THE KENYA-UNITED STATES FREE TRADE AGREEMENT:

A LEGAL ANALYSIS

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Published by

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This study was made possible through the financial support of The Open Society Initiative for Eastern Africa (OSIEA). However, the views expressed therein do not necessarily reflect their official policy position.

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Preface

This report assesses the legal and policy implications of a comprehensive, deep and high-standard free trade agreement (FTA) between the Republic of Kenya (Kenya) and the United States of America (U.S.) using the United States–Mexico–Canada Agreement (USMCA) as the organizing framework. The USMCA is a comprehensive (34 chapters) trade and investment agreement between the U.S., Mexico, and Canada that was signed on November 30, 2018, and entered into force on July 1, 2020. The USMCA is a revised version of the North American Free Trade Agreement (NAFTA) which went into effect on January 1, 1994. The reason for using the USMCA as the organizing framework should be obvious. Judging by the summary of negotiating objectives released by the U.S. and Kenya, both sides are aiming for an agreement that is similar to the USMCA in terms of scope and coverage. Because the U.S. typically negotiates FTAs in light of previous ones, the USMCA is likely to be the starting point for negotiations.

A review of the legal implications of a free trade agreement is extremely important for a number of reasons. *First*, based on the *pacta sunt servanda* principle enshrined in Article 26 of the Vienna Convention of the Law of Treaties (VCLT), once ratified, an FTA is binding upon the parties and must be performed by them in good faith. Under Article 27 of the VCLT, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. *Second*, FTAs are not benign policy instruments. FTAs have legal consequences and can expose states to considerable legal risks and legal consequences. *Third*, accentuating the legal risks associated with FTAs is the fact that most FTAs come fully equipped with one or more binding and built-in dispute resolution mechanisms. *Fourth*, given their increasingly expansive scope, high-standard, comprehensive FTAs reach too deeply into the domestic regulatory space of states and have the potential to chill regulatory action and undermine rights protected under domestic, regional, and international law. *Fifth*, FTAs can create a different type of legal risk for states, an internal one. Provisions of an FTA that contravene the domestic constitution of a state could be challenged in a domestic court and are increasingly challenged. In short, FTAs are not immune to domestic legal challenges and processes.

A legal analysis of the proposed Kenya-U.S. FTA is important for an additional set of reasons. A bilateral trade deal between Kenya and the U.S. has implications for member states of the East African Community (EAC), for the African Continental Free Trade Area Agreement (AfCFTA), and for regional integration in Africa more broadly. Already, Kenya's decision to pursue a FTA with the U.S. has generated and continues to generate criticisms from numerous quarters. A key concern has to do with the likely impact of a Kenya-U.S. FTA on regional integration efforts in the continent. There are also concerns that a Kenya-U.S. FTA will become the model for United States engagement with other countries in the region. In its *Summary of Specific Negotiating Objectives* released in May 2020, the U.S. made clear that the vision "is to conclude an agreement with Kenya that can serve as a model for additional agreements in Africa, leading to a network of agreements that contribute to Africa's regional integration objectives." Whether a trade deal between the U.S. and Kenya can truly serve as a model for fifty-three other countries in Africa that are at vastly different levels of economic development and with their unique issues and challenges is a question that is bound to generate considerable debate in the future.

When considering the legal implications of a Kenya-U.S. FTA, the Agreement Establishing the World Trade Organization (WTO) and related multilateral trade agreements are the obvious starting point. The multilateral trade agreements are not the only international instrument in play, however. The principle of policy coherence requires that attention is paid to pertinent legal instruments in other fields of international law including the field of international human rights law and international environmental law are considered as well. It also requires that regional policy instruments are taken into account as well. For Kenya, it is imperative that trade and investment agreements are negotiated against the backdrop of regional and international treaties binding on Kenya including, the African Charter on Human and Peoples' Rights (ratified in 1992), the International Covenant on Civil and Political Rights (ratified in 1972), the International Covenant on Economic, Social and Cultural Rights (ratified in 1972), the Convention on the Elimination on All forms of Discrimination Against Women (ratified in 1984), the Convention on the Elimination of All forms of Discrimination (ratified in 2001), the Convention on Biological Diversity (ratified 1994); the Cartagena Protocol on Biosafety (ratified in 2002), the Vienna Convention for the Protection of the Ozone Layer (ratified in 1988); the Montreal Protocol on Substances that Deplete the Ozone Layer (ratified in 1988), and the Paris Agreement (ratified in 2016).

A host of "soft law" instruments also come into play when analysing the legal implications of an FTA between Kenya and the U.S. These include the Universal Declaration on Human Rights (1948); the UN Code of Conduct on Transnational Corporations (1983); the UN Guiding Principles on Business and Human Rights (2011); the ILO Tripartite Declaration on Multinational Enterprises (2011); the G20 Guiding Principles for Global Investment Policymaking (2016); the UN General Assembly Resolution 1803 (XVII): Permanent Sovereignty over Natural Resources (1962); the UN Declaration on the Rights of Indigenous Peoples (2007); and Transforming Our World: The 2030 Agenda for Sustainable Development (2015).

To be clear, there are many things that this report is not. This report is not intended to serve and cannot serve as a substitute for a sound and comprehensive economic impact assessment of the proposed Kenya-U.S. FTA. This report is also not a social impact assessment, a human rights impact assessment, a sustainability assessment, a constitutional impact assessment, or an environmental impact assessment. Although all these impact assessments are extremely important, they cannot be achieved in a single report. Impact assessment studies of FTAs that are based on sound methodologies and are conducted in a transparent manner have become indispensable in trade policy. It is imperative that the Kenyan government conduct impact assessments of any trade deal with the U.S. It should be noted that the U.S. routinely conducts impact assessments of individual FTAs as well as impact assessment of all its trade agreements. Recently, in June 2020, the U.S. International Trade Commission announced it has launched an investigation of the economic impact on the U.S. of all trade agreements with respect to which Congress has enacted an implementing bill under trade authorities procedures since January 1, 1984. The investigation, *Economic Impact of Trade Agreements Implemented Under Trade Authorities Procedures, 2021 Report*, is required by law and will be submitted to Congress by June 29, 2021.

Three final caveats. First, the issues addressed in this report are complex and the consequences so serious that the present report can be read only as a work in progress. There is need to continue to monitor the impact of an FTA and assess its legal consequences for

contracting parties long after the FTA has entered into force. Second, the COVID-19 pandemic reminds us that the unexpected can occur at any time and thus underscores the need not only to preserve domestic regulatory space in trade and investment agreements, but to also fundamentally reassess the role of these agreements in a post-pandemic era. Third, an analysis of the political economy of a proposed Kenya-U.S. FTA is beyond the scope of this study.

In this report, each substantive chapter starts with an introduction and is followed by an overview and an analysis of a relevant USMCA chapter. Each substantive chapter concludes with a section titled 'Key Considerations for Kenya' and a section titled 'Key Recommendations.' The proposed coverage of the Kenya-US FTA is very huge and goes well beyond the commitment Kenya assumed under the Agreement Establishing the World Trade Organization. If implemented, the proposed FTA will have enormous implications for Kenya. Consequently, one key consideration, for Kenya, is the wisdom of concluding a comprehensive FTA with the United States – a path that economic powerhouses such as Japan, China, Brazil, India, and the European Union have, so far, been very hesitant to thread. Should Kenya decide to proceed with a deep, comprehensive and high standard FTA with the U.S., detailed and comprehensive economic, human rights, environmental, constitutional, and sustainability impact assessments are strongly recommended. Moreover, given Kenya avowed support for and commitments to regional integration in Africa, a comprehensive assessment of the impact of a proposed FTA on regional integration in Africa is also strongly recommended. Finally, as Kenya delves into comprehensive and high standard FTAs, it is imperative that the Kenya government review, and possibly revamp and upgrade, Kenya's trade laws and trade policy instruments taking into account the principles of sustainable development, policy coherence, transparency, inclusivity, and democratic participation. In reviewing and upgrading Kenya's trade infrastructure, greater involvement of the Kenyan Parliament as well as local, state and regional governments is strongly recommended as is the participation of all stakeholders particularly vulnerable and disenfranchised groups. Furthermore, topics such as trade adjustment assistance, trade remedies, import relief, unfair trade practices, trade policy research, women and trade, indigenous people and trade amongst others must be clearly and thoroughly addressed and communicated to all relevant stakeholders.

ABBREVIATIONS AND ACRONYMS

AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
AEC	African Economic Community
AGOA	African Growth and Opportunity Act
ARIA VI	Assessing Regional Integration in Africa VI
AU	African Union
AUC	African Union Commission
BIT	Bilateral Investment Treaties
BHR	Business and Human Rights
CAFTA-DR	Central America-Dominican Republic Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CFTA	Continental Free Trade Area
COMESA	Common Market for Eastern and Southern Africa
CSR	Corporate Social Responsibility
EAC	East African Community
ECA	United Nations Economic Commission for Africa
EIA	Environmental Impact Assessment
EPA	Economic Partnership Agreement
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTZ	Free Trade Zone
GI	Geographical Indication
GSP	Generalized System of Preferences
HS	Harmonised System
HTS	Harmonized Tariff Schedule
IP	Intellectual Property
IPRs	Intellectual Property Rights
ISDS	Investor state Dispute Settlement
LDC	Least-developed country
KORUS	Korea Free Trade Agreement (KORUS)
MAFTA	Morocco Free Trade Agreement (MAFTA)
MFN	Most-Favored-Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
NTB	Non-tariff Barrier
OECD	Organisation for Economic Co-operation and Development
REC	Regional Economic Community
SIA	Social Impact Assessment
SDGs	Sustainable Development Goals
SME	Small and Medium Enterprises
SSA	Sub-Saharan Africa
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TRIMs	Trade-Related Investment Measures Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
USITC	United States International Trade Commission
USMCA	United States- Mexico-Canada Free Trade Agreement

USTR	United States Trade Representative
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Introduction

On 8 July 2020, United States Trade Representative (USTR) Robert Lighthizer and Kenya Cabinet Secretary for Industrialization, Trade, and Enterprise Development Betty Maina formally launched free trade agreement (FTA) negotiations between the United States (U.S.) and the Republic of Kenya (Kenya).[1] The plan to commence trade negotiations was announced on 6 February 2020, following a meeting between U.S. President Donald Trump and his Kenyan counterpart, President Uhuru Kenyatta.[2] If successful, the Kenya-U.S FTA will be the first comprehensive trade agreement that the U.S. will conclude with a country in sub-Saharan Africa (SSA) and the second such agreement that the U.S. will conclude with a country in Africa; the first FTA was concluded with Morocco in 2004. Presently, Kenya enjoys unilateral trade advantages under two preferential trading schemes in the U.S. – the Generalized System of Preferences (U.S. GSP) and the African Growth and Opportunity Act (AGOA). Done right, a FTA with the U.S. could be an opportunity for Kenya to modernize its economy, fully and deeply integrate into the global value chains, attract more foreign direct investment (FDI), and stimulate across the board economic growth. For the U.S., a Kenya-U.S. FTA is an opportunity to counter China's growing dominance in Africa, open the Kenyan market to U.S. businesses, address lingering security concerns in the East African region, and develop a modern, post-AGOA framework which could serve as a template for trade agreements with other economies in Africa. Understandably, Kenya's decision to pursue a bilateral trade deal with the U.S. is generating considerable controversy in Kenya, in the East African Community and in Africa as a whole. This begs several questions. What are the likely legal and policy implications, for Kenya, of a deep and comprehensive FTA with the U.S.? What are the likely impacts of such an agreement on Kenya's domestic regulatory space? What potential legal risks and challenges will Kenya assume if and when such an agreement is concluded?

1.1. Purpose and Scope of the Evaluation

1.1.1. Purpose of the Study

The purpose of this study is to develop a comprehensive document that will address, from a legal (international law) perspective, key issues currently on the table in the on-going FTA negotiations between Kenya and the USA. Although addressed in various chapters, constitutional issues raised by the proposed FTA are not the primary focus of this study. Based on the negotiating objectives of the U.S. and Kenya, both sides hope to conclude a comprehensive agreement. Consequently, this study will use the USMCA as the primary frame of reference for the analysis. The study will also draw relevant insight from prior FTAs involving the U.S. A review of some FTAs involving the U.S. is very important because the U.S. typically negotiates FTAs in light of previous ones. As one commentator notes:

> The United States negotiates free trade agreements in light of previous ones, negotiating outcomes obtained in other fora and the decisions of international trade tribunals…. A

[1] Joint Statement Between the United States and Kenya on the Launch of Negotiations Towards a Free Trade Agreement, July 8, 2020. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/july/joint-statement-between-united-states-and-kenya-launch-negotiations-towards-free-trade-agreement

[2] U.S. Announces Intent to Start Talks on Kenya Trade Agreement, 6 February 2020. https://www.bloomberg.com/news/articles/2020-02-06/u-s-announces-intent-to-start-talks-on-kenya-trade-agreement

concluded agreement will build on prior treaties and influence the course of future international arrangements. But the impact of a United States free trade agreement is not always clear, including because of a lack of reliable data, and the extent of national legal change is a contested issue given existing reform agendas and external influences.[3]

1.1.2. Scope of the Study

The study involves: (i) a WTO-compatibility review; (ii) a WTO-plus review; (iii) an environmental, social and governance review; (iv) a dispute settlement mechanism review; (v) a review of implications on Kenya's foreign policy, and (vi) a review of U.S. trade laws and regulations likely to shape Kenya-US FTA.

1.1.2.1. WTO-Compatibility Review

- With a focus on three key sectors – agriculture, textiles & apparels, and intellectual property rights – review and analyze the compatibility of a USMCA-style FTA between the U.S. and Kenya with the Agreement Establishing the World Trade Organization.
- Provide short advisory brief on their compatibility with WTO requirements regarding flexibilities for developing countries.

1.1.2.2. WTO-Plus Review

- With a specific focus on investment protection, regulatory cooperation, corruption, and digital trade, and using the provisions of the USMCA as the organizing framework, review and analyze the obligations that Kenya is likely to assume in a Kenya-U.S. FTA.
- Specifically,
  - assess the substantive remit of the obligations that states assume when committing to new disciplines and what will be required to implement them;
  - identify those provisions of the agreement that present legal challenges and risks for Kenya;
  - assess the extent to which the provisions deviate from regional norms where those exist; and
  - overall, analyze the legal implications, for Kenya, of assuming obligations under these new disciplines.

1.1.2.3. Environmental Review

- Assess the legal implications, for Kenya, of an environmental chapter modeled after the environmental chapter of the USMCA.
- Assess likely impact of commitments relating to the environment on Kenya's domestic regulatory space.
- Assess likely impact of commitments relating to the environment on Kenya's outstanding international obligations.

1.1.2.4. Labor Review

- Assess the legal implications, for Kenya, of a labor chapter similar to the USMCA's labor chapter.

[3] Stephen Tully, *Free Trade Agreements With The United States: 8 Lessons For Prospective Parties From Australia's Experience*, Br. J. Am. Leg. Studies 5 (2016).

- Assess likely impact of labor commitments on Kenya's domestic regulatory space.

1.1.2.5. Governance Review

- Examine the USMCA's anti-corruption chapter and analyse its likely legal implication.
- Examine the provision of the USMCA relating to good regulatory practices and analyse likely legal implication for Kenya.
- Identify and briefly discuss other provisions of the USMCA that have implications for domestic regulatory space, foreign policy and/or sovereignty.

1.1.2.6. Dispute Settlement Review

- Examine the main dispute settlement mechanisms and procedures available under the USMCA.
- Specifically, identify and briefly analyze processes and procedures available for private action, including investor-State dispute resolution.
- Assess the legal implications and risks, for Kenya, of the dispute settlement mechanisms and processes identified.

1.1.2.7. Review of U.S. trade laws and regulations likely to shape implementation of proposed Kenya-US FTA

- Identify and briefly discuss trade laws that the U.S. typically uses to protect its defensive and offensive interest.
- Identify and briefly discuss agencies and institutions central to the administration of U.S. trade policy.

1.2. Methodology and Limitations

This study is based on desktop research and examination of background literature, a desk review and analysis of all relevant WTO agreements, the USMCA, and all relevant FTAs involving the U.S.

One limitation to this study is the lack of information about on-going negotiations and lack of meaningful access to draft texts. One commentator has noted that for U.S. FTA negotiations "[n]egotiations typically occur behind closed doors, which is a process having adverse implications for transparent decision-making, public consultation periods and contributions from interested non-governmental actors."[4] The absence of timely and meaningful access to documents and information shared during an FTA negotiation is a major impediment to any effort to proactively evaluate the terms and parameters of any proposed trade deal.

Governments adopt different approaches to the issue of transparency in FTA negotiations. In the context of on-going FTA negotiations between the U.S. and the UK, both sides exchanged letters setting out the arrangements for handling documentation and

[4] Stephen Tully, *Free Trade Agreements With The United States: 8 Lessons For Prospective Parties From Australia's Experience*, Br. J. Am. Leg. Studies 5 (2016).

information during the FTA negotiations.[5] The U.K. and the U.S. agreed to treat information exchanged as part of the negotiating process as confidential, unless both sides decide otherwise. However, in a letter to his U.S. counterpart dated April 3, 2020, U.K.'s Chief Negotiator Oliver Griffiths, wrote, "[o]ur commitment to transparency and inclusivity means Parliament, the devolved administrations and legislatures, local government, business, trade unions, civil society, and the public from every part of the United Kingdom must have the opportunity to engage with and contribute to our trade policy...." The letter adds that "[t]he UK may decide to put certain information into the public domain to facilitate engagement but they will reflect the UK position only."[6] For the UK, the arrangement does not supersede the government's duty under the Freedom of Information Act.

[5] https://www.gov.uk/government/publications/exchanging-information-during-uk-us-trade-agreement-negotiations

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881072/UK_to_US_trade_agreement_confidentiality_letter.pdf

2. Background and Context

2.1. Kenya-U.S. FTA Trade Negotiations: A Timeline

The Kenya-U.S. trade talks can be traced to 2018 when President Kenyatta visited the U.S. on an official state visit. In August 2018, the U.S. and Kenya agreed to elevate their relationship to a strategic partnership and affirmed the new partnership "as a cornerstone of peace, stability and good governance in Africa and the Indian Ocean region." Also in August 2018, during the official visit, President Kenyatta and President Trump decided to establish a structured mechanism called the Bilateral Strategic Dialogue (BSD).[7] The BSD's initial task was to "review progress in the implementation of agreed areas of cooperation, explore new areas of engagement and modalities for strengthening the growing diverse bilateral relations between Kenya and the USA."[8] The inaugural BSD meeting was convened in May 2019 and focused on four key issues: economic prosperity, trade and investment; (b) defence cooperation; (c) democracy & governance; and (d) regional and multilateral issues.[9] Separate from the BSD, in 2019, the two sides established the U.S.-Kenya Trade and Investment Working Group (Working Group). The inaugural meeting of the Working Group held in Washington, D.C. on April 3-8, 2019.[10] Within the framework of the Working Group, the two sides agreed to work together on the following four areas: (a) maximize the remaining years of the African Growth and Opportunity Act (AGOA); (b) pursue exploratory talks on a future bilateral trade and investment framework; (c) strengthen commercial cooperation; and (d) develop short-term solutions to reduce barriers to trade and investment. The second meeting of the Working Group occurred from October 31 to November 4, 2019 in Nairobi, Kenya.[11]

On 6 February 2020, the White House announced plan to start trade negotiations with Kenya.[12] On 27 March 2020, acting in accordance with section 105(a)(1)(A) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Trade Promotion Authority, 2015), the USTR notified the U.S. Congress that the Trump Administration will negotiate an FTA with Kenya. "Under President Trump's leadership, we look forward to negotiating and

[7] Kenya Ministry of Foreign Affairs (2019). *Inaugural Bilateral Strategic Dialogue (BSD) in Washington*. https://www.mfa.go.ke/?p=2622
[8] Id.
[9] Joint Statement on the Inaugural U.S.-Kenya Bilateral Strategic Dialogue. 8 May 2019. https://www.state.gov/joint-statement-on-the-inaugural-u-s-kenya-bilateral-strategic-dialogue/#:~:text=The%20United%20States%20and%20Kenya,relationship%20to%20a%20Strategic%20Partnership.
[10] USTR (2019). Inaugural Meeting of the U.S.-Kenya Trade and Investment Working Group. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/inaugural-meeting-us-kenya-trade-and#:~:text=Inaugural%20Meeting%20of%20the%20U.S.%2DKenya%20Trade%20and%20Investment%20Working%20Group,-04%2F08%2F2019&text=Washington%2C%20D.C.,established%20by%20President%20Donald%20J.
[11] USTR (2019). *The United States and Kenya hold Second Meeting of the Trade and Investment Working Group*, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/november/united-states-and-kenya-hold
[12] *U.S. Announces Intent to Start Talks on Kenya Trade Agreement*, 6 February 2020. https://www.bloomberg.com/news/articles/2020-02-06/u-s-announces-intent-to-start-talks-on-kenya-trade-agreement

concluding a comprehensive, high-standard agreement with Kenya that can serve as a model for additional trade agreements across Africa,"[13] Ambassador Lighthizer noted in his letter to Congress.[14] According to the USTR, the proposed FTA intends to "build[] on the objectives of the [AGOA] and serve as an enduring foundation to expand U.S.-Africa trade and investment across the continent."[15]

2.2. Kenya and United States Economic Relations: Overview

2.2.1. Kenya

Kenya is a member of the World Trade Organization (WTO). Kenya is also a member of the East African Community (EAC) and a member of the Common Market for Eastern and Southern Africa (COMESA). Kenya has ratified the African Continental Free trade Area (AfCFTA) Agreement, a free trade agreement of continental significance (**Appendix I**). The AfCFTA Agreement was signed on 21 March 2018, and became effective on 30 May 2019. The AfCFTA is a mega-regional trade agreement that creates a pan-African trade bloc that has the potential to create a $3.4 trillion economic area. To date, 54 states have signed the AfCFTA Agreement and 29 states, including Kenya, have both signed and ratified the agreement. Implementation of the AfCFTA is set to begin on 1 January 2021. The AfCFTA is more than a traditional free trade area and is more like a comprehensive economic partnership agreement. Article 6 of the AfCFTA Agreement stipulates that "[t]his Agreement shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy."

KENYA-U.S. FTA NEGOTIATION: KEY TIMELINE

Date	Event
October 2000	Kenya designated an AGOA beneficiary
January 2001	AGOA Benefits extended to Kenya's Textile Sector
August 2018	The U.S.-Kenya bilateral relationship elevated to a strategic partnership
August 2018	The Bilateral Strategic Dialogue established
August 2018	The U.S.-Kenya Trade and Investment Working Group established
February 2020	The White House announced plan to start trade negotiations with Kenya
March 23, 2020	The USTR solicited public comments and announced plans to hold a public hearing on a proposed U.S.-Republic of Kenya trade agreement (public hearing subsequently cancelled due to COVID-19).
May 22, 2020	The United States released "United States-Kenya Negotiations: Summary of Specific Negotiating Objectives"
June 22, 2020	Kenya released "Proposed Kenya – United States of America Free Trade Area Agreement: Negotiation Principles, Objectives and Scope"

[13] AGOA.Info (2019). *Trump administration notifies Congress of intent to negotiate trade agreement with Kenya*, https://agoa.info/news/article/15751-trump-administration-notifies-congress-of-intent-to-negotiate-trade-agreement-with-kenya.html

[14] https://agoa.info/images/documents/15751/2020kenyaftacongressionalnotificationletter-pelosi.pdf

[15] Id.

2.2.2. The United States

In 2019, the U.S. had a $21.4 trillion economy. The value of U.S. merchandise total exports was $1.6 trillion in 2019, and the value of U.S. merchandise general imports totaled $2.5 trillion over the same period. The U.S. is a member of the WTO. The U.S. is currently party to 14 FTAs involving a total of 20 countries (**Appendix II**). The U.S. has also concluded forty-five BITs of which thirty-nine are in force. The U.S. continues to negotiate FTAs. The USTR published negotiating objectives for trade agreements with the European Union (EU) and the United Kingdom (UK) in January and February 2019, respectively. The U.S. and Britain launched formal negotiations on an FTA on May 5, 2020. The negotiation of the Transatlantic Trade and Investment Partnership was launched in 2013 but died in 2016 without an agreement. In April 2019, the European Council approved the reopening of limited negotiations with the U.S.[16]

2.3. Kenya and Unilateral Preference Schemes

2.3.1. The United States Generalised System of Preferences

The U.S. generalized system of preference (GSP) program was established in 1974 pursuant to Title V of the Trade Act of 1974 (19 U.S.C. §§ 2461 – 2467).[17] The Trade Act came into effect on January 1, 1976. GSP regulations may be found at 15 CFR Part 2007.[18] Finally, the GSP regulations of U.S. Customs and Border Protection (CBP) may be found at 19 CFR Part 10.171 - 10.178. The GSP program provides preferential duty-free treatment for over 3,500 products from a wide range of 'designated beneficiary developing countries' (BDCs), including qualifying 'least-developed beneficiary developing countries' (LDBDCs).[19] An additional 1,500 products are GSP-eligible only when imported from LDBDCs. Authorization of the GSP program expired on December 31, 2017. However, on March 23, 2018, President Trump signed into law H.R. 1625 (Public Law 115-141), the "Consolidated Appropriations Act, 2018," which effectively authorized the GSP program through December 31, 2020, retroactive to January 1, 2018.[20]

Section 19 USC 2462(b)(2) of the Trade Act sets forth the criteria that each country must satisfy before being designated a GSP beneficiary. Kenya is a GSP-eligible beneficiary developing country.[21] To benefit from GSP, "a good must be either wholly obtained or

[16] https://www.consilium.europa.eu/en/press/press-releases/2019/04/15/trade-with-the-united-states-council-authorises-negotiations-on-elimination-of-tariffs-for-industrial-goods-and-on-conformity-assessment/

[17] 19 U.S. Code § 2462 - Designation of beneficiary developing countries. https://www.law.cornell.edu/uscode/text/19/2462

[18] *The Regulations of the U.S. Trade Representative Pertaining to Eligibility of Articles and Countries for the Generalized System of Preference Program* (15 CFR Part 2007). https://ustr.gov/issue-areas/trade-development/preferenceprograms/generalized-system-preference-gsp/gsp-program-inf.

[19] U.S.T.R. (2019). U.S. Generalized System of Preferences Guidebook. https://ustr.gov/sites/default/files/IssueAreas/gsp/GSP_Guidebook-December_2019.pdf#page=14. According to the Guidebook, as of December 2019, there were 119 BDCs, including 17 non-independent territories and 44 LDBDCs. See General Note 4 of the U.S. Harmonized Tariff Schedule for the most up-to-date number of GSP beneficiaries: https://hts.usitc.gov/current.

[20] Consolidated Appropriations Act, 2018 (Title V) - H.R. 1625. U.S. Custom and Border Protection, Generalized System of Preferences. https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/generalized-system-preferences

[21] U.S.T.R. (2019). U.S. Generalized System of Preferences Guidebook. https://ustr.gov/sites/default/files/IssueAreas/gsp/GSP_Guidebook-December_2019.pdf#page=14

sufficiently manufactured in a GSP country."[22] Sufficiently manufactured means that "all 3rd-country materials have undergone a substantial transformation plus at least 35% of the good's value has been added in the beneficiary country."[23] In addition, the good must be "imported directly".[24] The U.S. GSP program imposes quantitative ceilings – Competitive Need Limitations (CNLs) – on GSP benefits for all tariff items and BDC.[25] CNLs are basically quantitative ceilings on GSP benefits for each product and beneficiary developing country. Under certain circumstances, the CNLs may be waived. Under the U.S. GSP program, a wide range of Kenya's manufactured products are entitled to preferential duty treatment in the U.S. On any of the 3,000-plus items eligible for GSP treatment, no quantitative restrictions are applicable to exports from Kenya.

2.3.2. Kenya and the African Growth and Opportunity Act

2.3.2.1. About the African Growth and Opportunity Act

AGOA is a piece of legislation that the U.S. Congress approved and signed into law in May 2000.[26] AGOA had an initial eight-year term but has been extended a couple of times. On 29 June 2015, pursuant to the Trade Preferences Extension Act of 2015, AGOA was extended for 10 years, through June 2025.[27] AGOA essentially authorized a new trade and investment policy for SSA. AGOA is a preferential trade agreement in that it provides non-reciprocal duty-free access for qualifying goods from qualifying SSA countries. Since 2000 when it was signed into law, AGOA has been a core element of the U.S. trade relationship with SSA. AGOA builds on and expands the trade preference under the U.S. GSP.

AGOA is similar to the U.S. GSP in the sense that both are part of the U.S. tariff preference program designed to assist beneficiary countries by providing greater access to the U.S. market.[28] The eligibility criteria and rules of origin for AGOA are similar to those of the GSP program. AGOA differs from U.S. GSP in a few aspects. First, all GSP-eligible products qualify for duty-free access under AGOA. Second, about 1,800 additional qualifying HTS 8-digit tariff-line items qualify for duty-free access only under AGOA. Third, AGOA beneficiary countries (and least-developed beneficiary developing countries) are exempt from the GSP CNLs. Fourth, 26 countries eligible for AGOA textile and apparel benefits in 2019 also qualified for additional textile and apparel benefits intended for LDBDCs.

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[22] U.S. Custom and Border Protection, Generalized System of Preferences. https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/generalized-system-preferences

[23] Id.

[24] Id.

[25] For more information see the USTR-US Generalized System of Preferences Guidebook at https://ustr.gov/sites/default/files/IssueAreas/gsp/GSP_Guidebook-December_2019.pdf.

[26] The African Growth and Opportunity Act, or AGOA (Title I, Trade and Development Act of 2000; P.L. 106–200). https://www.govinfo.gov/content/pkg/STATUTE-114/pdf/STATUTE-114-Pg251.pdf

[27] U.S.T.R. (2019). U.S. Generalized System of Preferences Guidebook. https://ustr.gov/sites/default/files/IssueAreas/gsp/GSP_Guidebook-December_2019.pdf#page=14

[28] USTR, Preference Programs. https://ustr.gov/issue-areas/preference-programs

THE AFRICAN GROWTH AND OPPORTUNITY ACT

SEC. 103. STATEMENT OF POLICY. 19 USC 3702.
Congress supports—
(1) encouraging increased trade and investment between the United States and sub-Saharan Africa;
(2) reducing tariff and nontariff barriers and other obstacles to sub-Saharan African and United States trade;
(3) expanding United States assistance to sub-Saharan Africa's regional integration efforts;
(4) negotiating reciprocal and mutually beneficial trade agreements, including the possibility of establishing free trade areas that serve the interests of both the United States and the countries of sub-Saharan Africa.

To qualify for AGOA beneficiary status, a country must meet three requirements. First, the country must be from SSA. *Second*, the country must meet AGOA's eligibility criteria (**Appendix III**). *Third*, AGOA preference only applies to specified goods. To qualify for AGOA benefits, countries must meet the eligibility criteria set forth in: (1) section 104 of AGOA (19 U.S.C. 3703); and (2) section 502 of the Trade Act of 1974 (19 U.S.C. 2462) (hereinafter 1974 Act). In 2019, 39 SSA countries were eligible for AGOA benefits. Of the 39 AGOA-eligible countries, 27 were eligible for AGOA textile and apparel benefits for all or part of 2019. The list of AGOA beneficiaries is reviewed and revised annually.[29] The annual eligibility review has consequences for countries. Following the annual eligibility review conducted in 2019, Cameroon lost its AGOA eligibility status effective January 1, 2020. With Cameroon out, thirty-eight (38) countries are eligible for AGOA benefits in 2020 (**Appendix IV**).[30]

For eligible SSA countries, AGOA provides duty-free access to the U.S. market for over 1,800 products.[31] Qualifying products include textile and clothing, select agricultural products, travel luggage, wine, machinery and equipment, and chemicals. In 2019, total U.S. goods imports under AGOA (including GSP) totaled $8.4 billion compared to $13.7 billion in 2017.[32] In 2019, total U.S. non-oil imports under AGOA totaled $3.8 billion, down from $4.3 billion in 2017. U.S. AGOA apparel imports totaled $1.4 billion in 2019 and is reportedly the highest annual total since 2005.[33] In 2019, leading AGOA export categories to the U.S. were crude oil ($4.6 billion in 2019), apparel ($1.4 billion), agricultural products ($656 million), minerals and metals ($510 million), transportation equipment ($499 million), and chemicals and related products ($434 million).[34]

[29] 2020 Annual Review of Country Eligibility for Benefits Under AGOA (May 13, 2030).
[30] USTR (2019). AGOA Eligible and Ineligible Countries – 2020. https://ustr.gov/issue-areas/preference-programs/african-growth-and-opportunity-act-agoa/list-eligible-countries
[31] USTR (2019), Africa Growth and Opportunity Act. https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa
[32] USTR (2020)
[33] USTR (2020)
[34] Id.

U.S/ imports for consumption from AGOA beneficiaries, 2017-2019

Item	2017	2018	2019
Total import from AGOA countries (million $)	24.868	24,524	20, 763
Total imports under AGOA (millions $)	13,550	12,025	8.400
Total imports under AGOA, excluding GSP (million $)	12,235	10,791	7,328
Total imports under AGOA (as a share of all imports from AGOA countries) was 40.5%, down from 54.5% in 2017.	54.5	49.0	40.5

Source: United States International Trade Commission

In many circles, AGOA is seen as a form of aid to countries in SSA, and not necessarily designed to bring about significant economic transformation in the continent. AGOA has been a useful negotiating tool for the U.S. In 2015, faced with South Africa's ban on the import of chicken products from the United States, the Obama administration mandated a 30-day "out-of-cycle" review of AGOA trade privileges with South Africa, a move that had the potential to lead to South Africa losing some or all of its benefits under AGOA. In the face of the real threat of being excluded from the AGOA reauthorization act, the South African government relented and allowed the U.S. to export 65,000 tons of chicken products to South Africa.[35] Assessments of AGOA's impact are mixed. In a recent report, the USTR concluded that AGOA "has encouraged American companies to both do business with and invest in [SSA]," "has spurred economic growth and regional integration across the continent," and has "provided incentives to African governments to undertake key political and economic reforms."[36] According to the USTR:

> AGOA has helped numerous beneficiary countries expand and diversify their exports to the United States. By providing these new market opportunities for African exports, the legislation has bolstered economic growth, generated jobs and helped to alleviate poverty on the continent. Additionally, AGOA has helped create a more conducive environment for American investment and business interests as African markets continue to expand. The legislation has also enabled many American companies to get a foothold into key African markets and diversify their global sourcing chains.[37]

2.3.2.2. Kenya and AGOA

Kenya was designated an AGOA beneficiary on 2 October 2000. On 18 January 2001, AGOA beneficiary status was also extended to Kenya's textile sector. Kenya has maintained its AGOA status and qualifies for duty free access until 2025. Kenya has consistently taken advantage of the benefits related to AGOA's tariff preferences and liberal rules of origin for apparel. By country, the U.S. is Kenya's third largest export market (after Uganda and Pakistan). Kenya's export to the U.S. since the start of AGOA totals $646 million up 493% from the figure in 2000. U.S. export to Kenya since the start of AGOA totals $315 million up

[35] *US pressures South Africa to import its chicken.* https://agoa.info/news/article/5889-us-pressures-sa-to-import-its-chicken.html

[36] USTR (2020). 2020 Biennial Report on the Implementation of the African Growth and Opportunity Act. https://ustr.gov/sites/default/files/assets/agoa/USTR-Biennial-Report-to-Congress-on-AGOA-062320.pdf

[37] Id.

34% from the figure in 2000. On average, about 74% of Kenya's recent export to the U.S. qualified specifically for duty-free preferences under GSP/AGOA.

Apparels/textile and agricultural products are very important in Kenya-U.S. trade. The top exports from Kenya to the U.S. in 2018 were apparel products (# 1), agricultural products (# 2), electronic products (# 3), chemical products (# 4), misc. manufacturers (# 5), minerals/metals (# 6) and forestry products (# 7). In 2018, Kenya's was reportedly the number one apparel exporter from Africa to the U.S. Kenya was among the top five country exporters under AGOA in 2019 and exported $518 million in goods mostly apparel, nuts, cut flowers.[38] Kenya is one of 16 AGOA-eligible countries that has adopted national an AGOA utilization strategy.[39]

Major suppliers of duty-free U.S. imports under AGOA in 2019

Country	Share of total AGOA imports
Nigeria	42.7%
South Africa	16.7%
Angola	7.4%
Kenya	7.0%
Ghana	5.7%
The Republic of Congo	5.6%
Total	85.0%

Source: United States International Trade Commission

2.4. Kenya's Top Trading Partners[40]

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 while goods imports totaled $644 million.[41] In terms of import from the U.S., in 2018, Kenya was the United States' 110th largest goods export market.[42] 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). The U.S. exports agricultural products to Kenya. In 2018, the U.S. total exports of agricultural products to Kenya totaled $37 million. Leading U.S. agricultural export categories to Kenya include coarse grains (ex. corn) ($10 million), wheat ($6 million), pulses ($5 million), vegetable oils (ex. soybean) ($3 million), and planting seeds ($3 million).

In terms of exports to the U.S., in 2018, Kenya was the United States' 85th largest supplier of goods imports. 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

[38] The top five country exporters were Nigeria ($3.1 billion; mostly crude oil), South Africa ($2.0 billion; mostly vehicles and parts, nuts, wine), Angola ($605 million; mostly crude oil), Kenya ($518 million; mostly apparel, nuts, cut flowers), and Ghana ($441 11 million; mostly crude oil, cassava, cocoa powder/paste).

[39] Kenya Ministry of Industry, Trade and Cooperatives (2018). The Kenya National African Growth and Opportunity Act (AGOA) Strategy and Action Plan (2018 – 2023).

[40] USTR, Kenya, https://ustr.gov/countries-regions/africa/east-africa/kenya

[41] USTR, Kenya, https://ustr.gov/countries-regions/africa/east-africa/kenya

[42] USTR, Kenya, https://ustr.gov/countries-regions/africa/east-africa/kenya

($43 million), tea, including herb ($17 million), essential oils ($11 million), and other vegetable oils ($3 million).[43]

Kenya's Export: Top 10 Export Destinations (2018)

	Trading Partner	Millions in Dollars
1	Uganda	611
2	Pakistan	586
3	United States	468
4	Netherlands	458
5	United Kingdom	397
6	United Arab Emirate	346
7	Tanzania	294
8	Egypt	199
9	Rwanda	176
10	Democratic Republic of Congo (DRC)	150

Source: International Monetary Fund, Direction of Trade Statistics

Kenya's Imports: Top Ten Source of Imports (2018)

	Trading Partner	Millions in Dollars
1	China	3,661
2	India	1,828
3	Saudi Arabia	1,705
4	UAE	1,457
5	Japan	987
6	South Africa	640
7	United States	528
8	Uganda	488
9	Germany	461
10	Indonesia	455

Source: International Monetary Fund, Direction of Trade Statistic

2.5. Kenya-U.S. Free Trade Agreement: Negotiating Objectives of Parties

2.5.1. United States: General and Specific Negotiating Priorities for U.S.-Kenya FTA

The general objectives of the U.S. regarding trade and investment agreements are found in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 ("TPA-2015" or "Trade Promotion Authority, 2015"), a legislation that was signed into law in 2015 to reauthorize Trade Promotion Authority (TPA) also known as "fast track."

On May 22, 2020, the U.S. published the *United States-Kenya Negotiations: Summary of Specific Negotiating Objectives* (U.S. – Negotiating Objectives) that outlines the specific negotiation objectives for the Kenya-U.S. FTA.[44] Based on the general negotiating objectives articulated in the Trade Promotion Authority, 2015, and the negotiating priorities released by the USTR, the U.S. envisages a comprehensive trade agreement that is arguably modeled after the USMCA, a 2,410-page deep integration trade scheme. In total, the USTR identified at least twenty-one (21) key priorities:

[43] USTR, Kenya, https://ustr.gov/countries-regions/africa/east-africa/kenya; See AGOA: https://agoa.info/news/article/15804-from-agoa-to-fta-kenya-us-ties-growing-from-strength-to-strength.html
[44] USTR, 'United States-Kenya Negotiations: Summary of Specific Negotiating Objectives' (May 22, 2020).

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

2.6. Kenya's Negotiation Principles and Priorities

In a document released on June 22, 2020, Kenya laid out its negotiating principles, objectives and priorities.

2.6.1. Negotiating Principles

According to the Kenyan government, the following principles will guide the Kenya-U.S. FTA negotiations:

- ✓ The FTA will be WTO compatible and will allow for application of the 'Special and Differential Treatment.'
- ✓ The FTA will be an instrument for economic and trade development.
- ✓ The FTA negotiations shall respect the commitments that Kenya has taken at Multilateral (WTO), Continental (AfCFTA), Regional (EAC, COMESA, TFTA) and Bilateral level;
- ✓ The FTA will preserve and build on AGOA *acquis*;
- ✓ The Negotiations shall cover substantially all trade; and
- ✓ Any EAC Partner State that did not participate in these negotiations at the outset should be allowed to join the negotiations, subject to terms and conditions already agreed or accede to the concluded FTA.

2.6.2. General Negotiating Objectives

Going into negotiations, the general negotiating objectives of the Kenyan government are:

- ✓ To initiate, negotiate and conclude a WTO compatible FTA, one that promotes preferential and mutually beneficial trade, investment and economic relations and is

consistent with GATT 1994 Article XXIV, Part IV on Trade and Development and GATS Article V.

- ✓ To ensure that Kenya benefits from the American foreign policy towards Africa and Kenya in particular with a view to reaping the benefits of first mover advantage of such trade agreement with USA.
- ✓ To ensure that the FTA agreement pays fidelity to Kenya's commitments and obligations with existing Multilateral, Regional and Bilateral trade agreements for which Kenya has signed and ratified.
- ✓ To make sure that the FTA provides for safeguards, and exceptions to protect Kenya's nascent industrial and agricultural sectors.
- ✓ To increase the inflow of USA FDI into Kenya that will improve vertical and horizontal linkages in the Kenyan economy.
- ✓ To take advantage of the opportunities created within the negotiations to provide market access for identified goods and services.
- ✓ To take advantage of the opportunities created within the negotiations that provide for national and regional advantages arising from foreseen commercial consequences associated with global health, economic and social dynamics.
- ✓ To promote Kenya's position as a transit hub for goods and services that has been availed by the expansion of land sea and air transport infrastructure to attract investments.
- ✓ To ensure the expansion of value chains, especially in production, value addition and transit trade and to create demonstrable economic benefits to the Kenyan economy especially creation of decent jobs and sustainable livelihoods.
- ✓ To make sure that the outcome of the negotiations will become the basis of future FTAs with other African countries, Kenya and the USA will endeavour to brief interested African countries periodically.
- ✓ To make sure that the outcome of the negotiations contains provisions for technical assistance and capacity building which will be made available to enable Kenya to fully participate in the negotiations, implement obligations under the FTA.
- ✓ To make sure that the negotiations on trade in goods, trade in services, investment and other areas will be conducted in an agreed sequence to ensure a balanced outcome.
- ✓ To create 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.

2.6.3. Specific Negotiating Objectives

In terms of sectoral coverage, Kenya's negotiating objectives mentions most of the sectors identified in the U.S. negotiating objectives including:

1. Trade in Goods
2. Food and Agriculture
3. Sanitary and Phytosanitary Measures
4. Customs
5. Rules of Origin
6. Trade Remedies
7. Technical Barriers to Trade
8. Legal and Transparency Issues
9. Anti-Corruption
10. Trade in Services

11. Digital Trade in Goods and Services and Cross-Border Data Flows
12. Investment
13. Intellectual Property
14. Labor
15. Environment
16. State-Owned Enterprises
17. Government Procurement
18. Dispute Settlement

2.6.4. Conclusion

When Kenya and the U.S. launched their trade talks on July 8, 2020, both sides appeared poised to hammer out a deal that goes well beyond traditional trade policy. If the choice is between "deep" trade agreement (the USMCA model) and a limited "skinny" deal, based on their respective negotiating objectives, both sides have clearly opted for a very deep and comprehensive FTA. Essentially, any deal hammered out will commit both sides to cut their tariffs, undertake additional obligations in policy areas covered by the WTO, and also undertake additional obligations in policy domains not currently regulated by the WTO.

Agriculture

3. Agriculture

3.1. Introduction

Global agricultural trade has seen tremendous growth over the last fifty years. Since 1995 and with the establishment of the WTO, global agricultural exports have more than tripled in value and more than doubled in volume. In 2018, global agricultural export by value was estimated at about $1.8 trillion. Agriculture is very important in U.S. trade policy. In the FY2019, farm product exports from the U.S. totaled $136 billion and made up about 8% of total U.S. exports. In FY2019, U.S. agricultural imports were valued at $131 billion. Underscoring the importance of agriculture in U.S. trade, sales of U.S. agricultural products to foreign markets absorb about one-fifth of U.S. agricultural production. Not unsurprisingly, how to open up new markets for U.S. farm products and how to protect and enhance the health of the U.S. farm economy are major considerations that drive U.S. trade policy.

NAFTA eliminated almost all quotas and tariffs on agricultural trade between the U.S., Mexico and Canada. Largely as a result of NAFTA, Canada and Mexico, respectively, are the first and third largest export markets for U.S.' food and agricultural products. The USMCA builds on NAFTA's liberalization framework and largely maintains all the NAFTA's duty-free treatment. The USMCA also includes several significant changes. First, Canada agreed to grant new market access to dairy products from the U.S. Second, the USMCA includes a separate stand-alone chapter on sanitary and phytosanitary (SPS) measures. Third, the USMCA addresses biotechnology and contains new rules and mechanisms on increased trilateral transparency and cooperation on agricultural biotechnology.

3.2. Agriculture and the USMCA

The USMCA's agricultural chapter (Chapter 3) is comprised of 16 articles and several annexes including a Mexico-U.S. Bilateral annex (Annex 3-B), a Canada-U.S. Bilateral annex (Annex 3-A), an alcohol annex (Annex 3-C), and a proprietary food formula annex (Annex 3-D). The agricultural provisions of the USMCA are extensive and cover a broad range of issues including tariffs, SPS, biotechnology, and cooperation.

3.2.1. Market Access

Regarding tariff, the USMCA maintains NAFTA's tariff rates. Essentially, all food and agricultural products that had zero tariffs under NAFTA, remain at zero under the USMCA. In addition, Canada made a number of concessions to the U.S. in key sub-sectors. For example, Canada agreed increase market access for U.S. dairy products via tariff rate quotas (TRQs). Thus, U.S. dairy imports within a TRQ enter Canada duty-free while those beyond the quota level face higher over-quota tariff rates of as much as 200% in some cases. Canada also agreed to replace the poultry TRQs under NAFTA with new TRQs and are expected to lead to greater

imports of U.S. eggs, turkey meat, and eggs, but reduce the quantity of U.S. chicken meat that can be imported into Canada duty free.[45]

3.2.2. Agricultural Intellectual Property; Biotechnology

The USMCA addresses biotechnology directly and explicitly. In general, Parties confirm the importance of encouraging agricultural innovation and facilitating trade in products of agricultural biotechnology, while fulfilling legitimate objectives, including by promoting transparency and cooperation, and exchanging information related to the trade in products of agricultural biotechnology. In the USMCA, biotechnology is defined as:

> [T]echnologies, including modern biotechnology, used for the deliberate manipulation of an organism to introduce, remove, or modify one or more heritable characteristics of a product for agriculture and aquaculture use and that are not technologies used in traditional breeding and selection.[46]

USMCA's provisions on agricultural biotechnology are mostly about transparency, timely review of products that require regulatory approval, and cooperation between the Parties. For example, Article 3.14 provides that each Party shall make available to the public and, to the extent possible, online: (a) the information and documentation requirements for an authorization, if required, of a product of agricultural biotechnology; (b) any summary of any risk or safety assessment that has led to the authorization, if required, of a product of agricultural biotechnology; and (c) any list of the products of agricultural biotechnology that have been authorized in its territory.[47] Further, a Party requiring any authorization for a product of agricultural biotechnology shall inter alia, (i) accept and review applications for the authorization, if required, of products of agricultural biotechnology on an ongoing basis year-round; (ii) adopt or maintain measures that allow the initiation of the domestic regulatory authorization process of a product not yet authorized in another country; and communicate with the other Parties regarding any new and existing authorizations of products of agricultural biotechnology so as to improve information exchange.

The USMCA also has a section on managing low-level presence (LLP) occurrence. LLP "occurs when an importing country detects low levels of plant materials that are the product of agricultural biotechnology and have passed safety assessments in another country, but not in the importing country."[48] In the event of an LLP occurrence, the exporting party is obliged to inter alia provide any summary of the specific risk or safety assessments that the exporting Party conducted in connection with any authorization of the product of modern biotechnology that is the subject of the LLP occurrence. On request, and if available, the importing party is obliged to provide to the exporting Party a summary of any risk or safety assessment that the importing Party has conducted in accordance with its domestic law in connection with the LLP occurrence.

3.2.3. Spirits

Annex 3-C of the USMCA applies to trade in distilled spirits, wine, beer, and other alcohol beverages. The focus is on measures related to the internal sale and distribution of

[45] USMCA, Article 3.14.1.
[46] USMCA, Article 3.12.
[47] USMCA, Article 3.14.
[48] United States International Trade Commission (2019).

distilled spirits, wine, beer, or other alcohol beverages. USMCA Parties agree to treat the distribution of each other's spirits, wine, beer, and other alcoholic beverages as they do for products of national origin. The agreement establishes listing requirements for a product to be sold, along with specific limits on cost markups.

3.2.4. Agriculture-specific MFN

As between the U.S. and Mexico, each Party made a commitment to "ensure that any measure it adopts or maintains regarding the grading of agricultural goods for quality, whether on a mandatory or voluntary basis, shall be applicable to imported agricultural goods, on the basis of the same regulatory framework, including the same requirements and based on the same criteria as domestic agricultural goods."[49]

3.2.5. Mexico-United States Side Letter on Cheeses[50]

A side letter between the U.S. and Mexico protects against the use of some GIs as a restraint on trade. The side letter reads in part:

> In recognition of their shared commitment to certainty and transparency in trade, the United States and Mexico recognize that the following terms are terms used in connection with cheeses from U.S. producers currently being marketed in Mexico. Mexico confirms that Mexican cheese producers also use these terms. Mexico confirms that market access of U.S. products in Mexico is not restricted due to the mere use of these individual terms.

The Side Letter lists 33 names for cheese that Mexico promises would remain available as common names for U.S. cheese producers to use in exporting cheeses to Mexico. Because some of the names on the list are currently protected as GIs in the EU, analysts speculate that the Side Letter on Cheeses may put Mexico in a difficult situation vis-à-vis the EU.

3.2.6. Cooperation

Pursuant to Article 3.13, each Party shall designate and notify a contact point or contact points for the sharing of information on matters related to the agricultural chapter, in accordance with Article 30.5 (Agreement Coordinator and Contact Points). Under Article 3.16, the Parties establish a Working Group for Cooperation on Agricultural Biotechnology (Working Group) for information exchange and cooperation on policy and trade-related matters associated with products of agricultural biotechnology. The Parties also agreed to establish a Committee on Agricultural Trade ("Agriculture Committee"), composed of government representatives of each Party.

3.2.7. Others

The USMCA exempts the Parties from each other's special safeguards on agricultural products that receive preferential tariff treatment; establishes best practices in TRQ administration, SPS regulations, and regulation of agricultural biotechnology; and also provides protection for proprietary food formulations.

[49] ANNEX 3-B AGRICULTURAL TRADE BETWEEN MEXICO AND THE UNITED STATES, Article 7.
[50] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/MX-US_Side_Letter_on_Cheeses.pdf

3.3. Regulatory Space

The agricultural chapter of the USMCA contains several provisions designed to protect domestic regulatory space. For example,

- The section on biotechnology does not require a Party to mandate an authorization for a product of agricultural biotechnology to be on the market. *Article 3.14.2.*

- In Article 3.6, the Parties recognize that domestic support measures can be of crucial importance to their agricultural sectors but may also have trade distorting effects and effects on production. The article further provides that if a Party supports its agricultural producers, the Party "shall consider domestic support measures that have no, or at most minimal, trade distorting effects or effects on production."

- Article 3.5 is titled 'Export Restrictions – Food Security' and recognizes "that under Article XI:2(a) of the GATT 1994, a Party may temporarily apply an export prohibition or restriction that is otherwise prohibited under Article XI:1 of the GATT 1994 on a foodstuff to prevent or relieve a critical shortage, subject to meeting the conditions set out in Article 12.1 of the Agreement on Agriculture.

