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**THE KENYA-UNITED STATES
FREE TRADE AGREEMENT:
QUESTIONS, ISSUES, SCOPE,
STRATEGIES, PROSPECTS
AND OPTIONS**

A Memorandum



Memorandum

**THE KENYA-UNITED STATES FREE TRADE
AGREEMENT: QUESTIONS, ISSUES, SCOPE,
STRATEGIES, PROSPECTS AND OPTIONS**

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Introduction

On March 2020, at the direction of President Donald J. Trump, the United States Trade Representative (USTR) Robert Lighthizer notified Congress that the Trump Administration will negotiate a free trade agreement (FTA) with Kenya. “Under President Trump’s leadership, we look forward to negotiating and concluding a comprehensive, high-standard agreement with Kenya that can serve as a model for additional trade agreements across Africa,” said Ambassador Lighthizer, in the said letter. According to the USTR, the proposed FTA intends to “build[] on the objectives of the African Growth and Opportunity Act (AGOA) and serve as an enduring foundation to expand U.S.-Africa trade and investment across the continent.”¹

If and when the Kenya-U.S. FTA negotiation commences, the U.S. will not be negotiating in a vacuum. The U.S. will be negotiating the Kenya-U.S. FTA against the backdrop of some recent trade negotiations involving the United States and against the backdrop of key U.S legislations, executive orders, and policy actions that collectively shed light on the negotiating priorities, strategies, and motivations of the United States. Key legislations, executive orders, and policy actions include:

- **Bipartisan Congressional Trade Priorities and Accountability Act of 2015** (a.k.a. Trade Promotion Authority)
- **“United States-Kenya Negotiations: Summary of Specific Negotiating Objectives,”** (May 22, 2020). On May 22, 2020, Office of the U.S. Trade Representative (USTR) released the specific negotiating objectives of the proposed U.S.-Kenya Free Trade Agreement.
- The Trump Administration, **“America First” Strategy**.

Comprehensive trade deals of the size envisioned by the United States are not easy to pull off. The United States will undoubtedly be the more dominant player in a Kenya-U.S. FTA negotiation. Indeed, experts agree that few countries come close to negotiating on parity with Washington. For both sides, it will undoubtedly be a long path to negotiations. Consequently, it is important that the Kenyan Government is fully briefed on:

- The critical pillars of President Trump’s trade policy.
- The critical aspects of President Trump’s trade strategy and capacity.
- The important lessons that Kenya could draw from recent trade negotiations and/or deals involving the United States.
- The potential risks to domestic regulatory space of a comprehensive Kenya-U.S. FTA.
- The potential risks to domestic and regional policy coherence of a comprehensive Kenya-U.S. FTA.
- Controversial issues that might prolong talks.

¹ Id.

Kenya-US Economic Relations: Key Trade and Investment Statistics²

Whether a Kenya-U.S. trade deal will be in Kenya's best interest would depend on the answers to many critical questions and an understanding of the state of U.S.-Kenya trade and investments.

Kenya is currently the U.S.'s 98th largest goods trading partner with \$1.0 billion in total (two way) goods trade during 2018. Goods exports totaled \$365 million; goods imports totaled \$644 million. According to information available on the USTR's website:

Exports

- Kenya was the United States' 110th largest goods export market in 2018.
- U.S. goods exports to Kenya in 2018 were \$365 million, down 19.7% (\$89 million) from 2017 and down 17.5% from 2008.
- The top export categories (2-digit HS) in 2018 were: aircraft (\$103 million), machinery (\$41 million), plastics (\$37 million), electrical machinery (\$31 million), and special other (repairs) (\$16 million).
- U.S. total exports of agricultural products to Kenya totaled \$37 million in 2018. Leading domestic export categories include: coarse grains (ex. corn) (\$10 million), wheat (\$6 million), pulses (\$5 million), vegetable oils (ex. soybean) (\$3 million), and planting seeds (\$3 million).

Imports

- Kenya was the United States' 85th largest supplier of goods imports in 2018.
- U.S. goods imports from Kenya totaled \$644 million in 2018, up 12.6% (\$72 million) from 2017, and up 87.5% from 2008.
- The top import categories (2-digit HS) in 2018 were: woven apparel (\$240 million), knit apparel (\$153 million), edible fruit & nuts (cocoa, brazil, cashew) (\$74 million), special other (returns) (\$55 million), and coffee, tea & spice (coffee) (\$50 million).
- U.S. total imports of agricultural products from Kenya totaled \$154 million in 2018. Leading categories include: tree nuts (\$75 million), coffee, unroasted (\$43 million), tea, including herb (\$17 million), essential oils (\$11 million), and other vegetable oils (\$3 million).

