

## **Evaluating The Kenya-United Kingdom Economic Partnership Agreement, 2020 and its Dispute Resolution Provisions**

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*This paper considers the Economic Partnership Agreement (EPA) between the United Kingdom and Kenya signed on 8<sup>th</sup> December 2020 and which was ratified by the Kenyan Parliament on 9<sup>th</sup> March 2021. The theory underlying the concept of the EPA is that they seek to create greater market access to both countries and are a source of much needed development for the developing such as Kenya. The research considers the nature, importance and historical foundation of EPAs and will address a number of issues particularly as they impact dispute avoidance and settlement which is the focus of this study.*

## **1. Introduction**

On 8<sup>th</sup> December 2020 the governments of the United Kingdom and the Republic of Kenya signed and established an economic partnership agreement (EPA)<sup>1</sup> designated as a treaty with investment provisions (TIP)<sup>2</sup> by the United Nations Conference on Trade and Development (UNCTAD). The EPA<sup>3</sup> provisionally came into force on 1<sup>st</sup> January 2021 pending full ratification procedures per the Explanatory Memorandum<sup>4</sup> and it has since been passed by

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<sup>1</sup> UK Department of International Trade, *UK and Kenya sign trade agreement* (2020) Available at <https://www.gov.uk/government/news/uk-and-kenya-sign-trade-agreement> Last accessed on 9 March 2021

<sup>2</sup> Investment Policy Hub, *Economic Partnership Agreement between the Republic of Kenya and the United Kingdom of Great Britain and Northern Ireland* (2021) UNCTAD. Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4940/kenya---united-kingdom-epa-2020-> Last accessed on 15 March 2021

<sup>3</sup> UK Parliament, *Economic Partnership Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Kenya, a Member of the East African Community, of the other part* Miscellaneous Series No.9 (2020) CP339 Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/945516/MS\\_9.2020\\_Economic\\_Partnership\\_Agreement\\_UK\\_Kenya\\_Member\\_of\\_East\\_Africa\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945516/MS_9.2020_Economic_Partnership_Agreement_UK_Kenya_Member_of_East_Africa_Community.pdf) Last accessed on 19 March 2021

<sup>4</sup> UK Foreign, Commonwealth & Development Office, *Explanatory Memorandum on the Economic Partnership Agreement between the Republic of Kenya, a Member of the East African Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (MS No.9/2020) Parliamentary Undersecretary of State, Department of International Trade. Available at <https://www.gov.uk/government/publications/economic-partnership-agreement-between-the-united-kingdom-of-great-britain-and-northern-ireland-of-the-one-part-and-the-republic-of-kenya-a-member> Last accessed 15 March 2021

both the UK and Kenyan Parliaments and now awaits the exchange of ratification documents.<sup>5</sup>

Both Trade Secretaries in the UK and Kenya have variously billed this EPA to be an outcome of the strategic partnership agreed between the Heads of Government of the two countries<sup>6</sup> and as an opportunity to reposition their economies onto a sustainable growth trajectory and otherwise expand their trading, investment, tourism and historical relationships.<sup>7</sup> The EPA covers trade in goods,<sup>8</sup> fisheries,<sup>9</sup> agriculture,<sup>10</sup> economic and development cooperation,<sup>11</sup> institutional provisions<sup>12</sup> and further sets out the dispute avoidance and settlement process.<sup>13</sup> It also features its general exceptions,<sup>14</sup> general and final provisions<sup>15</sup> as well as annexes and protocols<sup>16</sup> to the foregoing. In addition to this the EPA contains has a *rendezvous* clause making provision for further negotiations to be concluded within the next 5 years in respect of trade in services,<sup>17</sup> competition policy,<sup>18</sup> investment and private sector development,<sup>19</sup> trade environment and sustainable development,<sup>20</sup> intellectual property rights<sup>21</sup> and transparency in public procurement<sup>22</sup> as well

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<sup>5</sup> Kenya High Commission, *Kenya-UK Economic Partnership Agreement* (10 March 2021) Available at <https://www.kenyahighcom.org.uk/news/kenya-uk-economic-partnership-agreement> Last accessed on 15 March 2021

<sup>6</sup> Ministry of Industrialization, Trade and Enterprise Development, *Press Release by Hon. Betty Maina, CBS, Cabinet Secretary for Industrialization, Trade and Enterprise Development on Kenya-United Kingdom Trade Negotiations* (1 September 2020) Available at <https://www.industrialization.go.ke/index.php/kenya-uk-trade-and-economic-partnership-agreement> Last accessed on 16 March 2021

<sup>7</sup> Ministry of Industrialization, Trade and Enterprise Development *Ibid Supra* Note No.6

<sup>8</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(b)

<sup>9</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(c)

<sup>10</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(d)

<sup>11</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(e)

<sup>12</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(f)

<sup>13</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(g)

<sup>14</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(h)

<sup>15</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(i)

<sup>16</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 1(j)

<sup>17</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 3(a)

<sup>18</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 3(b)(i)

<sup>19</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 3(b)(ii)

<sup>20</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 3(b)(iii)

<sup>21</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 3(b)(iv)

<sup>22</sup> Kenya-UK EPA *Supra Ibid* Note No.4 – Article 3(b)(v)

as any other areas<sup>23</sup> that may emerge. The parties to the EPA are the United Kingdom of Great Britain and Northern Ireland and the Republic of Kenya.<sup>24</sup>