3.4. Key Considerations for Kenya

3.4.1. The Importance of Agriculture in U.S. Economy

The food and agricultural sector play a major and significant role in the U.S. Economy. In 2019, the food and agricultural contributed $1.109 trillion to the U.S. gross domestic product (GDP), a 5.2-percent share.[51] Of the $1.109 trillion from the agriculture, food, and related industries, the output of America's farms was $136.1 billion —about 0.6 percent of GDP. The U.S. food and agricultural sector accounted for 10.9 percent of total U.S. employment in 2019. What is more, sale of U.S. agricultural products to foreign markets is very important to the U.S. government. In every year since 1960, U.S. agricultural export has exceeded its imports.[52] Not surprising, food and agriculture features very strongly in U.S. FTAs. In the January 2020 "Phase One" executive agreement with the Chinese government, China agreed to reduce certain retaliatory tariffs and made commitments to grant tariff exclusions for various agricultural products in order to reach a target level of U.S. imports—$32 billion (relative to a 2017 base of $24 billion) over a two-year period. Signed on October 7, 2019, "Stage One" of the U.S.-Japan Trade Agreement (USJTA) also contains significant market access improvements for U.S. agricultural exports.

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[51] https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/#:~:text=Agriculture%2C%20food%2C%20and%20related%20industries,about%200.6%20percent%20of%20GDP.

[52] U.S. Department of Agriculture (USDA), Foreign Agricultural Service (FAS), Global Agricultural Trade System (GATS), February 2020.

U.S. Agricultural Trade, Fiscal Years, 2014-19 Billion U.S. Dollars

Source: Congressional Research Service (2020).

3.4.2. U.S. Food and Agricultural Exports

The U.S. is the world's second largest agricultural trader after the EU. U.S. agricultural exports have grown steadily over the past quarter century, reaching $136.7 billion in 2019, up from $46.1 billion in 1994."[53] With U.S. agricultural output growing faster than domestic demand for many products, U.S. farmers and agricultural firms increasingly rely on export markets to sustain prices and revenues. Over the years, the product composition of U.S. agricultural exports has shifted, a reflection of changes in global supply and demand.[54] In the last two decades, exports of consumer-oriented products, including high-value products (HVP) such as dairy products, meats, fruit, and vegetables, have shown strong growth driven by increasing population and income worldwide and growing diversification of diets.[55]

3.4.3. U.S. Agricultural Trade Policy

Increasing market access for U.S. food and agricultural product is integral in U.S. agricultural trade policy.[56] According to the Trade Promotion Authority, 2015, the principal negotiating objective of the U.S. with respect to agriculture is to obtain competitive opportunities for United States exports of agricultural commodities in foreign markets substantially equivalent to the competitive opportunities afforded foreign exports in United States markets and to achieve fairer and more open conditions of trade in bulk, specialty crop, and value added commodities. Because of the role of the food and agricultural sector in the U.S. economy, agriculture is frequently a sticking point in U.S. trade relations. Studies suggest that the USMCA "[w]ill likely increase annual U.S. agricultural and food exports to the world by $2.2 billion (1.1 percent) when fully implemented."[57]

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[53] https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance/
[54] https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance/
[55] Id.
[56] E. Courea, "Pompeo: Agriculture a Sticking Point in U.K.-U.S. Trade Talks," Politico, January 30, 2020
[57] United States International Trade Commission (2019).

In any trade deal with Kenya, the U.S. will undoubtedly want to address existing tariff and non-tariff barriers to U.S. agricultural export. Issues such as public food stockholding are likely to be on the table as well. In the past, the U.S. government has expressed concern that Kenya's MFN tariffs – rates that apply to imports from the U.S. – are relatively high. As noted in a 2019 report:

> As of 2017 (latest data available), Kenya's Most Favored Nation (MFN) applied tariff rate averages 12.8 percent for all imported products. Kenya generally applies the EAC Customs Union's Common External Tariff, which includes three tariff bands: zero percent duty for raw materials and inputs; 10 percent duty for processed or manufactured inputs; and 25 percent duty for finished products. For certain products and commodities deemed "sensitive," Kenya applies ad valorem rates above 25 percent. This includes rates of 60 percent for most milk products, 50 percent for corn and corn flour, 75 percent for rice, 60 percent for wheat flour, 100 percent for sugar, and 50 percent for textiles. For some products and commodities, tariffs vary across the five EAC member states…. In 2017, Kenya's simple average WTO bound tariff rate was significantly higher at 100 percent for agricultural products and 58.5 percent for nonagricultural products. Kenya's maximum WTO bound tariff rate is 100 percent for both agricultural and non-agricultural products.[58]

Beyond tariffs, the U.S. government has expressed concerns about Kenya's ban on imports of nearly all genetically engineered (GE) agricultural products.[59] [60] Regarding Kenya's ban on genetically engineered agricultural products, the U.S. government has observed:

> Kenya's GE ban has blocked both food aid and commercial U.S. agricultural exports derived from agricultural biotechnology from Kenya. The restriction affects U.S. exports of processed and unprocessed foods and feed ingredients, such as soy, corn, and distiller dried grains. The GE import ban also affects transshipment. Food aid shipments of GE commodities destined for inland east African countries, which would ordinarily enter through the Port of Mombasa, must be diverted to other ports or reformulated with non-GE commodities.[61]

3.4.4. Market Access is a Key Issue for the U.S.

Kenya is presently not a significant trading partner for U.S. agricultural products.[62] However, judging from United States' negotiating objectives, the U.S. is interested in market access for U.S. food and agricultural products.[63] The USTR wants to secure comprehensive market access for U.S. agricultural goods in Kenya by reducing or eliminating tariffs. Essentially, the U.S. wants to take NAFTA's agricultural provision as the floor and build on NAFTA. A Kenya-US FTA that builds on the agricultural provisions in NAFTA and the USMCA is likely to have a major, arguably devastating, impact on Kenya's agricultural producers. NAFTA's market access openings for agricultural product were significant. According to the Baker Institute:

> One of the most significant market opening aspects of NAFTA was the elimination of virtually all quotas and tariffs on agricultural trade between the U.S. and Mexico, and most restrictions on trade between the U.S. and Canada. As a result, Canada and Mexico have become the largest and third-largest export markets for the U.S., respectively. U.S. agricultural exports to Canada

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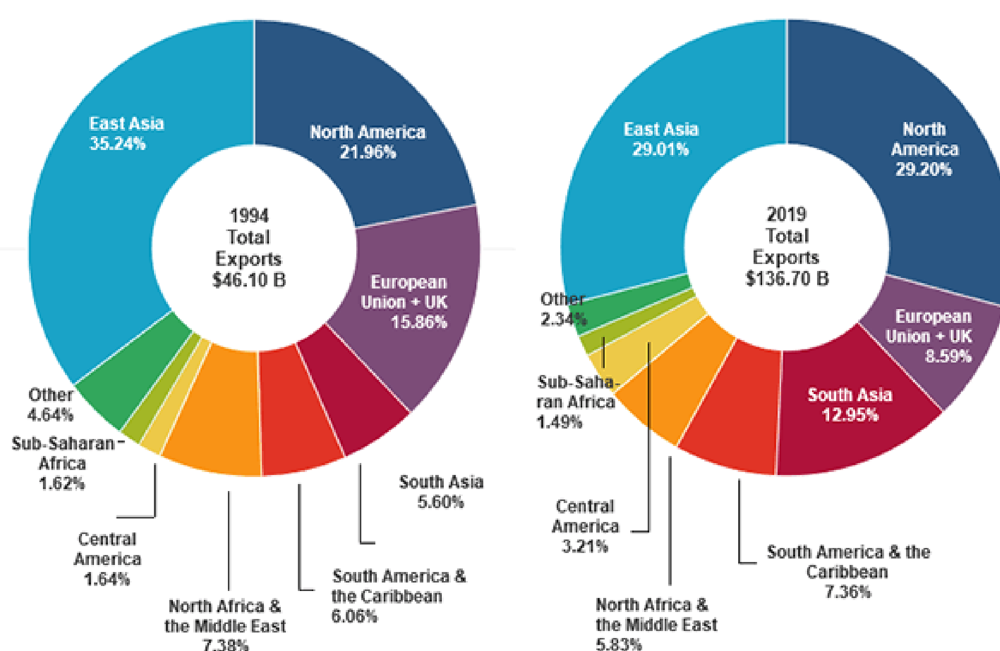
[58] USTR, 2019 National Trade Estimate Report on foreign Trade Barriers, 2019.
[59] FAS, "Kenya: Agricultural Biotechnology Annual," GAIN Report KE2019-0008, February 14, 2020.
[60] USTR, 2019 National Trade Estimate Report on foreign Trade Barriers, 2019.
[61] USTR, 2019 National Trade Estimate Report on foreign Trade Barriers, 2019.
[62] Significant trading partners for U.S. agricultural products include Canada, Mexico, and the EU. In 2017 alone, Canada and Mexico each accounted for 18 percent of U.S. agricultural imports, and for 17 percent and 13 percent, respectively, of U.S. agricultural exports.
[63] https://www.usitc.gov/publications/332/pub4889.pdf, p. 118.

were worth $23 billion in 2016 and included prepared food, fresh vegetables, fresh fruit, snack foods, and non-alcoholic beverages. U.S. imports from Canada amounted to $22 billion.[64]

3.4.5. FTAs Have Helped to Increase U.S. Agricultural Export. Africa Remains an Untapped Market for U.S. Agricultural Export.

Over the last 25 years, the destinations for U.S. agricultural exports have shifted in response to liberalization orchestrated by FTAs such as NAFTA and the USMCA. The elimination of agricultural trade barriers as a result of NAFTA and the USMCA nearly quadrupled exports (by value) to Canada and Mexico.[65] A simulation by the United States International Trade Commission ("USITC" or "U.S. International Trade Commission") that considered only the effects of the USMCA provisions relating to agricultural market access found increased U.S. agricultural exports to the world of $435 million.

Shares of Different Region in U.S. Agricultural Exports (1994 and 2019)

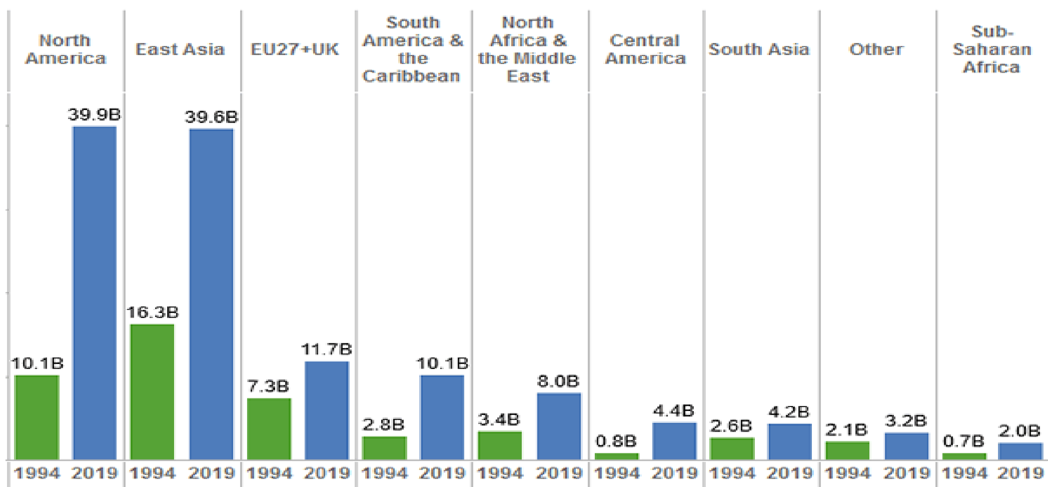


Source: United States Department of Agriculture

[64] https://www.bakerinstitute.org/media/files/files/29e60e2b/bi-report-102119-mex-usmca-6.pdf

[65] https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance/

U.S. Export Values per Region, 1994 and 2019



Source: USDA

3.4.6. Impact on Kenyan Agriculture

An FTA between a developing country like Kenya and a country that is one of the top agricultural exporters in the world is likely to have a significant impact on the former. In 2019, U.S. agricultural exports reached $136.7 billion, up from $46.1 billion in 1994. Studies on the impact of NAFTA on agricultural sector in Mexico are mixed. To critics, NAFTA destroyed Mexico's agricultural sector, flooded Mexico with cheap agricultural imports, led to the displacement of farmers. Critics also note that while NAFTA liberalized trade in food and agricultural products, it did not curb farm subsidies in the US and Canada. The result is an uneven playing field that leave poor farmers in poorer countries worse off while large agribusinesses reap the benefits of agricultural trade liberalization. According to non-governmental organization (NGO) Public Citizens:

> Before NAFTA, Mexico only imported corn and other basic food commodities if local production did not meet domestic needs. NAFTA eliminated Mexican tariffs on corn and other commodities. NAFTA terms also required revocation of programs supporting small farmers. But NAFTA did not discipline U.S. subsidies on agriculture. The result was disastrous for millions of people in the Mexican countryside whose livelihoods relied on agriculture. Amid a NAFTA-spurred influx of cheap U.S. corn, the price paid to Mexican farmers for the corn that they grew fell by 66 percent, forcing many to abandon farming. From 1991 to 2007, about 2 million Mexicans engaged in farming and related work lost their livelihoods. Mexico's participation in NAFTA was conditioned on changing its revolutionary-era Constitution's land reforms, undoing provisions that guaranteed small plots ("ejidos") to millions of Mexicans living in rural villages. As corn prices plummeted, indebted farmers lost their land, which newly could be acquired by foreign firms that consolidated prime acres into large plantations. According to a New Republic exposé: "as cheap American foodstuffs flooded Mexico's markets and as U.S. agribusiness moved in, 1.1 million small farmers – and 1.4 million other Mexicans dependent upon the farm sector – were driven out of work between 1993 and 2005. Wages dropped so precipitously that today the income of a farm laborer is one-third that of what it was before NAFTA." The exposé noted that, as jobs and wages fell, many rural Mexicans joined the

ranks of the 12 million undocumented immigrants competing for low-wage jobs in the United States.[66]

3.5. Key Recommendations

3.5.1. Assess the Cost of Agricultural Trade Liberalization for Kenya and Kenyan Farmers

The cost, to Kenya, of agricultural trade liberalization must be assessed carefully. In 2019, U.S. total exports of agricultural products to Kenya totaled $53 million in 2019. Kenya must seriously calculate the ramifications of a trade deal with a country whose agricultural exports currently stands at $136.7 billion. Leading U.S. export categories to Kenya in 2019 included: wheat ($27 million), vegetable oils (ex. soybean) ($7 million), pulses ($5 million), coarse grains (ex. corn) ($3 million), and planting seeds ($2 million). In the context of an FTA, U.S. exports of farm products to Kenya would enjoy a huge tariff advantage if the agreement resulted in zero tariffs on most agricultural products exported to Kenya. Several questions come to mind. For example,

- Can Kenya afford to open its agricultural sector to U.S. agricultural exports given the current NFN tariffs applicable to agricultural products?
- What are the likely implications of agricultural trade liberalization for farmers in Kenya and in the East African region as a whole?
- Will a trade deal with the U.S. enhance or undermine food security in Kenya and in the East African region as a whole?
- What can Kenya learn from countries like Mexico and Morocco regarding the costs and benefits of agricultural trade liberalization?
- What are the costs, in terms of nutrition security and health, of increased import of U.S. processed food and beverage; In 2017, U.S. processed food and beverage export to the world exceeded $43 billion.

3.5.2. Address a Host of Non-Tariff Barriers

In any trade deal with the U.S., the U.S. is likely to focus on tariffs and nontariff barriers to U.S agricultural exports. It is imperative that Kenya assess the risks to Kenya's agricultural sector and to the Kenyan economy of crosscutting provisions such as those affecting sanitary and phytosanitary measures, biotechnology, intellectual property rights, technical barriers to trade, and regulatory cooperation. How might these issues affect Kenya's offensive and defensive interests? The effort of countries like the U.S. to develop new export markets and to promote science-based trade standards globally has the potential to negatively affect small holder farmers, women, indigenous groups, and other vulnerable communities. It is therefore important that the views and interest of these stakeholders are adequately represented in trade policy and in trade agreements.

It is surprising that on key issues that affect its food and agricultural sector, Kenya's negotiating objective is silent. It is also somewhat surprising that ahead of the launch of trade talks Kenya made a major concession to the U.S. that expands access to the Kenyan market for U.S.

[66] NAFTA's Legacy for Mexico: Economic Displacement, Lower Wages for Most, Increased Migration, https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/NAFTA-Factsheet_Mexico-Legacy_Oct-2019.pdf

wheat export.67 On January 28, 2020, Kenya's national plant protection organization officially signed the *Export Certification Protocol between Kenya Plant Health Inspectorate Service and APHIS/PPQ on Wheat Grain Consignments to Kenya* for immediate implementation. The protocol reportedly gives U.S. exporters full access to Kenya's wheat market, valued at nearly $500 million annually. In light of all the discussions in this chapter, it is recommended that the Kenyan government review its negotiating objective relating to food and agriculture. During negotiations, it is imperative that the Kenyan government raise and address a host of issues not presently reflected in Kenya's negotiating objectives for agriculture.

Food/Agriculture

Negotiating Objectives (Kenya)	**Negotiating Objectives (United States)**
Silent except as regards SPS. "Negotiations on SPS, shall be based on the existing Cooperation Agreement between the USA and EAC."	- Eliminate practices that unfairly decrease U.S. market access opportunities or distort agricultural markets to the detriment of the United States, including: • Non-tariff barriers that discriminate against U.S. agricultural goods; and • Restrictive rules in the administration of tariff rate quotas. - Promote greater regulatory compatibility to reduce burdens associated with unnecessary differences in regulations and standards, including through regulatory cooperation where appropriate.

3.5.3. A Comprehensive Assessment of Effect of Agricultural Trade Liberalization

The U.S. is the world's second largest agricultural trader after the EU. In the FY2019, farm product exports from the U.S. totaled $136 billion and made up about 8% of total U.S. exports. Given the volume and value of U.S. agricultural export, a thorough and comprehensive economic, social and environmental assessment of the impact of liberalization of Kenya's agricultural Sector is strongly recommended.[68] The Kenyan government should carry out impact assessment of the potential impact of an agricultural deal on the Kenyan farm sector as well as on related sectors. In relation to the USMCA, the U.S. government carried out numerous impact assessments. One study by the United States International Trade Commission concluded that the USMCA "is likely to lead to slight increases in U.S. exports of dairy products, poultry meat, eggs, and egg-containing products to Canada, and to a slight increase in Canada's exports of dairy products to the United States and a minimal increase in Canada's exports of sugar and SCPs to the United States."[69] The study also concludes that the USMCA

[67] Press Release: *USDA Expands Market for U.S. Wheat: Adds Idaho, Oregon, and Washington to List of States that Can Export Wheat to Kenya*, February 25, 2020. https://www.usda.gov/media/press-releases/2020/02/25/usda-expands-market-us-wheat-adds-idaho-oregon-and-washington-list

[68] Daren Bakst, "Agricultural Trade with China: What's at Stake for American Farmers, Ranchers, and Families," Heritage Foundation Backgrounder No. 3340, August 29, 2018, https://www.heritage.org/agriculture/report/agricultural-trade-china-whats-stake-americanfarmers-ranchers-and-families

[69] https://www.usitc.gov/publications/332/pub4889.pdf, p. 117.

"will likely increase annual U.S. agricultural and food exports to the world by $2.2 billion (1.1 percent) when fully implemented."[70] The USTIC's simulation that considered only the effects of the agriculture market access provisions in USMCA showed increased U.S. agriculture and food exports to the world of $435 million.[71]

3.5.4. Assess the Potential Benefits of an FTA

Agriculture is one of the cornerstones of the Kenyan economy and the Kenyan government hopes to encourage agricultural transformation in Kenya. Kenya's key agricultural exports already enter the U.S. market duty free. A trade deal with one of the largest economies in the world whose agricultural imports was $131 billion in 2019 can go a long way in transforming Kenya's agricultural sector but only if Kenya is actually able to take advantage of the opportunities that such a deal offers. To be clear, many agricultural products (e.g. meat, dairy, tomatoes, peanuts, oranges, grapefruit and juices) are not covered either by US GASP or AGOA. However, it is doubtful that an FTA that offers zero tariffs for agricultural products will benefit Kenya unless steps are taken to make Kenya's agricultural sector and agricultural export more competitive. The good news for Kenya is that:

- Over the last quarter century, U.S. agricultural imports have grown steadily.
- Between 1994 and 2019, total agricultural imports more than tripled in value, reaching $129 billion, up from a low of $27 billion in 2000.
- From FY2015 to FY2019, U.S. agricultural imports averaged $143 billion per year.
- Studies point to a growing domestic demand, in the U.S., for an array of consumer-oriented products.
- According to a Congressional Research Service report, imported foods account for an average of about one-fifth of all foods consumed or marketed in the United States each year.

The bad news is that presently, Kenya is insignificant to the U.S. agricultural trade calculations. Kenya does not export a wide range of agricultural products to the U.S. and the value of Kenya's agricultural export to the U.S. is relatively miniscule. In 2019, Kenya's top agricultural exports to the U.S. were edible fruit & nuts (macadamia nuts) ($55 million) and coffee, tea & spice ($41 million). Even with AGOA preferences, Kenya hardly makes a dent in the U.S. coffee market. Consider that:

- In 2019, the U.S. spent US$5.8 billion on coffee imports (19.4% of total coffee imports).
- Kenya is presently not among the top exporters of coffee to the U.S.
- Indonesia (a U.S. GSP beneficiary) is the 10th largest supplier of agricultural imports to the U.S. In 2019, U.S. total imports of agricultural products from Indonesia totaled $3.0 billion.[72] Leading categories include: tropical oils ($880 million), rubber & allied products ($867 million), cocoa paste & cocoa butter ($312 million), unroasted coffee ($301 million), and spices ($177 million). In November 2020, the U.S. extended Indonesia's GSP status.

[70] https://www.usitc.gov/publications/332/pub4889.pdf
[71] https://www.usitc.gov/publications/332/pub4889.pdf
[72] Note that not all Indonesia's export to the U.S. qualify for the U.S. GSP scheme.

- About 13 percent, or US$2.61 billion, of Indonesia's export to the US was under GSP exemptions.

Coffee imports to the United States in 2019, by country of origin (in billion U.S. dollars)

Country	**Value of Coffee Import**
Colombia	$1.34
Brazil	$1.03
Guatemala	$0.32
Indonesia	$0.3
Vietnam	$0.28
Nicaragua	$0.26
Honduras	$0.25
Peru	$0.22
Mexico	$0.16
Costa Rica	$0.14

Source: Congressional Research Service (2020).

In sum, FTAs are not magic wands and may not be the tool for agricultural transformation in Kenya or in other developing countries. In the context of the Dominican Republic-Central America FTA (CSFTA-DR), the impact of the trade deal on agricultural export of the Central American nations have been modest at best, according to a Congressional Research Service paper.[73]

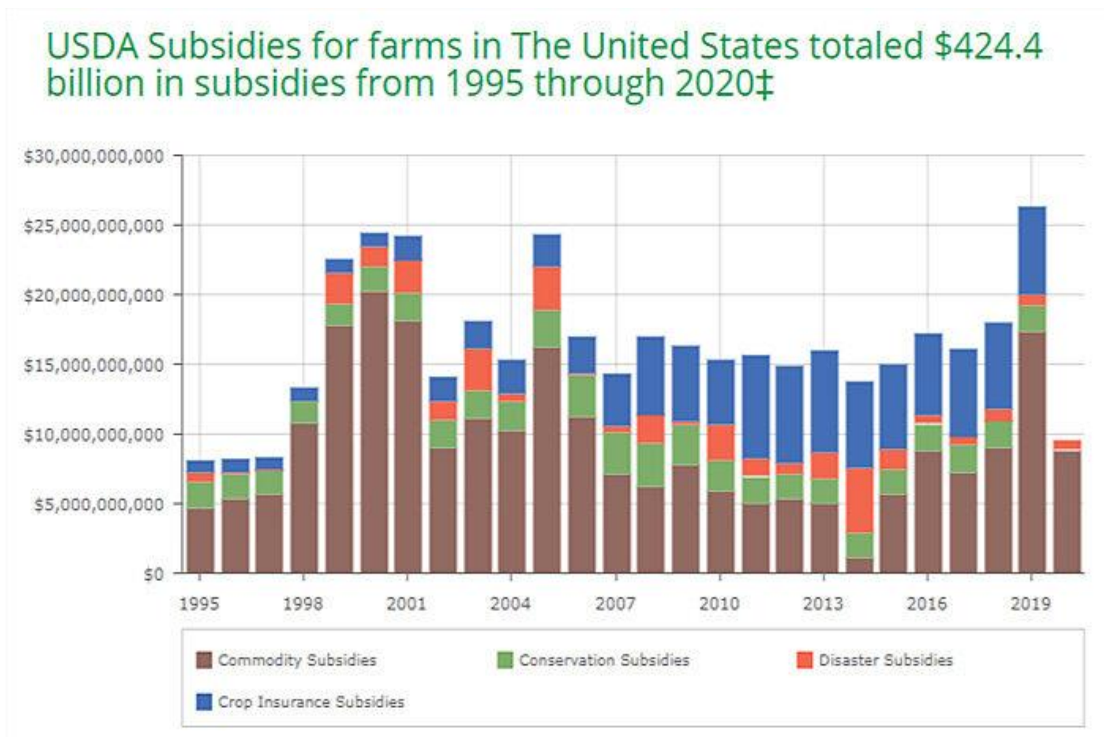
3.5.5. Consider the Likely Impact of U.S. Agricultural Subsidies

For nearly 100 years now, the U.S. government has played a major role in aiding U.S. farms and farmers through subsidies, including direct payments, crop insurance, and loans. Excluding crop insurance payments, in the U.S., federal government payments to farms have steadily risen, from $1.5 billion in 1949 to $32.1 billion in 2000.[74] In 2000, government payments made up about 45.8% of total net farm income in the U.S. Under the Trump Administration, payments to farms saw additional increases. In 2019 alone, U.S. farms received $22.6 billion in government payments and this represented about 20.4 per cent of the $111.1 billion in total net farm income. In 2020, farm subsidies jumped to $46.5 billion. In sum, farm businesses in the U.S. receive massive subsidies (about $ 20 billion annually) from the federal government. It is estimated that 39 percent of the 2.1 million farms in the U.S. receive subsidies.[75] A significant percentage of U.S. farm subsidies go to crops that are likely to end up in the Kenya if agricultural trade is fully liberalized between the two countries; most of U.S. agricultural subsidies go to corn, soybeans, wheat, cotton, and rice. In the past few years, ad hoc programs not subject to Congressional scrutiny have increased. In addition to traditional farm support programs, recent ad hoc programs that provided up to an additional $60.4 billion in payments to agricultural producers in the U.S. include:

- the 2018 Market Facilitation Program (MFP), valued at $8.6 billion (to partially offset the estimated trade damage from retaliatory tariffs),

[73] Congressional Research Service, D*ominican Republic-Central America – United States Free Trade Agreement (CAFTA-DR)*, IN FOCUS (August 22, 2019).
[74]
[75] https://www.downsizinggovernment.org/agriculture/subsidies

- the 2019 Market Facilitation Program valued at $14.5 billion (to partially offset the estimated trade damage from retaliatory tariffs,
- Coronavirus Food Assistance Programs (CFAP) in 2020 (CFAP-1) valued at up to $16.0 billion,
- Coronavirus Food Assistance Programs Assistance (CFAP-2) valued at $14.0 billion, and
- the 2020 Paycheck Protection Program (described as forgivable loans to agricultural interests, valued at $7.3 billion).[76]



Source: CATO Institute; USDA.

Subsidies in rich countries are controversial.[77] Subsidies in rich countries arguably harm agricultural producers in poor countries and is an issue that has been raised repeatedly in the WTO.[78] As one analyst put it:

> When countries subsidize farm production and doing so boosts commodity exports, it undermines foreign producers and distorts global trade patterns. Most high-income nations subsidize their farmers, yet those nations often complain about subsidies in other countries undermining their own farmers…..
>
> One particular concern is that farm subsidies and trade protections in high-income countries — such as the United States — harm lower-income countries and undermine their efforts at economic reform. Global stability is enhanced when poor countries adopt markets and achieve growth through trading. But U.S. and European farm subsidies and agricultural import barriers undermine progress on free trade….

[76] https://crsreports.congress.gov/product/pdf/R/R46263
[77] Agricultural Subsidies, The Economist (September 12, 2012). https://www.economist.com/economic-and-financial-indicators/2012/09/22/agricultural-subsidies
[78] See CRS Report RS22522, Potential Challenges to U.S. Farm Subsidies in the WTO: A Brief Overview.

The Kenyan government is fully aware of the problems agricultural subsidies in rich countries pose for countries in Africa and for sustainable development in general. The Kenyan government has been involved in the WTO dispute settlement process as third parties in only a few cases and all had to do with export subsidies for sugar.[79] The critical questions are:

- Does the Kenyan government plan to address agricultural subsidies in a Kenya-U.S. FTA and if so how?
- How does the Kenyan government plan to counter the effect of the hefty agricultural subsidies available to U.S. farmers? What concrete plans are in place to ensure that Kenyan farmers are able to compete against subsidized agricultural imports from the U.S.?
- What lessons can the Kenyan government draw from other countries, developed as well as developing, that have either concluded FTAs with the U.S. or have attempted to conclude such agreements in the past?
- What lessons can the Kenyan government draw from other developing countries regarding the provision of farm support to domestic agricultural producers?

While some economies are able to use national-level "countervailing duty" laws and procedures to unilaterally impose duties on subsidized U.S. imports, may developing countries are not presently in a position to go this route either because the necessary laws are not in place or because the countries lack the necessary expertise to effectively and rigorously enforce existing laws. A recent report found that foreign trade remedy investigation of U.S. agricultural export is on the rise.[80] The report notes that "[i]n recent years, a number of trading partners have challenged imports of U.S. agricultural products, even initiating repeated or multiple investigations into the same products." Increasingly, countries like China, EU, India, Canada, and Mexico are making greater use of their domestic trade remedy laws to address perceived unfair agricultural exports from the U.S.[81]

3.5.6. Adopt Strategy to Counter Stiff Competition for U.S. Agricultural Market

Kenya faces stiff competition for the U.S. agricultural market. To benefit from any trade deal with the U.S., Kenya must take drastic action to improve the performance of its agricultural sector. Kenya will competition from U.S. FTA partners and non-FTA partners. Compared to Kenya, a growing number of developing countries in Asia and Latin America are exporting a wider range of agricultural products to the U.S. and are also exporting more value-added food and agricultural exports to the U.S. Consider that:

- In 2019, the U.S. imported agricultural products from India valued at about $2.6 billion and during the same period imported agricultural products valued at $126 million from Kenya.
- Canada supplied $22.2 billion worth of agricultural products to the U.S. between 2013-2015.
- Mexico supplied $19.3 billion worth of agricultural products to the U.S. in 2013-15 respectively, mostly consumer-oriented goods such as horticultural products, red meats, and snack foods.

[79] DS265, DS266, and DS283.
[80] Congressional Service Report, Foreign Trade Remedy Investigations of U.S. Agricultural Products (November 10, 2020).
[81] Congressional Service Report, Foreign Trade Remedy Investigations of U.S. Agricultural Products (November 10, 2020).

- South America, led by agricultural producers such as Brazil, Chile, and Colombia, averaged $13.7 billion in U.S. imports in the period between 2013-2015, consisting largely of horticultural, sugar, and tropical products in which it has a comparative or seasonal advantage.
- The EU accounted for $18.9 billion worth of U.S. agricultural imports in 2013-15, with horticultural products accounting for more than half the value.[82]
- Of the current largest 20 agricultural suppliers, the fastest growing sources of U.S. consumer-oriented imports since 1994 are Vietnam (cashews, pepper), Peru (fresh fruits), India (pepper and sesame seed, vegetable extracts), Switzerland (carbonated soft drinks), and Singapore (tropical and essential oils).[83]

3.5.7. Adopt A National Strategy to Boost Agricultural Export

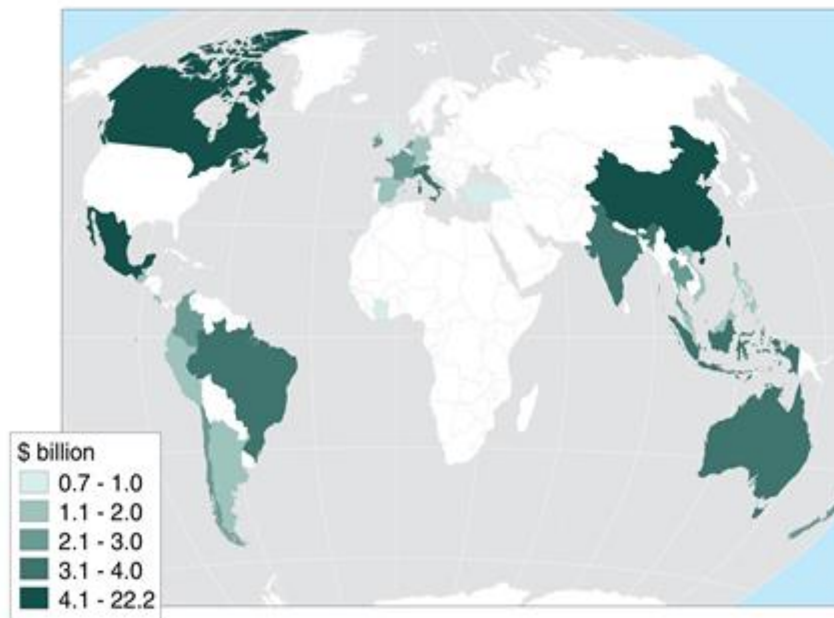
To stand a chance of benefiting from a trade deal with the U.S., the Kenyan government must adopt specific strategies to boost Kenya's agricultural exports and to add value to those exports. The U.S. is a huge market for agricultural products and the market continues to grow. In FY2019, the value of U.S. agricultural imports was $131 billion. The composition of U.S. agricultural import is changing. According to the United States Department of Agriculture (USDA),

> Consumer-oriented products have dominated U.S. agricultural imports and have grown faster than total agricultural product imports, increasing on average by more than 7 percent annually since 1994. Increasing demand for year-round variety in foods has driven imports of horticultural products during the offseason in U.S. production. Horticultural products accounted for more than half of U.S. agricultural imports in 2019. Sugar and tropical products, such as coffee, cocoa, and rubber, accounted for approximately 17 percent of imports….[84]

The U.S. import shares (based on value) "have been higher for manufactured products than for nonmanufactured products."[85] Although since 2013, nonmanufactured products such as food grains and horticultural goods have driven increases in the share of imports in food consumption, manufactured products "drove the rise in import share of consumption growth between 2008 and 2012. Even with AGOA in place, countries in Africa are not among the top exporters of agricultural goods to the U.S. This begs the question, beyond the export of nuts, coffee, tea and spices, what specific strategies does the Kenyan government plan to implement to boost agricultural export to the U.S. and to capture a larger share of the U.S. market?

[82] https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58394
[83] https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance/
[84] https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance/
[85] USDA, U.S. Agricultural Trade at a Glance. https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at-a-glance/

Top 30 U.S. agricultural import sources, 2013-15 average



Source: USDA, Economic Research Service calculations based on data from U.S. Department of Commerce, U.S. Census Bureau, Foreign Trade Database.

3.5.8. Reassess the Role of Parliament in Kenya's Agricultural Trade Policy

Presently, the Kenyan Parliament plays little or no role in the formulation and implementation of Kenya's agricultural trade policy. Considering that members of parliament represent a diverse group of stakeholders including Kenyan farmers, it is imperative that the parliamentarians play a more active and meaningful role in shaping Kenya's agricultural trade policy. In the U.S., Congress plays a very important role in formulating agricultural trade policy and in monitoring the implementing of trade policy. In the Trade Promotion Authority, 2015, Congress articulated the general negotiating objectives for the agricultural sector. Congress receives and reviews periodic reports on U.S. agricultural export and import. With the passage of the 2018 farm bill (P.L. 115-334) in 2018, Congress reauthorized major agricultural export promotion programs through FY2023. Relevant provisions in the farm bill address issues such as export credit guarantee programs, export market development programs, and international science and technical exchange programs designed.

The Kenyan Parliament can and should play a more meaningful role in the development, implementation, and enforcement of Kenya's agricultural trade policy. There are many important roles that the Kenyan Parliament can play including providing negotiating objectives, establishing trade adjustment assistance programs for Kenyan farmers, designing and funding credible export market development programs, and addressing the many social, environmental, cultural, and sustainability issues that agricultural trade raises for developing countries.

3.5.9. Invest in Kenya's Agricultural Sector, in Kenyan Farmers, and in Kenya's Agricultural Trade Policy Apparatus

It is important that the Kenyan government invest in Kenya's agricultural sector and in developing Kenya's agricultural trade policy instruments.

First, the government must assess whether existing laws, policies and programs are sufficient to develop the agricultural sector, address the needs of key stakeholders in the sector, ensure the safety of agricultural imports, and address issues such as food and nutritional insecurity, pandemics, climate change, etc. The government must assess what steps must be taken to improve the country's food import laws and oversight system.

Second, the government must assess whether existing laws, policies and programs are adequate to address unfair agricultural imports. Does Kenya have strong and effective laws to tackle agricultural dumping and unlawful agricultural subsidies? Even if the laws on the books are adequate, does Kenya have an effective and functioning trade remedies regime?

Third, the government must assess Kenya's capacity to administer the country's trade laws and policies effectively. A Kenya-U.S. FTA would pit Kenya against a country that has a plethora of agencies mandated to advance the U.S. agricultural trade policy. In the U.S. numerous federal, state, and local agencies share responsibilities for regulating the safety of the U.S. food supply, including imported foods. These agencies include:

- The Food and Drug Administration: Responsible for ensuring the safety of all domestic and imported food products (except for most meats and poultry).
- The Department of Homeland Security (DHS): Responsible for coordinating agencies' food security activities.
- United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS): Responsible for protecting plant and animal resources from domestic and foreign pests and diseases.
- Department of Homeland Security, United States Customs and Border Protection. Responsible among other things for inspecting food and agricultural products and enforcing relevant regulations at ports of entry.
- Environmental Protection Agency: Responsible among other things for ensuring that the chemicals used on food crops do not endanger public health.
- USDA, Agricultural Marketing Service: Responsible for overseeing product quality and marketing grades and standards for a range of crops and agricultural products, including imported products in certain circumstances.
- National Marine Fisheries Service (NMFS) at the at the National Oceanic and Atmospheric Administration (NOAA): responsible for administering a number of seafood and fisheries safety and sanitation programs.

3.5.10. Address Public Interest Issues Implicated in Trade in Products Developed Through Agricultural Biotechnologies

Trade in products developed through agricultural biotechnologies raise a host of issues including public health, farmers' rights, environment, and human rights, that need to be explicitly addressed in any trade deal with the U.S. It is therefore recommended that Kenya review and update its negotiating objective to specifically address issues like biotechnology. Although the

USMCA's provision on biotechnology is relatively modest, it has major implications for the domestic regulatory space of USMCA Partners. In the context of a Kenya-U.S. trade deal, it is worth noting that biotechnology is explicitly mentioned and addressed in the negotiating objectives of the U.S. but not in Kenya's.

Biotechnology

Negotiating Objectives (Kenya)	Negotiating Objectives (United States)
Silent	Establish specific commitments for trade in products developed through agricultural biotechnologies, including on transparency, cooperation, and managing low level presence issues, and a mechanism for exchange of information and enhanced cooperation on agricultural biotechnologies.

3.5.11. Anticipate Strong Enforcement of U.S. Import Requirements

While a trade deal with the U.S. has the potential to boost Kenya's agricultural export, agricultural exports to the U.S. face intense scrutiny and must contend with stringent import requirements for a wide range of food and agricultural products. This begs at least two question. First, do Kenyan agricultural producers have capacity to overcome the immense nontariff barriers that agricultural exports to the U.S. face? Second, will a Kenya-U.S. trade deal address the myriad non-tariff barriers to developing countries' agricultural exports to the U.S.? Consider that:

- According to a 2016 study by the United States Department of Agriculture (USDA), from 2005 to 2013, the U.S. Food and Drug Administration refused the entry of 87,552 shipments of food into the U.S. after determining that the shipments violated or appeared to violate one or more U.S. laws.[86]
- According to the same study, adulteration accounted for 57% of all FDA import refusals during the 2005- 2013 period (totaling 80,825 import refusals).[87] Significantly, about half of FDA import refusals due to adulteration were attributable to other sanitary adulteration, such as filthy or decomposed appearance or unregistered processes.[88]
- Five food product categories accounted for the majority of shipments refused: (i) Fishery and seafood products (20.5 percent of all refusals); Vegetables and vegetable products (16.1 percent); Fruit and fruit products (10.5 percent); (iv) Spices, flavors, and salts (7.7 percent); and (v) Candy without chocolate and chewing gum (7.2 percent).[89]
- In making decisions about which food import shipment to inspect, the FDA reportedly uses a risk-based prediction algorithm to determine whether shipments

[86] J. Bovay, FDA Refusals of Imported Food Products by Country and Category, 2005-2013, March 2016. https://www.ers.usda.gov/webdocs/publications/44066/57014_eib151.pdf?v=4009.9
[87] Id.
[88] Id.
[89] Id.

should be inspected in the field or a laboratory, and also relies on *Import Alerts*, which provide guidance on firms and products that meet the criteria for detention without physical examination and require the importer to produce evidence that no violation is present, before the shipment may enter general commerce.[90]

- In FY2018, the Food and Drug Administration (FDA) examined more than 16.9 million import lines of FDA-regulated foods.[91]
- The FDA has 13 foreign offices structured to enable U.S. authorities make decisions about products entering the U.S.[92] Decisions to establish a foreign post are reportedly based on a number of factors including on the volume of imported products and the magnitude of problems associated with imported products.

Given stronger border enforcement and stringent import requirements in the U.S., effort must be made to build and strengthen the capacity of Kenyan agricultural producers to export to the U.S. and take advantage of market opportunities that an FTA might offer. Barriers to agricultural imports into the U.S. also allows for a more serious and honest assessment of the potential costs and benefits of agricultural trade liberalization for Kenya.

3.5.12. Address Sensitive Issues and Protect Sensitive Sectors

It is important that the Kenyan government address sensitive issues at the intersection of trade and public health, as well as trade and human rights. Over the years, the United Nations Special Rapporteur on the Right to Food and published reports on a wide range of topics. The following reports should be of interest to Kenya's trade negotiators:

- Report on Pesticides and the right to Food, A/HRC/34/48, 24 January 2017.
- Report: Critical perspective on food systems, food crises and the future of the right to food, A/HRC/43/44, 21 January 2020.
- Report on integrating a gender perspective in the right to food, A/HRC/31/51, 14 December 2015.
- The Impact of Climate Change on the Right to Food, A/70/287, 5 August 2015.

3.5.13. Food Security, Climate Change, Agriculture and Trade

It is recommended that the Kenyan government integrate food security and climate change issues and considerations into all aspects of trade and investment agreements. Climate change issues and challenges can no longer be treated as an isolated problem that only deserve a passing reference in the preambles of FTA and, sometimes in the chapter on environment. The interaction between climate change, agriculture and global trade must and should shape the negotiation of the agricultural chapter in any FTA. In particular, the impact of climate change on women, African farmers, indigenous populations and other vulnerable groups should be factored into Kenya's trade and investment agreements.

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[90] Id.

[91] Id.

[92] Foreign offices are located in China (posts in Beijing, Shanghai, and Guangzhou); India (posts in New Delhi and Mumbai); Latin America (posts in San Jose, Costa Rica; Santiago, Chile; and Mexico City, Mexico); Europe (posts in Brussels, Belgium; London, UK; and Parma, Italy); South Africa (Pretoria); and Jordan (Amman).

Indigenous peoples, African women and African farmers are among those who have contributed least to the problem of climate change, but are among those suffering from its worst impacts. These groups are the worst hit because they are heavily dependent on lands and natural resources for their basic needs and livelihoods. In a 2007 report, a former UN Special Rapporteur on the Rights of Indigenous Peoples stated:

> "Extractive activities, cash crops and unsustainable consumer patterns have generated climate change, widespread pollution and environmental degradation. These phenomena have had a particularly serious impact on indigenous people, whose way of life is closely linked to their traditional relationship with their lands and natural resources, and has become a new form of forced eviction of indigenous peoples from their ancestral territories, while increasing the levels of poverty and disease." (see A/HRC/4/32, para. 49)

It is recommended that the Kenyan government carry out a study on innovative approaches to addressing climate change and food security in FTAs. It is also recommended that the Kenyan Government consider options for integrating considerations for its vulnerable populations in trade and investment agreements. Options may include periodic impact assessments throughout the life of the agreement, special carve-out clauses, strong and effective provisions on corporate social responsibility and corporate accountability.

3.5.14. Rethink Negotiating Objectives

Given the role of agriculture in the Kenyan economy and in Kenya's trade with the world, Kenya's negotiating objectives for the agricultural sector is shockingly very modest. The negotiating objective relating to agriculture does not appear to have been carefully designed to protect Kenya's offensive and defensive interests on a wide range of issues including issues relating to subsidies, biotechnology, and sanitary and phytosanitary measures. Not surprising, on subsidies, the U.S. negotiating objective is extremely light. It is important that these issues, although not detailed in the Kenya's negotiating objectives are thoroughly addressed during negotiations.

Agriculture

Negotiating Objectives (Kenya)	Negotiating Objectives (United States)
Negotiations on SPS, shall be based on the existing Cooperation Agreement between the USA and EAC.	- Secure comprehensive market access for U.S. agricultural goods in Kenya by reducing or eliminating tariffs. - Provide reasonable adjustment periods for U.S. import-sensitive agricultural products, engaging in close consultation with Congress on such products before initiating tariff reduction negotiations.

Subsidies

Negotiating Objectives (Kenya)	Negotiating Objectives (United States)
Silent	**Subsidies:** - Seek to build on the existing transparency principles in the SCM Agreement. - Seek to establish a consultative mechanism to discuss subsidy issues that arise in the bilateral relationship. - Seek to facilitate the exchange of information and to expand cooperation with respect to subsidy issues outside of the bilateral relationship. - Seek to develop disciplines that address the creation or maintenance of capacity inconsistent with market principles.

4. Textiles and Apparel

4.1. Introduction

The textiles and apparel sectors are significant sectors in global trade and are at the center of many controversies. According to the *World Trade Statistical Review 2020*, the value of the world textiles (SITC 65) and apparel (SITC 84) exports totaled $305bn and $492bn in 2019, according to the WTO. By global standards, Kenya is not a key player. Together, the world's three top exporters of textile – China, the EU and India – accounted for 66.9% of the value of world textile exports in 2019.

The USMCA boasts a new textile chapter (Chapter 4) that addresses a host of topics including handmade, traditional folkloric, and indigenous handicraft goods, rules of origin, cooperation, and verification. In the USMCA, the U.S. sought to incentivize greater North American production in textiles and apparel trade, strengthen customs enforcement, and facilitate broader consultation and cooperation among the Parties on issues related to textiles and apparel trade.[93] The USTR acknowledges that "[t]he new Textiles chapter provisions are stronger than those in NAFTA 1.0 with respect to both enforcement and incentivizing North American production of textiles."[94] Among other things, the textile chapter:

- has a USMCA-specific ROOs for textiles and apparel;
- adopts the so-called "yarn-forward" rules of origin for woven fabric, apparel, and made-up textile articles;
- adopts a "fiber-forward" concept for yarns and knit fabrics;
- increases the NAFTA textile de minimis allowance from 7 to 10 percent;
- strengthens verification and enforcement by introducing textile-specific customs enforcement language;
- establishes a committee on textile and apparel trade matters; and
- includes a two-part annex that sets up measurements and a change in tariff classification.

4.2. USMCA Obligations Relative to Textiles and Apparel

4.2.1. Market Access/ Rules of Origin

NAFTA gradually eliminated tariffs and quotas on regionally made textile and apparel products. USMCA builds on NAFTA's market access provisions. Generally, the Rules of Origin and Origin Procedures established in Chapters 4 (Rules of Origin) and 5 (Origin Procedures) apply to all textile and apparel goods except as specifically provided in Chapter

[93] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing
[94] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing

6.[95] Under the USMCA, yarns are subject to a "fiber-forward" rule. A fiber-forward ROO requires that the fiber must originate in a USMCA country and all processes are required to produce the yarn after that, e.g. extruding or spinning and any final processing must occur in the USMCA territory. The USMCA also imposes a yarn-forward ROO.[96] The yarn-forward ROO requires the formation of the yarn (spinning or extruding) and all processes following yarn formation occur in the USMCA territory. A new provision in the USMCA requires that sewing thread, coated fabric, narrow elastic strips, and pocketing fabric used in apparel and other finished products must be made in a USMCA country to qualify for duty-free access to the U.S. According to a report from Rice University's Baker Institute for Public Policy (Baker Institute),

> "If anything, protections for the U.S. textile industry increased under the USMCA. In the USMCA, reliance on low-cost fabrics from Asia is discouraged, and duties on non-originating yarn and fabric ("tariff preferential levels" or TPLs) are limited to 10% by volume of North American garments to qualify for duty-free treatment."

The USMCA permits a few exceptions to the general rules of origin for textiles and apparels. Notable exceptions include:

- *Single transformation*. Under the single transformation rule, a foreign origin fabric and/or yarns can be used for specific products provided the cutting of the fabric or knitting to shape, and all subsequent processes, are performed in the USMCA territory.
- *Short Supply provisions*. Under this rule, the use of certain foreign fiber, fabric or yarns, is allowed if they are determined to be in short supply.
- *Tariff preference levels (TPLs)*. With TPLs, specific quantities of non-originating product that have undergone significant processing in the USMCA territory qualify for duty-free treatment. Restructured tariff preference levels, to ensure that this limited exception to the rules of origin is not overused pursuant to the USMCA, at the expense of regional supply chains. TPLs are a specific duty exception related to fabrics and textile products from Non-USMCA countries.
- *De Minimis*. The de minimis rule is based on weight. Under the rule, non-originating materials shall nonetheless be considered to be an originating good if the total weight of all those materials is not more than 10 percent of the total weight of the good, of which the total weight of elastomeric content may not exceed 7 percent of the total weight of the good.[97]
- *Sets*. The USMCA establishes a rule for sets which provides that all the goods of a set must be originating or the total value of non-originating goods in the set must not exceed 10%.[98]

4.2.2. Handmade, Traditional Folkloric, or Indigenous Handicraft Goods

Under Article 6.2 (Handmade, Traditional Folkloric, or Indigenous Handicraft Goods), an importing Party and an exporting Party may identify particular textile or apparel goods that they mutually agree are: (a) hand-loomed fabrics of a cottage industry; (b) hand-made cottage industry goods made of those hand-loomed fabrics; (c) traditional folklore handicraft goods; or (d) indigenous handicraft goods. Goods identified as handmade, traditional folkloric or

[95] USMCA, Article 6.1.1.
[96] USMCA Article 6.3 refers to the Annex 6-A Special Provisions
[97] USMCA, Article 6.1.
[98] USMCA, Article 6.1.

indigenous handicraft "shall be eligible for duty-free treatment by the importing Party provided that any requirements agreed by the importing and exporting Parties are met."[99]

4.2.3. Review and Revision of ROO

The USMCA has an in-built system, specific to the textiles and apparel sector, for reviewing and revising ROO. With this system, Parties can review and renegotiate rules of origin for textile and apparel goods without revising the entire agreement. Article 6.4 is titled "Review and Revision of Rules of Origin" and empowers a USMCA Party to request review of ROO determination. Article 6.4.1 provides:

> 1. **On request of a Party**, the Parties **shall consult** to consider whether particular goods should be subject to different rules of origin to address issues of availability of supply of fibers, yarns, or fabrics in the territories of the Parties.[100]
>
> 2. In the consultations, each Party **shall consider** the data presented by a Party showing substantial production in its territory of the particular good. The consulting Parties shall consider that substantial production has been shown if that Party demonstrates that its domestic producers are capable of supplying commercial quantities of the good in a timely manner….[101]

If, based on the initial assessment, the Parties agree that the fiber, yarn, or fabric is not commercially available, the Parties "shall endeavor to reach agreement promptly on a corresponding proposed product-specific rule change and, as appropriate, proceed with their respective domestic procedures for implementation…."[102] An agreement between the Parties shall supersede any prior rule of origin for such good when approved by each Party in accordance with any necessary legal procedures of each Party.[103]

4.3. Verification/Enforcement/Administration

With the goal of increasing Made-in-USA fibers, yarns, and fabrics by increasing the cost of non-USMCA materials, the USMCA addresses verification and enforcement explicitly. Essentially, the USMCA imposes extensive record keeping requirements and introduces a textile-specific verification and customs cooperation provision that is designed to create new tools for strengthening customs enforcement and preventing fraud and circumvention.[104]

4.3.1. Cooperation

The USMCA mandates deeper cooperation as regards textiles. Article 6.5.1 provides that the Parties shall cooperate, through information sharing and other activities as provided for in Article 7.25 (Regional and Bilateral Cooperation on Enforcement), Article 7.26 (Exchange of Specific Confidential Information), Article 7.27 (Customs Compliance Verification Requests), and Article 7.28 (Confidentiality between Parties), on matters related

[99] USMCA, Article 6.2.2.
[100] Emphasis added.
[101] Emphasis added.
[102] USMCA, Article 6.4.1.
[103] USMCA, Article 6.4.1.
[104] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/fact-sheets/rebalancing

to trade in textile and apparel goods. Each Party is obliged to designate a contact point for information exchange and other cooperation activities related to trade in textile and apparel goods in accordance with Article 30.5 (Agreement Coordinator and Contact Points).[105]

4.3.2. Verification

The USMCA embraces the concept of "jump visit." In addition to the normal verification procedures provided for in Article 5.9, the textile chapter (Article 6.6.) provides for a special textile and apparel origin verification procedure. An importing Party may, through its customs administration, conduct a verification with respect to a textile or apparel good pursuant to Article 5.9 (Origin Verification), and the associated procedures, to verify whether a good qualifies for preferential tariff treatment, or through a request for a site visit.[106] Indeed, an importing Party may request a site visit from an exporter or producer of textile or apparel goods to verify whether: (a) a textile or apparel good qualifies for preferential tariff treatment under this Agreement; or (b) customs offenses with regard to a textile or apparel good are occurring or have occurred.[107] During such a site visit, an importing Party may request access to: (a) records and facilities relevant to the claim for preferential tariff treatment; or (b) records and facilities relevant to the customs offenses being verified.[108]

4.3.3. Denial of Claim for Preferential Tariff

Pursuant to Article 6.7. of the USMCA, the importing Party may deny a claim for preferential tariff treatment for a textile or apparel good: (a) for a reason related to determinations of origins; (b) if, pursuant to a site visit it has not received sufficient information to determine that the textile or apparel good qualifies for preferential tariff treatment; or (c) if, pursuant to a request for a site visit, the importing Party is unable to conduct a site visit as access or permission for the site visit is denied, the importing Party is prevented from completing the site visit, or the exporter, producer, or person having the capacity to consent on behalf of the exporter or producer does not provide access to the relevant records or facilities during a site visit. Article 6.6.7 sets out the rules that the importing Parties must follow when conducting site visits. Pursuant to Article 6.6.11, if verifications indicate a pattern of conduct by exporters/producers of false/unsupported representations that a certain good qualifies for preferential treatment the importing Party may withhold preferential treatment for identical goods of that person until it is demonstrated that goods do qualify for such treatment.

