

The GLOCEPS

Policy Paper

Research and Analysis in Diplomacy and Foreign Policy Pillar

Strategies for Kenya's Leverage on the Kenya-United States of America Free Trade Agreement (KUSFTA) Negotiations

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Kenya's position in the Kenya-United States Free Trade Area Agreement (KUSFTA) negotiations is bound to be affected by internal and external socio-political dynamics. These include the structure of Kenya's negotiating team, the political developments in the two countries, stakeholder participation, the China-US trade war and regional politics. While some of these factors strengthen Kenya's position, others amplify her limitations and threaten her influence. The country's ability to navigate these factors will determine her strategic leverage on the US, a more robust and distinctly advantaged state. This paper recommends depoliticizing the negotiation process, formulating evidence-based negotiation objectives, inclusive stakeholder participation, instituting reforms in the business environment, leveraging Chinese infrastructure and building alliances with regional partners.

~Executive Summary



Introduction

There are internal and external socio-political factors at play in the ongoing KUSFTA negotiations that are bound to affect Kenya's position and leverage. The internal dynamics include the capacity of Kenya's negotiating team, Kenya's 2022 elections, stakeholder involvement and the business environment. The key external factors are regional politics, the US political dynamics and the US-China trade wars. While the first round of negotiations was concluded in

August 2020, the negotiation process is expected to run for about two or three more years. This allows Kenya to tactfully craft a fair agreement that protects her strategic interests and diplomatic standing in the regional and global spaces. Therefore, this paper analyses the factors that are critical to Kenya's leverage and explores the strategies she can employ to elevate her bargaining power in the KUSFTA negotiations.





Background

Kenya and the US agreed to negotiate a bilateral free trade agreement in February 2020. The agreement seeks to ensure trade normalcy after AGOA expires in 2025. The pact is expected to promote trade, investment, technology transfer, and bilateral relations between Kenya and the US. KUSFTA is strategic since Kenya is a crucial ally of the US in security cooperation. Kenya has leveraged herself as an essential security partner, lagging in Vision 2030 and therefore needs a trade boost. However, US negotiators have on several occasions customarily put aside the special bilateral relationships states share when negotiating free trade agreements. The coun-

try's key focus has been first to protect her national interests, and she is often unwilling to make any significant concessions or commitments that do not favour her. The need for Kenya to be more strategic is crucial given that the ongoing negotiations will be under President Joe Biden, who has not shown eagerness to pursue KUSFTA. The Biden administration has instead signalled that it will review the negotiation objectives and revise America's industrial policy, economy and climate change objectives. These goals have favoured Buy America, Build America agenda, and combating the influence of China globally.



Photo credit: African Business





Key Findings

The following internal and external factors remain significant in relation to Kenya's strategic leverage on the KUSFTA negotiations.

Internal factors

A number of internal political factors are bound to profoundly influence Kenya's ability to effectively negotiate KUSFTA and remain distractors to the leverage, if not addressed. They include the capacity of the negotiation team, domestic politics, the business environment and limited stakeholder participation.

