The Kenya-US Trade Negotiations: An Opportunity to Comprehensively Rethink Treaty Making in Africa

By:

Munia El Harti Alonso
Akinyi Lisa Agutu

March 10, 2021

The conclusion of the 2020 Presidential election in the United States and the election of the Biden/Harris Administration is an opportunity to reflect on the future of US/Africa trade treaty making. This article aims to take stock of the Kenya-US trade negotiations initiated in July 2020, setting out the idiosyncrasy of the Kenya-U.S Free Trade Agreement ("FTA") talks in a first part (section 1). The US/Kenya FTA, if concluded, will be the second FTA with an African state since the 2004 Morocco-U.S FTA. The negotiations are also notable as they depart from old generation treaty making, and gear towards a comprehensive approach to treaty making.

The future Kenya-U.S FTA presents an opportunity for a U.S engagement with Africa at the regional and continental level. First, by levelling the playing field through cooperation in a "retail multilateralism approach" that focuses on the unique needs of each party. Second, the FTA is set to serve as a stepping-stone for a regional FTA with the U.S, allowing East African Community ("EAC") members to join the negotiations or accede to the treaty. The FTA thus presents a unique opportunity to deepen the U.S-EAC trade and investment relationship, to go beyond the existing Trade and Investment Framework Agreements (section 2).

A focus on the ongoing Kenya-U.S trade negotiations is also pertinent as a lens to rethink the trade and investment treaty making reform at the continental level in the context of the African Continental Free Trade Area ("AfCFTA") (section 3). The authors conclude with concrete suggestions aiming to improve the drafting of the prospective Kenya-U.S FTA provisions.

1. The Unique Nature of the Kenya-US FTA Negotiations

The ongoing Kenya-U.S trade negotiations launched in the summer of 2020 are unique, as the U.S only has one FTA with an African country, Morocco. The Kingdom has entertained historic diplomatic ties to the United States, being the first country to recognize the United States.

The FTA is of particular importance to Kenya, as the U.S is Kenya's third most important trading partner in terms of export volume with USD 467 million, after Pakistan (USD 586 million) and neighboring Uganda (USD 611 million) between 2014 and 2018. Contrary to the global trend, Kenya boasts a positive GDP (+5.9%) and FDI flows growth (+0.2%) for 2019. Kenya's exports under the African Growth and Opportunity Act (AGOA) were worth USD 429 million as at September 2020. The highest volume of goods exported under this regime includes apparel and accessories, unprocessed agricultural products, food and kindred products, minerals and ores and chemicals among others. Kenya's trade concentrates on manufactured goods and processed food items, sectors that foster local labor. The predominance of the tertiary sector is in line with the national macroeconomic profile of African states, "remain[ing] primarily commodities producers".

The US is equally significant to Africa, as the fourth trading partner with Sub-Saharan Africa, and the second in the Middle East North Africa Region. The U.S trade with Africa has decreased with exports from the US to Africa totaling USD 18.27 million and imports worth 19.47 million in 2020 as compared to 2019 figures of 26.72 million in exports, and imports reaching USD 30.21 million. This is significantly less than in the previous years for instance in 2008 imports reached a record USD 113 million. Albeit these lower figures reflective of the U.S unilateralism in the past four years, there is momentum for a re-engagement in the context of a new administration and a post-pandemic economic recovery.

The negotiations are also notable because of the principles articulated by Kenya in its FTA negotiations. Those principles depart from the old generation bilateral treaty making. Old Generation FTAs covered in a limited matter "only trade in goods, and even agricultural products were often only added to their scope at a later stage". In contrast, the new generation FTAs are "comprehensive FTAs that correspond better to the more complex economic exchanges that take place today". The limitations of the old generation FTAs in our view are transposable and still present in the stale Trade and Investment Framework Agreements (TIFAs). Thus, the US Kenya treaty presents a unique opportunity to adopt a comprehensive FTA in the African context, with the current US-Kenya FTA negotiations (section 1) and shifting away from unsubstantial TIFAs in the region (section 2).

1.1. An overview of the US Kenya FTA negotiations

On 8 July 2020, the US and Kenya issued a Joint Statement on the launch of negotiations towards the FTA. The talks come in the context of the 2018 strategic partnership between the two countries following the signing of a bilateral commercial Memorandum of Understanding in June 2018.

