UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

USCIB Comments on Negotiating Objectives Regarding a U.S.-Kenya Trade Agreement

Docket Number: **USTR-2020-0011**

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On March 17, 2020, the Administration notified Congress of its intention to enter into negotiations with the Republic of Kenya (Kenya) for a U.S.-Kenya trade agreement. The United States Council for International Business (USCIB) supports negotiation of a comprehensive trade agreement with Kenya as part of a broader strategy to open international markets for U.S. companies and remove barriers and unfair trade practices in support of economic growth and job creation. We strongly believe that free trade with Kenya is overwhelmingly in the interests of both countries and their global trading partners, provided that the agreement is a high standard and comprehensive bilateral trade and investment agreement.

USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and regulatory coherence. Its members include U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world, generating $5 trillion in annual revenues and employing over 11 million people worldwide. As the U.S. affiliate of the International Chamber of Commerce, the International Organization of Employers and Business at OECD, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.[1]

Reaching an agreement with Kenya is important for the United States because this would be the first trade agreement with a Sub-Saharan African country. Beyond Kenya, the Administration should continue ambitions to initiate trade negotiations with other African partners. A successful trade agreement with Kenya should be negotiated as a single, comprehensive agreement which covers comprehensive market access and national treatment for goods, services, investment and government procurement, and also addresses key rules issues as well. Beyond Kenya, a high standard U.S.-Kenya FTA could serve as a benchmark for the further negotiation and implementation of the broader African Continental Free Trade Area Agreement (AfCFTA), parts of which entered into force in May 2019, and is viewed as a great step forward for African trade modernization. Below are several USCIB priority issues for negotiations of a U.S.-Kenya Trade Agreement.

[1] More information is available at www.uscib.org.

Elimination of Tariffs and Border Taxes

The core of any free trade agreement is tariff elimination, and the agreement with Kenya should contain commitments by Kenya to expeditiously eliminate its tariffs on U.S. products. Any exceptions should be limited, and subject to automatic revision to match more generous terms Kenya might provide to subsequent negotiating partners. U.S. exports should be exempted from Kenya's border taxes that function like tariffs, including Kenya's 2% import declaration fee (IDF) and 1.5% railway development levy (RDL), just as imports from Kenya's trading partners in the East African Community (EAC) and Common Market for Eastern and Southern Africa (COMESA) are.

Intellectual Property

An agreement with Kenya should include a comprehensive Intellectual Property (IP) chapter. A strong outcome on an IP chapter is critical to about 40% of the U.S. economy, 30% of all U.S. employment, and over half of all U.S. exports.

The agreement should prioritize world-class IP protection and enforcement mechanisms that protect the proprietary knowledge of U.S. companies operating abroad as well as support the growth of Kenya's innovative output.

The agreement should also include a strong base term and scope of protection for patents, copyrights, trademarks, designs, undisclosed test or other data; provide a high-standard data protection term for both biologics and small molecule drugs; establish a statutory commitment to protect trade secrets; exclusive rights for all forms of IP regardless of the technology; transparent, predictable, and carefully-defined rules for limited exceptions, as appropriate, to rights across all forms of IP.

Finally, the agreement should help increase capacity, build infrastructure, and create frameworks to prevent trade in counterfeits.

Digital Trade Chapter

The agreement should include a high standard digital trade chapter, drawing from the United States-Mexico-Canada Agreement (USMCA) for important provisions including those related to source code and algorithms, e-signatures, privacy, cybersecurity, data flows and storage. The agreement should include obligations that discourage policies requiring foreign companies to localize investments, production, services, data, or other activities, which suppress bilateral trade and investment both for goods and services. A U.S.-Kenya trade agreement should also include commitments that data can flow unimpeded across borders except for limited and well-defined public policy exceptions.

Government Procurement

U.S. businesses have historically faced numerous barriers preventing them from competing fairly for Kenyan government procurement. The Government Procurement chapter of a U.S.-Kenya FTA should ensure open, transparent, and reciprocal access to U.S. and Kenyan procurement markets, with strong commitments on fair procurement practices consistent with those contained in the USMCA Government Procurement chapter and comprehensive market access commitments by Kenya on procurement by government ministries and government corporations. Increasing transparency and competition in Kenyan government procurement will benefit U.S. exporters and generate greater value and more effective governance for Kenya, and also ensure that U.S. exporters can compete fairly with exporters from third countries. Kenya should either eliminate or allow U.S. products to count as "domestic" for purposes of: any domestic content requirements for government procurement; any domestic set-asides in government procurement; and any price preferences for locally manufactured goods (including the 15% price preference in tenders for locally manufactured medicines). Commitments on government procurement procedures should (a) permit and encourage use of best-value/lifecycle-cost procurement evaluation criteria and (b) require commercial entities to submit and demonstrate adherence to a high-standard code of ethics as a prerequisite to participation.

