Taking these Rights Seriously:

Civil Society Organisations' Parallel Report to the Initial State Report of the Republic of Kenya on the implementation of the International Covenant on Economic, Social and Cultural Rights

Economic Partnership Agreements and the resultant impact on the realisation of human rights in Kenya

October 2008

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1 Introduction and background

The Kenya Government is currently negotiating a bilateral trade agreement – the Economic Partnership Agreements (EPAs) – with the European Union (EU) under the auspices of the East African Community (EAC). The EPAs are an envisioned new trade relationship between the EU and the African, Caribbean and Pacific (ACP) group of states. The EPAs are in line with the World Trade Organization's (WTO) requirements of non discrimination and the principle of reciprocity. Complaints had been forwarded to the WTO by Latin American developing countries that the EU was offering ACP states preferential market access which had been guaranteed through the successive Lomé Conventions and the Cotonou Partnership Agreement (CPA). To this end, the EU and the ACP states commenced negotiations for a new trade regime that was compliant to WTO requirements in 2004.[i] The fundamental objective of the EPAs is to further open the ACP markets to products from the EU.

To facilitate the negotiations, the EU outlined the regional configurations within the ACP states that it would negotiate with. In Africa, the regional blocs that were identified by the EU were the Economic Community of Western Africa States (ECOWAS), the Eastern and Southern African states (ESA), Southern Africa Development Community (SADC), the Economic and Monetary Community of Central Africa (CEMAC). The Caribbean and Pacific states were divided into two regional blocs – the Caribbean Forum of ACP states (CARIFORUM) and the Pacific ACP States (PACP).

The negotiations for a new trade regime should have been concluded by 31 December 2007. However, by November 2007, only the CARIFORUM was in a position to initial a comprehensive EPA. To avoid trade disruption and under duress from the EU, eighteen African[ii] and two Pacific[iii] countries initialled interim EPAs. The ACP states that refused to initial the EPAs were forced to export products to the EU under the less favourable Generalised System of Preferences (GSP) for Non – Least Developed

Countries (non – LDCs) and under the Everything But Arms (EBA) initiative for LDCs. South Africa, on the other hand, continues to export under the Trade Development and Cooperation Agreement (TDCA).

The EAC states initialled an Agreement establishing a Framework Agreement for an Economic Partnership Agreement (FEPA) in November 2007. This agreement binds both parties – the EU and the EAC – to continue negotiations for a comprehensive EPA.

2 Areas of concern

Socio economic impact assessments that have been carried out by Kenya Institute for Public Policy Research and Analysis (KIPPRA)[iv] have painted a grave picture on the country's pursuit to realize sustainable development.

Acknowledging that all human rights are universal, indivisibility, interdependent and interrelated, the EPAs makes a travesty of international human rights obligations that Kenya and the EU states are party to.

2.1 **Violation of the right to food**

Hunger is an affront to human dignity and human rights. Extreme hunger afflicts more than 800 million people and is a fundamental constraint to development. At the 1996, World Food Summit, representatives of 185 countries and the European Community (EC) vowed to achieve universal food security, the access of all people at all times to sufficient, high quality, safe food to lead active and healthy lives. However, despite this pledge current data indicates that the number of undernourished is falling at a rate of 8 million each year, which is far below the average rate of 20 million per year. In acknowledging the dire need to end hunger worldwide, the United Nations Millennium Development Goals (MDGs), which were endorsed by all UN member states, outlined the critical need to end poverty and hunger.

The KIPPRA report states that if the EPAs are concluded with current EU subsidies[v][vi] and with the Non Tariff Barriers (NTBs) in place, staple foods such as maize, rice, dairy and wheat will experience decreased production and exports. Maize is the staple food for Kenyans; it is grown and consumed by more than **90 per cent** of Kenyan households. Wheat is the third most important staple food after maize and potatoes.

The impact of the EPAs in these sectors would mean small scale farmers, majority of whom are women, would lose their livelihoods due to flooding of cheap and heavily subsidised agricultural products from the EU. Loss of livelihoods and continued dependency on imported food would mean massive hunger for many. This would be especially so for vulnerable and marginalised groups like women.

