The North-South Trade Agreements and Integration in Africa: A Focus on the Proposed USA - Kenya Free Trade Agreement

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Introduction

There is now a considerable amount of literature written on the Kenya's proposed Free Trade Agreement (FTA) with the United States of America (US). Commentators have addressed a variety of issues that have arisen while others have offered suggestions on what Kenya needs to be on the lookout for. For instance, James Gathii in his piece, An Early Assessment of the Prospective Kenya-United States Agreement traces the history of the USA's interest in Kenya which began with a mere goal of creating an investment agreement especially in the context of African Growth Opportunity Act (AGOA). He noted that the US initially considered other options of Africa-US relations before deciding to go through a bilateral approach. Among the other options the US

initially considered included entering into a continental agreement or using the Regional Economic Economic Communities (RECs). Professor Gathii further suggests that what Kenya needs to negotiate with the US , if it must, is a trade facilitative agreement akin to the WTO's Trade Facilitation Agreement(TFA). Also, that Kenya should "seek detailed and explicit rules, rather than vague aspirational language, as a way of guaranteeing any new obligations in a U.S.-Kenya trade agreement...". I have previously addressed a small aspect on cross-border date flows in a commentary on the USA's negotiation objectives on data.

This piece seeks to make additional perspectives to the ongoing debate and attempts to address the following questions around the proposed FTA and the integration efforts in Africa:

1. What is AGOA and how is it different from the FTAs that the USA is negotiating with Global South Countries?
2. What is the place of FTAs in the EAC and AfCFTA Legal Frameworks?

From Unilateral Preference Arrangements to Reciprocal FTAs

Qualifying Sub-Saharan Africa including Kenya access the US market under the AGOA scheme. In fact, some commentators and lobbyists have alluded to the expiry of AGOA in 2025 as a strong reason when Kenya has commenced the negotiations toward concluding an FTA. This is the view espoused not by the Kenyan government and trade officials, but also other powerful business organizations bases in the US such as the US Chamber of Commerce which has recently urged President Biden to seal the deal. A cursory look at the objectives of the negotiations as set out by either country makes this less persuasive. However, before delving further, it is important to give an outlay of AGOA's legal framework and how it came to be.

The World Trade Organization (WTO) was formed to provide common institutional framework for the conduct of trade relations among its Members. Article IX(3) of the Agreement grants the Ministerial Conference the power to waive an obligation imposed on Member by the WTO agreement of any other multilateral trade agreements so long as three fourth of the membership backs this decision. AGOA has a waiver of the WTO's Most Favored Nation rule which expires in 2025.

Kenya is not USA’s most significant Trading Partner

The US’s interest in crafting an FTA with Kenya cannot be based on the significance of the US’s trade relationship with Kenya. A cursory look at the Kenya USA trade facts as presented by the office of the United States Trade Representative confirms this. Kenya is not a significant trading partner of the US and a look at trade data between these two countries confirms this. For instance, in 2019 Kenya was the United States' 109th largest goods export market. According to USTR, the U.S. goods exports to Kenya in were, up 9.9% ($36 million) from 2018 but down 38.6% from 2009. The top export categories from USA to Kenya (2-digit HS) in 2019 were: aircraft ($59 million), plastics ($58 million), machinery ($41 million), cereals (wheat) ($30 million), and special other (returns or repairs) ($29 million). The U.S. total exports of agricultural products to Kenya totaled $53 million in 2019. Leading domestic export categories include: wheat ($27 million), vegetable oils (ex. soybean) ($7 million), pulses ($5 million), coarse grains (ex. corn) ($3 million), and planting seeds ($2 million).