Customs and Trade Facilitation

It is important that any U.S.-Kenya FTA include strong provisions on customs and trade facilitation. The following points should be included:

- Streamline and modernize customs processes and implement high standard trade facilitation measures above the baseline commitments in the WTO's Trade Facilitation Agreement (TFA).
- Adopt the use of electronic customs forms, electronic signatures and authentication, and secure on-line payments.
- Establish a commercially meaningful *de minimis* level, inclusive of duties and taxes, and allow simplified and expedited clearance of these shipments without a Harmonized Tariff Schedule number and on a most-favored nation (MFN) basis.
- Separate the physical release of goods from the duty and tax collection process. Trusted traders should be able to calculate and pay duties and taxes after the physical release of the goods, and allow periodic payments of these fees as opposed to doing so on a transaction-by-transaction basis.
- Provide for the immediate release of express shipments upon arrival, provided that all required documentation and data have been submitted.
- Create a single window to allow the trade community to provide the necessary information to satisfy all government agency requirements with a single data transmission.
- Develop a robust informal entry process that is above the *de minimis* level, but below the formal entry level, that would necessitate less documentation than is required in a formal entry and would aim to reduce the time, cost, and complexity in trade.

- Simplify the process for returning goods of domestic origin. Returned shipments should be released without a formal declaration required, provided that the reference to the preceding outbound shipment and goods declaration can be provided so that both shipments can be reconciled. Clear guidance should be provided to ensure that duties are not collected on returned goods that have not been improved to avoid the cumbersome procedure of the trade having to request refunds of such duties.
- Evaluate the possibility of aligning the Parties' trusted trader programs more closely with a view toward laying the basis for eventual mutual recognition.
- Strengthen capacity and regulatory/legislation frameworks to prevent illicit trade by:
    - Increasing and strengthening interagency cooperation across the Kenyan government;
    - Developing an educational campaign to increase awareness;
    - Implementing a process to proactively detect illicit medicines; and
    - Creating a surveillance network.
- Improve capacity within Kenya Revenue Authority (KRA) to eliminate delays related to pre-import inspection for pharmaceuticals.
- Enforce and adhere to government parallel trade guidelines and revise existing guidelines to require that a company has a marketing authorization to import the product.
- Fully implement the Revised Kyoto Convention to which Kenya acceded in 2010.

Investment

USCIB supports strong investor and investment protections. Those protections, which include robust investor-state dispute settlement (ISDS) rule-of-law provisions must be included in any final trade agreement. Importantly, the protections must comprehensively cover all sectors without any limitations on the claims that investors can make on specific investment protections. There should also not be any requirements of exhaustion of remedies in Kenya's domestic courts.

U.S.-Kenya restrictions on FDI should be eliminated except in narrowly negotiated areas. An ISDS mechanism through which businesses can seek redress directly from a government for expropriation, discriminatory treatment, and other treaty violations, is a crucial component of the agreement. Certain types of legislation cannot be adjudicated by domestic laws and all governments have the capacity to be discriminatory. ISDS depoliticizes important investment rules by putting them in the realm of neutral and legal arbitration. Although ISDS has been the subject of some recent criticism, it remains necessary to adequately ensure the fair treatment of foreign investors. It does not undermine any individual nation's sovereignty. Simply, it ensures that states follow World Trade Organization (WTO) and other basic obligations in making regulation non-discriminatory.

What constitutes an investment must be defined broadly, to include investment agreements, without carving out any industries or sectors from the protections of this chapter. The pillars of the investment chapter also must remain intact, including national treatment, MFN treatment, minimum standard of treatment, guarantees for compensation in case of expropriation, free transfers, prohibition of performance requirements, and ISDS. A U.S.-Kenya agreement should include protection from performance requirements to purchase or use a particular technology for all sectors, including financial institutions. It should also include protection from any requirement to transfer technology for all sectors, including financial services. It is also critical that an agreement reached with Kenya include rules prohibiting the Parties from requiring companies to transfer their technology, production process, or other proprietary information to persons in their respective territories as a condition of market access.

