

APRIL 2021

U.S.-KENYA TRADE NEGOTIATIONS

Implications for the Future of the U.S.-Africa Trade Relationship



U.S. CHAMBER OF COMMERCE
U.S.-Africa Business Center



AMCHAM
KENYA

COVINGTON

Dear Stakeholder:

On behalf of the American Chamber of Commerce Kenya (AmCham Kenya), Covington & Burling LLP (Covington), and the U.S. Chamber of Commerce, we are pleased to share the report, “U.S.-Kenya Trade Negotiations: Implications for the Future of the U.S.-Africa Trade Relationship.”

In February 2020, President Uhuru Kenyatta announced Kenya’s intention to enter into a trade deal with the United States. By March, communities around the world were beginning to grapple with the social, economic, and political disruption caused by the novel coronavirus pandemic, including staggering loss of human life, a precipitous global economic downturn, nearly half of the world’s global workforce at risk of losing their livelihoods, and many millions pushed into extreme poverty. On January 20, 2021, Joseph R. Biden was sworn in as the 46th President of the United States, and at the time of this publication, his administration was assessing its approach to an inclusive trade policy agenda.

It is against this backdrop that we have prepared this in-depth study regarding a potential free trade agreement (FTA) between the U.S. and Kenya. Our goal is to examine the priority trade issues likely to be a focus for each side as well as the issues that will present a challenge for the negotiators. The report draws from insights gathered from dozens of interviews with business executives and experts to explore stakeholder interest and perspectives regarding FTA obligations on apparel and agricultural products as well as financial and digital services traded between the United States and Kenya. The report also analyzes potential obligations relating to regulatory transparency, investment, intellectual property, and other cross-cutting provisions. Finally, this study considers the U.S.-Kenya FTA as a model for the future of U.S.-Africa trade in the context of the implementation of the African Continental Free Trade Area agreement and the expiration of the African Growth and Opportunity Act (AGOA) in 2025.

A resounding message we heard from the Kenyan and American business executives whom we interviewed is that they would like to see accelerated progress to advance a high standard, comprehensive U.S.-Kenya FTA. This type of an FTA is an optimal starting point for maturing the U.S.-Kenya trade relationship. An FTA will also lead to the reduction in tariff and non-tariff barriers, while also serving to enhance predictability and alleviate market uncertainty.

Kenya is a long-standing, strategic U.S. partner in Africa. American investment in Kenya and bilateral trade are important elements of the U.S.-Kenya relationship. As one of Africa’s most diversified and fastest-growing economies, Kenya boasts a young, entrepreneurial population, is a pioneer of mobile financial services and inclusion, is home to a vibrant tech hub, and is the region’s transportation and logistics hub. As evidenced by Kenya’s ranking as third-most improved country globally in the World Bank’s Ease of Doing Business Survey, Kenya is well poised for further growth. Our findings suggest that there is substantial potential to expand the benefits of trade between the two countries.

We have sought to shed light on the objectives of the parties to the negotiations, to provide insights on various key trade issues and chapters in the negotiations, and to consider the role and importance of an FTA in the broader scope of U.S.-Africa trade relations. We hope this report contributes to advancing the vital dialogue among all stakeholders about the future of trade between the United States and Africa.

We greatly appreciate your support in this endeavor.

Sincerely,



Scott Eisner
Senior Vice President
U.S. Chamber of Commerce



Witney Schneidman
Senior Advisor for Africa
Covington & Burling LLP



Maxwell Okello
Chief Executive Officer
AmCham Kenya



U.S. CHAMBER OF COMMERCE

The U.S. Chamber of Commerce is the world's largest business organization representing companies of all sizes across every sector of the economy. Our members range from the small businesses and local chambers of commerce that line the Main Streets of America to leading industry associations and large corporations.

They all share one thing: They count on the U.S. Chamber to be their voice in Washington, across the country, and around the world. For more than 100 years, we have advocated for pro-business policies that help businesses create jobs and grow our economy.



U.S. CHAMBER OF COMMERCE U.S.-Africa Business Center

The U.S.-Africa Business Center is the preeminent voice advocating for increased trade between the United States and Africa, with a focus on leading the U.S. business community in a new period of unprecedented engagement with Africa's regional economic communities, the established African private sector, as well as small and medium-sized enterprises. Its relationships with key members of Congress, the administration, and foreign governments open doors for strategic dialogues that advance private sector involvement in Africa. Our priorities include protecting intellectual property and enabling innovation, promoting regulatory coherence and increasing the ease of doing business, enhancing U.S.-Africa bilateral and regional engagement, and expanding commercial support for Africa.



AMCHAM KENYA

Founded in 2005 and based in Nairobi, the American Chamber of Commerce Kenya (AmCham Kenya) is a business support organization representing key American and Kenyan businesses committed to and invested in the U.S.-Kenya commercial relationship. Our mission is to transform lives and create economic opportunity by catalysing two-way trade and investment between Kenya and the United States. AmCham Kenya is affiliated to the U.S. Chamber of Commerce in Washington, D.C. and currently represents over 180 companies including several American blue-chip corporations with key interests in the technology, manufacturing, healthcare, infrastructure development, professional services, consumer services, banking, and finance sectors. AmCham's priorities focus on policy and commercial advocacy, business intelligence, and trade & investment promotion.

COVINGTON

Covington & Burling LLP is a pre-eminent international law firm with more than 1,300 lawyers and advisors and offices in Beijing, Brussels, Dubai, Frankfurt, Johannesburg, London, Los Angeles, New York, Palo Alto, San Francisco, Washington, Shanghai, and Seoul. We are known for the high quality of our work, in-depth knowledge of key industries, sophistication in complex corporate, regulatory, advisory, and contentious matters, deep loyalty to clients, and commitment to the highest professional and ethical standards. Built on the firm's model of collaboration across practices, industry sectors, and geographies, our Africa practice has unparalleled experience helping clients navigate the challenges of investing and operating on the continent. Our team includes a rare mix of lawyers and advisors with decades of experience working on the ground in Africa. This offers our clients deep expertise on transactional, regulatory, dispute resolution, and compliance matters, coupled with invaluable experience working internationally to solve complex problems at senior levels of government.

© 2021 Covington & Burling LLP. All rights reserved.

ACKNOWLEDGMENTS

The American Chamber of Commerce Kenya (AmCham Kenya), Covington, and the U.S.-Africa Business Center at the U.S. Chamber of Commerce graciously acknowledge our corporate partners, members, clients, and all individuals who participated in the study, drafting, and development of this report. Brionne Dawson, Kate McNulty, and Witney Schneidman were the principal authors of the report, with input from Robert Casty, Jay Ireland, Emma Merrill, Mosa Mkhize, Rhodah Mwangi, Shivani Naidoo, Maxwell Okello, Evangelos Razis, and Kim Stietz.

The authors would like to thank the individuals who participated in the drafting and development of this study, including those individuals listed in the Appendix who provided valuable insight and analysis through interviews conducted by our team. The individuals who shared their expertise and contributions were essential to this project.

METHODOLOGY

AmCham Kenya, Covington, and the U.S. Chamber of Commerce assembled a team that reviewed documentation from public sources and carried out analysis on the U.S.-Kenya trade negotiations. In addition, the research team conducted structured, in-depth conversations with interview respondents to include business executives, experts, and current and former government officials. The interviews were largely carried out between July and October 2020. Interview respondents were selected based on their expertise on U.S.-Africa trade policy or their observations as key stakeholders in the public or private sector. A non-exhaustive list of interview respondents is available in the Appendix to this report.

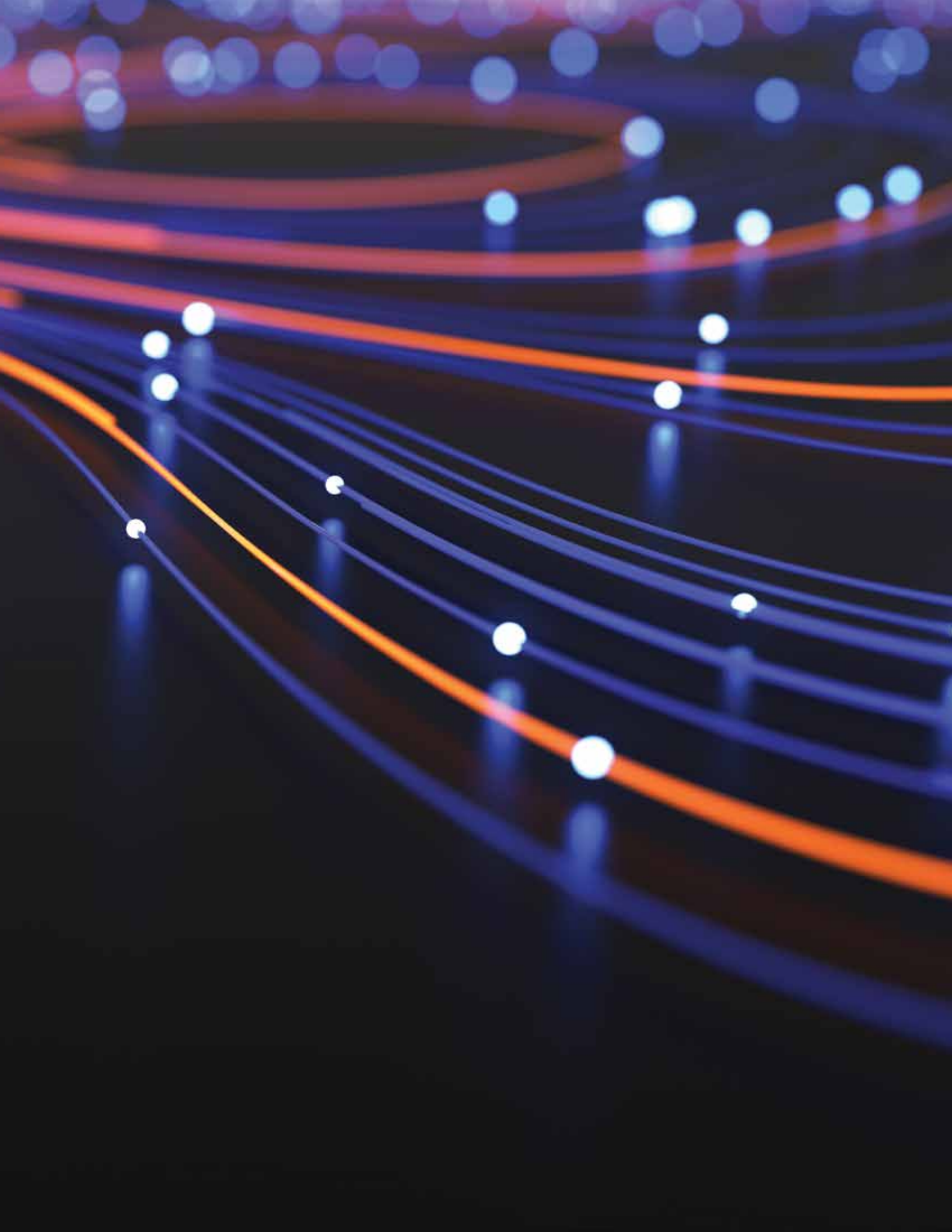


TABLE OF CONTENTS

INTRODUCTION	1
KEY FINDINGS	2
PART I:	
Process and Priorities for a U.S.-Kenya Trade Agreement	3
A. Domestic Negotiating Processes and Objectives	4
1. U.S. Negotiating Process and Objectives	4
2. Kenya’s Negotiating Process and Objectives	5
B. Policy Priorities for the Governments of the United States and Kenya	7
1. Areas of Mutual Interest and Benefit	7
2. U.S. Priorities	13
3. Kenyan Priorities	21
PART II:	
The FTA and AGOA	25
A. Background on the Establishment and Purpose of AGOA	26
B. Kenya’s Experience with AGOA Utilization	26
C. The Future of AGOA and the U.S.-Kenya FTA	27
PART III:	
The FTA, the EAC, and the AfCFTA	27
CONCLUSION	28
APPENDIX: LIST OF RESPONDENTS INTERVIEWED FOR THIS STUDY	30
REFERENCES	31



INTRODUCTION

In February 2020, the United States and the Republic of Kenya announced the launch of negotiations to conclude a comprehensive and reciprocal free trade agreement (FTA) that would be the first of its kind between the United States and a sub-Saharan African country. The negotiations, announced by U.S. President Trump and Kenya's President Kenyatta, marked an important development in recent U.S. engagement with Africa and, if successful, would represent the most significant innovation in U.S.-African trade relations since the enactment of the African Growth and Opportunity Act (AGOA) trade preference program in 2000.

Just over one year later, an agreement has yet to be reached, presenting the Biden administration with a decision on whether to continue negotiations with Kenya. The conclusion of an FTA would undoubtedly signify an important shift in U.S. trade policy in the region. By adopting a reciprocal approach toward market access and other trade issues, the negotiation of a bilateral FTA between the United States and Kenya will have important ramifications for unilateral programs like AGOA, which was in fact intended to be a stepping-stone to a more mature U.S. trade relationship with African countries when it was developed over 20 years ago.

The timing of the negotiations is auspicious. AGOA is set to expire in 2025, absent a renewal by the U.S. Congress. The proposed bilateral trade agreement also coincides with the launch by members of the African Union of efforts to implement the African Continental Free Trade Area (AfCFTA), following the agreement's entry into force on May 30, 2019 by which time 24 countries had deposited their instruments of ratification. These trade developments have also occurred in the context of the COVID-19 pandemic. In this overarching context, the future of U.S. trade policy with Kenya—and with Africa more generally—will be a crucial issue with which the Biden administration and Congress must grapple. These issues are further influenced by the challenges that U.S. firms doing business in Africa face from competitors in China, Europe, and elsewhere.

It is against this backdrop that the American Chamber of Commerce Kenya (AmCham Kenya), Covington, and the U.S.-Africa Business Center at the U.S. Chamber of Commerce have collaborated on a study examining the potential challenges and benefits of an FTA between Kenya and the United States. This study also considers the implications of a U.S.-Kenya FTA with respect to AGOA, and takes into account the recent impacts of the COVID-19 pandemic on trade.

This study does not seek to make policy recommendations for government officials or trade negotiators, but rather provides a factual analysis of the key issues that any bilateral FTA between the United States and Kenya would be expected to address. This study incorporates insights from interested U.S. and Kenyan businesses and stakeholders on these issues. Further, it seeks to consider these key trade issues in the broader context of U.S.-Africa trade, by taking stock of recent and impending developments relating to the negotiation of the AfCFTA and the upcoming expiration of AGOA. In this way, this study may serve as a helpful reference for policymakers, businesses, and others seeking to better understand U.S.-Kenya trade negotiations, and may also contribute to discussions regarding policy recommendations put forward by such groups. In particular, this Covington-Chamber-AmCham study is structured around three principal themes:



The U.S.-Kenya FTA: This study explores several questions regarding trade negotiations for a potential U.S.-Kenya FTA. For instance, how might negotiations be approached in light of the potential impact on trade in apparel, agricultural goods, and other goods produced in the United States and Kenya? How might the parties address other issues, including trade in services, regulatory barriers, and digital trade? What are the priority public policy and commercial issues that may shape negotiations, as well the future U.S.-Kenya commercial relationship, should a trade agreement be put in place?



