Comments on the proposed U.S. – Kenya Free Trade Area

Submission by Mauritius

General and Specific Negotiating Objectives

The signature of AGOA into law in 2000 marked a significant shift in US-Sub-Saharan Africa relations. It laid the foundation for a renewed partnership that would be mutually beneficial to both the US and countries in Sub-Saharan Africa (SSA). The aim of AGOA was to strengthen trade and economic relations between the US and SSA countries and thus contribute to advancing economic development of African Countries.

Since the enactment of AGOA, total U.S. imports from SSA have more than doubled. Though Africa's main exports to the US under AGOA continue to be unprocessed oil and minerals, U.S. imports of non-extractive products have also grown significantly (including agricultural products, motor vehicles and apparel).

The US had, in 2018, made it clear that the way forward to maintaining, and further improving trade and investment relations with African Countries was to conclude Free Trade Agreements as no further extension of AGOA seemed to be envisaged for the post 2025 period. In this regard, the US Administration indicated that it would select a "properly selected partner" with whom it would negotiate a model FTA to be subsequently used as a Model for FTAs with other African Countries.

The US and Kenya announced on 6th February 2020 that they have agreed to launch negotiations on a Free Trade Agreement to establish a predictable long-term relationship on trade.

Mauritius is of the view that the prompt initiation of the Free Trade Area negotiations and its early conclusion is necessary if this is to serve as a model for other African Countries, bearing in mind the expiry of AGOA is only in a few years' time (2025).

Asymmetry and Level of Ambition

Africa is not a homogenous continent. It comprise 55 Countries at different levels of development. It is home to the largest number of LDCs (29) in the world, landlocked countries, developing and small island developing states. Given that the US-Kenya FTA is to be replicated with other African countries, it is important to ensure that the principle of asymmetry constitutes one of the key principles of the FTA. African countries may not be in a position to take the same level of commitments as the US. Moreover, to have the buy-in of the other African countries in the FTA, the principle of asymmetry would be crucial. We are proposing that the US should, on its part consider providing full duty and quota free access under the FTA as is the case with Economic Partnership Agreements between African countries and the European Union.

Most countries in Africa have nascent industries, and are exporters of primary products. They are not integrated in the regional and global value chains. In this respect, the level of ambition under the Free Trade Area should therefore be commensurate with the level of development of African Countries, but at the same time it should meet the test of Article XXIV of GATT 1994 in terms of trade coverage to ensure legal certainty.

As far as Mauritius is concerned, we would be ready to negotiate a Free Trade Agreement which is ambitious in terms of coverage and which may, besides trade in goods, also include services, intellectual property rights, competition policy, economic cooperation, transparency measures, environment and other issues to be mutually agreed.

Minimum Level of Access

To ensure continuity of trade post AGOA, prevent trade disruption, and ensure that the FTA is built on the acquis of AGOA, the market access conditions for trade in goods under the FTA should, as a strict minimum, be on par with AGOA, both in terms of duty and Rules of Origin (ROO). In this context, the single stage transformation requirement for textiles and clothing i.e, the third country fabric rule should be maintained, and further improved for categories not covered. Moreover, the ROO should be further simplified and made more flexible for other products such as fish and fish products. processed fruits and vegetables and non-agricultural manufactured goods.

Promotion of Intra African Trade

It is expected that FTAs concluded between African Countries and the US should not be inconsistent with the objectives of the African Continental Free Trade Area (AfCFTA) which entered into force on 30 May 2019 after ratification by 22 African Countries. In fact the summit decision on the AfCTFA is very clear in terms of ensuring that Agreements entered into by African Countries with third Countries should not frustrate, and be inconsistent with the objectives thereof. Consequently, the modalities for trade liberalization in the context of the FTA both for trade in goods and services should not be inconsistent with the AfCFTA modalities and timeframes. The AfCFTA covers trade in goods, trade in services, including movement of people, investment and trade related issues such as IPR, Competition policy. So these issues may have to be covered by the FTA.

