

THE KENYA-USA NEGOTIATIONS FOR A FREE TRADE AREA AGREEMENT: MAKING A CASE FOR A GENDER-RESPONSIVE APPROACH

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Abstract

Through free trade agreements, participating states aim to facilitate trade among themselves by eliminating all barriers from their Free Trade Area's (FTA) internal trade. The extent to which a participating state derives and distributes benefits from an FTA agreement necessarily depends on the nature and structure of its economy. Thus, the gender dimension of an economy must be one of the factors to be considered in any discussion on a free trade agreement so as to ensure equitable and full participation of all persons who fall in a country's working age group. In doing this, some of the questions that should be considered are: what is the gender profile of the country's economy and how does it affect men and women? What factors (inhibitors and enablers) have contributed to the present gender profile of the economy? What is the desired level of gender-inclusion in the economy and how can it be achieved? And are there effective mechanisms under the free trade agreement for enforcing the gender-inclusion goals? In seeking to answer these questions, this article looks at the gender issues in the Kenya-USA FTA agreement negotiations.

Keywords: Kenya-USA FTA, Free Trade Area, Trade and Gender Equality, Gender Inclusion, Gender-Responsive Approach, Gender-Impact Assessment

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1.0 Introduction

On 8 July 2020, Kenya and the United States of America (USA) launched bilateral negotiations on a free trade area (FTA) agreement.¹ Typically, through FTAs, countries agree to eliminate trade barriers like tariffs and quotas on trade with each other while retaining autonomy on trade policy with third countries with the aim of facilitating trade between themselves. So far, Kenya and the USA have exchanged their negotiation objectives and a number of preparatory trade negotiation rounds have been carried out.² Remarkably, the negotiation objectives identified by Kenya and the USA have not identified gender inclusion as a major concern. In fact, there is only a single mention of promoting participation of women in government procurement in the USA's objectives.

This brief article seeks to contribute to the ongoing discourse on a possible Kenya-USA FTA Agreement, with gender lenses. The article is divided into five sections. Section one discusses general points relating to the ongoing trade negotiations and the nature of economic engagements between Kenya and the USA. Section two provides an analysis of the gender profile of Kenya's economy. Section three proposes some approaches that could be employed to make the resultant FTA agreement and its implementation gender-responsive. Section four tries to anticipate some challenges that may be experienced in the development and implementation of a gender-responsive FTA. Section 5 contains the conclusions.

Kenya is a key security and economic partner of the USA in Africa and this can be attested to by the fact that the ongoing negotiations represent the first ever attempt to create an FTA between the USA and a Sub-Saharan African country, and the second in the whole of Africa.³ Kenya is an important

¹ Republic of Kenya, Statement by Betty C Maina, CBS, Cabinet Secretary, Ministry of Industrialisation, Trade and Enterprise Development during the Launch of the Negotiations of the Kenya-United States of America (USA) Free Trade Agreement (FTA) on 8 July 2020.

² Office of the United States Trade Representative, 'United States-Kenya negotiations: Summary of specific negotiating objectives,' May 2020; and Ministry of Industrialisation, Trade and Enterprise Development.

³ The USA signed an FTA with Morocco in 2004.

player in USA's Eastern Africa anti-terrorism campaign.⁴ In trade terms, however, Kenya does not constitute a significant trading partner for the USA. 2019 statistics rank Kenya as USA's the 96th largest goods trading partner (US Dollars 1.1 billion), the 109th largest goods export market (USD 401 million) and the 86th largest supplier of goods imports (USD 667 million).⁵ Conversely, for Kenya, the USA is a very important trading partner. In 2019 and 2020, the USA was the 4th leading destination market for exports from Kenya valued at USD 552.3 million (8.7%) and USD 525 million (7.7%) respectively.⁶ In 2020, the USA was the 7th largest import source for Kenya representing 3.44% (USD 531 million) of its total imports.⁷ In character, the exports from Kenya to the USA are mainly low-value added products such as fruits, nuts, ores, slag, coffee and spices.⁸ On the other hand, the major USA exports to Kenya are high value-added products like aircraft, plastics and machinery.⁹ Detailed data on trade in services between the two countries is not available for analysis.