The Future of AGOA and U.S. Trade Policy in Africa: AGOA is set to expire in 2025, which creates an opportunity to explore a set of questions related to its future. What has AGOA achieved over the past 20 years? What are the lessons learned from AGOA? What does a U.S.-Kenya FTA mean for AGOA, and can the FTA be a model for a network of trade agreements to replace AGOA?



AfCFTA and the U.S.-Kenya FTA: A third theme will consider the interplay between a U.S.-Kenya FTA and the implementation process of the AfCFTA. How might a “network” of FTAs between the United States and African countries impact implementation of the AfCFTA?

In addressing these three themes, this study relies on open-source materials from which we analyze trends in trade between the United States, Kenya, and Africa more generally. We also reviewed publicly available documents setting out explicit government priorities for the negotiations. Critically, this study also incorporates information obtained through interviews with key business executives from leading U.S. firms active in Kenya and other parts of Africa, Kenyan firms currently involved in exporting goods and services to the United States, and other stakeholders.¹ We expect that this report will be of value to policymakers, business leaders, and others in the United States and Africa who have an interest in the ongoing commercial relationship between the United States and Kenya, as well as the U.S. trade relationship with Africa writ large.

KEY FINDINGS

In the course of our research and conversations with dozens of business leaders and other stakeholders, we identified the following as priority issues for an FTA between the United States and Kenya:

- **Increasing Predictability:** A number of business executives anticipate that an FTA will introduce more predictability in U.S.-Kenya commercial relations, mitigating the uncertainty associated with the annual eligibility review process under AGOA. A comprehensive high-standard FTA also contains obligations relating to transparency, anticorruption, good regulatory practices, and government procurement, which could improve the business environment in Kenya and encourage more U.S. investment into the country.
- **Engaging Small and Medium Enterprises (SMEs):** Both Kenya and the United States have an interest in promoting economic opportunities for small and medium enterprises in their respective countries. The United States has included chapters in prior FTAs that seek to promote and facilitate participation of SMEs in international trade, while Kenya hopes the FTA will lead to the creation of “decent jobs and sustainable livelihoods” generated by a growing economy.
- **Expanding Reciprocal Access:** An FTA would inject reciprocity into the U.S.-Kenya commercial relationship, which would make U.S. goods and services more competitive with products from Europe that currently receive preferential treatment under the Economic Partnership Agreements. It would also be a signal to China of Kenya’s interest in diversifying its commercial relationships.
- **Facilitating Digital Trade:** The economic importance of digital trade has been underscored by the COVID-19 pandemic, as governments and populations have increasingly sought to use digital options and contactless alternatives to ensure business continuity while maintaining social distancing. Interview respondents identified digital trade as a key condition for ensuring inclusive economic growth through trade, including for SMEs and other businesses across various sectors such as agriculture, infrastructure, and health. They also underscored the role high-standard digital trade disciplines play in creating certainty for businesses navigating the fast-changing and increasingly complicated web of laws, regulations, and standards that contribute to global data governance. At the same time, some challenges exist, including Kenya’s implementation of a digital service tax (DST) effective January 1, 2021. Local tech companies have voiced their opposition to the tax, while U.S. tech companies and the U.S. government have opposed the unilateral adoption of such measures outside an ongoing multilateral negotiation under the Organisation of Economic Co-operation and Development (OECD). Respondents interviewed for this study were hopeful that the FTA process could present a more favorable outcome for the industry on this and other issues related to digital trade measures.
- **Tackling Trade in Genetically Modified Organisms (GMOs):** Since 2012, Kenya has imposed a ban on most imports of GMOs, including feed imports and food. This has been an obstacle for agricultural trade between the United States and Kenya and has also disrupted trade to other parts of the continent. Interview respondents were optimistic that an FTA could facilitate a bilateral solution to this issue.



Kenya had the second highest AGOA utilization rate of the 40 program beneficiaries in 2018, and the highest utilization rate for non-oil exports.

- **Improving Intellectual Property Protections:** Business executives interviewed for this study consistently cited the improvement of intellectual property protections and enforcement in Kenya as a potential benefit of an FTA, which respondents anticipate could lead to new investments by the innovative industries.
- **Enhancing Transparency, Capacity Building, and Enforcement:** The trade negotiations, as well as the AfCFTA agreement, create an opportunity to address challenges in Kenya to international trade, including those relating to the regulatory environment, trade facilitation, intellectual property (IP) enforcement, law enforcement, and supply chain policies. Progress in these areas will improve the overall business environment in Kenya, and will also align with Kenyan policies that seek to address illicit trade, which is a key challenge for companies doing business in the Kenyan market. Technical assistance will likely be key to addressing these issues, and may require the United States to consider measures that incorporate robust trade capacity building in the final agreement.
- **Preserving AGOA Benefits:** Over 70% of Kenyan exports to the United States are covered by AGOA. Kenya had the second highest AGOA utilization rate of the 40 program beneficiaries in 2018, and the highest utilization rate for non-oil exports. Kenyan decision makers will want to maintain this access in trade negotiations with the United States. At the same time, U.S. negotiators will seek to ensure that any agreement contains adequate reciprocal market access.

PART I: PROCESS AND PRIORITIES FOR A U.S.-KENYA TRADE AGREEMENT

Following the announcement of the intention to launch FTA talks in February 2020, the United States and Kenya proceeded rapidly to the start of negotiations. On March 17, 2020, the Office of the U.S. Trade Representative (USTR) submitted formal notification to the U.S. Congress that the Trump administration would initiate the negotiations,² and it solicited public comment on the same. In May 2020, USTR issued its summary of objectives for the negotiations,³ and Kenya responded by issuing its own negotiating objectives one month later.⁴ The first round of trade negotiations between U.S. and Kenyan officials took place virtually in early July 2020,⁵ and a second round of negotiations was held in mid-November 2020. A third round of negotiations planned for January 2021 was postponed, to allow for the transition of administrations in the United States to the incoming Biden administration.

While the negotiating objectives published by Kenya and the United States are generally aligned, there are some important divergences and differences between the U.S. and Kenyan decision-making processes that have been undertaken by each government to develop their negotiating priorities. This section first describes these differences in process and substantive negotiating objectives that may influence the flexibility negotiators from each country have in making the tradeoffs that are generally necessary to conclude a trade agreement. Next, this section describes the priority issues expected to be more critical for negotiators, that were identified through analysis of open-source documents and interviews with businesses and other stakeholders across both countries.

TRADE PROMOTION AUTHORITY

Because trade agreements often require modifications to U.S. law, any legislation implementing those changes must be approved by Congress. This can create unease among U.S. trading partners that Congress will make last minute changes to the terms agreed with USTR, while also subjecting the implementing legislation to amendments unrelated to the trade agreement. In order to overcome these obstacles, the U.S. Congress has historically passed time-limited legislation that authorizes the President to negotiate trade agreements and submit the required legislation to Congress for expedited consideration. This expedited process is referred to as “fast track” or trade promotion authority (TPA). The most recent iteration of TPA was approved in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, and expires on July 1, 2021. In addition to deciding whether to pursue the Kenya FTA, the Biden administration will also face expiration of TPA in July 2021, and may need to consider whether to request a renewal of the legislation if it wants to retain fast track authority.

In the United States, USTR is responsible for negotiating trade agreements on behalf of the President. In order to take advantage of the expedited fast-track process, USTR must follow specific requirements set out in TPA legislation, including notification and public comment requirements, and the development of specific trade negotiating objectives. These negotiating objectives reflect U.S. commercial priorities, as well as congressional priorities. These congressional priorities are set out in TPA legislation and define the scope of the issues Congress expects will be addressed in the trade agreements. With respect to negotiations with Kenya, USTR released the U.S. negotiating objectives on May 22, 2020.

A. Domestic Negotiating Processes and Objectives

1. U.S. NEGOTIATING PROCESS AND OBJECTIVES

The United States is a party to 14 comprehensive FTAs with 20 countries.⁶ Only one FTA is with an African country, Morocco, which went into force on January 1, 2005. Most recently, the United States renegotiated its regional FTA with Canada and Mexico to conclude the U.S.-Mexico-Canada Agreement (USMCA), which entered into force in July 2020.

A. THE COMPREHENSIVE U.S. FTA MODEL

Recent U.S. FTAs incorporate commitments consistent with the principal negotiating objectives set out by Congress in the TPA legislation.⁷ Where Congress feels that its priorities are not adequately reflected in the final FTA text, it may work with USTR to modify the agreement up to and even after signature, as occurred most recently in the context of the USMCA.⁸ Keeping these congressional trade objectives in mind, recent U.S. FTAs have generally adopted a chapter-by-chapter structure that reflects negotiating objectives emphasized in TPA legislation. The chapters include:

- Market access for industrial goods
- Market access for agricultural goods
- Textiles and apparel
- Customs administration / trade facilitation
- Sanitary and phytosanitary measures (SPS)
- Trade remedies
- Technical barriers to trade (TBT)
- Sector-specific commitments on non-tariff barriers
- Government procurement
- Investment
- Cross-border trade in services (CBTS)
- Temporary Entry
- Financial services
- Telecommunications
- Digital trade
- Intellectual property (IP)
- Competition policy and state-owned enterprises (SOEs)
- Labor
- Environment
- Small and medium-sized enterprises (SMEs)
- Anticorruption and transparency

B. U.S. COMPREHENSIVE MODEL APPLIES IN THE KENYA NEGOTIATIONS

Under the Trump administration, USTR articulated plans to pursue commitments in a U.S.-Kenya FTA commensurate with those contained in comprehensive FTAs the United States has concluded with more developed economies.⁹ For instance, USTR's negotiating objectives for Kenya were nearly identical to those prepared for trade negotiations with the United Kingdom¹⁰ and Japan,¹¹ and were also substantively similar to the negotiating objectives USTR developed for the USMCA.¹² In discussions with stakeholders, USTR also indicated that the USMCA would serve as a model for a U.S.-Kenya FTA.

While consistent with prior U.S. negotiating objectives, USTR's objectives for Kenya contain some new elements. For instance, the negotiating objectives indicate that the FTA is intended to serve as "a model for additional agreements across Africa,"¹³ thereby laying the groundwork for USTR to negotiate "reciprocal and mutually beneficial trade agreements that serve the interests of both the United States and the countries of sub-Saharan Africa."¹⁴ USTR is thus seeking to use a bilateral free trade agreement with Kenya as a model, which could transition U.S. trade policy away from the unilateral preferences currently provided under AGOA toward trade arrangements based on reciprocity. This is in line with the approach the United States has implemented in other regions, having previously negotiated bilateral FTAs in place of unilateral preference programs in Latin America and the Caribbean. In addition, it is not the first attempt the United States has made to incorporate reciprocity into its trade relationship with sub-Saharan African countries. The United States and the five members of the Southern African Customs Union (Botswana, Lesotho, Namibia, South Africa, and Swaziland) previously launched negotiations to conclude a reciprocal FTA in 2003. The attempt was unsuccessful, however, as negotiations were suspended in 2006 and ultimately replaced with a long-term joint work program in the form of the Trade, Investment and Development Cooperation Agreement. The launch of U.S.-Kenya trade negotiations is significant in its own right, however, particularly so given the forthcoming expiration of AGOA in 2025. However, it is unclear if, when, or how a bilateral agreement may galvanize a transition toward reciprocal U.S. trade agreements with African countries. The intervening period ahead of the possible expiration of AGOA in 2025 provides little time for the United States to conclude FTAs with other sub-Saharan African countries. Nevertheless, the possibility of using an FTA with Kenya as a model for future agreements with Africa suggests that the United States will seek to incorporate the most robust obligations possible, though the Biden administration's perspective on this approach remains to be seen.

2. KENYA'S NEGOTIATING PROCESS AND OBJECTIVES

Kenya is a party to several African regional trade agreements, including the East African Community (EAC) comprised of six African countries including Kenya, which promotes intra-regional trade and the free movement of goods and capital across member states.¹⁵ Under the framework of the EAC, Kenya implements several EAC policies regarding trade and investment, including application of a common external tariff. While tariffs under this system range from zero to 100%, the average tariff is approximately 25%, though goods identified as sensitive are usually subject to higher rates. In addition to the EAC, Kenya is also a member of the African Continental Free Trade Area (AfCFTA), which commenced trading on January 1, 2021, and for which Kenya was one of the first countries to deposit instruments of ratification.¹⁶ In addition, Kenya also recently announced that it had concluded a bilateral trade agreement with the United Kingdom (UK and EU) to govern the terms of trade between the two countries following the UK's transition out of the European Union (EU).¹⁷ By virtue of its membership in the EAC, Kenya is participating in negotiations to conclude a Tripartite Free Trade Area among various African regional organizations, and has also ratified an Economic Partnership Agreement between the EAC and the EU.¹⁸

With respect to preparations for an FTA with the United States, Kenya has acknowledged that it faces certain challenges as a result of both economic disparities with the United States as well as disparities in technical capacity to effectively negotiate. The government of Kenya sought to address these challenges, including by engaging consultants with economic, trade, and legal expertise to provide technical assistance and capacity building to negotiators.¹⁹ In addition—like the United States—Kenya also solicited public comments from stakeholders for the development of its negotiating objectives, though the process in Kenya is less formalized than the U.S. process under TPA legislation. Following this consultative process, Kenya released an outline of its negotiating objectives approximately one month after the publication from the United States.²⁰



The Kenyan objectives are similar to those of the United States with respect to the scope of issues addressed. There are, however, certain aspects of Kenya's objectives that diverge from the U.S. objectives. For instance, the Kenyan objectives are silent on specific negotiating objectives identified by the United States, including good regulatory practices, subsidies, competition, procedures for medical devices, and issues relating to SMEs. In addition, Kenya's objectives may signal a different negotiating approach to other issues in a manner that focuses on broader economic development rather than securing particular trade concessions. For example, while the U.S. objectives spell out specific obligations and disciplines sought across a variety of areas (including, among others, non-discrimination, elimination of customs duties, and prohibition of localization), Kenya's objectives instead emphasize the desired economic outcomes of the agreement.