State-to-State Dispute Settlement

Any U.S.-Kenya agreement should include strong state-to-state dispute settlement. The provisions should include the improved dispute settlement elements reached with Congress to ensure that one party cannot block a panel proceeding.

Transparency

USMCA included the most robust transparency provisions to date and an agreement with Kenya should similarly include strong provisions in this area. These provisions should ensure publishing rules for advance notice and comment, address licensing issues including fees and other areas of the licensing process.

Anti-corruption

Corruption continues to be a challenge in Kenya, undermining both Kenyan governance and U.S. businesses seeking to export or invest in Kenya. This can be a particular problem when U.S. businesses in Kenya are competing against third country competitors that wrongly view corruption not as a scourge and crime but merely as a cost of doing business. In order for a U.S.-Kenya trade agreement to realize the trade and development goals set by both Parties, it is crucial that the agreement contain an anti-corruption chapter that sets, as a minimum standard, the provisions of Chapter 27 in the USMCA. We also encourage the United States and Kenya to include an additional provision in this anti-corruption chapter that will encourage enhanced private sector coordination to strengthen ethical business conduct, including the development and implementation of high-standard codes of ethics spanning key sectors of shared interest.

Direct Selling

The treatment of direct selling is of great importance in the negotiations with Kenya. Direct selling is a distribution-services system through which companies outsource sales and sales-management services to independent contractors. This distribution system was recognized in the recently completed trade agreement among the United States, Mexico and Canada (USMCA, Chapter 15, Cross Border Trade in Services, Article 15.10: Paragraph 1, footnote 7). The U.S. Government should replicate this language in the trade agreement with Kenya that will recognize the legitimacy of direct selling. Specifically, the definition of direct selling should be identical to the language in the footnote 7 referenced above.

Rules of Origin

For apparel products, the existing African Growth and Opportunity Act (AGOA) benefits need to be maintained over a period of time to allow for vertical integration of the country and region, eventually moving to a yarn-forward rule of origin. In addition, in recognition of the regional distance between the United States and Kenya we urge additional peripheral origin requirements on inputs used to produce apparel (such as sewing thread, pocketing fabrics, elastomeric, etc.) be avoided as is the case with all non-Western Hemisphere free trade agreements.

Regulatory Cooperation & Practices

Good Regulatory Practices should contain provisions defining what information and studies may be used to develop domestic regulations, and how stakeholders should be involved in the rulemaking process. In addition, there should be clear procedures for adopting, reviewing and repealing regulations. Overall, the regulatory process should be transparent, based on evidence, and allow for engagement and public comment of affected parties or the affected party before regulatory action is taken.

A U.S.-Kenya FTA should support ongoing efforts to increase capacity and harmonization of regulatory processes to remove barriers to access to medicines. It should also improve regulations for the prescribing and distribution of pharmaceuticals to ensure quality and compliance.

In addition to FTA negotiations, the U.S. Treasury Department should seek opportunities to work more closely with Kenya's financial regulatory community in order to promote good regulatory practices and exchange information.

Procedural Fairness for Pharmaceuticals and Medical Devices

In a U.S.-Kenya FTA, USTR should seek standards to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for U.S. products. Any agreement should also promote value-based reimbursement systems & decisions with the objective of transforming national reimbursement systems to ensure improved health systems sustainability and improved patients access to evidence-based medicines. It should also implement a pricing framework that includes mark-up caps.

Financial Services

USCIB supports a high-standard financial services chapter in the U.S.-Kenya FTA negotiations. In many cases, the chapter should build on progress made in the USMCA Financial Services Chapter, however there are some areas where USMCA should not be the model for negotiations with Kenya and improvements are needed. Other chapters of the agreement should not exclude financial services from coverage of their commitments. The following list highlights many of the areas of importance to include in the financial services chapter negotiations.

Non-discriminatory treatment: Any agreement should ensure non-discriminatory treatment to level the playing field with state-owned entities, and domestic and foreign competitors. In this respect, a U.S.-Kenya FTA should maintain the same commitment to national treatment found in the USMCA for sectors such as electronic payments services (EPS).

Market access: Like USMCA, the chapter should ensure that financial services firms may choose the legal structure and establish an absolute right to enter the market, and expand geographically throughout the market. The United States should negotiate market access commitments using a "negative list" and "ratchet" to ensure a high standard of market openness and lock in further liberalization expanding and creating new business opportunities.