The Kenyan ministry of Industrialization Trade and Enterprise Development issued a set of guiding principles to guide the ongoing negotiations of the US-Kenya FTA. The key principles articulated by Kenya are:

(i) The FTA will be WTO compatible and will allow for application of the 'Special and Differential Treatment'

(ii) The FTA will be an instrument for economic and trade development.

(iii) The FTA negotiations shall respect the commitments that Kenya has taken at Multilateral (WTO), Continental (AfCFTA), Regional (EAC, COMESA, TFTA) and Bilateral level

(iv) The FTA will preserve and build on AGOA acquis

(v) The Negotiations shall cover substantially all trade

(vi) Any EAC Partner State that did not participate in these negotiations at the outset should be allowed to join the negotiations, subject to terms and conditions already agreed or accede to the concluded FTA

2. A Potential for a Comprehensive US Engagement in Africa: The Retail Multilateralism Approach

The current US political landscape momentum allows for a shift to the new generation treaty making. In qualitative terms, the Biden administration will likely engage in "retail multilateralism which focuses on the unique needs of each party and how the multilateral system can be beneficial to them." Patrick Pearsall foresees that the US will participate in "multilateral trade and investment negotiations in key regions where American influence has waned [i.e. Africa], but front and center in the mandate will be the direct impacts on individual people (e.g. labor, environment, skills)".

This approach is of importance as current engagement between the United States and Kenya under the African Growth and Opportunity Act of 2000, (AGOA) shows that Kenya utilizes 98% of trade preferences. The benefits under AGOA are set to lapse in 2025, however, the need for these trade preferences remain. Concern remains due to the inequality between the difference in size of the two economies whereby Kenya may be disadvantaged by the duty free access of the U.S to critical sectors such as agriculture, and manufacturing. In addition, there are fears that amidst efforts towards African regional integration through the AfCFTA, where trading begins in January 2021 for countries that ratified the protocols like Kenya, the Kenya-U.S FTA will bring about barriers to intra-African trade.

2.1. Leveling the Playing Field in Economic Diplomacy Through Cooperation

Following Professor Kampto's view on cooperation, "now a reality for both small and big states", the US could have a more cooperative view of its relations with the African Region.

We argue that in addition to symmetric relations fostered by cooperation, the US could engage in trade (and investment) negotiations in substantive terms, going beyond TIFAs with the African Region.

2.2. The EAC Optimal Regional Positioning to go Beyond the US-EAC TIFA

The Joint Statement already captures importantly that the US and Kenya "seek to conclude a free trade agreement that will complement regional integration efforts within the East African Community (EAC), as well as the landmark African Continental Free Trade Area". In concrete terms, the Kenya-US FTA could serve as the basis for further regional integration by EAC member states (2.2.1), or more ambitiously by the EAC as a whole (2.2.2).

2.2.1. EAC Member States to Join the FTA Negotiations or Accede to the Finalized FTA

As regards the EAC, the Kenyan Trade Ministry guidelines for the negotiation of the FTA indicate a possibility for the FTA itself to be expanded to EAC states:

"(vi) Any EAC Partner State that did not participate in these negotiations at the outset should be allowed to join the negotiations, subject to terms and conditions already agreed or accede to the concluded FTA" [emphasis added]

Other EAC member states could therefore join the US-Kenya FTA negotiations, if they agree to the terms already negotiated bilaterally, or accede later to the concluded FTA. In that sense, the US-Kenya FTA would be a platform for African regional integration. Since some or all of the EAC states that accede later or join the negotiations will not provide input at the inception, it will be crucial for the language of the treaty to encompass regional considerations.

2.2.2. The Legal Provisions of the EAC Allow for Trade and Investment Treaties with Third Parties

Kenya is an original founding member of the EAC, an intergovernmental organization founded in 1967, that then became defunct in 1977, and that was revived on 7 July 2000. The EAC is composed of six countries in Eastern Africa: founding members Kenya, Tanzania and Uganda, joined later by Burundi, Rwanda and South Sudan. The EAC established a customs Union within which the members must have a uniform external tariff.

Article 37 of the EAC Customs Union Protocol on “Trade Arrangements with Countries and Organizations outside the Customs Union” outlines that member states may enter into trade agreements with a foreign country so long as the terms of the agreement are not in conflict with the provisions of the protocol. This article also requires member states to send the EAC Secretary-General the terms of any trade deal once it “intends to conclude or amend an agreement” with a third party for comments and proposals from the EAC partner states.