Kenya also puts forward more detailed and concrete proposals on some issues that extend beyond those articulated by the United States. One such example is on the issue of textiles, where Kenya's objectives are more extensive with respect to the market access it enjoys under AGOA and will seek to maintain. Kenya's objectives also focus on regional integration in Africa to a greater degree than the United States, because of the importance of regional trade to the Kenyan economy. For example, Kenya's objectives with respect to rules of origin envision the establishment of a regime to support regional supply chains and accumulation, while the U.S. objectives appear more focused on incentivizing local production occurring squarely within the borders of the United States and Kenya.²¹ In addition, Kenya's objectives seek negotiation of disciplines compatible with existing regulatory frameworks in place between the United States and the East African Community (EAC).²² Further, Kenya's negotiating objectives also focus on creating "a framework through which any EAC Partner State that did not participate in these negotiations at the outset is allowed to join the negotiations, subject to terms and conditions that would be agreed between the USA and Kenya."²³ In comparison, the U.S. objectives merely acknowledge the need to support regional integration "where appropriate."²⁴

B. Policy Priorities for the Governments of the United States and Kenya

Based on a review of economic data, the competing negotiating objectives published by the United States and Kenya, and interviews conducted with industry stakeholders, this section identifies issues that are anticipated to be of particular commercial importance for the United States and Kenya in FTA negotiations. While this review identified several areas of mutual interest to both Kenya and the United States, it also revealed several issues that are likely to be contentious as a result of the diverging priorities or policies. Even among these more contentious issues, however, few appear to be excessively divisive, and none rise to the level of being insurmountable.

1. AREAS OF MUTUAL INTEREST AND BENEFIT

This section addresses trade issues where U.S. and Kenyan commercial and policy priorities are expected to align in the course of trade negotiations. While that is not to imply that these issues will be free from controversy in discussions between U.S. and Kenyan negotiators, the establishment of trade obligations in these areas is expected to promote substantial benefits for both countries, and therefore may present the greatest opportunities for mutual agreement.

A. INCREASE IN PREDICTABILITY OF TRADE AND INVESTMENT

During interviews with private sector stakeholders, one of the potential benefits of a U.S.-Kenya FTA that was consistently cited was the potential for the FTA to increase predictability in the bilateral economic relationship. In particular, interview respondents expressed hope that an FTA would increase transparency and long-term stability in the application of duties imposed on Kenyan products exported to the United States.

Under the current approach implemented through AGOA, exports from AGOA beneficiaries are eligible for duty-free treatment by the United States, but participating African countries are subject to annual eligibility reviews that can result in removal of these trade preferences. As a result, the annual eligibility review creates some regulatory uncertainty for producers in Kenya seeking to export goods to the United States. This uncertainty is compounded by questions as to whether AGOA will be renewed by the U.S. Congress. With an FTA, however, the application of tariffs would be normalized to the extent that the applicable year-over-year duties on Kenyan exports to the United States (or U.S. exports into Kenya) would become more predictable. However, some interview respondents expressed concern that a U.S.-Kenya FTA could incorporate elements from the recently concluded USMCA that may limit this predictability. For instance, inclusion of a “sunset” mechanism that would terminate the agreement absent a regularly scheduled renewal may raise doubts about the longevity of the FTA.²⁵

Interview respondents also noted that an FTA could increase predictability in market access in Kenya for U.S. exporters and investors, including in the regulatory environment. Several respondents identified corruption as a particular obstacle to trade and investment, as it adds non-negligible costs to doing business in Kenya, which ranks 137 out of 198 on Transparency International’s 2019 Corruption Index.²⁶ Interview respondents noted particular concerns with corruption in Kenya with respect to government procurement and government approvals.

As a means to address these issues, business executives cited provisions in prior U.S. FTAs addressing technical barriers to trade (TBT) such as standards and conformity assessments, which impose obligations relating to transparency and due process in certain government processes. Interview respondents also noted that U.S. FTAs also contained obligations in chapters relating to anticorruption, good regulatory practices, government procurement, and publication and administration, which could also reduce corruption and improve the business environment in Kenya. In particular, it was hoped that these chapters would establish disciplines by which the Kenyan government would be bound to ensure a certain degree of transparency and due process in the promulgation and application of its domestic regulations.

Finally, interview respondents also noted that the conclusion of a U.S.-Kenya FTA would bring other long-term intangible benefits to the business environment in Kenya, including providing a needed signal to American investors that the risks of doing business in Kenya were lower as compared to competitor markets.



A U.S.-Kenya FTA would bring other long-term intangible benefits to the business environment in Kenya, including providing a needed signal to American investors that the risks of doing business in Kenya were lower as compared to competitor markets.

B. AGRICULTURAL MARKET ACCESS

Another area of mutual interest for the United States and Kenya is the area of agricultural market access. Distinct from regulatory issues impacting trade in agricultural products (see discussion regarding sanitary and phytosanitary issues below), negotiations on agricultural market access relate, among other things, to the tariffs, quotas, or tariff-rate quotas (TRQs) that each party may set for agricultural imports. The United States and Kenya are certain to have keen interest in ensuring market access for their agricultural exports, given the importance of the agricultural sector to their economies. At the same time, however, agriculture is traditionally among the more politically sensitive sectors in trade negotiations, in which countries generally have acute defensive interests.²⁷

For the United States, agricultural market access has historically been a key priority of U.S. trade negotiators and Congress²⁸ and U.S. interview respondents identified agriculture as a potential area for growth for U.S. exports, particularly given Kenya's role as a trading hub and gateway to East Africa.²⁹ Kenya's principal agricultural imports are palm oil, wheat, rice, sugar, and corn.³⁰ Kenya has increased imports of agricultural products over the last decade, though the share of those products coming from the United States remains small—at approximately 3%—and U.S. market share has actually declined over that period.³¹ While higher-priced U.S. exports have typically struggled to compete in the Kenyan market, higher-value agricultural goods are becoming increasingly popular among a growing middle class in Kenya. U.S. business representatives interviewed for this study accordingly saw an opportunity to increase U.S. agricultural exports to Kenya, including for products such as alcoholic beverages, fruits, fish, pasta, and other agricultural commodities.³² With respect to the types of concessions the United States may be willing or expected to make in agricultural market access negotiations, the United States has traditionally sought to preserve protections from increased imports for certain U.S. agricultural sectors. While the United States may therefore adopt a defensive stance in negotiating with Kenya, it is possible that it will be less pronounced than in past negotiations with larger trading partners such as the EU or Japan, where higher trade volumes are at stake.

For Kenya, agriculture is a significant pillar of the country's economy, and will be of particular interest throughout any FTA negotiations. Kenya's agricultural sector has historically accounted for as much as one-third of the country's gross domestic product (GDP) and is a substantial employer.³³ As the sector responsible for approximately two-thirds of all of Kenya's merchandise exports, agricultural trade (including trade in food and raw agricultural commodities) constitutes an overwhelming share of Kenya's overall trade with the world. Kenya can accordingly be expected to prioritize securing predictable access to the U.S. market—seeking terms at least as favorable as those provided under AGOA—for its key agricultural exports such as tea, cut flowers, coffee, dates, figs, pineapples, avocados, and nuts.³⁴

At the same time, however, Kenya may also adopt a defensive posture toward agriculture market access for other commodities. With over 75% of Kenya's agricultural output coming from small-scale farming or livestock production³⁵ Kenya may be hesitant to invite substantial competition from large corporate farms and producers in the United States. Indeed, tariffs currently provide some protection for Kenya producers from such competition, as the United States maintains an average bound tariff rate on agricultural products of approximately 5.2%, and Kenya's average bound rate for agricultural products is approximately 20.3%. Should Kenya reduce tariffs on potentially sensitive agricultural products, it can be expected to seek generous transition periods to ensure phasing out of such duties is gradual. Even so, there may also be substantial opportunities for large agricultural firms to set up distribution networks by partnering with small Kenyan retailers across the country, thereby generating additional economic opportunities for smaller businesses in Kenya.



C. INCLUSIVE GROWTH FOR SMALL AND MEDIUM ENTERPRISES

Private sector stakeholders interviewed indicated that an issue of potential mutual interest to the United States and Kenya would be promoting inclusive growth in Kenya, especially for SMEs and job creation for younger workers. The United States has already included disciplines in prior FTAs that seek to promote benefits for SMEs. Kenya has also explicitly identified “the creation of decent jobs and sustainable livelihoods” and “balanced outcome[s]” as objectives for the conclusion of an FTA. In order to realize these benefits for SMEs and others, executives interviewed emphasized that the FTA would have to adopt strong disciplines on digital trade, which can promote increased opportunities for participation by SMEs. This was seen as a key way in which both SMEs and younger workers can participate more actively in the global economy while minimizing costs, especially given physical restrictions currently in place as a result of the COVID-19 pandemic.³⁶

D. INCREASE THE U.S. PRESENCE IN AFRICA

Several business executives interviewed for this study expressed a view that, in many ways, U.S. trade policy toward Africa has been more passive than other nations. For instance, both the United States and the EU offer access to unilateral trade preference programs for less developed countries in Africa. The EU, however, has also pursued a more active trade policy by seeking to negotiate reciprocal Economic Partnership Agreements (EPAs) with African countries as well. Indeed, the EU has been pursuing these reciprocal trade arrangements for decades, encouraging African countries to enter the agreements as regional groups. To date, the EU has concluded EPA negotiations with several regional blocs in Africa, including the EAC, the Economic Community of West African States, and the Southern African Development Community, among others. To date, only some of these agreements have been implemented.

Even in African countries where EPAs have not yet been implemented, U.S. executives expressed concern that U.S. firms were often disadvantaged in Africa as compared to European firms. Some interview respondents reported instances of U.S. companies shifting their production out of the United States to facilities in Europe, so that they would enjoy better access to markets in Africa. Even where such shifts do not result in duty-free treatment, EU-origin products may still face lower tariffs than those produced in the United States. Interview respondents also expressed concern over convergence in EU and African policies and cultural views resulting from the proliferation of EU EPAs, which may disadvantage U.S. manufacturers, including with respect to genetically modified agricultural products and geographic indications, among others, where U.S. and EU approaches differ.

While these concerns were expressed in terms general to the African continent, and not specifically with respect to Kenya, interview respondents noted that they viewed a potential U.S.-Kenya FTA as a positive development that could more broadly begin to level the playing field for U.S. firms seeking to do business in Africa.

In addition to competition resulting from EU engagement in Africa, U.S. business representatives also noted China’s major role in the region. According to the U.S. Export-Import Bank, China has signed bilateral trade agreements with 40 countries on the African continent, is the number one exporter of goods to 19 of 48 sub-Saharan African countries, and has become Africa’s largest trading partner.³⁷ Interview respondents acknowledged that China’s economic policy approach to Africa differs markedly from that of the United States and other countries, as it is characterized by extensive financing arrangements that encourage use of Chinese goods or suppliers. Both business executives and policymakers interviewed for this study noted that the potential conclusion of a bilateral U.S.-Kenya FTA would provide an opportunity to demonstrate the significance of the United States as a trade and investment partner for Kenya in particular, as well as for Africa more generally. In addition, increasing the U.S. trade and commercial presence in Africa would also be consistent with U.S. policies in other areas, including with respect to U.S. efforts to counter the proliferation of Chinese financing tools that disadvantage U.S. companies.³⁸

Increasing the U.S. presence in Kenya is also compatible with Kenya’s policy goals as well. More specifically, a stronger U.S. presence would allow Kenya to demonstrate to its current and prospective trade partners (including China and the EU) that it has a range of options in the trade policy space and is not disproportionately dependent on a single partner or economy as a source of trade or economic growth. Kenya may find this

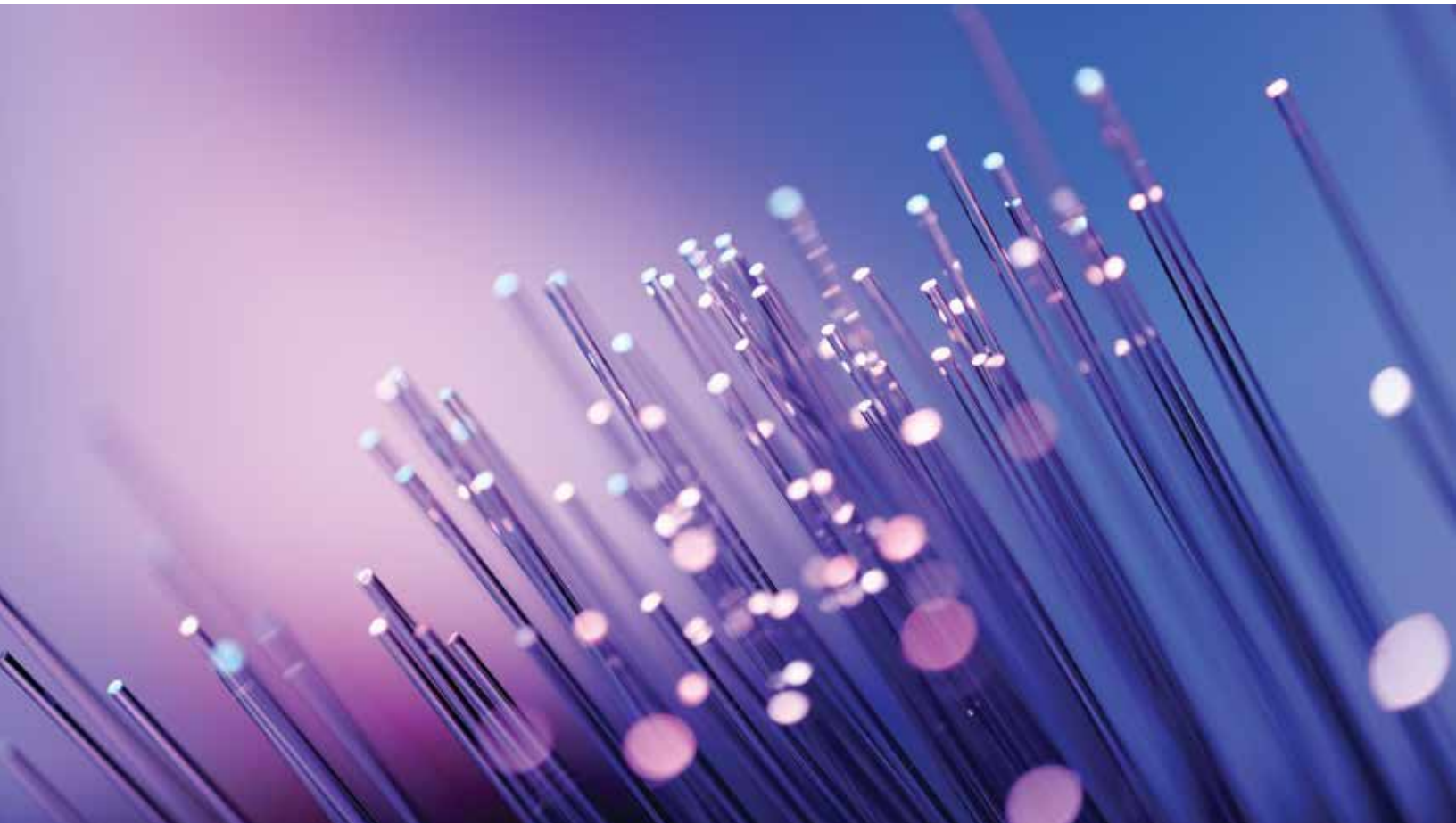


provides it with greater leverage or credibility when negotiating with its trading partners. This may be particularly relevant for Kenya’s relationship with China, given rising concerns (and calls for renegotiation of terms) over Kenya’s exposure to railway-related debts financed by China, among other trade-related issues.³⁹