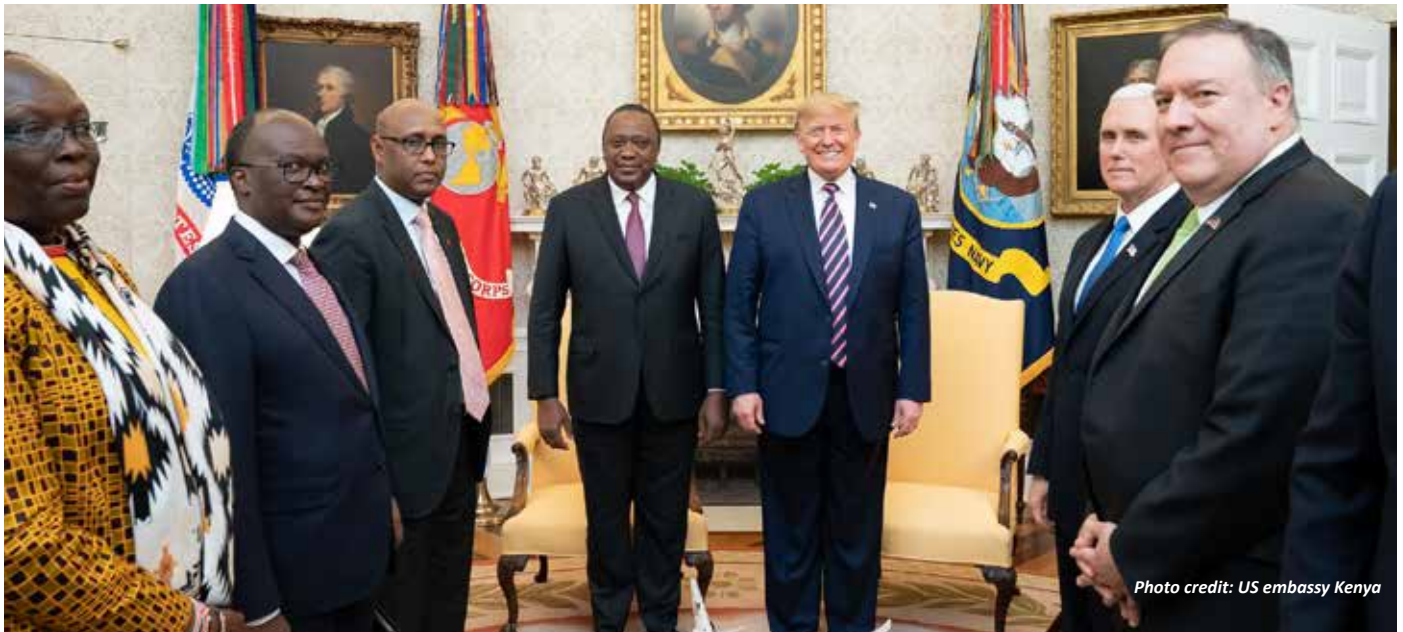


Photo credit: US embassy Kenya

The capacity of Kenya's negotiating team

Kenya's negotiation team comprises 170 experts who are primarily bureaucrats, embedded within ministries and who may be lacking the requisite technical expertise on the US and free trade negotiations. Ideally, free trade agreement negotiations need to be led by a specialized non-ministerial committee that draws on the expertise of bureaucrats. While bureaucrats have previously relied on procedures and rules to make their decisions, their positions on KUSFTA could be amplified by incorporating perspectives from economic analysts, scholars, and think tanks. A consortium of local and global experts can re-orient Kenya's objectives to achieve Kenya's development blueprints, such as the Vision 2030 and the Big Four Agenda.

Kenya needs to learn more about the US so as to be in a favourable position during the negotiations. There appears to be a gap between US trade interests and Kenya's negotiation objectives. For instance, as Kenya focuses on prioritizing Made in Kenya' product, these may only be competitive in the intra-Africa trade but not as exports to the US, whose market requires high-quality finished products. It is important to recognize that the government has hired an American public relations company, Rational 360, to make up for the technical expertise and networking deficiencies. The company will provide public relations support, communications counsel, and technical support needed to help Kenya engage the US on KUSFTA. It comprises





former US government officials whose negotiation bias is likely to favour America's interests over Kenya's. Customarily, Americans will always put American interest's first, and therefore Kenya ought to rethink how she will use the company to win over Americans. Indeed, in the past years, parliament has questioned the worth of using US public relations firms as they have been of little benefit to Kenya. Therefore, it is essential to complement the efforts of such firms with a consortium of homegrown and diaspora initiatives.

Similarly, the parliament departmental committee may experience challenges with regards to the proper technical capacity to consume, understand and drive the negotiations commit-

tee. Kenya's parliamentary committee on trade and industrialization comprises business administrators, lawyers, land economics and survey experts. Their US senate committee's counterparts on finance have senators with expertise in intellectual property rights, counterfeits control, international affairs, international free trade, and agricultural policy. They have systems to report continuously on the interests of their electorates. Each senator hires a team of experts in various fields critical to their constituents. In the Kenya-UK EPA, the challenges which were primarily attributed to the parliamentary departmental committee's misunderstandings, lack of comprehension and proper technical knowledge on the terms of the agreement, caused delays in ratification.



