



Statement of the U.S. Chamber of Commerce

ON: “Negotiating Objectives for a U.S.-Kenya Trade Agreement”

TO: Office of the U.S. Trade Representative

BY: U.S. Chamber of Commerce

DATE: April 24, 2020

1615 H Street NW | Washington, DC | 20062

The Chamber’s mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

The U.S.-Africa Business Center of the U.S. Chamber of Commerce (“Chamber”) appreciates the opportunity to present the following comments to the Office of the U.S. Trade Representative (“USTR”) on its request for comments on “Negotiating Objectives for a U.S.-Kenya Trade Agreement” pursuant to 85 FR 16450, docket number USTR-2020-0011 (March 23, 2020). The Chamber is the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions.

The U.S. business community is encouraged that the United States and Kenya have announced plans to negotiate a comprehensive, high-standard trade agreement. In keeping with the Chamber’s advocacy for free enterprise, competitive markets, and rules-based trade and investment, the Chamber is enthusiastic about these negotiations to remove barriers to trade and investment between the United States and Kenya. In this vein, USTR’s commitment to the negotiating objectives established in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, known as Trade Promotion Authority (TPA), is most welcome.

The upcoming negotiations are an opportunity to address a range of longstanding issues and clear a path for mutually beneficial trade and economic growth. Reducing or eliminating trade barriers would boost the long-term economic outlook for the United States and Kenya and benefit firms, workers, farmers, and consumers in both countries. Doing so will further position Kenya as a model for economic reform across Africa. The U.S.-Kenya trade negotiations will also be important in the context of the ongoing work to forge the African Continental Free Trade Agreement, an initiative that these bilateral negotiations will complement and enhance. Overall, the U.S.-Kenya Trade Agreement must be a high-standard bilateral trade agreement that sets a precedent for future U.S. trade partnerships with other sub-Saharan African economies.

To summarize the Chamber’s objectives, we urge the U.S. and Kenyan negotiators to consider the following goals:

- **Single Comprehensive Deal:** Conclude a single, comprehensive agreement that reflects an outcome on all issues under negotiation, as agreed by the parties, rather than seeking agreement on a subset of issues or pursuing a phased approach.
- **Trade in Industrial Goods:** Eliminate all tariffs on industrial goods traded between the United States and Kenya, include a high-standard chapter on Technical Barriers to Trade (TBT) to address non-tariff barriers, and expand market access for remanufactured goods exports by ensuring that they are not classified as used goods that are restricted or banned.
- **Trade in Services:** Secure high standard rules and open market access commitments to ensure access to Kenya’s services market, including obligations for new services.
- **Trade in Agricultural Products:** Address market access through tariff elimination and by resolving concerns about non-science-based restrictions on agricultural trade with a high-standard chapter on Sanitary and Phytosanitary (SPS) measures.
- **Protect Intellectual Property:** Address intellectual property (IP) rights and enforcement as they relate to patents, copyrights, trademarks, and trade secrets to enhance U.S. and Kenyan leadership in innovative industries.
- **Protect Investment:** Eliminate forced technology transfers, reduce barriers to foreign direct investment by ensuring non-discriminatory treatment, ensure a high standard of

protection for U.S. investors subject to a high standard investor-state dispute settlement mechanism.

- Good Regulatory Practices: Formalize a joint commitment to follow good regulatory practices, including sufficient advance notice and comment periods and in-depth consultations that include both domestic and foreign stakeholders.
- Emerging Technologies: Promote effective regulatory cooperation to address emerging technologies and prevent unnecessary regulatory divergence.
- Digital Trade: Facilitate a mutual right to transfer and store data across borders for all sectors, prohibit data localization requirements, ban customs duties and taxes on electronic transmissions, promote risk-based approaches to cybersecurity, foster cloud use across sectors, ensure non-discriminatory and interoperable frameworks for the protection of personal information, and align any plans to tax digital services with international tax regimes.
- Government Procurement: Establish open, fair, transparent, predictable, non-discriminatory, and value-based rules to govern government procurement.
- Procedural Fairness for Pharmaceuticals and Medical Devices: Seek standards to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for U.S. products.
- Section 232 Tariffs: Remove expeditiously the U.S. Section 232 tariffs on imports of steel and aluminum from Kenya.

* * *

The following issue- and sector-specific priorities are listed alphabetically, and the order does not reflect prioritization.