2.2 Violation of the right to work

The KIPPRA report posits that **65 per cent** of Kenyan industries will face unfair competition from EU industries. These vulnerable industries include food processing, textiles, paper and printing firms. The report notes that food and beverages sourced from the EU will increase by **KES 3 billion from KES 1.6 billion to KES 4.6 billion**. From the institute's analysis, the EU will become the main supplier of food and beverages accounting for **67 per cent** of all food and beverages imported into the country. This in turn would affect food processing exports to regional markets which account for KES 1 billion.[vii] These industries employ **over 100,000** people who will lose their jobs if the EPAs are concluded.

In the Agricultural sector, milk and milk products will also face unfair competition from heavily subsidised diary products from the EU.[viii] The dairy sector in Kenya is produced by over **625,000 smallholders;** the sector supports over **3 million people.** As noted above, the maize sub sector will also be affected by the EPAs. The sub sector provides livelihoods to **over 4 million farmers** who are directly involved in production. **Over 100,000 people** are employed in agro processing and another **200,000** in distribution channels. In the case of wheat, the sub sector employs **over 20,000 farmers**; **over 4,000 people** are employed in agro processing and a further **200,000 people are employed in the distribution chain**.

3 Loss of public revenues

3.1 Loss of revenue through elimination of tariffs

The KIPPRA report notes that Government revenues will be lost in the post EPA regime. It has been estimated that the Kenya State stands to lose potential revenue of **KES 9.5 billion**. Stimulations carried out by the institute indicate that total revenue as a share of

Gross Domestic Product (GDP) would decline from 21 per cent to 19 per cent, while import duty share in total revenue would decline from 8 per cent to 6 per cent.

3.2 **Loss of revenue generated by the agricultural sector**

In the case of the agricultural sector, sub sectors such as maize and wheat will suffer decreased production and exports due to dumping of heavily subsidised products from the EU. In the case of maize, marketed produce fetched **KES 3.3 billion** in 2004 and wheat produce generated **KES 1.2 billion**. In a post EPA regime, the Government is likely to receive less revenue from these key agricultural sectors due to decreased production.

3.3 **Loss of revenue generated through regional trade**

The EAC and the Common Market for Eastern and Southern Africa (COMESA) markets are the key destinations of Kenya's exports. Exports to the COMESA region accounted for 34 per cent of total exports with Uganda receiving the bulk. In 2003, the total exports to the COMESA region amounted to KES 61.4 billion. These exports comprise manufactured goods in the form of petroleum and oil products, dairy, medicaments, paper and paper products, fertilisers, footwear and cement. Petroleum and oil exports to the COMESA market fetched KES 15.7 billion which translated to 25.6 per cent of total exports. Light oils and preparations generated approximately KES 8.2 billion and had export share of 13.3 per cent.

The KIPPRA report sends a warning bell on loss of traditional markets that Kenya has dominated in the post EPA regime. Kenyan manufacturers will face competition from more experienced and efficient producers from the EU.

The potential impact of loss of public resources generated from the above sectors would gravely affect critical sectors such as education and healthcare which are usually the first sectors to experience budget cuts due to limited resources. This would negate the Government's current efforts to provide quality free primary education for all. Loss of revenues would also impact the Government's commitment to realise the right to healthcare.

In an effort to bridge loss of revenues in the post EPA regime, the Government may be forced to increase taxes such as Value Added Tax, a tax that affects the poor and vulnerable groups in society.

4 Violation of the right to self determination

4.1 Coercion to initial the FEPA

Kenya, like other African states, was coerced to initial the FEPA by the EU. The EU threatened Kenya and other African states that their exports would enter the EU market under the unfavourable GSP; this would in turn make exports of vital products such as horticulture far too expensive and thus uncompetitive in the European market. Threats such as these forced the African Union (AU) to issue a strong worded declaration expressing their concern regarding the political and economic pressures that was exerted by the EU.[ix] **(Please see Annex 1)**

4.2 Introduction of the 'Singapore Issues'

The FEPA binds Kenya to initiate negotiations on trade related issues that have been dubbed the 'Singapore Issues.' The text states in Article 37:

> Building on the Cotonou Agreement and taking into account the progress made in the negotiations of a comprehensive EPA text, the parties agree to continue negotiations in the following areas…….. (d) trade in services; (e) trade related issues namely: (i) competition policy, (ii) investment and private sector development,………. (iv) intellectual property rights, (v) transparency in public procurement.

