Information Brief on US-Kenya FTA

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Kenya's basis for FTA with US questioned, inherent dangers flagged by African Trade Experts

Serious dangers to Kenyan economic transformation, the East African Community (EAC) and Africa's economic development are inherent in the intended Free Trade Agreement (FTA) between Kenya and the United States. Dangers of crippling sectors such as agriculture, manufacturing, the digital space, among others and disintegration of its economy due to undue pressure from the United States are imminent. Such a move, too, will set a counterproductive floor for all other African countries in their future trade relations with the US since it will give the US a pole position, according to African trade experts.

These alarms were raised in a pan-African webinar discussions on the US-Kenya FTA on May 8, 2020, hosted by Third World Network-Africa (TWN-Africa), SEATINI Uganda and ECONEWS-Africa, under the umbrella of the Africa Trade Network (ATN) and had over seventy participants including policy makers, private sector players and CSOs in Africa and beyond.

Early this year, the Office of the US Trade Representative notified the US Congress of the Trump Administration's intention to negotiate an FTA with Kenya.

Kenya has argued that the intended FTA is a forward-looking replacement for the African Growth and Opportunity Act (AGOA), which expires in 2025. This was reiterated by Mr Peter Njoroge, Director of International Trade, Ministry of Industry and Trade of Kenya during the meeting. He also made the point that assurances have been given by the Trump Administration that this FTA would not undermine Africa's economic integration.

The above assertion raised reactions from other experts and participants. 'What is being pushed by the United States industry for the intended FTA is scary and it is even more scary when one looks at the provisions in the US Mexico-Canada Free Trade Agreement (USMCA)' says Ambassador (retired) Nelson Ndirangu of Kenya, a trade expert with over thirty (30) years of trade and economic policy analysis, trade negotiations and currently Chairman, Competition Authority of Kenya.

According to Ambassador Ndirangu, the US has said, time and again that it would use USMCA as the basis for negotiating trade relations with countries in the world. If that is going to be the basis, according to the Ambassador, then Kenya, would need to be careful so it does not end up having an agreement that is one-sided.

The USMCA has come up with an increasing regional value content. Take the auto sector they have insisted that 75 percent of the auto content be made in North America. So, if this is anything to go by,

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and when goods negotiations start, such clauses might make it difficult for Kenya to add value and to export to the US when the percentage is that high, says Ambassador Ndirangu.

The trade expert also warned about investment and labour provisions and related dispute settlement through international arbitrations. From experience when they are adjudicated elsewhere the host country ends up losing.

The provisions, modelled on the USMCA, would put Kenya in a tight corner. Because any small disturbance that affects returns on investment of companies could lead to demands for compensation by US investors irrespective of the prevailing environment.

Take the problem of the Corona virus that governments are confronted with, and if one of the terms is that if government comes up with measures that will affect returns on investment then it has the right to seek compensation.

Ambassador also raised issues in relation to agriculture. If the USMCA is replicated in the Kenya-US FTA then there would be serious concerns. The US would want Kenya to lift the ban on Genetically Modified Organism (GMO) foods. That could be an issue because there were reasons why Kenya placed the ban on the GMOs and those reasons remain valid.

Another area is e-commerce, an issue that is still new at the World Trade Organisation (WTO) though it has been at the WTO for the past thirty-two years. When one looks at what is being suggested by the US industry and also the USMCA it is a little bit scary. Ambassador Ndirangu advised that maybe a cooperation agreement on e-commerce could be a better option until the discussions at the WTO are concluded so that whatever is going to be negotiated will be compatible with the WTO agreement.

He also touched on services. The US will be pushing for market access with Kenya opening up more sectors but the US will probably not mention mode 4 because in most of the agreements that US has signed mode 4 issues are absent. But this is one area that Kenya may benefit and may wish to push for as part of the negotiations.

He therefore advised the negotiators of Kenya to be fully prepared ahead of the task and to get the rules of the negotiations clearly set from the onset to prevent the negotiating parties outstepping the bounds of the negotiations.

Another trade expert, Tetteh Hormeku, Head of Programmes, Third World Network-Africa, contributing to the discussions, centred on the coherence and compatibility issues triggered by the intended FTA. That is coherence in relation to the African Union and its aspirations, coherence and compatibility with Kenya and the East African Community, coherence and compatibility with Kenya and Kenyan history in trade policy making.

According to Tetteh, from his readings, Kenya is proposing to negotiate a reciprocal FTA with the US, which is basically the reorganized North American Free Trade Agreement (revised NAFTA). And Kenya has had a long history in which it has been caught with similar agreements in the past.

The Kenyan economy, dependent on primary commodities with all its internal fragmentations, locked in the global economy and a particular character of weak productive capacity, intending to have a reciprocal trade agreement with a country as big as the US raises a lot of issues. Such a move carries a fundamental disconnect not withstanding what the claims of the objectives of the Agreement are.