4.3.4. Committee on Textile and Apparel Trade Matters

Article 6.8.1. of the USMCA provides for a Committee on Textile and Apparel Trade Matters, (Textiles Committee), composed of government representatives of each Party. The Textiles Committee may consider any matter arising under the textile chapter, and its functions shall include review of the implementation of this Chapter, consultation on technical or interpretive difficulties that may arise under the Chapter, and discussion of ways to improve the effectiveness of cooperation under this Chapter. The Textiles Committee "shall assess the potential benefits and risks that may result from the elimination of existing restrictions on trade between the Parties in worn clothing and other worn articles … including effects on business

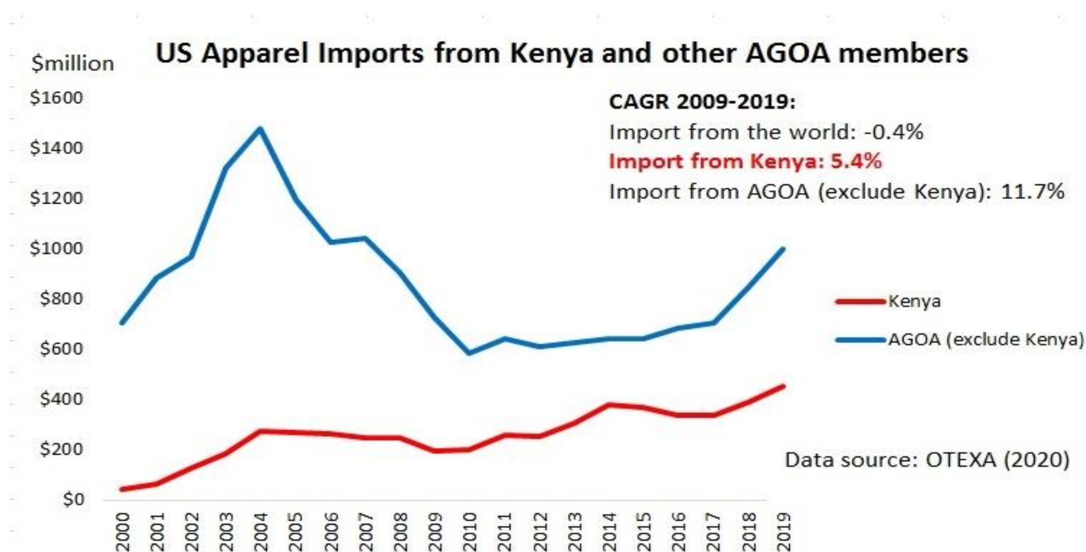
[105] USMCA, Article 6.5.3.
[106] USMCA, Article 6.6.1.
[107] USMCA, Article 6.6.2.
[108] USMCA, Article 6.6.3.

and employment opportunities, and on the market for textile and apparel goods, in each Party."[109]

4.4. Key Considerations for Kenya

4.4.1. AGOA Expanded Apparel Export from Africa.

Under AGOA, Kenya and other countries in Africa increased their apparel exports to the United States. Despite AGOA, overall, SSA is a very small apparel supplier to the U.S. market and, in 2019, accounted for only 1.7 percent of the market shares in 2019. The apparel product group includes a wide range of knit, woven, and other apparel of natural and manmade fibers, and covers all types of apparel, including shirts (tops), pants (bottoms), suits, underwear, dresses, outerwear, and swimwear. According to the USITC, between 2016 and 2018, U.S. imports for consumption of apparel from SSA under AGOA grew at a compound annual growth rate CAGR of 9.9 percent. Five SSA countries—Kenya, Lesotho, Madagascar, Mauritius, and Ethiopia—accounted for almost 95 percent of all apparel imported from the region under AGOA.



Source: Sheng Lu (2020)

The largest growth is in Ethiopia's export. U.S. imports of apparel from Ethiopia had a CAGR of 76.5 percent between 2016 and 2018, reflecting an increase in exports to the U.S. from $37 million to $114 million.

Apparel: U.S. Imports Under AGOA from SSA and Selected Countries: 2016-2018

Produce and Country Source	2016 Millions $	2018 Millions $	CAGR 2016-2018 (%)
Madagascar	94	189	42.0
Ethiopia	37	114	76.5
Kenya	338	391	7.2
Lesotho	295	320	4.0
Tanzania	37	42	6.4
Mauritius	187	138	-14.1

[109] USMCA, Article 6.8.3.

Source: USITC

The table above shows that overall, Africa's textiles and apparel sector is growing. However, while the sector is growing, continued growth is not guaranteed for all the participating states or for the continent as a whole.

4.4.2. The Textiles and Apparel Sector is a Very Important Sector for the U.S.

The textiles and apparel sectors are very important in the U.S. According to the U.S. International Trade Commission, total U.S. exports of textiles and apparel increased in 2017, with growth in all categories except apparel.[110] Analysts attribute growth in U.S. exports in part to an increase in U.S. exports of nonwoven fabrics, particularly higher-value nonwoven fabrics. The U.S. textile industry today is considered "highly sophisticated" and primarily makes fiber; spins or extrudes yarn; and knits, weaves, dyes, and finishes fabrics.[111] The U.S. textile and apparel sectors have undergone and continue to undergo extensive structural changes.[112] As a Congressional Research Service report notes, although U.S. production at textile mills in 2018 was 60% below the 1994 level, and U.S. production at apparel plants was 88% less in 2018 than in 1994, "significant textile production remains in the United States largely owing to automation, which has helped reduce operating costs for U.S. producers."[113] The U.S. textiles and apparel sector is highly protected. According to the Baker Institute, "[d]espite the relatively small volume of apparel production in the U.S. (constituting about 3% of the U.S. market), the textile and apparel industry remains one of the most protected sectors, along with steel."[114]

4.4.3. Market Access is A Priority for the U.S.

Market access for U.S. textiles and apparel goods is a priority for the U.S. government. From 2018 to 2019, the U.S. total exports of textile and apparel decreased by $678 million (3.0 percent) to $22.1 billion. With regards to the textiles and apparel sector, and in the context of Kenya-U.S. FTA, the USTR's negotiating objectives is to "[s]ecure 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."

The U.S. has, in the past, used FTA's to open markets for its textile and apparel goods. Significantly, some of the major destinations for U.S. textiles and apparel goods are states that the U.S. has concluded trade agreements with such as USMCA Partners and member states of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR). The USMCA region is the largest U.S. textile export market in the world and the CAFTA-DR region is the second-largest. In 2017, the U.S. exported $2.5 billion worth of textiles to the CAFTA-DR region. The fact that the USMCA includes a separate chapter on textiles and apparel also underscores the importance of the sector in U.S. trade policy.

[110] https://www.usitc.gov/research_and_analysis/trade_shifts_2017/textiles.htm
[111] Id.
[112] *Lu,* 2017 U.S. Fashion Industry Benchmarking Study, July 2017, 9–10.
[113] Congressional Research Service, Textile and Apparel Sectors Disagree on Certain Provisions of the Proposed U.S.-Mexico-Canada (USMCA) Agreement, In Focus. March 5, 2019.
[114] https://www.bakerinstitute.org/media/files/files/29e60e2b/bi-report-102119-mex-usmca-6.pdf

Value of the Leading 15 Markets for U.S. Textiles and Apparel Exports 2019

Leading Export Destination	Value in
Mexico	5 931.02
Canada	5 344.72
Honduras	1 609.92
China	788.75
United Kingdom	644.34
Japan	577.92
Dominican Republic	548.39
Nicaragua	484.17
El Salvador	450.08
Germany	385.42
Hong Kong	333.17
South Korea	320.08
Australia	284.76
Guatemala	264.73
Italy	212.77
Vietnam	197.62

Source: M. Shahbandeh, Nov 23, 2020

In sum, presently, Canada and Mexico are the top markets for U.S. exports of textile and apparel goods.[115] In 2017, more than 40 percent of U.S. export of fabric went to Mexico and more than 45 percent of U.S. exports of finished textile or made-up products went to Canada.[116] Although the Kenya is presently not a top market for U.S. exports of textiles and apparel goods, a Kenya-US FTA will likely lead to increased export of textile and apparel goods to Kenya.

4.4.4. The U.S. is a Huge Market for Textiles and Apparel Goods

The U.S. is a huge market for textiles and apparel goods and presents an immense export opportunity for countries with strong textiles and/or apparel sectors. In 2017, the value of U.S. imports of textiles and apparel increased by $1.2 billion (1.0 percent) to $121.4 billion.[117] From 2018-2019, U.S. general imports of textiles and apparel increased by $177 million (0.1 percent) to $127.7 billion.

[115] USITC, hearing transcript, November 16, 2018, 405 (testimony of Rick Helfenbein, American Apparel and Footwear Association).

[116] USITC, U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors (2019), p. 108.

[117] https://www.usitc.gov/research_and_analysis/trade_shifts_2017/textiles.htm

Textiles and Apparels: U.S. General Imports by Select Trading Partner, 2019

Country	**Value**	**Share**
China	42,898	33.6%
Vietnam	14,427	11.3%
India	8,907	7.0%
Bangladesh	6,196	4.9%
Mexico	5,992	4.7%
Indonesia	4,888	3.8%
Pakistan	3,261	2.6%
Honduras	2,957	2.3%
All other Countries	38,162	29.9%
Total	**127,689**	**100.0%**

Source: United States International Trade Commission

Although the U.S. represents a huge market for textiles and apparel goods, whether Kenya is positioned to exploit any additional market access opportunity that an FTA would provide depends on a complex mix of factors including the strength of Kenya's textiles and apparel sectors, the type of support the sectors get from the government, and the nature of the competition from Asia and Latin America.

4.4.5. Tough Competition from Asia

Although textiles and apparel goods are among Kenya's top export to the U.S. under AGOA, Kenya's textile export is minuscule compared to export from other countries including countries in Asia.[118] In 2019, U.S. apparel import from Kenya totaled $454 million, and compares very poorly to U.S. apparel imports from other countries. In 2019, the top five suppliers of textiles and apparel to the U.S. were: China (#1), Vietnam (#2), India (#3), Bangladesh (#4), and Mexico (#5). The performance of countries in Asia is particularly significant considering that some of these countries do not have the benefit of a preferential trading relationship with the United States. The numbers are staggering:

- China is the United States' largest supplier of textiles and apparel. In 2017, China accounted for 37.0 percent of total U.S. imports of textiles and apparel which totaled $45.0 billion.
- In 2017, U.S. imports of textile and apparel from Vietnam totaled $12.2 billion, of which nearly 96.6 percent were apparel imports.
- In 2017, U.S. import of textile and apparel from India grew by 3.2 percent and
- In 2017, U.S. imported $6.1 billion of textiles and apparel from Mexico.
- In 2019, all top apparel suppliers to the U.S. (by value) were developing countries including China (29.7%, down from 33.0% in 2018), Vietnam (16.2%, up from 14.7% in 2018), Bangladesh (7.1%, up from 6.5%), Indonesia (5.3%, down from

[118] Birnbaum, David. "Trends in US Garment Imports from South Asia." Just-Style.com, March 28, 2018. https://www.just-style.com/analysis/trends-in-us-garment-imports-from-south-asia_id132640.aspx.

5.4% in 2018), India (4.8%, up from 4.6% in 2018) and Mexico (3.7%, down from 4.0% in 2018).[119]

- Apparel is one of Indonesia's largest export products to the U.S. In 2019, Indonesia exported apparel products valued at over US$2 billion in 2019.

The performance of the textiles and apparel sector in Vietnam and China has been widely noticed. According to one analyst:

> The most significant competitive challenge for textile and apparel production in the Western Hemisphere comes from outside the region, specifically China and Vietnam. China is the world's largest manufacturer of man-made fibers, a large producer of cotton, and a major supplier of yarns, fabrics, and trims. China has become the leading exporter of textiles and apparel to the U.S. market, supplying 38% of imports in 2017. Vietnam is the second-largest source of apparel for the United States. Neither has a preferential trading relationship with the United States, suggesting lower production costs have offset tariff incentives offered by NAFTA. Asian apparel uses little or no U.S.-made yarn and fabric, but Asian countries rank as top markets for U.S. cotton exports.[120]

The strong competition from Asia is a cause for deep reflection and introspection for the Kenyan government and for the textiles and apparel sector in Kenya. Are Kenyan manufacturers able to keep the unit cost for their apparel competitive with that from other key U.S. suppliers? Is the Kenyan government willing and able to invest in Kenya's apparel sector? What can the Kenyan government learn from governments in countries like Vietnam and China about the trade policy tools needed to stimulate the textiles and apparel sectors? What can the private sector in Kenya learn from their counterparts in countries like Vietnam, China, and India? If Kenya is currently sourcing inputs from countries in Asia, would Kenya's final product receive preferential treatment under a Kenya-U.S. FTA with strengthened rules of origin?

4.4.6. Supply Side Constraints

It is imperative that serious efforts are made to address the numerous supply-side constraints to textiles and apparel export from Kenya. Presently, businesses in Kenya's textile and apparel sector cannot compete with similar businesses in countries like Vietnam and China. The textiles and apparel sector in Vietnam is very strong and is getting stronger.[121] Forecasted to reach over three billion U.S. dollars by 2022, Vietnam's apparel market is characterized by companies with good market capitalization.[122] Analysts attribute Vietnam's success to a number of factors including, existence of a diversified supply chain, low labor costs, and an industry that is focused on specialization, modernization and increasing value.[123] Textile

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[119] https://shenglufashion.com/2020/02/16/patterns-of-u-s-textile-and-apparel-imports-updated-february-2020/

[120] Textile and Apparel Sectors Disagree on Certain Provisions of the Proposed U.S.-Mexico-Canada (USMCA) Agreement. In Focus. 5 March 2019. https://www.everycrsreport.com/files/2019-03-05_IF11124_832643b6fa7c2b77c032535f652bfbf425ee9527.pdf

[121] Russell, "Vietnam Leads US Apparel Import Growth," February 8, 2018; Lu, *2017 U.S. Fashion Industry Benchmarking Study*, July 2017, 16–20.

[122] Wrights, Beth. "Vietnam Again Leads US Apparel Import Growth in June." Just-Style.com, August 11, 2017. https://www.just-style.com/analysis/vietnam-again-leads-us-apparel-import-growth-in-june_id131379.aspx

[123] Wrights, Beth. "Vietnam Again Leads US Apparel Import Growth in June." Just-Style.com, August 11, 2017. https://www.just-style.com/analysis/vietnam-again-leads-us-apparel-import-growth-in-june_id131379.aspx and Russell, Michelle. "Vietnam Eyes $200bn Garment, Textile Exports by 2035." Just-

companies in Vietnam are committed to increasing their global market share and have called on the Vietnamese government to create a development strategy to 2025, with a vision towards 2040.

4.4.7. Expect Strong Enforcement from the U.S.

One lesson from the USMCA's chapter on textiles and apparel which boasts a separate customs textile enforcement rules is that any trade deal between the U.S. and Kenya is likely to have robust customs enforcement provisions to prevent fraud and circumvention. Kenyan export to the U.S. will undoubtedly face rigorous verification processes. Given the U.S. growing practice of including sector specific enforcement processes in FTAs, it is imperative that ROO relating to apparels and textiles are development-friendly and are sensitive to regional integration agenda.

4.5. Key Recommendations

4.5.1. Flexible Rules of Origin. Regional Integration/ AGOA Acquis

Rules of origin, which specify how much processing must occur within a free-trade area for a product to obtain duty free benefits, is likely to be the most important and contentious issue in any trade talk. Given the importance of the textile sector to the Kenyan economy and the economy of several African states, it is important that a Kenya-U.S. FTA ensure continuity of trade post AGOA, prevent trade disruption, and also ensure that the FTA is built on the acquis of AGOA. This means that that market access conditions for apparels and textile under the FTA should, at a strict minimum, be on par with AGOA, both in terms of duty and ROO. In 2019, 97% of all U.S. apparel imports under AGOA were assembled in LDBCs from third-country fabrics. It is important that the single stage transformation requirement for textiles and clothing, the so-called third country fabric rule be maintained, and further improved for categories not covered. Madagascar's apparel sector is cited as an example of a sector that has developed a truly regional supply chain that includes zippers from Swaziland, denim from Lesotho, and cotton yarn from Zambia and South Africa.[124] What this means is that the "yarn-forward" ROO common in U.S. FTAs is likely to be devastating for countries in Africa. A Congressional Service Report acknowledges the importance of a flexible ROO for most countries in Africa. According to the report:

> Establishing new apparel trade rules may be particularly complicated. As a lesser-developed beneficiary country (LDBC) under AGOA, Kenya qualifies for AGOA's third-country fabric rule, which allows Kenya to export apparel made with imported fabrics to the United States duty-free. In 2019, 97% of all U.S. apparel imports under AGOA were assembled in LDBCs from third-country fabrics. By contrast, U.S. FTAs typically use a more stringent "yarn forward" rule of origin, requiring local or U.S. sourcing of yarn and fabrics to qualify for duty-free treatment. Negotiators must also set rules for allowable levels of sourcing from other AGOA countries.[125]

Style.com, May 29, 2018. https://www.just-style.com/news/vietnam-eyes-200bn-garment-textile-exports-by-2035_id133618.aspx.

[124] John Page and Nelipher Moyo, Supporting Deeper Regional Integration in Africa, Brookings Institute (Brookings Institute, June 1, 2011).

[125] Congressional Research Service, U.S.-Kenya FTA Negotiations, In Focus, May 28, 2020. https://crsreports.congress.gov/product/pdf/IF/IF11526

In 2012, the USTR made a passionate plea for Congress to extend the Third-Country Fabric provision in AOA. According to the USTR:

> Critical to AGOA's performance: AGOA is the cornerstone of America's trade and investment policy with sub-Saharan Africa. AGOA's performance and effectiveness are closely tied to its Third-Country Fabric (TCF) provision, which is set to expire in September 2012. The TCF provision is crucial to the continued survival of Africa's textile and apparel industry – it has generated hundreds of thousands of jobs in sub-Saharan Africa, including in least developed countries, and has helped American retailers reduce their costs, diversify their supply chains, and provide greater low-cost apparel options for U.S. consumers. Swift passage of legislation extending AGOA's TCF provision is necessary to ensure AGOA's continued success – and the stability, development, and economic growth of sub-Saharan African countries. Congress has extended the TCF provision twice with bipartisan support.[126]

Under the CAFTA-DR, regional producers from six partner countries are allowed to ship apparel products to the U.S. duty-free as long as the yarn and fabrics used for these manufactures originate in the region, with some exceptions. ROO that incentivize the use of regional outputs, requiring the sourcing of sewing thread, narrow elastic fabrics, pocketing, and coated fabrics from within the U.S.-Kenya FTA will likely affect other EAC countries and has implications for the ACFTA.

4.5.2. Conduct a Comprehensive Impact Assessment of the Possible Impact of Liberalization of the Textiles and Apparel Sector

It is recommended that the Kenyan government carry out a comprehensive assessment of the likely impact of a Kenya-US FTA on the textiles and apparel sector.[127] As a matter of state practice, more and more countries are carrying out impact assessments of their trade and investment trade agreements. On April 19, 2019, the U.S. International Trade Commission released its independent assessment report on the likely economic impact of the USMCA.[128] The study looked at USMCA's impact on the economy as a whole as well as on specific sectors of the U.S. economy. Regarding the impact of USMCA on the U.S. textile and apparel sector, the study found that the USMCA overall is a balanced deal for the textile and apparel sector, particularly regarding the rules of origin (ROO) debate.

4.5.3. Involve Kenyan Textile and Apparels Sector in Trade Policy Making

In Kenya, industry stakeholders in the textiles and apparel sector are best positioned to: (i) offer frank assessment of the state of Kenya's textiles and apparel sector; (ii) offer advice on the potential impact of a Kenya-U.S. FTA on the sector; (iii) suggest what trade adjustment assistance the sector needs; and (iv) advise on how the government can best support the sector. In the U.S., stakeholders in the textiles and apparel sector contribute to U.S. trade policy in numerous ways including through research and testimonies before Congress and key agencies. For example, on November 16, 2018, leading U.S. textile and apparel associations appeared

[126] FACT SHEET: Urgent Need to Extend AGOA's Third-Country Fabric Provision and Implement CAFTA-DR Textileand Apparel Provisions
https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/urgent-need-extend-agoas-third-country-fabric-provision-and-i

[127] USITC, U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors (2019).

[128] U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors (April 2019), https://www.usitc.gov/publications/332/pub4889.pdf

before the United States International Trade Commission to provide industry assessment of the USMCA.[129] Representatives of the National Council of Textile Organizations, the U.S. Fashion Industry Association, and the American Apparel and Footwear Association, all presented their views on the likely impact of the USMCA on the sector. Evident from the November 16 hearing is the fact that the textiles and apparel sector is not a monolithic group and that an FTA can have different and differential impact on different sub-sectors. As one commentator notes:

> [T]he U.S. textile industry and U.S. fashion brands and apparel retailers hold divided views on the textile and apparel specific rules of origin provision in USMCA—particularly the tariff preference level (TPL). In general, the U.S. textile industry welcomes the changes that limit the usage of-USMCA originating textile inputs, whereas U.S. fashion brands and retailers ask for more flexibilities. Further, even though the agreement seems to be a balanced deal, both the two sides expressed "dissatisfactions" for what they did not get.[130]

4.5.4. Conduct a Readiness and Benchmarking Study

A readiness and benchmarking study that assesses the relative strength of companies in Kenya's apparels and textile sector is highly recommended. There are many questions to be asked. For example:

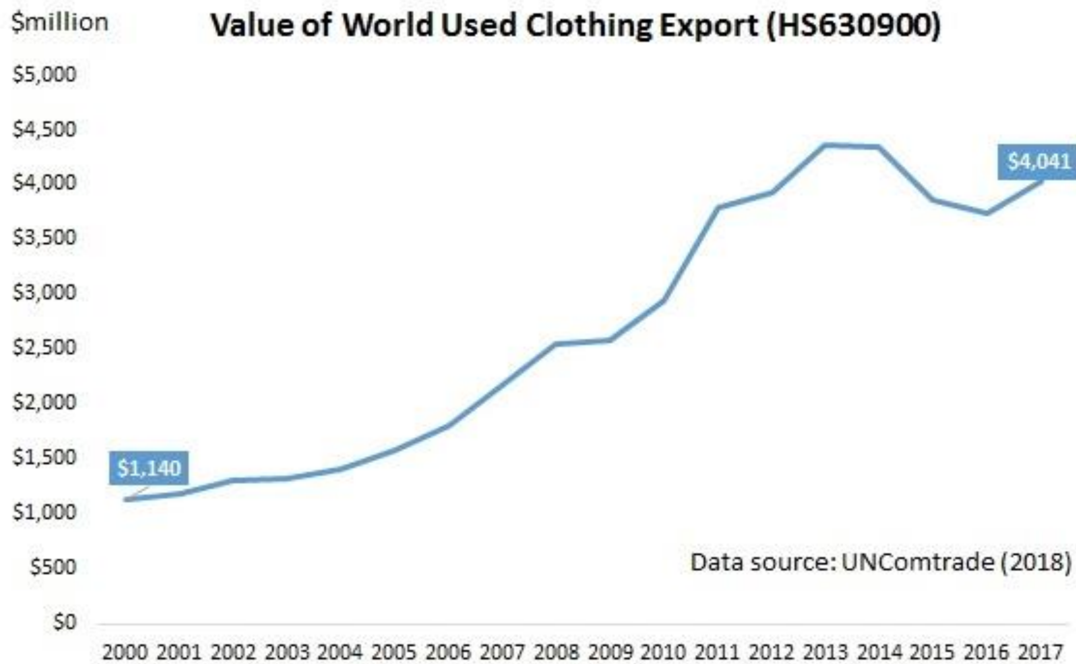
- Are the fundamentals of the Kenyan textile industry sound?
- What is the record of Kenya's textile sector in terms of productivity, export, flexibility and innovation?
- Is Kenya's textiles and apparel sector well-positioned globally and ready to compete globally?
- What is needed to make the industry in Kenya globally competitive? Is there a national development strategy for Kenya's textiles and apparel sector?
- How many companies in Kenya demonstrate readiness and interest in exploiting any additional benefits that an FTA might bring? In the event that a trade deal contains restrictive ROO and onerous documentation requirements, would companies in Kenya still be able to claim any duty savings arising from the FTA?
- Are key industry stakeholders involved in the policymaking process on all major matters affecting the entire textiles and apparel production chain including international trade negotiations, parliamentary initiatives, and regulatory activities?

4.5.5. Address Hot-Button Issues: For Example, Trade in Second-hand Clothing

Trade in used clothing is a major issue that should be addressed in any trade deal between Kenya and the United States. First, the volume and value of trade in second-hand clothes has gone up significantly in the past decade. Between 2006 and 2016, the value of world used clothing trade (HS code 630900) increased by 106 percent, going from $1.8bn in 2006 to $3.7bn in 2016.[131] Second, the U.S. is one of the world's largest source of secondhand clothing and accounts for about 15 percent of used clothing export.[132] Indeed, developed countries enjoy a comfortable market share and the dominant suppliers of used clothing to the world. In 2016, three countries – U.K., U.S., and Germany – accounted for 40 percent of the world's used

[129] https://www.usitc.gov/external_relations/documents/before_105_003.pdf
[130] https://shenglufashion.com/2020/08/03/wto-reports-world-textiles-and-apparel-trade-in-2019/
[131] https://shenglufashion.com/2018/11/15/why-is-the-used-clothing-trade-such-a-hot-button-issue/
[132] https://shenglufashion.com/2018/11/15/why-is-the-used-clothing-trade-such-a-hot-button-issue/

clothing exports. Furthermore, the EU and the U.S. together accounted for as much as 65 percent of the value of world clothing exports between 2006 and 2016.[133]



Source: Sheng Lu (2018)

Third, developing countries in general, and SSA countries in particular, account for most of the world's used clothing import. In 2016, SSA countries reportedly accounted for 20 percent of the world's used clothing, far more than any other regions in the world. In 2015, the EAC accounted for nearly 13% of global imports of used clothing, worth $274m, according to a report by the United States Agency for international Development. *Fourth*, to protect their nascent garment and textile industry, some countries in Africa have either banned the import of secondhand clothing or are considering this option. In 2015, countries in the EAC announced plans to ban second-hand apparel and shoes from 2019; Kenya backed away from these plans, however. *Sixth*, the U.S. has long pushed SSA countries for market access for U.S. used clothing export and has not hesitated to sanction countries that have chosen to maintain a ban on used clothing. In March 2017, the Trump Administration initiated an out-of-cycle review of Rwanda, Tanzania, and Uganda's AGOA eligibility regarding their decisions to phase in a ban on imports of used clothing and footwear.[134] Based on the results of the review, former President Trump suspended duty-free treatment for all AGOA-eligible apparel products from Rwanda. The President decided not to suspend benefits for Tanzania and Uganda "because each has taken steps toward eliminating prohibitive tariff rates on imports of used clothing and footwear and committed not to phase in a ban of these products."[135] In 2017, in the face of mounting pressure, some EAC member states reversed course and opted for high tariffs instead of an outright ban.

[133] Id.
[134] https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/march/title
[135] Id.

Top used clothing exporters					Unit: $million			
Exporters	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**Trend**	**Share in 2017**
European Union	$1,440	$1,606	$1,536	$1,318	$1,324	$1,431		35.4%
United States	$629	$678	$670	$573	$553	$608		15.1%
South Korea	$351	$364	$357	$317	$270	$307		7.6%
China	$62	$101	$189	$284	$218	$298		7.4%
Canada	$192	$174	$168	$139	$126	$132		3.3%
Japan	$125	$120	$127	$113	$94	$85		2.1%
Top used clothing importers					Unit: $million			
Importers	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**Trend**	**Share in 2017**
Sub-Saharan Africa	$725	$847	$797	$647	$553	$697		23.8%
Malaysia	$135	$146	$160	$146	$150	$177		6.0%
Ukraine	$116	$129	$105	$97	$128	$154		5.3%
Russian Federation	$153	$161	$144	$119	$117	$149		5.1%
Pakistan	$153	$160	$147	$141	$154	$148		5.1%
Cameroon	$77	$83	$78	$74	$71	$140		4.8%
Data source: UNComtrade (2018)								

Source: Sheng Lu (2018)

The secondhand clothing saga raises important questions about the likely impact of an FTA between the U.S. and Kenya on Kenya's industrialization policy and strategy, on the industrialization policies of EAC member states, and on regional integration efforts in Africa. What are the costs and benefits of AGOA membership? Does the benefit of a secondhand clothing ban outweigh the risk associated with the loss of AGOA benefits? Can countries in Africa promote their textile industry without jeopardizing the benefits of AGOA membership? China is likely to complicate negotiations over used clothing because a significant percentage of China's used clothing export end up in SSA. Between 2006 and 2016, China's used clothing export increased by more than 684 percent, and went from only US$0.32m in 2006, to US$218m.[136]

4.5.6. Address Capacity Building and Technical Assistance in the Agreement

It is recommended that the Kenyan government, in collaboration with relevant stakeholders, seriously assess the capacity building and technical assistance needs of Kenya's textiles and apparel sector and address these needs in a meaningful way in any future agreement with the U.S. The cost of implementing the textile provisions of any new FTA cannot be ignored. With respect to the USMCA, analysts have noted that the record keeping requirements mandated by the agreement's additional documentation rules are likely to further increase the costs and complexities of apparel manufacturing in North America.[137]

[136] Id.
[137] https://www.bakerinstitute.org/media/files/files/29e60e2b/bi-report-102119-mex-usmca-6.pdf

4.5.7. Review and Revise Negotiating Objectives. Prepare for Tough Negotiations

The USTR is very clear that in a Kenya-US FTA, one of the goals of the U.S. will be to "[s]ecure 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." Surprisingly, Kenya does not have a sector-specific negotiating objective for the apparels and textile sector.

Textiles and Apparel

Negotiating Objectives (Kenya)	**Negotiating Objectives (U.S.)**
No sector-specific objectives for the textiles and apparel sector. **Rules of Origin** • Develop simple and easy to implement rules of origin which ensure that the benefits of the Agreement go to products genuinely made in Kenya building on AGOA Rules of Origin. • Establish rules of origin that encourages regional value chain by allowing cummulation across the existing regional blocs; • Establish flexible rules of origin that allows for wider cummulation provision, including extended cummulation; • Rules that recognizes the different levels of development between the USA and Kenya and therefore allow asymmetrical rules. • Establish rules of origin that incentivize development of the nascent agricultural and industrial sector in Kenya.	**Trade in Goods** - Secure comprehensive duty-free market access for U.S. industrial goods and strengthen disciplines to address non-tariff barriers that constrain U.S. exports. …. - 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.

5. Investment

5.1. Introduction

The last few decades have seen tremendous increase in global FDI flow. In 2019, the value of global FDI flows stood at $1.54 trillion. Globally, the COVID-19 crisis caused a dramatic fall in FDI and is reshaping investment policy in significant ways. As a result of COVID-19, developing economies "are expected to see the biggest fall in FDI because they rely more on investment in global value chain (GVC)-intensive and extractive industries, which have been severely hit, and because they are not able to put in place the same economic support measures as developed economies."[138] In 2019, FDI flows to Africa declined by 10 per cent to $45 billion. In 2020, as a result of COVID-19 and low commodity prices, FDI flows to Africa fell by 25 to 40 per cent. Although experts believe that a rebound, with FDI reverting to the pre-COVID-19 underlying trend in 2022, is possible, there is wide agreement that this outlook is highly uncertain.[139] Experts speculate that the pandemic "could have lasting effects on investment policymaking."[140] One the one hand, the crisis could prompt countries to move towards more restrictive investment policies. On the other hand, the crisis could trigger increased competition for FDI.

As the largest investor and the largest recipient of FDI, the U.S. is uniquely positioned to shape global investment policy. On an annual basis, U.S. direct investment abroad, or new spending by U.S. firms on businesses and real estate abroad stood at approximately $148 billion in 10`9.[141] Conversely, the U.S. attracted approximately $261 billion in FDI in 2019. The United States defines direct investment abroad as the ownership or control, directly or indirectly, by one person (individual, branch, partnership, association, government, etc.) of 10% or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise.[142] Historically, the U.S. approach to international investment has been to push for an open and liberalized international investment regime that is in line with U.S. economic and national security interests.

NAFTA removed barriers to investment, ensured basic protection to foreign investors, and provided a mechanism for the settlement of investment dispute. All U.S. FTAs concluded after NAFTA replicated NAFTA's investment liberalization framework. Following NAFTA's example, every U.S. FTA now contains a chapter on investment. The U.S. has concluded bilateral investment treaties (BITs) with a few countries in Africa including Rwanda, Mozambique, Senegal, Egypt, and Morocco. The latest U.S. BIT with an African nation is the U.S.-Rwanda BIT which was signed in 2008 and entered into force in 2012. For its part, Kenya is not averse to BITs. To date, Kenya has concluded a total of 19 BITs of which 11 are in force. The last Kenyan BITs to enter into force are the Japan-Kenya BIT (entered into force

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[138] UNCTAD, World Investment Report 2020 (2020), p. x
[139] UNCTAD, World Investment Report 2020 (2020), p. x, at 1.
[140] UNCTAD, World Investment Report 2020 (2020), p. x, xi.
[141] http://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf
[142] 15 C.F.R. §806.15 (a)(1)

September 2017), the Kenya-United Arab Emirate BIT (entered into force in June 2017) and the Kenya-Korea BIT (entered into force May 2017). Although Kenya signed a BIT with Singapore in 2018, that particular treaty is not yet in force.

Essentially, the United States' international investment agreement (IIA) program "helps to protect private investment, to develop market-oriented policies in partner countries, and to promote U.S. exports."[143] The BIT program's basic aims are: "to protect investment abroad in countries where investor rights are not already protected through existing agreements (such as modern treaties of friendship, commerce, and navigation, or free trade agreements)"; "to encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way"; and "to support the development of international law standards consistent with these objectives."[144]

NAFTA's investment protections were criticized for being too broad and for not appropriately balancing the rights of investors vis-à-vis those of host states. Since NAFTA, there has been an attempt, in subsequent U.S. trade and investment agreements, to clarify certain provisions and to affirm the right to regulate. Investment is covered in Chapter 14 of the USMCA. The investment chapter of USMCA, chapter 14, establishes a general framework for investment protection and enforcement. Like NAFTA, the USMCA is an investment liberalization mechanism. Chapter 14 encompasses substantive protections for investors and investments as well as mechanisms to settle disputes arising out of violations of such investment protections. As regards basic substantive rights and protections, the USMCA provisions track those of NAFTA. As regards investor-state dispute settlement (ISDS), USMCA provisions introduces considerable changes (see infra chapter 6). Chapter 14of the USMCA maintains most of the traditional protection available to investors. In a clear attempt to affirm the right to regulate, the USMCA clarifies language related to expropriation, national treatment, the minimum standard of treatment, and most-favored nation.

5.2. Definition of Investment

Article 14.1 of the USMCA—like other recent U.S. FTAs—defines investment in very broad and expansive terms. Unlike NAFTA, it does not merely enumerate what qualifies as an investment. It sets forth what constitutes an investment and what does not. Investment is defined as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." It enumerates a non-exhaustive list of examples and these include:

(a) an enterprise;
(b) shares, stock and other forms of equity participation in an enterprise;
(c) bonds, debentures, other debt instruments, and loans;
(d) futures, options, and other derivatives;
(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
(f) intellectual property rights;
(g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law; 2 and

[143] https://ustr.gov/trade-agreements/bilateral-investment-treaties
[144] https://ustr.gov/trade-agreements/bilateral-investment-treaties

(h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases.

Experts agree that the USMCA's definition of investment is more descriptive and of a wider scope than the one provided under NAFTA. Under Article 14.1, the following do not constitute investment: (i) an order or judgment entered in a judicial or administrative action; (ii) claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with such commercial contract.

5.3. Substantive Obligations

USMCA investment chapter imposes pre-establishment commitments on Contracting Parties. It accords protection to investors and investment as regards the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The USMCA grants a number of rights to investors including: (i) national treatment (14.4), Most-Favored-Nation (MFN) Treatment (14.5), Minimum Standard of Treatment (14.6), Treatment in Case of Armed Conflict or Civil Strife (14.7), Expropriation and Compensation (14.8), Transfers (14.9), Performance Requirements (14.10), Senior Management and Boards of Directors (14.11)

5.3.1. National Treatment

Each Party is obliged to accord to investors of another Party and covered investment, treatment no less favorable than that it accords, in like circumstances, to its own investors and covered investments with respect to the **establishment**, **acquisition**, **expansion**, **management**, **conduct**, **operation**, and **sale or other disposition of investments** in its territory. The agreement clarifies that whether treatment is accorded in "like circumstances" depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.[145]

5.3.2. Most-Favored-Nation Treatment

Regarding MFN treatment, each Party commits to "accord to investors of another Party treatment no less favorable than the treatment it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the **establishment**, **acquisition**, **expansion**, **management**, **conduct**, **operation**, and **sale** or **other disposition of investments** in its territory."[146] Like the NT obligation, the MFN obligation is qualified by the statement found in Article 14.5 (4) that "[f]or greater certainty, whether treatment is accorded in "like circumstances" under this Article depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."

5.3.3. Minimum Standard of Treatment (MST)

Under Article 14.6.1. of the USMCA, each Party "shall accord to covered investments treatment in accordance with customary international law, including fair and equitable

[145] USMCA, art. 14.4(4). Emphasis added.
[146] USMCA, art. 14.5.

treatment and full protection and security." Unlike NAFTA, the USMCA add new clarifications and limitations. Pertinent qualifications include:

- ✓ A clarification that Article 14.6.1. prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments.
- ✓ A clarification that the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.
- ✓ A clarification that the obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;
- ✓ A clarification that the obligation to provide "full protection and security" requires each Party to provide the level of police protection required under customary international law.
- ✓ A statement that a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of the minimum standard of treatment obligation.
- ✓ A statement that the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of the minimum standard of treatment obligation even if there is loss or damage to the covered investment as a result.
- ✓ Additional interpretive guidance in the form Annex 14-A (Customary International Law). In Annex 14-A, USMCA Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment) "results from a general and consistent practice of States that they follow from a sense of legal obligation." They also agreed that the customary international law minimum standard of treatment of aliens refers to "all customary international law principles that protect the investments of aliens."

5.3.4. Expropriation

Pursuant to Article 14.8 (Expropriation and Compensation), no Party shall expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation and (d) in accordance with due process of law. Both direct and indirect expropriation are covered. Details about compensation are set out clearly in the Article 14.8 paragraphs 2, 3 and 4.

The expropriation provision contains several qualifications and clarifications. First, to start with, whether an action or series of actions by a Party constitutes an expropriation shall be determined in accordance with paragraph 1 of this Article and Annex 14-B (Expropriation). Second, in Annex 14-B, the Parties confirm their shared understanding that an action or a series

of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment. Third, the Parties clarify that Article 14.8.1 addresses both direct expropriation (in which an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure) and indirect expropriation (in which an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure). Fourth, the Parties further clarify the factors to use to determine whether an action or series of action constitute indirect expropriation. The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations, and (iii) the character of the government action, including its object, context, and intent.

5.3.5. Transfers

5.3.5.1. Obligation

First, Pursuant to Article 14.9, each Party "shall permit **all transfers relating to a covered investment** to be made freely and without delay into and out of its territory."[147] The list of allowable transfers is open-ended and broad and includes:

- contributions to capital;
- profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance, and other fees;
- proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- payments made under a contract entered into by the investor, or the covered investment, including payments made pursuant to a loan agreement or employment contract; and
- payments made pursuant to Article 14.7 (Treatment in Case of Armed Conflict or Civil Strife) and Article 14.8 (Expropriation and Compensation).

Second, each Party is obliged to permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. Third, a Party shall not require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits, or other amounts derived from, or attributable to, investments in the territory of another Party. Fourth, each Party is obliged to permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of another Party.

There are two qualifications to the transfer obligation in the USMCA. According to Article 14.9.5, notwithstanding the stipulated obligations a Party may prevent or delay a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities or derivatives; (c) criminal or penal offenses; (d) financial

[147] Emphasis added.

reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

5.3.6. Performance Requirements

5.3.6.1. Obligations

The USMCA and US Model BIT 2012 restrict the use of specific performance requirements in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment. State Parties undertake not to impose or enforce a wide range of requirements, or enforce a wide range of commitments or undertakings. One new feature in the USMCA is the prohibition of performance requirements related to the purchase, use, or according of a preference to a technology of the party (or a person of the Party). Additionally, performance requirements related to certain royalties and license contracts are also restricted.

Article 14.10

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:
(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use, or accord a preference to a good produced or a service supplied in its territory, or to purchase a good or a service from a person in its territory;
….
(f) to transfer a technology, a production process, or other proprietary knowledge to a person in its territory;
….
(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of a person of the Party, or
(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, a technology; or
(i) to adopt:
(i) a given rate or amount of royalty under a license contract, or
(ii) a given duration of the term of a license contract, in regard to any license contract in existence at the time the requirement is imposed or enforced, or any commitment or undertaking is enforced, or any future license contract freely entered into between the investor and a person in its territory, provided that the requirement is imposed or the commitment or undertaking is enforced in a manner that constitutes direct interference with that license contract by an exercise of non-judicial governmental authority of a Party….

Under the USMCA, State Parties also undertake not to condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, on compliance with a wide range of requirements.

5.3.7. Senior Management and Board of Directors

Pursuant to Article 14.11, no Party shall require that an enterprise of that Party that is a covered investment appoint to senior management positions a natural person of a particular

nationality.[148] A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

5.4. Governments' Right to Regulate

The USMCA contains several provisions that affirm the right of a host state to regulate in the public interest. Pertinent provisions include:

- ✓ A clarification that nothing in Chapter 14 shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with the Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.[149]
- ✓ With respect to expropriation, there is a provision that non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.
- ✓ With respect to expropriation, there is also a qualification that Article 14.8 does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that the issuance, revocation, limitation, or creation is consistent with Chapter 20 (Intellectual Property) and the TRIPS Agreement.
- ✓ A preservation of country-specific nonconforming measures relating to each party's obligations on investment provided they are set out in Annexes I and II in Part B of USMCA.

5.5. Key Considerations for Kenya

5.5.1. U.S. Position as the World's Largest Source of FDI and the World's Leading FDI Destination

The U.S. is one of the world's largest sources of FDI. Consequently, an FTA with the U.S. could, in theory, help Kenya attract much-needed FDI to Kenya. According to the U.S. Bureau of Economic Analysis, the U.S. direct investment abroad position, or cumulative level of investment, increased $158.6 billion to $5.96 trillion at the end of 2019 from $5.80 trillion at the end of 2018.[150] The U.S. is also one of the world's leading FDI destinations. According to the Bureau of Economic Analysis, at the end of 2019, the FDI in the U.S. position increased $331.2 billion to $4.46 trillion, up from $4.13 trillion at the end of 2018. FDI in the U.S. surpassed $4 trillion on a historical-cost basis in 2017.

5.5.2. COVID-19 and Foreign Direct Investment

[148] USMCA, Article 14.11.1.
[149] USMCA, Article 14.16 (Investment and Environmental, Health, Safety, and other Regulatory Objectives).
[150] https://www.bea.gov/data/intl-trade-investment/direct-investment-country-and-industry#:~:text=The%20foreign%20direct%20investment%20in,at%20the%20end%20of%202018.

According to the Organization for Economic Cooperation and Development (OECD), FDI flows are expected to decline sharply as a consequence of the pandemic and the resulting supply disruptions, demand contractions, and pessimistic outlook of economic actors.[151] Against the backdrop of COVID-19 and forecasts as to declines in FDI flow to developing countries, policy makers are under pressure at attract FDI and are weighing their policy options. UNCTAD speculates that investment policy is likely to move in opposite directions. According to UNCTAD:

> The pandemic could have lasting effects on investment policymaking. On the one hand, it may solidify the shift towards more restrictive admission policies for foreign investment in strategic industries. On the other, it may trigger increased competition for investment as economies seek to recover from the crisis. At the international level, the pandemic will accentuate the need for IIA reform as government responses to the health crisis and its economic fallout could create friction with IIA obligations.[152]

In sum, there is stiff global competition for investment dollars and, like most governments, the Kenyan government is under immense pressure to attract FDI particularly into key sectors. Attracting FDI is an important policy objective especially in a post-COVID-19 world. In 2019, 54 economies introduced at least 107 measures affecting foreign investment; significantly, threequarters of those measures were in the direction of liberalization, promotion, and facilitation.

5.5.3. The Development Dimension in IIAs

A growing number of IIAs address a host of issues not traditionally found in investment agreements such as prudential measures,[153] balance of payment,[154] denial of benefits,[155] temporary safeguards,[156] intellectual property rights (IPRs),[157] rule of law, consumer protection, development, and corruption. Both the EAC Model Investment Treaty and the Draft Pan-African Investment Code address development issues.

Addressed in the Draft Pan-African Investment Code are topics such as: Competition Law and Policy (Article 28); Transfer of Technology (Article 29); Environment and Technologies (Article 30); Human Resource Development (Article 36); Taxation (Article 39); Consumer Protection (Article 40). According to Article 29(1) of the Pan-African Investment Code, "Member States shall put in place policies for the purpose of promoting and encouraging the transfer and acquisition of appropriate technology."

The EAC Model Investment Treaty addresses the development dimension extensively. Article 16 is titled 'Right to Pursue Development Goals' and empowers a host State to support the development of local entrepreneurs, enhance local productive capacity and address historically based economic disparities suffered by identifiable ethnic or cultural groups. The

[151] http://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf
[152] World Development Report 2020, xi.
[153] Argentina-Japan BIT, Article 20 (Prudential Measures); Japan-UAE BIT, Article 20; Australia-Hong Kong, Article 21.
[154] CCIA Agreement, Article 25.
[155] Argentina-Japan BIT, Article 23; Singapore-Kazakhstan BIT, Article 18.
[156] Japan-UAE BIT, Article 19; CCIA Agreement, Article 24.
[157] Japan-UAE BIT, Article 21.

Netherlands Model Investment Agreement addresses a host of issues not traditionally found in BITs including, Rule of Law (Article 5) and Sustainable Development (Article 6).[158]

Addressed in the Pan-African Investment Code are issues such as: Competition Law and Policy (Article 28); Transfer of Technology (Article 29); Environment and Technologies (Article 30); Human Resource Development (Article 36); Taxation (Article 39); Consumer Protection (Article 40). According to Article 29(1) of the Pan-African Investment Code, "Member States shall put in place policies for the purpose of promoting and encouraging the transfer and acquisition of appropriate technology.".

Chapter 3 of the *Draft Pan-African Investment Code* is titled 'Development Related Issues' and it takes on a controversial issue, performance requirements. Rather than restrict the use of performance requirement as is the norm in many IIAs, the Draft Pan-African Investment Code actually encourages their use. Article 17 (1) states that 'Member States may support the development of local, regional and continental industries that provide, inter alia, up-stream and down-stream linkages and have a favorable impact on attracting investments and generating increased employment in Member States.' Article 17(2) provides that 'Member States may introduce performance requirements to promote domestic investments and local content.' Addressed in the Pan-African Investment Code are issues such as: Competition Law and Policy (Article 28); Transfer of Technology (Article 29); Environment and Technologies (Article 30); Human Resource Development (Article 36); Taxation (Article 39); and Consumer Protection (Article 40). According to Article 29(1) of the Draft Pan-African Investment Code, 'Member States shall put in place policies for the purpose of promoting and encouraging the transfer and acquisition of appropriate technology.'

EAC MODEL INVESTMENT TREATY

Article 16: Right to Pursue Development Goals

16.1 Notwithstanding any other provision of this Treaty, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.

16.2 Notwithstanding any other provision of this Treaty, a State Party may

(a) support the development of local entrepreneurs…..

16.3 Notwithstanding any other provision of this Treaty, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Treaty.

5.5.4. U.S. is Critical of Several Aspects of Kenya's Investment Policy

The USTR has identified a litany of barriers to investment in Kenya. Some of the barriers to investment identified include (i) limitations on foreign equity participation,

[158] Netherlands model Investment Agreement 22 March 2019. https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download

including restrictions on foreign participation in the mining sector; (ii) local content requirements; (iii) state-owned enterprises; and (iv) Constitutional provisions limiting foreign land ownership. Regarding limitations on foreign equity participation, the USTR notes in a 2019 report:

> Kenya imposes foreign ownership limitations in several sectors, often in combination with local content requirements. For example, the Communications Authority, Kenya's telecommunications regulator, requires 20 percent Kenyan shareholding within three years of receiving a license. The 2016 Private Security Regulation Act restricts foreign participation in the private security sector by requiring that Kenyans hold at least 25 percent of shares in private security firms. The Kenya Insurance Act (2010) restricts foreign capital investment to two thirds, with no single person controlling more than 25 percent of an insurers' capital. Additionally, in 2015, the government imposed regulations requiring that Kenyans own at least 15 percent of the share capital of derivatives exchanges. The 2016 Mining Act imposes a variety of restrictions on foreign participation in the mining sector. Among other restrictions, the Mining Act reserves acquisition of mineral rights for Kenyan companies; requires 60 percent Kenyan ownership of both mineral dealerships and artisanal mining companies; and requires largescale mining operations to offer 20 percent equity on the Nairobi Securities Exchange within three years of commencing operations, while also offering 10 percent "free-carried interest" (free equity stake in capital operations) to the Kenyan government.[159]

On Kenya's local content policies, the 2019 report states:

> The 2011 National Construction Authority Act imposes local content restrictions on "foreign contractors," defined as companies incorporated outside Kenya or with more than 50 percent ownership by non-Kenyan citizens. The Act also contains provisions requiring foreign contractors to hire from the local labor market, unless the National Construction Authority determines the necessary technical skills are not available locally. In addition, the Act requires foreign contractors to enter into subcontracts or joint ventures assuring that at least 30 percent of the contract work is done by local firms. Regulations implementing these requirements were in process as of December 2018.[160]

Regarding land ownership, the USTR notes in the report that:

> The 2010 Kenyan Constitution prohibits foreigners from holding freehold land title anywhere in the country, permitting only leasehold titles of up to 99 years. The cumbersome and opaque process required to acquire land raises concerns about security of title, particularly given past abuses relating to the distribution and redistribution of public land. Complicated land transactions procedures, lack of adequate urban planning, and under-investment in land demarcation are exposing investors to the risk of being given fake title deeds or finding a plot with multiple titles and unauthorized sales for those tracts of land. There are some estimates that clear titles are unavailable for about two-thirds of Kenyan land. The 2016 Community Land Bill made it easier for communities to claim title over their ancestral land and receive documentation.[161]

5.5.5. U.S. Law Makers Are Pushing for Strong Investor Protection Provisions

U.S. Law makers are pressing for very strong investment protection provisions. In a written follow-up to a June 2020 hearing before the House Ways & Means Committee, Rep. David Schweikert put the following question to U.S. Trade Rep. Lighthizer:

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[159] 2019 National Estimates Report, p. 314.
[160] 2019 National Estimates Report, p. 314.
[161] 2019 National Estimates Report, p. 314.