### **1.1 Understanding the Concept of the Economic Partnership Agreement: *What is an EPA?***

An EPA can be defined to be a development-oriented asymmetric agreement providing important advantages and safeguards to African, Caribbean and Pacific (ACP) countries and the European Union in order to foster their sustainable economic development, regional integration and integration into and within the world markets.<sup>25</sup> EPAs establish free-trade areas and/or preferential trade relationships with regional groupings and are touted to be an attempt to liberalise trade between economies with disparate levels of development. Under an EPA the EU or one regional block and now the United Kingdom, provides full duty free and quota free market access to EPA countries and/or regions and ACP countries/regions for their part commit to open at least 75% of their markets to their European counterparts.<sup>26</sup>

They are negotiated within the ambit of the Cotonou Partnership Agreement of 2000 made between ACP countries and the EU<sup>27</sup> and are subject to the Marrakesh Agreement that established the World Trade Organization (WTO).<sup>28</sup> An interesting feature of EPAs is that though they are negotiated by ACP countries within regional blocks the state parties execute and ratify them bilaterally and the signatories are bound bilaterally.<sup>29</sup>

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<sup>23</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 3(c)

<sup>24</sup> Kenya-UK EPA Supra Ibid Note No.4 – Preamble

<sup>25</sup> European Parliament, *An overview of the EU-ACP countries' economic partnership agreements Building a new trade relationship* (July 2018) European Parliamentary Research Service. Available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625102/EPRS\\_BRI\(2018\)625102\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625102/EPRS_BRI(2018)625102_EN.pdf) Last accessed on 17 March 2021

<sup>26</sup>European Centre for Development Policy Management, *Economic Partnership Agreements: Frequently Asked Questions* (2014) Available at <https://ecdpm.org/wp-content/uploads/ECDPM-17-10-14-EPA-QA.pdf> Last accessed on 19 March 2021

<sup>27</sup> EU-ACP Ibid Supra Note No.26

<sup>28</sup> WTO Publications, *The WTO Agreements Series 1-Agreement Establishing the WTO* (May 1998) Available at [https://www.wto.org/english/res\\_e/booksp\\_e/agrmntseries1\\_wto\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/agrmntseries1_wto_e.pdf) Last accessed on 15 March 2021

<sup>29</sup> James Thuo Gathii, *The Cotonou Agreement and Economic Partnership Agreements – Chapter 19 of Realizing the Right to Development: Essays in Commemoration of 25*

Conceptually EPAs are based on 4 basic principles, to wit (1) Partnership meaning that they involve rights and obligations of both sides; (2) Regional integration to the extent that they are intended to stimulate integration of ACP countries into the global economy; (3) Development for contracting states; and (4) they link ACP countries with WTO.<sup>30</sup>

## 1.2 Context of Kenya-UK Trade Negotiations:

The EPA was necessitated by the UK's departure from the European Union and it has its roots in the European Union Economic Partnership Agreement with the East African Community<sup>31</sup> (the 'EU-EAC EPA').<sup>32</sup> It is therefore important to note that the UK government has indicated that it considers this EPA as a first step towards a regional agreement with the East African Community.<sup>33</sup> As Kenya is classified as lower middle-income contrary<sup>34</sup> she does not enjoy preferential treatment other than as previously set out in the EU

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*Years of the United Nations Declaration on the Right to Development* (2013) United Nations Office of the High Commissioner for Human Rights Pg.262 Available at <https://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIIChapter19.pdf> Last accessed on 17 March 2021

<sup>30</sup> Salif KONÉ, *Economic Partnership Agreement between West Africa and the European Union in the Context of the World Trade Organization(WTO) and the Regional Integration Process* (2010) *Journal of Economic Integration*, Vol. 25, No. 1 (March 2010), pp. 104-128 at pg.108 Available at <http://www.jstor.org/stable/23000967?origin=JSTOR-pdf> Last accessed on 17 March 2021

<sup>31</sup> European Union, *Economic Partnership Agreement between the East African Partner States and the European Union and its Partner States* (2014) Available at [https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153845.pdf](https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.pdf) Last accessed on 19 March 2021

<sup>32</sup> International Agreements Committee, *Scrutiny of international agreements: Economic Partnership Agreement with Kenya, Trade in Goods Agreement with Norway and Iceland, and Free Trade Agreement with Vietnam* (3 February 2021) House of Lords. Available at <https://www.publicinformationonline.com/shop/217994> Last accessed on 15 March 2021

<sup>33</sup> House of Lords Library, *UK-Kenya Economic Partnership Agreement* (26 February 2021) UK Parliament. Available at <https://lordslibrary.parliament.uk/uk-kenya-economic-partnership-agreement/> Last accessed on 15 March 2021

<sup>34</sup> United Nations, *World Economic Situation and Prospects* (2020) Available at [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020\\_Annex.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf) Last accessed on 17 March 2021

ACP EPA which she has signed<sup>35</sup> and particularly in the face of Britain's exit from the EU which has meant that the UK requires to negotiate new trade agreements.<sup>36</sup>

Per data for 2018, at least 6.6% of Kenya's total exports are destined for the UK making it its fifth largest export market after Uganda (10.1%), Pakistan (9.7%), United States of America (7.7%) and Netherlands (7.6%).<sup>37</sup> The Observatory of Economic Complexity for its part captured the country's top 5 export data for 2019 in monetary terms as follows maintaining the same export destination countries to be (1) Uganda [\$619m]; (2) Pakistan [\$440m]; (3) USA[\$546m]; (4) Netherlands [\$487m]; and (5) UK [\$387m].<sup>38</sup> From the British perspective, Kenya is her 73<sup>rd</sup> largest trading partner and its total trade and services in 2019 amounted to £1.4billion.<sup>39</sup> The top goods imported by