E. TRADE AND ENVIRONMENT

Addressing environmental issues is also expected to be a priority for both the United States and Kenya in conclusion of any trade agreement. For the United States, environmental issues have been of increasing importance in the negotiation of FTAs, including as a negotiating priority identified by Congress. Most recently, Democrats in the U.S. Congress secured modifications to environmental provisions of the USMCA negotiated with Canada and Mexico after the agreement had been signed, by insisting on such changes as a condition of ratifying the agreement. These changes included, among others, modifications to strengthen enforcement of the agreement’s environmental obligations.⁴⁰

Reflecting the importance of the environment as a trade issue for the United States, U.S. negotiating objectives outline a number of priorities in this area. For instance, U.S. objectives seek the establishment of strong and enforceable environmental obligations to “provide a framework for conducting, reviewing, and evaluating cooperative activities that support implementation of the environment commitments,” and also seek to establish “a process for the public to raise concerns directly with the government of Kenya if they believe it is not adhering to environmental commitments.”⁴¹ U.S. objectives also identify as a priority the negotiation of obligations to limit Kenya’s ability to derogate from or waive “protections afforded in



environmental laws for the purpose of encouraging trade or investment.⁴² U.S. negotiators also seek to obtain specific commitments on sustainable fishing, trade in environmental goods, and provisions to mitigate the discharge of solid waste in the marine environment.⁴³

For Kenya, environmental issues have also become increasingly prominent, including in the context of international trade. At the highest level, Kenya's 2010 constitution provides that "[e]very person has the right to a clean and healthy environment," and that the State will "[e]liminate processes and activities that are likely to endanger the environment."⁴⁴ Any trade agreement reached would have to comply with these constitutional provisions. With respect to its trade negotiating objectives, Kenya's objectives in the area of the environment are much more limited in scope than those of the United States, though both parties support adherence to Multilateral Environmental Agreements to which each is a party.⁴⁵ Kenya's objectives also encourage bilateral cooperation with the United States on environmental protection.⁴⁶

One particular environmental issue that has arisen in the context of negotiations relates to plastic pollution. Trade in plastic waste was identified as an issue of growing concern by U.S. and Kenyan policymakers even before launch of trade negotiations.⁴⁷ In 2017, for example, the government of Kenya banned the use of plastic carrier bags.⁴⁸ The Kenyan government also banned single-use plastics in protected areas in June 2020, and has contemplated banning plastic bottles.⁴⁹ In addition, industry-driven efforts have also sought to address concerns regarding plastic waste in Kenya. The polyethylene terephthalate (PET) plastic industry in Kenya has incorporated the Kenya PET Recycling Company (PETCO) as its producer responsibility organization. PETCO represents the local PET plastic industry's joint effort to self-regulate post-consumer PET recycling; currently, over 15 companies that produce more than 50% of plastic bottles in Kenya are actively participating. In August 2020, reports surfaced that issues regarding trade in plastic

waste may be addressed in the context of U.S.-Kenya trade negotiations, with some stakeholders seeking to liberalize trade in plastics.⁵⁰ In response, 62 members in both chambers of the U.S. Congress penned a letter to President Trump opposing FTA provisions that would weaken Kenya's restrictions on plastics, noting that "the United States' solution to the plastic pollution crisis cannot be to simply open more markets abroad for plastic products and find destinations to send increasing amounts of plastic waste. This is totally at odds with the global policy solution to prevent plastic pollution—not to mention climate change."⁵¹ The government of Kenya has also denied reports that an FTA with the United States would undermine Kenya's commitment to environmental protections. Speaking to Kenyan press, Kenya's Cabinet Secretary for Industrialization, Trade, and Enterprise Development responded to the aforementioned reports by confirming that no proposal had been brought forward in the negotiations that would curb Kenya's restrictions on plastic, and that Kenya would not accept any proposal that conflicts with its environmental laws.⁵² Even with such assurances, public outcry arising from fears that an FTA could result in increased plastic waste flowing to Kenya and the region persisted, precipitating a 20,000-signature petition submitted to the Kenyan government by Greenpeace Africa calling for upholding existing laws.⁵³

With respect to more general environmental issues, private sector interview respondents articulated the point of view that the U.S.-Kenya trade agreement is an opportunity to enhance progress both parties have already made on environmental issues, particularly with respect to climate change, facilitating green growth, enabling sustainable waste management and pollution control, and accelerating progress on the circular economy. In this respect, private sector respondents noted that industry is strongly supportive of Kenya's 2019 Draft Sustainable Waste Management Bill, which includes, among others, provisions on closing open dumpsites, improving waste management procedures, expanding markets for recycled products, and expanding the market for pre- and post-consumer recycled products.⁵⁴ Respondents also noted that a U.S.-Kenya FTA should respect the laws and gains made in accelerating Kenya's progress on environmental sustainability.

2. U.S. PRIORITIES

While the United States and Kenya share a range of mutual interests as described above, there are issues on which the United States will be more offensively focused. Although these issues are likely to be a source of contention in the negotiations to conclude a U.S.-Kenya FTA, none appear insurmountable.

A. DIGITAL TRADE AND CROSS-BORDER DATA FLOWS

Digital trade broadly encompasses the sale of consumer products over digital platforms, the supply of online services, as well as data flows that facilitate trade and manufacturing. It involves transactions that take place on online platforms between businesses as well as transactions that take place directly between businesses and consumers.⁵⁵

While measuring digital trade is notoriously difficult, it has grown faster than traditional trade in goods and services, a trend which has been accelerated by the COVID-19 pandemic. The economic impact of the internet alone was estimated to be \$4.2 trillion in 2016, equivalent to the fifth largest global economy.⁵⁶ As digital trade has become an increasingly important source of income and economic growth, governments have sought to regulate digital activity as well as tax income derived from such activities.

The United States, for its part, has vocally opposed imposition of unilateral regulations or taxes by foreign governments on companies supplying digital services, as these measures have been found to discriminate against U.S.-headquartered companies. For instance, in July 2019, USTR initiated a Section 301 investigation⁵⁷ against France for its proposed imposition of a digital service tax (DST) of 3% on larger companies involved in the provision of digital services.⁵⁸ In June 2020, USTR initiated additional investigations against similar practices in a range of other countries, including Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey, and the United Kingdom.⁵⁹ The United States has pressed other governments not to impose taxes on digital services or transactions and to instead focus their energies on the multilateral negotiations taking place under the aegis of the OECD to address tax challenges relating to the digitization of the global economy.⁶⁰ Further, the United States has included affirmative obligations in U.S. trade agreements

to liberalize digital trade by restricting the ability of U.S. partners to impose duties on electronic transmissions or discriminate against digital products originating or first made available in the United States. These have been bolstered by new commitments on the transfer of data across borders and restrictions on requirements that data be stored or processed locally.⁶¹

The U.S. position diverges from the Kenyan posture on digital trade. In 2020, Kenya adopted or implemented a number of policies that either tax digital trade or have created uncertainty for cross-border data flows. For instance, in June 2020, Kenya adopted a DST in its 2020 Finance Act that imposes a tax of 1.5% on persons operating in or selling products through digital marketplaces, to be assessed on the value of eligible digital transactions. The DST came into force on January 1, 2021, following the issuance of implementing regulations by the National Treasury in December 2020. In addition to the DST, Kenya has also enacted Value Added Tax (VAT) on Digital Marketplace Supply that would create a value-added tax on foreign providers of digital or electronic services, effective April 2021. The VAT would levy a tax of 14% on electronic content provided via digital marketplaces, including downloads of software, streaming television and movies, apps, and electronic books, among others. Finally, Kenya also adopted provisions to regulate the international transfers of personal information in its 2019 Data Protection Act. The act establishes the office of Kenya's data protection commissioner, who is responsible for authorizing legal tools for cross-border transfers of personal information and empowers the Kenyan government to impose specific data localization requirements. These requirements have created uncertainty about Kenya's international data transfer regime and have been identified by both U.S. industry and USTR as an issue of concern.⁶² The United States is on record as criticizing Kenya's policies regarding data flows and data localization, asserting "Kenya's Data Protection Act, 2019, passed in November, includes unclear and potentially restrictive provisions governing the cross-border transfer of personal information."⁶³



HOW DIGITAL TRADE RULES ENHANCE MARKET CERTAINTY

Companies engaged in cross-border digital commerce face an ever-changing landscape of rules that govern the collection and use of data. These include privacy and data protection laws, cybersecurity standards, regulatory oversight, and requirements on specific technologies, including cloud services, artificial intelligence, and the Internet of Things. When governments commit to high-standard digital trade disciplines, such as those found in the U.S.-Mexico-Canada Agreement and the U.S.-Japan Digital Trade Agreement, they send a powerful message to the global business community that they will not use digital policies to pursue protectionist ends.

One prominent example is forced data localization requirements. Research has illustrated that measures requiring companies to locally store and/or process data serve as formidable market access barriers and do not advance legitimate public policy ends, including privacy and cybersecurity. Importantly, high-standard digital trade disciplines ban data localization requirements as a condition for market entry, establish an affirmative right for companies to transfer information across borders, and require governments to protect their citizens' privacy. Similarly, high-standard digital trade disciplines also include safeguards for companies' source code and algorithms, enabling them to offer software and data analytics on a cross-border basis without fear of expropriation by foreign governments.

High-standard digital trade rules therefore serve as a foundation of certainty for companies engaged in digital commerce. For governments seeking to spur digital transformation and stand out as a destination for data-intensive services and investment, there are few signals to the global business community other than signing onto these binding commitments.

The diverging U.S. and Kenyan approaches to digital trade and cross-border data flows are also reflected in each government's negotiating objectives. The U.S. negotiating objectives seek to eliminate duties, discriminatory measures, or restrictive requirements that would negatively impact digital trade.⁶⁴ In contrast, Kenya's objectives are less specific and more outcome oriented, emphasizing "facilitation of digital trade in goods and services and cross-border data flows in line with [Kenya's] development agenda," and the need to "[p]rovide [a] framework to strengthen the Kenyan innovation and Entrepreneurship ecosystem and upgrading of innovation startups." In addition, the Kenyan negotiating objectives are silent on other issues prioritized by the United States that impact digital trade, including forced disclosure of source code and common approaches to cybersecurity.

Despite these policy differences, respondents interviewed for this study were optimistic that trade negotiators could reach a compromise on issues relating to digital trade and cross-border data flows. Those interviewed cited several reasons for their optimism. First, as noted above, many of the measures implemented by Kenya to tax digital trade or localize data storage are relatively new. While this led some to believe it would be unlikely for Kenya to repeal the measures in full, others anticipated they could easily be modified or tweaked prior to (or as part of) implementation of an FTA. In addition, interview respondents in both Kenya and the United States noted that the effects of the COVID-19 pandemic may also prompt reconsideration of the DST and VAT by the government of Kenya. As the pandemic has underscored the crucial role played by digital services in keeping businesses operating in the face of government-mandated closures or lockdowns, officials may be more willing to consider rolling back digital taxes or localization measures, at least in part, as a means of promoting continued deployment of such products and services in Kenya.

B. AGRICULTURAL BIOTECHNOLOGY AND RELATED SPS MEASURES

As noted earlier, market access for agricultural goods will likely be a priority for both U.S. and Kenyan negotiators in the FTA negotiations. Beyond tariff barriers, the United States is expected also to seek removal of certain regulatory barriers to market access for its agricultural products. For instance, USTR has highlighted sanitary and phytosanitary (SPS) measures in Kenya as impediments to increasing bilateral trade in agriculture. In particular, since November 2012, Kenya has imposed a broad ban on imports of

genetically modified organisms (GMOs), including food and feed imports, which has not only prevented trade between the United States and Kenya, but also disrupted U.S. trade to other parts of the continent, given the need to avoid Kenyan ports when transporting such products.⁶⁵ While Kenya has at various times announced plans to lift these restrictions,⁶⁶ the ban had been maintained throughout 2019. In late 2019, however, Kenya approved commercial farming of genetically modified cotton—the first in the EAC to do so.⁶⁷ Since that time, Kenya has also advanced its consideration of commercialization of additional GMO products, including genetically modified maize and cassava.⁶⁸

Several U.S. and Kenyan stakeholders interviewed for this study acknowledged the difficulty of resolving the different U.S. and Kenyan approaches to the issue of GMOs. In particular, because GMOs may be viewed as unsafe in Kenya, the cultural component of domestic opposition to GMO products will serve as a particular barrier to expanded market access for U.S. exports of such products. Nevertheless, interview respondents noted the potential benefits to both Kenya and the United States should such a solution be reached. For instance, while consumer expenditures on food in Kenya are among the highest in the world,⁶⁹ imports of both U.S. agricultural products and technology help to reduce both food prices as well as the overall amounts spent by Kenyan households on food. This would free up disposable income for other activities and have a positive impact on domestic demand in Kenya. In addition, interview respondents also noted opportunities for finding synergies in supply chains for animal feed, where GMO products cost substantially less than non-GMO products. In general, however, respondents were optimistic that a potential solution could be reached, including by identifying specific end-users that could benefit most from access to GMO products and by potentially exploring a segregated supply of U.S. GMO and non-GMO products.

In addition to GMOs, USTR has also pointed to other SPS measures that serve as barriers to agricultural trade with Kenya. For instance, USTR has described Kenya’s meat, milk, and dairy import requirements as “complex, non-transparent, and costly,”⁷⁰ as Kenya requires importers to provide both a standardized sanitary certification and a “Letter of No Objection to Import Permit” from the Department of Veterinary Services (DVS) within the Ministry of Agriculture, Livestock, and Fisheries.⁷¹ Importers must explain the reason they are importing the product and what market need the product will meet.⁷² Further, DVS has reportedly denied permits to importers for rationales other than those related to SPS regulations, such as the availability of a product to be supplied by local producers.⁷³ Consequently, addressing such regulatory barriers will likely be an important priority for the United States as a means to improve market access for agricultural exports to Kenya.

C. INTELLECTUAL PROPERTY PROTECTIONS

The negotiation of strong obligations on intellectual property (IP) protection and enforcement has historically been a key focus of U.S. trade negotiators, consistent with congressional directives that U.S. negotiators should “ensur[e] that the provisions of any trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law.”⁷⁴ Trade obligations relating to IP protections commonly include obligations on the protection and enforcement of rights relating to trademarks, copyrights, patents, and trade secrets.