At present, trade between the USA and Kenya is conducted under the framework provided by the African Growth and Opportunity Act (AGOA) which grants duty-free market access for some products from eligible Sub-Saharan African countries.¹⁰ AGOA was enacted in 2000 and, unless it is extended further, it shall expire in 2025.¹¹ Crucially, the Kenya-USA FTA once concluded, could replace AGOA in USA-Kenya trade relations and is intended to serve as a model for future negotiations between the USA and other African countries.¹²

⁴ Samuel L. Aronson, 'United States aid to Kenya: A study on regional security and counterterrorism assistance before and after 9/11' 5(1) *African Journal of Criminology and Justice Studies* (2011) 119, 125.

⁵ Office of the United States Trade Representative, 'Countries and regions: Kenya' - <<https://ustr.gov/countries-regions/africa/east-africa/kenya#:~:text=Kenya%20is%20currently%20our%2096th,was%20%24266%20million%20in%202019.>> on 19 August 2021.

⁶ Kenya Export Promotion and Branding Agency, *Kenya export performance in 2020*, March 2021.

⁷ TrendEconomy, 'Annual International Trade Statistics by Country (HS02): Kenya' - <<https://trendeconomy.com/data/h2/Kenya/TOTAL>> on 19 August 2021.

⁸ Office of the United States Trade Representative, 'Countries and regions: Kenya.'

⁹ Office of the United States Trade Representative, 'Countries and regions: Kenya.'

¹⁰ TRALAC, 'About AGOA' - <<https://agoa.info/about-agoa.html>> on 21 March 2022.

¹¹ TRALAC, 'About AGOA'.

¹² Office of the United States Trade Representative, 'United States-Kenya negotiations: Summary of specific negotiating objectives, May 2020.'

2.0 The gender profile of Kenya's economy

According to the most recent census, there are 24,014,716 (50.5%) women, 23,548,056 (49.5%) men and 1,524 (0.003%) intersex people in Kenya.¹³ Further, only 19,677,401 people are working as part of Kenya's labour force, 49.8% of whom are male while 50.2% are female.¹⁴ Kenya's current gross domestic product (GDP) is approximately USD 99 billion (2020).¹⁵ Informal employment accounts for approximately 83% of total employment in Kenya¹⁶ and the gender pay gap stands at 32% in favour of men.¹⁷ Table 1 and 2 below contain additional facts about the economy and its gender profile respectively.¹⁸

Table 1: Summary of key facts of the economy (2017)¹⁹

GDP composition by end use	Household consumption	77%
	Government consumption	13.7%
	Investment in fixed capital	17.1%
	Investment in inventories	-0.1%
	Exports of goods and services	13.9%
	Imports of goods and services	-21.7%
GDP composition by sector of origin	Agriculture	35%
	Industry	17.6%
	Services	47.7%
Labour force by occupation	Agriculture	61.1%
	Industry	6.7%
	Services	32.2%

¹³ Kenya National Bureau of Statistics, 'Kenya Population and Housing Census: Distribution of population by age, sex and administrative units' 3, 2019, 11.

¹⁴ KNBS, 'Kenya Population and Housing Census' 162.

¹⁵ Heritage Foundation, '2021 Index of economic freedom' - <<https://www.heritage.org/index/country/kenya>> accessed 23 August 2021.

¹⁶ KNBS, Economic Survey, 2019, 39; and KNBS, *Inequality trends and diagnostics in Kenya*, 2020, 64.

¹⁷ Equileap, *Gender equality in Kenya: Assessing 60 leading companies on workplace equality*, Special Report, November 2019, 11.

¹⁸ Moody's Analytics, 'Economic indicators: Kenya' - <<https://www.economy.com/kenya/indicators#ECONOMY>> on 23 August 2021.

¹⁹ Information sourced from Moody's Analytics, 'Economic indicators: Kenya' - <<https://www.economy.com/kenya/indicators#ECONOMY>> on 23 August 2021.