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<sup>35</sup> UK Parliament, *Scrutiny of International Agreements: Economic Partnership Agreement with Kenya, Trade in Goods Agreement with Norway and Iceland, and Free Trade Agreement with Vietnam* (2021) Available at <https://publications.parliament.uk/pa/ld5801/ldselect/ldintagr/221/22104.htm> Last accessed on 19 March 2021

<sup>36</sup> Kimberly Amadeo and Janet Berry-Johnson, *What Was Brexit, and How Did It Impact the UK, EU, and the US?* (12 March 2021) The Balance. Available at <https://www.thebalance.com/brexit-consequences-4062999> Last accessed on 19 March 2021

<sup>37</sup> Daniel Workman, *Kenya's Top 10 Exports* (2021) World's Top Exports – WordPress. Available at <http://www.worldstopexports.com/kenyas-top-10-exports/> Last accessed on 16 March 2021

<sup>38</sup> OEC, *Kenya* (2021) Datawheel. Available at <https://oec.world/en/profile/country/ken> Last accessed on 17 March 2021.

Per its website the Observatory of Economic Complexity (OEC) is an online data visualization and distribution platform focused on the geography and dynamics of economic activities which integrates and distributes data from a variety of sources to empower analysts in the private sector, public sector, and academia. The OEC is currently designed and developed by Datawheel, but it began as a research project at MIT's Collective Learning group (former Macro Connections Group). The OEC was the Master Thesis of Alex Simoes (2012), directed by Professor Cesar A. Hidalgo. In 2012 the OEC was spun out of MIT as an open source project. The OEC was refined throughout the years, expanding its technical and analytical capacities.

<sup>39</sup> UK Department of International Trade, *Continuing the United Kingdom's Trade Relationship with Kenya: Economic Partnership Agreement between the Republic of Kenya, a Member of the East African Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part* (2020) Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachm>

UK from Kenya comprising coffee, tea and spices (£121 million, mostly black tea), edible vegetables (£79 million, mostly green beans) and live trees and plants (£54 million, mostly cut flowers).<sup>40</sup> The exports to Kenya were vehicles other than railway or tramway stock (£67 million), machinery and mechanical appliances (£63 million) and pharmaceutical products (£27 million)<sup>41</sup>

## **2. The Metanarrative of Development and an Idealized Historical Background of EPAS:**

At the heart of the metanarrative of the development paradigm is that the third world, less developed countries, developing nations and other emerging markets should follow in the footsteps of the West the ultimate solution being economic growth and development .<sup>42</sup> Rostow's blueprint for its part prescribing the 5 phases of (1) traditional society; (2) modern science leading to increased production in agriculture and industry; (3) take-off where new development trumps obstacles and creates self-generating growth; (4) refined and complex processing; and (5) high mass consumption being the overriding objective of a somewhat linear conception of growth.<sup>43</sup> The development paradigm has in some instances created challenges in the past such as those that arose from policies such as the Bretton Woods structural adjustment policies leading to a new international world order and eventually culminating in the United Nations Declaration of the Right to Development (UNDRD).<sup>44</sup>

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ent\_data/file/946086/ccs1220728208-kenya-trade-parl-report-accessible.pdf Last accessed on 17 March 2021

<sup>40</sup> UK Department of International Trade Supra Ibid Note No.40

<sup>41</sup> UK Department of International Trade Supra Ibid Note No.40

<sup>42</sup> Ruth E. Gordon, *Deconstructing Development* (2004) 22 Wis. Int'l. L. J. 1 - Jon H. Sylvester Golden Gate University School of Law. Available at <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1192&context=pubs> Last accessed on 16 March 2021

<sup>43</sup> W. W. Rostow, *The Stages of Economic Growth*, The Economic History Review, New Series, Vol. 12, No. 1 (1959), pp. 1-16 Published by: Wiley on behalf of the Economic History Society. Available at <https://www.jstor.org/stable/2591077> Last accessed on 16 March 2021

<sup>44</sup> UN General Assembly, *Declaration on the Right to Development: resolution / adopted by the General Assembly*, 4 December 1986, A/RES/41/128. Available at: <https://www.refworld.org/docid/3b00f22544.html> Last accessed 16 March 2021]

The UNDRD had the effect of expanding the definition of development to include technology, human rights, participation, equal opportunity, accountability and differential treatment for developing countries.<sup>45</sup>

In 1973 the United Kingdom joined the then European Economic Community (precursor to the European Community and then the European Union) and mid-1973 the EC began negotiations with the Commonwealth countries of Africa, Caribbean and Pacific (ACP) and the Yaoundé Association comprising 18 former French, Belgian and Italian colonies for the treaty that would be signed in 1975 and which came to be popularly known as the Lomé Convention.<sup>46</sup> The Lomé Convention is touted to be one of the exceptional circumstances in which the ACP states negotiated from something approaching a position of equality the key example being that of the inclusion of the System for the Stabilisation of Export Earnings (STABEX) which provided a guarantee of finance from the European Development Fund (EDF) to protect the fluctuating revenues that resulted from the export of a number of agricultural products that were not covered by the Common Agricultural Policy.<sup>47</sup> However, during the late 1990s, the World Trade Organization (WTO) ruled that the Lomé convention was in conflict with global trade rules, because it discriminated against other developing countries in Asia and Latin America creating the necessity and basis for the Cotonou Agreement of 2000 which had the effect of stipulating that the EU shall establish full-fledged trade agreements with groups of African countries.<sup>48</sup>