Cross Border Market Access: USMCA expanded and improved coverage of cross-border commitments and these improvements should be included in the financial services chapter with Kenya. USMCA expanded commitments in areas such as EPS, portfolio management, and investment advice services.

Transfer of Data and Prohibition of Data Localization: A financial services chapter should ensure the free flow of data for the financial services sector and prohibit data localization or storage measures. USMCA serves as a starting point, however the standard used for the privacy exception in the computing facility provision should be changed from an avoidance standard to be no more burdensome than necessary. The prohibition of data localization should be technology neutral.

Digital Technology: USTR should seek to include language in the chapter that promotes the shared understanding of the use of cloud technologies by financial institutions. It should promote cooperation regarding data connectivity developments, including digital innovation, supporting development and growth.

Senior Management: A U.S.-Kenya FTA should ensure that financial services firms may engage the top managerial personnel and Board members of their choice, without regulatory approval and regardless of nationality.

Investment Provisions: The Financial Services Chapter should incorporate investment provisions from the investment chapter including expropriation (direct and indirect), the minimum standard of treatment, free transfers, performance requirements, denial of benefits, and special formalities. Previous FTAs did not apply the performance requirements article to financial institutions falling short to protect financial institutions from requirements to purchase or use domestically produced goods or services or to have to purchase or use a particular technology.

Investor-State Dispute Settlement: Breaches of investor protections, including breaches of the national treatment and MFN articles in the financial services chapter, should be subject to an ISDS mechanism without a requirement to use domestic courts in Kenya before proceeding with a claim.

Government Procurement: In prior agreements the financial services chapter ensured non-discriminatory treatment for government procurement in the financial sector. Unfortunately, in USMCA government procurement was excluded from the financial services chapter. The agreement with Kenya offers an opportunity to ensure that U.S. financial services firms receive non-discriminatory fair treatment in the procurement of services by the Kenyan government.

Subsidies: The financial services chapter, consistent with past practice, should discipline subsidies to financial services firms.

Delivery Services

A U.S.-Kenya FTA should require fair, non-discriminatory treatment of delivery service providers by addressing the unique challenges associated with postal operators through the inclusion of a delivery services sectoral annex in the agreement to ensure that U.S. and Kenya consumers and businesses retain access to world-class delivery service options.

The annex should build off of the Delivery Services Annex in the USMCA, but at the very least should prohibit postal operators from cross-subsidizing services provided in the competitive environment, require that the regulator of delivery services be independent of any operator, prohibit the assessment of fees or other charges on delivery service suppliers in order to fund the supply of universal service, and eliminate any market distorting laws, regulations, or policies that grant advantages to postal operators providing competitive services.

VAT Exemptions

The application of Kenya's 16 percent Value Added Tax (VAT) and the frequent changes to the list of products eligible for VAT exemption (or zero rating) generate considerable uncertainty and unpredictability for U.S. businesses exporting to Kenya, discouraging the development of bilateral trade and investment ties. Moreover, removal of an existing VAT exemption could offset for an affected U.S. company some or all of the benefits provided by the FTA. The U.S. should seek commitments by Kenya to preserve existing VAT exemptions affecting U.S. products, and to establish a process whereby U.S. companies can raise concerns about VAT exemptions they perceive as unfair, non-transparent, or prejudicial.

Unilateral Measures on Taxation of the Digitalizing Economy

Kenya has adopted a tax on digital marketplaces, although detailed guidance on the operation of this tax is pending and it has therefore not yet been implemented. Countries should refrain from adopting unilateral measures, especially in this time of crisis. Unilateral measures may require significant resources to implement, when resources are scarce, and countries are helping companies preserve liquidity in the face of the crisis. USCIB members are concerned that this measure would undercut a broader international agreement; and may violate income tax treaty obligations and trade obligations of Kenya depending on how it is implemented. USCIB supports a solution that complies with treaty obligations (both tax and trade); is based on income tax principles, including taxing profits, not revenues, is based on local value creation by the company, appropriately recognizes the value of technology intangibles in the income allocation factors; minimizes double taxation; and includes strong dispute resolution mechanisms. The OECD is pursuing agreement along these lines and the issues should be decided at the OECD. These digital tax issues are of vital importance to U.S. business and must be resolved as soon as possible to maximize the benefits of a U.S.-Kenya FTA.