Table 2: Gendered Profile of the Economy

	Indicator	Men	Women
1	Labour force participation rate (2019) ²⁰	69.6%	64.1%
2	Real monthly earning index (2014) ²¹	4.12	3.52
3	Unemployment rate (2019) ²²	2.43%	2.76%
4	Modern sector employment (2017) ²³	66%	34%
5	Wage employment in agricultural sector (2016) ²⁴	67%	33%
6	Share of agricultural sector employment over all sources of employment (2019) ²⁵	11.4%	11.9%
7	Wage employment in manufacturing sector (2017) ²⁶	84%	16%
8	Wage employment in public administration (2017) ²⁷	64%	36%
9	Wage employment in service activities (2017) ²⁸	48%	52%
10	Mean annual household real per capita expenditure based on gender of the household head (2016) ²⁹	Ksh 56,745	Ksh 50,800

²⁰ KNBS, *Inequality trends and diagnostics in Kenya*, 2020, 104.

²¹ KNBS, *Inequality trends and diagnostics in Kenya*, 2020, 103.

²² World Bank, 'Unemployment, total (% of total labor force) (modeled ILO estimates) - Kenya' -<<https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?locations=KE>> on 23 August 2021.

²³ KNBS, *Women and men in Kenya: Facts and figures 2017*, 46.

²⁴ KNBS, *Women and men in Kenya*, 46.

²⁵ Other types of employments account for employment of men and women as follows: Household chores (3.3% for men and 5.2% for women); Financial (2.2% for men and 3.5% for women); Professional (2.8% for men and 1.7% for women); Accommodation (2.8% for men and 3% for women); Health (3.8% for men and 8.3% for women); Transport (4.3% for men and 1.1% for women); ICT (4.4% for men and 4.7% for women); Construction (9.8% for men and 3.6% for women); Public Administration (8.7% for men and 13.6% for women); Trade (10.1% for men and 7.6% for women); Manufacturing (15.5% for men and 5.9% for women); Education (16.8% for men and 27% for women); Formal-wage employment (31.06% for men and 17.72% for women); and Self-Employment (41.21% for men and 54.43% for women). KNBS, *Economic Survey, 2019* 39; and KNBS, *Inequality Trends and Diagnostics in Kenya, 2020* 65; KIPPRA, *Kenya Economic Report: Creating an Enabling Environment for Inclusive Growth in Kenya, 2020* 10.

²⁶ KNBS, *Women and men in Kenya*, 47.

²⁷ KNBS, *Women and men in Kenya*, 48.

²⁸ KNBS, *Women and men in Kenya*, 49.

²⁹ KNBS, *Inequality trends and diagnostics in Kenya, 2020*, 40.

	Indicator	Men	Women
11	Average asset ownership index based on the gender of the household head (2016) ³⁰	5	4.2
12	Share of ownership of unlicensed establishments (2015) ³¹	38.2%	61.8%
13	Primary school enrolment (2017) ³²	52%	50%
14	Secondary school enrolment (2017) ³³	52%	48%
15	Student enrolment in technical institutions (2017) ³⁴	62%	38%
16	Student enrolment in universities (2017) ³⁵	55.5%	44.5%
17	Membership of the National Assembly (2017) ³⁶	80%	20%
18	Membership of the Senate (2017) ³⁷	72%	28%
19	Governors (2017) ³⁸	100%	0%
20	Membership of County Assemblies (2017) ³⁹	68%	32%
21	Cabinet Secretaries (2017) ⁴⁰	75%	25%
22	Principal Secretaries (2017) ⁴¹	63%	37%
23	Membership of the Supreme Court Bench (2017) ⁴²	72%	28%
24	Membership of the Court of Appeal Bench (2017) ⁴³	74%	26%

³⁰ KNBS, *Inequality trends and diagnostics in Kenya*, 2020, 105.

³¹ KIPPRA, *Kenya economic report: Creating an enabling environment for inclusive growth in Kenya*, 2020, 83.

³² KNBS, *Women and men in Kenya*, 48.

³³ KNBS, *Women and men in Kenya*, 39.

³⁴ KNBS, *Women and men in Kenya*, 44.

³⁵ KNBS, *Women and men in Kenya*, 41.

³⁶ KNBS, *Women and men in Kenya*, 60.

³⁷ KNBS, *Women and men in Kenya*, 60.

³⁸ KNBS, *Women and men in Kenya*, 60.

³⁹ KNBS, *Women and men in Kenya*, 60.

⁴⁰ KNBS, *Women and men in Kenya*, 61.

⁴¹ KNBS, *Women and men in Kenya*, 61.