> While Kenya has taken steps to improve its business environment … it still maintains many restrictions on foreign investment, including foreign equity limitations, local content requirements, and limitations on the ownership and control of land…. In light of these issues, strong investor protection and a strong ISDS mechanism to enforce them are needed to address investors' concerns in Kenya. Can you commit to pursuing strong investor protections, including ISDS for all sectors, in a US-Kenya FTA?[162]

Interestingly, while Lighthizer was somewhat evasive on the ISDS issue, he was adamant that the U.S. intended to secure a "high-standard investment agreement." According to Lighthizer:

> The Administration is seeking a high-standard and comprehensive U.S.-Kenya FTA, including a high-standard investment chapter. To this end, the Administration will seek to secure for U.S. investors in Kenya important rights consistent with U.S. legal principles and practice and the highest international standards of investment protection, such as those reflected in the U.S.-Mexico-Canada Agreement. We will also seek to reduce or eliminate barriers to U.S. investment in Kenya, such as equity and land ownership limitations and local content requirements.[163]

5.5.6. Crisis in International Investment Law

The international investment law regime is in crisis. Widespread concern that IIAs have the potential to constrain regulatory action and expose countries to considerable legal risks, is prompting a growing number of countries to engage in multi-year BIT review processes and to engage in meaningful reform of their IIAs. Several factors are prompting countries to review their international investment agreement framework and engage in reform directed in part at safeguarding regulatory space in old and new IIAs.

5.6. Key Recommendations

5.6.1. Conduct a Detailed and Comprehensive Cost-Benefit Analysis

U.S. FDI stock in Kenya which was $353 million in 2019 is insignificant when compared to U.S.'s cumulative level of investment globally which in 2019 was $5.96 trillion. U.S. FDI stock in Kenya is also minuscule when compared to U.S. FDI stock in some other developing countries. The U.S. FDI in Indonesia (stock) was $12.2 billion in 2019, a 18.7% increase from 2018. As of 2019, the U.S. FDI in Brazil (stock) was $81.7 billion, a 3.4% increase from 2018,[164] the U.S. FDI in India (stock) was $45.88 billion, and the U.S. FDI in the Republic of Korea (stock) was $39.11 billion. In theory, a trade deal with the U.S. could position Kenya to attract a greater share of FDI from U.S. investors. However, there are no guarantees that a trade deal will position Kenya to attract a greater share of U.S. FDI. Furthermore, there is no guarantee that a trade deal will position Kenya to attract FDI to the country's SDG-sectors. UNCTAD has noted a decline in SDG-relevant investments in 2020 and the fact that the COVID-19 pandemic significantly exacerbated SDG financing gaps in developing countries. Because FDIs frequently impose considerable cost on host countries and promised benefits sometimes fail to materialize, it is important that the Kenyan government assess the costs and benefits of investment liberalization agreement with a country that occupies a unique position in the global economy as the largest investor and the largest

[162] https://www.c-span.org/video/?473040-1/house-ways-means-committee-hearing-trade-policy
[163] https://www.c-span.org/video/?473040-1/house-ways-means-committee-hearing-trade-policy
[164] https://ustr.gov/countries-regions/americas/brazil#:~:text=U.S.%20foreign%20direct%20investment%20(FDI,a%203.4%25%20increase%20from%202018.

recipient of FDI. There are many important questions for the Kenyan government to answer. For example,

- will an FTA with the U.S. necessarily make Kenya a more attractive market for U.S. investors?
- will an FTA with the U.S. help Kenya attract more SDG-relevant investment?
- will an FTA with the U.S. encourage Kenyan investors to invest in the U.S. market? and
- what are the costs and benefits of full investment liberalization for Kenya?

5.6.2. Rethink Assumptions About the Role of IIAs in Attracting FDI

Some studies show that FTAs do not always bring increased FDI for developing countries and that investment decisions of multinationals are influenced by a complex mix of factors? Although the U.S. is the largest source of FDI in the world and invests in many countries, most of the countries that the U.S. has bilateral investment treaties with are developing countries. Significantly, the U.S. does not have investment treaties or FTAs with countries that are among the largest recipients of U.S. FDI. According to the Bureau of Economic Analysis, the investment of U.S. multinational enterprises (MNEs) in affiliates in five countries accounted for more than half of the total position at the end of 2018. The largest destinations for cumulative U.S. FDI outflow through 2017 included the Netherlands at $883.2 billion, followed by the United Kingdom ($757.8 billion), Luxembourg ($713.8 billion), Ireland ($442.2 billion), and Canada ($401.9 billion).

Significantly, the U.S. has not concluded an FTA or IIA with most of the countries that are in the top five in terms of FDI into the U.S. According to the Bureau of Economic Analysis, by country of the immediate foreign parent, five countries accounted for more than half of the total position at the end of 2017. The United Kingdom was the top investing country with a position of $540.9 billion, followed by Japan ($469.0 billion), Canada ($453.1 billion), Luxembourg ($410.7 billion), and the Netherlands ($367.1 billion).

Countries with highest direct investment position received from the U.S. 2019 (In billions US dollars)

Top Destinations of U.S. FDI	Value	Existence of FTA, IIA or Both
The Netherlands	860.53	No
United Kingdom	851.41	No
Luxembourg	766.1	No
Canada	402.26	Yes
Ireland	354.94	No
Singapore	287.95	Yes
Bermuda	262.42	No
Switzerland	228.97	No
Australia	162.4	Yes
Germany	148.26	No
Japan	131.79	No
China	116.2	No
Mexico	100.89	Yes
France	83.83	No
Hong Kong	81.88	No

Source: Bureau of Economic Analysis;[165] Statistica.com[166] (Authors Compilation).

[165] https://www.bea.gov/news/2018/direct-investment-country-and-industry-2017

[166] https://www.statista.com/statistics/188806/top-15-countries-for-united-states-direct-investments/

Top Country Source of FDI into the U.S.

	Country Source of FDI into the U.S.	**Existence of FTA, IIA, or Both**
1	United Kingdom	No
2	Japan	No
3	Canada	Yes
4	Luxembourg	No
5	The Netherlands	No

Source: Bureau of Economic Analysis/ UNCTAD. Author's Compilation)

In sum, the Kenyan government must rethink assumptions about the role of IIAs in attracting FDI. While investment climate is undoubtedly a key consideration for foreign investors thinking about where to invest, whether FTAs and BITs actually make a country more attractive to foreign investors is a matter of considerable debate.

5.6.3. Review and Evaluate Investment Policy Options

Across the globe, countries are weighing their options as far as investment policy tools are concerned. While the number of IIAs concluded by states continues to grow, changes in the IIA regime is clearly on the way suggesting that countries are carefully weighing their options and are daring to be innovative. *First*, while some countries are concluding and signing new IIAs, others are terminating IIAs that they believe are not in their best interest. In 2019, the number of IIA terminations (34) exceeded the number of new IIAs (22) for the second time, according to UNCTAD.[167] To date, some 349 IIAs have been effectively terminated. *Second*, countries are continuing to reform their IIAs. According to UNCTAD, nearly all new IIAs contain reform features including provisions designed to effectively preserve domestic regulatory space. *Third*, a growing number of countries are taking IIAs very seriously and are holding off on concluding new agreements. Although the U.S. has for years pursued BIT negotiations with China and India, both talks have stalled, suggesting that countries are giving serious consideration to the costs and benefits of IIAs.

5.6.4. Protect the Right to Regulate

The Kenyan government must seek to preserve its right to regulate in the public interest. Regional and continental visions and goals are driving reform efforts in many parts of the world and are prompting states to reassert their right to regulate in the public interest. In Africa, key regional and continental policy instruments all affirm the right of states to regulate in the public interest. In the preamble to the Agreement Establishing the African Continental Free Trade Area, participating States "[r]eaffirm[] the right of State Parties to regulate within their territories and the State Parties' flexibility to achieve legitimate policy objectives in areas including public health, safety, environment, and public morals." In the preamble to the Pan-African Investment Code, Member States of the African Union "RECOGNIZ[E] their right to regulate all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives." Article 15 of the EAC Model Investment Treaty is titled 'The Right of States to Regulate' and addresses the right to regulate in expansive terms. Article 15 of the EAC Model Investment Treaty (2016) provides thus:

[167] UNCTAD, World Investment Report 2020, p. 19.

15.1 The Host State shall have the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and social and economic policy objectives.
15.2 Except where the rights of a Host State are expressly stated as an exception to the obligations of this Treaty a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Treaty.
15.3 For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Treaty.

5.6.5. Be Innovative

It is important that the Kenyan government is creative in designing the investment chapter of any future FTA. Against the backdrop of the crisis in international investment law, more and more states are taking the initiative to propose new treaty clauses that can address their unique situation. It is suggested that the Kenyan government study and draw lessons from recent IIAs. In this regard, although the USMCA's investment chapter affirms the government's right to regulate, many other innovative provisions found in some recent FTAs are clearly missing from the USMCA. For example, some recent FTAs explicitly address expropriation relating to land. An example is Annex 9-C of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership which provides:

ANNEX 9-C EXPROPRIATION RELATING TO LAND

1. Notwithstanding the obligations under Article 9.8 (Expropriation and Compensation), where Singapore is the expropriating Party, any measure of direct expropriation relating to land shall be for a purpose and upon payment of compensation at market value, in accordance with the applicable domestic legislation and any subsequent amendments thereto relating to the amount of compensation where such amendments provide for the method of determination of the compensation which is no less favourable to the investor for its expropriated investment than such method of determination in the applicable domestic legislation as at the time of entry into force of this Agreement for Singapore.

2. Notwithstanding the obligations under Article 9.8 (Expropriation and Compensation), where Viet Nam is the expropriating Party, any measure of direct expropriation relating to land shall be:
(i) for a purpose in accordance with the applicable domestic legislation; and
(ii) upon payment of compensation equivalent to the market value, while recognising the applicable domestic legislation.[168]

5.6.6. Address Sustainable Development

In any future FTA, the investment chapter should be designed with a view to helping Kenya meet its sustainable development goals. The imperatives of sustainable development and the realization that the ultimate goal of FDI is to contribute to sustainable development is driving reform efforts in many countries. The third, fourth, and fifth preambular statement in the EAC Model Investment Treaty reads:

Recognizing the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human development and human rights particularly in light of EAC Partner States commitments to international conventions in that respect[.]

[168] See: http://www.itd.or.th/wp-content/uploads/2019/09/Annex-18-CAPTPP-Chapter-9-Annexes-9-B-and-9-C.pdf

Seeking to promote, facilitate, encourage, protect and increase investment opportunities that enhance sustainable development within the territories of the State Parties;

Understanding that sustainable development requires the fulfillment of the economic, social and environmental pillars that are embedded within the concept[.]

5.6.7. Ensure a Balance of Rights and Obligations

The last decade saw the rise of global corporate accountability movements in many parts of the globe.[169] The result has been an uptick in the number of legal *albeit* soft law instruments that address corporate social responsibility and other issues at the intersection of business and human rights.[170] Corporate social responsibility is addressed in the USMCA. Although laudable, the corporate social responsibility provisions in the USMCA do not go as far as those found in some recent IIAs.

In a growing number of recent BITs, Contracting Parties impose CSR obligations directly on investors. In the Morocco-Nigeria BIT, several articles address CSR including Article 14 (Impact Assessment), Article 17 (Anti-corruption), Article 18 (Post-Establishment Obligations), Article 19 (Corporate Governance and Practices), Article 10 (Investor Liability) and Article 24 (Corporate Social Responsibility). Article 17(4) of the Morocco-Nigeria BIT provides that "a breach by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment." Article 17(5) provides that Contracting Parties can, consistent with their applicable law, to prosecute and where convicted penalize persons that have breached the applicable law implementing the obligations relating to corporate responsibility.[171] Article 16.4. of the EAC Model Investment Treaty provides that investors "shall, in performing their activities, protect the environment and where the activity causes damages to the environment, they shall restore it to the extent appropriate and feasible."

NIGERIA-MOROCCO BIT
ARTICLE 14
Impact Assessment

1) Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.

2) Investors or the investment shall conduct a social impact assessment of the potential investment. The Parties shall adopt standards for this purpose at the meeting of the Joint Committee….

[169] UNCTAD's Reform Package, at p. 66 (observing that "The last decade has seen the development of CSR standards as a unique dimension of "soft law" that is rapidly evolving.").

[170] The United Nations Guiding Principles on Business and Human Rights (2011). See also, E.g. The OECD Guidelines For Multinational Enterprises (2011 Edition). Available at < https://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm>.

[171] Morocco-Nigeria BIT, Article 17(5).

5.6.8. Ensure Policy Coherence

The need for policy coherence is also driving reform efforts today. Increasingly, states are acknowledging their commitments and obligations under other international and regional treaties and the need for coherence in international, regional and domestic policy making. In the preamble to the Agreement Establishing the African Continental Free Trade Area, participating states "[r]ecogniz[e] the importance of international security, democracy, human rights, gender equality, and the rule of law for the development of international trade and economic cooperation." In the EU-Singapore Investment Partnership Agreement, Contracting Parties reaffirmed their commitment to the Charter of the United Nations and had regard to the principles articulated in the Universal Declaration of Human Rights.[172] Policy coherence in investment policy is particularly relevant in a post-pandemic era. Today, countries are (i) revising investment policies in response to COVID-19, (ii) taking extra steps to protect strategic assets; and (iii) are integrating food security plans and public health plans into their investment policies. On 25 March 2020, the EU Commission issued the "Guidance to the Member States Concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets."[173]

5.6.9. Adopt a Strategy for Attracting a Greater Share of U.S. FDI

In 2019, Japan, the United States and the Netherlands were the largest sources of FDI outflows worldwide, according to the OECD.[174] Should Kenya go ahead with plans to conclude an FTA with the U.S., it is recommended that Kenya adopt specific policies and strategies for attracting a greater share of U.S. FDI. U.S. FDI in Kenya (stock) was $353 million at the end of 2018; this pales in comparison to U.S. FDI stock in many other countries. The question is what can Kenya do to attract a greater share of U.S. capital? What can Kenya do now not only to attract a greater share of FDI but also to attract FDI to sectors that need it the most?

5.6.10. Adopt Strategy for Increasing Kenya's FDI in the United States

The U.S. is one of the top destinations of global FDI. Investment liberalization is not only about attracting FDI but also about exporting capital to key markets. Over the last two decades developing country MNEs have become a growing source of global FDI. According to the World Bank, FDI from developing countries has increased twentyfold in the last two decades, accounting for nearly one-fifth of global FDI flows in 2015. Significantly, "[w]hile larger developing countries, especially the BRICS, are driving this phenomenon, about 90 percent of developing countries of all sizes and income levels are now undertaking outward foreign direct investment…"[175] Given that the U.S. is one of the top destinations of global FDI, a Kenya-U.S. should not only be about FDI but also about how to encourage Kenyan enterprises to invest in the U.S. market. Consider that:

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[172] See also EU-Canada Comprehensive and Economic Trade Agreement (Contracting parties, "REAFFIRM[ED] their strong attachment to democracy and to fundamental rights as laid down in the Universal Declaration of Human Rights.").

[173] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XC0326(03)&from=EN

[174] http://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf

[175] The *Global Investment Competitiveness Report 2017/2018* (2017).

- Cumulatively, the U.S. is one of the world's prime location for international investment.[176]
- FDI in the U.S. surpassed $4 trillion at the end of 2017 on a historical-cost basis.[177]
- In the past five years, international architectural and engineering services firms have increased their investment in the United States by 385 percent.[178] During the same period, international investment in the U.S. manufacturing industry rose 86, while information was the third-fastest growing industry with a 53 percent increase.

About three quarters of the FDI to the U.S. are from rich nations. Collectively, eight countries – UK, Canada, Japan, Germany, Ireland, France, Switzerland, and Netherlands – account for three-fourths of total FDI in the U.S. According to the Bureau of Economic Analysis: "By country of the foreign parent, five countries accounted for more than half of the total position at the end of 2018. The U.K. remained the top investing country with a position of $560.9 billion. Canada ($511.2 billion) moved up one position from 2017 to be the second largest investing country, moving Japan ($484.4 billion) into third, while the Netherlands ($479.0 billion) and Luxembourg ($356.0 billion) switched places as the fourth and fifth largest investing countries at the end of 2018.[179]

Although a sizeable chunk of FDI in the U.S. are from developed economies, developing countries have not been left out. The last decade has seen increased FDI in the U.S. from Asia-Pacific countries as well as other emerging market economies. According to the USTR, in 2019: Thailand's FDI in the U.S (stock) was $1.9 billion, Indonesia's FDI in the U.S (stock) was $399 million, Vietnam's FDI in the U.S. (stock) was $57 million, while Cambodia's FDI in the United States (stock) was $4 million. According to a 2018 report by the Global Business Alliance, of the top 20 countries with companies invested in the U.S., between 2012 and 2017, Singapore increased its U.S. growth by more than 400 percent, and China and South Korea also saw significant increases.[180]

5.6.11. Improve Kenya's Investment Climate

According to a survey of 750 multinational investors and corporate executives, "political stability and security along with a stable legal and regulatory environment" far outweigh considerations of tax rates and labor costs when deciding where to commit foreign investment capital.[181] Although investment protection is important to MNEs, protection need not be enshrined in an FTA. Investment guarantees provided in a country's laws are good enough.

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[176] In 2019, the United States and China, the Netherlands, Ireland and Brazil were major FDI recipients. See, http://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf
[177] Foreign Direct Investment in the United States 2018. https://globalbusiness.org/report/foreign-direct-investment-in-the-united-states-2018
[178] Fastest Growing FDI Sectors: Buildings, Beverages and Books (September 13, 2018). https://globalbusiness.org/blog/fastest-growing-fdi-sectors-buildings-beverages-and-books
[179] https://www.bea.gov/news/2019/direct-investment-country-and-industry-2018
[180] https://globalbusiness.org/blog/this-asia-pacific-country-leads-the-list-of-america-s-most-rapidly-expanding-investors-and-it-s-not-china
[181] The Global Investment Competitiveness Report 2017/2018 (2017).

While investment climate reforms are necessary for markets to move from fragility to resilience, decisions about the types of reform that are needed, the sequencing of reforms, and prioritization of interventions, require serious consideration and a careful balancing of interests. What is more, a complex mix of factors affect FDI suggesting that developing countries must be very careful about policy decisions they make in a bid to attract FDI. Factors affecting FDI include political stability, tax rates, size of local market, commodities, culture, and access to free trade areas. Consider that as at 2015, "[a]bout 71% of the accumulated U.S. foreign direct investment is concentrated in high-income developed countries that are members of the OECD," that "investments in Europe alone account for over half of all U.S. direct investment abroad, or $2.9 trillion," and that "Europe has been a prime target of U.S. investment since U.S. firms first invested abroad in the 1860s."[182]

5.6.12. Vulnerable Groups (Indigenous People, Women, Farmers, etc.) and International Trade and Investment Agreements – Toward a More Inclusive Approach to Trade

In view of Kenya's commitments under international and regional human rights law and rights enshrined in the Kenyan Constitution, the Kenyan government must protect the rights and interests of vulnerable groups, particularly indigenous peoples, into any FTA it negotiates. Kenya's obligations to indigenous peoples under the Kenyan Constitution cannot and must not be superseded or undermined by commitments under any FTA.

In the last few years, the impact of trade and investment agreements on vulnerable groups including women and indigenous peoples has come under increased scrutiny. In a 2015 report to the U.N. General Assembly, the Special Rapporteur on the Rights of Indigenous Peoples warned that the protections that international investment agreements provide to foreign investors can have significant impacts on indigenous peoples' rights.[183] In a 2016 report, the Special Rapporteur warned that research "reveals an alarming number of cases in the mining, oil and gas, hydroelectric and agribusiness sectors whereby foreign investment projects have resulted in serious violations of indigenous peoples' land, self-governance and cultural rights."[184] As the Special Rapporteur explained:

> 27. Typically, the host States involved employ economic development policies aimed at the exploitation of energy, mineral, land or other resources that are predominantly located in the territories of indigenous peoples. The government agencies responsible for implementing those policies regard such lands and resources as available for unhindered exploitation and actively promote them as such abroad to generate capital inflows. Recognition of indigenous peoples' rights in the domestic legal framework is either non-existent, inadequate or not enforced. Where they exist, institutions mandated to uphold indigenous peoples' rights are politically weak, unaccountable or underfunded. Indigenous peoples lack access to remedies in home and host States and are forced to mobilize, leading to criminalization, violence and deaths. They experience profound human rights violations as a result of impacts on their lands, livelihoods, cultures, development options and governance structures, which, in some cases, threaten their very cultural and physical survival. Projects are stalled and there is a trend towards investor-State dispute settlements related to fair and equitable treatment, full protection and security and expropriation.

[182] https://fas.org/sgp/crs/misc/RS21118.pdf
[183] A/70/301.
[184] A/HRC/33/42

It is recommended that the Kenyan government carry out a study on innovative approaches to protecting the rights and interests of indigenous peoples in Kenya's trade and investment agreements. Options may include targeted impact assessment, special carve-out clauses, strong and effective provisions on corporate social responsibility and corporate accountability. Canada applies a two-track approach to advancing the interests of indigenous peoples through FTAs. First, Canada has started to include chapter-specific reservations and exceptions related to indigenous peoples and Indigenous businesses in its FTAs. Second, Canada is actively engaging with indigenous peoples on Canada's International Trade Policy Priorities. In September 2017, Global Affairs Canada established the trade-focused Indigenous Working Group (IWG). At Canada's insistence, indigenous-specific provisions appear in several chapters of the USMCA including, Exceptions and General Provisions chapter, Small and Medium-sized Enterprises chapter, Textile and Apparel Goods chapter, Environment chapter, Investment chapter, Annex II Investment and Services Non-Conforming Measures – Investment and Cross-Border in Services: Aboriginal Affairs, and Annex IV – State-Owned Enterprises and Designated Monopolies Non-Conforming Activities – All existing and future state-owned enterprises.

5.6.13. Rethink Negotiation Objectives

Considering the numerous issues confronting Kenya, Kenya's negotiation objective is extremely modest and must be reviewed. There are many questions left unanswered. Are all sectors open for negotiation? What sensitive sectors are off the table? What specific barriers to Kenyan investment in the U.S. should the agreement address?

Investment Chapter

Negotiating Objectives (Kenya)	Negotiating Objectives (US)
"The negotiations shall aim at creating a liberal, facilitative, and competitive investment environment. Negotiations for investment shall cover the four pillars of promotion, protection, facilitation and liberalization."	- 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.

Increasingly, countries are rethinking the idea of granting foreign investors greater rights than domestic investors. Not surprising, a negotiating objective of the U.S. is to ensure that Kenyan investors are not accorded greater substantive rights than domestic investors.

In the final analysis, whether an investment chapter is necessary in an FTA and the scale of investment liberalization a government embarks upon is based on serious calculations of costs and benefits. The global competition for FDI is intense and is likely to intensify amid the current FDI slump. Even if an FTA is considered necessary, several considerations still await the Kenyan government. For example, how to ensure that FDI go to sectors that need it most and actually contribute to sustainable development is a question most developing countries are grappling with.

6. Investor-State Dispute Settlement

6.1.1. Introduction

Under international law, dispute settlement between states is typically a state-to-state process. Although controversial, today, investor-State dispute settlement (ISDS) is at the very core of the international investment law regime and is found in most BITs and IIAs.[185] A separate dispute settlement system for investment was included in NAFTA and has been included in nearly all other U.S. FTAs since NAFTA. ISDS allows an investor to bypass domestic dispute resolution processes and to bring claims over alleged breaches of investment obligations directly against a host state before an international tribunal. By allowing non-state entities to bring claims directly against states, the ISDS essentially elevates private entities to the status of subjects of international law. ISDS proceedings are typically conducted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) and a few other international arbitration centers. The last two decades witnessed increased use of ISDS and increased backlash against ISDS. According to UNCTAD:

> The number of treaty-based investor–State dispute settlement (ISDS) cases reached over 1,000. Most of the 55 publicly known ISDS cases initiated in 2019 were brought under IIAs signed in the 1990s or earlier. ISDS tribunals rendered at least 71 substantive decisions. In the decisions holding the State liable, the amounts awarded ranged from several millions to $8 billion.[186]

NAFTA granted foreign investors the right to initiate arbitration claims against host states directly without needing to go to domestic courts first or even exhausting domestic remedy. Chapter 14 of the USMCA retains the ISDS mechanism but with significant modifications. Under the USMCA, the scope of ISDS is drastically reduced. Essentially, the USMCA:

- ✓ Eliminates ISDS between Canada and the U.S. It eliminates the ability of U.S. and Canadian investors to use the ISDS mechanism against one another after a three-year phaseout period and only in relation to claims initiated prior to the eventual termination of the NAFTA (Annex 14-C).
- ✓ Eliminates ISDS as between Canada and Mexico *(*Annex 14-C).
- ✓ Preserves "legacy investment claims." Investors with prior investments (those existing before the USMCA entered int force) can continue to bring claims under NAFTA until July 1, 2023.
- ✓ Provides limited ISDS protection to U.S. investors in Mexico and Mexican investors in the U.S. but only under specific circumstances (ANNEX 14-D).
- ✓ Provides a two-track protection scheme for ISDS involving U.S. and Mexico investors: (1) for general investments; and (2) for covered investment.
- ✓ Explicitly excludes as a claimant an investor that is owned or controlled by a person of a non-Annex Party that, on the date of signature of the USMCA, the

[185] UNCTAD, *Investor-state dispute settlement: A sequel - UNCTAD Series on Issues in International Investment Agreements II* (UNCTAD/DIAE/IA/2013/2).
[186] World Investment Report 2020, p. xii.

> other Annex Party has determined to be a non-market economy for purposes of its trade remedy laws and with which no Party has a free trade agreement.

In sum, Canada is not part of the ISDS under the USMCA. In effect, U.S. and Mexican investors cannot bring arbitration claims against Canada under the USMCA, nor can Canadian investors bring such claims against Mexico or the United States. However, Canada has an ISDS mechanism with Mexico via TPP-11 which went into force in 2018. An investor may only submit a claim to arbitration under USMCA's investment chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts).

6.1.2. Legacy Investment Claims and Pending Claims (Annex 14-C)

The USMCA preserves 'legacy investment claims.' Investors who made investments covered by the NAFTA prior to its termination may bring claims under the NAFTA for up to three years after the date of NAFTA's termination. In effect, the USMCA does not disrupt pending ISDS cases under NAFTA. Furthermore, the USMCA allows for new claims under NAFTA rules for three years from the date of NAFTA's termination. Since the USMCA went into effect July 1, 2020, legacy investment claims can be brought until July 2023.

6.1.3. General Disputes (Annex 14-D).

Subject to several conditions and limitations, the ISDS retains ISDS for U.S. and Mexican investors. The USMCA limits the types of claims that are subject to ISDS. Protected investors can bring ISDS claims regardless of the sector for violation of: (i) national treatment1 (post-established investment), (ii) most favored nation (post-established investment), and (iii) direct expropriation. The conditions and limitations include those related to exhaustion of domestic remedy and statute of limitation.

6.1.3.1. Limited ISDS Claims

ISDS claims are limited to claims alleging a breach of national treatment (post-establishment), a breach of most-favored-nation treatment (post-establishment), and direct expropriation. Article 14.D.3, paragraph 1 of the USMCA specifically eliminates:

- Claims alleging a violation of national treatment with respect to the establishment or acquisition of an investment (the so-called "right to invest" provision),
- Claims alleging a violation of MFN with respect to the establishment or acquisition of an investment,
- claims alleging a violation of the minimum standard of treatment, and
- claims alleging indirect (or regulatory) expropriation.

To clarify, under the USMCA, national treatment and MFN treatment claims are not permitted regarding the establishment of an investment. Claims for indirect expropriation are also barred.

6.1.3.2. Exhaustion of Domestic Remedy (A mandatory 30-months of litigation in domestic courts)

Under the USMCA, at least 90 days before submitting any claim to arbitration, a claimant is required to deliver to the respondent a written notice of its intention to submit a

claim to arbitration (notice of intent).[187] No claim shall be submitted to arbitration unless the claimant "first initiated a proceeding before a competent court or administrative tribunal of the respondent with respect to the measures alleged to constitute a breach" and the claimant or the enterprise obtained a final decision from a court of last resort of the respondent or 30 months have elapsed from the date the proceeding was initiated.

6.1.3.3. Statute of Limitation

There is a statute of limitation. To submit a claim to arbitration it is important that no more than four years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged.

6.1.3.4. Procedure and Transparency

The USMCA contains detailed and updated provisions on panel selection, transparency, and conflict of interest. The USMCA, Annex 14-D, Article 6, provides that arbitrators need to comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration. For example, arbitrators cannot act as counsel or as party-appointed expert or witness in any pending arbitration under the agreement for the duration of the proceedings in which they have been appointed.

6.1.3.5. Chinese Claimants (Annex 14-D)

Article 1 of Annex 14-D of the USMCA, defines "Claimants" narrowly to exclude certain classes of claimants. According to Article 1:

> "[C]laimant means an investor of an Annex Party that is a party to a qualifying investment dispute, excluding an investor that is owned or controlled by a person of a non-Annex Party that, on the date of signature of this Agreement, the other Annex Party has determined to be a non-market economy for purposes of its trade remedy laws and with which no Party has a free trade agreement."

Analysts agree that Article 1 of Annex 14-D "is clearly aimed at excluding Chinese-owned or controlled firms or persons in the U.S. or Mexico from using the ISDS process."[188] In 2017, the U.S. Department of Commerce's International Trade Administration, in a 200-page memorandum, concluded that "China is a non-market economy (NME) country because it does not operate sufficiently on market principles to permit the use of Chinese prices and costs for purposes of the Department's antidumping analysis."[189]

6.1.4. Covered Contracts (Annex 14-E)

Annex 14-E of the USMCA is titled, "Mexico-United States Investment Disputes Related to Covered Government Contracts." Five sectors are considered "covered sectors": **oil and gas**, **power generation**, **telecommunications**, **transportation**, and **infrastructure**. In addition to the general disputes claims, Mexican and U.S. investors that have a written agreement in a covered sector can bring additional claims as prescribed in Annex 14-E will benefit from the

[187] USMCA, Annex 14.D.3, paragraph 2.
[188] Heritage Foundation. P. 28. https://www.heritage.org/sites/default/files/2019-01/BG3379_0.pdf
[189] Leah Wils-Owens, Office of Policy, Enforcement & Compliance, "China's Status as a Non-Market Economy," memorandum to Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations October 26, 2017, https://enforcement.trade.gov/download/ prc-nme-status/prc-nme-review-final-103017.pdf

protections of the General Investments, plus: (i) Minimum Standard of Treatment, (ii) Transfers, (iii) Performance Requirements, (iv) Senior Management and Boards of Directors, and (v) Indirect Expropriation (even though the term "tantamount to expropriation" has been removed). The 'covered sectors' are: oil and gas production, telecommunications, transportation, certain infrastructure, and power generation.

6.4.Key Considerations for Kenya

6.4.1. ISDS Cases Continue to Increase

ISDS claims have become a feature of the international investment regime today and investors are not shying away from initiating ISDS claims. According to the United Nations Conference on Trade and Development (UNCTAD),

- At least 55 publicly known cases were initiated in 2019;[190]
- Of the 55 known cases that were initiated in 2019, most (nearly 70 percent) were brought by developed-country investors;[191]
- As of January 1, 2020, the total number of publicly known ISDS claims has reached 1,023;[192]
- To date, over 120 countries and one economic grouping are known to have been respondent to one or more ISDS cases;[193]
- The new ISDS cases in 2019 were initiated against 36 countries and one economic grouping (the EU) and a majority of the new cases were brought against developing countries and transition economies.
- During the first seven months of 2020, investors brought at least 31 known ISDS cases pursuant to IIAs.
- Countries in Africa are not immune to ISDS claims and a growing number experienced their first ISDS only in the last decade. Sierra Leone faced its first ISDS claim in 2019, the Republic of Benin (Benin) in 2017,[194] the Republic of Mauritius (Mauritius) in 2016,[195] the Republic of Sudan (Sudan) in 2014,[196] the Republic of Madagascar (Madagascar) in 2013,[197] and both the Republic of Equatorial Guinea (Equatorial Guinea) and the Republic of South Sudan (South Sudan) in 2012.[198]

6.4.2. There is Support for ISDS Among Investors

There is considerable support for ISDS particularly among investors in rich countries. Proponents believe that ISDS helps protect foreign investors from discriminatory treatments,

[190] UNCTAD, IIA Issues Note: International Investment Agreements, Issue 2 (July 2020).
[191] Id.
[192] Id.
[193] Id.
[194] *Puma Energy Holdings SARL v. the Republic of Benin*, SCC Case No SCC EA 2017/092.
[195] *Thomas Gosling and others v. Republic of Mauritius*, ICSID Case No ARB/16/32.
[196] *Michael Dagher v. Republic of the Sudan*, ICSID Case No ARB/14/2.
[197] *Peter De Sutter, Kristof De Sutter, DS 2 S.A. and Polo Garments Majunga S.A.R.L. v. Republic of Madagascar*. See also, *Courts (Indian Ocean) Limited and Courts Madagascar S.A.R.L. v. Republic of Madagascar*, ICSID Case No ARB/13/34.
[198] *Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea*, ICSID Case No ARB(AF)/12/2. The case against South Sudan was registered on August 29, 2012. See *Sudapet Company Limited v. Republic of South Sudan*, ICSID Case No ARB/12/26.

do not restrict the right of host states to regulate in the public interest, and even help entrench respect for the rule of law in host states. Proponents believe that ISDS provide investors with much-needed neutral and effective venue for resolving disputes with their host states. Proponents also believe that robust ISDS actually encourage investment in developing countries, particularly countries with weak governance mechanisms. The Heritage Foundation has argued that "[a] neutral and independent ISDS arbitration process ensures that Americans are guaranteed fair treatment, an especially important consideration for investments in developing countries."[199] In its public comments to the USITC, the Coalition of Services Industries specifically recommended that breaches of investor protections should be subject to an ISDS mechanism without a requirement to use domestic courts in Kenya before proceeding with claim.

6.4.3. There is Strong Congressional Support for ISDS Especially in Trade Deals Involving Developing Countries

The U.S.'s approach to ISDS in the USMCA does not necessarily suggest that the U.S. has completely rejected and abandoned ISDS. In the Trade Promotion Authority, 2015, Congress articulated the negotiating objectives for investment disputes in broad terms including inter alia "providing meaningful procedures for resolving investment disputes." Even if the U.S. is willing to give up ISDS in trade deals with other developed countries, the U.S. is less willing to do so in trade deals with developing countries. Going forward, we could see the U.S. adopting a flexible, ad hoc approach to ISDS whereby ISDS is omitted from agreements involving developed countries, while agreements with developing countries still ISDS in some form.

ISDS and investor protection is clearly on the mind of U.S. law makers. Some U.S. lawmakers appear to want ISDS to be included in Kenya-US FTA and in FTAs involving developing countries more generally. At a July 21, 2020, Senate Finance Committee hearing to confirm Michael Nemelka as Deputy USTR, Senator Grassley asked:

> **Grassley**: If confirmed, you'll be overseeing our negotiations with Kenya. With respect to the USMCA, we've had folks express concerns that the approach to protecting American investment is insufficient. In particular, they are worried that Mexico may be moving in the wrong direction in giving a fair shake to Americans since the investor state dispute settlement has been scaled back. This affects more than just investments that could have been made -- could have been done -- in America or in any other country. It involves issues like licensing intellectual property or investments in geologic resourcing. We want Americans to be able to safely make those types of investments overseas because they benefit us here at home. If confirmed, will you commit that for Kenya that you will seek comprehensive protections for American investors that are more robust than the approach taken in USMCA?
>
> **Nemelka**: The investment chapter with Kenya I agree is going to be a very important chapter for that agreement. And we have a goal of making it a high standard, comprehensive chapter. With respect to ISDS, I know that that is still under consideration and you have my commitment to work with Ambassador Lighthizer to carefully consider that issue and consult with you on it.[200]

While Lighthizer was somewhat evasive on the ISDS issue, he was adamant that the U.S. intended to secure an agreement with strong enforcement mechanism. According to Lighthizer:

[199] https://www.heritage.org/sites/default/files/2019-01/BG3379_0.pdf
[200] https://www.finance.senate.gov/chairmans-news/grassley-at-hearing-on-trade-tax-nominations

> "[W]e will seek mechanisms to ensure that Kenya lives up to its commitments. The Administration is still considering its approach to specific enforcement mechanisms for the U.S.-Kenya investment chapter, including the appropriateness of investor-state dispute settlement."

6.4.4. Criticisms of ISDS

Robust ISDS provisions have been a part of FTAs for many years. In the past decade, the ISDS has come under intense scrutiny. Criticisms for the ISDS is widespread and include:[201]

- concern that ISDS by giving exclusive rights to foreign investors essentially discriminate against domestic investors and communities;
- perceived lack of transparency and accountability in the ISDS system;
- perceived pro-investment bias of investment arbitral tribunals;
- the absence of appeal mechanism;[202]
- concerns that the ISDS "threatens domestic sovereignty and weakens the rule of law by giving corporations special legal rights, allowing them to ignore domestic courts;"[203]
- general concern that ISDS cases threaten democracy because they subject countries to extrajudicial private arbitration by anonymous arbitrators;
- concerns that arbitral tribunals have the potential to impinge on the powers and jurisdiction of domestic courts;[204]
- concern that while investors can bring claims against states, states generally do not have corresponding right to bring claims against investors or to file counterclaims;[205]
- the heavy cost of investment arbitration on poor countries.[206] According to UNCTAD, on average successful claimants were awarded about $522 million, corresponding to about 40 per cent of the amount claimed;[207]
- concern that ISDS allows investors to challenge a broad range of governmental measures including those related to alleged breaches of investment contracts, direct and indirect expropriation, revocation of licenses and even changes to domestic regulatory frameworks; and

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[201] 230 Law and Economics Professors Urge President Trump to Remove Investor-State Dispute Settlement (ISDS) From NAFTA and Other Pacts, October 25, 2017. https://www.citizen.org/wp-content/uploads/migration/case_documents/isds-law-economics-professors-letter-oct-2017_2.pdf

[202] Eun Young Park, Appellate Review in Investor State Arbitration in Reshaping the Investor-State Dispute Settlement 443-454 (Jean E Kalicki et al. eds., 2015).

[203] < https://www.afj.org/wp-content/uploads/2015/03/ISDS-Letter-3.11.pdf>; *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3); Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26.

[204] *Puma Energy Holdings (Luxembourg) SARL v the Republic of Benin*, SCC Case No. SCC EA 2017/092.

[205] See generally Ana Vohryzek-Griest, State Counterclaims in Investor–State Disputes: A History of 30 Years of Failure, 15 Int'l Law: Revista Colombiana de Derecho Internacional 83 (2009).

[206] See *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt,* ICSID Case No ARB/14/4 [*Unión Fenosa Gas v. Egypt*] (US $2,013,071,000 awarded in damages. This amount does not include interest or legal costs); See Wena Hotels Ltd. v Egypt (ICSID Case No. ARB/98/4) (interest of US$ 11,431,386 (A US$8,061,897 award plus interest of US$11,431,386 at the rate of 9%, compounded quarterly). See also, Bernadus Henricus Funnekotter and others v Republic of Zimbabwe (ICSID Case No. ARB/05/6 (Approximately US12 million awarded plus interest awarded). *American Manufacturing and Trading v Zaire*, ICSID Case No ARB/93/1 (US$9 million awarded plus interest at 7.5% per annum in default of payment).

[207] UNCTAD, "Special Update on Investor-State Dispute Settlement: Facts and Figures," [IIA Issue Note, No. 3, 2017] (UNCTAD/DIAE/PCB/2017/7).

- concerns about the so-called "regulatory chill."[208]

In a March 7, 2019, letter to the UNCITRAL Working Group III on Investor-State Dispute Settlement, seven independent human rights experts appointed and mandated by the United Nations Human Rights Council expressed their concerns that IIAs and their ISDS mechanism "have often proved to be incompatible with international human rights law and the rule of law" and called attention to the risk that IIAs and ISDS pose to the regulatory space required by States to comply with their international human rights obligations as well as to achieve the SDGs. According to the said letter:

> The inherently asymmetric nature of the ISDS system, lack of investors' human rights obligations, exorbitant costs associated with the ISDS proceedings and extremely high amount of arbitral awards are some of the elements that lead to undue restrictions of States' fiscal space and undermine their ability to regulate economic activities and to realize economic, social, cultural and environmental rights. The ISDS system can also negatively impact affected communities' right to seek effective remedies against investors for project-related human rights abuses. In a number of cases, the ISDS mechanism, or a mere threat of using the ISDS mechanism, has caused regulatory chill and discouraged States from undertaking measures aimed at protection and promotion of human rights.[209]

6.4.5. U.S. Investors are Active in the ISDS Space. Kenyan Investors are Not.

Investors from the United States are very active as far as use of ISDS is concerned. As already noted, of the 55 known cases ISDS that were initiated in 2019, most (nearly 70 percent) were brought by developed-country investors.[210] Furthermore, with seven cases each, the highest numbers of cases were brought by investors from the U.K. and the U.S. with seven cases each. According to UNCTAD, "[o]f all known cases, investors from the United States, the Netherlands and the United Kingdom have filed the largest shares…."[211] Investors from the U.S. claim the No. 1 spot (183 cases), followed by investors from the Netherlands (111 cases), and then the U.K. (86).

Most frequent home States of claimants, 1987–2019 (Number of known cases)

States	Number of Cases
United States of America	183
The Netherlands	111
United Kingdom	86
Germany	69
Spain	57
Canada	51
France	51
Luxembourg	41
Italy	39
Switzerland	37
Turkey	35
Cyprus	26

[208] A/HRC/30/44 and Corr.1 and A/70/285 and Corr.1.
[209] OL ARM 1/2019, 7 March 2019. Emphasis added.
[210] UNCTAD, IIA Issues Note: International Investment Agreements, Issue 2 (July 2020).
[211] Id.

Source: UNCTAD; IIA Issues Note.

Unlike U.S. investors, African investors are not active in the ISDS space. It is not likely that Kenyan investors will be wanting to initiative claims against the U.S. anytime soon. Although African investors are beginning to use the ISDS system, the number is still very negligible. To date, African investors that have involved ISIS have been primarily companies head quartered in South Africa,[212] Mauritius,[213] and Egypt.[214]

6.4.6. The U.S. Understands How the ISDS Regime Works and is Ready

The United States is well-versed on how the ISDS regime works and has not lost a single case. Of the 77 known NAFTA investor-state disputes, 35 have been filed against Canada, 22 against Mexico and 20 against the US. Significantly, while U.S. investors have won many of their cases against Mexico and Canada, the U.S. has never lost a NAFTA investor dispute or paid any compensation to Canadian or Mexican companies. A report by the American Petroleum Institute concludes that "[t]he US has a perfect track record in ISDS cases brought against it under NAFTA by Canadian and Mexican interests, and US companies have won or favorably settled all of the cases they have brought against Canada and Mexico."[215] In a 2017 report, the American Petroleum Institute found that "[i]n the past 22 years since the inception of NAFTA, the United States has not lost a single ISDS claim brought against it;" that "Under NAFTA, US investors have won or favorably settled many of the 40 claims against Canada and Mexico;" and that "ISDS is also critical to gaining leverage to induce reasonable actions and favorable settlements from foreign governments, enhancing the bargaining and deal-making power of U.S. firms."

6.5. Key Recommendations

6.5.1. Resist Traditional ISDS. Review Options.

Against the backdrop of changes in the IIA regime that is currently underway and progress on the reform of the IIA regime that is visible in some recent treaties, it is recommended that the Kenyan government review its options very carefully. An ISDS, even in a modified form, still poses considerable risks for a developing country like Kenya. Limiting ISDS to a narrow list of sectors still carries a lot of risk for a developing country like Kenya. Across the globe, countries are weighing their options. At least six options can be discerned:

- ✓ Abandon an investor-state framework and replace with a state-state framework, in which states would be responsible for legal enforcement of investment regulations.
- ✓ Abandon international investment arbitration and replace with domestic mechanisms.
- ✓ Link the Kenya-US FTA to a yet-to-be-established multilateral investment court.
- ✓ Retain an investor-state framework but with limited scope.

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[212] *AngloGold Ashanti* (*Ghana*) Limited *v*. Republic of *Ghana*, ICSID Case No ARB/16/15. Oded Besserglik v. Republic of Mozambique, ICSID Case No. ARB(AF)/14/2.

[213] LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar

[214] *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16.

[215] US Benefits of Investor-State Dispute Settlement (ISDS). API-ISDS-Backgrounder-and-Annex-14Sep2017.pdf

- ✓ Retain ISDS but with improved procedures.
- ✓ Abandon legalized treaty-based investment protections; under this model provisions on investment will not be directly legally enforceable.

- ***No ISDS. Only State-to-State Mechanism***

A small but growing number of recent IIAs involving African states do not provide for ISDS. ISDS is absent from the ISDS in Brazil–Ethiopia BIT (2018), Brazil–Malawi BIT (2015), Brazil–Mozambique BIT (2015), and Angola–Brazil BIT (2015); all four agreements only provide for State-State dispute settlement.[216] The USMCA eliminates ISDS as between United States and Canada.

- ***No ISDS. Domestic Approach Only***

At least one country in Africa – South Africa – has foreclosed future participation in international investment arbitration of any kind.[217] In Tanzania, the Public Private Partnership Act, No. 19 of 2010 (as amended in 2013 and 2014) was amended to, inter alia*,* eliminate international investment arbitration.[218] Section 22 of the Public-Private Partnership (Amendment) Act, No. 9 of 2018 stipulates that any dispute arising under a Public-Private Partnership agreement 'shall in case of mediation or arbitration be adjudicated by judicial bodies or other organs established in Tanzania and in accordance with its laws'.

- ***A Multilateral Investment Court (A standing ISDS Tribunal)***

The idea of a multilateral investment court has been suggested. Instead of ad hoc ISDS, the EU has proposed a more formalised quasi-court system.[219] The investment court system (ICS) is found in a growing number of IIAs involving the EU such as the EU-Singapore Investor Protection Agreement (2018) and the Canada-EU Comprehensive Economic Trade Agreement (2016). It is noteworthy that an ICS mechanism still gives foreign investors the opportunity to invoke the jurisdiction of an international arbitration tribunal and to claim and obtain compensation in the event of a treaty breach. Proponents of the ICS argue that the system will produce substantial benefits in terms of rule of law, consistency, and predictability. Critics are not convinced, however.[220]

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[216] See United Nations Conference on Trade and Development, International Investment Agreement Navigator – Brazil < https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil > accessed 2 July 2019.

[217] To date, South Africa has terminated BITs with a number of countries, including Austria, Denmark, France, the United Kingdom, the Netherlands, Switzerland, Germany, Sweden, Argentina, Belgo-Luxembourg Economic Union, and Spain. See UNCTAD, Investment Policy Hub – South Africa < https://investmentpolicy.unctad.org/international-investment-agreements/countries/195/south-africa > accessed 10 August 2019.

[218] See *The Public-Private Partnership* (*Amendment*) *Bill*, No 9 of *2018* (*the PPP Amendment Bill*). See also, *PPP: Why government wants local arbitration*. THE CITIZEN (13 September 2018) <http://www.thecitizen.co.tz/News/PPP--Why-government-wants-local-arbitration/1840340-4757416-11tmrii/index.html>.

[219] European Commission, A Future Multilateral Investment Court, MEMO/16/4350 (Dec. 13, 2016), http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm [https:// perma.cc/9FTL-4923] (archived Oct. 21, 2017); The Multilateral Investment Court Project, EUR.COMM. (Dec. 21, 2016), http://trade. ec.europa.eu/doclib/press/index.cfm?id=1608 [https://perma.cc/B8BQ-KMYX]; See also Belen Olmos Giupponi, Recent Developments in the EU Investment Policy: Towards an Investment World Court?, 26 J. ARB. STUD. 175, 210 (2016).

[220] Jason Webb Yackee, Controlling the International Investment Law Agency, 53 HARV. INT'L L.J. 391, 434 (2012).

Although welcomed in some quarters, the investment court model is generating a lot of criticisms from scholars and civil society groups.[221] Critics worry that the ICS does not really fix the fundamental flaws of ISDS.[222] According to the Independent Expert on the promotion of a democratic and equitable international order, the newly proposed investment court system "suffers from the same fundamental flaws as investor-State dispute settlement"[223] and "lacks the fundamental safeguards to ensure an independent legal system in line with the requirements of due process."[224] Moreover, "States would remain vulnerable to the same kind of frivolous and vexatious claims that have characterized the hugely expensive, slow and unpredictable investor-State dispute settlement litigation."[225]

- ***A Limited ISDS***

A growing number of states are embracing the idea of a limited ISDS. Many strategies can be deployed to limit the scope of ISDS. The USMCA's approach is one example. Under the USMCA, general ISDS claims are limited to claims alleging a breach of national treatment (post-establishment), a breach of most-favored-nation treatment (post-establishment), and direct expropriation. In addition, investors who invest in any of the five "covered sectors – oil and gas, power generation, telecommunications, transportation, and infrastructure – have additional rights. It is worth nothing that while the U.S. has never lost a claim brought against it under ISDS, Kenya has.

- ***Improved ISDS***

In the last few years, considerable effort has gone into improving the functioning of the ISDS system. Discussions about ISDS reform are occurring in many forums, including the International Center for the Settlement of Investment Disputes and the United Nations Commission on International Trade Law (UNCITRAL).[226] ICSID has been exploring the possibility of amended rules for investor-State proceedings since October 2016. In February 2020, ICSID published *Working Paper # 4: Proposals for Amendment of the ICSID Rules*.[227] ICSID has also published three prior working papers, each setting out the proposals for amendment. The U.S. is open to reform. In the Trade Promotion Authority, 2015, Congress articulated the negotiating objectives for investment disputes in broad terms including inter alia:

> "(G) seeking to improve mechanisms used to resolve disputes between an investor and a government through—
> (i) mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims;
> (ii) procedures to ensure the efficient selection of arbitrators and the expeditious disposition of claims;
> (iii) procedures to enhance opportunities for public input into the formulation of government positions; and

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[221] Gus van Harten, "Key flaws in the European Commission's proposals for foreign investor protection in TTIP", 18 November 2015, p.1, http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2692122
[222] Public Citizen, "Tens of Thousands of U.S. Firms Would Obtain New Powers to Launch Investor-State Attacks against European Policies via CETA and TTIP", 2014, p.1, https://www.citizen.org/documents/EU-ISDS-liability.pdf
[223] A/HRC/33/40 (12 July 2016).
[224] A/HRC/33/40 (12 July 2016).
[225] A/HRC/33/40 (12 July 2016).
[226] In 2017, UNCITRAL created the Working Group III and entrusted it with the mandate to work on the possible reform of investor-State dispute settlement. Reports of the Working Group III are publicly available. UNCITRAL, Press Release, UNCITRAL to consider possible reform of investor-State dispute settlement (14 July 2017) < http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html>
[227] https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf

(iv) providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements."

Whether current reform initiatives are enough is a matter of considerable debate. Instead of piecemeal reform efforts, some critics are calling for "a fundamental, systemic change, which entails moving towards a fairer and more transparent multilateral system, which duly takes into account the rights and obligations of investors and States in line with all applicable international laws and standards concerning human rights, labour rights and environmental rights."[228] In a March 2019 letter to the UNCITRAL Working Group III on Investor-State Dispute Settlement, seven independent human rights experts, appointed and mandated by the United Nations Human Rights Council, expressed concern that IIAs and their ISDS mechanism "have often proved to be incompatible with international human rights law and the rule of law" and called for "systemic structural changes to the architecture of ISDS".[229]

6.5.2. A Limited ISDS Could Still Pose Serious Challenges for Kenya

A limited ISDS could still present considerable problems and challenges for a developing country like Kenya. A limited ISDS does not necessarily address most of the problems and shortcomings in the system. Furthermore, the USMCA's enhanced protection for investors in five key sectors – oil and gas, power generation, telecommunications, transportation, and infrastructure – is highly suspect as they appear to have been selected with U.S. foreign investors in mind. The USMCA's choice of "covered sectors" arguably excludes small and medium-sized enterprises given that the oil and gas, power generation, telecommunications, transportation, and infrastructure sectors are typically dominated by giant multinational enterprises.