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<sup>45</sup> Ruth E. Gordon Supra Ibid Note No.14 pg.43

<sup>46</sup> Vincent A. Mahler, *Britain, the European Community, and the Developing Commonwealth: Dependence, Interdependence, and the Political Economy of Sugar* International Organization, vol. 35, no. 3, 1981, pp. 467–492. JSTOR. Available at <https://www.jstor.org/stable/2706432> Last accessed on 16 March 2021

<sup>47</sup> Stephen R. Hurt, *Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention* (2003) *Third World Quarterly*, Feb., 2003, Vol. 24, No. 1 (Feb., 2003), pp. 161-176 Published by: Taylor & Francis, Ltd. Available at <https://www.jstor.org/stable/3993636> Last accessed on 16 March 2021

<sup>48</sup> Sebastian Krapohl & Sophie Van Huut *A missed opportunity for regionalism: the disparate behaviour of African countries in the EPA-negotiations with the EU* (2020) *Journal of European Integration*, 42:4, 565-582, Available at <https://doi.org/10.1080/07036337.2019.1666117> Last accessed on 16 March 2021

Article 2 of the Cotonou Agreement laid out the four fundamental principles of the new EU-ACP relationship to be (1) the emphasis of equality between the two parties and the responsibility and ownership by each ACP state of its own development.; (2) the inclusion of non-state actors within the process; (3) the importance of political dialogue within the overall framework of relations between the EU and ACP states; and (4) the need for differentiation of the relationship between the EU and ACP group arising from the evolving diversity of levels of development among these states. It is also important to note the special emphasis placed on fostering the growth of regional development strategies.<sup>49</sup>

An interesting feature that has emerged following the Cotonou Agreements is that the EU's external trade policy differentiates between trade partners with different economic potentials and different trade patterns. This means that African countries face very different trade regimes when exporting to the EU (1) such that least developed countries (LDCs) enjoy free access to the European market under the Everything-but-Arms (EBA) initiative; (2) oil exports from some ACP-countries do not face any barriers when entering the European market; and (3) the Trade Development and Cooperation Agreement (TDCA) granted South Africa access to the European market until recently. The respective regimes in terms of increasing preferential access are (1) the EU Generalized System of Preferences (GSP); (2) the GSP plus sub-regime; and (3) Everything But Arms (EBA) sub-regime where LDCs are granted duty-free quota-free (DFQF) access to the EU.<sup>50</sup> These different trade regimes constitute extra-regional economic privileges for the respective African countries.<sup>51</sup> Accordingly, the size of the economy, the value of intra- and extra-regional trade, together with the privileged status in extra-regional markets determine the interest of African states in negotiating EPAs.<sup>52</sup> Further, a large number of LDCs (26 out of 50) that enjoy DFQF market access under the EBA initiative since 2002, have opted not to enter into any EPAs reflecting their

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<sup>49</sup> Stephen R. Hurt Supra Ibid Note No.48

<sup>50</sup> Jaime de Melo and Julie Regolo, *The African Economic Partnership Agreements with the EU: Reflections inspired by the case of the East African Community*, Science Direct Journal of African Trade 1(2014) 15 - 24

<sup>51</sup> Sebastian Krapohl & Sophie Van Huut Supra Ibid Note No.49

<sup>52</sup> Sebastian Krapohl & Sophie Van Huut Supra Ibid Note No.49

desire to keep the status quo thereby avoiding the bilateral liberalization of their domestic trade.<sup>53</sup>

### **3. The Pre-Brexit Bilateral Relationship Between The UK and Kenya**

It is impossible to consider any historical linkages between Kenya and the United Kingdom without recalling that Kenya was a colony of the Britain upto the time she attained independence in 1963. At the onset of independence Kenya adopted a policy of foreign investment attraction<sup>54</sup> and this was enshrined in the Foreign Investment Protection Act, 1964<sup>55</sup> which to-date outlines the basic foreign investment protections that the country gives.<sup>56</sup> Officially the country pursued a foreign policy of non-alignment but practically engaged in quiet diplomacy all aimed at enabling the then fledgling country participate in international politics without losing its identity.<sup>57</sup>

British foreign policy for its part can be glenned from Winston Churchills categorization to comprise 3 interlinked circles, the empire-Commonwealth, the American special relationship and Europe which according to him “the two beyond the empire being more significant”<sup>58</sup> Be that as it may and notwithstanding the fact that the balance of trade remains in Britain’s favour, Kenya’s successive regimes since independence have maintained strong political and economic ties with the UK and UK remains a leading destination

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<sup>53</sup> Jaime de Melo and Julie Regolo Supra Ibid Note No.51

<sup>54</sup> Phyllis W. Waruhiu, *Kenya’s Bilateral Investment Treaties: Rethinking the Vaguely Drafted Substantive Provisions* (2019) University of Nairobi School of Law pg.17 Available at [http://erepository.uonbi.ac.ke/bitstream/handle/11295/106711/Waruhiu\\_Kenya%E2%80%99s%20Bilateral%20Investment%20Treaties%20Rethinking%20the%20Vaguely%20Drafted%20Substantive%20Provisions.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/106711/Waruhiu_Kenya%E2%80%99s%20Bilateral%20Investment%20Treaties%20Rethinking%20the%20Vaguely%20Drafted%20Substantive%20Provisions.pdf?sequence=1&isAllowed=y) Last Accessed on 15 March 2021

