The Implications of the United States-Kenya Free Trade Area Negotiations on the African Continental Free Trade Agreement

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In February 2020 the United States President Donald Trump and his Kenyan counterpart Uhuru Kenyatta announced their intention to negotiate a bilateral free trade agreement. The announcement of a bilateral free trade agreement negotiations triggered several negative reactions from members of the African Continental Free Trade Agreement (AfCFTA) and the East African Community (EAC) who felt frustrated by the decision of Kenya. Some member of the EAC have argued that under article 37 of the EAC Customs Union protocol "Trade Arrangements with Countries and Organisation Outside the Customs Union" states that countries are required 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. Therefore such provision precludes Kenya from entering into a trade agreement with United States.

What is in there for both States? The decision of a United States bilateral free trade agreement with an African state was initially announced in January 2018 by the US Trade Representative Robert Lighthizer when he stated " I think that before very long we are going to pick out an African country properly

selected and enter into a free trade agreement with that country. . . And then if that done properly will become a model for these other countries." The total trade in goods between the United States and Kenya amounted to US $ 1 billion in 2018. Kenya rank the 98th largest trading partner for the United States and neither imports nor exports to Kenya ranks amongst the top five to United States trading partners in the Sub-Sahara Africa. Then one begs to ask what would have motivated the United States handpicking Kenya first. Kenya aims to permanently secure the profits of the African Growth Opportunity Act (AGOA) which terminates in 2025. By signing the agreement Kenya hopes to realize its economic goals contained in its vision 2030 and to solidify economic cooperation between the two states.

As Scott Eisner the President of the United States Africa Business Center at the US Chamber of Commerce stated "it really is who was willing to raise their hand and who had the most political will behind it." For Kenya indeed there was host of reason for raising their hand first. More than 70 percent of Kenya's exports to the United States are duty free utilizing the AGOA a preferential treatment coming to end in 2025. In the past five years less than 2 percent of Kenya's exports to the United States were subject to import duties. Kenya has been a leading beneficiary of the AGOA preferences since its inauguration in 2000 and its exports to the United States have increased six time fold from US$109 million to US$ 667 million by 2019. Therefore, with such huge export percentage accessing the United States market duty free, Kenya faces a greater risk should the AGOA expire without a replacement. The Kenyan Cabinet Secretary for Industrialisation, Trade and Enterprise Development Betty Maina recently remarked that, "increasing and sustaining export performance to the United States requires a trade arrangement that is predictable and guarantees preferential market access for Kenyan products. Kenya is also keen to attract foreign direct investment from the United States that will improve vertical and horizontal linkages in the Kenyan economy. The increased inflow of investment from the United States has the potential to create job opportunities and catalyze other value chains that will benefit micro and small enterprises in Kenya".

For the United States some of the proposed reason for the deal with Kenya was security. Kenya is a key ally for the United States in its campaign against the Al

Shabab of Somalia therefore Kenya will provide a safe haven for the United States in its engagement in the region. Additionally, there is need for the United States to deepen its commercial ties with the East African powerhouse and to serve as a foundation for further expanding throughout the East African Community. As China's Belt and Road Initiative reaches the shores of the African continent with Kenya already a recipient of US$4 billion railway project that links Nairobi and Mombasa the US-Kenya free trade area might have been aimed at countering China expansion throughout Africa.

Repercussions of Kenya going solo The establishment of the AfCFTA presents massive potential for boost in intra-Africa trade, growth and investment. Kenya's unilateral action would weaken the continent bargaining position; undermine collective negotiating strategy of the AfCFTA. Such a bilateral free trade agreement would undermine the collective progress made to bring together the whole continent under one trading bloc. Kenya needs to weigh the potential benefit in the short term of its bilateral negotiations with the United States and the risk of getting an unfavorable deal against the potential long term benefits of a continental approach that would enhance Africa's bargaining position, maximize regional economies of scale and promote regional integration and broader transformation across the continent.. The African Union favored negotiating a continent wide free trade agreement with the United States to leverage the strength of the AfCFTA. It is crucial to note that the formation of the AfCFTA is aimed at being a continental podium upon which Africa can engage the world on trade issues to reinforce its bargaining power.

The United States intends to make use of the trade agreement with Kenya as a model for further negotiations with other African states. Some of the greater ramifications of the free trade area negotiations would include that the outcomes will have significant implications on future dealing between African states and the United States considering that the United states intend to use the agreement with Kenya as a blueprint to engage the rest of Africa . In March 2018 the AfCFTA was signed by 54 African countries the agreement entered into force in 2019 and on the 1st July 2020 the AfCFTA took effect. It should be noted that the attempts by the United States to use Kenya as a model will not reflect the needs of other African Union members and could upset regional

integration. The former deputy chairperson of the African Union Commission Erustus Mwencha remarked that "under the African Union the African heads of states have discouraged member states from entering into bilateral free trade negotiations with third parties because they jeopardize the AfCFTA." Mwencha further stated that Kenya would be able to negotiate a fair much better deal if it coordinated with other members. The bilateral United States-Kenya trade agreement would have the effect of discouraging intra-regional trade in Africa and lead to gradual disintegration of the AfCFTA ambitions.

Is the AfCFTA a continental platform for engaging the rest of the world? The AfCFTA cannot deter its member states from entering into bilateral free trade agreements. Member states in a free trade agreement such as the African Continental Free Trade Agreement retain the autonomous policy space to determine issues such as tariffs and trade policies; they are free to conclude deals with third parties on condition that their existing obligations are respected. The AfCFTA is not a supranational institution that will engage the rest of the world on behalf of Africa it is still subject to the oversight of the African Union General Assembly which is the highest decision making body of the African Union. Additionally being part of the AfCFTA does not mean that a country has relinquished its treaty making power to a regional body; therefore Kenya does retain the sovereignty to conclude bilateral treaties. The AfCFTA agreement does not establish any institution with mandate to negotiate trade agreements on behalf of member states; countries retain the policy space to negotiate trade agreements with third parties. With all being said the Kenya's trade negotiations with the United States may perhaps in future become a stepping stone for further collective engagement between the United States and Africa? The AfCFTA does not restrict its member states from concluding trade agreements with third parties. Article 18 of the AfCFTA Agreement provides under clause 1 that State Parties shall, when implementing this Agreement, accord each other, on a reciprocal basis, preferences that are no less favourable than those given to third parties. Therefore Kenya is duty-bound to extend any such treatment given to the United States under the free trade agreement to members of the AfCFTA.

To sum up, the United States-Kenya free trade area negotiations does have substantial consequences on the integration efforts which may conflict with

Kenya’s commitments under the AfCFTA. In as much the African Union in moving towards multilaterism, the United States under the Trump administration is taking the bilateralism trajectory which pose a threat to the hard earned gains realized and to be realized under the AfCFTA. There is need to set up a continental body with the mandate to engage rest of the world on behalf of Africa with a common position on trade issues in order to preserve the objectives and ambitions of the AfCFTA. Finally, there is need for greater caution in engaging into bilateral treaties between AfCFTA members and third parties because it may result in the race to the bottom and gradual disintegration of the AfCFTA ambitions and objectives.

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