Article 37 of the EAC Common Market Protocol requires members to “adopt common negotiating positions in the development of mutually beneficial trade agreements with third parties; and promote participation and joint representation in international trade negotiations.”

In addition, a 2019 Extraordinary Meeting of the East African Community Sectoral Council on Trade, Investment, Finance, and Industry (SCTIFI) called on EAC Partner States to engage with the US at a regional level making reference to member States in order to maintain the strength and integrity of the Customs Union.

2.2.3. Past Practice Supports an Engagement of the US with the EAC as a whole

The Kenyan guidelines opt for treaty making based on bilateralism, spanning to plurilateralism whereby the EAC states join the FTA. The guidelines do not envision the EAC as a whole joining the FTA negotiations, but we argue that past practice allows for this approach. Engaging the EAC as a whole rather than the EAC states would provide for consistency within the EAC and a truthful regional integration without fragmentation.

The Joint Statement mentions the AGOA "acquis" through which Kenya enjoys unilateral trade benefits that are limited to tariffs. The AGOA is a Congress legislation that "assists" economies in Africa based on eligibility criteria screened by the US. In addition, Kenya receives unilateral benefits through the Generalized System of Preferences ("GSP"), a system that favors poor countries around the world. These unilateral benefits are not reciprocal, they are limited to tariffs and can be unilaterally revoked which makes them a weak strategy for trade growth.

Aside from the AGOA and GSP, the US has previously engaged with the EAC as a whole with the adoption of the 2008 EAC-US TIFA. Comparatively, the EAC has adhered to the Economic Partnership Agreement ("EPA") with the European Union. It is also reported that the "European 'equivalent' trade scheme—the "Everything but Arms" initiative—has a higher utilization rate than AGOA". It is worth mentioning that Kenya was the only EAC member state to ratify the EAC-EU EPA.

The US could step up to the European engagement, shifting away from the unilateral system of preferences under AGOA and the GSP as well as TIFAs. "TIFA" stands for Trade Investment Framework Agreement, treaties that pave the framework to trade and investment akin to Agreements in Principle, but do not contain any substantial provisions. Whilst the U.S has signed Trade and Investment Framework Agreements ("TIFAs") with 8 African countries and 4 regional organizations, we argue that those agreements are paper tigers. TIFAs merely provide for "strategic frameworks and principles for dialogue", whilst a full-blown FTA like the Kenya-U.S one is set to contain substantive provisions.

Beyond the potential for regional integration, the FTA provides for potential at the continental level. The Joint statement clearly emphasized that the FTA "will complement regional integration efforts within the East African Community (EAC), as well as the landmark African Continental Free Trade Area".

3. US-Kenya Free Trade Agreement: Capitalizing on the US-Kenya Talks to Bolster Reform in Africa at the Continental Level

The US-Kenya FTA negotiations come to light in the wake of Africa's continental integration efforts through the adoption of an arsenal of reforms via the African Continental Free Trade Area (AfCFTA) which entered into force in May 2019.

The AfCFTA signifies a shift towards a more integrated approach towards trade in Africa as demonstrated by the ratification of over thirty African states since its entry into force. Regional integration is not a novel concept per se to the African continent as the AfCFTA builds upon existing Regional Trade Agreements (RTA's) that emanate from the Regional Economic Communities (REC's). At the strictu sensu continental level however, this level of integration is a first of its kind with the AfCFTA forming the world's largest plurilateral trade agreement.

3.1. The US-Kenya FTA Coupled by a Prioritization of the AfCFTA

The President of Kenya Uhuru Kenyatta highlighted in the Atlantic Council Meeting, that the U.S-Kenya FTA must be conducted in a manner that does not hinder obligations under the AfCFTA which is a major priority for Kenya. President Kenyatta therefore stated that the negotiations with the United States would only take place "without undermining [the AfCFTA] arrangement". President Kenyatta also stated that the AfCFTA should be seen as an opportunity for the United States to trade with other African countries, Kenya being the first of many countries they can partner with.

In answer to the question of how Kenya will go about negotiations knowing that they stand to lose a lot giving tariff free access to one of their biggest sources of income such as textiles and agriculture, President Uhuru Muigai Kenyatta stated that he views the negotiations as a win-win situation where the U.S can gain access to goods and Kenya will benefit from investment in Kenya and the opportunities that come with that.