Agriculture and Biotechnology

- The agreement should address market access barriers relating to tariffs and resolve concerns about non-science-based restrictions on agricultural trade in a transparent and timely fashion via a chapter on Sanitary and Phytosanitary Standards (SPS) that builds on the WTO SPS Agreement.
- It should seek standards to encourage timely, transparent, science-based approval systems for biotechnology and chemistry products with clearly established timelines and provide nondiscriminatory market access for U.S. products.

Autos

- The agreement should ensure that Kenya fully accepts vehicles that meet the U.S. Federal Motor Vehicle Safety Standards (FMVSS).

Competition

- The agreement should address competition enforcement to ensure it is conducted in a manner that assures due process, is based on sound economic analysis, does not

undermine legitimate IP rights, and is not misused as a tool for industrial policy or forced technology transfer.

- It should establish strong disciplines to ensure the private sector is able to compete fairly on a market basis, including with state-owned enterprises (SOEs), which in some parts of the world have emerged as active cross-border commercial actors in ways not contemplated in earlier trade agreements. Inclusion of such rules will establish an important standard to inform future negotiations, including with African partners.

Customs and Trade Facilitation

- The agreement should streamline and modernize customs processes and implement high standard trade facilitation measures above the baseline commitments in the WTO's Trade Facilitation Agreement.
- It should promote the use of electronic customs forms, electronic signatures and authentication, and secure online payments.
- It should raise the *de minimis* limit to a commercially meaningful level, inclusive of duties and taxes, and allow clearance of these shipments without a Harmonized Tariff Schedule number and on a most-favored nation basis.
- It should separate the physical release of goods from the duty and tax collection process. Trusted traders should be able to calculate and pay duties and taxes after the physical release of the goods, and the agreement should allow periodic payments of these fees as opposed to doing so on a transaction-by-transaction basis.
- It should provide for the immediate release of express shipments upon arrival, provided that all required documentation and data have been submitted.
- It should create a single window to allow the trade community to provide the necessary information to satisfy all government agency requirements with a single data transmission.
- It should develop a robust informal entry process that is above the *de minimis* level, but below the formal entry level, that would necessitate less documentation than is required in a formal entry and would aim to reduce the time, cost, and complexity in trade.
- It should simplify the process for returning goods of domestic origin. Returned shipments should be released without a formal declaration required, provided that the reference to the preceding outbound shipment and goods declaration can be provided so that both shipments can be reconciled. Clear guidance should be provided to ensure that duties are not collected on returned goods that have not been improved to avoid the cumbersome procedure of the trade having to request refunds of such duties.
- It should include an expedited customs route for medical equipment and parts that American companies need to import into Kenya to continue life-saving treatments and maintain business continuity.
- It should establish equivalence between authorized economic operator programs in the two countries.
- It should strengthen capacity and regulatory/legislation frameworks to combat illicit trade.

Digital Trade

- The agreement should apply a high, new standard for cooperation to support development of the digital economy by including a robust chapter on digital trade drawing on the United States-Mexico-Canada Agreement (USMCA) and the U.S.-Japan Digital Trade Agreement text.
- The digital trade chapter and analogous provisions in the financial services chapter should secure commitments that guarantee free flow of data and storage across borders and prohibit the localization of data and computing facilities applicable across all sectors.
- The agreement should include rules prohibiting parties from requiring companies to use local technology infrastructure, transfer their technology, IP, production processes, or other proprietary information as a condition of market entry. This should include the transfer of, or access to, a source code of software or to an algorithm expressed in that source code.
- It should ensure that the two countries provide duty-free access for information and communications technology (ICT) products as well as prohibit customs duties on electronic transmissions, including information transmitted electronically.
- It should reaffirm the commitment of the two governments to reach a multilateral solution to tax challenges arising from the digitalization of the economy and should prohibit discriminatory digital taxation measures that contravene international taxation principles.
- It should include a recognition that, given the evolving nature of cybersecurity threats, risk-based approaches are more effective than prescriptive regulation in addressing those threats. Accordingly, both parties should endeavor to employ, and encourage enterprises within its territory to use, risk-based approaches that rely on consensus-based standard and risk management best practices to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events.
- It should commit the parties to regular cybersecurity consultations, in partnership with the private sector, to ensure that standards, best practices and other cooperative mechanisms to keep pace with technological advances.
- It should state that no party shall accord less favorable treatment to digital products created, produced, published, contracted for, commissioned or first made available on commercial terms in the territory of another party, or to digital products of which the author, performer, producer, developer or owner is a person of another party, than it accords to other like digital products.
- It should provide protections for online platforms and marketplaces to host lawful speech and commerce without being treated as the originators of content.
- The two governments should promote artificial intelligence and machine learning technologies by committing to adopt good regulatory practices, including risk-based, outcome-focused, and technology-neutral approaches to AI governance that are sufficiently flexible to account for new opportunities and challenges, while recognizing the extent to which potential risks can be mitigated using existing regulatory and sectoral frameworks.
- It should facilitate public access to and use of government information fosters economic and social development, competitiveness, and innovation.