<sup>55</sup> Act No.35 of 1964

<sup>56</sup> The Act was last amended as Act No.8 of 2009

<sup>57</sup> Kiganka Sheila Mwende, *Critical Analysis of Bilateral Relations Between Kenya and Britain from 1963 to 2017* (2018) University of Nairobi Institute of Diplomacy and International Studies pg.33 Available at [http://erepository.uonbi.ac.ke/bitstream/handle/11295/105076/Kiganka\\_Critical%20Analysis%20Of%20Bilateral%20Relations%20Between%20Kenya%20And%20Britain%20From%201963%20To%202017.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/105076/Kiganka_Critical%20Analysis%20Of%20Bilateral%20Relations%20Between%20Kenya%20And%20Britain%20From%201963%20To%202017.pdf?sequence=1) Last accessed on 15 March 2021

<sup>58</sup> Kiganka Sheila Mwende, Supra Ibid Note No.58. pg.57

for Kenyan exports.<sup>59</sup> It is worth noting though that the *Kibaki regime* adopted a dramatic departure from the established norm by pursuing an economic diplomacy approach which expanded economic ties with the Far East. Nevertheless, in real terms Kenya still maintains robust economic ties with UK<sup>60</sup> and Kenya and UK did enter a bilateral agreement in 1999<sup>61</sup> which is currently in force.

#### **4. Regional Economic Communities and Groupings Currently Affecting Kenya**

Regional Economic Communities (RECs) in Africa include the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC).<sup>62</sup> Kenya belongs to the EAC alongside Uganda, Tanzania, Burundi and Rwanda.<sup>63</sup> In addition to this Kenya is a member of at least 3 other regional economic integration groupings such as the Common Market for Eastern and Southern Africa (COMESA), the Inter-Governmental Authority on Development (IGAD) and the Indian Ocean Commission (IOC). More recently together with 54 African nations she also ascended to the membership of the African Continental Free Trade Area (AfCFTA)<sup>64</sup> which came into force on 1st January 2021.<sup>65</sup> The multiplicity of RECs and regional integration groupings creates a complex dynamic when it comes to negotiating EPAs with

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<sup>59</sup> Kiganka Sheila Mwende Supra Ibid Note No.58. pg.35

<sup>60</sup> Kiganka Sheila Mwende Supra Ibid Note No.58.pg.35

<sup>61</sup> UNCTAD, *UK - Kenya Agreement for the Promotion and Protection of Investments* (1999) Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1795/download> Last accessed on 15 March 2021

<sup>62</sup> European Centre for Development Policy Management, *Overview of the regional EPA negotiations ESA-EU Economic Partnership Agreement* (November 2006) In Brief No.14E

<sup>63</sup> East African Community, *Treaty for the Establishment of the East African Community* (2006) Available at <https://www.eacj.org/wp-content/uploads/2012/08/EACJ-Treaty.pdf> Last accessed on 16 March 2021

<sup>64</sup> African Union, *Agreement Establishing the African Continental Free Trade Area* (2018) Available at [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) Last accessed on 16 March 2021

<sup>65</sup> Franck Kuwonu, *Africa's free trade area opens for business* (Jan 2021) Africa Renewal. Available at <https://www.un.org/africarenewal/magazine/january-2021/afcfta-africa-now-open-business> Last accessed on 16 March 2021



comprehensive and reassuring to Parties that the mechanisms provide legal certainty, clarity through interpretation of provisions, and security in protecting rights and enforcing obligations.<sup>69</sup>

The UK-Kenya EPA is a framework agreement modelled substantially along the lines of the EU EAC EPA<sup>70</sup> and this model in turn is almost a replica of other EU ACP EPAs and free trade agreements. Similar to other economic partnership agreements around the world this EPA is framed as a stand-alone, self-contained agreement that is neither above nor below in the order of precedence among international economic and development cooperation laws or regulations.<sup>71</sup> Article 128(1)(d)<sup>72</sup> accordingly provides that nothing in the Agreement shall be construed to prevent the adoption or application by either Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement.

### **5.1 Dispute Avoidance and Settlement Provisions:**

The EPA's dispute avoidance and settlement provisions relating to interpretation and application of the EPA are found at Part VII which comprises Articles 109 to 127 and the main mechanisms provided for are a continuum ranging from negotiations to formal adjudication. It follows the generic procedural and institutional which are in a three-stage framework that maximizes Party autonomy, by attempting dispute resolution first through consultations (Party-Party negotiation), then through mediation (Parties discuss dispute with mediators) and, finally, through binding arbitration (Parties agree to abide by a panel's final resolution).<sup>73</sup> The key aspects to consider include the bases of standing and jurisdiction, standards of pleading,

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*Trade Agreement* (2002) 3 J World Investment 739 Pg.750 Available at Heinonline. Last accessed on 19 March 2021

<sup>69</sup> Doris Folasade Akinyooye, *Africa - EU Trade Relations: Legal Analysis of the Dispute Settlement Mechanisms under the West Africa - EU Economic Partnership Agreement* (2020) 2020 ELTE LJ 125. pg.137. Available at Heinonline. Last accessed on 19 March 2021

<sup>70</sup> UK Parliament Supra Ibid Note No.17

<sup>71</sup> Doris Folasade Aknyooye Supra Ibid Note No.70 pg.139

<sup>72</sup> Kenya-UK EPA Supra Ibid Note No.4

<sup>73</sup> Joel Davidow and Joseph Whitlock, *General Dispute Resolution Provisions of the Japan-Singapore Economic Partnership Agreement and the North American Free Trade Agreement* (2002) 3 J World Investment 739 pg.752 Available on Heinonline Last accessed on 19 March 2021

selection and qualification of mediators or arbitrators, availability of review of initial determinations and remedial procedures to enforce binding decisions. A striking feature is the increased institutionalization as the mechanisms veer into arbitration.<sup>74</sup>