3.2. Making Development Central to the Design of the FTA

The US-Kenya FTA presents a unique opportunity for a comprehensive agreement that includes "trade-plus" issues such as gender, labor, food security, infrastructure, "improving the rules on investment, intellectual property, e-commerce, the environment and the rule of law." This calls for the prioritization of development by ensuring that the rules are tailored and staged to cater for the particular circumstances of the Kenyan and the US markets. To this end, economic and social development should be centered in the design of the FTA together with mechanisms for measuring the impact of the rules.

The Kenyan government has as part of its negotiation principles that the FTA should be a tool for trade and economic development. This is in line with the AfCFTA and the African Union ("AU") agenda 2063 which prioritize social and economic development among their key objectives. The AfCFTA undertakes the model of a tailored and incremental approach to development by prioritizing the needs of the parties to it in the rules which are negotiated in phases. As Kenya is a party to the AfCFTA and has reiterated its priority to its obligations under the agreement, it is pertinent that the US-Kenya FTA is modeled to ensure that these commitments are kept.

In view of the Kenyan approach to the FTA negotiation and the new US administration, the authors foresee a favorable set of factors towards reinforced cooperation with Africa at the regional and continental level.

3.3 Suggested Proposals for the Kenya-US FTA

The Kenya-US FTA can draw from existing agreements in order to leverage the best outcome. This includes the Digital Economy Partnership Agreement ("EPA") signed between Chile, New Zealand and Singapore. This agreement contains novel provisions that the FTA can draw from such as digital inclusion (Article 11) which ensures that traditionally marginalized groups such as "women, rural populations, low socio-economic groups and indigenous peoples" can gain access to digital economy opportunities. In addition, the Kenya-US FTA can include e-commerce provisions that ensure expedited customs procedures to support increasing trade. It is pertinent that the FTA strikes a balance between Kenya and the United States, to cater to the individual needs of the Kenyan economy.

There are no official statistics on trade in services between Kenya and the US due to its low volume. Trade in services is an overlooked yet important component of trade that should be included in the Kenya-US FTA. It is also important that the FTA prioritizes intellectual property discussions to ensure that there is adequate protection and equally, access to products such as medicine and vaccines. The FTA is timely in light of the global Covid-19 pandemic and recent news of effective vaccines being discovered in the US with parallel research ongoing in Kenya to combat the virus. A mutually beneficial agreement will strengthen each party's ability to combat the novel

Covid-19 virus. The interests of the stakeholders should be balanced with the rights of the inventors and that of the general public. To that end, Members of the World Trade Organization (WTO) have agreed to continue discussions in early 2021 with support from Canada, Mexico, Australia, Canada, Chile and Mexico on the proposed waiver of IP rights, in light of their shared goal of " providing access to high-quality, safe, efficacious and affordable vaccines and medicines for all."

Environmental protection should also be prioritized as there have been recent concerns about the Kenya-US FTA granting leeway to the American Chemistry Council to increase the exports of plastics to Africa. This protection should extend to marine litter, recycling as well as plastic bags. It is therefore important that an environmental, social and human impact assessment be made to ensure that a favorable outcome is reached for both parties.

Conclusion

The negotiations for the Kenya-US FTA have now gone into the second round, a more substantial one where the text of the agreement will be discussed. Kenya has prepared thirteen chapters for negotiation that cover pertinent sectors such as labor, environment, intellectual property and small and medium enterprises. It would be important for the Kenya-US FTA to deviate from traditional one-size-fits-all agreements and instead prioritize the individual needs of the parties.

To this end, the authors suggest three key proposals:

1. Prioritizing and centering sustainable development into the rules of the FTA together with mechanisms for their implementation

2. Using existing regional trade agreements as well as the African Continental Free Trade Area as "building blocks" for the negotiation of the US-Kenya FTA

3. Including "trade-plus" issues in the US-Kenya FTA to cater to a wide variety of needs outside those in the traditional FTA model following the example of mega-regulation under the Trans-Pacific Partnership (TPP). It will be important for Kenya to balance the desire to regulate these novel areas with the need to table a WTO compatible agreement.

It will remain to be seen if the Biden/Harris administration pushes for a swift conclusion of the negotiations, in order to table the US-Kenya FTA via the Trade Promotion Authority ("TPA") fast track. Rather, the new administration is set to pick up the negotiations with a "retail" approach, heralding a promising new era for economic diplomacy in Africa.

View online: The Kenya-US Trade Negotiations: An Opportunity to Comprehensively Rethink Treaty Making in Africa

Provided by Afronomicslaw