⁴² KNBS, *Women and men in Kenya*, 62.

⁴³ KNBS, *Women and men in Kenya*, 62.

	Indicator	Men	Women
25	Membership of the High Court Bench (2017) ⁴⁴	62%	38%
26	Membership of the Magistracy (2017) ⁴⁵	52%	48%
27	Membership of Boards of Directors in private sector companies (2015) ⁴⁶	80%	20%
28	Chairs to Board of Directors in private sector companies (2015) ⁴⁷	90%	10%
29	Membership of Boards of Directors in Private Sector Companies listed in the Nairobi Securities Exchange (2015) ⁴⁸	79%	21%
30	Membership of the National Police Service (2016) ⁴⁹	85%	15%
31	Experience of physical violence (15-49 Age Group) (2014) ⁵⁰	8%	38%
32	Experience of physical sexual violence (15-49 Age Group) (2014) ⁵¹	4%	13%

3.0 Suggestions for a gender-sensitive approach

As outlined above, Kenya's economy manifests gender inequality in terms of access to opportunities, access to education and skills, participation in policy and decision making, earnings and access to and control of means of production. Although enhancing trade flow between Kenya and the USA through an FTA agreement could provide an opportunity to empower women, such mere enhancement would not in itself help alleviate gender inequalities.

⁴⁴ KNBS, Women and men in Kenya, 62.

⁴⁵ KNBS, Women and men in Kenya, 62.

⁴⁶ KNBS, Women and men in Kenya, 62.

⁴⁷ KNBS, Women and men in Kenya, 62.

⁴⁸ KNBS, Women and men in Kenya, 52.

⁴⁹ KNBS, Women and men in Kenya, 67.

⁵⁰ KNBS, Women and men in Kenya, 52.

⁵¹ KNBS, Women and men in Kenya, 52.

In fact, it may widen the disparities in favour of men by magnifying the existing fault lines. Thus, this section highlights the ways in which gender considerations can be included in the Kenya-USA FTA agreement.

3.1.0 Involvement of female trade experts

Gender equality in trade, like any other sphere of life, cannot be achieved without meaningful participation of women. Thus, there is need to involve more women and women trade experts and other resource persons with technical knowledge and practical experience on the connection between trade and gender inequality in the negotiations.

3.2.0 Ex-ante study on distributional effects

There already exists a wealth of information on the gender inequality in the structure of Kenya's economy. Using this information as a starting point, the Government of Kenya should, first, carry out a study to compile up-to-date data on the status of gender inequality in the economy. In this study, it could rely on the United Nations Minimum Set of Gender Indicators.⁵² Using this updated information, the government should then carry out a further study on the possible distributional effects of the FTA along gender lines (gender-impact assessment). These two studies should provide a wholesome view of the economy, identifying the patterns and parameters of existing gender inequalities and how the FTA would impact them.

3.3.0 Setting gender-inclusivity goals

The gender-impact assessment report should form the baseline for setting the negotiations on a gender-conscious path. The 2010 Constitution provides for equality between men and women and this must be reflected in the

⁵² The list is made up of 52 indicators to be used across countries and regions, for the national production and international compilation of gender statistics. The indicators are organised into five categories as follows: economic structures and access to resources; education; health and related services; public life and decision-making; and human rights of women and child.

gender-inclusivity goals.⁵³ The Government should use the studies proposed above to identify the sectors where women are advantaged and those in which they are disadvantaged. In the sectors where women are advantaged, subject to the constitutional dictates, the Government must design ways to safeguard this. In sectors where women are disadvantaged, the Government must outline clear and time bound goals for meeting the constitutional requirement for gender equality.

3.4.0 Textual provisions⁵⁴

The proposed FTA agreement could ensure gender mainstreaming in the following three ways: adoption of a side note or protocol on gender concerns; a stand-alone chapter on gender concerns in the FTA agreement; or inclusion of provisions that safeguard gender equality in different topics to be covered in the FTA agreement. Whichever option the negotiating team adopts, the matters listed below should be expressly provided for:

1. A preamble and set of objectives/principles with an explicit provision on gender equality and gender inclusion goals.
2. Incorporation of legal standards in national laws on gender equality as minimum standards.
3. Gender equality exceptions or reservations along the same lines as those on protection of public morals, human health, animal life or the environment already appearing in trade agreements. Such a provision could allow a party to deviate from the commitments under the FTA agreement should its gender equality goals make it necessary.
4. More favourable treatment for women-owned trading companies.
5. Incentives like tax rebates/holidays for trading companies with policies that enhance women empowerment through flexible working hours, sexual harassment policies, skill development programmes for women and embracement of gender diversity at all levels.