6.5.3. Carefully Assess the Costs and Benefits of ISDS

What would Kenya gain my including an ISDS in a Kenya-U.S. FTA and what would Kenya loose by such inclusion? In the short to medium term, an ISDS is not likely to be of any use to Kenyan investors for at least two reasons. First, Kenyan investors have little or no presence in the U.S. presently and the situation is not likely to change in the near future. Second, Kenyan investors, and indeed African investors, are not active users of ISDS. In his 2016 report, the UN's Independent Expert on the promotion of a democratic and equitable international order rightly noted that:

> The main financial beneficiaries of investor-State dispute settlement awards are not small investors or middle-sized enterprises, whose investment would be most needed for job creation and long-term development, but monopolies with at least $1 billion in annual revenue and individuals with a net worth of over $100 million.[230]

As previously noted,[231] whether BITs and IIAs lead to increased FDI for countries that ratify them is a matter of considerable debate and has not been demonstrated conclusively. While

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[228] 'Reference: OL ARM 1/2019,' (7 March 2019) <https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf>

[229] 'Reference: OL ARM 1/2019,' (7 March 2019) <https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf>

[230] A/HRC/33/40 (12 July 2016).

[231] *Supra,* Chapter 5

some studies suggest that investment treaties have a positive effect on FDI to developing countries, others do not.

6.5.4. Ensure Broad Public Debate

There is a need for a broader debate, within Kenya, regarding Kenya's investment policy. A survey of recent FTAs suggests that many states are thinking outside the box and are considering more creative options. Indeed, the USMCA's approach to ISDS which reflects the Trump Administration's broader skepticism of international dispute resolution mechanisms and Canada's concerns about ISDS is a license for Kenya to be creative in any trade deal with the U.S. whether USMCA's ISDS provisions strikes the right balance between protecting investors and respecting a government's right to regulate is a matter of considerable debate.

6.5.5. Continue to Work on Improving Kenya's Investment Climate

Efforts to strengthen domestic and regional framework for business and commercial arbitration (new laws, new policies, and new institutions) in Africa are ongoing. It is imperative that the Kenyan government address genuine concern about the rule of law and independence of the judiciary in Kenya. In its 2019 report, the USTR stated:

> Despite efforts to increase efficiency and public confidence in the judiciary, a backlog of cases and continuing corruption – both perceived and real – reduce the credibility and effectiveness of Kenya's judicial system. While judicial reforms are moving forward, bribes, extortion, and political considerations continue to influence outcomes in court cases. An Employment and Labor Relations Court exists in Kenya, but it is plagued by long delays in rendering judgments. As such, foreign and local investors risk lengthy and costly legal procedures.[232]

6.5.6. Review and Update Negotiating Objectives

In the light of all the concerns raised about the functioning of ISDS and reform efforts underway in many countries, it is recommended that the Kenya's Government revise its negotiating objective to specifically and explicitly addresses ISDS issues and concerns. To be sure, in their respective negotiating objectives, United States and Kenya did not address ISDS. This omission is somewhat surprising and could prove problematic for Kenya.

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ISDS

Kenya (Negotiating Objectives)	**United States (Negotiating Objectives)**
INVESTMENT • The negotiations shall aim at creating a liberal, facilitative, and competitive investment environment. Negotiations for investment shall cover the four pillars of promotion, protection, facilitation and liberalization.	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. …..
DISPUTE SETTLEMENT • The Kenya – USA FTA shall include a dispute settlement mechanism that would provide an effective, efficient, and transparent process for consultations and dispute resolution on trade issues[.]	DISPUTE SETTLEMENT • …. Establish a dispute settlement mechanism that is effective and timely.

Intellectual Property

7. Intellectual Property

7.1. Introduction

Intellectual property refers to creations of the mind in physical and digital form.[233] Intellectual property rights (IPRs) are typically protected by law. IPRs are time-limited rights that governments grant to IP owners to prevent unauthorized use and/or exploitation of their IP. The U.S. considers IPRs to be a key source of its comparative advantage. Not surprising, advancing IPR protection globally has been a key U.S. trade negotiating objective since 1988 (P.L. 100-418). U.S has broad ambition when it comes to protecting IPRs through FTA. The Trade Promotion Authority, 2015, retains prior U.S. trade negotiating objectives for U.S. trade agreements to "reflect a standard of protection similar to that found in U.S. law."[234] Trade Promotion Authority, 2015, adds several new objectives including the objective of "providing strong protection for new and emerging technologies," "ensuring that standards of protection and enforcement keep pace with technological developments," and combating cyber theft including by "preventing or eliminating government involvement in the violation of intellectual property rights, including cyber theft and piracy."

Bipartisan Congressional Trade Priorities and Accountability Act of 2015.

19 USC 4201

(5) INTELLECTUAL PROPERTY. The principal negotiating objectives of the United States regarding trade-related intellectual property are—

(A) to further promote adequate and effective protection of intellectual property rights, including through—

(i)(I) ensuring accelerated and full implementation of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 3511(d)(15) of this title, particularly with respect to meeting enforcement obligations under that agreement; and

(II) ensuring 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**;

(ii) providing **strong protection 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;

(iii) preventing or eliminating discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights;

(iv) ensuring that standards of protection and enforcement keep pace with technological developments, and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works;

(v) **providing strong enforcement of intellectual property rights**, including through accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms; and

(vi) preventing or eliminating government involvement in the violation of intellectual property rights, including cyber theft and piracy;

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[233] WIPO, What is Intellectual Property? https://www.wipo.int/about-ip/en/

[234] TPA, P.L. 114-26

(B) to secure fair, equitable, and nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection; and

(C) to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001, and to ensure that trade agreements foster innovation and promote access to medicines.[235]

NAFTA was the very first FTA to have a chapter dedicated to IPRs. The USMCA continues NAFTA's emphasis on strong IP protection but expand protection in many important respects. The objective of the USMCA's IP chapter (Chapter 20) is that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[236] Some of the notable features of USMCA's chapter on intellectual property include:

- ✓ An extensive IP chapter that encompasses 64 pages including annexes;
- ✓ establishment of a Committee on Intellectual Property Rights (IPRC);
- ✓ Extended copyright and trademark protection;
- ✓ Copyright term extended to 70 years;
- ✓ Prohibitions on circumvention of technological protection measures;
- ✓ Criminal and civil penalties protections for trade secret misappropriation (theft); and
- ✓ Copyright safe-harbor provisions on ISP liability.

7.2.Scope

Pursuant to Article 20.5 (Nature and Scope of Obligations), each Party "shall provide in its territory to the nationals of another **Party adequate and effective protection and enforcement of intellectual property rights**, while ensuring that measures to enforce intellectual property rights do not themselves become barriers to legitimate trade."[237] Furthermore, a Party "may, but shall not be obliged to, provide more extensive protection for, or enforcement of, intellectual property rights under its law than is required by this Chapter." Each Party shall be free to determine the appropriate method of implementing the provisions of this Chapter within its own legal system and practice. The IPRs in the USMCA includes provisions on patents, copyrights, trademarks, trade secrets, geographical indications, and enforcement.

7.3.Obligations

The USMCA contains both general obligations and specific obligations. General obligations include upholding specified international agreements and providing "national treatment." In addition, there are specific obligations regarding a host of issues and topics including: biologics; internet service providers, geographical indications; trademarks; trade secrets; and IP enforcement.

[235] 19 §4201(b)(5). Emphasis added.
[236] USMCA, Article 20.2.
[237] Emphasis added.

7.3.1. Protected IPRs

The USMCA provides protection for the main types of IPRs including copyrights, patents, trade secrets, trademarks, and geographical indications. The USMCA also addresses IPR monitoring and enforcement explicitly and expansively. As highlighted in this section, the USMCA imposes numerous TRIPS-plus obligations on Parties (**see Annex V**).

7.3.1.1. Patents

Like NAFTA, the USMCA provides that patents should be made available for any invention, whether product or process, in all field of technology, provided that an invention is new, involves and inventive step, or is capable of industrial application. The USMCA contains many significant TRIPS-plus provisions relating to patents including:

- *Patentable subject matter*. Patent protection for new uses, methods, or processes of a known product was originally included in the USMCA but was subsequently removed by the Protocol of Amendment.[238]
- *Patent and regulatory term extension*. Under the TRIPS Agreement, states are obliged to grant patent protection for a term of 20 years. The TRIPS Agreement does not provide for patent term adjustment. The USMCA provides for adjustments of patent terms for "unreasonable" delays in the patent examination or regulatory approval processes. Article 20.44(3) of the USMCA provides that "[i]f there are unreasonable delays in a Party's issuance of a patent, that Party shall provide the means to, and at the request of the patent owner shall, adjust the term of the patent to compensate for those delays."[239] An unreasonable delay at least shall include a delay in the issuance of a patent of more than five years from the date of filing of the application in the territory of the Party, or three years after a request for examination of the application has been made, whichever is later.
- *USMCA provisions specific to pharmaceuticals. Protection of Test data*. The USMCA provides for five-year regulatory exclusivity for new pharmaceutical product.[240]
- *USMCA provisions specific to agricultural chemical products. Protection of test data*. The USMCA obliges Parties to provide a 10-year regulatory exclusivity for undisclosed test or other data concerning the safety and efficacy of the agricultural chemical products submitted to support application for marketing approval.[241]

7.3.1.2. Copyright

Copyrights provide creators of artistic and literary works with exclusive rights to reproduce, publicly perform and display, and distribute their works. The USMCA's provisions relating to copyright builds on earlier agreements including the Berne Convention, the TRIPS Agreement and NAFTA. In many respects, the USMCA added TRIPS-plus provisions relating to copyrights. Key provisions include:

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[238] https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Protocol-of-Amendments-to-the-United-States-Mexico-Canada-Agreement.pdf

[239] An unreasonable delay at least shall include a delay in the issuance of a patent of more than five years from the date of filing of the application in the territory of the Party, or three years after a request for examination of the application has been made, whichever is later.

[240] USMCA, Article 20.48.1.

[241] USMCA, Article 20.45.

- ✓ *Extension of copyright term*. The TRIPs Agreement provides for minimum term of life plus 50 years. Going beyond the protection in the TRIPS Agreement, the USMCA provides for copyright terms of life plus 70 years, or 70 years from publication for most works.[242]
- ✓ *Protection against circumvention of effective technological measures*. The USMCA requires Parties to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms.[243] The USMCA specifically requires Parties to provide civil and criminal penalties for circumventing technological protection measures, such as digital locks.
- ✓ *Safe Harbors*. USMCA Parties are to provide safe harbors to allow legitimate online internet intermediaries to develop their business while providing enforcement against digital copyright infringement.
- ✓ *"Notice and takedown" systems*. The USMCA also requires Parties to establish so called notice and takedown procedure designed to address intermediary liability. A similar "notice and takedown" system is in place in the U.S.

7.3.1.3.Trademarks

The USMCA's provision relating to trademarks is extensive. Among other things, each Party is required to:

- ✓ Mandates the protection and registration of sound marks;[244]
- ✓ Obliges Parties to make best efforts to register scent marks;[245]
- ✓ Mandates USMCA Parties to ratify the Madrid Protocol;[246]
- ✓ Provide that trademarks include collective marks and certification marks;
- ✓ Provide a system for the examination and registration of trademarks that includes among other things providing an opportunity for third parties to oppose the registration of a trademark and an opportunity to seek cancellation of a trademark through, at a minimum, administrative procedures and requiring administrative decisions in opposition and cancellation proceedings to be reasoned and in writing, which may be provided by electronic means.
- ✓ Establish a system for the electronic application for, and maintenance of, trademarks; and publicly available electronic information system, including an online database, of trademark applications and of registered trademarks.
- ✓ Creates new remedies for trademark holders against a person that registers or holds a domain name that is identical or confusingly similar to the trademark and with a bad faith intent to profit.
- ✓ Prohibits recordal of trademark licenses as a requirement to establish the validity of the license or as a condition for use of a trademark by a licensee to be deemed

[242] USMCA, Article 20.62.
[243] USMCA, Article 20.66.1.
[244] USMCA, Article 20.17.
[245] USMCA, Article 20/17.
[246] USMCA, Article 20.7(2)(a).

to constitute use by the holder in acquisition, maintenance, or enforcement proceedings.

7.3.1.4.Trade Secrets

The USMCA extends the protection for trade secrets under the TRIPS Agreement in several respects. Among other things, the USMCA,

- Requires Parties to "ensure that persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (**including state-owned enterprises**) without their consent in a manner contrary to honest commercial practices."[247]
- Obliges Parties to provide civil judicial procedures for any person lawfully in control of a trade secret to prevent, and obtain redress for, the misappropriation of the trade secret by any other person;
- Requires Parties to provide for criminal procedures and penalties for the unauthorized and willful misappropriation of a trade secret; and
- Provides that USMCA Parties "shall not limit the duration of protection for a trade secret," so long as the subject matter remains a trade secret as defined in the agreement.

7.3.1.5.Geographical Indication

Under the USMCA, GI protection is not mandatory. Pursuant to Article 20.29, the Parties "recognize that geographical indications may be protected through a trademark or a sui generis system or other legal means." The USMCA sets forth procedural standards that a Party's GI protection system (sui generis or not) should meet.[248] Among the standards is the requirement that a Party (i) ensure that applications or petitions are published for opposition and provide procedures for opposing GIs that are the subject of applications or petitions; (ii) require that administrative decisions in opposition proceedings be reasoned and in writing, which may be provided by electronic means; and (iii) provide for cancellation of the protection or recognition afforded to a geographical indication.

Although a USMCA Party is not required to protect GIs, if a party chooses to protect GIs, such a Party must provide procedure for interested persons to object to such protection. Article 20.31 provides:

> Article 20.31: Grounds of Denial, Opposition, and Cancellation
>
> 1. If a Party protects or recognizes a geographical indication through the procedures referred to in Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications), that Party shall provide procedures that allow interested persons to object to the protection or recognition of a geographical indication, and that allow for that protection or recognition to be refused or otherwise not afforded, at least, on the grounds that the geographical indication is
>
>   (a) likely to cause confusion with a trademark that is the subject of a pre-existing good faith pending application or registration in the territory of the Party;
>   (b) likely to cause confusion with a pre-existing trademark, the rights to which have been acquired in accordance with the Party's law; and

[247] Article 20.69: Protection of Trade Secrets
[248] USMCA, Article 20.30 (Administrative Procedures for the Protection or Recognition of Geographical Indications).

(c) a term customary in common language as the common name for the relevant good in the territory of the Party.

Article 20.32 provides the guidelines for determining whether a term is the term customary in the common language.

7.3.2. International Agreements

Under the USMCA, Parties are expected to have ratified or to ratify specified IPR treaties. First, under Article 20.7.1., each Party affirms that it has ratified or acceded to five specified IP treaties:

- Patent Cooperation Treaty[249];
- Paris Convention[250];
- Berne Convention[251];
- WIPO Copyright Treaty[252]; and
- WIPO Performances and Phonograms Treaty.[253]

Second, Article 20.7.2. stipulates that each Party is obliged to ratify or accede to six specified agreements, if it is not already a party to that agreement, by the date of entry into force of this Agreement: (a) Madrid Protocol[254]; (b) Budapest Treaty[255]; (c) Singapore Treaty[256]; (d) UPOV 1991[257]; (e) Hague Agreement[258]; and (f) Brussels Convention.[259] Third, each Party agrees to "give due consideration to ratifying or acceding to the [Patent Law Treaty], or, in the alternative, shall adopt or maintain procedural standards consistent with the objective of the [Patent Law Treaty]."[260]

Analysts speculate that the choice of the treaties listed in Article 20.7 was driven by the U.S. and reflect only those treaties that the U.S. has ratified or is in the process of ratifying. This might explain why treaties relating to climate change are noticeably absent from Article 20.7.

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[249] https://www.wipo.int/pct/en/
[250] The Paris Convention for the Protection of Industrial Property, done at Paris on March 20, 1883 as revised at Stockholm on July 14, 1967. https://www.wipo.int/treaties/en/ip/paris/
[251] The Berne Convention for the Protection of Literary and Artistic Works, done at Berne on September 9, 1886, as revised at Paris on July 24, 1971. https://www.wipo.int/treaties/en/ip/berne/
[252] The WIPO Copyright Treaty, done at Geneva on December 20, 1996. https://www.wipo.int/treaties/en/ip/wct/
[253] The WIPO Performances and Phonograms Treaty, done at Geneva on December 20, 1996. https://www.wipo.int/treaties/en/ip/wppt/
[254] https://www.wipo.int/madrid/en/
[255] *Budapest Treaty* on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. https://www.wipo.int/treaties/en/registration/budapest/
[256] The Singapore Treaty on the Law of Trademarks, done at Singapore on March 27, 2006. https://www.wipo.int/treaties/en/ip/singapore/
[257] The International Convention for the Protection of New Varieties of Plants, done at Paris on December 2, 1961, as revised at Geneva on March 19, 1991
[258] The Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs, done at Geneva on July 2, 1999.
[259] The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, done at Brussels on May 21, 1974. https://www.wipo.int/treaties/en/ip/brussels/
[260] The Patent Law Treaty adopted by the WIPO Diplomatic Conference done at Geneva on June 1, 2000. https://www.wipo.int/treaties/en/ip/plt/#:~:text=The%20Patent%20Law%20Treaty%20(PLT,such%20procedures%20more%20user%20friendly.

7.3.3. National Treatment Obligations

USMCA Parties take on national treatment obligation in the area of IP. In respect of all categories of intellectual property covered in Chapter 20, each Party "shall accord to nationals of another Party treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property rights." In relation to specified national treatment obligation, a Party may derogate from national treatment obligation in relation to its judicial and administrative procedures, including requiring a national of another Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that this derogation is: (a) necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter; and (b) not applied in a manner that would constitute a disguised restriction on trade.[261]

7.3.4. Transparency Requirements

The USMCA imposes IPR-specific transparency obligations on Parties. Article 20.9.1. provides that each Party "shall endeavor" to publish online its laws, regulations, procedures, and administrative rulings of general application concerning the protection and enforcement of intellectual property rights. Further, each Party shall, "subject to its law," endeavor to publish online information that it makes public concerning applications for trademarks, geographical indications, designs, patents, and plant variety rights.[262] Also, each Party shall, "subject to its law," publish online information that it makes public concerning registered or granted trademarks, geographical indications, designs, patents, and plant variety rights, sufficient to enable the public to become acquainted with those registered or granted rights.

7.3.5. Cooperation

The USMCA imposes an obligation on Parties to cooperate in the protection of IPRs. *First*, each Party "**may** designate and notify the other Parties of one or more contact points for the purpose of cooperation" related to IPR protection and enforcement.[263] *Second*, the Parties "**shall endeavor to cooperate**" on the subject matter covered by the IPR Chapter, such as through appropriate coordination and exchange of information between their respective intellectual property offices, or other agencies or institutions, as determined by each Party.[264] *Third*, pursuant to Article 20.14, the Parties established a Committee on Intellectual Property Rights (IPR Committee), composed of government representatives of each Party. The IPR Committee has broad functions. Five functions specifically identified in the statute are:

- exchange information, pertaining to intellectual property rights matters, including how intellectual property protection contributes to innovation, creativity, economic growth, and employment,
- work towards strengthening border enforcement of intellectual property rights through the promotion of collaborative operations in customs and exchange of best practices;

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[261] USMCA, Article 20.7.3.
[262] USMCA, Article 20.9.2.
[263] USMCA, Article 20.12. Emphasis added.
[264] USMCA, Article 20.13. Emphasis added.

- exchange information regarding trade secret-related matters, including the value of trade secrets and the economic loss associated with trade secret misappropriation;
- discuss proposals to enhance procedural fairness in patent litigation, including with respect to choice of venue; and
- upon request of a Party and in the interest of advancing transparency, endeavor to reach a mutually agreeable solution before taking measures in connection with future requests of recognition or protection of a geographical indication from any other country through a trade agreement.[265]

7.4.Enforcement

The USMCA envisages strong and effective protection of IPRs. In the USMCA, the IPR chapter is enforceable through government-to-government dispute settlement. Each Party "shall ensure that enforcement procedures" as specified are available under its law so as to permit effective action against an act of infringement of covered IPRs including expeditious remedies to prevent infringements and remedies that constitute a deterrent to future infringements.[266] Each Party shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright or related rights piracy on a commercial scale.[267] Additionally, the USMCA also includes: commitments on civil, criminal, and other national enforcement for IPR violations, such as copyright enforcement in the digital environment; criminal penalties for trade secret theft and camcording; as well as ex-officio authority for customs officials to seize counterfeit trademark and pirated copyright goods.

7.5.Regulatory Space

The USMCA's intellectual property chapter provides several exceptions to IPRs. For example,

- Each Party is free to determine the appropriate method of implementing the provisions of the IP Chapter within its own legal system and practice.[268]
- A Party may also provide that fraud, misrepresentation, or inequitable conduct may be the basis for cancelling, revoking, or nullifying a patent or holding a patent unenforceable.[269]
- The Parties affirm their commitment to the Declaration on TRIPS and Public Health.[270] Consequently, Chapter 20 does not and should not prevent the effective utilization of the TRIPS/health solution.[271]
- The Parties agree that their obligations relating to intellectual property do not and should not prevent a Party from taking measures to protect public health.[272] Specifically, the Parties affirm that Chapter 20 "can and should be interpreted and implemented in a manner supportive of each Party's right to protect public health and,

[265] USMCA, Article 20.14.
[266] USMCA, Article 20.78.
[267] USMCA, Article 20.84.1.
[268] USMCA, Article 20.5.2.
[269] USMCA, Article 20.38 (1).
[270] USMCA, Article 20.6.
[271] USMCA, Article 20(6)(b).
[272] USMCA, Article 20.6 (a).

in particular, to promote access to medicines for all." Further, "[e]ach Party has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria, and other epidemics, can represent a national emergency or other circumstances of extreme urgency."

- Pursuant to Article 20.4, having regard to the underlying public policy objectives of national systems, the Parties recognize the need to: (a) promote innovation and creativity; (b) facilitate the diffusion of information, knowledge, technology, culture, and the arts; and (c) foster competition and open and efficient markets; through their respective intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including right holders, service providers, users, and the public.
- Regarding exhaustion of IPRs, nothing in the USMCA prevents a Party from determining whether or under what conditions the exhaustion of intellectual property rights applies under its legal system.[273]
- Article 20.20 provides that a Party may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that those exceptions take account of the legitimate interests of the owner of the trademark and of third parties.
- Regarding cooperation, Article 20.16 specifically provides that cooperation activities "are subject to the availability of resources, on request, and on terms and conditions mutually decided upon between the Parties involved." The Parties also affirm that cooperation under is additional to and without prejudice to other past, ongoing, and future cooperation activities, both bilateral and multilateral, between the Parties, including between their respective intellectual property offices.

7.6.Key Considerations for Kenya

7.6.1. IP Obligation in the USMCA is Beyond That in AGOA and the TRIPS Agreement

AGOA addresses intellectual property protection. However, the IP provisions in U.S. FTA's go over and beyond AGOA's provisions relating to IP. AGOA's eligibility requirements are set out in Section 104 of the AGOA legislation (Public Law 106/200). Under Article 104 (A)(1)(C) of AGOA, the U.S. President is authorized to designate a SSA country as an eligible SSA country if the President determines that the country has as established, or is making continual progress toward establishing the elimination of barriers to United States trade and investment, including by "the protection of intellectual property." [274]

7.6.2. U.S. Has Expressed Concerns About the Standard of IPRs Protection in Kenya

Although Kenya is not mentioned in the USTR's latest Special 301 Report on the adequacy and effectiveness of trading partners' protection of IPRs (*2020 Special 301 Report*), the U.S. has expressed concerns about the standard of IP protection in Kenya. While acknowledging that the Kenya has taken steps to improve the protection and enforcement of IPRs, the U.S.

[273] USMCA, Article 20.11.
[274] 19 U.S.C. §§ 3701-3739 (2006).

government is concerned about the level of IP protection in Kenya and has expressed this repeatedly. In a 2019 report, the USTR observed:

> Recently, the Kenyan government has taken steps to improve the protection and enforcement of intellectual property (IP) rights by updating its copyright and trademark legislation, including new amendments that enable recordation of trademarks with customs authorities. However, concerns related to the widespread availability of counterfeit and pirated goods remain. Stakeholders also have raised concerns regarding the widespread distribution of IP-infringing content online, and have identified opportunities for increased collaboration with internet service providers to expeditiously remove or disable access to infringing material residing on their networks.[275]

7.6.3. Industry Concerns Regarding Protection and Enforcement of IPRs in Kenya

The private sector in the U.S. has raised numerous concerns regarding the quality of IP protection and enforcement in Kenya. In its March 26, 2020, public comments to the USITC, the Global Intellectual Property Strategy Center raised a number of specific concerns about IPRs in Kenya. Concerns were wide ranging and included – Kenya's porous entry points, the influx of counterfeit goods in Kenya, as well as lack of effective enforcement due to corruption and lack of resources.

7.6.4. Expect Strong U.S. Enforcement of IPR Provisions in any FTA

The U.S. has a track record of aggressively enforcing treaty obligations relating to IPRs. Using the WTO dispute settlement mechanism, enforcement tools in FTAs, as well as other trade policy tools, the U.S. typically takes a strong stance as regards IP enforcement. In 2019, USTR also announced plans to open new GSP eligibility reviews for South Africa based on IP protection and enforcement concerns.[276] Also in 2019, the USTR closed GSP eligibility reviews with no loss of GSP eligibility for Uzbekistan, based on improvements in its protection and enforcement of IP rights. [277] This is simply to note that Kenya must be mindful of the commitment it assumes under an FTA as the U.S. is likely to effectively enforce those commitments. This cannot be interpreted as an argument to include IPRs in an FTA in order to avoid eligibility reviews. For one thing, once a country concludes an FTA with the U.S., eligibility reviews under the US preference programs will no longer arise. For another, history suggests that the US takes IPR provisions in trade agreements and the focus of the US government is on effective implementation of IPRs commitments rather than mere reference in a trade agreement.

7.6.5. USMCA's List of IP Treaties: Implications for Kenya

As already noted, the USMCA expects USMCA Partners to have ratified five key IP treaties and also expects them to ratify six additional IP treaties. Because Kenya has already ratified most of the treaties listed, such a provision in a Kenya-U.S. FTA would not necessarily

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[275] 2019 National Trade Estimates Report.

[276] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement

[277] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement

change the IP landscape for Kenya. Kenya did not ratify two of the eleven treaties specifically listed in the USMCA.

How might a USMCA-type trade agreement change the IP landscape for Kenya?

Treaty	Kenya (Ratified)	Kenya (Not Ratified)
Patent Cooperation Treaty	8 June 1994	
Paris Convention	13 May 1965	
Berne Convention	10 March 1993	
WCT	19 December 1996	
WPPT	19 December 1996	
Madrid Protocol	25 March 1998	
Budapest Treaty	---	✓
Singapore Treaty	27 March 2006	
UPOV 1991	13 May 1991	
Hague Agreement	---	✓
Brussels Convention	5 January 1976	
Patent Law Treaty	1 June 2000	

Source: World Intellectual Property Organization. Author's Compilation.

7.7. Key Recommendations

7.7.1. Extensive TRIPs-plus Provision May be Problematic for Kenya: A Comprehensive Cost-Benefit Analysis is Required

It is important that the Kenyan government carry out a comprehensive study of the costs and benefits of taking on TRIPs-plus obligations in any future trade deal. On the one hand, TRIPs-plus obligations could encourage innovation and help strengthen Kenya's growing reputation as a major innovation hub in Africa. On the other hand, TRIPs-plus obligations have the potential to undermine access to medicine and health care in Kenya, encroach on the rights of farmers to seed and other agricultural inputs, stifle innovation in Kenya, and encroach on a host of rights guaranteed under the Kenyan Constitution. As noted in a Congressional Research Service paper,

> Some USMCA provisions specific to pharmaceuticals aim, based on U.S. trade negotiating objectives, to "encourage innovation and access to medicine." Yet debate exists on whether USMCA appropriately incentivizes research and development for new medicines while also allowing affordable access to medicines through market entry of generic medicines.[278]

7.7.2. Push for Clear and Binding Provisions on IP-Related Capacity Building and Technical Assistance in any FTA

TRIPs-plus provisions in FTAs are difficult and costly to implement. This is especially so for developing countries already stretched thin by COVID-19 and a host of other crisis that preceded COVID-19. A country like Kenya would undoubtedly need a lot of technical assistance and financial support to effectively implement most of the TRIPs-plus provisions found in recent FTAs involving the U.S. Although the USMCA has provisions on capacity

[278] https://crsreports.congress.gov/product/pdf/IF/IF11314

building and technical assistance, most of the provisions are not binding. Consider Article 20.14.3 of the USMCA which provides:

> The Parties **shall endeavor to cooperate** on providing technical assistance regarding trade secret protection to the relevant authorities of non-Parties and identify appropriate opportunities to increase cooperation between the Parties on trade-related intellectual property rights protection and enforcement.[279]

Before committing to obligations that are certain to require Kenya to implement considerable legal and administrative changes, it is important that promises of technical assistance and capacity building are clear, are for an extended duration, and are binding.

7.7.3. Review Negotiation Priorities

Regarding intellectual property rights, Kenya's negotiating objective is shockingly silent on a host of issues pertaining to IPRs (**See Annex VI**). In the light of all the possible problems and challenges associated with a TRIPs-plus IPR agenda and the U.S. negotiating priorities relating to IP protection, it is imperative that the Kenyan government review and update Kenya's negotiation priorities to reflect Kenya's needs, safeguard Kenya's domestic regulatory space, protect guaranteed constitutional rights, and address associated implementation costs and challenges. Although Kenya's negotiating objectives mentions capacity building, there is still considerable room for improvement.

[279] Emphasis added.

Digital Trade

8. Digital Trade

8.1. Introduction

The last two decades witnessed the rapid growth of digital technologies. Across the globe, digital technologies are facilitating economic activity and creating new opportunities for consumers and businesses across the globe. Digital trade is a feature of our modern economic world. Thanks to digital technologies, products and services including e-commerce, social media, telemedicine, and other offerings are increasingly available across national boundaries. Kenya is one of Africa's leading technology hubs. Since 2016, Kenya's information and communications technology sector has been growing at an average rate of 10.8 percent. Kenya is reportedly the third highest consumer of internet technology in Africa, with 46.87 million users. Regarding the definition of digital trade, according to the OECD:

> While there is no single recognised and accepted definition of digital trade, there is a growing consensus that it encompasses digitally-enabled transactions of trade in goods and services that can either be digitally or physically delivered, and that involve consumers, firms, and governments. That is, while all forms of digital trade are enabled by digital technologies, not all digital trade is digitally delivered. For instance, digital trade also involves digitally enabled but physically delivered trade in goods and services such as the purchase of a book through an on-line marketplace, or booking a stay in an apartment through a matching application.[280]

The USITC defines digital trade as follows:

> The delivery of products and services over the Internet by firms in any industry sector, and of associated products such as smartphones and Internet-connected sensors. While it includes provision of e-commerce platforms and related services, it excludes the value of sales of physical goods ordered online, as well as physical goods that have a digital counterpart (such as books, movies, music, and software sold on CDs or DVDs).[281]

Digital platforms are undoubtedly the key to the new era of globalization in the twenty-first century. Thanks to digital platforms, individuals and small businesses can participate directly in globalization, with significant economic impact. According to a new (2019) McKinsey Global Institute (MGI) report, *Digital globalization: The new era of global flows*, digital flows now exert a larger impact on GDP growth than the centuries-old trade in goods.[282] According to Mckinsey:

- Approximately 12 percent of the global goods trade is conducted via international e-commerce;
- About 50 percent of the world's traded services are already digitized;

[280] OECD, Digital Trade, https://www.oecd.org/trade/topics/digital-trade/
[281] https://www.usitc.gov/publications/332/pub4716.pdf
[282] https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.pdf

- Over a decade, all types of flows acting together have raised world GDP by 10.1 percent over what would have resulted in a world without any cross-border flows. This value amounted to some $7.8 trillion in 2014 alone, and data flows account for $2.8 trillion of this impact.
- Across the globe, some 900 million people have international connections on social media, and 360 million take part in cross-border e-commerce.

Digital trade raise new trade policy issues including digital protectionism, the lack of common disciplines to help govern such trade, the emergence of diverging standards and new trade barriers, and broader public policy questions about online information. Barriers to digital trade take many forms and include: high tariffs, discrimination against digital products/services, localization requirements, limitations on cross-border data flow, mandated use of local technology, content, or supplier, discriminatory, unique standards or burdensome testing, filtering or blocking, and IPR infringement, requirements for source code disclosure, transfer of technology, or proprietary cryptography information, limitations and restrictions on cross-border electronic card payment.[283] Recently, the OECD launched the Digital Services Trade Restrictiveness Index (DSTRI) which identifies, catalogues and quantifies cross-cutting barriers that affect trade in digitally enabled services across multiple countries.[284]

At the multilateral level, in 2017, the WTO ministerial Conference issued a Joint Statement on plans to launch plurilateral e-commerce negotiations. In January 2019, the decision was taken on the sidelines of the World Economic Forum in Davos, 76 of 164 WTO members launched an e-commerce negotiations.[285] The purported goal of the plurilateral is to modernize trade rules and develop a high-standard outcome that builds on existing WTO agreements. Participants hope to address a range of issues including data flows, data privacy, data localization requirements, e-contracts and e-signatures, disclosure of source codes, as well as custom duties on electronic transmissions. Although developed and developing countries are participating in the WTO E-Commerce Plurilateral, some countries (e.g. India) have opted out on national interest grounds.[286]

Digital trade was not addressed in NAFTA or in most older FTAs but is increasingly addressed in a growing number of FTAs. Digital trade is addressed in the Trans-Pacific Partnership (since renamed the Comprehensive and Progressive Agreement for Trans Pacific Partnership ("CPTPP", "TPP11" or "TPP-11")). Digital trade is also addressed in the Singapore-Sri Lanka trade agreement. A new chapter in the USMCA (Chapter 19) addresses digital trade and is modelled after a similar protection in the TPP-11. According to analysts, the USMCA's Chapter 19 and related chapter in TPP-11 both contain some of the most comprehensive and high-standard provisions relating to digital trade barriers. In October 2019, the U.S. and Japan concluded a stand-alone agreement on digital trade. The United States-Japan Digital Trade Agreement parallels the USMCA, and according to the USTR is one of the "most comprehensive and high standard trade agreement" negotiated on digital trade barriers and

[283] Congressional Research Service, Digital Trade. https://crsreports.congress.gov/product/pdf/IF/IF10770
[284] https://stats.oecd.org/Index.aspx?DataSetCode=STRI_DIGITAL
[285] Joint Statement on Electronic Commerce, 25 January 2019. https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf
[286] India Refuses to join e-commerce talks at WTO, says rules to hurt country. Business Insider. https://www.business-standard.com/article/economy-policy/india-refuses-to-join-e-commerce-talks-at-wto-says-rules-to-hurt-country-119022500014_1.html

could set precedents for other ongoing talks. The U.S. Congress is very proactive when it comes to digital trade. Broad negotiation objectives are laid out very clearly in the Trade Promotion Authority, 2015.

TPA, P.L. 114-26

> ….
>
> (6) DIGITAL TRADE IN GOODS AND SERVICES AND CROSSBORDER DATA FLOWS.—The principal negotiating objectives of the United States with respect to digital trade in goods and services, as well as cross-border data flows, are—
>
> (A) to ensure that current obligations, rules, disciplines, and commitments under the World Trade Organization and bilateral and regional trade agreements apply to digital trade in goods and services and to crossborder data flows;
> (B) to ensure that—
> (i) electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form; and
> (ii) the classification of such goods and services ensures the most liberal trade treatment possible, fully encompassing both existing and new trade;
> (C) to ensure that governments refrain from implementing trade-related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data;
> (D) with respect to subparagraphs (A) through (C), where legitimate policy objectives require domestic regulations that affect digital trade in goods and services or cross-border data flows, to obtain commitments that any such regulations are the least restrictive on trade, nondiscriminatory, and transparent, and promote an open market environment; and
> (E) to extend the moratorium of the World Trade Organization on duties on electronic transmissions.

8.2.USMCA and Digital Trade: Scope

In the USMCA, Parties recognize the economic growth and opportunities provided by digital trade and the importance of frameworks that promote consumer confidence in digital trade and of avoiding unnecessary barriers to its use and development. Chapter 19 of the USMCA applies to "measures adopted or maintained by a Party that affect trade by electronic means" but does not apply to government procurement or to information held or processed by or on behalf of a Party, or measures related to that information, including measures related to its collection.[287] Under the USMCA, "digital product" means:

> "a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically. For greater certainty, digital product does not include a digitized representation of a financial instrument, including money."[288]

8.3.The USMCA and Digital Trade: Obligations

Among other things, Chapter 19 of the USMCA, (i) bans custom duties on digital products; (ii) ensures non-discriminatory treatment of digital products and requires anti-spam laws in each country; (iii) bars countries from requiring the disclosure of source code; (iv) bars governments from requiring the disclosure of "algorithms expressed in that source code" unless that disclosure was required by a regulatory body for a "specific investigation, inspection, examination enforcement action or proceeding"; (v) offers

[287] USMCA, Article 19.2.2.
[288] USMCA, Article 19.1.

significant protection to internet service providers; (vi) bars data localization; and (vii) requires each country to establish personal information protection law.

8.3.1. Custom Duties

Article 19.3.1 stipulates that "No Party shall impose customs duties, fees, or other charges on or in connection with the importation or exportation of digital products transmitted electronically, between a person of one Party and a person of another Party." For the purposes of the USMCA, digital product means a computer program, text, video, image, sound recording, or other product that is digitally encoded, produced for commercial sale or distribution, and that can be transmitted electronically. The ban on custom duties does not preclude a Party from imposing internal taxes, fees, or other charges on a digital product transmitted electronically, provided that those taxes, fees, or charges are imposed in a manner consistent with the USMCA.

8.3.2. Non-Discriminatory Treatment of Digital Products

Article 19.4 of the USMCA mandates national treatment and most-favored nation in the treatment of digital products. Article 19.4.1. stipulates:

> "No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products."

This provision does not apply to a subsidy or grant provided by a Party, including a government-supported loan, guarantee, or insurance.

8.3.3. Domestic Electronic Transactions Framework

The USMCA commits each Party to accept legal validity of a signature in electronic form. Under the USMCA, each Party "shall maintain a legal framework governing electronic transactions consistent with the principles of the UNCITRAL Model Law on Electronic Commerce 1996."[289] Furthermore, each Party commits to endeavor to: (a) avoid unnecessary regulatory burden on electronic transactions; and (b) facilitate input by interested persons in the development of its legal framework for electronic transactions.[290]

8.3.4. Electronic Authentication and Electronic Signatures

Except in circumstances provided for under its law, a Party shall not deny the legal validity of a signature solely on the basis that the signature is in electronic form.[291] Furthermore, no Party shall adopt or maintain measures for electronic authentication and electronic signatures that would: (a) prohibit parties to an electronic transaction from mutually determining the appropriate authentication methods or electronic signatures for that transaction; or (b) prevent parties to an electronic transaction from having the opportunity to

[289] USMCA, Article 19.5.1.
[290] USMCA, Article 19.5.2.
[291] USMCA, Article 19.6.1.

establish before judicial or administrative authorities that their transaction complies with any legal requirements with respect to authentication or electronic signatures.[292]

8.3.5. Online Consumer Protection

Under the USMCA, the Parties recognize the importance of adopting and maintaining transparent and effective measures to protect consumers from fraudulent or deceptive commercial activities when they engage in digital trade. Each Party "shall adopt or maintain consumer protection laws to proscribe fraudulent and deceptive commercial activities that cause harm or potential harm to consumers engaged in online commercial activities."[293] In recognition of the importance of, and public interest in, cooperation between their respective national consumer protection agencies or other relevant bodies on activities related to cross-border digital trade in order to enhance consumer welfare, the Parties affirm their commitment to cooperate with respect to online commercial activities.

8.3.6. Personal Information Protection

When it comes to personal information protection, the USMCA does not mandate a particular legal framework. In general, USMCA Parties recognize the economic and social benefits of protecting the personal information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade. To this end, each Party "shall adopt or maintain a legal framework that provides for the protection of the personal information of the users of digital trade."[294] In the development of this legal framework, each Party "should take into account principles and guidelines of relevant international bodies, such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013)."[295]

8.3.7. Cross-Border Transfer of Information by Electronic Means

Article 19.11.1 of the USMCA stipulates that "[n]o Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person." However, Article 19.11.1. does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure: (a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and (b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective.[296]

8.3.8. Location of Computing Facilities (Data Localization)

Data localization is a term that refers to regulations that require an individual or firm operating in a territory to store the data it collects in a computing facility in that territory. The USMCA prohibits data localization. Article 19.12 provides that "[n]o Party shall require a

[292] USMCA, Article 19.6.2.
[293] USMCA, Article 19.7.3.
[294] USMCA, Article 19.8.2.
[295] USMCA, Article 19.8.2.
[296] USMCA, Article 19.11.2

covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory."[297]

8.3.9. Unsolicited Commercial Electronic Communications

Article 19.13.1 provides that each Party "shall adopt or maintain measures providing for the limitation of unsolicited commercial electronic communications." Further, each Party "shall adopt or maintain measures regarding unsolicited commercial electronic communications sent to an electronic mail address that: (a) require suppliers of unsolicited commercial electronic messages to facilitate the ability of recipients to prevent ongoing reception of those messages; or (b) require the consent, as specified in the laws and regulations of each Party, of recipients to receive commercial electronic messages." Each Party "shall endeavor to adopt or maintain measures that enable consumers to reduce or prevent unsolicited commercial electronic communications sent other than to an electronic mail address" and shall provide recourse in its law against suppliers of unsolicited commercial electronic communications that do not comply with a measure adopted or maintained pursuant.

8.3.10. Cooperation

USMCA Partners commit to cooperate to promote digital trade. In Article 19.14.1, Parties agree to endeavor to: (a) exchange information and share experiences on regulations, policies, enforcement and compliance relating to digital trade; (b) cooperate and maintain a dialogue on the promotion and development of mechanisms; (c) actively participate in regional and multilateral fora to promote the development of digital trade; (d) encourage development by the private sector of methods of self-regulation that foster digital trade; (e) promote access for persons with disabilities to information and communications technologies; and (f) promote, through international cross-border cooperation initiatives, the development of mechanisms to assist users in submitting cross-border complaints regarding personal information protection. The Parties also agree to consider establishing a forum to address any of the issues related to digital cooperation.

8.3.11. Cyber Security

In recognition that threats to cybersecurity undermine confidence in digital trade, Article 19.15.1 provides that the Parties shall endeavor to: (a) build the capabilities of their respective national entities responsible for cybersecurity incident response; and (b) strengthen existing collaboration mechanisms for cooperating to identify and mitigate malicious intrusions or dissemination of malicious code that affect electronic networks, and use those mechanisms to swiftly address cybersecurity incidents, as well as for the sharing of information for awareness and best practices. USMCA Parties affirm that risk-based approaches may be more effective than prescriptive regulation in addressing cybersecurity threats. Consequently, each Party shall endeavor to employ, and encourage enterprises within its jurisdiction to use, risk-based approaches that rely on consensus-based standards and risk management best practices to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events.[298]

[297] USMCA, Article 19.12.
[298] USMCA, Article 19.15.2.

8.3.12. Source Code

Source code is the collection of coded commands that are generally used in the development of computer and software programs. The USMCA bans the forced transfer of source code. Article 19.16 provides that "[n]o Party shall require the transfer of, or access to, a source code of software owned by a person of another Party, or to an algorithm expressed in that source code, as a condition for the import, distribution, sale or use of that software, or of products containing that software, in its territory."[299] However, the this does not preclude a regulatory body or judicial authority of a Party from requiring a person of another Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding, subject to safeguards against unauthorized disclosure.

8.3.13. Interactive Computer Services

In the USMCA, the Parties recognize the importance of the promotion of interactive computer services, including for small and medium-sized enterprises, as vital to the growth of digital trade. To that end, a provision in the agreement precludes Parties from adopting or maintaining measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created, or developed the information. The USMCA essentially limits the liability of suppliers and users of interactive computer services.

8.3.14. Open Government Data

In Article 19.18, USMCA Parties recognize that facilitating public access to and use of government information fosters economic and social development, competitiveness, and innovation. Article 19.18.2 provides that to the extent that a Party chooses to make government information, including data, available to the public, "it shall endeavor to ensure that the information is in a machine-readable and open format and can be searched, retrieved, used, reused, and redistributed." The Parties "shall endeavor to cooperate" to identify ways in which each Party can expand access to and use of government information, including data, that the Party has made public, with a view to enhancing and generating business opportunities, especially for SMEs.[300]

8.4.Regulatory Space

FTA provisions on digital trade raise a host of legal, economic, and public interest issues for states including constitutional, human rights, national security issues. Perhaps in recognition of the implications of a broad discipline on digital trade, the USMCA's Chapter 19 contains several provisions designed to safeguard domestic regulatory space. For example:

- The non-discriminatory obligation does not apply to a subsidy or grant provided by a Party, including a government-supported loan, guarantee, or insurance.[301]

[299] USMCA, Article 19.16: Source Code 1.
[300] USMCA, Article 19.18.3.
[301] USMCA, Article 19.3.2

- Article 19.17 (Interactive Computer Services) does not apply with respect to Mexico until the date of three years after entry into force of the Agreement.

- Article 19.17 (Interactive Computer Services) is subject to Article 32.1 (General Exceptions), which, among other things, provides that, for purposes of Chapter 19, the exception for measures necessary to protect public morals pursuant to paragraph (a) of Article XIV of GATS is incorporated into and made part of this Agreement, mutatis mutandis.

8.5. Key Considerations for Kenya

The USMCA's digital trade chapter "represents the strongest set of digital trade provisions yet negotiated, at least outside the single market created in the European Union."[302] USMCA's digital trade chapter sets a new standard for e-commerce and is likely to influence future FTA particularly FTAs involving the U.S. As digital trade proliferates, digital trade provisions in FTA are likely to become the norm.

8.5.1. Non-controversial Issues in USMCA's Chapter 19

Some of the principles in the digital chapter of the USMCA are not controversial at all. The chapters include non-controversial foundational principles such as certainty in electronic contracting and the validity of electronic signatures. Provisions in the USMCA that seek to foster greater certainty for online trade are very important and should be welcomed. Such provisions facilitate digital transactions by permitting the use of electronic authentication and electronic signatures, while protecting consumers' and businesses' confidential information. Provisions that promote collaboration in addressing cybersecurity challenges are also good. Other provisions of the USMCA's digital chapter are more controversial, however. These include provisions that crack down on data localization measures, provisions that address forced disclosure of proprietary computer source code and algorithms, as well as provisions that purportedly promote open access to government-generated public data.

8.5.2. U.S. Has Expressed Specific Concerns Regarding Aspects of Kenya's Policy that Affect Digital Trade

In 2019, the U.S. expressed grave concerns about some pending legislations in Kenya relating to data protection. It is therefore to be expected that in any FTA with Kenya, the U.S. is likely to press hard for binding obligations on digital trade. In a 2019 report, the USTR expressed concern about a draft of Kenya's Data Protection Bill. According to the 2019 report:

> **Data Localization Requirement**
>
> A draft of a Data Protection Bill requires the local storage of personal data, prohibits the cross-border processing of certain "sensitive personal data," and places strict conditions on the transfer of personal data outside Kenya. The United States remains concerned that, if passed into law, such restrictions on crossborder data flows would constitute a serious barrier to digital trade….

[302] Anupam Chander, *The Coming North American Digital Trade Zone*, 9 October 2018. https://www.cfr.org/blog/coming-north-american-digital-trade-zone. *See also* Chander, Anupam and Le, Uyen P., Data Nationalism (March 13, 2015). Emory Law Journal, Vol. 64, No. 3, 2015.

Internet Services

The Computer Misuse and Cybercrimes Act was signed in May 2018, though certain key provisions of the Act remain suspended by Kenya's judiciary, pending review of a petition challenging the constitutionality and legality of those provisions. Some of the suspended provisions of the Act could limit online access to information and curtail the creation of user-generated content, potentially limiting the ability of some service providers to operate profitably in Kenya.

The East African Legislative Assembly passed the EAC Electronic Transactions Act in 2015. While the Act provides some protection of intermediaries from liability for third party content, it fails to include any counter-notice procedures for a third party to challenge a content takedown request, and removes legal protections if the intermediary receives a financial benefit from the infringing activity. Lack of a counternotice provision exposes internet intermediaries to business process disruptions as a result of potentially frivolous takedown notices. Removing legal protection for intermediaries that receive a financial benefit from infringing activity could remove an entire class of intermediaries from the scope of liability protections and could result in a general obligation on these intermediaries to monitor internet traffic. Depending on Kenya's implementation of this Act, it could serve as a serious barrier for internet platforms seeking to supply services in Kenya.[303]

Significantly, in 2019, Kenya passed a comprehensive data protection legislation – the Data Protection Act of 2019. The Kenyan President signed the Act on November 8, 2019, and it became effective on November 25, 2019. The Act, now the primary statute on data protection in Kenya, aims at protecting the personal information of individuals in Kenya. The Act inter alia establishes the Office of the Data Protection Commissioner, makes provision for the regulation of the processing of personal data, provides for the rights of data subjects, and defines the obligations of data controllers and processors.

8.5.3. Disciplines on Digital Trade Protectionism Creates Winners and Losers

Discipline on digital trade protectionism clearly favors countries that are the major exporters of digital product. In any Kenya-US FTA, a digital chapter is more likely than not to benefit the U.S. rather than Kenya. The U.S. is presently home to 11 of the world's 15 largest internet businesses. According to a December 2020 report from the US Congressional Research Service, in 2018, U.S. exports of information and communication technology (ICT) goods and services were $148 billion and $80 billion, respectively. Furthermore, exports of potential digitally-enabled services totaled $499 billion, comprising over half of U.S. services exports.[304] Studies show that the volume of global data flows is growing faster than trade or financial flows, and its positive GDP contribution offsets the lower growth rates of trade and FDI. Understandably, the U.S. is keen to preserve U.S. technological leadership and is also keen to eliminate conditions that could impair U.S. digital sales.

8.5.4. Possible Threats to Internet Sovereignty

A government that seeks strict control over digital data within its border may not welcome disciplines on digital trade. With growth in digital trade and effort by some countries to liberalize digital trade, a growing number of governments are passing laws to regulate digital

[303] *2019 National Trade Estimates Report*.
[304] Congressional Research Service, Digital Trade, 3 December 2020. https://crsreports.congress.gov/product/pdf/IF/IF10770

trade and the use of the internet more generally through inter alia the requirements to use local standards, and national security reviews.

Data localisation requirements are highly controversial. Countries that favor data localization laws (e.g. Russia, Turkey, and Indonesia) require that certain data on citizens collected electronically must be processed and stored within the country. U.S. companies and many Western governments oppose data localization laws on the argument that ensuring local storage and processing can be either technically or economically infeasible and can create considerable uncertainty for businesses. The USTR has argued that "[d]ata localization requirements significantly raise costs for firms, especially foreign firms, which are more likely to depend on data centers located abroad. Data localization requirements also blunt the effectiveness of certain cybersecurity best practices and would prevent Kenyans from taking advantage of best-in-class services."[305] "Let's not kid ourselves: some data restrictions out there are purely protectionist," said then-EU Trade Commissioner Cecilia Malmström in a 2016 speech to the European Parliament. "Rules that require data to be localised in a place, or that impose limits on transferring data, often have no justification, other than to inhibit market access by overseas companies. That is not data protection, it is protectionism; that is our trade partners not playing fair."