How about Imports

Kenya was the United States' 86th largest supplier of goods imports in 2019. U.S. goods imports from Kenya totaled $667 million in 2019, up 3.7% ($24 million) from 2018, and up 137.7% from 2009. The top import categories (2-digit HS) in 2019 were: woven apparel ($286 million), knit apparel ($168 million), edible fruits & nuts (macadamia nuts) ($55 million), ores, slag, and ash (titanium) ($52 million), and coffee, tea & spice (coffee) ($41 million). U.S. total imports of agricultural products from Kenya totaled $126 million in 2019. Leading categories include: tree nuts ($55 million), unroasted coffee ($34 million), tea, including herbal ($11 million), essential oils ($10 million), and other vegetable oils ($6 million). Accordingly, the trade balances between these countries show that the U.S. goods trade deficit with Kenya was $266 million in 2019; a 4.4% decrease ($12 million) over 2018.

On Investments, the USTR report further indicates that U.S. foreign direct investment (FDI) in Kenya (stock) was $353 million in 2019, a 3.8% decrease from 2018. There is no information on the distribution of U.S. FDI to Kenya. There is also no data on Kenya's FDI to the U.S. From the foregoing, it is clear

that in terms of trade, Kenya is not so much of a significant trading partner to the United States. Since the proposed US/Kenya FTA will focus on issues beyond the classical trade in goods, it is not farfetched to conclude that there are other interests at play in driving the agreement.

FTAs in the Context of Africa's Continental and Regional Integration Treaty Framework.

The emergence of the negotiation of FTAs involving African countries and the developed countries, and even other developing countries such as China and India (South -South FTA) has elicited debate on what impact they potentially have on regional integration frameworks. These FTAs also raise questions about whether they would produce benefits that are skewed toward the [economically] stronger negotiating partners. Some of the key issues regarding these FTAs have included whether the East African Community as a REC allows individual member States to conclude FTAs with third parties, and secondly whether the AfCFTA envisages Partner States to have such FTAs with third parties. In the next section of this essay, I address these twin issues. First, I discuss the EAC's approach. Second, I discuss the AfCFTA Treaty framework.

FTAS with Third Parties under the Treaty Establishing the East African Community

There have been debates around Kenya's proposed FTA with the USA and more particularly whether it sits well with the EAC integration efforts and ambitions. Whilst these positions have been urged from a trade relation and harmonious integration perspective, it is important that the legal position concerning FTA within the EAC Treaty law be set straight, and the starting point must be the EAC Treat as a Regional Trade Agreement.

Article 75 of the EAC Treaty establishes the East African Customs Union and mandates the negotiation of the East African Customs Union Protocol to deal with critical integration aspects of the EAC including application of the principle of asymmetry, elimination of internal tariffs, elimination of non-tariff barriers, establishment of Common External Tariff (CET), rules of origin, trade remedies, trade restrictions, competition, duty drawbacks refund and remission of duties and taxes , customs cooperation, re-exportation of goods, simplification, harmonization of trade documentation and procedures, among

others. The EAC Customs Union Protocol was signed by the Partner States on 2nd March,2004.

The Protocol in its interpretive paragraph defines a "foreign country" as a country other than a Partner State and by implication these [foreign countries] include all non-EAC countries both within African and from other parts of the world.

Further, it lays down the framework for engagement with foreign countries in trade relations. Article 37 (4)(a) provides that:

“A Partner State may separately conclude or amend a trade agreement with a foreign country provided that the terms of such an agreement or amendments are not in conflict with the provisions of this Protocol” while Article 37(4)(b) underscore that should a Partner State wish to conclude a trade agreement with a foreign country, then it should notify the other Partners States”

Where a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of this Article, with a foreign country the Partner State shall send its proposed agreement or amendment by registered mail to the Secretary General, who shall communicate the proposed agreement by registered mail to the other Partner States within a period of thirty days, for their consideration.”

