

In July 2020, the government of Kenya started [negotiations](#) with the United States for the conclusion of a bilateral Free Trade Agreement (FTA). Such negotiations were initiated to ensure to Kenya a more stable access to the US market, due to the imminent expiration of the AGOA (in 2025), a unilateral (non-reciprocal) preferential trade arrangement of which Kenya is beneficiary that allows eligible least developed and developing countries from Sub-Saharan Africa to export duty free and quota free to the US market a [series of products](#) corresponding to about 2000 product lines of the Harmonised System.

The negotiations with the US were preceded in February 2020 by the conclusion of a [phytosanitary protocol](#) that allows U.S. wheat growers in the Pacific Northwest (PNW) to access to Kenya's market. Before the adoption of such protocol, Kenya used to apply an import ban of U.S. wheat from this region due to concerns about the potential presence of a plant disease known as flag smut.

The EAC Court of Justice, with a [decision](#) adopted on 2 December 2022, determined that both the free trade agreement and the phytosanitary protocol have been negotiated in violation of Article 37(4)(b) of the EAC [Customs Union Protocol](#). Such article requires Partner States that intend to conclude a new trade agreement (or to amend an existing agreement) with a foreign country, to notify the proposed agreement or amendment to the EAC Secretary General, who in turn has to communicate it to the other Partner States within a period of thirty days, to give them the possibility to express their views and comments.

According to the Court, by omitting to engage the other Partner States through the Secretary General as stipulated by Article 37, the Kenyan government has jeopardized one of the foundations of the EAC, i.e. the principle of coordination of Partner States economic policies, and violated the rule that establishes the precedence of the Community organs, institutions and laws on implementation of the Treaty, contrary to Article 8 of the Treaty.

With the establishment of a Customs Union (CU), in 2004, the EAC partner States have lost part of their competences regarding the determination of their trade policies, that are now devolved to the EAC institutions, responsible for implementing a common policy in the field of external trade on behalf of all EAC members. However, the devolution of trade policies competences is not total, as the EAC Partner States still maintain the possibility to enter into separate FTA with

foreign countries outside the customs union, on condition that this is done with the consent of the other EA

C Partner States. An aspect that qualifies the EAC customs union as an

[imperfect](#)

customs union.

The EAC Court of Justice also clarified that the phytosanitary protocol concluded by Kenya and US must be considered also a trade agreement within the meaning of Article 37 of the Customs Union Protocol based on the reasons that it allows goods, specifically wheat, from a third party to be imported into the Community.