Investment

U.S. foreign direct investment (FDI) in Kenya (stock) was \$405 million in 2017, a 7.5% decrease from 2016. There is no information on the distribution of U.S. FDI in Kenya.

No data on Kenya's FDI in the U.S. are available. There is no information on the distribution of Kenya FDI in the U.S."

Presently, most of Kenya's export to the United States enjoy duty-free access under the AGOA. Any move to discontinue AGOA would deal a devastating blow to the Kenyan economy.

² USTR, Kenya, <https://ustr.gov/countries-regions/africa/east-africa/kenya>

Kenya-U.S. FTA: Some Relevant Prior Agreements

1.1. Prior Agreement Between the US and Kenya

There is no existing FTA between the U.S. and Kenya or between U.S. and the East African Community. The U.S. signed a Trade and Investment Framework Agreements (TIFA) with the EAC in 2008, and with the Common Market for Eastern and Southern Africa in 2001. Unlike FTAs, TIFAs do not impose liberalization commitments on participating States.

1.2. Prior Agreement between the U.S. and Other African States

Presently, the U.S. has concluded only one FTA with an African country – Morocco. The U.S.- Morocco FTA was concluded in 2004 and entered into force in 2006. A US-Kenya FTA will be the first such agreement between the U.S. and a country in sub-Saharan Africa.

The U.S. has concluded bilateral investment treaties (BITs) with eight countries in Africa: Rwanda (2008), Mozambique (1998), Congo (1990), Egypt (1996), Cameroon (1986), Morocco (1985), DRC (1984), and Senegal (1983).

1.3. Other relevant Agreements Involving the U.S.

In total, the U.S. has concluded twenty (20) FTAs and forty-seven BITs (See **Appendix 1**). The most recent FTAs involving the U.S. that have the potential to affect and/or shape the US-Kenya trade negotiations are:

1.3.1. *The United States-Mexico-Canada Agreement (USMCA)*

- Between the US, Mexico, and Canada
- An update on the North American Free Trade Agreement (1992)
- Date of Entry into force: July 1, 2020

1.3.2. *The Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People's Republic Of China" (Phase One)*

- Parties: The United States and China
- Date of Conclusion: January 15, 2020
- Date of Entry into Force: 14 February 2020
- Focus: Narrow. Not a comprehensive trade deal.
- President Trump has since stated that he was not “thrilled” with the agreement.³

1.3.3. *The U.S.- Japan Trade Agreement (USJTA)*

- Parties: The United States and Japan
- Date of conclusion: October 7, 2019

³³ <https://www.reuters.com/article/us-usa-trade-china/u-s-china-trade-deal-not-falling-apart-white-house-adviser-idUSKBN22R2DT>

- Date of Entry into Force: January 1, 2020
- Nature: Phased approach. Not a comprehensive trade agreement

Trade Policy and Trade Negotiation Priorities of the United States

The U.S. trade negotiation priorities are spelt out in key policy instruments such as the Trade Protection Authority. On May 22, 2020, the U.S. published the “*United States-Kenya Negotiations: Summary of Specific Negotiating Objectives*” that outlines the specific negotiation objectives for the US-Kenya FTA.

1.4. The Broad Trade Negotiation Priorities of the United States

Article 1 of Executive Order 13796 provides:

Every very trade agreement and investment agreement entered into by the United States, and all trade relations and trade preference programs of the United States, **should enhance our economic growth, contribute favorably to our balance of trade, and strengthen the American manufacturing base.** Many United States free trade agreements, investment agreements, and trade relations have failed, in whole or in part, to meet these criteria.... **It is the policy of the United States to negotiate new trade agreements, investment agreements, and trade relations that benefit American workers and domestic manufacturers, farmers, and ranchers; protect our intellectual property; and encourage domestic research and development.**

1.5. Specific Negotiating Priorities for U.S.-Kenya FTA

Based on the negotiating priorities released by the USTR, the U.S. envisages a comprehensive trade agreement modeled after the USMCA. The USMAC is a 2,410-page trade scheme. In total, the USTR has identified at least twenty-one (21) key priorities:

1. Trade in Goods
2. Sanitary and Phytosanitary Measures
3. Rules of Origin
4. Technical Barriers to Trade
5. Good Regulatory Practices
6. Transparency, Publication, and Administrative Measures
7. Trade in Services, Including Telecommunications and Financial Services
8. Digital Trade in Goods and Services and Cross-Border Data Flows
9. Investment
10. Intellectual Property
11. Procedural Fairness for Pharmaceuticals and Medical Devices
12. State-Owned and Controlled Enterprises
13. Subsidies
14. Competition Policy
15. Labor
16. Environment

17. Anti-Corruption
18. Trade Remedies
19. Government Procurement
20. Small and Medium-Sized Enterprises
21. Dispute Settlement

US-Kenya FTA Negotiating Priorities	Corresponding Chapter in the USMCA
Trade in Goods	Chapter 2 and 3
Sanitary and Phytosanitary Measures	Chapter 9
Rules of Origin	Chapter 4
Technical Barriers to Trade	Chapter 11
Good Regulatory Practices	Chapter 28
Transparency, Publication, and Administrative Measures	Chapter 29
Trade in Services, Including Telecommunications and Financial Services	Chapter 15, Chapter 17, Chapter 18
Digital Trade in Goods and Services and Cross-Border Data Flows	Chapter 19
Investment	Chapter 14
Intellectual Property	Chapter 20
Procedural Fairness for Pharmaceuticals and Medical Devices	Chapter 12 and 20
State-Owned and Controlled Enterprises	Chapter 25
Subsidies	
Competition Policy	Chapter 21
Labor	Chapter 23
Environment	Chapter 24
Anti-Corruption	Chapter 27
Trade Remedies	Chapter 10
Government Procurement	Chapter 13
Small and Medium-Sized Enterprises	Chapter 26
Dispute Settlement	Chapter 31

The U.S.' Trade Negotiating Objectives for the Kenya-U.S. FTA: Highlights

The views and position presented in the negotiating priorities of the United States shed's important light on the motivations, strategies, priorities of the U.S. regarding a possible Kenya-U.S. FTA. They offer some insight into the likely impact of a Kenya-U.S. trade deal on regional integration in Africa in general and East Africa in particular. This section

highlights key aspects of the U.S. negotiating objectives that raise important questions about the possible scope and impact of a Kenya-U.S. deal.

1.6. Trade in Goods

The U.S.'s objectives include *inter alia*:

- **Comprehensive duty-free access** for U.S. industrial goods (including U.S. textile and apparel products)
- Disciplines on non-tariff barriers to industrial goods
- **“Comprehensive market access for U.S. agricultural goods”**
- Non-tariff barriers against U.S. agricultural goods
- The goal of “greater regulatory compatibility” (p. 1 and 2)
- Specific commitments regarding biotechnology (p. 2).

1.7. These issues are noteworthy for their potentially broad scope and impact on regulatory sovereignty

- **Sanitary and Phytosanitary Measures**
 - “enforceable and robust SPS obligations that **build upon** WTO rights and obligations.”⁴
 - Regarding SPS **“strong** provisions on transparency and public consultation that require Kenya to publish drafts of regulations, allow stakeholders in other countries to provide comments on those drafts, and require authorities to address significant issues raised by stakeholders and explain how the final measure achieves the stated objectives.”
- **Custom and Trade Facilitation**
 - “Ensure **high standards** for implementation of WTO agreements involving trade facilitation and customs valuation.” P. 3
- **Agricultural goods**
 - Secure **comprehensive market access** for U.S. agricultural goods in Kenya by reducing or eliminating tariffs.
 - **Promote greater regulatory compatibility** to reduce burdens associated with unnecessary differences in regulations and standards, including through regulatory cooperation where appropriate
 - Establish **specific commitments for trade in products developed through agricultural biotechnologies.**