⁵³ Article 27, Constitution of Kenya.

⁵⁴ Some proposals have been borrowed from other sources like International Trade Centre (2020). *Mainstreaming Gender in Free Trade Agreements*. ITC, Geneva.

6. Technical and financial assistance for research and capacity building initiatives on gender and trade and education and skill development for women.
7. A joint mechanism to continuously monitor the effect of the FTA agreement on gender equality.
8. Legally binding dispute settlement mechanism to cover provisions on gender equality as well. The dispute settlement mechanism could allow for initiation of enforcement proceedings by citizens of the two parties in addition to the parties.

4.0 Possible challenges to the gender mainstreaming process

This section discusses some challenges that are likely to emerge in the negotiation, adoption and implementation of a gender-responsive approach in the Kenya-USA FTA agreement.

4.1.0 Lack of political goodwill

Despite the constitutional provisions providing for gender equality in Kenya, gender equality as a concept still remains a highly contested matter. This can be witnessed in the controversy relating to failure by the Parliament of Kenya to enact a law to give effect to the two-thirds' gender principle.⁵⁵ Trade policy negotiation is a political process. Thus, the general lack of political goodwill on the implementation of the provisions of the Constitution of Kenya on gender equality is likely to also undermine adoption of a gender-sensitive approach in the Kenya-USA FTA negotiations.

4.2.0 Lack of gender-disaggregated data

As outlined in section 2 above, although some data exist on the gendered structure of Kenya's economy, a lot of useful information is still not reliably

⁵⁵ This happened despite the existence of four court orders compelling Parliament to act.

available.⁵⁶ For instance, there is no well-established, consistent and standardised protocol on collection and compilation of this kind of data.⁵⁷ Further, the available data lacks crucial information such as daily time use by men and women, gender disaggregated pay information and gender dimensions of taxation.

4.3.0 Strong socio-cultural biases

Gender is a socio-cultural construct. Most communities in Kenya have cultural or customary practices that subjugate the welfare and interests of women and girls.⁵⁸ Having been practised for long periods of time, these practices have created an impervious layer that perpetuates and justifies injustices against women as part of accepted social order. For instance, despite the existence of laws on equality in Kenya, according to anecdotal accounts, women continue to predominantly shoulder the burden of most household roles like housekeeping, food preparation and childcare. Similarly, women are still discriminated against in land ownership and choice of work.⁵⁹

4.4.0 Absence of women in positions of power

Since women have historically been disadvantaged in terms of access to education and representation in policy/decision making positions,⁶⁰ there is a real danger that their participation in the FTA negotiations would be hampered due to a shortage of female trade experts within the Ministry of Industrialisation, Trade and Enterprise Development.

⁵⁶ KNBS and UN Women, *Gender sector statistics plan*, 2020, 11.

⁵⁷ Some progress has been made in this regard through the adoption in 2020 of the Gender Sector Statistics Plan.

⁵⁸ Republic of Kenya, Sessional Paper No. 02 of 2019 on National Policy on Gender and Development.

⁵⁹ Borden Project, 'Exploring land rights for women in Kenya' - <<https://borgenproject.org/land-rights-for-women-in-kenya/>> on 21 March 2022.

⁶⁰ UN Women, Kenya national gender statistics assessment 2018, 56; KNBS, Women and men in Kenya.

5.0 Conclusion

The economy is a gendered system and its movement by way of contraction or expansion would necessarily enhance any embedded inequalities within it. Women are generally disadvantaged in Kenya's economy. They don't have access to the lucrative sectors of the economy, they have poor earnings, they do not own factors of production, they are poorly represented in decision making organs and are overburdened by reproductive roles. Consequently, whatever promise the Kenya-USA FTA may hold, its benefits may not be felt by women in Kenya without a deliberate commitment to gender inclusion.