Whereas Article 37(4)(b) uses “shall” thereby making the submission of a proposed agreement by a Partner State mandatory, it is not apparent what the role of the other Partners States is in the scenario. This would simply be limited to giving comments on the proposed agreement which must be made within 90 days of the notification. Further, the nature of the “consideration” is also not clear. The Protocol has not expressly given the Partner States powers to block any negotiation that a Partner State may commence with a foreign country. Interestingly, the EAC Secretary General is expected to convene a meeting for “consideration" of the comments and proposals within 60 days after the comments have been received. Again, neither the nature of the comments nor the framework of the deliberations in this meeting is clear from the reading of the Protocol.

Further, the Protocol provides that should there be no comments at all, then the Partner State concerned may proceed with the trade agreement. It is thus not clear what exactly the discussions above are aimed at. Do these provisions mean to provide that lack of comments by a Partner State, or worse still, by all the concerned Partners gives a proposed agreement a thumbs up? And just what form should the comment take? What is clear is that the EAC Customs Union Protocol as an RTA does not prohibit Partner States from negotiating FTA with third countries. Neither is there a provision making any discussion, a precondition to be met by a Partner State before the commencement of trade negotiations with a third country.

But what was the intention of the EAC Treaty on this point? From the overall objective of the integration ambitions of the REC, it becomes clear that the EAC had envisaged to have Partner States negotiating with non- EAC countries as a block. Nevertheless, the EAC legal architecture does leave a lot of grey errors that leaves a lot of room for disagreement. Accordingly, there have been recent calls for a cautious approach to the subject. For instance, Annabel Gonzalez in her recent essay argues that customs union can negotiate bilateral free trade agreements but with caution. She further argues that the measures within such customs union that allows for negotiation as the bilateral FTAs can in fact lead to more flexible FTA with minimal impact on the customs union.

This approach of REC negotiating FTAs with third parties is not a new phenomenon in Africa. However, it is worth noting that it does require an explicitly supportive treaty framework. Great lessons on this can be learnt from the Southern African Customs Union(SACU) which has negotiated several FTA and Economic Partnership Agreements(EPA) with other countries such as the United Kingdom (UK) and the Southern Common Market (MERCOSUR).

SACU's legal framework has been effective in facilitating the negotiations leading to the above mentioned agreements. Article 19 of the SACU Agreement titled Trade Agreements With Countries Outside The Common Customs Area expressly prohibits SACU members (Contracting parties) from entering into a trade agreement without the concurrence of other contracting parties and subject to agreed conditions. Articles 19(1) of the Agreement clearly sets the tone as follows:

“ (1) A contracting party shall not, without the prior concurrence of the other contracting parties and subject to such conditions as may be agreed upon by the contracting parties, enter separately into or amend a trade agreement with a country outside the common customs area in terms of which concessions on the duties in force in the common customs area are granted to that country.”

Further, Article 19(2) provides that any such agreement can be concluded if it is not in conflict with any provision of the SACU agreement. The ultimate effect of the provision is simply that the concurrence of the entire membership is explicitly required before a country enters into a trade deal with a non- SACU country. Accordingly, compared with the EAC’s framework, SACU has a pretty watertight legal framework which is effective and perhaps progressive in so far as it tries to entrench regionalism.

James Gathii and Harrison Mbori in their piece Bilateralizing of the EAC- EU EPA: An Introductory Legal Analysis of the Kenya -UK Economic Partnership Agreement have delved into the issue further especially regarding whether Kenya’s action of doing it alone by negotiating and signing the EPA with the UK, violates the EAC Customs Union. They have observed and rightly so that this current deal between the UK the Kenya is just but a replica of the abortive European Union (EU)- EAC EPA which failed after it became impossible to secure requisite signatures of all the EAC countries.

At this point it is worth pointing out that the establishment of the EAC as a REC is anchored on the WTO Rules. The General Agreement in Tariffs and Trade (GATT) Article XXIV and General Agreement on Trade in Services (GATS) Article V respectively, allow WTO members to enter into agreements for the formation of free trade areas and customs union on the condition that these arrangements cover substantially all trade (in the case of trade in goods) and substantial sectoral coverage (in the case of trade in services).