⁴ Emphasis added

- **Rules of Origin,**
 - “Develop rules of origin that ensure that the benefits of the Agreement go to products genuinely made in the United States and Kenya.”
 - “Establish origin procedures that streamline the certification and verification of rules of origin and that promote strong enforcement, including with respect to textiles.” [A very similar language appeared in the US-EU trade negotiation and the U.S.-Japan FTA]
- **Textile** [Significant because Kenya’s apparel exports to the U.S. reached \$453million in 2019].
 - “Secure duty-free access for U.S. textile and apparel products and seek to improve competitive opportunities for exports of U.S. textile and apparel products while taking into account U.S. import sensitivities.”
- **Technical Barriers to Trade**
 - “**strong provisions** on transparency and public consultation”
 - Require application of decisions and recommendations adopted by the WTO TBT Committee that apply to standards, conformity assessment, transparency, and other areas.
- Good Regulatory Practices/ Transparency, Publication and Administrative Measures [Noteworthy because of its potential scope. This is a cross-cutting issue]
- **Investment:**
 - Secure for U.S. investors in Kenya important rights consistent with U.S. legal principles and practice, while ensuring that Kenyan investors in the United States are not accorded greater substantive rights than domestic investors.
 - Establish rules that reduce or eliminate barriers to U.S. investment in all sectors in Kenya.
- **Intellectual Property:**
 - Promote adequate and effective protection of intellectual property rights, including through the following....
 - Obtain **commitments to ratify or accede to international treaties reflecting best practices in intellectual property protection and enforcement;**
 - Provide **strong protection and enforcement for new and emerging technologies** and new methods of transmitting and distributing products embodying intellectual property, including in a manner that facilitates legitimate digital trade, including, but not limited to, technological protection measures;
 - **Ensure standards of protection and enforcement that keep pace with technological developments....**

- **State-Owned and Controlled Enterprises (SOEs)**
 - Build on the definition of an SOE in the United States-Mexico-Canada Agreement.
- **Subsidies**
 - Seek to build on the existing transparency principles in the SCM Agreement.
- **Environment**
 - **Establish strong and enforceable environment obligations** that are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the Agreement.
- **Labor**
 - Establish rules that will ensure that Kenya does not fail to effectively enforce labor laws implementing internationally recognized core labor standards and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.
 - Require Kenya to prohibit the importation of goods produced by forced labor, regardless of the source country.
- **Currency**
 - Ensure that Kenya avoids manipulating exchange rates in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage.
- **Anti-corruption**
 - Secure provisions committing Kenya to criminalize government corruption, to take steps to discourage corruption, and to provide adequate penalties and enforcement tools in the event of prosecution of persons suspected of engaging in corrupt activities.
- **Trade Remedies**
 - Preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping (AD), countervailing duty (CVD), and safeguard laws.
 - Strengthen existing procedures and create new procedures to address AD/CVD duty evasion, including the ability to conduct AD/CVD duty evasion verification visits.
- **Government Procurement**
 - Ensure reciprocity in market access opportunities for U.S. goods, services, and suppliers in Kenya.
 - Establish obligations and procedures to combat corruption in procurement.

Detailed Breakdown of Key Research Questions

From its published negotiation priorities, the U.S. wishes to conclude a free trade agreement that is “comprehensive,” “high quality” and “ambitious.” Given the size of Kenya’s economy and the potential impact of a comprehensive U.S.-style FTA on a developing country like Kenya, a careful, comprehensive, and very thorough assessment is warranted. Quite apart from and in addition to the negotiation priorities that the U.S. has set out, there is need to investigate issues relating to structure, timing, process, strategy and capacity. In this section we set forth, the major issues that deserve serious investigation.

Judging by the extensive list of issues on the US trade negotiating priorities, and the numerous issues that are and should be of concern to Kenyan government and Kenyan citizen, a comprehensive and extensive study is called for. Whether all the issues identified can be studied before the projected start of the negotiation process in July is critical. Given that the proposed agreement will largely mirror the USCMA, this may require urgent action given that the it is a humongous 2,410-page trade scheme.

Timing/ Capacity/Strength

1.8. Timing

- Is the timing right for a Kenya-U.S. FTA? Why? Why not?

1.9. Assessment of U.S. Trade Negotiation Strength and Capacity

- What is U.S. negotiating capacity/strength for a typical FTA? Specifically, what was U.S. negotiating strength/capacity for (a) USMCA; US-China (Phase 1), U.S.-Japan (Phase 1)
- What is Kenya’s negotiating strength/capacity?
- Assess the gaps in Kenya’s strength/capacity. Does Kenya have the strength and capacity to negotiate a USMCA-type agreement?

1.10. Assessment of U.S. Trade Negotiation Strategy

- An assessment of US negotiating strategy based on recent trade agreements.
- Which is best for Kenya, a comprehensive FTA or a staged, limited scope, agreement?

1.11. Assessment of Kenya’s Trade Negotiation Strength and Capacity

- Assess Kenya’s capacity to negotiate a comprehensive, high quality FTA.
- Assess Kenya’s capacity to implement a comprehensive, high quality FTA and the cost of non-compliance.