Kenya, as a World Trade Organization (WTO) member, has undertaken IP-related obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). According to a 2020 report by the Global Innovation Policy Center, Kenya’s IP system ranks among the best-scoring economies in sub-Saharan Africa and 41st of 53 global economies overall. In recent years, Kenya has also taken steps to improve IP protections in the country, updating its trademark and copyright legislation in 2019 and conducting a review by various government-led task forces of its IP system and structure. Following this review, the government of Kenya released for public comment the Intellectual Property Bill 2020, which seeks to improve government control over enforcement of IP rights, and to consolidate the functions of several government IP agencies—namely the Kenya Copyright Board, Kenya Intellectual Property Institute, and the Anti-Counterfeiting Agency—into a single entity dubbed the Intellectual Property Office of Kenya (IPOK). While these efforts have been welcomed by the United States and U.S. companies alike, U.S. stakeholders have also expressed optimism that a U.S.-Kenya FTA will result in further improvements, and may also clarify some uncertainty that may have resulted from the Intellectual Property Bill 2020 regarding roles and responsibilities for sector-specific IP issues in Kenya.



Under the framework of the WTO, 164 countries have undertaken obligations relating to such protections under the TRIPS Agreement. Conclusion of TRIPS and similar agreements seek to recognize the significant link between IP, trade, and investment.⁷⁵ Indeed, countries that maintain robust IP protections and enforcement have been estimated to be nearly 40% more likely to attract foreign direct investment, and are also more globally competitive.⁷⁶

Private sector executives interviewed for this study expressed the view that increased IP protections and enforcement would have an overall positive impact on the predictability of the Kenyan market and would serve as a signal to potential investors that the general, overarching regulatory framework in Kenya is conducive and welcoming to investments. Such a framework is particularly key to encouraging investments in innovative industries, including the sectors relating to the life sciences; agricultural biotechnology; information communications technology (ICT), and digital services. Respondents noted that U.S.-Kenya trade negotiations represent a unique opportunity to establish policies that promote investment in innovative sectors in Kenya, and also to provide local innovators with greater confidence in their ability to protect their inventions, which will spur further innovation in Kenya and the sub-Saharan African region more generally. Negotiations also provide an opportunity to build on Kenya's membership in the African Regional Intellectual Property Organization. Finally, respondents also underscored that because of the strong influence and presence of Chinese firms in Africa—particularly those interested in acquiring innovative technology or products—robust enforcement and protection of IP was of particular interest and value.

Aside from protections available for IP, negotiations are also expected to address enforcement of those protections, an issue that U.S. interview respondents have identified as a significant one. Various company representatives interviewed for this study noted that even where their companies or products benefit from protections under patents, trademarks, or copyrights, they still face challenges with enforcement of those rights in Kenya. As one example, several respondents cited significant problems with trade in counterfeit products in Kenya. While counterfeits are only one aspect of the broader area of illicit trade (see next section), trade in counterfeit products poses particular problems for innovative industries.

Effective enforcement of IP protections, including those required to combat trade in counterfeit products, is reliant on a number of factors. This includes the capacity and experience of government officials in administrative agencies that review applications for and grant particular IP rights. In addition, enforcement is influenced by the understanding of IP rights and protections that are held by generators of IP in a particular country, including universities or research institutions. Finally, the knowledge and capacity of judicial institutions

is key to ensuring that such institutions have the ability to understand often complex subject matter that is eligible for IP protections, and that they are also prepared and empowered to issue orders to prevent and penalize actions that infringe on IP rights held by others. Because the competence of all of these different actors is key to enforcement, enhanced U.S.-Kenyan coordination on—particularly through U.S. provision of training and capacity building for Kenyan administrative and judicial officials—would be mutually beneficial for both countries.

D. ILLICIT TRADE

U.S. companies interviewed for this study identified illicit trade as a concerning challenge for U.S. companies operating in Kenya. As noted above, one aspect of this problem relates to enforcement of IP protections and trade in counterfeit products, but illicit trade can also include drug trafficking or products made with forced or child labor. Illicit trade can also involve illegal trade in live animals as well as wildlife products such as elephant ivory, rhino horns, and other animal parts. Illicit trade may also result from illegal trade in other natural resources. For instance, activity relating to illegal logging is estimated to be worth up to \$157 billion annually. Illicit trade of natural resources threatens the survival of endangered species and can also contribute to environmental degradation.⁷⁷

Trade in counterfeit goods was a particular concern raised by a range of business representatives in the ICT sector, as well as respondents in the digital services, life sciences, and agricultural sectors. As a general matter, illicit trade undermines rule of law, contributes to government corruption, and is often linked to organized crime and even terrorist financing. From an economic perspective, illicit trade also threatens the establishment or maintenance of free and open marketplaces that are fundamental to improving competitiveness, increasing investment, and generating jobs.⁷⁸

U.S. companies highlighted counterfeits not only as a source of unfair competition, but also more generally as an issue affecting product and consumer safety. For instance, with respect to pharmaceutical products available in Kenya, the prevalence of counterfeit medicines raises concerns that such products pose significant risk to consumers from unsafe medicines, undercut the market for the genuine product, and harm the reputation of the genuine product by failing to provide the same benefits or treatment. This challenge is exacerbated by the ease with which counterfeiters can offer fake medicines over the internet and ship them by mail to consumers worldwide. Respondents also noted that trade in counterfeit software programs was also a particular challenge.

Of note, some interview respondents attributed trade in counterfeit products with tax policies in Kenya. Respondents explained that taxes imposed on legitimate goods pushed prices for such products higher, leading firms in Kenya (particularly smaller, cost-sensitive firms) to procure counterfeit products as a cost-saving “alternative.” Kenya’s status as a regional trade hub and the more lenient enforcement systems of some of its neighboring states was also identified as a challenge to enforcement.⁷⁹ Recognizing the threats posed by illicit trade, the Kenyan government has undertaken efforts to better understand and confront the problem, launching a national baseline survey on the issue and unveiling a National Illicit Trade Observatory tool in June 2020.⁸⁰

Historically, U.S. FTAs have contained several provisions that, both directly and indirectly, have the effect of curbing policies and practices that can facilitate illicit trade. Examples include trade obligations relating to transparency, public administration, anticorruption, and good regulatory practices, as well as additional commitments on labor and environment. Separately, individual chapter provisions relating to enforcement (including, for instance, those that appear in the IP chapters of prior U.S. FTAs, as discussed above) can also support efforts to eliminate illicit trade. As described above, however, ensuring government institutions and officials possess sufficient capacity to enforce these trade obligations is also key. Accordingly, capacity building, technical assistance, enhanced government frameworks, and surveillance can also be critical to obtaining the full benefit of these provisions.



Service industries are a major contributor to economic growth, accounting for roughly 50% of Kenya's GDP annually.

COUNTERING ILLICIT TRADE IN KENYA

In Kenya, the impact of illicit trade is far-reaching, undermining the achievement of longer-term economic goals while posing immediate threats to the health and safety of consumers and placing numerous livelihoods at risk.

Results of a National Baseline Survey¹ released in June 2020 by the Kenya Anti-Counterfeit Authority (ACA) revealed that the total value of illicit trade in Kenya stood at \$7.51 billion in 2018. Firms reported sales losses due to illicit trade worth \$654.56 million in 2018, with counterfeits accounting for 77% of total firms' sales losses followed by piracy at 19%. Building, mining and construction, and energy, electrical, and electronics, were the most affected sectors with a share of 23.37% and 14.67% in value of total illicit trade in 2018, respectively.

The total value of illicit trade in high-risk sectors such as pharmaceuticals and medical equipment, agricultural inputs and agrochemicals, and cosmetics were \$128.18 million, \$103.81 million, and \$6.45 million, respectively.² Overall, the government lost revenue worth \$1.39 billion and the country lost investment opportunity of \$1.12 billion in 2018, with a total 7,484 jobs lost between 2016 and 2018 due to illicit trade.

The survey, which aimed to map out the magnitude and impact of illicit trade in Kenya over the period between 2016 and 2018, concluded that "...from a domestic production point of view, illicit trade could be viewed as having the effect of wiping out a sector each year or stagnating sectoral growth."

Kenya has an existing legal framework and 10 government agencies mandated to combat illicit trade with a focus on counterfeit goods, piracy, substandard goods, goods that bypass customs, restricted goods, and unexercised goods. However, inefficiencies in agency enforcement and screening, as well as monitoring and tracking of both locally manufactured and imported goods, have been identified as key stumbling blocks.

As a countermeasure, in 2020 the ACA recommended legal and institutional reform and launched the National Illicit Trade Observatory as a tool for more robust monitoring. As noted in the U.S. negotiation objectives, a U.S.-Kenya FTA would require the means for adequate and effective enforcement, including by requiring accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms to ensure strong protections against illicit trade.

Sources:

¹National Baseline Survey on Counterfeit and Other Forms of Illicit Trade in Kenya, Anti-Counterfeit Authority (Feb. 10, 2021).

²National Observatory on Illicit Trade, Anti-Counterfeit Authority (last visited Feb. 16, 2020).

E. SERVICES, INCLUDING TELECOMMUNICATIONS AND FINANCIAL SERVICES

An additional priority area for the United States is likely the area of trade in services. Aside from the issue of digital services, few of the respondents interviewed for this study specifically identified the services sector as a priority issue for FTA negotiations. Similarly, the Trump administration minimized the importance of services in U.S. trade policy. Nevertheless, as the largest services trading country in the world,⁸¹ it is reasonable to expect the United States to seek some important concessions, given the significance of services trade to the U.S. economy.

The U.S. negotiating objectives identify as a goal “secur[ing] commitments from Kenya to provide fair and open conditions for services trade,” including through obligations that would prohibit discrimination against foreign services suppliers, eliminate restrictions on the number of service suppliers in a market, and limit local presence requirements for such suppliers.⁸² At the same time, U.S. industry representatives have appeared to express concern that USTR may seek to conclude a partial or phased-in agreement with Kenya that could exclude from an initial agreement comprehensive commitments on services. In particular, the Coalition on Services Industries has “urge[d] the Administration to conclude a single, comprehensive agreement that reflects an outcome on all issues under negotiation, as agreed by the parties, rather than seeking an agreement on a subset of issues or pursuing a phased approach.”⁸³ Such an approach would differ with the more incremental approach USTR took under the Trump administration when negotiating recent agreements with China and Japan.

Should USTR seek to conclude comprehensive commitments on services in a trade agreement with Kenya, interview respondents identified financial services as a key sector for market opportunities.⁸⁴ This sector, which encompasses commercial banking, insurance, and other financial services, has been among the fastest growing services sectors in Kenya and has established the country as a hub for financial activity in the region.⁸⁵ Respondents were careful to distinguish priorities associated with the financial services sector from those in the digital trade space, though they acknowledged some overlap exists. For instance, company representatives specifically noted the significance of data localization measures in the financial services sector, as many financial service providers rely on a broad network of data stored across several countries. These interview respondents emphasized that the ability to provide instantaneous services to



consumers all over the world depended on their ability to access this data, and therefore, data localization is not a sustainable approach. Accordingly, these companies were hopeful any FTA would incorporate obligations to limit the restrictions on cross-border data flows as much as possible.

Beyond financial services (and digital services addressed in greater detail above), communications services has been identified by the U.S. government as a sector particularly ripe for greater U.S.-Kenya trade.⁸⁶ Noting Kenya's status as a regional leader in terms of internet connectivity and the broadband sector, the U.S. Department of Commerce identifies the ICT sector in Kenya as one of Africa's fastest growing, having expanded over 10% between 2018 and 2019.⁸⁷ Consequently, the demand for ICT-related services, including related software programs, is expected to continue to grow.

From Kenya's perspective, service industries are a major contributor to economic growth, accounting for roughly 50% of Kenya's GDP annually.⁸⁸ Indeed, services have been the driving force behind much of the growth in Kenya's economy and domestic demand in recent years, and growth in exports of services has outpaced growth of goods exports.⁸⁹ Tourism is among the largest of Kenya's services exports.⁹⁰

Historically, Kenya's services sector has remained relatively protected, particularly in certain sub-sectors such as professional services, financial services, and transportation.⁹¹ Prior to concluding the AfCFTA, Kenya had not undertaken any service liberalization commitments in trade agreements outside of those under the WTO General Agreement on Trade in Services (GATS). Moreover, interview respondents noted their impressions that Kenya has resisted opening its services trade broadly to international competition. While services trade has not historically been a major focus of USTR's annual evaluation of Kenya's trade policy, USTR has identified certain barriers to entry and participation for service suppliers in Kenya in the insurance and telecommunications sectors in particular.⁹²

While interviews suggested Kenya has potentially been hesitant to pursue aggressive commitments to liberalize trade in services trade in the past, there are potentially substantial areas of overlap in the priority areas identified by U.S. interview respondents and areas where Kenya may benefit from increased trade. Both financial services and communications are sectors that create forward linkages to other areas of Kenya's economy, contributing as an input to other sectors' exports.⁹³ With respect to financial services in particular, analysis by the World Bank suggests that Kenya's financial services sector has already been a driving force behind Kenya's economic performance.⁹⁴ Expanded supply of financial services may serve as a further catalyst for economic growth in Kenya, in that "[a] more developed financial system increases financial inclusion and thus helps the economy to mobilize and allocat[e] savings more easily and more efficiently to investment needs."⁹⁵

3. KENYAN PRIORITIES

The United States is Kenya's fifth largest trading partner and second largest export market, accounting for approximately 9% of Kenya's exports.⁹⁶ There are certain issues in the FTA negotiations that Kenya alone will likely prioritize, some of which may face resistance from U.S. negotiators. One overarching issue that is sure to define Kenya's negotiating strategy will be to ensure that any future trading arrangement with the United States preserves, to the maximum extent possible, existing market access consistent with that enjoyed under AGOA. Indeed, Kenya's trade negotiating objectives specifically indicate the country's negotiators will seek "[t]o ensure that there is no disruption of Kenya's market access into the USA after AGOA expires" and that the FTA should establish "a predictable trade regime with the USA that is AGOA Plus."⁹⁷ While Kenya's utilization of AGOA is discussed in greater detail in Part III of this study, this overarching goal is likely to guide Kenya in negotiations relating to market access, particularly for priority sectors such as agriculture and textiles.

Kenya's negotiating priorities also include promotion of foreign direct investment and trade capacity building, among others. President Kenyatta's five-year economic policy agenda announced in December 2017 will also shape Kenya's negotiating positions, as the President seeks to deliver on his administration's "Big Four" agenda items: manufacturing, affordable housing, universal health coverage, and food security.⁹⁸ While Kenya's interests in these and other areas may require the United States to adopt a more flexible approach rather than strictly adhering to approaches adopted in prior FTAs, none of these issues would appear to create particularly difficult obstacles to the United States and Kenya concluding an FTA.