Is a regime that bars data localization in Kenya's interest? To some analyst, data localization "is the nemesis of digital trade" and "limits access to global services and serves as the principal instrument for protectionism in the information age."[306] Defenders take the view that rules that prohibit data localization significantly limits the ability of countries to protect their citizens.[307]

8.5.5. Threats to Other Public Interests – Privacy, Consumer Protection, etc.

Disciplines on digital trade protectionism have the potential to undermine rights guaranteed under the Kenyan Constitution as well as rights guaranteed under international and domestic human rights treaties binding on Kenya. The right to privacy is enshrined in Article 31 (c) and (d) of the Constitution of Kenya, 2010. Although the USMCA addresses consumer protection and protection of personal information, the agreement does not impose specific and meaningful obligation on Parties regarding these matters. For example, regarding the protection of personal information, Article 19.8.2 of the USMCA provides that "each Party shall adopt or maintain **a legal framework that provides for the protection of the personal information of the users of digital trade**. In the development of this legal framework, each Party should take into account principles and guidelines of relevant international bodies."[308] A statement in a footnote clarifies:

> For greater certainty, a Party may comply with the obligation in this paragraph by adopting or maintaining measures such as comprehensive privacy, personal information or personal data protection laws, sector-specific laws covering privacy, **or laws that provide for the enforcement of voluntary undertakings by enterprises relating to privacy**.[309]

[305] *2019 National Trade Estimates Report*.
[306] Anupam Chander , *The Coming North American Digital Trade Zone*, 9 October 2018. *https://www.cfr.org/blog/coming-north-american-digital-trade-zone*
[307] Michael Geist, *How the USMCA falls short on digital trade, data protection and privacy*, WASHINGTON POST (3 October 2018). https://www.bilaterals.org/?how-the-usmca-falls-short-on
[308] Emphasis added.
[309] USMCA, Article 19.8.2. (foot note 4). Emphasis added.

Michael Geist has argued that the USMCA's digital trade chapter locks in rules that will hamstring online policies for decades by restricting privacy safeguards and hampering efforts to establish new regulation in the digital environment.[310] According to Geist, "[t]he data localization and data transfer rules may erode efforts to safeguard privacy, and many other provisions represent a lost opportunity to establish higher standards. Indeed, as the United States touts high standard intellectual property protections in its trade agreements, it seemingly opts for low standard digital trade protections."[311] As Geist put it:

> "An imperfect digital trade chapter would ordinarily mean little for global e-commerce. Yet the USMCA chapter builds on the TPP and effectively entrenches the approach as the model for digital trade in agreements worldwide. In fact, it seems likely that the same provisions will be used in multilateral instruments, including efforts at the World Trade Organization to establish similar e-commerce rules.
>
> In doing so, a chapter that has never been subject to public scrutiny or debate, fails to reflect many global e-commerce norms, and may ultimately restrict policy flexibility on key privacy issues will have been quietly established as the go-to international approach. Before the USMCA sets the standard to be used around the world for decades, there needs to be a renewed effort to ensure it meets the needs of a far broader array of businesses, consumers and domestic policymakers."[312]

8.6. Key Recommendations

8.6.1. Adopt Policies that Encourage Innovation Including in the Digital Space

Trade and trade policies can be important engines for innovation. Today, firms of all sizes and in every industry use digital services and technologies to drive internal efficiencies and become globally competitive. Data and data flows have the potential to transform every sector of the Kenyan economy including the agricultural sector. As part of broader trade policy and development policy, it is important that the Kenya government adopt policies that encourage innovation and entrepreneurship. Mainstream digital technologies and services into Kenya's development policy is of paramount importance. Kenya and countries in Africa must embrace technological changes and seek to integrate technology into all sectors of their economy. Unfortunately, many countries in Africa are not fully ready for trade in the digital age. A 2018 article concluded that e-commerce law in Kenya "is lacking in several aspects that may expose consumers to several risks during electronic transactions" and that the limitations of Kenyan laws "are attributable to the fact that Kenya commerce laws are vestiges of paper based trade and the fact that most e-commerce laws are rudimentary."[313] The author of the article suggested that Kenya "may benefit immensely from borrowing standards of e-commerce set by international law and laws applied in other jurisdictions" and "needs to

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[310] Michael Geist, *How the USMCA falls short on digital trade, data protection and privacy*, WASHINGTON POST (3 October 2018).
[311] Id.
[312] Michael Geist: How the USMCA falls short on digital trade, data protection and privacy, Washington Post, 3 October 2018.
[313] Benjamin Musau, Electronics Commerce Law with an Special Emphasis on The Kenya Legal Tax and Regulatory Challenges. https://www.bmmusau.com/electronic-commerce-law-with-a-special-emphasis-on-the-kenya-legal-tax-and-regulatory-challenges/#:~:text=KICA%20as%20amended%20in%202013,people%20engaging%20in%20digital%20transactions.&text=The%20Act%20also%20provides%20for,e%2Dcommerce%20and%20protect%20consumers.

comprehensively address the glaring deficiencies in e-commerce law while borrowing best practices from international law."

According to Mckinsey, although there is substantial value at stake in the digital world, not all countries are making the most of this potential. However, in many respects, the question is not whether a country should support digital trade but whether binding obligations related to e-commerce and other aspects of digital trade is in a country's best interest. As regards digital trade, a Congressional Research Service report rightly notes that "[w]hat some policymakers see as protectionist … others may view as necessary to safeguard certain domestic policy interests."[314] An FTA is not necessary for a country to get more connected. It is certainly possible for a country to embark on unilateral reform using the OECD's *Digital Services Trade Restrictiveness Index*.

Policy coherence is absolutely essential for a country that desires a forward-looking innovation policy. In the *World Trade Report 2020*, titled 'Government policies to promote innovation in the digital age,' the WTO makes a strong case for digitally-oriented government policies. According to the WTO:

> [I]nnovation policy is not a single set of policy prescription to promote innovation but policy actions in several policy areas (education, science and technology, trade, entrepreneurship, investment and finance) constituting a framework for innovation to occur, but also for the innovation to be marketed and the underlying knowledge to be diffused.[315]

While some countries are adopting stand-alone digitally-oriented policies, others are revising their industrial policies to take into account the digital revolution sweeping the world. Studies show that countries are using a mix of traditional policy instruments and instruments specifically designed for the digital age.[316]

8.6.2. Conduct a Comprehensive Cost/Benefit Analysis of Disciplines on Digital Trade

Inevitably, technologies can be disruptive and do create winners and losers. There are arguments to support the liberalization of digital trade. *First*, digital connectivity is likely to enhance the volume of trade for the private sector in Kenya. *Second*, the requirement that custom duties cannot be imposed on digital products and services could potentially increase access to digitally-traded goods and services for ordinary folks in Kenya and help small businesses in Kenya get more connected to the global economy. *Third*, rules on electronic authentication and signatures can help facilitate digital transactions and contribute to ease of doing business in Kenya. *Fourth*, cross-border e-commerce can have a direct impact on improving livelihoods, can foster higher living standards, and can boost economic development. Judging by the *MGI Connectedness Index* which offers a comprehensive look at how countries participate in inflows and outflows of goods, services, finance, people, and data, Kenya still has some ways to go as far as getting connected to the global economy is concerned. According to *Country connectedness index and overall flows data, 2014*, United States ranked # 3 with a score of 52.7 and a flow value of $6,832 billion. By contrast, Kenya ranked #118 and has a score of 1.3 and a flow value of $35 billion.

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[314] Congressional Research Service, Digital Trade, 3 December 2020/ https://crsreports.congress.gov/product/pdf/IF/IF10770
[315] World Trade Report, World Trade Report 2020, p. 25.
[316] https://www.wto.org/english/res_e/booksp_e/wtr20_e/wtr20-2_e.pdf

There are strong arguments against full and unrestricted liberalization of digital trade as well. *First*, with increasing digitization and with digital trade involving more goods and services, a permanent moratorium on custom duties means loss of revenues for many poor and developing countries that currently impose duties on digital products. *Second*, disciplines on rules governing digital trade can also lead to massive data loss for some countries. *Third*, in the short term, disciplines on digital trade would more likely benefit countries with developed market systems and firms that already penetrate the online retail space. *Fourth*, for many developing countries, tech-driven commerce has the potential to displace a significant number of players in the traditional market. Finally, disciplines on rules governing digital trade have the potential to stifle the development of domestic technology industry.

In assessing the costs and benefits of a chapter on digital trade in a Kenya-U.S. FTA, it is strongly recommended that the Kenyan government review past proposals by the Africa Group on the issue of possible multilateral rules on e-commerce. In a 20 October 2017 WTO proposal, the Africa Group expressed concern about new rules that could constrain the domestic policy space of African countries and constrain their ability to industrialise. Specifically, the Africa Group: (i) questioned the propaganda that new e-commerce rules will be good for developing countries; (ii) questioned why some WTO members were pushing for new multilateral rules on e-commerce, while at the same time resisting efforts to meaningfully address the mandate of the Doha Development Agenda bring the Doha Round to a successful conclusion; and (iii) condemned hard rules on e-commerce and digital trade including, permanent moratorium on custom duties, non-disclosure of source code, no data localization requirements, as well as bans on forced technology transfers and source code disclosures.[317]

8.6.3. Adopted a Clear and Coherent Position on Digital Trade.

Liberalization of digital trade has implications for start-ups and micro, small and medium enterprises, for women-owned and minority owned businesses, for Kenya's Vision 2030, and for sustainable development goals. Before concluding a trade deal with binding provisions on digital trade, the Kenyan Government should consider adopting a comprehensive policy on digital trade. A growing number of countries are adopting national policies on e-commerce and digital trade. India is reportedly currently working on an e-commerce policy. The 2017 "Motion for a European Parliament Resolution: Towards a Digital Trade Strategy" (Towards a Digital Trade Strategy) is instructive.[318] In the document, the EU Parliament *inter alia*

- Stressed that any digital trade strategy must be fully in line with and contribute to the realisation of the 2030 Agenda for Sustainable Development;
- Highlighted the need for infrastructure, especially in rural, mountainous and remote areas, that is adequate in coverage, quality and security and supports net neutrality;
- Stressed that it is imperative that any digital trade strategy must be fully in line with the principle of policy coherence for development; and
- Stressed that any digital trade strategy must seek to promote and enable start-ups and micro, small & medium enterprises to engage in cross border ecommerce, recalling the contribution this could make to gender equality.

[317] The WTO Work Programme on Electronic Commerce, Statement by the Africa Group (JOB/GC/144).
[318] 2017/2065(INI). 'Towards a digital trade strategy', 12 December 2017. https://www.europarl.europa.eu/doceo/document/TA-8-2017-0488_EN.html

8.6.4. Between Participating in the WTO E-Commerce Negotiations and Negotiating a Bilateral Agreement on Digital Trade: Weigh Options Very Carefully.

At launch in January 2019, 76 of 164 WTO members were involved in the e-commerce negotiations. As of November 2020, the number of participating members stood 86.[319] According to reports, participating members seek to achieve a high-standard outcome that builds on existing WTO agreements and frameworks.[320] Many developing countries, including large emerging economies, are not involved in the WTO-plurilateral. India has chosen to boycott the WTO E-Commerce Plurilateral citing national security and other public interest concerns. South Africa have also opted out of the negotiations. Indonesia has joined the talks but is reportedly opposed to the permanent moratorium on tariffs on e-transmissions. Kenya joined the Joint Initiative on Electronic Commerce adopted in Davos on 17 July 2019.[321]

Presently, only a handful of countries in Africa are participating in the WTO E-Commerce negotiations.[322] African countries in general have expressed concerns about a multilateral discipline on e-commerce. In 2017, the Africa Group in the WTO stated emphatically that the group "will not support any ideas for negotiating rules, or move in a direction on developing rules on e-commerce."[323] Developing countries' hesitation to participate in the e-commerce plurilateral is understandable. However, if the choice is between binding commitments in an FTA or commitments in a multilateral agreement, a multilateral agreement may be a better option for Kenya and other countries in Africa.

8.6.5. Involve Parliament and the Kenyan Private Sector in Designing Kenya's Digital Trade Policy

The Kenyan Parliament and the private sector have important roles to play in shaping policies that will affect Kenya's nascent technology sector. It is recommended that the Kenyan Parliament be fully briefed on the subject of digital trade liberalization and that its views are sought on these issues. It is also recommended that the Kenyan government consult with Kenyan businesses and other stakeholders on issues that should inform digital trade negotiations.

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[319] https://www.wto.org/english/news_e/news20_e/ecom_26oct20_e.htm

[320] https://www.wto.org/english/news_e/news20_e/ecom_26oct20_e.htm

[321] Joint Statement on Electronic Commerce. Communication Submitted by Kenya. WTO document INF/ECOM/37, dated 19 July 2019. https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=255763

[322] Ministers representing the following Members of the World Trade Organization (WTO): Albania; Argentina; Australia; Bahrain, Kingdom of; Brazil; Brunei Darussalam; Canada; Chile; China; Colombia; Costa Rica; El Salvador; European Union; Georgia; Honduras; Hong Kong, China; Iceland; Israel; Japan; Kazakhstan; Korea, Republic of; Kuwait, the State of; Lao PDR; Liechtenstein; Malaysia; Mexico; Moldova, Republic of; Mongolia; Montenegro; Myanmar; New Zealand; Nicaragua; Nigeria; Norway; Panama; Paraguay; Peru; Qatar; Russian Federation; Singapore; Switzerland; Chinese Taipei; Thailand; the former Yugoslav Republic of Macedonia; Turkey; Ukraine; United Arab Emirates; United States; and Uruguay, welcome the progress made toward WTO negotiations on electronic commerce since the Eleventh WTO Ministerial Conference at Buenos Aires.

[323] JOB/GC/144.

8.6.6. Address the Development Dimension

Digital trade liberalization has implications for sustainable development and for the development strategies of states. Certain provisions in USMCA's chapter 19 have the potential to affect domestic policies relating to technology transfer and may constrain a state's effort to use digital products and platforms to address local needs and challenges. Should the Kenyan government proceed to negotiate a chapter on digital trade, such a chapter must have a strong pro-development component. In its 2017 motion, the EU Parliament explicitly noted "that pro-development technology transfer requirements should not be ruled out by disciplines on digital trade."[324]

The Indian government is skeptical about multilateral trade rules on e-commerce and fears massive revenue and data loss as well as intrusion in domestic regulatory space. The position articulated in India's draft e-commerce policy is that "[d]uring negotiations, policy space must be retained to seek disclosure of source code for facilitating transfer of technology and development of applications for local needs, as well as for security. Policy space to grant preferential treatment of digital products created within India must also be retained." [325]

8.6.7. Address Digital Rights

Trade agreements can be a lever to improve digital rights. Conversely, trade agreements can undermine digital rights. Consequently, it is recommended that the Kenyan government be very intentional about using trade agreements to improve and promote digital rights. It is important that trade rules create tangible benefits for consumers in Kenya and that they also ensure and promote respect for fundamental rights guaranteed in the Kenyan Constitution. The Kenyan government must also decide what issues are non-negotiation in any trade agreement. In its 2017 motion, the EU Parliament stressed that "sensitive sectors such as audio-visual services, and fundamental rights such as the protection of personal data, **should not be subject to trade negotiations**,"[326] and that "the protection of personal data **is non-negotiable in trade agreement**."[327]

8.6.8. Needs Assessment. Benchmarking Study

To effectively protect Kenya's offensive and defensive interests in the area of digital trade, a comprehensive knowledge of the state of Kenya's digital sector and the readiness of Kenyan businesses to participate in digital trade is required. It is recommended that the Kenyan government commission a full and detailed study on the state of the digital sector in Kenya. There are many questions to be asked. For example, how many households and businesses in Kenya have access to the internet? What strategies are in place for addressing the digital divide in Kenya? Do Kenyan enterprises, including local micro, small & medium enterprises have the capacity and infrastructure to interact digitally with enterprises around the globe and to access global value chains?

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[324] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf
[325] https://www.business-standard.com/article/economy-policy/india-refuses-to-join-e-commerce-talks-at-wto-says-rules-to-hurt-country-119022500014_1.html
[326] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf. Emphasis added.
[327] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf. Emphasis added.

8.6.9. Capacity Building

Capacity building and technical assistance should be a vital component of a digital chapter in a Kenya-U.S. trade deal. Among other things, the Kenyan government should consider binding provisions that require the U.S. to invest in digital infrastructure in Kenya in order to bridge the digital divide. The Kenyan government should also consider provisions that require specific investments in addressing the needs and challenges of local micro, small & medium enterprises. Paragraph 35 of the EU Parliament's motion is instructive and provides:

> The European Parliament,
>
> ….
>
> 35. Considers that digital issues should also feature more prominently in the EU's Aid for Trade policy to facilitate the growth of e-commerce via increased support for innovation and infrastructure and access to financing, notably via micro finance initiatives, as well as assistance in increasing online visibility for e-commerce businesses in developing countries, facilitating platform access and promoting the availability of e-payment solutions and access to cost-effective logistics and delivery services.[328]

8.6.10. *Address key Questions*

It is recommended that before accepting binding disciplines on digital trade, the Kenyan government address pertinent questions. For example:

(a) Does a USMCA-type chapter on digital trade effectively achieve Kenya's overall negotiating principles and objectives including the goal of an FTA that will be an instrument for economic and trade development?

(b) Does a USMCA-type chapter on digital trade strike the right balance among competing policy objectives including digital trade liberalization, privacy, consumer protection, sovereignty, and national security?

(c) Can Kenya and countries in Africa use the WTO e-commerce negotiations to advance a balanced and development-friendly international rules and standards for cross-border data flows? How?

(d) How might disciplines on digital trade hurt or help Kenya's rapidly growing domestic e-commerce sector, which is still finding its niche?

(e) How might binding rules on digital trade become a pretext for unfair mandatory market access to foreign companies?

8.6.11. Review and Upgrade Kenya's Negotiation Objectives

Kenya's negotiation objectives regarding digital trade are vague and do no address most of the pertinent issues that should be of concern to Kenya.:

Digital Trade

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[328] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf

Kenya (Negotiating Objectives)	**United States (Negotiating Objectives)**
Secure commitment to allow gradual regulations at facilitation of Digital trade in goods and services and cross-border data flow in line with the Countries development agenda in particular contribution of this trade to economic development[.] Support Kenya in strengthening E-Commerce and digital platforms for Trade in goods and services[.] Provide framework to strengthen the Kenyan Innovation and Entrepreneurship ecosystem and upgrading of innovation startups[.] Support in strengthening the infant incubation, acceleration and innovation hubs for innovative start-ups in Kenya.	- Secure commitments not to impose customs duties on digital products (e.g., software, music, video, e-books). - Ensure non-discriminatory treatment of digital products transmitted electronically and guarantee that these products will not face government-sanctioned discrimination based on the nationality or territory in which the product is produced. - Establish state-of-the-art rules to ensure that Kenya does not impose measures that restrict cross-border data flows and does not require the use or installation of local computing facilities. - Promote the interoperability of data protection regimes and mechanisms to facilitate cross-border information transfers. - Establish rules to prevent governments from mandating the disclosure of computer source code or algorithms. - Establish rules that limit non-IPR civil liability of online platforms for third-party content, subject to the Parties' rights to adopt non-discriminatory measures for legitimate public policy objectives or that are necessary to protect public morals.

9. Environment

9.1. Introduction

The interaction between global trade and the environment is increasingly the subject of considerable concern and debate. There is wide agreement that trade can have both positive and negative effect on the environment. On the one hand, "[e]conomic growth resulting from trade expansion can have an obvious direct impact on the environment by increasing pollution or degrading natural resources" and trade liberalisation "may lead to specialisation in pollution-intensive activities in some countries if environmental policy stringency differs across countries."[329] On the other hand, some believe that by supporting economic growth, development, and social welfare, increased trade can contribute to a greater capacity to manage the environment more effectively.[330] The question increasingly asked is, how can policymakers optimally combine trade and the environment policies?

NAFTA was the first free trade agreement to link environment and trade issues. However, NAFTA addressed environmental issues in a separate side agreement called the North American Agreement on Environmental Cooperation. Since NAFTA, every FTA concluded by the U.S. has incorporated provisions on the environment. U.S. negotiation objectives are clear. According to the TPA-2015, the objectives are two-fold. First, "to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources." Second, "to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, including obligations that require changes to United States laws or regulations or that would affect the implementation of such laws or regulations."

Regarding provisions on the environment, the U.S. negotiating objectives are clear. According to the Trade Promotion Authority, 2015, the negotiating objectives are two-fold. First, "to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources." Second, "to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, including obligations that require changes to United States laws or regulations or that would affect the implementation of such laws or regulations."

9.2. The USMCA and the Environment

The Parties to the USMCA recognize that a healthy environment is an integral element of sustainable development and recognize the contribution that trade makes to sustainable development. The objectives of Chapter 24 are to promote mutually supportive trade and environmental policies and practices; promote high levels of environmental protection and

[329] https://www.oecd.org/trade/topics/trade-and-the-environment/
[330] https://www.oecd.org/trade/topics/trade-and-the-environment/

effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues, including through cooperation, in the furtherance of sustainable development.

Following on NAFTA's example, the USMCA contains a chapter on the environment (Chapter 24). Unlike NAFTA, the environmental provisions of the USMCA are integral part of the agreement and appear in Chapter 24. The USMCA makes significant changes and additions to NAFTA's environmental side agreement. Key provisions are:

- ✓ Article 24.1: Definitions
- ✓ Article 24.2: Scope and Objectives
- ✓ Article 24.3: Levels of Protection
- ✓ Article 24.4: Enforcement of Environmental Laws.
- ✓ Article 24.5: Public Information and Participation.
- ✓ Article 24.6: Procedural Matters.
- ✓ Article 24.7: Environmental Impact Assessment.
- ✓ Article 24.8: Multilateral Environmental Agreements.
- ✓ Article 24.9: Protection of the Ozone Layer.
- ✓ Article 24.10: Protection of the Marine Environment from Ship Pollution.
- ✓ Article 24.11: Air Quality.
- ✓ Article 24.12: Marine Litter.
- ✓ Article 24.13: Corporate Social Responsibility and Responsible Business Conduct.
- ✓ Article 24.14: Voluntary Mechanisms to Enhance Environmental Performance.
- ✓ Article 24.15: Trade and Biodiversity.
- ✓ Article 24.16: Invasive Alien Species.
- ✓ Article 24.17: Marine Wild Capture Fisheries.
- ✓ Article 24.18: Sustainable Fisheries Management.
- ✓ Article 24.19: Conservation of Marine Species.
- ✓ Article 24.20: Fisheries Subsidies.
- ✓ Article 24.21: Illegal, Unreported, and Unregulated (IUU) Fishing.
- ✓ Article 24.22: Conservation and Trade.
- ✓ Article 24.23: Sustainable Forest Management and Trade.
- ✓ Article 24.24: Environmental Goods and Services.
- ✓ Article 24.25: Environmental Cooperation.
- ✓ Article 24.26: Environmental Committee and Contact Points.
- ✓ Article 24.27: Submissions on Enforcement Matters.
- ✓ Article 24.28: Factual Records and Related Cooperation.
- ✓ Article 24.29: Environmental Consultations.
- ✓ Article 24.30: Senior Representative Consultations.
- ✓ Article 24.31: Ministerial Consultations.
- ✓ Article 24.32: Dispute Resolution

In the main, Chapter 24 includes obligations for parties to maintain high levels of environmental protection and robust environmental governance. The USMCA parties also signed a parallel agreement – the Environmental Cooperation Agreement – that obliges the Parties to retain the Commission for Environmental Cooperation.

9.2.1. Enforcement of Environmental Laws

The USMCA takes a very serious approach to enforcement of environmental disciplines. "No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement."[331] Furthermore, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties.[332] In addition, each Party is obliged to promote public awareness of its environmental laws and policies, including enforcement and compliance procedures, by ensuring that relevant information is available to the public.[333]

9.2.2. Procedural Matters

Procedural matters are governed in Article 24.3 of the USMCA. Each Party shall provide for the receipt and consideration of written questions or comments from persons of that Party regarding its implementation of this Chapter. Upon receipt of questions or comments, each Party shall respond in a timely manner to these questions or comments in writing and in accordance with domestic procedures, and make the questions or comments and the responses available to the public, for example by posting on an appropriate public website.[334] Each Party is obliged to make use of existing, or establish new, consultative mechanisms to seek views on matters related to the implementation of the Chapter. These mechanisms may include persons with relevant experience, as appropriate, including experience in business, natural resource conservation and management, or other environmental matters.[335]

9.2.3. Multilateral Environmental Treaties

Each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.[336] Each Party is obliged to adopt, maintain, and implement laws, regulations, and all other measures necessary to fulfill its respective obligations under seven multilateral environmental agreements ("covered agreements").[337] The covered agreements are:

- ✓ the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended;
- ✓ the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended;
- ✓ the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended;
- ✓ the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended;

[331] USMCA, Article 24.4 (1).
[332] USMCA, Article 24.4.2.
[333] USMCA, Article 24.5.1.
[334] USMCA, Article 24.5.2.
[335] USMCA, Article 24.5.3
[336] USMCA, Article 24.8.2.
[337] USMCA, Article 24.8.4.

- ✓ the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980;
- ✓ the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and
- ✓ the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949.

Significantly, none of the covered agreements relate to climate change. The USMCA *does not* reference the United Nations Framework Convention on Climate Change or the Paris Agreement.

9.2.4. Specific Environmental Protection

Articles 24.9 to 24.23 of the USMCA focus on specific environmental protections and cover a broad range of issues including:

- protection of the ozone layer;
- protection of the marine environment from ship pollution;
- air quality;
- marine litter;
- voluntary mechanisms to enhance environmental performance;
- trade and biodiversity;
- invasive alien species;
- marine wild capture fisheries;
- sustainable fisheries management;
- conservation of marine species;
- fisheries subsidies;
- illegal, unreported, and unregulated fishing;
- conservation and trade;
- sustainable forest management and trade;
- environmental goods and services.

9.3. Dispute Settlement

Many aspects of Chapter 24 are subject to the dispute settlement provisions of the agreement. The agreement specifically provides that "[n]o Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, after the date of entry into force of this Agreement."[338] In the event of a violation, other USMCA Parties can file submissions and engage in consultations.

9.3.1. Submissions

Articles 24.27 and 24.28 of the USMCA set out a detailed procedure for the consideration of submissions once they are received. Pursuant to Article 24.27.1, "[a]ny person of a Party may file a submission asserting that a Party is failing to effectively enforce its environmental laws. Such submissions shall be filed with the Secretariat of the Commission for Environmental Cooperation (CEC Secretariat)." If the CEC Secretariat determines that a submission meets the admissibility criteria set out in the agreement, it shall determine within

[338] USMCA, Article 24.4.1.

30 days of receipt of the submission whether the submission merits requesting a response from the Party. If the CEC Secretariat makes such a request, it shall forward to the Party a copy of the submission and any supporting information provided with the submission.[339] The Party is required to respond within 60 days of delivery of the request. In responding, the Party shall inform the CEC Secretariat: (a) whether the matter at issue is the subject of a pending judicial or administrative proceeding; (b) whether the matter was previously the subject of a judicial or administrative proceeding; (c) whether private remedies in connection with the matter are available to the person making the submission and whether they have been pursued; and (d) information regarding the enforcement of the environmental law at issue. If the Party informs the CEC that the matter at issue is the subject of a pending judicial or administrative proceeding, the CEC Secretariat shall proceed no further.[340]

9.3.2. Consultations

The USMCA provides for several levels of consultation: Environment Consultations (Article 24.29); Senior Representative Consultations (Article 24.30), and Ministerial Consultation (Article 24.31).

9.3.3. Dispute Resolution

If the consulting Parties fail to resolve the matter under within 30 days after the date of receipt of a request under Article 24.29.2 (Environment Consultations), or any other period as the consulting Parties may decide, the requesting Party may request the establishment of a panel under Article 31.6 (Establishment of a Panel). [341] A panel so convened under Article 31.6 (Establishment of a Panel) has the discretion to seek technical advice or assistance, if appropriate, from an entity authorised under the relevant multilateral environmental agreement to address the particular matter, and provide the consulting Parties with an opportunity to comment on any such technical advice or assistance received. Such a panel is also mandated to provide due consideration to any interpretive guidance received in making its findings and determinations under Article 31.17 (Panel Report).

9.4.Policy Space

Several articles in the environmental chapter are designed to preserve domestic regulatory space.

9.4.1. Sovereign Right to Regulate

The USMCA, in Article 24.3.1., recognizes that each Party has "the sovereign right" to establish its "own levels of domestic environmental protection and its own environmental priorities" and the right “to establish, adopt, or modify its environmental laws and policies accordingly.” The USMCA also calls on each Party to "strive to ensure" that its environmental laws and policies “provide for, and encourage, high levels of environmental protection.”[342]

[339] USMCA, Article 24.27.3.
[340] USMCA, Article 24.27.4.
[341] USMCA, Article 24.32.
[342] USMCA, Article 24.3.2.

9.4.2. Enforcement

The Parties recognize that each Party retains the right to exercise discretion and to make decisions regarding: (a) investigatory, prosecutorial, regulatory, and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws a Party is in compliance with paragraph 1 if a course of action or inaction reflects a reasonable exercise of that discretion, or results from a bona fide decision regarding the allocation of those resources in accordance with priorities for enforcement of its environmental laws.[343]

9.4.3. Non-interference provision

There is a provision in the USMCA that nothing in the environmental chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party.[344]

9.5. Key Considerations for Kenya

It is increasingly accepted that trade should not happen at the expense of the environment. A chapter on the environment is a good thing. The USMCA's list of environmental and conservation topics to be addressed through trilateral cooperation is very ambitious and comprehensive. The language used in the USMCA environmental chapter is very similar to the language of NAFTA and other FTAs after NAFTA. A legal framework that commits FTA members to reporting on the state of the environment; striving for improvement of environmental laws and regulations; effective enforcement of environmental law; and publication and promotion of information can and should be welcomed.

9.5.1. Limited Scope and Reach

Critics are of the view that the USMCA's environmental chapter does not go far enough as far as addressing conservation and sustainable development is concerned. Thus, whether the provisions of the USMCA environmental chapter are sufficient to address regulatory backsliding is a matter of considerable debate. Whether the USMCA meets the baseline criteria to protect the health and environment is also a matter of intense debate. Despite its many laudable provisions, the USMCA's environmental chapter lacks clear and effective policies regarding environmental protection and sustainability assurances. For one thing, it does not endorse or reinforce climate change commitments as set out in the Paris Agreement. Furthermore, the agreement does not really address supply chains or sustainable trade.

9.5.2. The Marginalization of Climate Change in FTA's Involving the U.S.

The USMCA environmental chapter does not address climate change and does not include a reference to the United Nations Framework Convention on Climate Change or the Paris Agreement. The agreement references "clean technology" in a non-binding section on environmental goods and services and "carbon storage" in the sustainable forest management section but does not reference low-carbon technologies. Consider

[343] USMCA, Article 24.4.2.
[344] USMCA, Article 24.4.3.

Article 13.6 of the EU-Mercosur Trade Pact that promotes "domestic and international carbon markets" and "energy efficient, low-emission technology, and renewable energy." The EU and Mercosur made commitments to effectively implement the Paris Climate Agreement and also agreed to cooperate on the climate aspects of trade between the two sides. Even with its provisions on climate, environmental groups have been very critical of the deal. [345] German Chancellor Angela Merkel has reportedly expressed "considerable doubts" over the trade deal.[346] In July 2020, the Dutch Parliament requested that the Netherlands withdraw support from the agreement, citing the risk of deforestation it poses. In September 2020, the French government announced its opposition to the current version due to deforestation worries. With the recent change in administration in the U.S. and with the U.S. rejoining the Paris Agreement, prioritizing climate change in FTAs involving the U.S. may not be a problem in the near future.

9.5.3. Strong Enforcement from the U.S.

Strong enforcement from the U.S. can be expected. As already noted, under the USMCA, certain environmental violations are subject to the state-to-state dispute settlement mechanism. In the past the U.S. has submitted environmental disputes to the same state-to-state mechanism used for trade disputes.[347]

9.6. Key Recommendations

9.6.1. Sovereignty Issues and Concerns. The Right to Regulate

The Kenyan government must be careful not only to safeguard the right to regulate in the public interest but also ensure that it only takes on obligations that are consistent with the Kenyan Constitution. Where changes to existing law may be required, prior consultation with the Kenyan Parliament and other relevant stakeholders is recommended. This is the attitude of the U.S. regarding all FTAs. In the USTR's Negotiating Objectives, one of the principle objectives of the U.S. as regards the environment is:

> "to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, **including obligations that require changes to United States laws or regulations or that would affect the implementation of such laws or regulations**."[348]

9.6.2. Include the Precautionary Principle

The precautionary principle, a recognized principle of international environmental law, is not reflected in the USMCA's environmental chapter. Principle 15 of the Rio Declaration on

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[345] Will environmental failings bring down the EU-Mercosur deal? EURACTIVE, 25 September 2020. https://www.euractiv.com/section/economy-jobs/opinion/will-environmental-failings-bring-down-the-eu-mercosur-deal/

[346] Id.

[347] See David A. Gantz, "*Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements*," University of Miami Inter-American Law Review 42 (2011): 297. See also, see Mark Spalding and Marc Stern, NAFTA Effects: Claims and Arguments 1991- 1994, 1996 (Ottawa, CA: Commission for Environmental Cooperation, 1996), https:// bit.ly/2WnTRnl.

[348] Section 102(a)(7); 19 USC 4201(a)(7). Emphasis added.

Environment and Development (1992) codified for the first time at the global level, the precautionary approach. Principle 15 reads:

> "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

The precautionary principle essentially allows states to anticipate and avoid an environmental damage before it occurs and is thus an extension of the right of states to regulate in the public interest. The precautionary principle is now reflected in numerous international instruments. For example, Article 3 of the United Nations Framework Convention on Climate Change (UNFCCC) establishes that "parties should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects." It further states that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."

Increasingly, states are including the precautionary principle in their FTAs. Article 24.8 of the Canada-EU CETA is an example and provides:

> 1. When preparing and implementing measures aimed at environmental protection that may affect trade or investment between the Parties, each Party shall take into account relevant scientific and technical information and related international standards, guidelines, or recommendations.
> 2. The Parties acknowledge that **where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation**.[349]

9.6.3. Address Climate Change Explicitly in any FTA

The USMCA is silent on one of the biggest environmental challenges confronting Kenya - climate change. It is also significant that going into negotiations, one of the negotiating objectives of the U.S. is "to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures." It is imperative that FTAs involving Kenya address climate change explicitly and comprehensively including by:

- requiring parties to ratify the United Nations Framework Convention on Climate Change or the Paris Agreement;
- including explicit provisions related to renewable energy; and
- including languages related to carbon storage, in the context of sustainable forest management, and clean technology should be in the binding sections of any agreement.

It is worth noting that compared to the USMCA's neglect of climate change, the 2019 EU-Mercosur Trade Pact between the European Union and Argentina, Brazil Paraguay and Uruguay includes

[349] Emphasis added.

provisions related to "domestic and international carbon markets" and "energy-efficient, low-emission technology, and renewable energy."

9.6.4. Carry Out a Comprehensive Environmental Impact Assessment

It is recommended that the Kenyan government carry out a study of the impact of any proposed environmental chapter on the Kenyan economy and on individual sectors. What are the likely costs and benefits of an environmental chapter? Will such a chapter help Kenya address the myriad environmental issues and challenges it currently faces? With regard to the UCMCA's environmental chapter, the USITC concluded that "[t]he impact of USMCA's environment chapter on the U.S. economy and trade is difficult to measure quantitatively because of the complexity in measuring the economic impacts of environmental policies (especially those that are nonbinding). There does not appear be any public analysis of the potential economic impact of the chapter; commentaries have focused on the environmental aspects."[350]

9.6.5. Address Corporate Social Responsibility/Corporate Accountability

Given the relationship between globalization, industrialization and environmental pollution, it is imperative that the activities of businesses be addressed directly and explicitly in any FTA. Imposing direct responsibilities on businesses should not be off the table. Although the USMCA contains provisions on corporate social responsibility, the provisions are weak and non-binding. The USMCA provides that each Party "**shall encourage** enterprises organized or constituted under its laws, or operating in its territory, to adopt and implement **voluntary best practices of corporate social responsibility** that are related to the environment, such as those in internationally recognized standards and guidelines that have been endorsed or are supported by that Party."[351] The agreement does not define "voluntary best practices" and does not reference the United Nations Guiding Principles on Business and Human Rights or related instruments. Furthermore, the USMCA does not impose direct binding obligations on businesses. Parties generally agree to encourage "the use of flexible, voluntary mechanisms to protect the environment and natural resources, such as through the conservation and sustainable use of those resources, in its territory."[352]

In a growing number of trade and investment agreements, states are choosing to impose direct responsibilities on businesses. For example, in the Nigeria-Morocco BIT (2016), enterprises are required to conduct environmental impact assessments as stipulated in the domestic law of the host state. Furthermore, the Nigeria-Morocco BIT requires investors to apply the precautionary principle in their impact assessment. Article 14 of the Nigeria-Morocco BIT provides:

[350] https://www.usitc.gov/publications/332/pub4889.pdf, p. 251.
[351] USMCA, Article 24.13.2. Emphasis added.
[352] USMCA, Article 24.14.2 (a).

ARTICLE 14

IMPACT ASSESSMENT

1) Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.
2) Investors or the investment shall conduct a social impact assessment of the potential investment….
3) Investors, their investment and host state authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.

9.6.6. Address Environmental Issues in Other Chapters of an FTA

An environmental chapter in an FTA is a good start but is not enough to address the environmental issues and problems confronting Kenya. The provisions of several chapters of an FTA – for example, investment, agriculture, regulatory harmonization, and competition – have the potential to have major implications for the environment and for climate change. Should Kenya choose to conclude a comprehensive FTA with Kenya, it is important that the Kenyan government fully assess the impact of the entire agreement on the environment.

9.6.7. Technical Assistance and Capacity Building

It is recommended that attention be paid to addressing issues relating to technical assistance and capacity building as they relate to environmental problems and challenges. The good news is that technical assistance and capacity building are already addressed in the Trade Promotion Authority, 2015. One of the principal negotiating objectives of the United States with respect to the environment is to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development. The bad news is that FTA provisions relating to technical assistance and capacity building come in all shapes and sizes. Unless addressed in clear and precise terms that signal binding commitments, these provisions may be virtually useless.

Trade Promotion Authority, 2015

(10) LABOR AND THE ENVIRONMENT.—The principal negotiating objectives of the United States with respect to labor and the environment are—
….
(D) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development.

9.6.8. Review and Update Negotiation Objectives

Considering the climate change-related challenges facing Kenya and the fact that environment is explicitly addressed in the Constitution of Kenya, it is surprising that climate change is not mentioned in Kenya's negotiating objectives. It is thus recommended that Kenya's negotiating objectives on environmental issues be reviewed and revised.

Environmental

Negotiating Objectives (Kenya)	Negotiating Objectives (United States)
• Recognize the importance of Environment and support the Multilateral Environmental Agreements (MEAs) that each country is party to and the two should continue working closely in those foras.	- Establish strong and enforceable environment obligations that are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the Agreement. - Establish rules that will ensure that Kenya does not waive or derogate from the protections afforded in environmental laws for the purpose of encouraging trade or investment. - Establish rules that will ensure that Kenya does not fail to effectively enforce environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties.

10. Labor

10.1. Introduction

Worker rights provisions first appeared in U.S. FTAs in 1994 with the ratification of NAFTA.[353] Labor provisions have been incorporated in every FTA concluded by the U.S. since NAFTA. Indeed, since 1988, workers' rights have been included as a principle negotiating objective in Trade Promotion Authority legislation. The justification for including labor provisions in U.S. FTAs is "to help ensure that countries not derogate from labor laws to attract trade and investment and that liberalized trade does not give a competitive advantage to developing countries due to a lack of adequate standards."[354]

Under NAFTA, labor provisions were incorporated in a supplemental agreement known as "side" agreement. Over the years, labor provisions have moved from side agreements in FTAs to integral chapters within FTAs involving the U.S. the labor provisions in U.S. FTAs are becoming more detailed, are imposing more obligations on parties, and are having more teeth. Chapter 23 of the USMCA is dedicated to labor.

- ✓ Article 23.1: Definitions.
- ✓ Article 23.2: Statement of Shared Commitments.
- ✓ Article 23.3: Labor Rights.
- ✓ Article 23.4: Non-Derogation.
- ✓ Article 23.5: Enforcement of Labor Laws.
- ✓ Article 23.6: Forced or Compulsory Labor.
- ✓ Article 23.7: Violence Against Workers.
- ✓ Article 23.8: Migrant Workers.
- ✓ Article 23.9: Discrimination in the Workplace.
- ✓ Article 23.10: Public Awareness and Procedural Guarantees.
- ✓ Article 23.11: Public Submissions.
- ✓ Article 23.12: Cooperation.
- ✓ Article 23.13: Cooperative Labor Dialogue.
- ✓ Article 23.14: Labor Council.
- ✓ Article 23.15: Contact Points.
- ✓ Article 23.16: Public Engagement.
- ✓ Article 23.17: Labor Consultations.

10.2. USMCA and Labor: Obligations

In general, the USMCA Parties affirm their obligations as members of the International Labor Organization (ILO), including those stated in the ILO Declaration on Rights at Work

[353] Cathleen D. Cimino-Isaacs and M. Angeles Villarreal, Worker Rights Provisions in Free Trade Agreements (FTAs), In Focus.
[354] The United States-Mexico-Canada Agreement (USMCA) Updated July 27, 2020. https://fas.org/sgp/crs/row/R44981.pdf p. 32.

and the ILO Declaration on Social Justice for a Fair Globalization (2008). The Parties also recognize the important role of workers' and employers' organizations in protecting internationally recognized labor rights and also recognize the goal of trading only in goods produced in compliance with this Chapter.[355]

10.2.1. Labor Rights

Pursuant to Article 23.3, each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, a list of labor rights as stated in the ILO Declaration on Rights at Work. The listed labor rights are: (a) freedom of association6 and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor and, for the purposes of this Agreement, a prohibition on the worst forms of child labor; and (d) the elimination of discrimination in respect of employment and occupation. Each Party is also shall adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[356]

10.2.2. Non-Derogation

In Article 23.4 (Non-Derogation), the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labor laws. Accordingly, no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations: (a) implementing Article 23.3.1 (Labor Rights), if the waiver or derogation would be inconsistent with a right set out in that paragraph; or (b) implementing Article 23.3.1 or Article 23.3.2 (Labor Rights), if the waiver or derogation would weaken or reduce adherence to a right set out in Article 23.3.1 (Labor Rights), or to a condition of work referred to in Article 23.3.2 (Labor Rights), in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory.

10.2.3. Enforcement

Article 23.5 (Enforcement of Labor Laws) addresses enforcement of USMCA's labor provisions. Pursuant to Article 23.5.1, "[n]o Party shall fail to effectively enforce its labor laws **through a sustained or recurring course of action or inaction** in a manner affecting trade or investment between the Parties."[357] The USMCA specifies a range of actions that each Party must take with respect to their labor law. According to Article 23.5.2, each Party shall promote compliance with its labor laws through appropriate government action, such as by:

- appointing and training inspectors;
- monitoring compliance and investigating suspected violations, including through unannounced on-site inspections, and giving due consideration to requests to investigate an alleged violation of its labor laws;
- seeking assurances of voluntary compliance;
- requiring record keeping and reporting;
- encouraging the establishment of labor-management committees to address labor regulation of the workplace;

[355] USMCA, Article 23.2.
[356] USMCA, Article 23.3.2.
[357] Emphasis added.

- providing or encouraging mediation, conciliation, and arbitration services;
- initiating, in a timely manner, proceedings to seek appropriate sanctions or remedies for violations of its labor laws; and
- implementing remedies and sanctions imposed for noncompliance with its labor laws, including timely collection of fines and reinstatement of workers.

10.2.4. Forced or compulsory Labor

Article 23.6.1 of the USMCA provides that the Parties recognize the goal of eliminating all forms of forced or compulsory labor, including forced or compulsory child labor. Accordingly, "each Party shall prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor." In Article 23.6.2, the Parties agree to establish cooperation for the identification and movement of goods produced by forced labor.

10.2.5. Violence Against Workers

Violence against workers is addressed in Article 23.7. of the USMCA. In general, the Parties recognize that workers and labor organizations must be able to exercise the rights set out in Article 23.3 (Labor Rights) in a climate that is free from violence, threats, and intimidation, and the imperative of governments to effectively address incidents of violence, threats, and intimidation against workers. Consequently, the Parties agree that "no Party shall fail to address violence or threats of violence against workers, directly related to exercising or attempting to exercise the rights set out in Article 23.3 (Labor Rights), in a manner affecting trade or investment between the Parties."

10.2.6. Migrant Workers

USMCA Parties recognize the vulnerability of migrant workers with respect to labor protections. Accordingly, the parties agree that in implementing Article 23.3 (Labor Rights), each Party shall ensure that migrant workers are protected under its labor laws, whether they are nationals or non-nationals of the Party.

10.2.7. Discrimination

USMCA Parties recognize the goal of eliminating discrimination in employment and occupation, and support the goal of promoting equality of women in the workplace. Accordingly, Article 23.9.1 provides that each Party shall implement policies that it considers appropriate to protect workers against employment discrimination on the basis of sex (including with regard to sexual harassment), pregnancy, sexual orientation, gender identity, and caregiving responsibilities; provide job protected leave for birth or adoption of a child and care of family members; and protect against wage discrimination.

10.2.8. Public Awareness. Access to Remedy

Pursuant to Article 23.10 of the USMCA (Public Awareness and Procedural Guarantees), each Party shall promote public awareness of its labor laws, including by ensuring that information related to its labor laws and enforcement and compliance procedures is publicly available. A unique provision in the USMCA requires each Party to provide access to

remedy to persons with a recognized interest for the enforcement of its labor laws. Article 23.10.2 provides:

> 2. Each Party shall ensure that a person with a recognized interest under its law in a particular matter has appropriate access to tribunals for the enforcement of its labor laws. These tribunals may include administrative tribunals, quasi-judicial tribunals, judicial tribunals, or labor tribunals, as provided for in each Party's law.
>
> 3. Each Party shall ensure that proceedings before these tribunals for the enforcement of its labor laws:
> (a) are fair, equitable and transparent;
> (b) comply with due process of law;
> (c) do not entail unreasonable fees or time limits or unwarranted delay; and
> (d) that any hearings in these proceedings are open to the public, except where the administration of justice otherwise requires, and in accordance with its applicable laws.
> ….
>
> 6. Each Party shall ensure that tribunals that conduct or review these proceedings are impartial and independent.
> 7. Each Party shall ensure that the parties to these proceedings have access to remedies under its law for the effective enforcement of their rights under its labor laws and that these remedies are executed in a timely manner.

More generally, under the USMCA's environmental chapter, Each Party shall ensure that other types of proceedings within its labor bodies for the implementation of its labor laws: (a) are fair and equitable; (b) are conducted by officials who meet appropriate guarantees of impartiality; (c) do not entail unreasonable fees or time limits or unwarranted delay; and (d) document and communicate decisions to persons directly affected by these proceedings.

10.2.9. Public Submission

Each Party is required to provide for the receipt and consideration of written submissions from persons of a Party on matters related to the labor chapter in accordance with its domestic procedures. Each Party shall make readily accessible and publicly available its procedures, including timelines, for the receipt and consideration of written submissions. Furthermore, each Party is required to: (a) consider matters raised by the submission and provide a timely response to the submitter, including in writing as appropriate; and (b) make the submission and the results of its consideration available to the other Parties and the public, as appropriate, in a timely manner.

10.2.10. Cooperation

The USMCA mandates cooperation on labor issues. The Parties may, commensurate with the availability of resources, cooperate through inter alia: (a) exchanging of information and sharing of best practices on issues of common interest; (b) study trips, visits, and research studies to document and study policies and practices; (c) collaborative research and development related to best practices in subjects of mutual interest; (d) specific exchanges of technical expertise and assistance, as appropriate; and (e) other forms as the Parties may decide.

10.3. USMCA and Labor: Dispute Settlement

Dispute settlement relating to environmental issues occurs in stages that include dialogue, the Labor Council, and the Rapid Response Labor Mechanism.

10.3.1. Dialogues

Pursuant to Article 23.13.1, a Party may request dialogue with another Party on any matter arising under the labor chapter at any time by delivering a written request to the contact point that the other Party has designated under Article 23.15 (Contact Points). Once a party requests a dialogue, such a dialogue is mandatory. "Unless the requesting and receiving Parties (the dialoguing Parties) decide otherwise, dialogue **must commence within 30 days of a Party's receipt of a request for dialogue**."[358] As part of the dialogue, the dialoguing Parties are required to provide a means for receiving and considering the views of interested persons on the matter. What is more, the dialoguing Parties "shall address all the issues raised in the request."[359]

10.3.2. Consultation

Article 23.17.1 of the USMCA stipulates that Parties shall make every effort through cooperation and dialogue to arrive at a mutually satisfactory resolution of any matter arising under this Chapter. A Party (the requesting Party) may request labor consultations with another Party (the responding Party) "regarding **any matter**" arising under the labor chapter.[360] Third [arty participation is allowed. Essentially, a third Party that considers it has a substantial interest in a mater raised in a request for consultation may participate in the labor consultations by notifying the other Parties (the consulting Parties) in writing.

10.3.3. The Rapid Response Labor Mechanism

The Rapid Response Labor Mechanism (Mechanism) is a new and unique mechanism. The USMCA provides for two such mechanisms: (a) a United States-Mexico Facility-Specific Rapid Response Labor Mechanism (Annex 31-A); and (b) a Canada-Mexico Facility-Specific Rapid Response Labor Mechanism (Annex 31-B). The Rapid Response Labor Mechanism has been described as "the first of its kind" and allows the U.S. to take enforcement actions against individual factories if they fail to comply with domestic freedom of association and collective bargaining laws.[361] The Mechanism applies whenever a Party (the "complainant Party") has a good faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining under laws necessary to fulfill the obligations of the other Party (the "respondent Party") under the USMCA. Before invoking the mechanism, a complaining party shall first request that the respondent Party conduct its own review of whether a Denial of Rights exists and, if the respondent Party determines that there is a Denial of Rights, it attempt to remediate within 45 days of the request.[362] A central feature of this Mechanism is that it allows a complaining party to request a panel that targets a specific Covered Facility. A Covered Facility is defined as Covered Facility means a facility in the territory of a Party that: (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party, and is a facility in a Priority Sector. Article 31-A.5 provides:

Article 31-A.5: Requests for Establishment of Rapid Response Labor Panel

[358] Emphasis added.
[359] USMCA, Article 23.13.5.
[360] USMCA, Article 23.17.2.
[361] https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca
[362] Article 31-A.4.

> 1. If, after the conditions precedent for the establishment of a panel under Article 31-A.4 are met, the complainant Party continues to have a good faith basis to believe that a Denial of Rights is occurring at a Covered Facility, that Party may submit to the Secretariat a petition:
>
> (a) requesting the establishment of a panel to request that the respondent Party allow the panel an opportunity to verify the Covered Facility's compliance with the law in question and determine whether there has been a Denial of Rights; or
>
> (b) requesting the establishment of a panel to determine whether there has been a Denial of Rights.

Under the Mechanism, Mexico and United States are obliged to establish and maintain a list of Rapid Response Labor Panelists who are willing to commit to being generally available to serve as Labor Panelists for the Mechanism. A panel so established conducts the verification and determines whether there has been a denial of rights at a covered facility. If a panel determines that there has been a determination of rights, the complaining party may impose remedies as stipulated in Article 31-A.10. Remedies may include suspension of preferential tariff treatment for goods manufactured at the Covered Facility or the imposition of penalties on goods manufactured at or services provided by the Covered Facility.

10.4. Other Administrative Mechanisms

The USMCA provides for a contact point for labor issues and for a Labor Council. Under Article 23.14, USMCA Parties establish a Labor Council composed of senior governmental representatives at the ministerial or other level from trade and labor ministries, as designated by each Party. The Labor Council may consider any matter within the scope of this Chapter and perform other functions as the Parties may decide. Labor Council decisions and reports shall be made by consensus and be made publicly available, unless the Council decides otherwise.

10.5. Key Considerations for Kenya

The USMCA addresses some of the short comings in NAFTA's side agreement on labor. The USMCA's acceptance of the ILO's Declaration on Fundamental Principles and Rights at Work and the elimination of sex-based discrimination are all welcomed development. The USMCA provision that allows citizens to file labor complaints through the establishment of contact points is also arguably a welcomed development. Labor provisions in trade agreement have the potential to reduce income inequality and improve the rights of workers.

10.5.1. Strong Congressional Support for Labor Provisions in FTA Involving the U.S.

Whether labor provisions belong in trade agreements is a matter of considerable debate in many policy circles. The inclusion of labor provisions in United States' FTA has strong congressional backing and endorsement as reflected in various versions of Trade Promotion Authority, 2015. Given the strong Congressional support for labor provisions in FTA, it is most likely that any US-Kenya trade deal would have a labor chapter.

To be sure, AGOA addresses labor issues.[363] However, the labor provisions in FTAs involving the U.S. are considerably broader that the labor provisions in AGOA. AGOA eligibility requirements are set out in Section 104 of the AGOA legislation (Public Law

[363] 19 U.S.C. §§ 3701-3739 (2006).