FTAs concluded by African Countries with third Countries will have to be notified to the AU and will be closely scrutinized. In this respect, the Kenya-US FTA must demonstrate that it will positively contribute both to intra Africa trade and trade between US and Africa. This must be reflected in key negotiating areas such as trade in goods (through rules of origin) which should allow cumulation with regional partners within Africa such as COMESA, SADC, ECOWAS and the continent at large. Moreover, the US has a unique opportunity to show its commitment to the continent by including specific flexible rules for key products that would facilitate regional value chains.

Trade in Goods

FTA Coverage

It is expected that the US Kenya FTA would cover substantially all trade (to be in line with Art. XXIV of GATT 1994). The FTA should *a priori* cover all AGOA 7200 product lines and cover other products of interest to both parties. The parties will aim to provide full duty and quota free access. Since both economies are not at the same level of development, there should be a limited list of sensitive products for Kenya.

With regards to the export of sugar, it is proposed for the U.S. to apply the ‘net surplus producer’ principle to provide for an agreed upon volume of duty free access to the exporter, provided that the exporting party is a net surplus producer, as is already the case for most FTAs which the United States has negotiated since the North American Free Trade Agreement (NAFTA), now the USMCA. Such post-AGOA FTA access should have no negative impact on the U.S. sugar program or the U.S. sugar industry (given that Mexico’s access under the terms of the Suspension Agreement in the countervailing duty case is governed by a formula that is net of imports under U.S. FTAs).

The proposed agreement could include a Most Favored Nation (MFN) provision to ensure that other African Countries will not be discriminated towards and thus will have the option to negotiate an Agreement with the US as a minimum on the same terms.

Rules of Origin

Rules of origin have a key role to play in promoting manufacturing in the respective countries and economic growth. In the case of the FTA, the rules of origin criteria should build on the ‘acquis’ of AGOA Rules of Origin, namely the 35% value addition and specific rules of origin for textiles and clothing in particular the maintenance and further improvement of the third country fabric rule. Flexibility in the form of the CTH and the CTSH rule should be considered to promote industrialization and regional and global value chains.

This could be achieved by an average of 100% trade coverage by the US and 80% by the African countries.

The FTA could also be made conducive to regional integration in Africa by allowing cumulation provisions in the agreement that would allow the use of materials sourced from other African partners to achieve the rules of origin requirements. This would promote the development of intra-Africa and U.S.-Africa value/supply chains.

Trade Facilitation and Non-Tariff Barriers

The US Kenya FTA must build on the framework of the WTO Trade Facilitation Agreement (TFA) to specifically address bottlenecks associated with both border measures (cost of trading, administrative procedures, customs systems among others) and “behind the border measures”.

“Behind the Border” issues, would include competitiveness, export promotion, international standards, physical infrastructure, logistics and transport services. Essential measures must be taken to reduce lead time in export of goods, ensure timely delivery and reduce final cost of exports.

Furthermore, in order to address any unnecessary NTBs that parties may face in each other’s market, it is proposed to create a permanent committee and contact points dedicated to look into NTBs and resolve the issues in a swift manner. This could be substantiated by creating a set of specific rules with timelines for the resolution of identified NTBs.

The committee’s role could be streamlined to work on NTBs faced by all regional partners, including AGOA eligible countries. The barriers and solutions found by the committee would therefore be shared with all African countries to ensure that other countries do not encounter similar problems when trading with each other and with the U.S.

Additionally, the committee could be mandated to look into the relevance and reasonableness of fees, charges and taxes, that are applied to goods or services exported by the parties.

With regards to SPS and TBT requirements, African countries have consistently faced difficulties to meet the requirements imposed by the U.S. It is proposed for the U.S. to give special consideration to enhance the ability of Kenyan exporters to meet US SPS and TBT requirements.