1.12. Assessment of Policy Coherence

- Assess the compatibility of a proposed Kenya-U.S. trade agreement with existing and proposed sub-regional and continental arrangements.

1.13. Kenya's Negotiating Objectives

- It is important that Kenya is not simply reactive. A proactive approach is called for. It is thus imperative that Kenya consider and publish its own detailed negotiation objective.
- Note that democracies typically identify and publish their trade negotiation objectives only after meaningful consultation with key stakeholders.

1.14. Kenya's Meaningful and Strategic Response to the Negotiation Objectives of the United States

- Specific sectors that need to be thoroughly investigated are outlined in (A) – (T) below.
- It is important that the Kenya's government respond specifically to all issues identified the negotiation objectives published by the U.S.
- Assessment should be done against the backdrop of the USMCA and some other FTAs involving the United States.
- Critical Task: With a focus on issues (A) – (T).
 - Against the backdrop of the USMCA and some other recent trade agreements, identify risks of WTO-plus commitments.
 - Against the backdrop of the USMCA and some other recent trade agreements, identify risks of erosion of WTO flexibilities.
 - Against the Backdrop of the USMCA and some other recent trade agreements, identify risks of erosion of Kenya's right to regulate in the national interest.
 - Assess risk of intrusion on foreign policy and foreign relations.
 - Against the backdrop of the USMCA and some other recent trade agreements, unpack what an "ambitious," "comprehensive," and "high quality" agreement would mean for Kenya.
 - Beyond the natural and low-hanging fruits, identify major challenges relating to negotiations on (A) – (T).
 - Identify issues that may be susceptible to reasonable compromise and the issues that should be non-negotiable.
 - Identify, what Kenya's negotiating priorities ought to be.

A. Investment

- An assessment of the United States Model BIT 2012
- An assessment of the Investment Chapter of the USMCA

- An assessment of recent BITs involving United States
- An assessment of recent BITs involving Kenya.
- Assessment must be carried out in light of evolving best practices and the UNCTAD's Reform Package for the International Investment Regime (2018)

B. Investment Arbitration

- An assessment of the United States Model BIT 2012
- An assessment of the Investment Chapter of the USMCA
- An assessment of recent BITs involving United States
- An assessment of recent BITs involving Kenya.
- Assessment must be carried out in light of evolving best practices, the UNCTAD's Reform Package for the International Investment Regime (2018), the AU's Draft Pan-African Investment Code (2016).

C. Intellectual Property

D. Labor

E. Environment

F. Anti-Corruption

G. Good Regulatory Practices

H. Digital Trade

I. Sanitary and Phytosanitary Measures

J. Trade in goods including:

- Agriculture
- Textile
- Manufacture
- Others

K. Custom Trade and Facilitation

L. Rules of Origin

M. Trade in Services (including financial services and telecommunications)

N. State-owned enterprises

O. Subsidies

P. Competition policy

Q. Government Procurement

R. Trade remedies

S. Small and medium-sized enterprises

T. Dispute Settlement (excluding investor-State dispute settlement)

Conclusion

This memo only addresses the legal and policy aspects of a proposed Kenya-U.S. FTA. An economic analysis is also required. Ideally, an economic analysis of a Kenya-U.S. FTA should be carried out. A sectoral analysis of economic costs and benefits of a potential Kenya-U.S. FTA is also called for.

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- East African Community, The Treaty for the Establishment of the East African Community. Adopted on 30 November 1999 and entered into force on 7 July 2000.



Appendix 1

The United States has concluded FTAs with Twenty Countries

- Australia
- Bahrain
- Canada
- Chile
- Colombia
- Costa Rica
- Dominican Republic
- El Salvador
- Guatemala
- Honduras
- Israel
- Jordan
- Korea
- Mexico
- Nicaragua
- Oman
- Panama
- Peru
- Singapore

Attachments

1. Agreement between the United States of America, the United Mexican States, and Canada (2018)[“USMCA”]
2. The Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People’s Republic Of China (2020)[U.S.-China Trade Agreement – Phase 1]
3. Trade Agreement Between Japan and the United States of America (2019)[U.S.-Japan Trade Agreement – Phase 1]



Professor Uche Ewelukwa Ofodile: Recent Works

- Member, Editorial Advisory Committee, *International Legal Materials* (Since April, 2020)
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