Photo Credit: Reactor Review



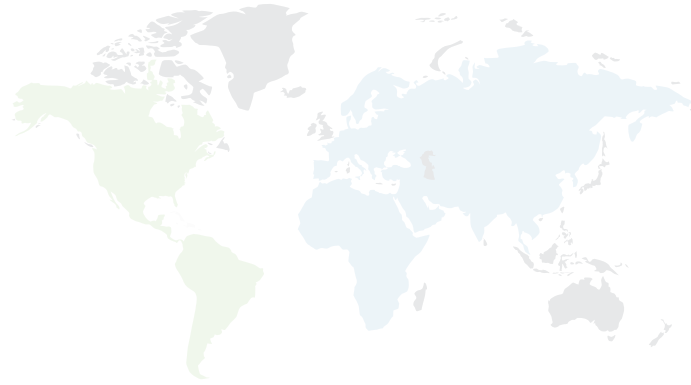


Photo Credit: The Star

Kenya's domestic politics

The politicization of bilateral trade agreements and transition politics is bound to affect Kenya's capacity to negotiate effectively. Moreover, Kenya is heading into a turbulent political and economic atmosphere, with the 2022 elections taking centre stage. The polls and Covid-19 response will undoubtedly affect the resources and governments focus' on the KUSFTA.

As the negotiations remain key to the legacy of the current administration, the urgency to truncate and accelerate KUSFTA to fit within the constitutional term of the current regime remains a key concern. The rush to seal the deal is likely to be disadvantageous to Kenya as it may derail the focus from pursuing specific beneficial outcomes of the agreement to delivering

political mileage and regime legacy.

Further, there is a possibility that the 2022 elections may lead to new appointments in the critical ministries tasked with negotiating the KUSFTA. Often, after elections, the Presidency merges, splits or reorganizes ministries. Elections are likely to result in the change of the chief negotiator and core team. This transitory politics will jeopardize Kenya's leverage and institutional memory that is key to these negotiations. More so, a new negotiator may thrust the negotiations into a new direction altogether. Ideally, the core negotiating team must be retained as much as possible for consistency and efficiency in serving the national interest.





Photo Credit: Deutschlandfunk Kultur

Stakeholder participation

The period before the negotiation resumes gives room for Kenya to partake in further stakeholder participation on KUSFTA. Kenya outlined her objectives then called upon some stakeholders to give their suggestions. Kenya used the top-bottom strategy, and the input gathered remained somewhat restricted. On the contrary, the American team sought the stakeholders' views before drafting the objectives in a bottoms-up approach. The Kenyan negotiations team is willing to get input and shift her goals even as the negotiations are underway. Before the Biden administration begins the negotiations, the Kenyan negotiation team has the advantage of consulting with and bringing onboard stakeholders who feel alienated. This includes think tanks that can provide adequate analysis and technical assistance to the negotiation committees and parliamentary committees.

The involvement of civil society, public and private stakeholders harnesses domestic interests and balance them with external interests. Lack of stakeholder participation is likely to weaken a nation's leverage by overlooking key negotiation issues. Stakeholder alienation is expected to result in stalemates and even legal, and implementation challenges long after the negotiations have been concluded. It is a concern that the negotiation team may not be aware that some Kenyans may not be supportive of KUSFTA and therefore there is a need for the ongoing deliberations to be brought down to a level that the majority of Kenyans can understand and participate.