- It should ensure that frameworks and practices for the protection of personal information are interoperable, take into account principles and guidelines of relevant international bodies, and are non-discriminatory.
- The parties should acknowledge the importance of cloud computing in advancing digital transformation and expanding access to technologies such as artificial intelligence and machine learning.
- The agreement should include commitments that the two governments will take proactive and coordinated leadership roles to promote a multi-stakeholder model for internet governance, privacy, and cybersecurity around the world, and particularly across the African continent. This includes working together to expand the interoperability of privacy frameworks across the globe.
- It should commit the parties to regularly review existing regulatory frameworks in specific sectors (e.g., transportation, hospitality, financial services etc.) that are impacted by technological development. This should include the removal or modernization of legacy regulations that no longer best serve the public interest, but instead limit the realization of the full social, economic, and environmental benefits of innovative, newly available technologies and the services and business models they generate.
- It should include the ability to establish forums and regular working groups between the two governments to address any emerging or lingering implementation issues related to the digital trade chapter.

Direct Selling

- The agreement should explicitly recognize direct selling as a legitimate and beneficial distribution service that expands consumer choice, encourages entrepreneurship and labor market flexibility, and broadens economic opportunity. At the same time, the Government of Kenya should acknowledge that up-line payments based on product sales shall not be prohibited. This distribution system was recognized in the USMCA (Chapter 15, Cross Border Trade in Services, Article 15.10: Paragraph 1, footnote 7). The definition of direct selling should be identical to the language in this footnote.

Energy & Infrastructure

- The agreement should foster a transparent market that enables all resources to compete fairly in bilateral tenders. It should ensure that market rules and pricing are technology-neutral and do not privilege incumbents over newcomers.
- It should promote international consistency in technical and safety standards to ensure the participation of leading global companies in both the U.S. and Kenyan markets.

Government Procurement

- The agreement should ensure open, transparent, and reciprocal access to the U.S. and Kenyan procurement markets.
- It should support a value-based system for government procurements with objective criteria based on “best value” rather than an exclusive focus on lowest price.
- It should foster procedures to allow expeditious payment of invoices.

- It should enjoin Kenya to join the WTO Government Procurement Agreement.

Intellectual Property

- The American economy is increasingly built on intellectual capital, including but not limited to intellectual property rights such as patents, copyrights, trademarks, and trade secrets. In Kenya, the existing and potential benefits of a robust IP infrastructure can pave the way for its transition to an innovation-led knowledge-based economy.
- The agreement should prioritize world-class intellectual property (IP) protection and enforcement mechanisms that protect the proprietary knowledge of U.S. companies operating abroad as well as support the growth of Kenya's innovative output.
- It should both guarantee nondiscriminatory protection of intellectual property rights and fair, equitable and nondiscriminatory market access, including complying with all commitments established in the WTO TRIPS Agreement and other relevant international agreements.
- It should include a strong base term and scope of protection for patents, copyrights, trademarks, designs, undisclosed test or other data; provide a high-standard data protection term for both biologics and small molecules; establish a statutory commitment to protect trade secrets; exclusive rights for all forms of IP regardless of the technology; transparent, predictable, and carefully-defined rules for limited exceptions, as appropriate, to rights across all forms of IP.
- It should include commitments to ratify or accede to international treaties reflecting best practices in IP protection and enforcement.
- It should support the development of Kenya's IP infrastructure to promote efficiency and transparency in the administration of IP systems, including by reducing regulatory hurdles and backlogs.
- On copyrights, the agreement should require parties to provide effective remedies for online copyright infringement, including intermediary liability, with appropriately conditioned safe harbors.
- The licensing of these IP assets has increased global access to innovative technology, created high value jobs, and resulted in billions of dollars of economic growth. To support the licensing of technology, this agreement should prohibit government interference in commercial negotiations between private parties related to IP.
- On trade secrets, civil and criminal causes of action and penalties for trade secrets theft are critically important.
- The agreement should help increase capacity, build infrastructure, and create frameworks to prevent trade in counterfeits.
- The independence of the courts and judiciary should be central to IP enforcement measures. This should also include fully effective injunctive relief, as well as deterrent-level civil and criminal remedies in law, backed up by effective enforcement efforts, including ex-officio authority to seize goods and enforcement for goods trans-shipped through a party's territory in order to combat trade in counterfeit goods.
- Finally, the agreement should state that no party shall require the transfer of, or access to, source code of software owned by a person of another party, or to an algorithm expressed

in that source code, as a condition for the import, distribution, sale or use of that software, or of products containing that software, in its territory.

