process of conclusion of the agreement itself. All this at the expense of those parties that have true economic and political interests in sealing the deal.

The case of the EU-Kenya EPA also shows that a solution to the abovementioned criticisms can be represented by the “variable geometry” approach. The latter allows to negotiate the agreement only with the most motivated country (or countries) of the regional bloc, while the others are free to join later, when they are ready to do so. Following such strategy, it is also more likely for the agreement to achieve deeper levels of integration: this is demonstrated by the fact that the EU-Kenya EPA comprises, *inter alia*, “Trade and Sustainable Development” provisions, that were not included in the EU-EAC EPA and that bring consistency with the aims previously set out in the Cotonou Agreement and now embodied in the new Samoa Agreement, but also with the case law of the Court of Justice of the EU (on the point see, for instance: [C. BEAUCILLON, \*Opinion 2/15: Sustainable Is the New Trade. Rethinking Coherence for the New Common Commercial Policy\*, in \*European Papers\*, 2017, pp. 819-828](#)).

However, before reaching a final assessment on the point, it will be necessary to verify the success of the EU-Kenya EPA, and of the “variable geometry” approach, in the next future. In particular, it is essential to understand if such agreement, after its (likely but not certain) entry into force, will actually attract other EAC countries and promote the development of the whole bloc; or if, on the contrary, it will isolate Kenya from the rest of the other EAC Member States, increasing the abovementioned economic gap and interfering with the regional integration process of the organisation.



### **ABSTRACT (ITA)**

Il contributo prende in considerazione l’APE UE-Kenya, firmato il 18 dicembre 2023 e definito dalla Commissione europea come l’accordo commerciale “più ambizioso” tra l’UE e un paese in via di sviluppo sotto il profilo delle disposizioni sulla sostenibilità. L’articolo, preliminarmente, fornisce una panoramica degli accordi commerciali dell’Unione, con particolare riferimento agli APE, e delle relazioni commerciali tra l’UE e il Kenya, evidenziando il loro reciproco interesse alla conclusione di un APE. Poi, si focalizza sui momenti chiave del processo verso un accordo: più nello specifico, il fallimento di un precedente strumento, l’APE UE-EAC, un esempio di accordo “da blocco a blocco”; nonché la decisione di adottare un approccio a “geometria variabile”, negoziando un APE UE-Kenya aperto agli altri paesi dell’EAC che volessero aderire successivamente. A questo punto, il contributo analizza alcuni dei principali elementi dell’APE UE-Kenya: in particolare, l’eliminazione asimmetrica delle tariffe; i meccanismi di prevenzione e risoluzione delle controversie; e le disposizioni su “Commercio e sviluppo sostenibile”. Infine, sarà possibile svolgere alcune considerazioni conclusive.

### **ABSTRACT (ENG)**

The contribution takes into consideration the EU-Kenya EPA, signed on 18 December 2023 and defined by the European Commission as the “most ambitious” trade deal between the EU and a developing country when it comes to sustainability provisions. The article, preliminarily, gives an overview of EU trade agreements, with particular reference to EPAs, and of trade relationships between the EU and Kenya, highlighting their mutual interest in concluding an EPA. Then, it focuses on the key moments of the process leading to an agreement: more specifically, the failure of a previous instrument, the EU-EAC EPA, an example of “bloc-to-bloc” agreement; and the decision to adopt a “variable geometry” approach, negotiating an EU-Kenya EPA open for other EAC countries to join later. At that point, the contribution analyses some of the key elements of the EU-Kenya EPA: in particular, the asymmetric removal of tariffs; the dispute avoidance and settlement mechanisms; and the “Trade and Sustainable Development” provisions. Finally, some concluding considerations will be made.