### **5.1.1 Dispute Avoidance:**

The Committee of Senior Officials is required to assist the EPA Council and in the area of trade it shall be responsible for undertaking action to avoid disputes and resolve disputes that may arise regarding the interpretation or application of the Agreement<sup>75</sup> in accordance with the provisions of Title I of Part VII. Part VII for its part applies to any dispute concerning the interpretation and application of the provisions of this Agreement, unless otherwise emphasizing the objective to avoid and settle disputes in good faith.<sup>76</sup>

### **5.2 Consultations:**

There are various provisions for consultation throughout the EPA but the general provisions for Consultations are found at Article 110 which requires the parties to enter into consultations and endeavour to resolve any dispute in good faith and with the aim of reaching a mutually agreed solution. Consultations within the WTO dispute settlement framework serves 2 conflicting roles, the first being a mechanism for bilateral settlement process and the second being a mandatory pre-litigation procedure.<sup>77</sup>

Under the EPA Consultations are initiated via a written request copied to the Committee of Senior Officials<sup>78</sup> setting out the issue and the provisions of the EPA that have not been complied with and the Consultations shall be held in the jurisdiction of the party complained against.<sup>79</sup> This Consultation meeting shall be held within 20 days of the date of receipt of the request and they require to be completed within 60 days also of the date of receipt of the written

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<sup>74</sup> Joel Davidow and Joseph Whitlock Supra Ibid No.75 pg.753

<sup>75</sup> Article 106(5)(d)(ii)

<sup>76</sup> Article 109 Kenya UK EPA

<sup>77</sup> Dukgeun Ahn, Jihong Lee & Jee-Hyeong Park, *Understanding Non-Litigated Disputes in the WTO Dispute Settlement System* (2013) 47 J World Trade 985 pg.989 Available on Heinonline. Last accessed on 19 March 2021

<sup>78</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(2)

<sup>79</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(3)

request. The parties are however at liberty to continue with the consultations and all information disclosed during the consultations remains confidential.<sup>80</sup>

### **5.2.1 Urgent Consultations:**

Urgent consultations are defined to include those related to perishable or seasonal goods are to be held as soon as practicable and in any event within 15 days of the date of receipt of the written request and require to be concluded within 30 days.<sup>81</sup>

### **5.2.2 Special Consultations:**

Provisions are further made for consultations in special circumstances such as (1) where there has been a failure of administrative cooperation to establish proof of origin based on objective evidence and/or proof of fraud;<sup>82</sup> and (2) where balance of payments difficulties arise in which case the dispute is referred to the EPA Council.<sup>83</sup>

### **5.2.3 Collapse of Consultations:**

Where the consultations are not fruitful with a mutually agreed solution being arrived at in general and/or urgent consultations either party may invoke settlement of the dispute by way of arbitration<sup>84</sup> or in the case of special consultations during an impasse in establishing proof of origin of a certain category of product a temporary suspension of not more than 6 months (renewable) may be imposed.<sup>85</sup> The parties may however refer the subject of consultation to Mediation by mutual agreement.<sup>86</sup>

### **5.2.4 Critique of the Consultations Provisions in the EPA:**

The WTO framework which has been replicated in the EPA has been critiqued on the grounds that there is no provision for withdrawal of a consultation once the same has been opened. Thus, unless the Consultation is settled or otherwise referred to mediation or arbitration the same remains technically open even

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<sup>80</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article Nos.110(3)

<sup>81</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(4)

<sup>82</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.16

<sup>83</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.131

<sup>84</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.110(5)

<sup>85</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.16(5)(d)

<sup>86</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article No.111(1)

where the state party abandons it midway.<sup>87</sup> In addition to this another legal challenge to settlement through Consultation is the lack of an enforcement procedure.<sup>88</sup>

### **5.3 Mediation:**

Mediation is provided for under Article 111<sup>89</sup> and it is a non-mandatory step therefore either party made proceed directly to arbitration without taking recourse in mediation.<sup>90</sup> The pleadings outlined as terms of reference for mediation shall be the matter referred to in the request for consultations.<sup>91</sup>

#### **5.3.1 Appointment of Mediator:**

The parties are required to agree upon a mediator within 15 days of the date of the agreement to request mediation in default of which the Chairperson of the Committee of Senior Officials or their delegate shall select a mediator within 25 days of the date of submission of agreement to request for mediation<sup>92</sup> from the pool of Arbitrators maintained pursuant to Article 125<sup>93</sup> provided that the mediator selected is not nationals of either of the disputing parties.<sup>94</sup>

#### **5.3.2 Mediation Process:**

The mediator is required to convene the parties within 30 days of being appointed<sup>95</sup> and s/he should receive the submissions from each Party at least 15 days before the meeting.<sup>96</sup> The mediator is required to notify a non-binding opinion not later than 45 days from the date of appointment which may include a recommendation on how to resolve the dispute consistent with the EPA.<sup>97</sup> The parties and the mediator are at liberty to adjust the time limits outlined in

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<sup>87</sup> Dukgeun Ahn, Jihong Lee & Jee-Hyeong Park Ibid Supra Note No.77 pg.992

<sup>88</sup> Dukgeun Ahn, Jihong Lee & Jee-Hyeong Park Ibid Supra Note No.77 pg.993

<sup>89</sup> Kenya-UK EPA Supra Ibid Note No.4

<sup>90</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(2)