A. INCREASE IN FOREIGN DIRECT INVESTMENT (FDI)

U.S.-owned multinational firms employ nearly 6,000 people in Kenya,⁹⁹ and Kenya is seeking disciplines in the FTA that will encourage and promote increased FDI in Kenya by U.S. firms. Such goals are fundamental in any bilateral trade and investment agreement, and provisions across the agreement will indirectly support this objective. This is particularly true for the provisions of an agreement that would directly or indirectly promote rule of law, transparency, and predictability in the bilateral economic relationship.

In addition, both the United States and Kenya have concluded standalone bilateral investment treaties designed to promote international investment. Such standalone agreements have also been integrated into FTAs as a discrete investment chapter. Historically, these agreements have contained substantive protections that limit the ability of the state parties to the agreement to expropriate investments made by investors of the other party. These agreements also entitle investors of each party (and their investments) to certain standards of treatment. Furthermore, such investment agreements (or FTA investment chapters) also historically established procedural protections that allow investors of one state party to directly enforce the obligations of the agreement by initiating a dispute against the other state party for a breach of a substantive protection. This mechanism is known as investor-state dispute settlement (ISDS). Both the United States and Kenya are parties to several agreements that include similar substantive investment protections as well as procedural obligations in the form of ISDS.

While a broader debate has developed over international investment agreements and various approaches adopted by countries regarding such agreements, any U.S. approach to investment obligations would have important ramifications for Kenya. Historically, enforceable investment obligations have been viewed as a tool for encouraging investors in developed countries like the United States to invest in less developed countries like Kenya. In the context of U.S. investment in Kenya, enforceable investment obligations, including in the form of ISDS, could offer reassurance to investors in this respect, particularly for those investors that are unfamiliar with Kenya's legal landscape. At the same time, however, Kenya's negotiators may seek to negotiate a revised approach to investment as part of the FTA negotiation that provides sufficient assurances to U.S. firms interested in investing in Kenya, without relying on ISDS as the enforcement mechanism.

In general, U.S. business representatives interviewed for this study were optimistic about the potential of an FTA to increase U.S. investment in Kenya. Notably, these respondents were nearly unanimous in their expectation that a major driver of increased U.S. investment in Kenya would be a desire to access the Kenyan market and to leverage this entry point as a gateway to East Africa as a whole. Some noted that traditional investment protections commonly seen in U.S. FTAs predating the USMCA would be important for encouraging such investment. Others focused more specifically on transparency and predictability in the regulatory space, arguing that it was equally or more important to ensure the FTA actually results in improvements to the regulatory environment in Kenya, which could minimize the need for enforcement of investor protections at a later stage.

B. TEXTILES AND APPAREL

Trade liberalization for textiles has traditionally been a politically sensitive issue in the United States, particularly given a decline in U.S. textile production since the late-1990s.¹⁰⁰ The United States has negotiated provisions in FTAs designed to protect the textile industry from import shocks, in part by phasing-in tariff reductions on textile products more gradually than in other sectors. The U.S. government has also established other preferential arrangements for domestically manufactured textiles, including "Buy American" preferences for textiles and apparel procured by certain federal agencies. FTA disciplines on rules of origin are also critical for trade in such products, as these rules generally determine how much processing must occur within the United States or its trading partner and what inputs may be used in order for a product to qualify for the preferential tariffs established under the FTA.¹⁰¹

Kenya is currently eligible for the textile and apparel benefits as a lesser developed beneficiary country, which include benefits relating to special rules of origin for textiles. Specifically, AGOA's third-country fabric provision allows apparel producers in Kenya (for certain products and with some limitations) to utilize

fabric from any country, including third countries such as India and China, and such products still remain eligible for duty-free and quota-free treatment. This system has allowed Kenya to become the largest AGOA country supplier of apparel to the United States. Indeed, the importance of this third-country fabric rule is made clear from the fact that 97% of all U.S. apparel imports under AGOA in 2019 were assembled by producers in eligible countries using third-country fabrics.¹⁰² Moreover, Kenya's apparel industry is well established, with a skilled workforce and a high worker retention rate. In light of these advantages, Kenya is expected to seek to retain this favorable access to the United States.

Kenya's negotiating objectives confirm as much, and identify textiles and apparel as a priority "building on AGOA Rules of Origin" and further "[e]stablish[ing] rules of origin that encourages regional value chain by allowing cumulation across the existing regional blocs."¹⁰³ Kenyan efforts to preserve the preferential access it enjoys under AGOA, including with respect to the third-country fabric rule, faces several obstacles, including U.S. domestic sensitivities with respect to the textile sector that may create opposition to continued duty-free treatment for Kenyan textiles and apparel under the current circumstances currently enjoyed by Kenyan exporters.

C. GENETIC RESOURCES

Kenya has identified among its negotiating objectives relating to IP, disciplines addressing "areas covered by Convention on Biodiversity, including genetic resources, folklore, traditional knowledge, and benefit sharing." Provisions addressing such issues have recently been included in FTAs concluded by other countries, including the Regional Comprehensive Economic Partnership (RCEP) agreement concluded among countries in the Asia-Pacific region. Such provisions explicitly preserve the ability of parties "to protect genetic resources, traditional knowledge, and folklore," including by requiring companies to disclose if their products utilize or incorporate such material. In certain cases, the United States has raised concerns with such provisions, particularly where disclosure is required as a condition of eligibility for IP protections.¹⁰⁴

D. TRADE CAPACITY BUILDING AND FLEXIBILITY TO ACCOUNT FOR KENYA'S DEVELOPING STATUS

While the information made available by USTR suggests that the Trump administration has sought to negotiate an ambitious and comprehensive trade agreement with Kenya, there are certain flexibilities that could be built into the agreement to account for Kenya's status as a developing country, which Kenya will likely seek to secure. In addition, as noted in various sections above, trade capacity building and technical assistance are expected to be critical to facilitating Kenya's implementation of any agreement. Accordingly, the United States may have to consider various approaches to incorporate trade capacity building and technical assistance into an agreement in order to improve Kenya's readiness to fully implement and utilize the benefits of a bilateral FTA.

The United States has previously negotiated and concluded FTAs with trading partners at comparative levels of development to Kenya. One of the most pertinent examples is the conclusion in 2004 of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR).¹⁰⁵ Similar to the U.S.-Kenya FTA negotiation, CAFTA-DR was designed to build on unilateral U.S. preference programs from which Central American countries benefited, such as the Caribbean Basin Economic Recovery Act (CBERA), the Caribbean Basin Trade Partnership Act (CBTPA), and the Generalized System of Preferences (GSP).¹⁰⁶ In addition, just as Kenya is designated a lower middle income country by the World Bank,¹⁰⁷ so too are Honduras and Nicaragua—both parties to CAFTA-DR—which are countries of similar development levels to Kenya.¹⁰⁸

In this respect, the approach adopted by the United States under CAFTA-DR may be instructive with respect to the types of flexibilities that can be implemented to account for the asymmetrical levels of development between the United States and Kenya. As an example, CAFTA-DR adopted an incremental approach to liberalization of market access by providing certain products with gradual phase-out periods for tariffs, with agricultural products receiving the most generous schedules (some lasting as long as 20 years). In addition, transitional tariff-rate quotas were also implemented for certain agricultural products,

as were transitional safeguards for both agriculture and textiles. The end result, however, is that nearly all agricultural trade is eventually made tariff-free.¹⁰⁹

In addition to the transitional commitments provided in the agreement, implementation of CAFTA-DR was also accompanied by efforts to build the capacity of the developing countries to trade with the United States. CAFTA-DR was the first U.S. FTA to establish a Committee on Trade Capacity Building.¹¹⁰ Since then, development and capacity building has become a more regular element of U.S. FTAs, and has also been included as a trade negotiating objective by Congress in TPA legislation.¹¹¹ In addition to the establishment of formal capacity building mechanisms in CAFTA-DR, the United States also provided a significant amount of monetary support to CAFTA-DR parties in order to promote trade capacity building in priority areas such as enforcement of IP, labor, and environmental obligations under the agreement. Indeed, between 2003 and 2007, the United States provided more than \$650 million to CAFTA-DR parties for trade capacity building efforts.¹¹² While it is not anticipated that Congress would again appropriate such a significant sum to support capacity building in future trade agreements, it is possible that Kenya and the United States could identify key priority areas for limited funding.

In addition, the experience of the U.S.-Morocco Free Trade Agreement is also instructive. In the 15 years since that agreement has been in place, two-way trade between the United States and Morocco has increased from roughly \$860 million to more than \$6.5 billion.¹¹³ Moroccan business leaders are clear, however, about the need to market products in the United States in order to grow exports—emphasizing that the private sector has to do its homework in order to take advantage of the benefits available under the FTA. The FTA has also led to improvements in the legal and regulatory environment in Morocco.

Finally, U.S. negotiation of the Trans-Pacific Partnership (TPP) may also provide guidance for how the United States can inject flexibility into a trade agreement with Kenya to account for the differing levels of economic development between the two countries. While the TPP never entered into force, the agreement, as negotiated, contained a number of transitional provisions designed to facilitate the participation by less developed economies in the agreement. In particular, Brunei, Malaysia, and Vietnam were all accorded transitional measures for implementing the obligations of the treaty under various chapters of the FTA.¹¹⁴

Kenya, for its part, has specifically identified the need for trade capacity building as a crucial element of an FTA, both generally and particularly with respect to its implementation of obligations regarding IP.¹¹⁵ Accordingly, to the extent that USTR undertakes to negotiate an ambitious and comprehensive trade agreement with Kenya, there are numerous flexibilities that could be employed to provide appropriate time and space for Kenya to implement its obligations, as the precedents utilized under CAFTA-DR and TPP demonstrate.

PART II: THE FTA AND AGOA

The passage of the African Growth and Opportunity Act (AGOA) in 2000 established a framework for U.S. trade policy toward Africa that has endured for over two decades and has served as the cornerstone of the U.S.-African commercial relationship. As originally implemented, AGOA was originally established for a period lasting from October 2000 to September 2008, but was later extended.¹¹⁶ The AGOA Acceleration Act of 2004 extended preferential AGOA access through September 2015.¹¹⁷ Most recently, the Trade Preferences Extension Act extended AGOA through its current expiration date of September 30, 2025.¹¹⁸

The implementing legislation that established AGOA anticipated that it might one day lead to the creation of free trade agreements with African nations. However, no blueprint or timetable for developing such FTAs was provided in the legislation.

C. Background on the Establishment and Purpose of AGOA

As a unilateral trade preference program, AGOA provides duty-free access to the U.S. market for over 1,800 products exported from sub-Saharan African countries that meet certain eligibility requirements.¹¹⁹ AGOA beneficiaries also receive duty-free access to the United States for more than 5,000 additional products under the GSP program.¹²⁰ The Trade and Development Act of 2000 sets forth the eligibility requirements AGOA beneficiaries are required to meet,¹²¹ while separate eligibility requirements dictate whether AGOA beneficiaries may also receive duty-free access under GSP.¹²²

Pursuant to these criteria, participating countries are required, among other things, to establish or make progress toward the rule of law, market-based reforms, due process, and political freedoms. Countries must also eliminate barriers to U.S. trade and investment, enact policies to reduce poverty, combat corruption, and protect human rights.¹²³ Through these criteria, AGOA seeks to promote development of business environments that encourage greater levels of trade and investment so that the United States can build a deeper partnership with African nations. The program is also designed to support economic development and to diversify exports from AGOA beneficiaries, which can make their economies less dependent on specific products or sectors and therefore less susceptible to external economic shocks. In this way, AGOA has been at the core of U.S. economic engagement with sub-Saharan Africa for the past two decades.¹²⁴

For those countries that fail to meet the eligibility criteria for participation, AGOA benefits may be suspended. For instance, after having their benefits previously suspended in 2015, access to AGOA was reinstated for The Gambia and Swaziland on December 22, 2017.¹²⁵ More recently, President Trump removed AGOA benefits for Mauritania effective January 1, 2019, and Cameroon effective January 1, 2020.¹²⁶ While there are 38 AGOA-eligible countries in sub-Saharan Africa in 2020, eligibility must be determined on an annual basis, and duty-free access may therefore be unpredictable from year to year for those countries where compliance with the eligibility criteria is questioned.

D. Kenya's Experience with AGOA Utilization

Over the past 20 years, AGOA has led to the creation of hundreds of thousands of jobs in Africa, especially in Southern and Eastern Africa, and has also helped to demonstrate the U.S. commitment to utilizing trade, in addition to development assistance, as a stimulus to economic development.

AGOA has played an important role in increasing U.S. trade with Africa, increasing African integration into global value chains, and diversifying sub-Saharan African economies. Exports from AGOA beneficiaries increased over 500% under the first 10 years of the program, and total two-way trade in goods between the United States and sub-Saharan Africa grew to an estimated \$41 billion in 2018.¹²⁷ Since the program's establishment, over \$500 billion worth of imports have come into the United States under the program.¹²⁸ Crude petroleum has historically accounted for a majority of U.S. imports by value under the program, with increases in recent years attributed largely to changes in oil prices. Even so, the value of AGOA non-oil imports in 2018 was roughly three times that of 2001.¹²⁹ The top non-oil exports to the United States under AGOA include mineral fuels, apparel, agricultural and food products, motor vehicles and parts, and manufactured metals.¹³⁰ The top U.S. exports to AGOA beneficiaries are machinery, vehicles, aircraft, and mineral fuels.¹³¹

Some analyses have found that utilization of preferences by eligible beneficiaries is considered relatively high for AGOA as compared to other preference programs, and even some reciprocal U.S. FTAs.¹³² At the same time, utilization rates vary significantly by country, and some benefits under the program have been used to a greater degree than others. Several AGOA beneficiaries have seized on the tariff preferences and liberal rules of origin for apparel to increase exports to the United States. Kenya is a prime example, as it is currently a leading apparel exporter under the program. For example, the United Aryan Ltd. (UAL) Apparel Factory based in Kenya supplies leading retailers like Levi Strauss and H&M, and since the extension of AGOA in 2015, UAL has added thousands of jobs and as of 2018 employed nearly 10,000 Kenyans.¹³³

As a result of its success exporting apparel and other goods under AGOA, Kenya had the second highest AGOA utilization rate of 40 beneficiary countries in 2018 (98%), eclipsed only by Ghana, and actually had the highest utilization rate (also 98%) when excluding oil exports.¹³⁴ Over 70% of Kenya's exports to

the United States are covered by AGOA.¹³⁵ Other goods exported by Kenya to the United States include cut flowers, nuts, and vegetables.¹³⁶ Tremendous growth in exports is evident in some of these sectors. Consider Kenya's export of macadamia nuts to the United States: in 2000, \$72,000; by 2004, \$8 million; by 2017, \$52 million. These exports support over 100,000 farmers in Kenya.¹³⁷

Contributing to Kenya's success under AGOA, the Kenyan government first developed an AGOA utilization strategy in 2012. Kenya developed this report even before the most recent extension of AGOA in 2015 encouraged beneficiary countries to do so as a means to improve use of the program's benefits. More recently, Kenya released an updated AGOA utilization strategy in 2018, which envisages "expanding U.S. market share and buyer diversification to trade facilitation, skills development, increasing productivity, trade-support capacity building, and export supply development."¹³⁸ As compared to the prior strategy, the 2018 strategy largely prioritized the same industries, albeit with greater emphasis placed on certain subsectors such as fresh fruits and vegetables in the agricultural space. Additionally, Kenya's 2018 utilization strategy also addressed to a greater degree issues of regional integration, including developments relating to the EAC and improvements to regional value chains. The report also identified challenges to increasing trade with the United States, including high transportation costs, particularly when compared to cheaper transportation costs when exporting to China.