The East African Court of Justice (EACJ) case against Kenya was initiated by disgruntled Kenyans who wanted her warned or stopped from





proceeding with the KUSFTA negotiations. The lawsuit points to disgruntled stakeholders that were not incorporated and are using the court to sabotage the negotiation process or seek redress. Likewise, some Kenyans may not understand why KUSFTA is essential for the nation and are therefore being used by some external geopolitical actors as proxies to derail Kenya's ambitions. As this case is underway, it poses a threat that could derail KUSFTA or even Kenya's membership in the EAC, a crucial trading bloc for Kenya. Similarly, the Kenyan diplomatic mis-

sion in the US has hosted virtual meetings on the KUSFTA, but experts portend that they are primarily procedural and rigid. These meetings have mainly been informative on KUSFTA and are yet to tap into the analytical expertise on negotiating and leveraging the US. The prominent and influential Kenyans in the US who possess a better understanding of the American markets and economy have avoided these virtual meetings. Therefore, there is a need for proper synergy with the American diaspora capable of pushing Kenya's agenda informally.



Photo Credit: Brookings Institution





The Kenyan-business environment

Kenya's business environment is yet to attract American investors. The country's business landscape is marred with a number of challenges which include corruption, bureaucratic hurdles and systemic flaws. Yet, Kenya urgently needs to attract American Foreign Direct Investment (FDI) to balance America's trade volumes. More efforts are required outside the signing of KUSFTA to attract American investors. A number of American companies have left Kenya due to corruption, labour unions upheaval, energy costs, uncompetitive investment and working environment, political instability, customs and port bureaucracies.

Kenya's extractive industry is a point of leverage to attract FDI targeting mineral extraction and processing. The country should be seeking to downplay the legacy of unfavourable trade deals that limited her to raw material exports and instead negotiate for capacity and invest-

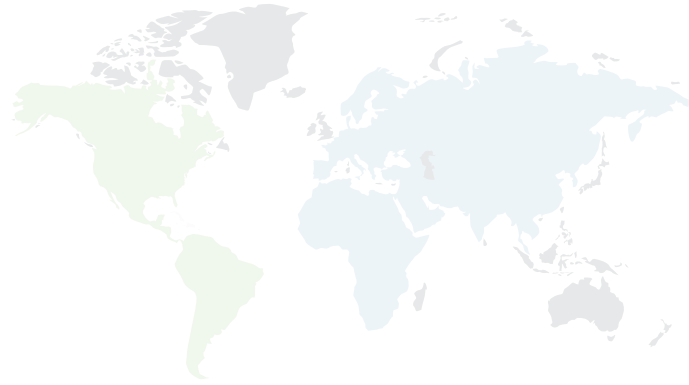
ment to refine and process her raw materials. However, her leverage will diminish if she does not have seamless institutions and systems to leverage.

Kenya's fruitless struggles to clean up corruption at the Kenya Ports Authority, targeting procurement processes and money laundering are some of the factors that are likely to reduce her strength in negotiations. Similarly, Kenya needs to streamline her national-level security risks, such as security lapses in airports and corruption in immigration offices, which are likely to hinder her prospects in negotiating with the US on making visa commitments as part of KUSFTA. So far, Kenya has also not negotiated to have visa privileges. Without a visa waiver program, the country will barely achieve any substantive progress as business owners will lack the mutual privilege to scout for opportunities in the US.



Photo credit: IPSOS





External factors

Factors external to Kenya are equally bound to impact on Kenya's leverage in the Kenya-United States Free Trade Agreement negotiations. They include regional and global politics and the political dynamics within the US.



Photo credit: Quartz

Regional Politics

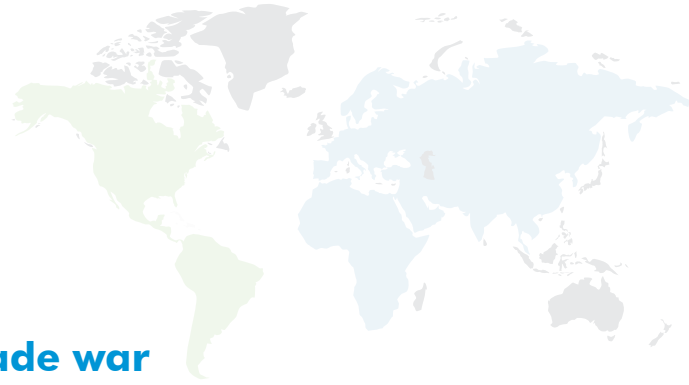
Regional political dynamics are equally capable of impacting on KUSFTA negotiations. EAC states, Common Market for Eastern and Southern Africa (COMESA) and some African Continental Free Trade Area (AfCFTA) states have condemned Kenya's decision to pursue KUSFTA unilaterally. They want the US to negotiate with Africa, similarly to AGOA. AfCFTA is Kenya's biggest trading partner, and therefore balancing the demands of the USFTA and AfCFTA will be crucial. Critics have portrayed Kenya as being at crossroads to win with one and lose on all others.