<sup>91</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(1)

<sup>92</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)

<sup>93</sup> Kenya-UK EPA Supra Ibid Note No.4

<sup>94</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)

<sup>95</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)

<sup>96</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(3)

<sup>97</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(4)

Article 111 given any complexities that may arise and/or difficulties that may be experienced.<sup>98</sup> All mediation proceedings shall remain confidential.<sup>99</sup>

It has been said that mediation occurs in a situation of a mutually hurting stalemate and generally where both parties have equal bargaining power.<sup>100</sup> A mutually hurting stalemate is present when both parties perceive of unilateral victory as unattainable and the cost of further loss or damage is greater than the expected gains from such a strategy. Both parties then wish to see a settlement as they, although they are in conflict, nevertheless share a few common interests.<sup>101</sup>

### **5.3.4 Critique of the Mediation Provisions in the EPA:**

The EPA provides for mediation to be carried out from the List of Arbitrators and not mediators and it is not clear what, if any qualifications as mediators will be required of them. In addition to this, the colonial heritage as well as the current trade imbalance and disparity in the economic classification of the parties to the EPA seem indicative that changes of mediation being taken up herein may be significantly diminished.

### **5.4 Arbitration:**

Where consultation fails the complaining party is at liberty to invoke arbitration proceedings<sup>102</sup> which must be initiated by way of a notice in writing addressed to the Committee of Senior Officials and which notice requires to outline the specific measures at issue and how such measures constitute a breach of the provisions of the EPA.<sup>103</sup> Within 10 days of submission of the notice to the Committee the parties may consult and agree on the arbitration panel<sup>104</sup> of 3 arbitrators.<sup>105</sup>

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<sup>98</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(5)

<sup>99</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(6)

<sup>100</sup> Johan Hellman, *The Occurrence of Mediation: A Critical Evaluation of the Current Debate* (December 2012) *International Studies Review*, Vol. 14, No. 4, Published by: Wiley on behalf of The International Studies Association  
Pg.593 Available at <https://www.jstor.org/stable/41804156> Last accessed on 19 March 2021

<sup>101</sup> Johan Hellman Supra Ibid Note No.100

<sup>102</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 112(1)

<sup>103</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 112(2)

<sup>104</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 113(2)

<sup>105</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 111(1)

#### **5.4.1 Appointment of Arbitration Panel:**

In the absence of consensus on the composition within the provided timeframe each party will select one arbitrator from the list of arbitrators established per Article 125 within 5 days and in the event of any party defaulting the Chairperson of the Committee of Senior Officials (or his/her delegate) will appoint a maximum of 2 arbitrators.<sup>106</sup> The 2 arbitrators will then appoint a third arbitrator from the EPA List of Arbitrators who will serve as Chairperson of the panel.<sup>107</sup> Where the 2 arbitrators default then either party may ask the Chairperson of the Committee of Senior Officials to select a chairperson by lot within 5 days.<sup>108</sup> The panel of arbitrators will be established when all 3 have been selected and they have accepted their appointment.<sup>109</sup>

#### **5.4.2 Powers of the Arbitration Panel:**

The panel may obtain information and technical advice they deem necessary from the parties, expert witnesses or of its own initiative and this may even include admitting amicus curiae provided that all sources of information are disclosed to the parties and that they have had an opportunity to submit comments on the same.<sup>110</sup> Though the parties are encouraged to agree upon a common working language the written and oral submissions of the parties shall be in any official language of the parties provided that any translation costs will be met by the party that insists on a language that is not shared.<sup>111</sup>

#### **5.4.3 Rules of Interpretation:**

The arbitration panel shall interpret the terms of the EPA in accordance with customary rules of interpretation of public international law, including those codified by the Vienna Convention on the Law of Treaties<sup>112</sup> provided that the interpretations and rulings of the panel shall not add to or diminish the rights and obligations provided for in the EPA.<sup>113</sup>

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<sup>106</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 113(3)

<sup>107</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 113(4)

<sup>108</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 113(4)

<sup>109</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 113(5)

<sup>110</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 121

<sup>111</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 122

<sup>112</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 123(1)

<sup>113</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 123(2)

#### **5.4.4 Interim Report & Final Arbitration Ruling:**

The arbitration panel shall make every effort to render decisions by consensus and where this is not possible a majority vote shall be taken.<sup>114</sup> All decisions require to set out the findings of fact, the applicability of the relevant provisions of the EPA and the reasoning behind any findings, recommendations and conclusions.<sup>115</sup> The Committee of Senior Officials shall make all rulings publicly available and the arbitration panel ruling shall be final and binding on the parties.<sup>116</sup>

The panel is required to issue an interim report summarising the descriptive section and its findings and conclusions within 90 days<sup>117</sup> unless otherwise required by circumstances and where there is some urgency within 45 days.<sup>118</sup> Either party may submit written comments to the arbitration panel on specific aspect of the interim report within 7<sup>119</sup> or 15 days<sup>120</sup> of notification of the said report for urgent or general cases respectively. The panel will consider the submissions and render a final arbitration panel ruling setting out a discussion of the arguments made at the interim review stage and address the questions and observations of the parties.<sup>121</sup> Such ruling shall outline recommendations on how the party complained against can remedy the situation and bring itself into compliance<sup>122</sup> immediately or otherwise within a reasonable period of time<sup>123</sup> and the same will be notified to the Committee of Senior Officials within 120 days<sup>124</sup> of the date of the panel's establishment unless advised otherwise advised in writing.<sup>125</sup> Once the party complained against complies then they are required to inform their counterparty and the Committee of Senior Officials.<sup>126</sup> In default the complaining party may require temporary compensation to be effected and/or otherwise take temporary retaliatory