Both Article XXIV GATT and Article V GATS lay conditions or criteria that a Regional Trade Agreement must fulfil. Under GAT xxiv, the FTA or Customs Union is not supposed to raise barriers to trade for third parties; duties be eliminated on "substantially all the trade” between the parties of a customs union or FTA or at least with respect to substantially all the trade in products originating in such territories; and for a customs union, its members should

apply "substantially the same duties and other regulations of commerce" to trade with non-members of the customs union.

Similarly, GATS Article V Members are not prevented from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement. Such agreements should first have substantial sectoral coverage, and second provide for the absence or elimination of substantially all discrimination in the sectors covered either through elimination of existing discriminatory measures and/or prohibition of new or more discriminatory measures.

EAC integration is thus anchored on the above and it would appear that it is indeed a right of each and every WTO member to commence negotiations and indeed to enter into an FTA whether or not that Member is a member of a REC. To argue otherwise at least by dint of GATT Article XXIV and GATS Article V, would perhaps be tantamount to negating the very principles set out in the WTO law. How does one reconcile these contradictory positions? Or put differently, does GATT and GATS and therefore the WTO, really give the REC the ammunition to deepen integration? The jury should surely be out there.

Coming back to the proposed US-Kenya, there is a need to discuss the likely implications of the proposed trade FTA on critical EAC issues such as preference erosion, and rules of origin as well as the overall implication of the WTO extra aspects of the proposed agreement such as security, corruption, public procurement, e-commerce, money laundering, and corruption in a more structured manner. These discussions should however not be held on the clear basis, as has been demonstrated above. Under the EAC Treaty Law, each Partner State is within its right to negotiate and enter into other trade agreements with non EAC countries.

It is interesting to note that this matter is at the moment pending before the EACJ in a suit being *Reference No. 5 of 2020; Christopher Ayieko & Another vs The Attorney General of Kenya*, that seeks to stop Kenya from entering into an FTA with the United States and it would be interesting to see how the court interprets Article 37 of the EAC Customs Union Protocol. As at the time of the writing this piece, the EACJ is yet to render its decision in this matter.

FTAS with third Parties under the Treaty establishing the African Continental Free Trade Agreement

Just like there have been commentaries on the place of preferential trading arrangements that African countries might have with other countries and in particular, the likely effect of those arrangements on integration.

As regards whether the AfCFTA Treaty gives members States the leeway to negotiate FTA with third parties, James Gathii has rightly pointed out that:

“As currently designed, the AfCFTA does not prevent Kenya to offer the same or more favorable trade terms to the United States than those that it has granted other AfCFTA member States. I believe this is what many critics of Kenya’s planned agreement with the United States have been getting at. They are worried that there is no mechanism to defend intra-regional trade liberalization commitments made by African countries through the AfCFTA from being available to economies like the United States that enter into a trade agreement with an AfCFTA member State once trading under AfCFTA rules commence”

Amaka Vanni and Tsotang Tsietsi in their article African Practice in International Economic Law: 2017–2019 while reflecting on the ethos of AfCFTA integration efforts, have noted that the negotiations for an FTA akin to Kenya’s proposed agreement with USA may lead to increase in barriers to intra-African trade and therefore undermine regional integration efforts. They further posit that the agreement is likely to create preferential rules of origin that would ensure only parties to the agreement benefit from the arrangement. In fact, the authors hold the view that the AfCFTA encourages intra- African trade, and frowns upon trade deals with third countries:

“The ethos of the AfCFTA, on the other hand, is that members are to concentrate on boosting intra-African trade and are discouraged from entering into bilateral trade deals with third parties.”

With the above concerns in mind, it is important to examine the proposed agreement in the context of AfCFTA because it is not only important to address whether the continental trading block allows members to enter into FTA with third countries, but it is also important to delve into the parameters and ultimately the effect of such agreements on African integration. The starting

point is to answer the key question which is, does the Ethos of AfCFTA discourage bilateralism?