E. The Future of AGOA and the U.S.-Kenya FTA

AGOA has been an important dimension of the U.S.-African relationship. As the program is set to expire in 2025, the Biden administration and its partners on the continent will need to decide whether to use the Kenya FTA as a model to extend AGOA or create a hybrid trade framework to guide U.S. commercial relations. As discussed further in the next section, the United States may also need to consider compatibility of its trade strategy with its potential support for regional initiatives on the continent, including implementation of the AfCFTA.

Should the Biden administration move forward with trade negotiations with Kenya, the experiences of both countries under AGOA will undoubtedly guide their respective approaches. Indeed, private sector respondents interviewed for this study noted concerns about Kenya's ability to maximize benefits from the implementation of a U.S.-Kenya FTA in light of Kenya's experience implementing AGOA. There will likely be significant overlap between the challenges Kenya has faced in exploiting AGOA benefits and those that could limit utilization of benefits under an FTA. Such obstacles include, among others, lack of awareness of trade benefits among Kenyan companies and public sector agencies, a similar lack of awareness of the U.S. market and U.S. commercial practices, limited capacity to meet U.S. standards and buyer requirements, and lack of competitiveness in some sectors.¹³⁹

Nevertheless, having incorporated lessons learned from prior experience under AGOA, Kenya has already set out an approach to addressing many of these obstacles in its updated 2018 AGOA utilization strategy, including by seeking to increase resources for government entities responsible for implementation of the strategy.¹⁴⁰ Furthermore, Kenya's FTA negotiating objectives also acknowledge these potential challenges, and the need to specifically focus on "maximizing benefits" of an agreement through "[e]conomic development and technical cooperation" with the United States.¹⁴¹ Kenya's focus on trade capacity building in its negotiating objectives further underscores its awareness of the need to improve readiness to fully utilize the benefits of a bilateral FTA. In response, the United States may have to adopt a novel approach to incorporate the trade capacity building and technical assistance sought by Kenya into a final agreement.

PART III: THE FTA, THE EAC, AND THE AFCFTA

When Ambassador Robert Lighthizer introduced the U.S.-Kenya FTA, he stated that both countries recognized that the trade accord had the potential to serve as a "model" for additional agreements across Africa, including with other EAC partner states.¹⁴² Whether a U.S.-Kenya FTA may fulfill this potential of serving as a model for other FTAs with African states remains to be seen. Even so, the mere launch of the negotiations has raised important questions not only regarding the future of U.S. trade policy toward the



continent, but also with respect to the future of intra-regional trade among African countries. In particular, the FTA negotiations have sparked concerns that they might impede Africa's efforts to implement the African Continental Free Trade Area.

Signed in 2018 by 55 African countries, the AfCFTA entered into force on May 30, 2019, following ratification by 22 countries. The scope of the agreement is impressive, as its coverage extends across economies valued at \$3.4 trillion in GDP, with combined populations of 1.3 billion people.¹⁴³ It establishes rules and disciplines in a wide variety of trade areas, including both traditional obligations to reduce tariffs and obligations to liberalize trade in services and reduce the trade-distorting impact of non-tariff barriers. The agreement also integrates more cutting-edge rules found in modern trade agreements, including those relating to competition and state trading enterprises.¹⁴⁴ It is by far the most extensive and most comprehensive trade agreement among African nations.

As the members of the AfCFTA begin implementing the agreement, questions have been raised about the compatibility of the AfCFTA with other trade agreements negotiated by individual AfCFTA members with third countries. This has been a particular question with respect to Kenya's FTA negotiations with the United States. Public statements by current or former officials familiar with the negotiations have highlighted these concerns. For instance, in a joint statement, Mukhisa Kituyi, secretary-general of the United Nations Conference on Trade and Development, and Erastus Mwencha, former deputy chairperson of the African Union Commission, stated that "Kenya should not provide cracks in the armor of those who have pushed for further collective engagement."¹⁴⁵ Mr. Mwencha also publicly remarked that, "Under the AU [African Union], the African heads of state have discouraged member States from entering into bilateral free trade negotiations with third parties because they jeopardize the AfCFTA."¹⁴⁶ Questions have also been raised about the compatibility of a U.S.-Kenya FTA with Kenya's existing commitments under the EAC, including commitments to apply common external tariffs.

President Kenyatta has responded to these criticisms by emphasizing that his government has "made it very clear" that the FTA would have to be negotiated without undermining Kenya's other trade agreements, including its obligations under the East African Community Customs Union and the African Continental Free Trade Area.¹⁴⁷ Further, President Kenyatta has articulated that the trade deal with the United States would actually assist the continent by establishing a point of reference for other African nations to negotiate bilateral arrangements within the AfCFTA framework.¹⁴⁸

CONCLUSION

In sum, the announcement by the United States and Kenya to negotiate a trade agreement is an important development in U.S. trade policy toward Africa in general, and sub-Saharan Africa in particular. Should efforts to build on unilateral U.S. trade preferences provided under AGOA and move toward reciprocal trade concessions be successful, this would represent a significant shift in U.S. trade policy that will not only have important implications for U.S.-Kenya relations but also for AGOA. By seeking to negotiate a robust and comprehensive FTA, comparable to agreements the United States has previously negotiated with other, more developed economies, the U.S.-Kenya FTA will also set the tone for U.S. trade policy toward other African countries in a way that has important ramifications for the AfCFTA as well. While the conclusion of such an agreement will certainly present challenges, prior USTR practice suggests that substantial flexibility may be incorporated into the agreement to account for the differing levels of development between the United States and Kenya.

APPENDIX: LIST OF RESPONDENTS INTERVIEWED FOR THIS STUDY

Respondent	Title	Association
James Cordahi	Senior Director, Government Affairs; Middle East, Africa & Pakistan	Abbott Laboratories
Rabia El Alama	Managing Director	American Chamber of Commerce (AmCham) Morocco
Florie Liser	President and CEO	Corporate Council on Africa
Sally Kimeu	Country Leader and Regional Manager for Kenya	CISCO
Charmaine Houvet	Public Policy Director and Government Affairs Lead for Africa	CISCO
Betty Kiplagat	Government Affairs and Industry Leader for Africa and the Middle East	Corteva Agriscience
Humphrey Kiruaye	Country Leader Kenya and the Great Lakes Region	Corteva Agriscience
Stergios Gkaliasoutsas	Managing Director	Del Monte Fresh Produce, Inc.
Brenda Mbathi	CEO, East Africa	General Electric
Michael Murungi	Government Affairs and Public Policy Lead in Eastern Africa	Google, Inc.
Nic Nesbitt	Chairman	Kenya Private Sector Alliance
Jason Brantley	Director, Sales and Marketing for Asia and Africa	John Deere
Sarah Dean	Global Public Policy Manager	John Deere
Michael Froman	Vice Chairman and President for Strategic Growth	Mastercard
Sahra English	Vice President, Global Public Policy	Mastercard
Cat Robinson	Director for Global Trade Policy and International Government Affairs	Pfizer
George Osure	Regional Director, East Africa	Syngenta
Erastus Mwencha	Chairman	Trade Mark East Africa
Peter Njonjo	CEO	Twiga Foods
Phillipine Mtikitiki	Board President	AmCham Kenya, VP and General Manager, Coca Cola East and Central Africa Franchise
Emily Waita	Director of Public Affairs, Communications & Sustainability Leader	Coca Cola East and Central Africa Franchise
Mark Chiaviello	Head: Client Coverage North America	Standard Bank Group
Joe Alaro	Head of Transactional Banking	Stanbic Bank Kenya
Martin Azenga	Country Head of Trade	Stanbic Bank Kenya

REFERENCES

- 1 For list of participating interview respondents, see the Appendix to this study.
- 2 USTR Press Release, Trump Administration Notifies Congress of Intent to Negotiate Trade Agreement with Kenya (Mar. 17, 2020).
- 3 USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives (May 22, 2020).
- 4 The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope (June 22, 2020).
- 5 USTR Press Release, Joint Statement Between the United States and Kenya on the Launch of Negotiations Towards a Free Trade Agreement (July 8, 2020).
- 6 U.S. FTA partners include Australia; Bahrain; Canada; Chile; Colombia; Costa Rica; the Dominican Republic; El Salvador; Guatemala; Honduras; Nicaragua; Israel; Jordan; Korea; Mexico; Morocco; Oman; Panama; Peru; and Singapore. See USTR Website, Free Trade Agreements (last visited Jan. 13, 2021).
- 7 Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320 (June 29, 2015).
- 8 After the USMCA was signed by the United States, Mexico, and Canada in September 2018, as well as having been ratified by Mexico in June 2019, Democratic members of the U.S. Congress sought changes to the Agreement as a condition of approval. These changes were negotiated between USTR and congressional representatives, and codified as a Protocol of Amendment to the USMCA, which was signed by the United States, Mexico, and Canada on December 10, 2019.
- 9 See USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, “Introduction” (May 22, 2020) (“Our specific objectives for this negotiation will comply with the specific objectives set forth by Congress in section 102 of the Trade Priorities and Accountability Act”).
- 10 USTR, United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives (Feb. 2019).
- 11 USTR, United States-Japan Negotiations: Summary of Specific Negotiating Objectives (Dec. 2018).
- 12 USTR, Summary of Objectives for the NAFTA Renegotiation (Nov. 2017).
- 13 USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, “Introduction” (May 2020).
- 14 *Id.*
- 15 Other EAC member countries include the Republics of Burundi, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda.
- 16 See World Trade Organization (WTO), Regional Trade Agreements Database: Kenya (last visited Jan. 13, 2021); Status of AfCFTA Ratification, TRALAC.org (Dec. 30, 2020).
- 17 United Kingdom Press Release, UK and Kenya Secure a Trade Agreement, Department for International Trade (Nov. 3, 2020).
- 18 USTR, 2020 National Trade Estimate Report on Foreign Trade Barriers, 303 (Mar. 31, 2020).
- 19 See Government of Kenya, The Public Procurement Information Portal, Call for Expression of Interest for “Consultancy to Provide Technical Assistance Towards the Negotiations for the Proposed Free Trade Agreement Between Kenya and the United States of America.”
- 20 The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope (June 22, 2020).
- 21 USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, 4 (May 22, 2020).
- 22 Such agreements could include the 2015 United States – East African Community Cooperation Agreement, which focused on issues relating to trade facilitation, SPS, TBT issues. USTR, Fact Sheet: The United States – East African Community Cooperation Agreement (Feb. 2015).

23 See The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States
of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope, 6-7, 9 (June 22, 2020).

24 USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, 1 (May 22, 2020).

25 See USMCA, Art. 34.7 (Review and Term Extension). Under this provision, the Agreement will
automatically terminate 16 years after entry into force unless it is affirmatively renewed by the United
States, Canada, and Mexico for an additional 16-year term.

26 Transparency International, *Corruptions Perceptions Index: Corruption Around the World 2019*, (2019).

27 David Vanzetti & Ralf Peters, *Do Sensitive Products Undermine Ambition?*, United Nations Conference
on Trade and Development (UNCTAD) Series on Assuring Development Gains from the International
Trading System and Trade Negotiations (2011), 1 (“Agriculture is also a socially and politically sensitive
area which frequently leads to the exclusion of a certain number of agricultural products from tariff
liberalization in regional and multilateral trade negotiations.”).

28 See generally, Congressional Research Service, *Major Agricultural Trade Issues in the 116th Congress*,
Report No. R45728 (May 20, 2019); Jane M. Porter & Douglas E. Bowers, *A Short History of U.S.
Agricultural Trade Negotiations*, Agriculture and Rural Economy Division, Economic Research Service,
U.S. Department of Agriculture. Staff Report No. AGES 89-23 (August 1989).

29 See Paul Trupo, *Strengthening the U.S.-Kenya Trade Relationship to Grow U.S. Agricultural Exports to
East Africa*, United States Department of Agriculture (USDA) Foreign Agricultural Service (June 24, 2019);
What Opportunities Might Kenya Provide U.S. Agriculture, Market Intel, Farm Bureau (July 10, 2020).

30 World Trade Organization, Country Profiles: Kenya (2019).

31 Paul Trupo, *Strengthening the U.S.-Kenya Trade Relationship to Grow U.S. Agricultural Exports to East
Africa*, United States Department of Agriculture (USDA) Foreign Agricultural Service (June 24, 2019);
What Opportunities Might Kenya Provide U.S. Agriculture, Market Intel, Farm Bureau (July 10, 2020).

32 Paul Trupo, *Strengthening the U.S.-Kenya Trade Relationship to Grow U.S. Agricultural Exports to East
Africa*, United States Department of Agriculture (USDA) Foreign Agricultural Service (June 24, 2019).

33 CIA World Fact Book: Kenya, last visited Jan. 13, 2021 (“About 75% of Kenya’s population of roughly
48.5 million work at least part-time in the agricultural sector, including livestock and pastoral
activities.”). See also International Trade Centre, Kenya: Company Perspectives — An ITC Series on
Non-Tariff Measures, at 6 (2014); World Bank, Kenya Economic Memorandum: From Economic Growth
to Jobs and Shared Prosperity, 35 (March 2016).

34 World Trade Organization, Country Profiles: Kenya (2019).

35 CIA World Fact Book: Kenya (last visited Nov. 16, 2020).

36 For an additional discussion of negotiation of digital trade under the FTA, see Section I.B.2.

37 U.S. Export-Import Bank, 2019 Sub-Saharan Africa Advisory Committee Statement on Competitiveness
Report (Sept. 23, 2019).

38 For instance, U.S. legislation enacted in December 2019 to reauthorize the Export-Import Bank
through 2026 included a new “Program on China and Transformational Exports” designed to support
the extension of financing at rates and on terms competitive with those provided by China. See
Further Consolidated Appropriations Act, 2020, Division I, Title IV (Export-Import Bank Extension),
Pub. L. No. 116-94, § 402 (Dec. 20, 2019).

39 See Abdou Rahim Lema & Samu Ngwenya, *COVID-19 Spells Trouble for China in East Africa*, The
Diplomat (Oct. 16, 2020).

40 Chairman Richard E. Neal, Fact Sheet: Improvements to the USMCA, Democrats Secure Wins for The People
in the New North American Free Trade Agreement, House Committee on Ways & Means (Dec. 10, 2019).