The Singapore issues lead to the collapse of the Cancun Ministerial after nine ministers from the US, European Commission (EC), Brazil, **KENYA,** Mexico, China, India, Malaysia and South Africa were unable to reach an agreement on whether the issues should be negotiated. Some of the reasons given by developing countries for rejecting the Singapore issues were that in the case of transparency in government procurement, developing country governments would be forced to open their procurement process. The result of this would be that developing countries would be unable to give special concessions to their growing small and medium enterprises (SMEs). However, despite the fact that these issues were rejected at the multilateral level, Kenya has been forced to open negotiation on these contentious issues.

5 Violation of the right of participation and right to information

The Cotonou Agreement underlines the principle of participation of all stakeholders in the EPA negotiations. The agreement reads

> Participation: apart from central government as the main partner, the partnership shall be open to different kinds of other actors in order to encourage the integration of all sections of society, including private sector and civil society organizations, into the mainstream of political, economic and social life.[x]"

However, despite the right to participation being guaranteed in the Agreement, CSOs were removed from the negotiation process. The Ministry of Trade and Industry wrote a letter to Ms. Grace Githaiga, the Executive Director of Econews Africa, Mr. Munaweza Muleji, the Director of Action Aid International Kenya and Mr. Gezahegn Kebede, the Country Programme Manager of Oxfam, Great Britain, revoking their participation in the EPA cluster meetings. **(Please See Annex 2)**

In regard to right to information, the Agreement under Article 5 makes provisions for cooperation in information sharing between state and non state actors. It has been noted by CSOs that the country negotiators have relayed documents pertaining to the negotiations at the last minute denying CSOs the chance to review the positions adopted by the negotiators. For example, the negotiators on 9 September 2008 sent out a document for review at a cluster meeting that was held on 10^{t} September 2008. **(Please see Annex 3)**

[i] Commencement of the negotiations varied across different regional blocs. CEMAC and ECOWAS, for instance, commenced negotiations in October 2003 while all the other blocs commenced in 2004.

[ii] Kenya, Tanzania, Uganda, Burundi, Rwanda, Ghana, Cote d'Ivoire, Namibia, Lesotho, Swaziland, Madagascar, Mauritius, Zimbabwe, Malawi, Botswana, Cameroon, Mozambique, Seychelles

[iii] Fiji and Papua New Guinea

[iv] KIPPRA, 'The Potential Impact of the Economic Partnership Agreements (EPAs) on the Kenyan Economy' carried out on behalf of the Ministry of Trade and Industry September 2005.

[v] The EU spends US$ 120 billion per year on agricultural subsidies; this system perpetuates dumping of cheap agricultural produce to developing countries.

[vi] The FEPA allows the EU to provide subsidies to all its producers. Article 18:4 states, "the provision of this Article shall not prevent the payment of subsidies exclusively to national producers, including payments to national producers derived from the proceeds of internal taxes or charges applied consistently with provisions of this Article and subsidies effected through government purchases of national products."

[vii] Ibid Page 109

[viii] The EU spends € 16 billion per year on agricultural subsidies. This roughly translates to USD$ 2 for a cow per day. In Kenya over 56 per cent of the population survive on USD$ 1 per day. **Milking the CAP** Oxfam Briefing Paper 34

[ix] African Union Assembly Tenth Ordinary Session 31 January – 2 February 2008 Addis Ababa 'Declaration on the Economic Partnership Agreements (EPAs)' DOC. EX.CL/394 (XII)

[x] Cotonou Partnership Agreements

The Rt Hon PETER MANDELSON PC
MEMBER OF THE EUROPEAN COMMISSION

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Brussels, 12 September 2007
CAB24/PM/PTH/ms/D1132

Mr Joe Baidoo-Ansah
Minister of Trade
Ghana

Dear Minister,

It was a pleasure to speak to you last week and I look forward to working together over the coming months. I would like to take this opportunity to follow up on some of the issues we discussed concerning the Economic Partnership Agreement (EPA) negotiations, particularly relating to the EU trade preference regimes available to Ghana next year.