Thus, while bilateral engagement with the US poses as a menace for Kenya's regional standing, it is also a strategic position. After AGOA expires in 2025, African states, more so, EAC states, will be in need of access to American markets. Kenya needs to exploit her economic, political, geographical and strategic advantage

in the East and Central Africa region to ensure that they harmonize the interests of the EAC with those of Kenya. Thus, consistent leadership in the region can cement Kenya's position and downplay critics with proper follow up.

More so, the current US administration favours building alliances over bilateral agreements. Thus, given that Congress has already endorsed Kenya's trade agreement, it provides an avenue for Kenya to exploit partnerships with other regional partners. Alliances will allow Kenya to balance her relations with Great Powers and African partners. This will make her a regional leader as she can craft political settlements and reward her regional allies. Given that this is the first Sub-Saharan USFTA, the US may be willing to bring more countries into a Kenyan-led alliance. This is crucial to the US as she remains keen on having a more significant American presence to counter the Chinese takeover.





The US-China trade war

It is becoming evident that Africa and particularly Kenya will be a battlefield for US-China trade wars. The 'war' is both an opportunity and a threat for Kenya since it hinges on her capability to balance her relations, considering her huge trade deficit with China. The world is moving to a tri-polar system, and Kenya has to align with the changing geopolitical powers. If Kenya signs with the US, she will be the target of China. There is a need for Kenya to downplay the risk as her current trade deficit with China is too high. The heavy two-way traffic with USFTA will compound matters for Kenyan businesses. It is important that the country begins reconsidering imports from the US as China has been reluctant to open up her markets to Kenyan products.

However, the US-China trade war is an opportunity for Kenya to benefit from both powers. In

the last decade, China has invested a lot in Kenya's infrastructure but the US is interested in exploiting this infrastructure to displace the Chinese from the Kenyan economy. Previously, the US has focused on countering China's growing influence in Africa rather than developing an Africa-specific policy. Thus, Kenya is in a strategic position to leverage her infrastructure to create geopolitical networks and political settlements that the US may be willing to exploit for more substantial inroads into the region. America has already shown interest in utilizing Chinese investments in infrastructure to leverage US economic strengths in services and advanced manufacturing. Consequently, Kenya must maximize on America's fear of a Chinese takeover and China's urge to take over. As the cold war heats up, Kenya needs to evaluate her trade relations with China accordingly.