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<sup>114</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 124(1)

<sup>115</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 124(2)

<sup>116</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 124(4)

<sup>117</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 114(1)

<sup>118</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 114(2)

<sup>119</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 114(2)

<sup>120</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 114(1)

<sup>121</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 114(3)

<sup>122</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 115(3)

<sup>123</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 115(4)

<sup>124</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 115(1)(a)

<sup>125</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 11b(1)(b)

<sup>126</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 116

measures.<sup>127</sup> The parties are nevertheless at liberty to negotiate a mutually agreed solution.<sup>128</sup>

#### **5.4.5 Critique of the Arbitration Provisions in the EPA:**

The dispute settlement procedures shall be governed by Rules of Procedure which as yet are not in place. The EPA Council has 6 months within which to provide these.<sup>129</sup>

#### **5.5 Third Party Neutrals in the EPA:**

The third-party neutrals in the EPA comprise of arbitrators from whom the mediators and arbitrators will be selected.

##### **5.5.1 List of Arbitrators:**

The Committee of Senior Officials shall establish a list of not less than 15 individuals who are willing and able to serve as arbitrators and it shall comprise of 3 sub-lists with 5 individuals each. The first category of sub-lists will contain individuals from each party who shall serve as arbitrators and the second category comprising arbitrators who are not nationals of either party and who shall serve as Chairperson of the arbitration panel. It will be the responsibility of the Committee of Senior Officials to ensure that the list is always maintained at this bare minimum.<sup>130</sup>

##### **5.5.2 Appointing Authority:**

In the absence of a list of arbitrators being established then the appointing authority shall be the Secretary General of the Permanent Court of Arbitration.<sup>131</sup>

##### **5.5.3 Competence, Knowledge & Experience of the Arbitrators:**

The arbitrators shall have specialized knowledge of and experience in law and international trade. They shall be independent and shall serve in their individual capacities and shall not take instructions and or be affiliated with the government of any of the parties. They shall comply with a Code of Conduct

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<sup>127</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 117 and 118

<sup>128</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 119

<sup>129</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 120

<sup>130</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 125(1)

<sup>131</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 125(3)

to be developed by the EPA Council together with the Rules of Procedure and shall be finalized within 6 months of the entry into force of the EPA.

## **5.6 EPA Dispute Settlement VIS-À-VIS WTO Dispute Settlement and The EPA**

The EPA has reserved application of the WTO dispute settlement mechanism as follows:-

### **5.6.1 Sector Based Mechanisms:**

**5.6.2** According to Article 48(7)<sup>132</sup> of the EPA WTO rules on dispute settlement shall apply to any disputes related to antidumping or countervailing measures. Article 49(4)<sup>133</sup> for its part outlines that the provisions of paragraph 1 shall be subject to the WTO Agreement on the Understanding on Rules and Procedures Governing the Settlement of Disputes.

### **5.6.3 Parties Rights and Obligations under the WTO Agreement:**

Arbitration panels shall not adjudicate disputes on the parties' rights and obligations under the WTO Agreement.<sup>134</sup> It is critical to outline that WTO can only address a dispute which deals with countries' WTO obligations and not those obligations that are solely addressed in a Free Trade Agreement<sup>135</sup> and vice versa. Thus, any potential claim before the WTO Dispute Settlement Body must deal with the WTO compatibility of such measures and not their EPA compatibility.<sup>136</sup> Likewise the claims arising from this EPA will only be considered within the dispute settlement mechanism provided in the EPA.

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<sup>132</sup> Kenya-UK EPA Supra Ibid Note No.4

<sup>133</sup> Kenya-UK EPA Supra Ibid Note No.4

<sup>134</sup> Kenya-UK EPA Supra Ibid Note No.4 – Article 126(1)

<sup>135</sup>Thomas Cottier & Marina Foltea, *Constitutional Functions of the WTO and Regional Trade Agreements*. In: Bartels, Lorand; Ortino, Federico (eds.) *Regional Trade Agreements and the WTO Legal System* (2006) (pp. 43-76). Oxford: Oxford University Press. Available at 10.1093/acprof:oso/9780199206995.003.0004 Last accessed on 19 March 2021

<sup>136</sup>Amin Alavi, Peter Gibbon and Niels Jon Mortensen, *EU-ACP Economic Partnership Agreements (EPAs) Institutional and Substantive Issues* (2007) Danish Institute for International Studies pg.51 Available at [https://pure.diis.dk/ws/files/61466/EU\\_ACP\\_Economic\\_Partnership\\_Agreements\\_EPAs\\_.pdf](https://pure.diis.dk/ws/files/61466/EU_ACP_Economic_Partnership_Agreements_EPAs_.pdf) Last accessed on 19 March 2021

## **6.0 Conclusion:**

It will be interesting to observe as the Kenya-UK EPA is operationalized particularly with the distinct dynamics that it will be effected in and the high developmental expectations that have been pegged on it. Of keen interest will be the establishment of the List of Arbitrators and whether or not given the dispute resolution thrust of the agreement any disputes will make it along the continuum all the way to the more formal arbitration mechanism.

The writer did not however consider the interplay with the other international investment instruments to which both the United Kingdom and Kenya are signatories including the International Centre for Settlement of Investment Disputes as well as the Bilateral Treaty between the 2 countries executed in 1999 and which continues to be in force. This presents a further area for research and study.

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