As stated above, Article 18 of the AfCFTA Treaty does allow members States to negotiate preferential agreements with countries who are not parties to the Treaty (Third Parties).

Article 18 (1) accord each Party, on a reciprocal basis, preferences that are no less favourable than those given to Third Parties when implementing the agreement. Notably, Article 18(2) on extension of preferences a Country has with third parties state that:

“A State Party shall afford opportunity to other State Parties to negotiate preferences granted to Third Parties prior to entry into force of this Agreement and such preferences shall be on a reciprocal basis. In the case where a State Party is interested in the preferences in this paragraph, the State Party shall afford opportunity to other State Parties to negotiate on a reciprocal basis, taking into account levels of development of State Parties.”

The above means that whenever a Partner State in the AfCFTA enters into an FTA with a non AfCFTA member, the preferences under such a deal can be extended only to AfCFTA States Parties that are interested in them, meaning the country must express their intention. Moreover, that interest is of itself not enough. Rather, a State Party that wishes to benefit from the preference another State Party has offered a third Party must commence negotiations for getting these preferences on a reciprocal basis. Reciprocity here implies that the country interested in such preferences must equally offer some concessions in return. It remains to be seen whether this scenario could lead to perpetual negotiations on the continent given the fact that there a myriad existing (and proposed trade deals) on the continent. These trade deals different countries in Africa have concluded with third countries include the USA- Morocco FTA, the Kenya-UK EPA , the SACUM-UK EPA, the EU-SADC EPA, the China- Mauritius FTA. What happens for instance in a case where an AfCFTA Partner State is interested in the preferences in these FTA? This interest would trigger Article 18(2) of the AfCFTA Treaty, meaning there will have to be fresh negotiations toward a reciprocal deal. One of the likely effects of this framework is ‘ multiple’ mini preferential arrangements in Africa which may complicate the already

spaghetti ball scenario of multiple and overlapping trade agreements.

North- Global South Deep Trade Agreements: What are the Best Approaches For African Countries

Aside from the legality of the Kenya -USA proposed FTA vis-as -vis regional integration both at the REC level and at the continental level, what needs addressing is the implication of the agreements such as the proposed Kenya-US FTA . The USA's negotiation objectives cover a wide swath of issues that have traditionally not been covered in trade deals in which Kenya is a party such as State Owned Enterprises (SOE), competition policy , labour standards, environment, anti-corruption, government procurement currency as well as what are clearly political commitment such elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel, and 'elimination of State-sponsored unsanctioned foreign boycotts of Israel, or compliance with the Arab League Boycott of Israel.' Whereas this piece does not intend, at this stage to analyze the potential legal, sociopolitical, economic and foreign policy implications, the objectives should the agreement be concluded. These aspects are seemingly part of the trend of the multilateral trade negotiations being championed by the Global North in their trade engagements with the Global South. They are the hallmark of deep trade agreements (DTA) or WTO-Extra Agreements.

Mattoo, A. Rocha, N and Ruta, M in Handbook of Deep Trade Agreements have observed that DTAs cover not only trade but other policy areas which come with different consequences and dimensions on integration. They bring different obligations to the parties and can indeed lead to conflict with agreements that a country is already a party. Do the Global South countries have the robustness that is needed to administer these agreements? For instance, does Kenya have what it takes to comply with US style labour standards contained in US FTAs? This kind of analysis is especially important since the US/Kenya FTA will lay the foundation for agreements with other African countries.

Conclusion

It is important that the Global South countries and particularly African countries device approaches that aim at entrenching integration in their own regions.

This is absolutely crucial now that African States have the ambition of increasing intra- African trade. Secondly, African governments need to approach FTA and EPAs with the countries in Global North with extra caution and with their development needs, economic situations, and integration ambitions in mind.

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