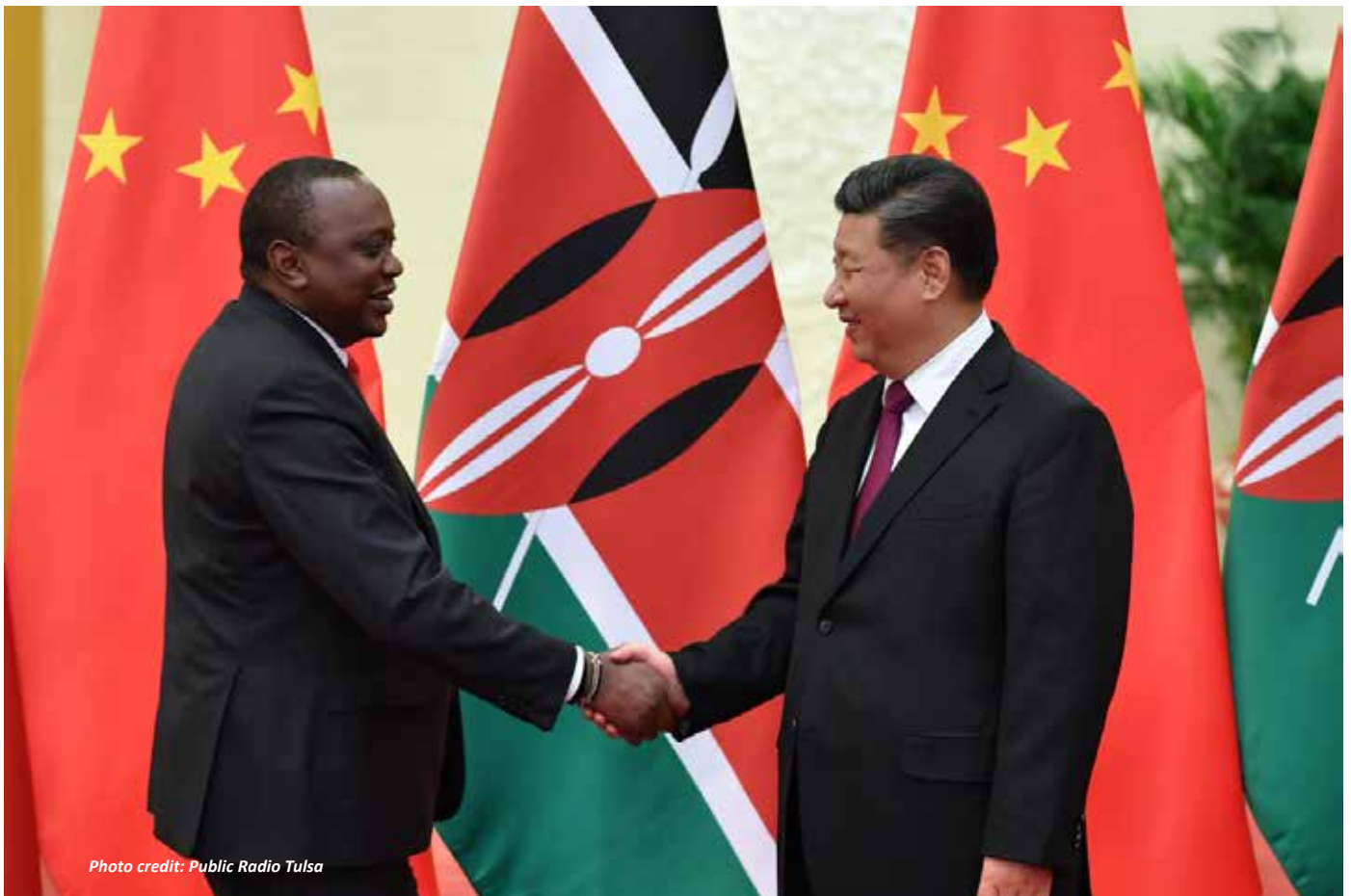


Photo credit: Public Radio Tulsa





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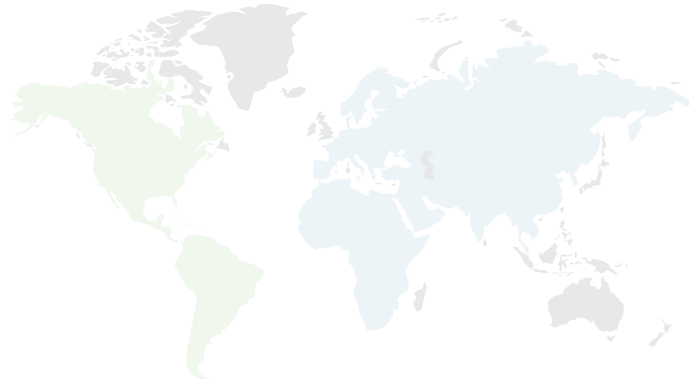
US political landscape