Industrial Goods

- The agreement should eliminate all tariffs on industrial goods.
- It should address remanufactured products at the end of their serviceable lives and bar discrimination against such goods when in same-as-when-new condition. This helps reduce owning and operating costs by providing quality components and equipment at a fraction of the cost of a new product. Remanufacturing reduces waste and minimizes the need for raw materials. Remanufactured goods are entirely or partially composed of recovered materials, have a similar life expectancy to a new product, and have a factory warranty similar to that of a new product. USMCA contains language that ensures market access for remanufactured products that should be replicated in a U.S.-Kenya trade agreement. USMCA states that countries cannot impose restrictions on remanufactured products that they place on used goods. This language sets a strong precedent for the treatment of remanufactured goods in future trade agreements with countries where barriers remain, and should be a priority negotiating objective in every new U.S. trade agreement.
- It should encourage regional linkages while fostering the growth of Kenya's apparel export sector by permitting the use of globally-sourced inputs and avoiding a trade-restraining "yarn forward" rule of origin.

Investment

- The agreement should use the obligations found in the U.S. 2012 model Bilateral Investment Treaty as the basis for an investment chapter in a U.S.-Kenya trade agreement. The agreement should protect U.S. and Kenyan investments from discriminatory treatment as well as direct and indirect expropriation. It should follow the model BIT's approach to minimum standard of treatment, including fair and equitable treatment, and performance requirements, and it should ensure free transfers. These obligations should be enforced through an investor-state dispute settlement (ISDS) mechanism that does not require using local courts prior to proceeding to ISDS. The agreement should ensure that all sectors are afforded the same level of protection.

Procedural Fairness for Pharmaceuticals and Medical Devices

- The agreement should set standards to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for U.S. products. The Transparency and Procedural Fairness approach and language adopted by the USMCA is a good template for these provisions.
- It should promote good governance through greater transparency, participation, and accountability in the development of regulations and other government decisions. These provisions should apply to national healthcare entities on listing or reimbursement rates and coverage and applicability of those covered entities should be outlined in the agreement.

- It should promote value-based reimbursement systems and decisions with the objective of transforming national reimbursement systems to ensure improved health system sustainability and improved patient access to evidence-based medicines.

Regulatory Practices

- The agreement should include provisions on Good Regulatory Practices defining how policymakers should seek the best, reasonably obtainable information, including scientific, technical, economic, or other information relevant to the regulation it is developing.
- It should promote clear procedures for adopting, reviewing, and repealing regulations.
- It should enshrine the principle that regulations should rely on “risk-based,” evidence-based standard-setting processes that incorporate cost-benefit analysis, and it should require engagement and public comment from affected parties or the affected party before regulatory action is taken.
- It should include commit the parties to avoid duplication in testing or approval requirements and an acceptance of a supplier’s declaration of conformity.

Small & Medium-Sized Enterprises (SMEs)

- Drawing on the USMCA as a model in this instance, the agreement should include a dedicated chapter on SMEs to establish channels of communication and information-sharing to ensure that smaller firms benefit from the agreement, including establishment of a committee of SME representatives and government officials to develop policy proposals to facilitate SME trade and investment.

Services

- The agreement should include high standard provisions on trade in services. This includes traditional provisions such as non-discriminatory treatment, local presence, transparency, market access, and others as well as address specific issues within the appropriate chapter. The United States should pursue a negative list approach to market access with limited, narrow exceptions based on U.S. private sector consultations. It should also encourage cooperation on licensing recognition and other regulatory issues.

Delivery Services

- The agreement should require fair, non-discriminatory treatment of delivery service providers by addressing the unique challenges associated with postal operators through the inclusion of a delivery services sectoral annex in the agreement to ensure that U.S. and Kenya consumers and businesses retain access to world-class delivery service options.
- The annex should build off of the Delivery Services Annex in the USMCA, but at the very least it should prohibit postal operators from cross-subsidizing services provided in the competitive environment, require that the regulator of delivery services be independent of any operator, prohibit the assessment of fees or other charges on delivery

service suppliers in order to fund the supply of universal service, and eliminate any market distorting laws, regulations, or policies that grant advantages to postal operators providing competitive services.

