

# **RESPONSE TO THE PROPOSED KENYA - UNITED STATES OF AMERICA FREE TRADE AREA AGREEMENT: NEGOTIATION PRINCIPLES, OBJECTIVES, AND SCOPE Draft 6**

## **COMMENTS**

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1. Kenya-USA FTA negotiations provide the country with a unique opportunity to enter into a bilateral trade and development cooperation negotiations with one of the global economic powerhouses -the United State of America which is Kenya's third largest export market and seventh overall trading partner. These negotiations should not be hurried. Kenya needs to have a team of experienced negotiators in matters of trade and therefore the need to build capacity. The building of this capacity should not be from the United States although the proposal document says that Kenya shall rely on Trade Facilitation shall be negotiated on the basis of the Cooperation Agreement between the USA and EAC. Kenya should rely on or trust a negotiating partner to build its capacity on trade negotiation.
2. One of the objectives mentioned in the proposal for the FTA between Kenya and the USA is to enhance and diversify exports of goods and services into the USA under predictable and preferential terms. Kenya should be having in mind that eliminating tariff and non-tariff barriers on all goods especially with an economic powerhouse like the United States can have a negative impact on its economic diversification goal.COVID-19 has taught us a big lessons that reliance on imports can have devastating effects during pandemics or other crises. Kenya lacks competitiveness in the manufacturing sector. Our manufacturing sector is still not yet fully developed as seen in its growth rate compared to services. This has mainly been attributed to our heavy reliance on imported manufactured goods including raw materials (inputs) that are quite expensive; unfavourable business environment due to high cost of energy, water, poor infrastructure which affects the efficient flow of goods and services. The USA exports to Kenya are mainly manufactured goods. Some of the nascent industries like the textile industry needs protection. Some of the goods from the USA that should not be allowed into the Kenyan market

are used clothes (Mitumbas) which literally killed the former vibrant textile industries including KICOMI, Nanyuki Textiles, Rivatex, and many others.

3. On the Issue of Rules of Origin and value chains, if raw materials and intermediate products are imported by Kenya to process the products to export to the USA, the rule of origin might prevent these products from being accepted in the USA. Kenya has been exporting textile products to the United States under AGOA. However, most of the materials used in the export processing zones where production for export of these products are imported from other countries and that is why Kenya has not seen backward linkages of the export of textile products. The cotton, buttons, yarn, sewing thread and almost all the materials used in the textile industries is imported since the cotton ginneries in Kenya died a long time ago when we allowed used clothing to compete with them. Secondly, other materials are imported apparently because Kenya does not produce them in the right quality and quantity. Under the AGOA, apparel and clothing accounted for 62% of Kenya's export earnings. Other exports were tea, horticulture, coffee, titanium ores and concentrates which accounted for the rest of the earnings. The question is why hasn't Kenya built taken advantage of the AGOA to increase its export to the USA? Does Kenya have new capacity to take advantage of the increased access to the USA market, capacity that was not there under AGOA or will it continue exporting apparel and clothing that it has concentrated on throughout the existence of AGOA? Kenyan negotiators should insist on an agreement that is going to take into consideration that Kenya is a developing country and Special and Differential treatment should be first on the list since USA is a highly developed country enjoying economies of scale in its production of both raw materials and in manufacturing.
4. Negotiators should insist that USA should not result to tariff or non-tariff barriers on manufactured exports from Kenya since these would render Kenya's manufactured exports uncompetitive.
5. The USA has been complaining bitterly of China taking advantage of its developing country status to sell subsidized products in the international market. On Trade remedies, there might be a possibility of USA dumping its subsidized products into Kenya's market. Kenyan negotiators should take advantage of Kenya's developing country status and insist on use of subsidies in both agriculture and manufacturing to cut on production costs and to help the growing industries achieve economies of scale.
6. On the issue of legal obligations, Kenya seems to be circumventing its commitments to EAC, COMESA and AfCFTA when the proposal that "nothing in this Agreement shall require Kenya to ratify any international agreement in order to fully implement the FTA' while at the same time,

the expect that the USA shall notify Kenya of its intention to ratify any treaty that may in any way affect the implementation of existing obligations under the FTA. The USA would also want Kenya to notify its intention to ratify any treaty that may in any way affect the implementation of existing obligations under the FTA.

7. Although the proposal states that one of the objectives is to create a framework through which any EAC Partner State that did not participate in these negotiations at the outset is allowed to join the negotiations, subject to terms and conditions that would be agreed between the USA and Kenya. It would be advisable for Kenya to negotiate for an FTA under the umbrella of EAC or under AfCFTA and not as a lone ranger. An FTA between the USA and Kenya would put a death nil on attempts to build a region-wide economic bloc, the African Continental Free Trade Area (AfCFTA) which prohibits bilateral free trade negotiations with third parties. Kenya should be thinking of the greater good of the continent rather than short term gains from a bilateral agreement with an economic and political giant in the form of the USA in its quest to cut down the economic dominance of China and kill the rules based multilateral trading system in the form of the WTO.
8. On trade in services, the proposal says that the negotiations shall aim to eliminate restrictions and/or discriminatory measures with respect to trade in services of export interests to Kenya. Kenya should insist on all the 4 modes of trade in services both ways but also insist on special and differential treatment due to its developing country status. The issue of VISA's to the USA is a non-tariff measure that makes it extremely difficult for Kenyans to travel to the USA whether for business or for pleasure. Kenya should not make it easy for USA citizens to enter the country while the USA makes it extremely difficult for Kenyans to enter the USA.
9. On the issue of digital trade, the proposal says that it will seek support in strengthening E-Commerce and digital platforms for Trade in goods and services and also seeking support in strengthening the infant incubation, acceleration and innovation hubs for innovative start-ups in Kenya hence acknowledging that Kenya is not negotiating on a level ground with the USA. In my earlier submission, I had mentioned that FTAs are usually beneficial to two countries that are more or less on the same level of development. When one country is negotiating from a position of weakness, then it stands to lose a lot from the deal.
10. On intellectual property rights, the proposal says that capacity building and technical assistance will be provided by the USA to Kenya in order to fully implement the Agreed provisions on Intellectual Property Rights. My argument above also applies here, that we are acknowledging that Kenya is not negotiating on a level ground with the USA. In my earlier submission, I had

mentioned that FTAs are usually beneficial to two countries that are more or less on the same level of development. When one country is negotiating from a position of weakness, then it stands to lose a lot from the deal.

11. On labor, it is not clear what the proposal means by undertaking to support and cooperate at the ILO as labour is a very important factor for production. What does it mean in relation to the FTA? Does it mean that Kenya will implement all the ILO provisions regarding labour including no use of child labour, flexibility, decent, dignified labour and so on? Even if USA opened its market to Kenyan goods, there is a possibility that the agreement will have clauses that ban child labour while most of the agricultural sector (avocado, coffee picking etc, weeding, digging etc, in Kenya uses child labor. This would work negatively for Kenya and it require labour market reforms.
12. I have not seen anything in the proposed FTA that mainstreams gender and inclusiveness.
13. The FTA should not be rushed just because AGOA is ending in 2025. Let the exploratory talks and consultations be as exhaustive as possible since rushing it would make Kenya negotiate from a point of desperation and hence get a bad deal.