The priorities of Democrats and Republicans on trade, defence and democracy determine how the US will conclude bilateral trade agreements. The current Senate has a 50-50 split, but the 'majority leader is a democrat. The American midterm elections slated for 2022 primaries may affect the composition of the Senate. The foreign policies of the Republican party focus on international trade and reducing the US trade deficit with other countries. They insist on reciprocal trade exchanges and have been against one-way opening up of American markets. This was evident in how the Trump administration initiated the US-China trade war, renegotiated the North American Free Trade Agreement (NAFTA), Japan–United States Free Trade Agreement (JUSFTA) and United States–Korea (South) Free Trade Agreement (KORUS). The US Senate expects a more powerful agreement than the United States–Mexico–Canada Agreement (USMCA). Republicans focus on ensuring America has total domination.

Democrats focus on defence, security and democratization and are far more likely to prior

itize promoting democracy, human rights and living standards in other nations, especially in Africa. As such, the current democrat majority may be keen on making demands on political reforms. However, they are likely to prioritize the renewal of AGOA, which may diminish the urgency of concluding KUSFTA. Nonetheless, democrats draw a lot of support from the African American community, and in fact, all members of the Congressional Black Caucus (CBC) are currently from the Democratic Party. Race politics in America is presently heightened and is a very divisive issue. However, Kenya's leverage on the Democratic party is yet to be fully utilized. The party remains the biggest ally Kenya can forge in Washington. More so, the Obama-factor remains a point of influence in the Biden administration, and Kenya has the opportunity to take advantage of it before significant changes occur. The democrats provide the most accessible avenue of winning the hearts and minds of Americans and Washington DC in lobbying for the resumption and fast-tracking of the negotiations.





Conclusion

Kenya's leverage in the KUSFTA negotiations will be based on her ability to carefully leverage her strengths and strategically surpass her limitations. The capacities of the negotiation team, the urgency to complete the negotiations before the 2022 elections and dismal stakeholder participation remain the most substantial internal weaknesses and threats to favourable leverage on KUSFTA. The democrat-republican policies in US politics, the China-US trade wars and regional politics are possible threats, but they also provide strategic opportunities that Kenya can employ to influence a Kenyan-centric free trade agreement. Therefore, it is important that Kenya considers how to strategically leverage her strengths when KUSFTA negotiations resume.



Photo credit: The African Paper

Recommendations

1. The Presidency should :
 - a) Insulate the negotiation team from the vagaries of the elections and transitions by protecting their tenure and mandate within a specialized committee that is not rooted in any ministry.
 - b) Institute an executive investment committee in the Office of the President to clean up the business environment and rid American investors of bureaucratic hurdles as Kenya seeks to attract massive Foreign Direct Investment.
 - c) Ride on the Obama factor, and invite the former US President to Kenya for a visit to leverage his support as KUSFTA gets underway.
2. The Ministry of Industrialization, Trade and Enterprise Development, and parliament should seek stakeholders input, think tanks, and experts in analytical and technical expertise on American interests, needs, and markets.
3. The Ministries of Foreign Affairs and that of Trade, Industrialization and Enterprise Development should negotiate for a political settlement with the EAC states who seek to benefit from KUSFTA in order to get their support. Kenya should shed off the tag of being a 'reluctant hegemon' and take advantage of her current leadership position to get regional support for KUSFTA.





4. The negotiation team should leverage Chinese infrastructure such as ports and roads, geographical position, mining-based raw materials to advance her political influence and to attract American concessions.
5. The Ministry of Foreign Affairs and the negotiation team should seek the assistance of influential Kenyan business community in the US, Kenyan diasporas, working and living in the US to act as honorary consuls to informally provide analysis on American interests and leverage points, and attract FDI from their spheres of influence.
6. In the build-up to the next phase of the negotiations, Kenya should find ways of facilitating Kenyan businesses to access financing through institutions such as the Africa Export-Import Bank (AFREX-IMBANK) and others to enable them easily export Kenyan products to the US.
7. Kenya should complement the role of Rational 360 Public Relations firm by creating a consortium of consultants and influential US lobby groups such as the Corporate Council for Africa and the Kenya-US Chamber of Commerce (AMCHAM), with whom they already have a strong working relationship.