41 *Id.*

42 USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, 11 (May 22, 2020).

43 *Id.*, 12. These provisions are in line with obligations contained in Chapter 24 of the US-Mexico Canada Agreement on which the U.S.-Kenya trade negotiations are reportedly modeled. See USMCA, Chapter. 24.

44 Kenya's Constitution of 2010, Arts.

45 The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope, 12 (June 22, 2020). With respect to this issue, U.S. objectives specifically reference adherence to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, as well as promoting sustainable fisheries management and long-term conservation of marine species. USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, 11 (May 22, 2020).

46 The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope, 12 (June 22, 2020).

47 Letter to President Trump from Senator Udall and Congressman Lowenthal (May 20, 2019).

48 United Nations Environment Programme, *Kenya Bans Single-Use Plastics in Protected Areas* (June 5, 2020).

49 *Id.*

50 Hiroko Tabuchi, Michael Corkery & Carlos Mureithi, *Big Oil Is in Trouble. Its Plan: Flood Africa With Plastic*, New York Times (Aug. 30, 2020).

51 Website of Congressman Lowenthal, Lowenthal, Udall, Merkley, Cohen, Blumenauer, Lead 62 Bipartisan Members of Congress Urging Trump Administration to Ensure Future Trade Agreement with Kenya Doesn't Undermine Plastic Waste Mitigation Efforts (Oct. 1, 2020).

52 *Kenya Denies Secret Plastic Deal Reports in U.S. Trade Negotiations*, The Star (Sept. 1, 2020).

53 Greenpeace, *The Power Is in Your Hands: Over 20,000 Implore CS Maina to Say No to Kenya-U.S. Plastic Deal* (Nov. 10, 2020).

54 The National Sustainable Waste Management Bill, 2019.

55 See generally USTR Fact Sheet, *Key Barriers to Digital Trade* (Mar. 2017); OECD, *Trade in the Digital Era* (2019).

56 Congressional Research Service, *Digital Trade and U.S. Trade Policy*, Report No. R44565 (May 21, 2019).

57 Under Section 301 of the Trade Act of 1974, USTR may initiate an investigation to determine whether an act, policy, or practice of a foreign country is actionable because denies benefits to the United States under any trade agreement, or is unjustifiable and burdens or restricts United States commerce. Where USTR determines that such an act, policy, or practice is actionable under Section 301, it may take responsive action in certain circumstances, including unilateral retaliatory trade action. 19 U.S.C. § 2411, *et. seq.*

58 Initiation of a Section 301 Investigation of France's Digital Services Tax, 84 Fed. Reg. 34042 (July 16, 2019).

60 Initiation of Section 301 Investigations of Digital Services Taxes, 85 Fed. Reg. 34709 (June 5, 2020).

60 The United States eventually suspended its participation in the negotiations at the Organization of Economic Cooperation and Development (OECD) in mid-2020, though negotiations are expected to continue in 2021. See Mark Scott, *Amid Political Rancor, Global Digital Tax Deal Pushed Back Until Mid-2021*, Politico (Oct. 12, 2020).

61 See USTR Fact Sheet, U.S.-Japan Digital Trade Agreement (Oct. 2019); USTR Fact Sheet, USMCA Digital Trade (2018).

62 Maria Curi, *Chamber Executive, Industry Groups: Digital Trade Key to U.S.-Kenya Deal*, Inside U.S. Trade (Apr. 28, 2020).

63 USTR, 2020 National Trade Estimate Report on Foreign Trade Barriers, 308 (Mar. 31, 2020).

64 USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, 6-7 (May 22, 2020).

65 USTR, 2020 National Trade Estimate Report on Foreign Trade Barriers, 306 (March 31, 2020)

66 In 2015, Kenya indicated it would lift the import ban on GMO products by October 2015, but failed to do so. *Id.*

67 Kenya's approval of genetically modified cotton was reportedly an action taken to boost Kenya's textile industry. See Leopold Obi, *After Bt Cotton Nod, Kenya Sets Sights on Biotech Food Crops*, Business Daily Africa (July 9, 2020).

68 *Id.*

69 Alex Gray, *Which Countries Spend the Most on Food? This Map Will Show You*, World Economic Forum (Dec. 7, 2016).

70 USTR, 2020 National Trade Estimate Report on Foreign Trade Barriers, 306 (Mar. 31, 2020).

71 *Id.*

72 *Id.*

73 *Id.*

74 Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320, § 102(b)(5)(A)(i) (June 29, 2015).

75 See World Trade Organization, Intellectual Property: Protection and Enforcement (last visited Feb. 12, 2021).

76 Global Innovation Policy Center, U.S. Chamber International IP Index: The Art of Possible, 20 (Feb. 2020).

77 World Economic Forum, Illicit Trade Endangers the Environment, the Law, and SDGs. We Need a Global Response (July 18, 2019).

78 *Id.*

79 Deo Gumba, *Trade and Counterfeit Goods: Kenya Needs Its Neighbours in Addressing the Counterfeit Trade*, ENACT (Aug. 26, 2020).

80 Kenya Anti-Counterfeit Authority Press Release, *Kenya Marks World Anti-Counterfeit Day 2020 with Launch of First National Baseline Survey on the Extend of Counterfeiting and Illicit Trade in Kenya* (June 10, 2020).

81 USTR Website, Benefits of Trade (last visited Jan. 13, 2021).

82 USTR, United States-Kenya Negotiations: Summary of Specific Negotiating Objectives, 5-6 (May 2020).

83 Coalition of Services Industries, Request for Comments on Negotiating Objectives for a United States-Republic of Kenya Trade Agreement, Docket Number USTR-2020-0011, 1 (April 28, 2020).

84 See *id.* Financial services encompasses several subsectors, including insurance services, banking, and investing.

85 World Bank, Kenya Economic Memorandum: From Economic Growth to Jobs and Shared Prosperity, 3 (March 2016).

86 International Trade Administration, Kenya - Country Commercial Guide: Information, Communications and Technology (ICT) (Sept. 13, 2020).

87 *Id.*

88 See World Bank, Kenya Economic Memorandum: From Economic Growth to Jobs and Shared Prosperity, viii (March 2016); International Trade Centre, Kenya: Company Perspectives—An ITC Series on Non-Tariff Measures, 6 (2014).

89 World Bank, Kenya Economic Memorandum: From Economic Growth to Jobs and Shared Prosperity, 81 (March 2016).

90 *Id.* at 84.

91 See, e.g., World Trade Organization, Services Trade Policy Database and Services Trade Restrictions Index: Kenya (2019).

92 USTR, 2020 National Trade Estimate Report on Foreign Trade Barriers, 308 (March 31, 2020).

93 World Bank, Kenya Economic Memorandum: From Economic Growth to Jobs and Shared Prosperity, 81, 83 (March 2016).

94 *Id.* at 13.

95 *Id.*

96 Congressional Research Service, *U.S.-Kenya FTA Negotiations*, Report No. IF11526 (May 28, 2020).

97 See The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope, 7 (June 22, 2020).

98 The Executive Office of the President, The Big 4, Government of Kenya (last visited Jan. 13, 2021).

99 Congressional Research Service, *U.S.-Kenya FTA Negotiations*, Report No. IF11526 (May 28, 2020).

100 From 1994 to 2017, textile manufacturers in the United States eliminated approximately 500,000 jobs. Michaela D. Platzer, *Renegotiating NAFTA and U.S. Textile Manufacturing*, Congressional Research Service, Report No. R44998 (Oct. 30, 2017).

101 For instance, reductions in tariffs on textiles under the North American Free Trade Agreement (NAFTA) were phased in over a 10-year period.

102 Michaela D. Platzer, *Renegotiating NAFTA and U.S. Textile Manufacturing*, Congressional Research Service, Report No. R44998 (Oct. 30, 2017).

103 Congressional Research Service, *U.S.-Kenya FTA Negotiations*, Report No. IF11526 (May 28, 2020).

104 The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope, 9 (June 22, 2020).

105 See, e.g., 2020 National Trade Estimate Report on Foreign Trade Barriers, 266 (March 31, 2020) (expressing concern with disclosure requirements for inventions related to traditional knowledge and genetic resources under Indonesia’s patent regime).

106 The parties to CAFTA-DR are the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua.

107 CAFTA-DR specifically sought to replace utilization by the Parties of the Caribbean Basin Economic Recovery Act (CBERA), the Caribbean Basin Trade Partnership Act (CBTPA), and the Generalized System of Preferences (GSP). J.F. Hornbeck, *The Dominican-Central America-United States Free Trade Agreement (CAFTA-DR)*, Congressional Research Service, 15 (Jan. 8, 2009).

108 World Bank Country Data (last visited June 1, 2020).

109 *Id.*

110 Limited exceptions exist with respect to sugar imported by the United States, potatoes and onions imported by Costa Rica, and white corn imported by the other parties to the agreement.

111 USTR Press Release, Building Trade Capacity Under CAFTA-DR (July 2007).

112 Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, 129 Stat. 320, § 102(c) (June 29, 2015).

113 USTR Press Release, Building Trade Capacity Under CAFTA-DR (July 2007).

114 See Raymond J. Ahearn, *Morocco-U.S. Free Trade Agreement*, Congressional Research Service, Report No. RS21464 (May 26, 2005); USTR Website, Morocco (last visited Jan. 26, 2020).

115 See TPP, Arts. 15.5 (Government Procurement); 18.83 (IP); 27.7 (Reporting in Relation to Party-Specific
Transition Periods).

116 The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States
of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope, 7, 12 (June 22, 2020).

117 Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 253 § 112(f) (May 18, 2000).

118 AGOA Acceleration Act of 2004, Pub. L. No. 108-274, 118 Stat. 820 § 7(a)(1) (July 13, 2004).

119 Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362, § 103 (June 29, 2015).
Additional enhancements made to the AGOA program through this legislation include efforts to promote
greater regional integration by amending the rule of origin, better utilization strategies by AGOA
beneficiaries, and outlining a path for deepening and expanding trade and investment ties with AGOA-
eligible countries.

120 USTR, 2018 Biennial Report on the Implementation of the African Growth and Opportunity Act, 9 (June 2018).

121 USTR, African Growth and Opportunity Act (AGOA) (last visited Jan. 13, 2021).

122 Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 253, § 104 (May 18, 2000).

123 Section 502 of the Trade Act of 1974 articulates bases for eligibility and factors the President shall
consider when determining whether to extend benefits under the GSP, which include, among others,
the country's level of economic development, the country's ability to protect intellectual property
rights, the extent to which the country has taken steps to reduce trade distorting investment practices,
and whether the country is taking steps to afford workers with internationally recognized worker rights.

124 Section 104 of AGOA requires that countries establish or make continual progress toward a market-
based economy, the rule of law, political pluralism and the right to due process, elimination of barriers
to U.S. trade and investment, economic policies to reduce poverty, a system to combat corruption
and bribery, and protection of internationally recognized worker rights. Trade and Development Act of
2000, Pub. L. No. 106-200, 114 Stat. 253, § 104(a)(1)(D) (May 18, 2000).

125 Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 253, § 104(a)(1)(E) (May 18, 2000).

126 See H.R. Rep. No. 106-606, Trade Development Act of 2000, 68 (2000) (Conf. Rep.); USTR, African
Growth and Opportunity Act (AGOA) (last visited Jan. 13, 2021).

127 USTR Press Release, Trump Administration Enforces Trade Preference Program Eligibility (Dec. 22, 2017).

128 USTR Press Release, President Trump Terminates Trade Preference Program Eligibility for Mauritania
(Nov. 2, 2018); Presidential Proclamation to Take Certain Actions Under the African Growth and
Opportunity Act and for Other Purposes (Dec. 26, 2019).

129 USTR, 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on
Trade Agreements Program, 34 (March 2019).

130 *Aggregate Bilateral Trade Between AGOA Countries and the United States*, AGOA.info (last visited
Jan. 26, 2020).

131 USTR, 2020 Trade Policy Agenda and 2019 Annual Report of the President of the United States on the
Trade Agreements Program, 104 (Feb. 2020).

132 *AGOA Exports by Product Sector (Excluding GSP)*, AGOA.info (last visited Jan. 26, 2020).

133 International Trade Commission, Total Exports to AGOA Beneficiaries for All Commodities in 2019,
Dataweb (last visited Jan. 26, 2020).

134 International Trade Commission, *AGOA: Trade and Investment Performance Overview*, Publication No.
4461, 233 (April 2014).

135 *Kenya: Textile Exports to the U.S. Stagnate, but Macadamia Exports Up*, AGOA.info (July 2, 2018).

136 The utilization rate is calculated as the value in U.S. dollars of imports from a country under AGOA
divided by the value of imports from that country eligible for AGOA preferences. U.S. International

- Trade Commission, *U.S. Trade and Investment With Sub-Saharan Africa: Recent Trends and New Developments*, Publication No. 5043, 25-26 (March 2020).
- 137 *Kenya-U.S. Trade Talks Resume After Hitch*, AGOA.info (Aug. 6, 2020).
- 138 *Kenya-U.S. Free Trade Talks Are Under Way: What Nairobi Must Get Right From Start*, AGOA.info (Aug. 18, 2020).
- 139 *Kenya: Textile Exports to the U.S. Stagnate, but Macadamia Exports Up*, AGOA.info (July 2, 2018).
- 140 See Kenya's AGOA Utilization Strategy 2018-2023, i (2018).
- 141 See *id* at xii.
- 142 *Id.* at xiii.
- 143 See The Republic of Kenya Ministry of Industrialization, Trade and Enterprise, Proposed Kenya-United States of America Free Trade Agreement: Negotiation Principles, Objectives, and Scope, 13 (June 22, 2020).
- 144 USTR Press Release, Joint Statement Between the United States and Kenya on the Launch of Negotiations Towards a Free Trade Agreement (July 8, 2020).
- 145 Maryla Maliszewska et al., *The African Continental Free Trade Area*, World Bank (July 27, 2020).
- 146 *Id.*
- 147 David Malingha, *U.S.-Kenya Trade Talks Seen a Risk for Africa Regional Pact*, Bloomberg (Feb. 16, 2020).
- 148 Luke Anami, *Kenya Will Be in Breach of EAC, AfCFTA Rules in Proposed Trade Deal With America*, Bilaterals.org (Feb. 16, 2020).
- 149 Larry Luxner, *Kenyan President Uhuru Kenyatta Says His Country Needs "Fiscal Space" Amid the COVID-19 Crisis*, Atlantic Council (June 18, 2020).
- 50 The President of the Republic of Kenya Website, *A New Trade Deal Between Kenya and the U.S. Will Be a Win for Africa, President Kenyatta Says* (June 18, 2020).



U.S. CHAMBER OF COMMERCE
U.S.-Africa Business Center

uschamber.com



AMCHAM
KENYA

amcham.co.ke

COVINGTON

www.cov.com