106/200). Under AGOA, the U.S. President is authorized to designate a SSA country as an eligible SSA country is the President determines that the country has as established, or is making continual progress toward establishing –

> "protection of internationally recognized worker rights, including the right of association, the right to organise and bargain collectively, a prohibition on the use of any form of forced or compulsory labour, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

10.5.2. Sovereignty Concerns

Labor provisions in FTA have the potential to intrude impermissibly into domestic policy space. The USMCA stopped short of allowing U.S. labor inspectors access to Mexican factories to evaluate whether they were meeting their obligations in large part because of push back from Mexico. The new Rapid Response Labor mechanism is intrusive at best and essentially allows U.S. to monitor and police working conditions in Mexico. As the Cato Institute notes:

> There are a number of concerning elements regarding how the labor provisions and a new "facility-specific rapid response labor mechanism" will operate. First, the burden of proof has shifted to the defendant in demonstrating that the alleged violation is not in a manner affecting trade or investment between the Parties. Second, inspections are not eliminated, but rather incorporated into the panel process, to serve as a fact-finding exercise. This will ultimately put a heavier burden on Mexico in future labor disputes. Third, the use of remedies appears similar to U.S. antidumping petitions and is ripe for abuse. Finally, it is notable that there is not one, but two annexes, one between the U.S. and Mexico and another between Canada and Mexico. In theory, Mexico could bring a complaint against the United States, but Canada and the United States have no recourse to these panels between them. Such an action locks in symbolic asymmetry among the North American partners.[364]

Mexico-specific provisions in the USMCA also raise concerns about sovereignty and regulatory space. One of the major innovations of the USMCA is the Mexico-specific requirements designed to facilitate the activities of independent unions and collective bargaining. USMCA, annex 23-A addresses "Worker Representation in Collective Bargaining in Mexico." For example, Mexico agreed to guarantee the: "right of workers to engage in concerted activities for collective bargaining or protection and to organize, form, and join the union of their choice, and prohibit employer domination or interference in union activities, discrimination or coercion against workers for union activity or support, and refusal to bargain collectively with the duly recognized union."[365]

For good or bad, the USMCA is forcing policy makers in Mexico to embark on some labor law reforms.[366] Depending on the state of Kenya's labor and employment law, a trade deal with the U.S. will require revisions to Kenya's domestic laws.

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[364]Inu Manak and Simon Lester, Evaluating the New USMCA. Cato At Liberty. 11 December 2019. https://www.cato.org/blog/evaluating-new-usmca-0

[365] USMCA, Annex 23-A, para. 1.

[366] Eric Martin, "Mexican Congress Passes Labor Law Tied to USMCA Trade Agreement," Bloomberg Law, April 29, 2019, https://bloom.bg/2GTz15W; see also "Mexican Official: Labor Reform Legislation Slated to Pass by the End of April," World Trade Online, February 19, 2019, https://bit. ly/2WoJ9gu.

10.5.3. Capacity Building

At the U.S. Department of Labor, the Bureau of International Labor Affair (ILAB) manages the labor provisions in the USMCA.[367] The USMCA implementing legislation includes $210 million to ILAB for USMCA-implementation activities: $180 million over four years for USMCA-related technical assistance projects and $30 million over eight years for the capacity of ILAB to monitor USMCA compliance, including the necessary expenses of additional full-time ILAB employees for the Interagency Committee and labor attachés in Mexico.[368] As of January 2020, ILAB had awarded $32 million to assist Mexico in complying with the labor commitments in the USMCA.[369] According to ILAB, projects supported with these funds will build government capacity in Mexico to: (i) implement its labor reforms, including training and support for the new labor courts and centers that will attempt to conciliate disputes and register unions and collective bargaining agreements;[370] (ii) implement commitments related to collective bargaining, secret ballot voting for union representation challenges and approval of collective bargaining agreements, as well as improve government enforcement of labor laws;[371] and (iii) combat child labor and forced labor, enforce labor laws and acceptable conditions of work in the agriculture sector, and promote economic empowerment of vulnerable women and girls.[372] ILAB is also implementing a project to build worker capacity in Mexico to identify violations of labor law, provide legal support, and improve advocacy and administrative functions.[373]

10.5.4. Expect Strong Enforcement From the U.S.

Strong U.S. enforcement of the labor chapter should be expected. The USMCA implementing legislation calls for the Department of Labor to post up to five attachés to the U.S. Embassy and/or consulates in Mexico. The attachés are to monitor implementation of the USMCA labor obligations and support bilateral cooperation on labor and employment matters. In the past, the U.S. has submitted labor disputes to the same state-to-state mechanism used for trade disputes.[374] Congress is also pressing for stronger enforcement of labor and environmental provisions in the USMCA and other FTAs.

The U.S. also monitors and enforces the labor provisions in its preference programs. In 2019, the USTR opened new GSP eligibility reviews for Azerbaijan, based on worker rights concerns.[375] On October 25, 2019, the USTR announced plans to suspend $1.3 billion in trade preferences for Thailand under the GSP for its “failure to adequately provide internationally-recognized worker rights.”[376] In 2020, Thailand lost some of its GSP benefits over poor enforcement of worker’s rights.

[367] https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca
[368] https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca
[369] https://www.dol.gov/agencies/ilab/our-work/trade/labor-rights-usmca
[370] Id.
[371] Id.
[372] Id.
[373] Id.
[374] See David A. Gantz, “Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements,” University of Miami Inter-American Law Review 42 (2011): 297.
[375] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement
[376] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/ustr-announces-gsp-enforcement

10.6. Key Recommendations

10.6.1. Cost/Benefit Analysis Required

From a human rights standpoint, labor provisions in a Kenya-U.S. FTA could advance rights protected under the Kenyan Constitution and under regional and international human rights law. However, frequently, labor provisions in FTAs have more to do with perceived unfair competition in the global market place than with the plight of workers in poor countries. Consequently, the Kenyan Government must evaluate the full costs and benefits of a broad labor chapter in an FTA with the U.S. What will Kenya give up by accepting binding labor provisions in its trade agreement and what will it gain?[377]

10.6.2. Public Consultation Required

It is recommended that the Kenyan government consult with relevant stakeholders including trade unions in Kenya before accepting binding obligations that could require reform of Kenya's labor laws. With the USMCA, some labor unions in Mexico (e.g. the Confederation of Mexican Workers) raised objections regarding aspects of the USMCA labor provision.[378]

10.6.3. Safeguard Domestic Regulatory Space

It is recommended that in any trade deal with the U.S., the labor chapter clearly affirm the right of each government to regulate in the public interest. Several provisions of the USMCA address the right to regulate but arguably do not go far enough. For example, under the USMCA, Article 23.5.3 provides that each Party retains the right to exercise reasonable enforcement discretion and to make bona fide decisions with regard to the allocation of enforcement resources between labor enforcement activities provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under the labor chapter. Article 23.5.4 provides that nothing in Chapter 23 shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another Party. Article 23.2 of the Canada-EU CETA goes much further than the USMCA in terms of affirming the right to regulate by recognizing the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments.

Canada-EU CETA

Article 23.2

Right to regulate and levels of protection

> Recognising the right of each Party to set its labour priorities, to establish its levels of labour protection and to adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments, including those in this Chapter, each Party shall seek to ensure those laws and policies provide for and encourage high levels of labour protection and shall strive to continue to improve such laws and policies with the goal of providing high levels of labour protection.

[377] "Foreign Affairs Minister: Mexico Unwilling to Give More on Labor Reform," World Trade Online, May 8, 2019, https://bit. ly/2Wml6i5

[378] See "Mexico's Biggest Union to Challenge a Key Part of Labor Reform," Bloomberg Law, April 24, 2019, https://bit. ly/2XlynUB.

10.6.4. Corporate Social Responsibility. Corporate Liability

It is recommended that the labor chapter of any proposed agreement address corporate liability and accountability for abuses of workers' rights. Over the years, U.S. businesses and other foreign corporations have been accused of violating worker's rights in countries in Africa. Sadly, even in the face of serious violations of labor rights and workers' rights, governments are often unwilling and/or unable to act and victims are left without any adequate remedy. In the U.S., a lawsuit has been brought accusing the Firestone tire company of illegally using child labor on a 118,000-acre latex-producing rubber tree farm in Liberia.[379] In December 2020, the U.S. Supreme Court heard arguments in a case that alleges that Nestle and Cargill facilitated the use of child slave labor on cocoa farms in Ivory Coast.[380]

It is recommended that the Kenyan government consult with experts on how to craft an effective corporate accountability provision in an FTA.

10.6.5. Capacity Building/ Technical Assistance

It is recommended that the Kenyan government assess the full cost of implementing a high-standard labor chapter in an FTA with the U.S. and issues relating to technical assistance and capacity building be part of any negotiation. The good news is that labor-related technical assistance and capacity building is addressed in the Trade Promotion Authority, 2015. One of the principal negotiating objectives of the United States with respect to labor is to strengthen the capacity of U.S. trading partners to promote respect for core labor standards. The bad news is that frequently FTA provisions relating to technical assistance and capacity building are not binding and tend to be very value. In the Trade Promotion Authority, 2015, one of the negotiating objectives relating to labor is to strengthen the capacity of United States trading partners to promote respect for core labor standards.

10.6.6. Update Negotiation Objectives

It is recommended that the Kenyan government review its negotiating objectives as they relate to labor issues. Compared to the U.S. negotiating objectives on labor, Kenya's negotiating objective is minimal at best (**See Annex VII**).

[379] *Flomo et al v. Firestone Natural Rubber Co*, 7th U.S. Circuit Court of Appeals, No. 10-03675.
[380] https://apnews.com/article/93cb9e2bbed293130e726b071c3ee125

Governance – Anti-Corruption

11. Governance – Anti-Corruption

11.1. Introduction

The link between corruption and global trade is prompting new efforts by states to include explicit anti-corruption provisions in their trade agreements.[381] Increasingly, good governance provisions are appearing in FTAs.[382] The U.S. pioneered the approach of embedding anticorruption provisions in trade agreements. Good governance chapters in FTAs address a broad range of policy issues not traditionally considered to be within the ambit of trade agreements. WTO agreements do not explicitly address corruption or bribery in trade relations. [383] However, WTO agreements address governance issues in a number of ways and particularly through provisions on transparency, procedural fairness (due legal process and access to courts),[384] reasonable, uniform, objective and impartial administration of measures,[385] as well as publication and notification requirements.[386] A full assessment of Kenya's anticorruption laws and policies is beyond the scope of this study.

Although NAFTA included several provisions on transparency, NAFTA did not have a separate chapter on anticorruption. Anticorruption provisions related to government procurement are found in the U.S.-Chile FTA. As noted, anti-corruption provisions are beginning to appear in more and more FTAs.[387] Since 2003, the U.S. has strengthened the anticorruption provisions of its trade agreements. Stronger anti-corruption provisions applicable to the whole agreement are found in the FTA with Morocco, as well as the FTA with the Central American countries. In October 2020, the U.S. and Brazil signed a new Protocol relating to trade rules and transparency. The protocol updates the 2011 Agreement on Trade and Economic Cooperation with three new annexes comprising "state-of-the-art" provisions on Customs Administration and Trade Facilitation, Good Regulatory Practices, and Anticorruption.[388] The use of anti-corruption provisions in FTAs has evolved and are still

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[381] OECD, Global Trade Without Corruption, OECD Publishing, 2017. Available at: http://www.oecdilibrary.org/governance/global-trade-without-corruption_9789264279353-en
[382] Transparency International, "Anti-Corruption and Transparency Provisions in Trade Agreements," Anti-Corruption Helpdesk, 2017.
[383] Schefer, K.N., 'Corruption and the WTO Legal System', Journal of World Trade, 43(4), Kluwer Law Online, 2009, pp. 737–770. Available at: http://phase1.nccrtrade.org/images/stories/publications/IP4/sk.corruption and trade 3.pdf
[384] Article X: 3 (b); Article VI:2; Article 41:4.
[385] Article X: 3 (a); Article VI:1.
[386] Article X:1, X:2; Article III:1; Article 63.1.
[387] Jenkins, M., 'Anti-Corruption and Transparency Provisions in Trade Agreements', Transparency International, 2017. Available at: https://www.transparency.org/files/content/corruptionqas/Anticorruption_and_transparency_provisions_in_trade_agreements_2017.pdf
[388] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules

evolving. Anticorruption commitments are becoming stronger and distinct from transparency commitments, and are increasingly included as stand-alone chapters in FTAs.

Chapter 27 of the USMCA is titled "Anticorruption" and "contains the most explicit and detailed set of anti-corruption provisions of any free trade agreement which the United States is a Party."[389] It is the first time that anticorruption has been addressed in the trade agreement between the U.S., Mexico, and Canada. The anticorruption provisions in the USMCA targets state parties rather than private enterprises. Chapter 27 of the USMCA is very similar to that in the TPP-11 (Chapter 25) and the Canada-EU Comprehensive Economic and Trade Agreement ("Canada-EU CETA").[390]

11.2. Obligations: Overview

In general, USMCA Parties affirm their resolve to prevent and combat bribery and corruption in international trade and investment. The Parties also affirm their adherence to several notable anticorruption treaties including, the 1996 Inter-American Convention Against Corruption (IACAC), the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the 2003 United Nations Convention against Corruption (UNCAC).[391] Article 27 of the USMCA imposes three main types of obligation on Contracting Parties: (1) obligations relating to legislative and other measures; (2) obligations relating to administrative measures; and (3) obligations relating to promotional measures.

11.3. Legislative Obligations

In FTAs, anticorruption provisions generally mandate the criminalization of corruption, mandate states to establish sanctions regimes and enforcement mechanisms, and also mandate state parties to ensure protection for whistleblowers. Article 27.3 of the USMCA requires State Parties to adopt or maintain legislative or other measures to criminalize: (i) bribery of a public official; (ii) bribery of a foreign public official; (iii) soliciting or acceptance of a bribe as public official; (iv) embezzlement; (v) misappropriation, or another diversion by a public official of property entrusted to the public official; and (vi) aiding or abetting of or conspiracy in the bribery-related offences listed above.

Article 27.3: Measures to Combat Corruption

> 1. Each Party shall adopt or maintain legislative and other measures as may be necessary to establish as criminal offenses under its law, in matters that affect international trade or investment, when committed intentionally, by a person subject to its jurisdiction:
>
> (a) the promise, offering, or giving to a public official, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties;
>
> (b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties;

[389] Collmann Griffin, Richard Mojica, and Marc Alain Bohn, Takeaways from the Anti-Corruption Chapter of the USMCA.
[390] TPP-11, Chap. 25; Canada-EU CETA, Chap. 21.
[391] USMCA, Article 27.2(2).

(c) the promise, offering, or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage for the official or another person or entity, in order that the official act or refrain from acting in relation to the performance of or the exercise of their official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business; and

(d) the aiding or abetting, or conspiracy in the commission of any of the offenses described in subparagraphs (a) through (c).

11.3.1. Administrative

Article 27 of the USMCA requires Parties to adopt specific administrative measures to combat corruption. Parties are required to adopt or maintain measures that specifically provide for:

- Sound accounting and auditing standards for enterprises that prohibit recording “off-the-books” accounts, non-existent expenditures, and similar transactions;
- Protections for whistleblowers – i.e., persons who report offenses in good faith to competent authorities – from unjustified reprisal;
- The disallowance of tax deductibility of bribes;
- Adequate procedures for selection and training of individuals for public positions considered especially vulnerable to corruption;
- Appropriate policies and procedures to identify and manage conflicts of interest for public officials;
- Requirements that senior public officials declare outside activities, employment, investments, assets, and substantial gifts or benefits;
- Codes or standards of conduct for the correct, honorable, and proper performance of public officials;
- Procedures for removing public officials accused of corruption-related offenses;
- Measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary; and
- A requirement that no party shall “fail to effectively enforce” its laws adopted or maintained pursuant to the USMCA.

11.3.2. Promotional

Under the USMCA, Parties are also obliged to undertake promotional measures including:

- Raise awareness among public officials of relevant bribery laws;
- Recognize the harmful effects of facilitation payments – i.e., small payments for “routine government actions” of a non-discretionary nature – and encourage enterprises to prohibit or discourage the use of such payments;

- promote the active participation of individuals and groups outside the public sector, such as enterprises, civil society, non-governmental organizations, and community-based organizations, in preventing and combatting corruption in matters affecting international trade or investment, and to raise public awareness regarding the existence, causes, and gravity of corruption, and the threat posed by it;[392]

- encourage private enterprises to: (a) adopt or maintain sufficient internal auditing controls to assist in preventing and detecting offenses; and (b) ensure that their accounts and required financial statements are subject to appropriate auditing and certification procedures;[393] and

- take appropriate measures to ensure that its relevant anticorruption bodies are known to the public and shall provide access to those bodies, if appropriate, for the reporting including anonymously, of an incident that may be considered to constitute an offense described in Article 27.3.1 (Measures to Combat Corruption).

11.4. Enforcement

Most of the anti-corruption provisions in the USMCA are enforceable.[394] Chapter 31 (Dispute Settlement), with some modifications, applies to disputes relating to a matter arising under the anticorruption chapter. A Party may only have recourse to the procedures set out Chapter 31 (Dispute Settlement) if it considers that a measure of another Party is inconsistent with an obligation under this Chapter, or that another Party has otherwise failed to carry out an obligation under the Anticorruption chapter, in a manner affecting trade or investment between Parties. Procedures set out in Chapter 31 include consultation, conciliation, mediation and the establishment of panels. The applicability of the dispute settlement mechanism to Chapter 27's anti-corruption provisions are not without limits. First, matters arising under Article 27.6 (Application and Enforcement of Anticorruption Laws) are excluded. Second, matters arising under Article 27.9 (Cooperation) are also excluded.

11.5. Key Considerations for Kenya

11.5.1. USMCA's Anti-Corruption Obligations Are Beyond Those in AGOA

AGOA addresses corruption. AGOA eligibility requirements are set out in Section 104 of the AGOA legislation (Public Law 106/200). Under Article 104 (A)(1)(E) of AGOA, the U.S. President is authorized to designate a SSA country as an eligible SSA country if the President determines that the country has as established, or is making continual progress toward establishing – "a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions." [395]

11.5.2. U.S. Has Expressed Specific Concerns About Kenya

[392] USMCA, Article 27.5 (1).
[393] USMCA, Article 27.5 (2).
[394] USMCA, Article 27.8.
[395] 19 U.S.C. §§ 3701-3739 (2006).

Over the years, the U.S. has expressed concerns about corruption in Africa in general and in Kenya in particular. In the 2019, the USTR noted that:

> Corruption remains a substantial barrier to doing business in Kenya. U.S. firms continue to report they find it difficult to succeed against competitors willing to ignore legal standards or engage in bribery and other forms of corruption. Corruption is widely reported to affect government procurement tender processes at both the national and county level. The government has not implemented anti-corruption laws effectively. U.S. firms routinely report direct requests for bribes from all levels of the Kenyan government. The Kenyan government began an anticorruption campaign using the Ethics and Anticorruption Commission (EACC) and Office of the Director of Public Prosecution to open cases against high profile offenders. While some cases brought to light by the EACC have resulted in convictions, no high-profile cases have ended in conviction. Despite efforts to increase efficiency and public confidence in the judiciary, a backlog of cases and continuing corruption – both perceived and real – reduce the credibility and effectiveness of Kenya's judicial system. While judicial reforms are moving forward, bribes, extortion, and political considerations continue to influence outcomes in court cases. An Employment and Labor Relations Court exists in Kenya, but it is plagued by long delays in rendering judgments. As such, foreign and local investors risk lengthy and costly legal procedures.[396]

11.6. Key Recommendations

Corruption negatively affects citizens and foreign investors, undermines sustainable development goals, and is inimical to the general welfare of a nation.[397] Experts agree that the effects of corruption are numerous and touch every facet of a society. Whether anti-corruption provisions in FTA are effective remains a matter of considerable debate, however.[398]

11.6.1. Corruption and Corporate Accountability

The USMCA's chapter on corruption is noticeably silent about investor responsibility and corporate accountability. It is recommended that in an FTA between Kenya and the U.S., the Parties should insert explicit investor liability clauses relating to bribery and corruption. Article 11 of the India-Kyrgyzstan BIT (2019) is an example and provides:

> Article 11. Compliance with laws
>
> The parties reaffirm and recognize that:
>
> (i) ….
>
> (ii) Investors and their investments shall not, either prior to or after the establishment of an investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of a Party as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage nor shall be complicit in inciting, aiding, abetting, or conspiring to commit such acts.[399]

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[396] USTR, 2019 National Trade Estimate Report on foreign Trade Barriers, 2019.

[397] Press Release, United Nations Office on Drugs & Crime, Eliminating Corruption is Crucial to Sustainable Development (Nov. 1, 2015), https:// www.unodc.org/unodc/en/press/releases/2015/November/eliminatingcorruption-is-crucial-to-sustainable-development.html.

[398] *US-Brazil anti-corruption pact a step forward, but impacts are limited, practitioners say* (29 Oct 2020). https://mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/anti-bribery-and-corruption/us-brazil-anti-corruption-pact-a-step-forward-but-impacts-are-limited-practitioners-say

[399] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download

11.6.2. Link Corruption to ISDS

Should Kenya agree to an investment chapter that provides for ISDS, it is recommended that corruption provisions be made an integral part of such a chapter. Specifically, it is recommended that investors that are guilty of corruption and related offenses are permanently barred from using the ISDS mechanism. The EU-Canada CETA does not have an autonomous chapter on anti-corruption. However, Article 8.18 of EU-Canada CETA precludes an investor from initiating an ISDS claim if the investment "has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process." Article 13.4 of the India-Kyrgyzstan BIT, provides:

> "An investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms."[400]

11.6.3. Regulatory Space

Experts believe that Chapter 27 of the USMCA was drafted with the U.S. Foreign Corrupt Practices Act ("FCPA") in mind. Kenya already has laws on the books to address corruption. Consequently, FTA anti-corruption provisions that include commitments to criminalize corruption, protect whistleblowers, and impose monetary sanctions on those guilty of corrupt activities may not necessarily be intrusive and may not require fundamental changes to Kenya's laws. Nevertheless, unless carefully drafted, anti-corruption provisions in FTAs have the potential to encroach on domestic regulatory space and may require treaty partners to introduce fundamental changes to their existing law. The USMCA's administrative and promotional commitments related to anti-corruption may require changes to Kenya's administrative practices. It is thus recommended that the anti-corruption provisions of any trade deal be carefully drafted so as not to encroach on domestic regulatory space of treaty partners. It is also recommended that Kenyan government assess fully the implications of the anti-corruption chapter on Kenya's administrative laws and practices.

11.6.4. Review Negotiating Objectives

Kenya's negotiation objectives relating to anti-corruption ais very limited. In view of the myriad issues that anti-corruption provisions in FTA raise for developing countries, it is recommended that the Kenyan government review and update Kenya's negotiating objectives.

[400] https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download

Anticorruption

Kenya (Negotiating Objectives)	United States (Negotiating Objectives)
• [E]nforcement of anti-corruption legislation and the exchange of information on anti-corruption cases and initiatives • Secure commitments by the Parties to provide information resources to help small businesses navigate requirements for exporting to each other's market.	- 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. In particular: • Require the adoption or maintenance of requirements for companies to maintain accurate books and records, which facilitate the detection and tracing of corrupt payments; • Require the establishment of codes of conduct and the development of other tools to promote high ethical standards among public officials; • Require Parties to disallow the deduction of corrupt payments for income tax purposes; and • Encourage Parties to promote the active participation by the public in efforts to combat corruption. - Require measures that address money laundering, recovery of proceeds of corruption, denial of safe haven for foreign public officials that engage in corruption, and protections for whistleblowers.

12. Good Regulatory Practices

12.1. Introduction

Good regulatory practices (GRPs) provisions in FTA have grown in response to concerns among businesses, particularly multinational corporations, of the so called “regulatory barriers to trade.” In trade circles, discriminatory and unpredictable regulatory processes are seen as regulatory barriers to trade and are considered non-tariff barriers. Regulatory cooperation and GRP chapters in trade agreements are a relatively new phenomenon. Typically, provisions on regulatory cooperation “require governments to institutionalise voluntary or mandatory arrangements through which public servants in different countries can and in some cases must work together, usually in close collaboration with industry, to reduce or eliminate differences in domestic laws, policies, standards, regulations and testing procedures — including health, environmental and consumer protections — that are said to impede trade.”[401] An end-product of regulatory cooperation “could be an equivalency agreement, whereby two countries agree to accept each other’s regulations and enforcement as “equivalent” even though the systems may be very different in practice.”[402] GRPs respond to concerns about regulatory burden on businesses. Early efforts to address regulatory barriers to trade can be found in WTO agreements on technical barriers to trade (e.g. Article 2.2. and Article 2.4) and sanitary and phytosanitary measures (e.g. Article 3). GRP provisions can also be found in some recent trade agreements such as the Canada-EU CETA (e.g. Chapter Twenty-One).

The U.S. strongly believes that regulatory barriers can impede market access for U.S. goods and services. The US-Canada Regulatory Cooperation Council (RCC) was launched in 2011 with the goal of “bring[ing] together regulators from both United States and Canadian departments with health, safety, and environmental protection mandates to reduce unnecessary differences between their regulatory frameworks.”[403] Passed in 2012, Executive Order 13609 of May 1, 2012 Promoting International Regulatory Cooperation affirms the U.S. commitment to promote regulatory cooperation and embraces as a formal U.S. policy many of the international regulatory cooperation principles.[404] Demonstrating U.S. commitment to eliminating or reducing perceived regulatory barriers to trade, the Trade Promotion Authority addresses regulatory practices explicitly and in detail.

Trade Promotion Authority, 2015

> ….
> (7) REGULATORY PRACTICES.—The principal negotiating objectives of the United States regarding the use of government regulation or other practices to reduce market access for United States goods, services, and investments are—
> (A) to achieve increased transparency and opportunity for the participation of affected parties in the development of regulations;

[401] BUND (2019), International Regulatory Cooperation and the Public Good.
[402] https://www.iatp.org/new-nafta-grp
[403] https://legacy.trade.gov/rcc/
[404] https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/eo_13609/eo13609_05012012.pdf

(B) to require that proposed regulations be based on sound science, cost benefit analysis, risk assessment, or other objective evidence;
(C) to establish consultative mechanisms and seek other commitments, as appropriate, to improve regulatory practices and promote increased regulatory coherence, including through—
(i) transparency in developing guidelines, rules, regulations, and laws for government procurement and other regulatory regimes; (ii) the elimination of redundancies in testing and certification; (iii) early consultations on significant regulations; (iv) the use of impact assessments; (v) the periodic review of existing regulatory measures; and (vi) the application of good regulatory practices;
(D) to seek greater openness, transparency, and convergence of standards development processes, and enhance cooperation on standards issues globally;
(E) to promote regulatory compatibility through harmonization, equivalence, or mutual recognition of different regulations and standards and to encourage the use of international and interoperable standards, as appropriate;
(F) to achieve the elimination of government measures such as price controls and reference pricing which deny full market access for United States products;
(G) to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for United States products; and
(H) to ensure that foreign governments— (i) demonstrate that the collection of undisclosed proprietary information is limited to that necessary to satisfy a legitimate and justifiable regulatory interest; and (ii) protect such information against disclosure, except in exceptional circumstances to protect the public, or where such information is effectively protected against unfair competition.

The USMCA has a new and separate chapter on GRPs. Chapter 28 is broken into twenty articles and an annex:

- ✓ Article 28.1: Definitions
- ✓ Article 28.2: Subject Matter and General Provisions
- ✓ Article 28.3: Central Regulatory Coordinating Body
- ✓ Article 28.4: Internal Consultation, Coordination, and Review
- ✓ Article 28.5: Information Quality
- ✓ Article 28.6: Early Planning
- ✓ Article 28.7: Dedicated Website
- ✓ Article 28.8: Use of Plain Language
- ✓ Article 28.9: Transparent Development of Regulations
- ✓ Article 28.10: Expert Advisory Groups
- ✓ Article 28.11: Regulatory Impact Assessment
- ✓ Article 28.12: Final Publication
- ✓ Article 28.13: Retrospective Review
- ✓ Article 28.14: Suggestions for Improvement
- ✓ Article 28.15: Information About Regulatory Processes
- ✓ Article 28.16: Annual Report
- ✓ Article 28.17: Encouragement of Regulatory Compatibility and Cooperation
- ✓ Article 28.18: Committee on Good Regulatory Practices
- ✓ Article 28.19: Contact Points
- ✓ Article 28.20: Application of Dispute Settlement
- ✓ ANNEX 28-A

In the USMCA, regulation means "a measure of general application adopted, issued, or maintained by a regulatory authority with which compliance is mandatory."[405] Regulatory cooperation is defined as "an effort between two or more Parties to prevent, reduce, or eliminate unnecessary regulatory differences to facilitate trade and promote economic growth, while maintaining or enhancing standards of public health and safety and environmental protection." USMCA's regulatory cooperation chapter can be broken down into four main parts: obligation, transparency, cooperation, and enforcement.

12.2. GRPs Obligations in the USMCA

Chapter 28 sets out specific obligations for Parties including practices relating to the planning, design, issuance, implementation, and review of the Parties' respective regulations. Chapter 28 also addresses regulatory process requirements.

12.2.1. General Obligations

In general, Parties recognize that implementation of government-wide practices to promote regulatory quality through greater transparency, objective analysis, accountability, and predictability can facilitate international trade, investment, and economic growth, while contributing to each Party's ability to achieve its public policy objectives (including health, safety, and environmental goals) at the level of protection it considers appropriate (Article 28.2.1). In Chapter 28, USMCA Parties are obliged to *inter alia*: (i) adopt or maintain internal processes or mechanisms providing for consultation, coordination, and review among domestic authorities in the development of regulations (Article 28.4.1); (ii) provide that proposed and final regulations are written using plain language to ensure that those regulations are clear, concise, and easy for the public to understand, recognizing that some regulations address technical issues and that relevant expertise may be required to understand or apply them (Article 28.8); and (iii) designate and notify a contact point for matters arising under Chapter 28 in accordance with Article 30.5 (Agreement Coordinator and Contact Points).[406]

12.2.2. Regulatory process requirements

Chapter 28 contains extensive regulatory process requirements including requirements relating to risk assessment, impact assessment, and early notifications.

- Risk Assessment

The risk assessment obligations are enshrined in Article 28.5 of the USMCA (Information Quality). In Article 28.5 each Party recognizes the need for regulations to be based upon information that is reliable and of high quality. Consequently, each Party "should adopt or maintain publicly available guidance or mechanisms that encourage its regulatory authorities when developing a regulation to: (a) seek the best, reasonably obtainable information, including scientific, technical, economic, or other information relevant to the regulation it is developing…."

- Regulatory Impact Assessment

In Article 28.11.1, the Parties recognize that regulatory impact assessment is a tool to assist regulatory authorities in assessing the need for and potential impacts of regulations they are

[405] USMCA, Article 28.1.
[406] USMCA, Article 28.19.

preparing. Consequently, each Party should encourage the use of regulatory impact assessments in appropriate circumstances when developing proposed regulations that have anticipated costs or impacts exceeding certain thresholds established by the Party. Furthermore, Article 28.11.2 calls on Parties to maintain procedures that promote the consideration key factors when conducting regulatory impact assessment. Article 28.11.2 provides:

> 2. Each Party shall maintain procedures that promote the consideration of the following when conducting a regulatory impact assessment:
>
> (a) the need for a proposed regulation, including a description of the nature and significance of the problem the regulation is intended to address;
>
> (b) feasible and appropriate regulatory and non-regulatory alternatives that would address the need identified in subparagraph (a), including the alternative of not regulating;
>
> (c) benefits and costs of the selected and other feasible alternatives, including the relevant impacts (such as economic, social, environmental, public health, and safety effects) as well as risks and distributional effects over time, recognizing that some costs and benefits are difficult to quantify or monetize; and
>
> (d) the grounds for concluding that the selected alternative is preferable.
>
> ….

- Early Notifications

Each Party is required to publish annually a list of regulations that it reasonably expects within the following 12 months to adopt or propose to adopt (Article 28.6). Furthermore, each regulation identified in the list should be accompanied by: (a) a concise description of the planned regulation; (b) a point of contact for a knowledgeable individual in the regulatory authority responsible for the regulation; and (c) an indication, if known, of sectors to be affected and whether there is any expected significant effect on international trade or investment.

12.2.3. Cooperation

Each USMCA Party commits to encourage its regulatory authorities to engage in mutually beneficial regulatory cooperation activities with relevant counterparts of one or more of the other Parties in appropriate circumstances to achieve the objectives of Chapter 28.[407]

12.3. Transparency

Chapter 28 includes extensive transparency requirements. Parties are to routinely publish information relating to their regulation and regulatory practices including (i) key information online, including draft regulations (notice and comment), annual regulatory agendas, and descriptions of regulatory agencies' functions and legal authorities; (ii) applicable forms used by regulatory agencies; (iii) fees associated with licensing, inspection, audits, etc.; and (iv) judicial or administrative procedures available to challenge regulations. Article 28.15.1 provides: "Each Party shall publish online a description of the processes and mechanisms employed by its regulatory authorities to prepare, evaluate, or review regulations. The description shall identify the applicable guidelines, rules, or procedures, including those regarding opportunities for the public to provide input."

[407] USMCA, Article 28.17.

12.4. Enforcement

The USMCA's obligations relating to good regulatory practices are enforceable through the dispute settlement processes established under Chapter 31. Before resorting to dispute settlement, USMCA Parties are required to exercise judgement as to whether recourse to dispute settlement under Chapter 31 (Dispute Settlement) would be fruitful.[408] Moreover, Article 28.20.3 stipulates that "[n]o Party shall have recourse to dispute settlement under Chapter 31 (Dispute Settlement) for a matter arising under this Chapter except to address **a sustained or recurring course of action or** inaction that is inconsistent with a provision of this Chapter."[409]

12.5. Key Considerations for Kenya

The USMCA's chapter on good regulatory practices is expansive but is not new. Chapter 28 builds upon similar provisions in FTAs such as TPP-11 and the Canada-EU CETA. The general idea is to make regulations less burdensome on trade. Although not the first time that GRPs are addressed in an FTA, the USMCA's chapter on good regulatory practices "appears to be the most comprehensive attempt to address this issue in any trade agreement the United States has signed."

12.5.1. Reducing Regulatory Burden on Trade is Generally a Worthy Treaty Objective

On their face, regulatory cooperation and deregulation initiatives endorse principles that encourage the proper functioning of a government. Principles such as increased transparency and public participation, clear central coordination, evidence-based regulation (with analysis of costs and benefits), accountability under the law, and impartiality are not adequately integrated into the administrative law practices of most countries in Africa and should be welcomed. Moreover, as rightly noted in Article 28.2 of the USMCA, the implementation of government-wide practices to promote regulatory quality through greater transparency, objective analysis, accountability, and predictability "can facilitate international trade, investment, and economic growth, while contributing to each Party's ability to achieve its public policy objectives (including health, safety, and environmental goals) at the level of protection it considers appropriate" and "can support the development of compatible regulatory approaches among the Parties, and reduce or eliminate unnecessarily burdensome, duplicative, or divergent regulatory requirements.

Good regulatory practices provision in FTAs raise a number of issues and concerns for most developing countries including concerns about risks associated with de-regulation, encroachment on domestic regulatory space, the de-prioritization of the precautionary principle, regulatory chill, and the cost of implementation.

12.5.2. GRPs Provisions in FTAs Exceed the Obligations in AGOA

AGOA does not explicitly address GRPs. However, broadly conceived, AGOA's rule of law requirements encompasses GRPs.[410] AGOA eligibility requirements are set out in

[408] USMCA, Article 28.20(1).
[409] Emphasis added.
[410] 19 U.S.C. §§ 3701-3739 (2006).

Section 104 of the AGOA legislation (Public Law 106/200). Under Article 104 (A)(1)(B) of AGOA, the U.S. President is authorized to designate a SSA country as an eligible SSA country if the President determines that the country has as established, or is making continual progress toward establishing – "the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law."

12.5.3. Risk of Impermissible Encroachment on Domestic Regulatory Space

To be sure, some provisions of the USMCA chapter on GRPs are clearly aimed at preserving domestic regulatory space but do not go far enough. For example, Article 28.2.3. states emphatically that Chapter 28 does not prevent a Party from: (a) pursuing its public policy objectives (including health, safety, and environmental goals) at the level it considers to be appropriate; (b) determining the appropriate method of implementing its obligations in this Chapter within the framework of its own legal system and institutions; or (c) adopting good regulatory practices that supplement those that are set out in this Chapter.[411] Despite the provision of Article 28.2.3., critics believe that regulatory cooperation and harmonization provisions in FTAs have the potential to "undermine the precautionary approach to protecting the public" and "will make it harder to protect the public and environment in the future."[412]

12.5.4. Increased Cost and Increased Administrative Burden for Developing Countries

GRPs provisions in FTAs impose additional costs on governments through mandatory regulatory impact assessment, mandatory cost-benefit assessments, and other requirements. In some recent FTAs, chapters dedicated to good regulatory practices enjoin signatories to follow the principles that already underlie U.S. administrative law and the APEC-OECD joint regulatory checklist. Because GRP provisions reflect principles and practices that are already in place in developed countries, GRPs provisions in FTA impose substantial costs on developing countries who frequently have to implement necessary reforms from scratch. There are also genuine fears that GRPs provisions create new hurdles for governments and regulators and create additional opportunities for lobbyists to shape regulations at the outset.[413]

12.5.5. Sovereignty Concerns. Export of U.S. Trade Ideology

Transparency, risk assessments, evidence-based regulation and public participation in rule-making and administrative processes can be of benefit to small businesses and vulnerable groups that are frequently left out of decision-making processes in many countries in Africa. However, critics worry that GRP provisions in FTAs effectively "internationalise a 'light

[411] Article 28.2.3.
[412] Sharon Anglin Threat, FAQ - Regulatory Cooperation, Harmonization and "Good Regulatory Practices" in USMCA. January 16, 2019. https://www.iatp.org/new-nafta-grp
[413] IATP. "New NAFTA": New red tape for regulators November 19, 2018. https://www.iatp.org/blog/new-nafta-new-red-tape

touch', trade-biased regulatory methodology favoured by corporations and their lobbyists."[414] According to a report by the Canadian Center for Policy Alternatives:

> "Good regulatory practices" (GRP) are … at once, an ideology of how and when government should intervene in the market (to protect people or nature, for example), a set of institutional arrangements for regulating in a pro-business way and in cooperation with other governments, and a new privileged space for multinational corporations to intervene in national rule-making, frequently and at the earliest stages.[415]

A light touch approach to regulation could potentially undermine values enshrined in the Kenyan Constitution. To be sure, Article 28.2.3 of the USMCA which affirms that Chapter 28 "does not prevent a Party from: (a) pursuing its public policy objectives (including health, safety, and environmental goals) at the level it considers to be appropriate" is a good start but can be improved upon. A provision in the Canada-EU CETA that is more explicit and calls for the preservation of standards already enshrined in several the WTO Agreements should be considered and possibly improved upon. Article 21.2 of the Canada-EU CETA provides:

> 1. The Parties reaffirm their rights and obligations with respect to regulatory measures under the TBT Agreement, the SPS Agreement, the GATT 1994 and the GATS.
>
> 2. The Parties are committed to ensure high levels of protection for human, animal and plant life or health, and the environment in accordance with the TBT Agreement, the SPS Agreement, the GATT 1994, the GATS, and this Agreement.

12.5.6. Entrenchment of Corporate Rule

Big businesses favor regulatory cooperation because it potentially provides the opportunity to prevent the adoption of regulations in the first place, rather than challenging them after the fact through drawn-out legal processes. The U.S. Chamber of Commerce believes that "[r]egulation and compliance frequently top the list of risks facing businesses globally" and that "international regulatory cooperation is vital to align trade, regulatory, and competition policy in support of open and competitive markets."[416] Critics fear that with the international investment arbitration regime in crisis, businesses are trying to make-up for the loss of ISDS by taking steps to proactively prevent the adoption of regulations in the first place.[417] In this regard, Article 28.14 of the USMCA is a concern and provides:

> Article 28.14: Suggestions for Improvement
>
> Each Party shall provide the opportunity for any interested person to submit to any regulatory authority of the Party written suggestions for the issuance, modification, or repeal of a regulation. The basis for those suggestions may include, for example, that, in the view of the interested person, the regulation has become ineffective at protecting health, welfare, or safety, has become more burdensome than necessary to achieve its objective (for example with respect to its impact on trade), fails to take into account changed circumstances (such as fundamental changes in technology, or relevant scientific and technical developments), or relies on incorrect or outdated information.

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[414] IATP. "New NAFTA": New red tape for regulators November 19, 2018. https://www.iatp.org/blog/new-nafta-new-red-tape

[415] https://www.tni.org/files/publication-downloads/international_regulatory_cooperation-web.pdf

[416] Promote Good Regulatory Cooperation. https://www.uschamber.com/issue-brief/promote-global-regulatory-cooperation

[417] IATP. "New NAFTA": New red tape for regulators November 19, 2018. https://www.iatp.org/blog/new-nafta-new-red-tape

Under the USMCA, Parties are also required to provide a mechanism for the retrospective review of their regulations.

Article 28.13: Retrospective Review

> 1. Each Party shall adopt or maintain procedures or mechanisms to conduct retrospective reviews of its regulations in order to determine whether modification or repeal is appropriate. Retrospective reviews may be initiated, for example, pursuant to a Party's law, on a regulatory authority's own initiative, or in response to a suggestion submitted pursuant to Article 28.14 (Suggestions for Improvement).

12.5.7. Precautionary Approach v. Science-based risk assessment

To critics, the so-called good regulatory practices are dangerous as they "gradually chip away at what little room governments have left to regulate in a precautionary way."[418] In this regard, the provisions in FTAs that call for science-based risk assessment and for risk management are viewed with suspicion. According to a report by the Canadian Center for Policy Alternatives:

> One important tenet of "good regulatory practice" is that regulation should be based on "risk management", meaning that its objective is limited, and it is justified by currently available scientific evidence. As the risk-based regulatory framework has evolved, it has come to also require regulators to minimize the costs, or "burdens" on business, consider how they might regulate in ways that encourage trade and innovation, and adopt international standards or practices wherever possible. These tenets attempt to strip political or ethical considerations from government rule-making and are, in a fundamental way, directly opposed to the precautionary principle, which states: "*When an activity raises threats of harm to human health or the environment, precautionary measures should be taken* ***even if some cause and effect relationships are not fully established scientifically****. In this context the proponent of an activity, rather than the public, should bear the burden of proof*" (emphasis added).[419]

12.6. Key Recommendations

12.6.1. Assess the Full Costs and Benefits of a Good Regulatory Practices Provisions

Given wide disparities in their levels of development and major differences in their administrative laws and practices, GRPs provisions in a Kenya-U.S. FTA are bound to impose significant cost on Kenya and would probably require Kenya to "upgrade" its administrative laws and policies. It is recommended that the Kenyan government carefully assess the costs and benefits of binding commitments on regulatory cooperation in an FTA with the U.S. In this regard, the Kenyan government can learn a thing or two from the USTR's negotiating objective relating to the environment. One of the U.S's negotiating objectives relating to the environment is "to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, **including obligations that require changes to United States laws or regulations or that would affect the implementation of such laws or regulations**."[420] To the extent that the values that underpin the GRPs provisions are important, and many are, it is recommended that the Kenyan Government consider implementing unilateral reforms rather than taking on binding commitments in FTAs.

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[418] Bund (2019), International Regulatory Cooperation and the Public Good.

[419] https://www.tni.org/files/publication-downloads/international_regulatory_cooperation-web.pdf

[420] TPA-15, Section 102(a)(7); 19 USC 4201(a)(7). Emphasis added.

12.6.2. Limit the Scope of any Regulatory Chapter

Should the Kenyan government consider a GRPs chapter to be inevitable in a FTA with the U.S., effort should be made to limit the scope of such a chapter. First, it is suggested that the scope of such a chapter be limited to regulatory cooperation activities and should not extend to the legislative or procedural aspects of domestic regulatory reform. Second, it is advised that cooperation be on a voluntary basis. For example, Article 21.2.6 of the Canada-EU CETA states explicitly that "[t]he Parties may undertake regulatory cooperation activities on a voluntary basis." For greater certainty, Article 21.2.6 of the Canada-EU CETA provides that "a Party is not required to enter into any particular regulatory cooperation activity, and may refuse to cooperate or may withdraw from cooperation."[421]

12.6.3. Careful Review of Negotiating Text. Safeguard Domestic Regulatory Space

Provisions on GRPs are often couched in vague languages and their meaning are not always very clear. Consider Article 28.4.1 of the USMCA (Internal Consultation, Coordination, and Review) under which the Parties recognize that internal processes or mechanisms providing for consultation, coordination, and review among domestic authorities in the development of regulations can increase regulatory compatibility among the Parties and facilitate trade. Article 28.4.1 goes on to provide:

> [E]ach Party **shall adopt or maintain** **those processes or mechanisms to pursue, among others, the following objectives**:
>
> (a) promoting government-wide adherence to good regulatory practices, including those set forth in this Chapter;
>
> (b) identifying and developing improvements to government-wide regulatory processes; (c) identifying potential overlap or duplication between proposed and existing regulations, and preventing the creation of inconsistent requirements across domestic authorities;
> (d) **supporting compliance with international trade and investment obligations**, including, as appropriate, the consideration of international standards, guides, and recommendations;
> (e) promoting consideration of regulatory impacts, including burdens on small enterprises of information collection and implementation; and
> (f) **encouraging regulatory approaches that avoid unnecessary restrictions on competition in the marketplace**. (Emphasis added)

The meaning and implication of Articles 28.4.1 (d) and (f) is not clear and could be highly contested under Articles 31 and 32 of the Vienna Convention on the Law of Treaties which codifies customary international law rules on treaty interpretation.

Given the risk of impermissible encroachment on domestic regulatory space, it is imperative that the Kenyan government take extra care to ensure that its domestic regulatory space is preserved in any GRPs chapter. There are many options and tools for preserving domestic policy space in a chapter on GRP and the Kenyan government is advised to study and weigh all options. For example, in the Canada-EU CETA, the Parties: (i) explicitly reaffirm their rights and obligations with respect to regulatory measures under several WTO agreements; (ii) express their commitment to ensure "high levels of protection for human, animal and plant life or health, and the environment;" and (iii) affirm that regulatory

[421] CETA, Article 21.2.6.

cooperation will not limit the ability of each Party to carry out its regulatory, legislative and policy activities.

12.6.4. GRP Obligations Should not be Enforceable

Given the different levels of development between the U.S. and Kenya, it is advisable that provisions on GRPs should not be subject to any dispute settlement mechanism. In the USMCA, obligation relating to regulatory cooperation is subject to dispute settlement under chapter 31. In the TPP-11, a similar provision is not subject to dispute settlement. Article 25.11 of the TPP-11 states that the Parties do not have recourse to dispute settlement "for any matter arising under" the regulatory coherence chapter. The Canada-EU CETA does not include a provision on dispute settlement at all in its regulatory cooperation chapter.

12.6.5. Review Negotiation Objectives

Given the many implications of a GRPs chapter for the Kenyan government and for Kenyan citizens, it is shocking that the Kenya's negotiating objective is silent on the issue. It is recommended that the Kenyan government revise its negotiating objective as regards regulatory cooperation and good regulatory practices.

Good Regulatory Practices

Kenya (Negotiating Objectives)	United States (Negotiating Objectives)
---	- Obtain commitments that can facilitate market access and promote greater compatibility between U.S. and Kenya regulations, including by: • Ensuring transparency and accountability in the development, implementation, and review of regulations, including by publication of proposed regulations; • Providing meaningful opportunities for public comment in the development of regulations; • Promoting the use of impact assessments and other methods of ensuring regulations are evidence-based and current, as well as avoiding unnecessary redundancies; and • Applying other good regulatory practices such as internal coordination mechanisms, and securing commitments to ensure transparency as well as meaningful opportunities to provide comments to expert regulatory advisory committees.

Dispute Settlement

13. Dispute Settlement

13.1. Introduction

Dispute settlement is a core element of the multilateral trading system and of FTAs. U.S. FTAs typically provide options for treaty partners to resolve disputes arising under an agreement in state-to-state fora. The USMCA provides several types of dispute settlement mechanism: (1) ISDS under Chapter 14; (2) Labor; (3) state-to-state dispute settlement under Chapter 31; (4) Binational Review of Trade Remedy Actions. State-to-State dispute settlement is addressed in Chapter 31 of the USMCA. Chapter 31 is modeled after the WTO dispute settlement mechanism and substantially on NAFTA's Chapter 20 mechanism.[422] Chapter 31 mechanism permits any of the three USMCA Parties to bring a claim against another Party that is allegedly violating its USMCA obligations. Note that Annex 31-A specifically addresses "United States-Mexico Facility-Specific Rapid Labor Mechanism", while Annex 31-B specifically addresses "Canada-Mexico Facility-Specific Rapid Labor Mechanism."

13.2. Scope of the USMCA's State-to-State Dispute Settlement Process. Bases for Invoking Chapter 31

The scope of the USMCA's state-to-state dispute settlement mechanism is extremely broad and extends even to obligations relating to regulatory cooperation. Consequently, enforcement of many obligations in the USMCA is covered by the dispute settlement mechanism in Chapter 31. The USMCA dispute settlement provisions apply to benefits a party would expect to receive under several chapters of the agreement including Chap. 2 (National Treatment and Market Access for Goods), Chap. 3 (Agriculture), Chap. 4 (Rules of Origin), Chap. 5 (Origin Procedures), Chap. 6 (Textile and Apparel Goods), Chap. 7 (Customs Administration and Trade Facilitation), Chap. 9 (Sanitary and Phytosanitary Measures), Chap. 11 (Technical Barriers to Trade), Chap. 13 (Government Procurement), Chap. 15 (Cross-Border Trade in Services), and Chap. 20 (Intellectual Property).

Article 31.2 lists instances when a Party may use the Chapter 31 dispute settlement process. *First*, the dispute settlement provisions of Chapter 31 apply with respect to the avoidance or settlement of disputes between the Parties regarding the interpretation or application of this Agreement.[423] *Second*, a Party can invoke the dispute settlement when a Party considers that an actual or proposed measure of another Party is or would be inconsistent with an obligation of the USMCA Agreement or that another Party has otherwise failed to carry out an obligation of the USMCA Agreement.[424] *Third*, a Party can involve the state-to-state dispute settlement system when a Party considers that a benefit it could reasonably have

[422] Enforcing International Trade Obligations in USMCA: The State-State Dispute Settlement Mechanism. 3 January 2020. https://crsreports.congress.gov/product/pdf/IF/IF11399
[423] USMCA, Article 31.2.(a).
[424] USMCA, Article 31.2.(b).

expected to accrue to it under select chapters is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with this Agreement.[425]

With a few exceptions, Chapter 31 applies to most of the USMCA obligations. For instance, some of the USMCA chapters (e.g. Environment Chapter and Labor Chapter) have specialized enforcement provisions. Furthermore, under article 32.12 of the USMCA, certain investment decisions reviewed under the Investment Canada Act from Chapter 31 are exempted from Chapter 31's dispute settlement process. If a dispute regarding a matter arises under the USMCA Agreement and under another international trade agreement to which the disputing Parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute.[426]

13.3. Key Elements of USMCA's State-to-State Dispute Settlement Mechanism

13.3.1. Process

The dispute settlement process under the USMCA's Chapter 31 is very similar to that of the WTO and includes inter alia: consultation, establishing a panel, the panel process, and the panel report. Chapter 31 provides detailed guidelines as regard consultations (Article 31.4), Good Offices, Conciliation, and Mediation (Article 31.5), Establishment of a Panel (Article 31), Roster and Qualifications of Panelists (Article 31.8), Panel Composition (Article 31.9), Rules of Procedure for Panels (Article 31.11), Function of Panels (Article 31.13), Third Party Participation (Article 31.14), Role of Experts (Article 31.15), Suspension or Termination of Proceedings (Article 31.16, Panel Report (Article 31.17), Implementation of Final Report (Article 31.18), Non-Implementation – Suspension of Benefits (Article 31.19) and Alternative Dispute Resolution (Article 31.20)

13.3.2. Consequences of Using Chapter 31

Once a Party requests establishment of a panel under USMCA, it may not raise the same issue under another trade agreement or in another forum such as the WTO. Thus, using USMCA limits the Parties to the panel process and remedies set forth in the agreement. When deciding whether to rely on USMCA or to invoke another agreement, a Party may consider whether it prefers an agreement with an appellate mechanism, which USMCA lacks, or whether the substantive provisions of other agreements more directly address its concerns.

13.3.3. Private Rights

The USMCA prohibits a Party from providing for a right of action under its law against another Party on the ground that a measure of that other Party is inconsistent with the agreement.