Kenya claims to be forward-looking to avert trade disruptions come 2025 when AGOA expires and that as the only developing country within the EAC region, it does not enjoy trade preferences that the other members, which are Least Developed Countries (LDCs), can access.

Tetteh Hormeku's response to this is that the fundamental starting point remains the same whether a country is an LDC or developing country, the economic structures remain the same and similar with countries in the region. That is in terms of economic content, structure and economic capacity and therefore the development imperatives that flow from that such as transforming the economies, the issue of the implications of a comprehensive agreement with the US is raised across board.

Secondly, there is the claim that other countries should support Kenya because whatever Kenya gets will be the basis on which other countries will deal with the US in the near-future trade relations. In the view of participants, if that were the case--the eventual demise of the AGOA--Kenya should have sought a wider African response since it is something that confronts all developing countries in Africa. Such a move would have presented a better front than Kenya going solo.

This problem of coherence with existing trade agreements in Africa are not new in the view of the participants. When the Africa's Continental Free Trade Agreement (AfCFTA) negotiations commenced the benchmark of ambitious liberalisation had been set already in the EPAs engagement with the European Union (EU). Some countries had gone to 80 percent, 90 percent.

So, experts warned that whatever concessions that Kenya would give to the US is likely to be the floor that other African countries will deal with the US. In the view of experts this floor is likely to be counterproductive and would fail to give the kind of space that African countries need to make sense and make effective use of agreements that they are entering into with the AfCFTA.

Within the AfCFTA, African countries have only concluded negotiations in the Trade in Goods Protocol. Other areas such as investment, competition, intellectual property and now ecommerce are yet to be negotiated. In the view of experts, the kind of investment regulations that are needed in Africa to be able to accord priorities to African investors, within Africa, so as to promote Africa's development and support Africa's capacity building drive, would necessary be different from the kinds of investment rights that would be accorded American investors.

The best way to promote investment regulations and rules that promote development, in the light of the discussions, is to have an investment agreement of an affirmative action that gives preferences to African investors over and above the investors outside the continent. If Kenya goes ahead with an investment agreement with the United States, which is based and modelled on the revised NAFTA (USMCA), then Africa would face serious incompatibility ahead.

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Beyond market access what makes liberalizing markets useful is the productive capacity that countries develop. And those productive capacities come together in the areas of technology, investment relationships, services which will capacitate the market opening.

According to Tetteh, Kenya probably is becoming a trojan horse without meaning to, in the African space or maybe some interests groups in Kenya that are seeking particular interests in the US market, are becoming a trojan horse in Kenya and undermining the development imperatives of Kenya and the rest of Africa.

Contributing to the debate, Ms Jane Nalunga, Country Director of SEATIN-Uganda, indicated that the bitter lessons and experiences from the EPA negotiations as EAC and the posturing of the US in negotiations on Bilateral Investment Treaties (BITS) should guide the current intended FTA between Kenya and US.

To Ms Nalunga, the current intended FTA, in terms of its form and content is not different from the EPAs that the EU offered to African countries which many trade experts fought against on the basis that they detrimental to the aspirations of African countries.

Also, the US has been for some time now targeting the EAC to negotiate trade and investment agreements and BITs but again there have been challenges. Targeting Kenya is an issue of divide and rule tactics. Because the US knows there is EAC as a bloc, a Tripartite Agreement under negotiations as well as the AfCFTA but using Kenya as a Trojan horse to be able to push this FTA on Africa.

The FTAs that the US signed are really scary and she doubts whether Kenya stands a chance to protect the critical sectors. Kenya needs to think and evaluate what they are getting from the US. Kenyan trade with the US has been in deficit over the years and most of the products have been primary products compared to the value-added products that are coming from the US.

Just as most experts pointed out about the EPAs, the US like the EU, is also signing several trade FTAs with several countries and the preference will be eroded.

According to Ms Nalunga, what the current coronavirus pandemic has taught us is that countries need to have food sovereignty. If this FTA is signed, one of the first sectors to suffer is agriculture because the proposals from the US Grains Council is to get access to the Kenya market. With a hugely subsidised agricultural sector and the push for GMOs products by the US, Kenya's agriculture sector will not stand a chance.

Finally, the issues of the implication of the Kenya-US FTA on the EAC and Africa as a whole is very important. The EAC has a common external tariff and it will be affected. Also, the porous borders within the region would make it difficult for other countries to protect themselves once the US goods get into Kenya. They will find ways to the other EAC members.

So participants concluded that, in the light of all these, a Kenya-US FTA is not only a Kenyan issue and therefore wished Kenya could stand on its two feet and let the US negotiate with the rest of Africa but only after Africa has first concluded the AfCFTA as the basis to be able to negotiate with the US.

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