As you know, the current Cotonou trade preferences are incompatible with our joint commitment at the WTO that ACP and non-ACP countries are treated equally in EU preference schemes. This is why we agreed an explicit legal expiry date of 31st December 2007 in the Cotonou Agreement for these preferences. This gave the basis for other WTO members to grant us a waiver from WTO law allowing us to continue preferences until that date while we conclude EPA negotiations.

The first implication of this is that from 1st January 2008 we have no legal basis to continue the Cotonou preferences. The next is that, even if we did, we would never obtain a further waiver from the WTO. Such a waiver requires consensus of all WTO members and, as our experience with bananas shows, other developing countries resentful of ACP privileges in EU markets will not hesitate to challenge any extension of preferences. Unless we have an EPA in place by 1st January this means the European Commission has no other legal mandate than to charge Ghanaian exporters the tariff rates applicable under the General System of Preferences (GSP). Given the absence of any possibility to extend the Cotonou regime, this is the automatic default option.

In such a scenario, tariffs would apply to Ghanaian pineapples, canned tuna, cocoa products, aluminium and vegetables – around 25% of your exports to the EU. These exports are worth some 250 million euros per year and from 1st January 2008 Ghanaian industry would have to pay around 20 million euros for them to enter EU markets – equivalent to an average tariff of 8.4%. The situation is even worse for your neighbour, Ivory Coast, where 36% of their exports, particularly bananas, would be badly affected. Any decline in banana exports would of course have a knock on effect on the refrigerated shipping costs for the region and affect other exports.

As I said on the phone, our priority is to avoid this kind of trade disruption but the only way to do so is if we have a WTO-compatible market access offer from the West African region. The EU has already offered duty-free quota-free access to our markets from 1st January 2008 but we need an offer from both sides in order to notify a WTO-compatible agreement and establish an EPA trade regime. This would then not only preserve but improve current preferences, removing restrictions such as quotas on banana exports. This is on top of the other development benefits such as improved rules of origin, simpler trade-related rules, the opening up of services trade and a series of accompanying measures – such as a programme to upgrade West African industries and absorb the net fiscal impact of the trade reform.

But the real deadline is not 31st December – it is much earlier, as I have indicated before. There are a series of legal and procedural steps we need for our Member States to put in place a new trade regime. To agree an EPA on time, it is essential that we hold an EPA chief negotiators' meeting at Ministerial level on 5th October in Abuja and another in Brussels in the week of 22nd October. I was very concerned at suggestions by Dr. Chambas, the President of the ECOWAS Commission and Chief negotiator for West Africa, that these dates were being brought into question by his member states.

In these two meetings, the most important aspect to agree on is a WTO-compatible market access schedule for the EPA. This doesn't mean opening West African markets either fully or immediately to EU products. On the contrary, you can use the considerable flexibility built into WTO rules to allow you to continue to protect sensitive products. My technical teams are ready to work on this issue with ECOWAS experts, and Ghanaian experts specifically if needed, to help us move forward.

I'm afraid that there is no easy message on alternatives if we do not manage to reach this agreement – our multilateral commitments are binding and other developing countries expect us to abide by them. It is particularly important that you are fully aware of the realities of the GSP+ scheme. This is not an option, even for a short transitory period, to maintain Ghanaian preferences in 2008.

The GSP+ is based on offering improved preferences to countries that meet criteria linked to sustainable development and good governance. It is an exception to WTO principles subject to constant review within the WTO and the EU has to assure its full WTO compatibility. We cannot therefore apply flexibility on eligibility or the application process for countries like Ghana that do not meet the full criteria of GSP+ without undermining the principles of the scheme. The EU is bound under the rules of GSP+ to verify and justify that all beneficiaries meet GSP+ criteria on an ongoing basis.

Other WTO members will be very sensitive to the use of the GSP+ as a means to continue Cotonou preferences. Moreover some of them are candidate countries for GSP+ and have been through a long procedural and legal process to qualify. The list of candidate countries has been officially published following a full scrutiny procedure and written report including recommendations provided by relevant international organisations. These countries would challenge any attempt to exact less stringent entry requirements from ACP countries or attempt fast track procedures – which would devalue their commitments and the principles of this preference scheme.