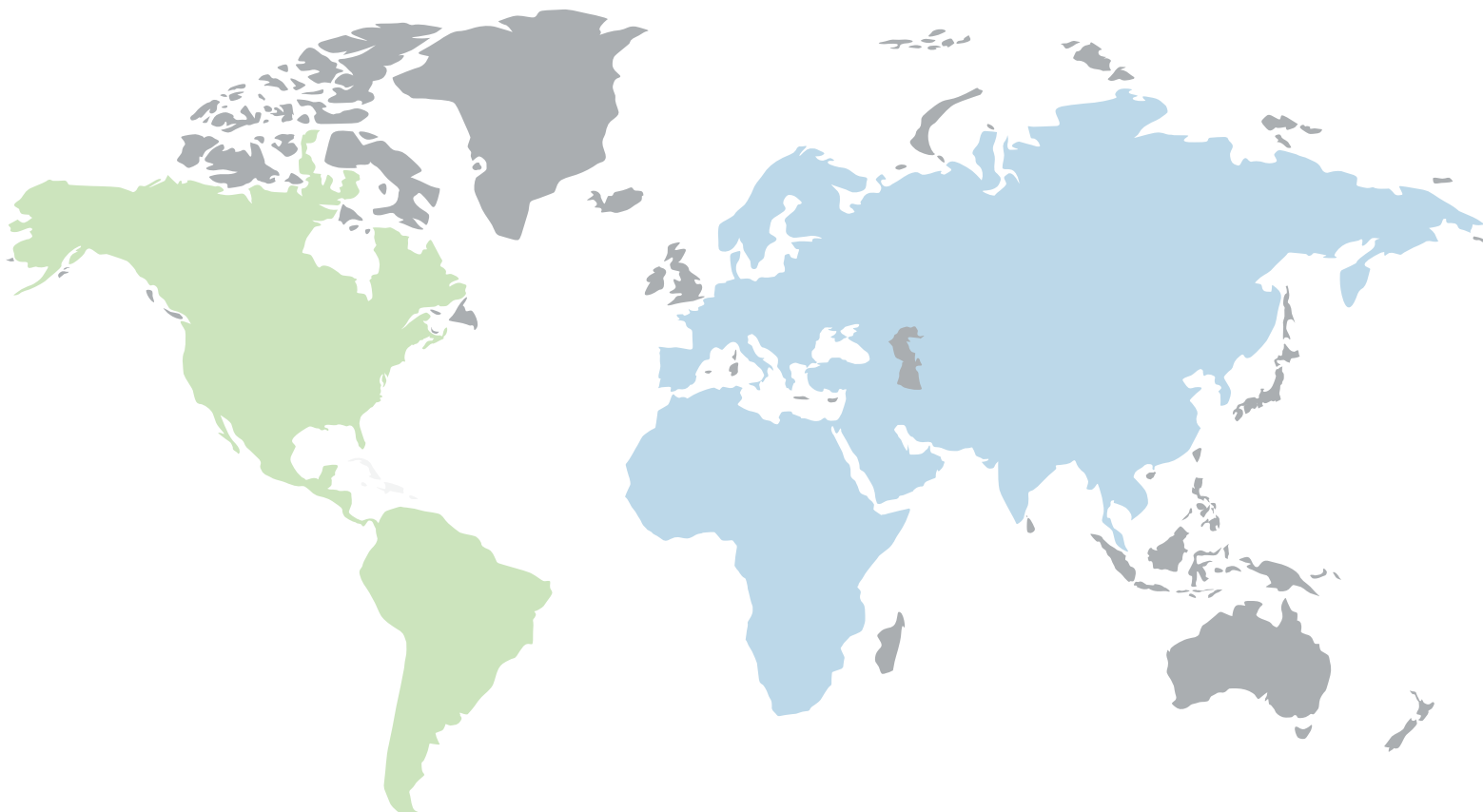


Photo credit: Atlantic Council

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