Trade in Services

It is therefore proposed for the model FTA to include a comprehensive and forward looking chapter on trade in services. In addition to the general provisions on trade in services, the chapter could, inter alia, include annexes to clarify the rules to be applied to different modes of supply and specific sectors.

Market Access

With respect to the market access commitments the U.S. should take into consideration the lower investment capacities of African investors. The agreement should as far as possible, eliminate restrictions on foreign equity participation and remove minimum investment requirements.

Mutual Recognition of Qualifications

The agreement should provide for a platform for Regulatory Authorities to engage with each other to develop rules for the recognition of qualifications and set timelines to begin negotiations on the mutual recognition of qualifications.

Movement and presence of natural persons supplying a service

The supply of services through Mode 4 (Presence of Natural Persons) remains one of the most restricted modes of supply as they are often affected by various forms of access restrictions imposed on the movement of the persons.

The agreement should contain an annex aimed at facilitating the movement and presence of natural persons in the territory of the parties. These could, inter alia, include provisions to regulate measures affecting the various categories of service suppliers, temporary entry of natural persons, transparency and processing of application, among others.

Proposed Topics to be included in the FTA Negotiations

1. Investment Facilitation

The US – Kenya FTA could include a chapter on investment facilitation with the aim of facilitating and streamlining the procedures applied in the pre-investment stage. These could include timelines for the processing of application, transparency, fees and charges, use of electronic communication & application, single window and review mechanism.

In addition, parties may be required to designate centralized contact/enquiry points that would facilitate the work of interested investors by sharing market intelligence and procedural information and liaising with local authorities during the application process.

2. Government Procurement

Only a limited number of countries can bid for government contracts in the US, namely LDCs, FTA partners and signatories to the GPA.

It is proposed that the FTA includes provisions relating to the possibility of bidding for government issued contracts.

3. Intellectual Property TRIPS (minimum should be TRIPS compliant legislation)

It is important to recall that US statutes include TRIPS plus provisions. A TRIPS Chapter is the US Kenya FTA must take into consideration the fact that both countries are at different levels of development. This concept of asymmetry is also present in recent agreements concluded by the US, namely the USMCA.

The USMCA's IP chapter includes express references to the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its flexibilities for public health matters. Of particular relevance is the USMCA's recognition that Mexico can define a 'national emergency' independently and that it must discuss any changes to the TRIPS Agreement that could contravene the USMCA with the United States and Canada.

In SAA countries, the enforcement of IP rights laws is often the weakest aspect of the law because it often faces challenges with regard to inadequate funding of enforcement agencies lack of trained staff. The assistance of the US in this regard would be a step in the right direction.

4. Digital Chapter

The US is known to be a proponent of no customs duties on digital products and is against data localization.

The USMCA follows the TPP in requiring each country to establish personal information protection laws, though it leaves the content of such laws and the means of enforcement to be decided by each country.

It is important for Kenya to secure relevant transition period for enactment of relevant personal information protection legislation (based on global best practices, including APEC privacy regulations).

5. Addressing logistical constraints

Logistical constraints for companies trading between the U.S and Africa are mostly related to the cost and availability of freight. Indeed, the demand and supply conditions between the two regions have a significant impact on the cost of freight as many companies only export in small quantities. Moreover, sea transport usually takes long periods of time to reach the U.S. and vice versa which is a major deterrent for buyers in the 2 regions.

It is proposed for the agreement to create a committee that would consult with relevant public and private stakeholders and endeavor to find mutual solutions to address the identified logistical constraints.

6. Economic Cooperation

It is proposed that the agreement includes a chapter on economic cooperation and capacity building aimed primarily at supporting the development of specific sectors and ensuring human resource development.

A Committee could look into possible U.S. – Africa collaboration in the development of partnership/investment mechanisms for specific sectors and/or key issues such as renewable energy, 5G technologies, ocean economy, big data, fin-tech, artificial intelligence and new technologies, among others.