You will also know that the GSP+ does not provide equivalence to the Cotonou preferences as some claim. Bananas, for example, are not covered and preferences are less generous for canned tuna. There is also no opportunity to benefit from the improved rules of origin which will be on offer under the EPA. Moreover, the GSP+ does not provide for improved market access in trade in services, nor for co-operation in trade related areas such as standards or links to development finance. Nor does the GSP+ include provisions to build regional markets.

These are not easy messages to deliver but, given the time left to us to conclude, it is important our exchanges are open as we will have to work together to find solutions. I can reassure you that with progress on a market access offer, I and my technical staff will do all we can to find a way forward. I hope we can continue our collaboration to provide Ghanaian traders and exporters the access they need to European markets.

Best wishes,

Peter Mandelson

→ Muenii

REPUBLIC OF KENYA

Ministry of Trade and Industry

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Ref. No **DET/48/218/01/1**.........

Date.... **26st July 2005**......................

Ms Grace Githaiga
Executive Director
EcoNews Africa

✓**Mr. Munaweza Muleji**
Director
Action Aid International Kenya

✓**Mr. Gezahegn Kebede**
Country Program Manager
Oxfam GB

Dear Gezahegn

RE: PARTICIPATION OF CIVIL SOCIETY ORGANIZATIONS IN KEPLOTRADE CLUSTERS

This refers to your letter of 14th July, 2005 which sought clarification on participation of Civil Society in deliberations of KEPLOTRADE and its clusters.

Let me start by assuring you that this Ministry appreciates and values the complimentary role that Civil Society can play in implementing the provisions of the Cotonou Partnership Agreement including negotiation for an Economic Partnership Agreement Indeed, it is because of this position that we have hitherto freely interacted and included Civil Society in KEPLOTRADE cluster activities. The decision to leave out Civil Society from the cluster activities was therefore reluctantly taken by the KEPLOTRADE Project Steering Committee after careful consideration and discussion of factors that can be attributed to the Civil Society itself.

For one, despite our open invitation to Civil Society in all the clusters, we have seen very limited representation and participation from them. EPAs are likely to impact on Kenyan citizenry in wide ranging areas and we therefore would like to see wider grassroots representation from Civil Society than at present.

Secondly, we have noted with regret, the habit of some NGOs to distribute unsanctioned leaflets at meetings which we have arranged, even when we have given them prior opportunity to discuss and contribute to the agenda. Such " ambush'' tactics are not only disruptive but send confusing signals to our negotiation partners, both in the ESA region as well as the EU. This is embarrassing to the country, to say the least.

Elsewhere, some Civil Society organizations have quoted KEPLOTRADE researched material prematurely, if not out of context. An example at hand is a recent statement by Econews entitled '*EPAs-threats to development in Africa - A statement by EcoNews*' that was presented at a London roundtable meeting on trade in Africa, organized by Traidcraft, one of EcoNews NGO partners in UK.

From the above, it can be seen that our current working relationship with Civil Society needs to be reviewed in order for us to effectively negotiate an EPA. This is what has prompted the PSC to seek a new approach to cooperating with it. We are of the view that Civil Society organizations' views need to be harnessed through tailored sessions where the organizations will have ample time to elaborate on their research findings and afford the stake holder's an opportunity to interrogate conclusions, positions and strategies being advocated. This may be difficult to achieve in scheduled cluster meetings, which have now moved from general issues to development of negotiation positions, taking threats of EPAs and opportunities into account.

KEPLOTRADE has an open door policy and therefore, in final analysis, the challenge is upon the Civil Society to input their views into the national position in the spirit of the Cotonou Agreement without appearing to be antagonistic or one sided.

I appreciate your views and welcome suggestions on how we can work as a cohesive group to advance a Kenyan agenda that takes into account the interests of all stakeholders.