Financial Services

- The agreement should include a robust financial services chapter building on many of the outcomes of the USMCA but also improving issues related to investor protections, ISDS, and government procurement.
- It should ensure the free flow of data for the financial services sector and prohibit data localization measures. For both of these provisions, USMCA serves as a starting point, but improvements are needed in the standard used for privacy in the computing facility provision. The use of an avoidance standard in the local computing facility provision sets a lower bar for the financial services sector than included in the agreement for other sectors. This improvement would ensure that financial regulators maintain flexibility with respect to privacy but do so in a way that is no more burdensome than necessary. Inclusion of such a provision in a U.S.-Kenya trade agreement is critical for the financial sector as a number of African governments have sought to require localization of data in the recent past.
- The agreement should include language that ensures the prohibition on data localization is technology neutral and include language that promotes the shared understanding of the use of cloud technologies by financial institutions.
- It should include a provision that sets out cooperation on FinTech developments, complementing multilateral and other bilateral efforts aimed at promoting cross-border financial technology development and growth.
- Financial institutions must invest abroad to serve customers and clients and, in doing so, make significant investments under the prudential regime of the trading partner. These investments should be afforded the same level of protection in a U.S.-Kenya trade agreement as other investments.
- The agreement's financial services chapter should incorporate many of the investor protections from the investment chapter including expropriation (direct and indirect), the minimum standard of treatment, free transfers, performance requirements, denial of benefits, and special formalities. Breaches of these protections, including breaches of the national treatment and most-favored nation articles in the financial services chapter, should be subject to an ISDS mechanism without a requirement to use domestic courts in Kenya before proceeding with a claim.
- While not included in previous trade agreements in the financial services chapter, the performance requirements article of the investment chapter includes rules important to financial institutions, including a commitment that firms cannot be required to purchase or use domestically produced goods or services or be required to purchase or use a particular technology. Just as the financial services chapter includes by cross reference other investment chapter provisions, it should include the performance requirements article in the list of articles that apply to the chapter.
- In prior U.S. trade agreements, the financial services chapter ensured non-discriminatory treatment for government procurement in the financial sector. Unfortunately, government procurement was excluded from the financial services chapter in USMCA. The

agreement with Kenya offers an opportunity to address this concern, ensuring U.S. financial institutions receive fair treatment in the procurement of services by the Kenyan government. Non-discriminatory treatment is important particularly with regard to competitors from other foreign suppliers.

- The financial services chapter, consistent with past practice, should discipline subsidies to financial services firms. Provisions in the financial services chapter should discipline the granting of subsidies to state-owned financial institutions with limited exception for certain programs.

Electronic Payment Services

- The agreement should follow the electronic payment services (EPS) commitments in USMCA, providing for both market access and national treatment and thus establishing a level playing field for domestic and foreign-based suppliers of EPS. Robust, high-standard commitments for EPS are particularly relevant and necessary for the first U.S. trade agreement with a country in Sub-Saharan Africa, where secure and innovative payment methods offer a key to achieve financial inclusion, increase transparency, reduce graft, formalize the economy, and build trust and security in the financial system.
- Domestic regulation should account for, and be respectful of, different business models, encouraging a diverse set of players in the payments space. This competition among players will not only result in greater consumer choice and inclusion, but will also spur innovation, contributing to a more robust payments ecosystem that will allow all market participants to develop and supply a wide range of payment services with differing product features and value propositions. In particular, strong market access and national treatment commitments will ensure and safeguard an open and competitive market for EPS by discouraging requirements for local switching or processing of transactions, and duplicative or otherwise burdensome licensing requirements.

Telecommunications

- The agreement should include rules to ensure that major telecommunications services suppliers in their territory provide interconnection, leased circuit services, co-location, and access to poles and other facilities under reasonable terms and conditions and in a non-discriminatory and timely manner. It should also include rules, where a license is required, to ensure transparency in regulatory processes and that regulations do not generally discriminate against specific technologies. These rules should apply to mobile as well.

Contact:
Brionne Dawson
U.S. Chamber Africa Business Center
U.S. Chamber of Commerce
1615 H Street NW
Washington, D.C. 20062
Bdawson@uschamber.com