Yours sincerely

Ng'eno

Dr. N.K Ng'eno, HSC
PERMANENT SECRETARY & CHAIRMAN
KEPLOTRADE PROJECT STEERING COMMITTEE

From: JOSHUA MUTUNGA [mailto:katisyasr@yahoo.co.uk]
Sent: Tuesday, September 09, 2008 8:10 PM
To: AGRICULTURE, MWANZIA; tedowango@yahoo.com; kipi@swiftkenya.com; kncci@swiftkenya.com; agayo ogambi; marketing@hcda.or.ke; md@hcda.or.ke; mbuguaek@yahoo.com; wandaka2003@yahoo.com; Francis Kionga; fmmwega@yahoo.com; frotich@epzakenya.com; info@epzakenya.com; fredarika@yahoo.com; grace.njeru@gmail.com; chiefexe@epc.or.ke; motieno@epc.or.ke; jkorir@cbik.or.ke; anyaga@teaboard.or.ke; smegbiashara@yahoo.com; oisebej@kebs.org; cuts-nairobi@cuts.org; eccgg@hotmail.com; jkiio@kdb.co.ke; cmuumbi@yahoo.com; kiraguwachira@yahoo.com; lmerrill@oxfam.org.uk; md@kpcu.co.ke; chemengichmail@yahoo.com; Nicholas Waiyaki; ongubon@yahoo.com; planning@kenyasugar.co.ke; paulotung@yahoo.com; disabledkenya@yahoo.com; pgs@nbnet.co.ke; rod.evans@f-h.biz; rkobia@ktdateas.com; kathunisalome@yahoo.com; tboardk@kwed.com; ksb@africaonline.co.ke; info@fpeak.org; tkonyango@yahoo.com; olielotk@yahoo.com; walter.kamau@kam.co.ke; somogere@yahoo.com; protase Echessah; paoga@econewsafrica.org; nairobi@cuts.org; jochola@econewsafrica.org; ppasitau@oxfam.org.uk; emueni@oxfam.org.uk; afipek@accesskenya.co.ke; karemeri@yahoo.com; admin@afipek.org; rtanui@beaconet.org; imbugua@yahoo.com; info@cotu-kenya.org; gsoffice@ncck.org; admin@khrc.or.ke; mgumo@treasury.go.ke; rodneykondal.evans@gmail.com; kephisiu@kephis.org; pknjoroge@kephis.org; abillajanet@hotmail.com; charles.onduso@kra.go.ke; ckiric@yahoo.com; gndira@epc.or.ke; director@kephis.org; ndungik@yahoo.com; cwkithinji@gmail.com; kkamau@ncck.org; wanjiku.njeru@kra.go.ke; dochienguk@yahoo.co.uk; okerubo@yahoo.com; hellenoriaro@yahoo.com; b_ronga@yahoo.co.uk
Cc: jnkosure@gmail.com; pmwaniki@keplotrade.org; somogere@gmail.com; cwkithinji@yahoo.com; katisyasr@yahoo.co.uk; SILAS NYANGI; snyangi@trade.go.ke; ERIC RONGE; BERNARD KAGIRA
Subject: AGRICULTURE & MARKET ACCESS CLUSTER MEETING ON THUR. 11TH SEPT. 2008

Dear all,

Please find attached draft report of the Study on Rules of Origin for your familiarization in readiness to its presentation at the Cluster meeting scheduled for Thursday 11th September.

Regards,

Joshua Mutunga
KEPLOTRADE COMMUNICATIONS

(1) Economic and Social Rights Centre (Hakijamii)

(2) African Women's Development and Communications Network (FEMNET)

(3) Eastern Africa Coalition on Economic, Social and Cultural Rights (EACOR)

(4) Building Eastern Africa Community Network (BEACON)

(5) International Commission of Jurists - Kenya Section (ICJ-K)

(6) Kenya Human Rights Commission (KHRC)

(7) The Reproductive Health and Rights Alliance (RHRA)

(8) Mazingira Institute

(9) Centre for Minority Rights and Development (CEMIRIDE)

(10) Centre on Housing Rights and Evictions (COHRE)

(11) Kenya Food Security Policy Advocacy Network (KeFoSPAN)

(12) Students Association for Legal Aid and Research (SALAR)

(13) HIV/AIDS and Human Rights Project

(14) Children's Legal Action Network (CLAN)

(15) Kenya Land Alliance

(16) Federation of Women Lawyers Kenya

(17) Institute for Law and Environmental Governance

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