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[425] USMCA, Article 31.2.(c). The select chapters are: Chapter 2 (National Treatment and Market Access for Goods), Chapter 3 (Agriculture), Chapter 4 (Rules of Origin), Chapter 5 (Origin Procedures), Chapter 6 (Textile and Apparel Goods), Chapter 7 (Customs Administration and Trade Facilitation), Chapter 9 (Sanitary and Phytosanitary Measures), Chapter 11 (Technical Barriers to Trade), Chapter 13 (Government Procurement), Chapter 15 (Cross-Border Trade in Services), or Chapter 20 (Intellectual Property Rights).

[426] USMCA, Article 31.3.

13.3.4. Alternative Dispute Resolution

Article 31.22.1. of the USMCA stipulates that each Party "shall, to the extent possible," encourage, facilitate, and promote through education, the use of arbitration, mediation, online dispute resolution and other procedures for the prevention and resolution of international commercial disputes between private parties in the free trade area. Article 31.22.2 provides that "each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards and settlement agreements in those disputes, and to facilitate and encourage mediation procedures." A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on June 10, 1958, or the Inter-American Convention on International Commercial Arbitration, done at Panama on January 30, 1975.

13.4. Considerations for Kenya

13.4.1. State-to-State Dispute Settlement Still Very Popular

State-to-state dispute settlement mechanism is very common in FTAs and tend to be modeled after the WTO dispute settlement mechanism. The WTO has one of the most active international dispute settlement mechanisms in the world and the US is one of the most active users of this mechanism. According to the WTO, since 1995, 597 disputes have been brought to the WTO and over 350 rulings have been issued.[427] While WTO member states have made active use of the WTO dispute settlement process, resort to state-to-state dispute settlement is infrequent under U.S. FTAs.[428] According to a 2020 report of the Congressional Research Service:

> Three cases have been decided under North American Free Trade Agreement (NAFTA) DS, with other disputes adjudicated under WTO DS. Other than in NAFTA, the United States has brought one FTA dispute—with Guatemala over labor practices—to formal DS. Notably, the revised NAFTA – the proposed U.S.-Mexico-Canada Agreement (USMCA) did not change the roster selection process, which potentially allows a party to prevent the creation of a panel over lack of consensus regarding panel appointments.[429]

13.4.2. U.S. Uses WTO Dispute Settlement Mechanism Actively

The U.S. is well-versed in the WTO trade dispute settlement process; Kenya is not. As of September 20, 2019, the U.S. has brought 124 cases against other countries to the WTO, and has had 155 cases brought against it. In October 2019 in the Airbus subsidies case, a WTO arbitrator rendered a decision regarding the level of countermeasures sought by the United States.[430] The decision approved countermeasures against EU exports worth up to $7.5 billion

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[427] WTO | Dispute settlement gateway WTO | Dispute settlement gateway

[428] Ian F. Fergusson, Dispute Settlement in the WTO and U.S. Trade, In Focus, 6 December 2019. Agreementshttps://crsreports.congress.gov/product/pdf/IF/IF10645#:~:text=U.S.%20free%20trade%20agreements%20(FTAs)%20provide%20options%20to%20resolve%20disputes,state%20and%20investor%2Dstate%20fora.&text=If%20a%20dispute%20is%20common,the%20dispute%20to%20multiple%20fora.

[429] Id., p. 2.

[430] DS316. European Communities and Certain member States — Measures Affecting Trade in Large Civil Aircraft

annually as commensurate with the degree and nature of the adverse effects determined to exist. The award of $7.5 billion annually is reportedly "by far the largest award in WTO history—nearly twice the largest previous award."[431] Regarding U.S. trade disputes with China, one study found that, "[o]ver the last 16 years, US officials have challenged Chinese practices 23 times in the WTO; the win-loss record is 20-0, with three cases pending. In the most recent decision, the WTO panel found that China's agricultural subsidies are inconsistent with WTO rules, upholding US claims."[432] The study also found that "[w]hen the United States defends its own policies against Chinese complaints, it also gets good results: China has won only about one-third of the cases it has brought against the United States, with six cases currently pending. US officials won one case and parts of three others. One Chinese complaint was dropped when the US International Trade Commission terminated an unfair trade investigation."[433]

The point is that trade disputes and trade dispute settlement mechanisms are not for the faint hearted and that over U.S. has had a lot of practice first with the dispute settlement process under GATT and more recently with the WTO dispute settlement mechanism. The fact that Kenya is relatively inexperienced when it comes to the utilization of dispute settlement mechanism in trade agreements should be an important consideration in designing a dispute settlement mechanism for the proposed Kenya-U.S. FTA.

13.4.3. State-to-State Dispute Settlements are Potent Even if Disputes Don't Get Past the Consultation Phase

According to a Congressional Service Report, "[s]tate-to-state DS is infrequent under U.S. FTAs and disputes are usually resolved via consultation." However, the facts that disputes under U.S. FTAs are usually resolved via consultation can and should still be a cause for concern for a developing country like Kenya. State-to-state dispute settlement mechanisms have the potential to constrain domestic regulatory space and chill regulatory action even when limited to "consultations." Studies show that economically powerful states routinely initiate consultations in the hope of forcing recalcitrant state to review and revoke offending measures. According to one study:

> "Almost 40 percent of the time, US complaints against China are resolved after consultations and without a protracted process of adjudication by a WTO dispute panel. On average, results are achieved eight months after the WTO talks begin. But in cases where panels are required to provide written decisions, the process takes more than three times longer and almost always is subject to appeal and compliance procedures that extend the duration of the proceedings even further."[434]

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[431] USTR, U.S. Wins $7.5 Billion Award in Airbus Subsidies Case, 10/2/2019.

[432] Jeffrey J. Schott and Euijin Jung , *In US-China Trade Disputes, the WTO Usually Sides with the United States*, March 12, 2019. https://www.piie.com/blogs/trade-and-investment-policy-watch/us-china-trade-disputes-wto-usually-sides-united-states

[433] Id.

[434] Id.

13.4.4. The United States' Increased Attack on the WTO Dispute Settlement Mechanism is a Major Concern

Although the U.S. traditionally has championed the use of effective and reciprocal dispute settlement mechanisms to enforce trade commitments, the U.S. has grown increasingly hostile to the WTO dispute settlement mechanism and does not respond well to adverse decisions against it. Since 2016, the U.S. has vetoed the appointment of WTO Appellate Body panelists, as their terms expired, and has effectively crippled the Appellate Body as a result. Since December 10, 2019, the Appellate Body has been unable to hear new cases, and unable to finish existing cases.[435] On December 11, 2019, the Appellate Body lost its quorum of three members necessary for it to decide appeals of panel decisions.[436] Presently, appealed WTO cases are in limbo and the Appellate Body can no longer adopt panel reports. Throughout his term, former President Trump repeatedly railed against the WTO, calling it a disaster.[437]

Over the years, the U.S. has voiced numerous criticisms over the functioning of the WTO dispute settlement process. Central U.S. concerns include whether Appellate Body is exceeding its mandate and interpreting WTO agreements too expansively. Essentially, the U.S. accuses the Appellate Body of "judicial activism" and disregarding the language of the DSU and is thereby "adding to or diminishing rights or obligations under the WTO Agreement[s]" without the consent of WTO Members contrary to the mandate of Article 3.2. of the Dispute Settlement Understanding. To the U.S. the Appellate Body's "judicial activism" restricts the ability of the U.S. "to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices."[438]

13.5. Key Recommendations

13.5.1. Protect Kenya's Regulatory Space. Limit the Scope of the State-to-State Dispute Settlement Mechanism

State-to-state dispute settlement mechanisms are not benign mechanisms. State-to-state mechanisms can encroach on domestic regulatory space and can impose significant costs on a state. Although it is the ISDS mechanism that has come under scrutiny in the last decade, state-to-state mechanisms can be problematic particularly for developing country. While it may be difficult, if not impossible, to completely leave out a state-to-state dispute mechanism from an FTA, the mandate of such a mechanism can be significantly curtailed. One approach is to limit the range of issues that could be submitted to such a mechanism. Issues such as labor, environment, anti-corruption, good regulatory practices can be left out of the scope of the dispute settlement mechanism. Under the EU-Canada CETA, several chapters are not subject to the state-to-state dispute settlement mechanism including Chapter Sixteen (Electronic

[435] *U.S. blocks WTO judge reappointment as dispute settlement crisis looms*, Reuters, 27 August 2018. https://www.reuters.com/article/us-usa-trade-wto/u-s-blocks-wto-judge-reappointment-as-dispute-settlement-crisis-looms-idUSKCN1LC19O
[436] The WTO's Appellate Body Loses Its Quorum: Is This the Beginning of the End for the "Rules-Based Trading System"? 16 December 2019. https://crsreports.congress.gov/product/pdf/LSB/LSB10385
[437] Id.
[438] The United States Trade Representative, 2019 Trade Policy Agenda and 2018 Annual Report of the President of the United States on the Trade Agreements Program. https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf

Commerce), Chapter Seventeen (Competition Policy), Chapter Twenty-One (Regulatory Cooperation), and Chapter Twenty-Seven (Transparency).

13.5.2. Assess Costs and Benefits

The pertinent question is, what are the costs and benefits of a state-to-state dispute settlement mechanism for a country like Kenya? The question is pertinent given that the in the event of non-compliance and non-implementation, the principal remedy available to the complaining party is suspension of benefits. Article 31.19 of the USMCA (Non-Implementation – Suspension of Benefits) provides that if the disputing Parties are unable to agree on a resolution to the dispute, the complaining Party may suspend the application to the responding Party of benefits of equivalent effect to the non-conformity or the nullification or impairment until the disputing Parties agree on a resolution to the dispute.

Considering the wide difference in the size of their respective economies, it is unlikely that in the event of noncompliance by the U.S. Kenya can ever use the state-to-state dispute settlement mechanism to compel compliance. As a Congressional Research Service report rightly notes, “Kenya is not a major U.S. trade partner in global terms.” Moreover, “Kenya is a relatively small U.S. trading partner (96th largest in 2019), but the United States is a major trading partner (5th largest) and second-largest export market for Kenya (absorbing 9% of Kenya’s exports).”

While some developing country members of the WTO are active participants in the WTO dispute settlement system, most countries in Africa have never been involved in the system. Egypt, Morocco and South Africa have been involved as Respondents.[439] Kenya has never participated in a WTO dispute settlement case as a Complainant or as a Respondent; Kenya has only been involved as a Third Party in three cases.[440] A few other countries in Africa (e.g. Benin, Chad, Ghana, and Cameroon) have also been involved as Third Parties in a handful of cases. However, in the WTO’s twenty-five-year history, not a single country in Africa has initiated a complaint in the WTO dispute settlement system.[441]

13.5.3. Consider Past Proposals for Reforming the WTO Dispute Settlement System as they Shed Important Light on Some of the Defects of the System and How to Design a Dispute Settlement Mechanism that is Sensitive to the Needs and Special Situations of Developing Countries

In theory a compulsory dispute settlement system is of particular benefit to developing countries on the argument that “any judicial law enforcement system benefits the weak more than the strong because the strong would always have other means to defend and impose their interests in the absence of a law enforcement system.”[442] In practice, developing countries on average do not benefit from trade-related dispute settlement mechanisms. In the context of the

[439] South Africa has been involved in five WTO cases as Respondent. Egypt has been involved in four cases as Respondent. Morocco has been involved in three cases as Respondent. See: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

[440] *European Communities — Export Subsidies on Sugar* (Complainant: Australia), DS265; *European Communities — Export Subsidies on Sugar* (Complainant: Brazil), DS266; *European Communities — Export Subsidies on Sugar* (Complainant: Thailand), DS283.

[441] https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

[442] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm

WTO dispute settlement mechanism, the WTO admits that "it is clear that developing country Members wanting to avail themselves of the benefits of the dispute settlement system face considerable burdens."[443] Considering the experience of developing and least developed countries in the WTO, it is recommended that the Kenyan government review some of the past proposals for reforming the WTO dispute settlement system particularly proposals from developing country members of the WTO. Overall, it is imperative that the Kenyan government avoid committing to an FTA with a cookie-cutter dispute settlement mechanism that does not serve its interests in any possible way.

13.5.4. Carefully Consider the Mechanism for Binational Review of Trade Remedy Actions

U.S. FTAs including the USMCA contains a binational dispute settlement mechanism to review anti-dumping (AD) and countervailing duty (CVD) decisions of a domestic administrative body. While some groups in the United States support its elimination from the USMCA, others do strongly advocate for it to be retained. A study of the advantages and disadvantages of binational review of trade remedy actions is beyond the scope of this paper. It is recommended that Kenya study this mechanism very carefully and make a careful assessment regarding the implications of such a mechanism for a developing country like Kenya. Such a study should be informed by a careful assessment of the quality of Kenya's trade remedy laws and procedures at the present time.

13.5.5. Address Key Questions

Kenya should not accept a dispute settlement provision simply because such a mechanism is routine in trade agreements. There are many important questions to ask. For example,

- Will the state-to-state dispute settlement mechanism strike the right balance between the protection of a state's trade interests and maintaining a government's right to regulate?

- In the absence of a strong and effective dispute settlement mechanism, how does Kenya hope to deal with the increasing use of unilateral trade measures by the United States and other countries to address issues that the multilateral trading system and FTAs may be ill-equipped to resolve?

- Given the huge disparity between the Kenyan economy and the U.S. economy, how does the Kenyan government hope to compel compliance in the event of a violation by the U.S.?

[443] it is clear that developing country Members wanting to avail themselves of the benefits of the dispute settlement system face considerable burdens.

13.5.6. Review Negotiating Objectives

Kenya's negotiating objective regarding dispute settlement is modest at best. Prompt, effective and enforceable dispute settlement has been a long-standing U.S. trade negotiating objective. It is recommended that the Kenyan government review and possibly update its negotiating objectives regarding dispute settlement.

Dispute Settlement

Negotiating Objective (Kenya)	**Negotiating Objective (United States)**
• The Kenya – USA FTA shall include a dispute settlement mechanism that would provide an effective, efficient, and transparent process for consultations and dispute resolution on trade issues	- Encourage the early identification and settlement of disputes through consultation and other mechanisms. - Establish a dispute settlement mechanism that is effective and timely, and in which panel determinations are based on the provisions of the Agreement and the submissions of the Parties and are provided in a reasoned manner. - Establish a dispute settlement process that is transparent by: • Requiring that Parties' submissions be made publicly available; • Requiring that hearings be open to the public; • Requiring that final determinations by a panel be made publicly available; and • Ensuring that non-governmental entities have the right to request making written submissions to a panel. - Have provisions that encourage compliance with the obligations of the Agreement. - Provide mechanisms for ensuring that the Parties retain control of disputes and can address situations when a panel has clearly erred in its assessment of the facts or the obligations that apply.

14. Special and Differential Treatment

14.1. Introduction

Special and Differential Treatment (S&DT) is a doctrine that was forged in the multilateral trading system in the 1960s.[444] The purpose of the S&DT was to provide greater flexibility for developing countries in trade commitments. Grounded in the understanding that developed and developing countries were not similarly situated, the S&DT endorsed non-reciprocity, allowed differentiation concerning the scope of the obligations developing countries took on and permissible exemptions. As a normative rule of the multilateral trading system, the SDT is codified in the General Agreement on Tariffs and Trade (GATT) in 1979 as the so-called "enabling clause." Essentially, the generalized system of preferences established under GATT and continued in the WTO is anchored on the doctrine of S&DT. In the multilateral trading system, special and differential provisions include:

- longer time periods for implementing Agreements and commitments,
- measures to increase trading opportunities for developing countries,
- provisions requiring all WTO members to safeguard the trade interests of developing countries,
- support to help developing countries build the capacity to carry out WTO work, handle disputes, and implement technical standards, and
- provisions related to least-developed country (LDC) Members.[445]

In sum, the S&DT rebalances the international law principle of sovereign equality by eliminating the strict reciprocity in international agreements. S&DT also acknowledges the development needs of developing countries and the need for trade agreements to take into account the development dimension. Even in the context of the multilateral trading system, S&DT was and remains a very controversial concept.[446] Not surprising, at the 4th WTO Ministerial Conference in Doha, WTO Ministers mandated the WTO Committee on Trade and Development to examine the special and differential treatment provisions in WTO agreements.[447] The Bali Ministerial Conference in December 2013 established a mechanism to review and analyse the implementation of S&DT provisions.

[444] "Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries," World Trade Organization, https://www.wto.org/english/docs_e/ legal_e/enabling1979_e.htm.; Uche Ewelukwa, *Special and Differential Treatment in International Trade Law: A Concept in Search of Content*, 79(4) NORTH DAKOTA LAW REVIEW (2004).
[445] WT/COMTD/W/239
World Trade Organization, SPECIAL AND DIFFERENTIAL TREATMENT PROVISIONS IN WTO AGREEMENTS AND DECISIONS NOTE BY THE SECRETARIAT. 12 October 2018.
[446] Hoeckman, B. (2005). Operationalizing the Concept of Policy Space in the WTO: Beyond Special and Differential Treatment. In Reforming the World Trading System (Reforming the World Trading System, Chapter 11). Journal of International Economic Law, 8*(2),* 405–424.
[447] Doha Work Programme. WT/MIN(05)/DEC, 22 DECEMBER 2005. Adopted on 18 December 2005

14.2. Special and Differential Treatment in FTAs

Outside of the context of the multilateral trading system, S&DT has not been a very popular doctrine. The idea of differentiated responsibilities in an FTA is not very common although they appear in some agreements. While elements of S&DT can be seen is some South-South trade and investment agreements, S&DT provisions are not that common in North-South agreements and, when they appear, take the form of capacity building and technical assistance provisions and carve out for domestic regulatory space. S&DT provisions can be found in some economic partnership agreements involving the EU.

14.3. Key Considerations for Kenya

14.3.1. The U.S. is Critical of the WTO Framework for Special and Differential Treatment

The U.S. is a vocal critique of the WTO's approach to S&DT.[448] The U.S. has been particularly critical of the use of the designation of 'developing-country' status in the WTO and the fact that the system does not differentiate between levels of development among developing countries. The U.S. is concerned that rich countries like China receive a "free ride" from the rest of the multilateral trading system when they unilaterally self-designate themselves developing countries. Instead of the current system that allows countries self-designate, the U.S. has proposed an evidence-based, case-by-case approach to SDT. In a 2019 memorandum to the USTR, the White House asserted that "[w]hen the wealthiest economies claim developing-country status, they harm not only other developed economies but also economies that truly require special and differential treatment."[449] According to the 2019 memorandum:

> Although economic tides have risen worldwide since the WTO's inception in 1995, the WTO continues to rest on an outdated dichotomy between developed and developing countries that has allowed some WTO Members to gain unfair advantages in the international trade arena. Nearly two-thirds of WTO Members have been able to avail themselves of special treatment and to take on weaker commitments under the WTO framework by designating themselves as developing countries. While some developing-country designations are proper, many are patently unsupportable in light of current economic circumstances.[450]

In the 2019 memorandum, the White House instructed the USTR "to secure changes at the WTO that would prevent self-declared developing countries from availing themselves of flexibilities in WTO rules and negotiations that are not justified by appropriate economic and other indicators."[451] The White House memorandum also empowered the USTR to unilaterally decide to "no longer treat as a developing country for the purposes of the WTO any WTO Member that in the USTR's judgment is improperly declaring itself a developing country and inappropriately seeking the benefit of flexibilities in WTO rules and negotiations."[452] The U.S. criticism is particularly directed at rich economies such as China, Brunei, Hong Kong, Kuwait,

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[448] Memorandum on Reforming Developing-Country Status in the World Trade Organization, 26 July 2019. https://www.whitehouse.gov/presidential-actions/memorandum-reforming-developing-country-status-world-trade-organization/

[449] Id.

[450] Id.

[451] Id.

[452] Id.

Macao, Qatar, Singapore, the United Arab Emirates, Mexico, South Korea, and Turkey. However, it points to the United States' growing impatience with the notion of S&DT as a whole. The U.S. has not embraced many of the proposals for reforming S&DT advanced by developing countries including proposals by least developing countries in the WTO.

14.3.2. Special & Differential Treatment in FTAs Involving U.S. is Limited

Nothing precludes the introduction of SDT in a FTA if the contracting parties agree. The Vienna Convention on the Law of Treaties allows states to vary the terms of their treaty obligations.[453] The U.S. addresses development issues and concerns primarily preferential programs such as the GSP and AGOA. Based as they are on the principle of reciprocity, FTAs involving the U.S. do not address S&DT explicitly and most do not have a stand-alone chapter on sustainable development. Furthermore, the U.S. has historically opposed the use of performance requirements; most BITs involving the U.S. restrict the use of performance requirements. To the extent that FTAs involving the U.S. addresses S&DT, they do this in three ways: (i) through provisions that affirm the government's right to regulate; (ii) through provisions on technical assistance and capacity building; and (iii) occasionally through extended time-frame for implementation. S&DT provisions in the form of fewer substantive obligations, differentiated substantive obligations, or preferential exemption from restrictive action is rare in FTAs involving the U.S.

In the preamble to the U.S.-Morocco FTA, the Parties expressed commitment "to foster bilateral cooperation while recognizing the differences in their level of development and the size of their economies," but otherwise did not mention S&DT as a specific policy objective of the agreement. In the preamble, the Parties also explicitly "[a]ffirm[ed] their commitment to facilitate trade between them by eliminating barriers to bilateral trade;" expressed a desire to "[b]uild[] on their rights and obligations under the WTO Agreement and other agreements to which they are both parties;" and stated their desire to "to liberalize and expand bilateral agricultural trade and investment and thereby make their agricultural sectors more competitive, foster rural development, and increase prosperity in their territories."

Occasionally S&DT provisions in the form of longer time-frame for implementation can be found in FTAs involving the U.S. Chapter 19 (Digital Trade) of the USMCA offers an example. ANNEX 19-A of the USMCA provides that "Article 19.17 (Interactive Computer Services) shall not apply with respect to Mexico until the date of three years after entry into force of this Agreement." Article 19.17.4 of the USMCA provides that no Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has created, or developed the information.

[453] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980, Art. 2(1)(d). Retrieved from https://treaties.un.org/doc/Publication/UNTS/Volume 1155/volume-1155-I-18232-English.pdf.

14.3.3. U.S. Criticisms of Certain Laws in Kenya

Judging by the United States' criticism of several laws and policies in place in Kenya, it is unlikely that the U.S. would be willing to include expansive SDT provisions in any trade deal with China. In the past, the U.S. has been very critical of local content laws and restrictions in Kenya – laws designed to encourage development and promote local participation in key sectors. In the *2019 National Trade Estimate Report*, the U.S. government's major annual report on the barriers to trade, investment, and services that American exporters and other businesses encounter around the world, the USTR criticized Kenya's 2011 National Construction Authority Act and was also very critical of a proposed local content bill. Regarding the National Construction Authority Act, the USTR stated:

> The 2011 National Construction Authority Act imposes local content restrictions on "foreign contractors," defined as companies incorporated outside Kenya or with more than 50 percent ownership by non-Kenyan citizens. The Act also contains provisions requiring foreign contractors to hire from the local labor market, unless the National Construction Authority determines the necessary technical skills are not available locally. In addition, the Act requires foreign contractors to enter into subcontracts or joint ventures assuring that at least 30 percent of the contract work is done by local firms. Regulations implementing these requirements were in process as of December 2018.[454]

Regarding the proposed local content bill, the USTR stated:

> **Local Content Requirements**
>
> When making initial investments, foreign investors with foreign staff are required to submit plans for the gradual phasing out of non-Kenyan employees. In considering an application for investment, the Kenya Investment Authority reviews the extent to which such investment or activity will contribute to employment creation, acquisition of new skills or technology, and government revenues.
>
> Kenya's legislature is considering a local content bill applicable to the oil and gas and other extractive sectors. The bill would require enterprises applying for licenses and project permits to submit a "local content plan" that sets forth specific actions the enterprise will take to give "first priority" to locally produced goods and services, utilize the local workforce, and develop local employment skills. The plan also must include a local research and development plan, a plan for transferring technology to Kenyan firms, and a plan for replacing non-Kenyan employees with Kenyan employees over time. The bill further requires the Kenyan government to "encourage" joint ventures with local firms. The proposed bill gives the Cabinet Secretaries responsible for the extractive sectors a mandate to review and reject applicants' local content plans and to prescribe regulations specifying minimum levels of local content. U.S. business associations have raised concerns over the bill, pointing to its lack of clarity, overlap with the 2016 Mining Act, and the possibility that it could conflict with Kenya's commitments under the WTO. The U.S. Government also has raised concerns with the Kenyan government.[455]

The USTR has also criticized Kenya's export bans designed to stimulate domestic industry:

> Export Barriers Under the 2014 Scrap Metal Act, Kenya restricts the export of any form of scrap metal absent authorization by the Ministry of Industry, Trade, and Cooperatives (MoITC) in order to discourage vandalism of infrastructure and to encourage domestic manufacturing that

[454] USTR, 2019 National Trade Estimates Report, p. 312.
[455] 2019 National Trade Estimates Report, p. 312.

uses scrap metal as an input. The 2013 Agriculture, Fisheries and Food Authority Act prohibits exports of raw agricultural produce such as macadamia, bixa orellana, cashew nuts, and pyrethrum without express authorization from the Cabinet Secretary for Industry, Trade, and Cooperatives. In June 2018, the MoITC introduced an export levy of 20 percent on the approved exportation of copper waste and scrap metal in an effort aimed at encouraging local smelting, enhancing the value of local copper waste, and discouraging black market export of copper cables and wires.[456]

14.4. Key Recommendations

14.4.1. No FTA Versus a FTA With S&DT Provisions

In the context of the WTO, LDCs and many developing countries have realized that S&DT provisions are not the panacea for a bad trade deal. S&DT provisions are frequently ineffective because they lack precision, and are framed in languages that are largely hortatory and voluntary. Given that a bad FTA with S&DT provisions is not in any nation's interest, the primary goal should be to avoid getting into a bad trade deal and to have the courage to walk away from the negotiating table if that goal cannot be achieved.

14.4.2. Explicit and Binding Language in FTA Required

S&DT principles and provisions do not arise automatically in FTAs. Explicit language permitting differentiated obligations or allowing selective use of exceptions and exemptions is required. It is therefore recommended that the Kenyan government develop a clear plan as to the types of S&DT provisions it desires and how to ensure that these provisions are fully and effectively integrated into the entire agreement. In its negotiating objectives, the Kenyan government expressed desire for an FTA that will allow for application of the 'Special and Differential Treatment.' The U.S. does not mention S&DT in its negotiating objectives. Rather, the U.S. is seeking a mutually beneficial trade agreement. Depending on what the Kenyan government means by 'special and differential treatment', arriving at a mutually satisfactory arrangement may be difficult.

14.4.3. SDT Provision Should Build on and Improve the WTO's Approach

It is recommended that S&DT provisions in an FTA should: (i) build on and improve on the WTO's approach; (ii) be an integral part of the FTA; (iii) be expressed in clear, precise, and binding terms; and (iv) be informed by some of the proposals for S&DT reform already submitted to the WTO, especially the proposals tended by the Africa Group.[457]

The Doha Mandate

44. We reaffirm that provisions for special and differential treatment are an integral part of the WTO Agreements. We note the concerns expressed regarding their operation in addressing specific constraints faced by developing countries, particularly least-developed countries. In that connection, we also note that some members have proposed a Framework Agreement on Special and Differential Treatment (WT/GC/W/442). **We therefore agree that all special and**

[456] USTR, 2019 National Trade Estimates Report, at p. 315.

[457] Uche Ewelukwa, *Special and Differential Treatment in International Trade Law: A Concept in Search of Content*, 79(4) NORTH DAKOTA LAW REVIEW (2004).

differential treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational....[458]

14.4.4. Be Innovative. Study Recent Trade and Investment Agreements for Ideas

Innovation in the design of trade and investment agreements is the current trend. A lazy 'business as usual' approach to trade and investment agreements is not warranted and is not acceptable or justifiable. With a view to protecting their interests and advancing sustainable development goals and objectives, a growing number of countries are introducing new provisions in their agreements and are redesigning old provisions. Most BITs and IIAs do not address home state obligation and when they do, only make a vague and passing reference to it. Article 25 of the Nigeria-Morocco BIT is titled "Assistance and Facilitation for Foreign Investment" and in paragraph 1 that the "Home State should assist the Host State in the promotion and facilitation of foreign investment in particular by their own investors" and that such assistance "shall be consistent with the development goals and priorities of the Host State." Some IIAs and model IIAs address issues such as technology transfer. Article 29(1) of the Draft Pan-African Investment Code (PAIC) provides that Member States shall put in place policies for the purpose of promoting and encouraging the transfer and acquisition of appropriate technology. Article 30 of the PAIC is titled 'Environment and Technologies' and provides that "[m]ember States and investors should take all practicable steps to promote, facilitate, and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how, based on the relevant international instruments, without prejudice to their rights and obligations...."

[458] DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION, WT/MIN(01)/DEC/1. 20 November 2001. Emphasis added.

Corporate Social Responsibility

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15. Corporate Social Responsibility

15.1. Introduction

There is currently no universally accepted definition of Corporate Social Responsibility (CSR). According to a UN Global Compact training guide, CSR "is the continuing commitment by business to behave ethically and to contribute to economic development, while improving the quality of life of the workforce and their families, as well as the local community and society at large".[459] CSR "encompasses the economic, legal, ethical, and discretionary or philanthropic expectations that society has of organizations at a given point in time".[460] CSR instruments are proliferating and take the form of soft international law. At the multilateral level, CSR instruments include the UN Global Compact, the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance, as well as the UN Guiding Principles on Business and Human Rights. CSR is not explicitly reflected in multilateral trade rules but can be found in a growing number of recent bilateral and regional trade agreements. FTAs involving the U.S. do not generally address corporate social responsibility. The USMCA contains a few CSR provisions. However, the USMCA's provisions relating to CSR are weak and out of step with evolving best practices of states.

15.2. Why Corporate Social Responsibility?

Corporations can be a force for good and have helped spread wealth and economic development around the globe. However, today corporations, alongside states, pose direct and significant threats to individual liberties. Studies show that "there are few if any internationally recognized rights business cannot impact - or be perceived to impact - in some manner."[461] Businesses have impacted and continue to impact rights that are considered very fundamental in most liberal traditions including, the right to life, liberty and security of the person, freedom from torture or cruel, inhuman or degrading treatment, equal recognition and protection under the law, freedom of thought, conscience and religion, right to a fair trial, right to hold opinions, freedom of information and expression, right to political life, as well as the right to privacy. A study of some 320 cases of alleged human rights abuses by corporations found that businesses have violated nearly all internationally recognized rights.[462] A 2008 report to the UN General Assembly concluded thus:

> Business is the major source of investment and job creation, and markets can be highly efficient means for allocating scarce resources. They constitute powerful forces capable of generating economic growth, reducing poverty, and increasing demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights. But markets work optimally only if they are embedded within rules, customs and institutions. Markets themselves require

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[459] UNEP and the Global Compact, "United Nations Global Compact – Environmental Principles Training Package, Trainer's Manual," p. 48 (2005).
[460] Visser, et al., The A to Z of Corporate Social Responsibility (2007).
[461] *A Survey of the Scope and Pattern of Alleged Corporate-Related Human Rights Abuse*, A/HRC/8/5/Add.2 (May 23, 2008), *available at* http://www.reports-and-materials.org/Ruggie-2-addendum-23-May-2008.pdf.
[462] Id.

> these to survive and thrive, while society needs them to manage the adverse effects of market dynamics and produce the public goods that markets undersupply. Indeed, history teaches us that markets pose the greatest risks - to society and business itself - when their scope and power far exceed the reach of the institutional underpinnings that allow them to function smoothly and ensure their political sustainability. This is such a time and escalating charges of corporate-related human rights abuses are the canary in the coal mine, signaling that all is not well.[463]

Globalization arguably exposes some of the weaknesses of liberalism. Globalization allowed companies to grow and expand well beyond their national borders and at the same time reduced the regulatory power of governments. The result is a noticeable "normative deficit" that even staunch defenders of liberalism cannot deny.[464] As the Special Representative of the Secretary General noted in his 2008 report,

> The permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only a realignment can fix the problem. In principle, public authorities set the rules within which business operates. But at the national level some governments simply may be unable to take effective action, whether or not the will to do so is present. And in the international arena states themselves compete for access to markets and investments, thus collective action problems may restrict or impede their serving as the international community's "public authority." The most vulnerable people and communities pay the heaviest price for these governance gaps.[465]

15.3. Corporate Social Responsibility in the USMCA

First, distinct from the USMCA's provision on labor and the environment is a separate and general provision on CSR that applies to the entire treaty. In Article 14.17 of the USMCA, Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily CSR guidelines. Article 14.17 provides:

> The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises. These standards, guidelines, and principles may address areas such as labor, environment, gender equality, human rights, indigenous and aboriginal peoples' rights, and corruption.

Second, a provision on corporate social responsibility is also found Chapter 24 (Environment). In Article 24(1), the Parties recognize the importance of promoting corporate social responsibility and responsible business conduct. Article 24.13.2 of the USMCA obliges each Party to encourage enterprises organized or constituted under its laws, or operating in its territory, to adopt and implement voluntary best practices of CSR that are related to the environment.

> Article 24.13: Corporate Social Responsibility and Responsible Business Conduct
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> 1. The Parties recognize the importance of promoting corporate social responsibility and responsible business conduct.
> 2. Each Party shall encourage enterprises organized or constituted under its laws, or operating in its territory, to adopt and implement voluntary best practices of corporate social responsibility

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[463] https://www.ohchr.org/en/issues/transnationalcorporations/pages/reports.aspx
[464] Margolis JD, Walsh JP (2003) Misery loves companies: rethinking social initiatives by business. Adm Sci Q 48(2):268–305
[465] https://www.ohchr.org/en/issues/transnationalcorporations/pages/reports.aspx

> that are related to the environment, such as those in internationally recognized standards and guidelines that have been endorsed or are supported by that Party, to strengthen coherence between economic and environmental objectives.

Third, the USMCA addresses CSR indirectly by recognizing and affirming the right of Parties to regulate in the public interest. In the preamble to the USMCA. Parties resolved to inter alia (i) "RECOGNIZE their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, and protect legitimate public welfare objectives…."; (2) "PROTECT human, animal, or plant life or health in the territories of the Parties and advance science-based decision making while facilitating trade between them;" (iii) "PROMOTE high levels of environmental protection, including through effective enforcement by each Party of its environmental laws;" and (iv) "PROMOTE the protection and enforcement of labor rights, the improvement of working conditions."

15.4. Corporate Social Responsibility in FTAs

The inclusion of explicit references to CSR in trade and investment agreements is a relatively recent phenomenon. The last two decades have seen changing attitudes and practices regarding the incorporation of CSR clauses in trade agreements. Most CSR clauses use hortatory language and do not purport to impose binding obligations on businesses. Furthermore, most CSR provisions in FTAs address labor and environmental issues but rarely broader social and governance issues.

15.4.1. CSR in FTAs Involving the United States

The United States-Peru Trade Promotion Agreement, which entered into force in 2009, was one of the first FTAs to include provisions promoting CSR principles. The agreement, in Article 17.6, establishes a Labour Cooperation and Capacity Building Mechanism (Mechanism) as a means of improving labour standards and advancing common commitments regarding labour matters.[466] In Annex 17.6(2)(o), the Parties agreed to carry out the work of the Mechanism by developing and pursuing bilateral or regional cooperation activities on labor issues, which may include, but need not be limited to "best labor practices: dissemination of information and promotion of best labor practices, including corporate social responsibility, that enhance competitiveness and worker welfare…."[467]

15.4.2. Other FTAs

A small but growing number of FTAs contain CSR clauses. The Canada-Peru agreement references CSR in the preamble and in several chapters of the body of the agreement. In the preamble of the agreement, both Canada and Peru agree to: "ENCOURAGE enterprises operating within their territory or subject to their jurisdiction, to respect internationally recognized corporate social responsibility standards and principles and pursue best practices." CSR provision is also found in Article 9.17 of the TPP-11. Other agreements with CSR clauses include Canada-Guinea BIT (Article 16), Canada-Burkina Faso BIT (Article 16), and Canada-Mongolia BIT (Article 14).

The USMCA's preamble does not mention CSR. By contrast, the Canada-EU CETA does. In the Canada-EU CETA, Parties resolved to "ENCOURAG[E] enterprises operating

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[466] See US-Peru Trade Promotion Agreement, Article 17.6.
[467] US-Peru Trade Promotion Agreement, Annex 17.6(2)(o) (emphasis added).

within their territory or subject to their jurisdiction to respect internationally recognized guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct."

15.4.3. Corporate Social Responsibility Mechanisms

A small but growing number of trade and investment agreements create institutional mechanisms generally tasked with promoting CSR. The Canada-Peru agreement creates an institutional mechanism tasked with, *inter alia*, promoting cooperation on CSR.[468] Article 817 ("Committee on Investment") of the agreement provides:

> 1. The Parties hereby establish a Committee on Investment, comprising representatives of each Party.
> 2. The Committee shall provide a forum for the Parties to consult on issues related to this Chapter that are referred to it by a Party. The Committee shall meet at such times as agreed by the Parties and should work to promote cooperation and facilitate joint initiatives, **which may address issues such as corporate social responsibility** and investment facilitation.[469]

To be clear, under the Canada-Peru agreement, the Investment Committee does not hold enforcement powers and cannot compel businesses to include CSR standards in their practices or mandate reporting requirements.

15.5. Corporate Social Responsibility in IIAs

Most IIAs in existence today are asymmetrical in that they set out obligations only for States and not for investors. Some would argue that there is a fundamental tension between the notion of CSR and the international investment law. Today, direct and indirect references to corporate social responsibility are beginning to appear in IIAs. In Africa, the need to achieve an overall balance of the rights and obligations of States vis-à-vis investors is increasingly affirmed in regional and continental policy documents. The Draft Pan African Investment Code addresses a host of issues relating to corporate social responsibility including, Framework for Corporate Governance (Article 19), Socio-political Obligations (Article 20), Bribery (Article 21), Corporate Social Responsibility (Article 22), Obligations as to the use of Natural Resources (Article 23), and Business Ethics and Human rights (Article 24). Part 3 of the South African Development Community (SADC) Model BIT is titled 'Rights and Obligations of Investors and State Parties', and covers a host of issues including Common Obligation against Corruption (Article 10), Compliance with Domestic Law (Article 11), Environmental and Social Impact Assessment (Article 13), Environmental Management and Improvement (Article 14), and Investor Liability (Article 17).

A growing number of recent IIAs involving countries in Africa address investor responsibilities and investor obligations. Examples can be found in Canada-Benin BIT (Article 16), Canada-Cameroon BIT (Article 15), Canada-Cote d'Ivoire BIT (Article 15), and Canada-Nigeria BIT (Article 16). Although not yet in force, the approach to corporate social responsibility in the Nigeria-Morocco BIT is extensive and very detailed.

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[468] Canada-Peru Free Trade Agreement, Preamble (emphasis added), http://www.international.gc.ca/trade-agreements-accords-commerciaux/ assets/pdfs/Canada-PeruFTA_Preamble-en.pdf.
[469] Emphasis added.

15.6. Key Considerations for Kenya

15.6.1. Asymmetry in International Investment Agreements

A major problem with the USMCA's investment chapter is that, like most IIAs in existence today, it is asymmetrical in orientation in the sense that it sets out obligations only for USMCA member states but does not address the obligation of investors. In response to the crisis in international investment law, direct and indirect references to corporate social responsibility are beginning to appear in IIAs. There is pressure on states to ensure that their IIAs achieve an overall balance of the rights and obligations as between states and foreign investors.

In Africa, regional agreements are beginning to address the notion of investor responsibility/accountability. The Pan-African Investment Code is not binding but underscores a growing consensus in the continent on the need for more balanced IIAs – IIAs that not only protects the rights and interests of foreign investors but also imposes obligations on foreign investors. Article 19(1) of the PAIC provides that investments "shall meet national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices." Pursuant to Article 20(1) investors shall adhere to socio-political obligations including, but not exclusively, the following: (a) respect for national sovereignty and observance of domestic laws, regulations and administrative practices; (b) Respect for socio-cultural values; (c) Non-interference in internal political affairs; (d) Non-interference in intergovernmental relations; and (e) Respect for labor rights. Furthermore, the PAIC also addresses other topics including Bribery (Article 21), Obligations as to the Use of natural resources (Article 23), and Business Ethics and Human Rights (Article 23).

Article 21
Bribery

1. Investors shall not offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a Member State, or to a member of an official's family or business associate or other person in order that the official or third country act or refrain from acting in relation to the performance of official duties.
2. Investors shall also not aid or abet a conspiracy to commit or authorize acts of bribery.

Article 23
Obligations as to the use of natural resources

1. Investors shall not exploit or use local natural resources to the detriment of the rights and interests of the host State.
2. Investors shall respect rights of local populations, and avoid land grabbing practices vis-à-vis local communities.

Article 24
Business Ethics and Human rights

The following principles should govern compliance by investors with business ethics and human rights:
(a) Support and respect the protection of internationally recognized human rights;
(b) Ensure that they are not complicit in human rights abuses;
(c) Eliminate all forms of forced and compulsory labor, including the effective abolition of child labor;
(d) Eliminate discrimination in respect of employment and occupation; and
(e) Ensure equitable sharing of wealth incurred from investments.

15.7. Key Recommendations

15.7.1. Consider A Separate Chapter on Corporate Social Responsibility

In any trade deal with the U.S., the Kenyan government should consider a separate chapter on corporate social responsibility. There is strong and growing support for including strong CSR provisions in trade agreements. The European Parliament has called for the inclusion of strong CSR provision in FTAs involving EU countries. In a 2009 motion, the European Parliament specifically:

- ✓ proposed that future trade agreements negotiated by the EU should incorporate a chapter on sustainable development which includes a CSR clause, based, in part, on the OECD Guidelines for Multinational Enterprises;[470]
- ✓ called for the principles underpinning CSR to be incorporated into the GSP and GSP+ regulation;[471] and
- ✓ Called on the EU Commission to advocate the incorporation of a CSR dimension into multilateral trade policies, both in the international forums which have supported the concept of CSR, in particular the OECD and the ILO, and in the WTO in the post-Doha context;[472]

Further, the European Parliament also demanded that the EU Commission call for an international convention to be drawn up to establish the responsibilities of 'host countries' and 'countries of origin', as part of the fight against the violation of human rights by multinational corporations and the implementation of the principle of extra-territoriality.[473]

15.7.2. Direct and Mandatory Obligation on Businesses

Mandatory CSR provisions in FTAs and IIAs are rare but are beginning to appear. However, there are many plausible arguments in support of mandatory CSR provisions. As noted in a 2004 study:

> "[i]t is not unreasonable to demand, in exchange for the extraordinary protection provided by IIAs and their investor-state dispute mechanisms, that investors follow certain basic minimum standards of acceptable conduct, such as full disclosure of past practice, conduct of consultations and environmental impact assessments and other widely-practiced expressions of corporate social responsibility".[474]

15.7.3. Sanctions and Legal Consequences Attached to CSR Provisions

Provisions in IIA relating to investor obligation and investor liability can be designed to have "teeth". To give 'teeth' to the provisions on investor liability, Article 17(4) of the

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[470] Motion for a European Parliament Resolution on Corporate Social Responsibility in International Trade Agreements, 2009/2201(INI).
[471] Id.
[472] Id., para. 31.
[473] Id., Para. 32
[474] Cosbey, A, et al., "Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements," International Institute for Sustainable Development, p. iv (2004).

Morocco-Nigeria BIT provides that "a breach by an investor or an investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment." Furthermore, State Parties are obliged, pursuant to Article 17(5) and consistent with their applicable law, to prosecute and where convicted penalize persons that have breached the applicable law implementing the obligations relating to corporate responsibility.

15.7.4. Set a Forward-Looking Agenda

FTAs are intended to be of relatively long durations and new issues are bound to arise during the life of an FTA for which no international standard exists. The precautionary principle requires that states also plan for instances where no law or principle applies. Article 19 of the Nigeria-Morocco FTA offers a solution that merits consideration. Article 19 (Corporate Governance and Practices) provides that in accordance with the size and nature of an investment, investments "shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices." Article 19(c) goes on to state that "[w]here relevant internationally accepted standards … **are not available or have been developed without the participation of developing countries**, the Joint Committees may establish such standards."[475]

15.7.5. Supervisory Mechanism

CSR provisions in FTAs are frequently treated as after thoughts inserted to ward off criticisms from civil society organizations. This has to change. In addition to binding commitments related to CSR, states must give careful consideration to how to monitor the activities of businesses in their jurisdiction. Given limited capacity and associated costs, implementing CSR provisions in trade agreements is always a challenge for developing countries. In this regard, the EU Parliament has proposed the establishment of a joint parliamentary monitoring committee for each FTA, to act as a forum for exchanges of information and dialogue between parliamentarians, to scrutinise the implementation of FTA chapters on sustainable development and CSR, and to draw up recommendations for the FTA joint committee, in particular in the light of impact assessments and in cases where proven breaches of human rights, labour rights or environmental agreements occur.[476] The proposal of the EU Parliament are worth considering and a clear evidence of innovative approaches to trade and investment agreements in recent years. Article 22.4 of the Canada-EU CETA makes provision for the establishment of a Committee on Trade and Sustainable Development. Article 22.5 of the Canada-EU CETA mandates the Parties to facilitate a joint Civil Society Forum composed of the representatives of civil society.

[475] Emphasis added.
[476] Id., para. 29.

FTAs and Foreign Policy

16. FTAs and Foreign Policy

16.1. Introduction

For a lot of rich countries, foreign policy interests are a key driver of trade agreements. The U.S. is not an exception and is not averse to using trade policy as a foreign policy tool. Increasingly, the U.S. is using FTAs to address foreign policy relating to countries such as China, Israel, and Cuba. Judging from the U.S. negotiating objectives, a Kenya-U.S. FTA would likely have implications for U.S. and Kenya foreign policy.

16.2. Non-Market Economy Provision in U.S. FTAs

Provision restricting trade agreements between FTA partners and non-market countries are beginning to appear in FTAs involving the U.S. The non-market economy provision in the USMCA has been dubbed the 'China Clause' an acknowledgement that the provision targets China and is an obvious attempt by the U.S. to discourage USMCA Parties from concluding future trade and investment agreements with China.[477] Article 32.10.1 of the USMCA defines a non-market country as "a country: (a) that on the date of signature of [the USMCA], a Party has determined to be a non-market economy for purposes of its trade remedy laws; and (b) with which no Party has signed a free trade agreement." [478] The USMCA does not prohibit trade agreements between Parties and a non-market country but makes concluding such an agreement more complicated by imposing certain transparency and notification requirements on the Party wishing to conclude the agreement and by giving USMCA treaty Partners the option of withdrawing from the USMCA in the event that such an agreement is concluded.

First, Article 32.10.2 of the USMCA mandates that "[a]t least 3 months prior to commencing negotiations, a Party shall inform the other Parties of its intention to commence free trade agreement negotiations with a non-market country."[479] Second, "[u]pon request of another Party, a Party intending to commence free trade negotiations with a non-market country shall provide as much information as possible regarding the objectives for those negotiations."[480] Third, "[a]t least 3 months prior to commencing negotiations, a Party shall inform the other Parties of its intention to commence free trade agreement negotiations with a non-market country."[481] Fourth, "no later than 30 days before the date of signature, that Party shall provide the other Parties with an opportunity to review the full text of the agreement."[482] Fifth, "entry by any Party into a free trade agreement with a non-market country, shall allow

[477] Pascale Massott, *The China clause in USMCA is American posturing. But it's no veto*. October 15, 2018. https://www.theglobeandmail.com/opinion/article-the-china-clause-in-usmca-is-american-posturing-but-its-no-veto/

[478] USMCA, Article 32.10 (1).

[479] USMCA, Article 32.10 (2).

[480] USMCA, Article 32.10(3).

[481] USMCA, Article 32.10 (2).

[482] USMCA, Article 32.10 (4).

the other Parties to terminate [the USMCA] on six-month notice and replace [the USMCA] with an agreement as between them (bilateral agreement)."[483]

Some analysts conclude that the USMCA's non-market country provision "is perhaps the worst feature of the USMCA for Beijing, as it may become a template for future trade talks Washington holds with allies such as Japan, India and the European Union."[484] To the Heritage Foundation, the non-market country provision in the USMCA "is problematic in many respects, as it not only allows for a country like the United States to prevent Canada or Mexico from seeking a trade agreement with a country such as China, but it also allows for a pseudo-termination of the USMCA."[485] The Heritage Foundation argues that "[a] trade agreement should not prevent the Party countries from advancing efforts to liberalize with trade, especially with countries which have so much to do in terms of lower trade barriers."[486] To Alex Lo of the Asia Pacific Foundation of Canada "[t]here are no two ways about it. Washington wants to limit the trade options of its allies and to isolate China. And it is just getting started."[487] The Asia Pacific Foundation of Canada and the Canadian International Council have complained that "Of all the penalties we have had to pay to get the North American free-trade agreement essentially renewed, this is the highest." "We have just sacrificed our independent trade [and arguably foreign] policy on the altar of the USMCA. What were our negotiators thinking?"[488]

16.3. Israel In/And United States' FTAs

Laws and resolutions to oppose boycotts of Israel, the so called anti-BDS laws are growing in the U.S. As of 2020, about 32 states have passed bills and executive orders designed to discourage boycotts of Israel. Resolutions condemning BDS are also on the rise in the U.S.[489] Several anti-BDS bills have also being introduced in Congress.[490] Anti-BDS are controversial and are facing legal challenges in the U.S.[491] Critics charge that anti-BDS laws violate the First Amendment of the U.S. Constitution. Human Rights Watch have accused states of using [492] It may be noted that David Kaye, the UN special rapporteur on the promotion and protection of

[483] USMCA, Article 32.10(5).
[484] Alex Lo, "USMCA Trade Pact: for Canada and Mexico, Throwing China Under Bus was a No-brainer," This Week in Asia, October 6, 2018, https://www.scmp.com/week-asia/opinion/article/2167145/usmca-trade-pact-canada-and-mexico-throwing-china-under-bus-was-no
[485] Tori K. Whiting and Gabriella Beaumont Smith, eds., "Backgrounder: An Analysis of the United States-Mexico-Canada Agreement," Heritage Foundation, January 28, 2019. https://www.heritage.org/sites/default/files/2019-01/BG3379_0.pdf
[486] Tori K. Whiting and Gabriella Beaumont Smith, eds., "Backgrounder: An Analysis of the United States-Mexico-Canada Agreement," Heritage Foundation, January 28 2019, 55, https://www.heritage.org/trade/report/analysis-the-unitedstates-mexico-canada-agreement
[487] Alex Lo, "USMCA Trade Pact: for Canada and Mexico, Throwing China Under Bus was a No-brainer," This Week in Asia, October 6, 2018, https://www.scmp.com/week-asia/opinion/article/2167145/usmca-trade-pact-canada-and-mexico-throwing-china-under-bus-was-no
[488] Id.
[489] Gershman, Jacob. "Illinois Lawmakers Pass Divestment Bill to Counter Israel Boycotts." *Wall Street Journal*, May 19, 2015, http://blogs.wsj.com/law/2015/05/19/illinois-lawmakers-pass-divestment-bill-to-counter-israel-boycotts/
[490] Annie Robbins, "AIPAC behind new US/EU trade legislation designed to thwart BDS," Mondoweiss, Feb. 11, 2015, http://mondoweiss.net/2015/02/behind-legislation-designed.
[491] Arkansas Times LP v. Mark Waldrip, Mikkel Jordahl v. Mark Brnovich; Abby Martin v. the State of Georgia.
[492] US: States Use Anti-Boycott Laws to Punish Responsible Businesses: Laws Penalize Companies that Cut Ties With Israeli Settlement. 23 April 2019. https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses

the right to freedom of opinion and expression, has stated that "Boycott…has long been understood as a legitimate form of expression, protected under Article 19(2)" of the International Covenant on Civil and Political Rights (ICCPR). Kaye further argues that the anti-BDS legislation of states in the US "appears clearly aimed at combatting political expression" and that "economic penalties designed to suppress a particular political viewpoint" would not meet the conditions under the ICCPR for permissible restraints on speech.

Anti-BDS provisions are enshrined in the Trade Promotion Authority, 2015, and are beginning to appear in trade agreements involving the U.S. An anti-BDS provision first appeared in the TPP.[493] Section 102(a)(20)(A) of the Trade Promotion Authority (2015) specifically targets the U.S.-EU Transatlantic Trade and Investment Partnership and provides:

> "(20) COMMERCIAL PARTNERSHIPS.—
> (A) IN GENERAL.—With respect to an agreement that is proposed to be entered into with the Transatlantic Trade and Investment Partnership countries … the principal negotiating objectives of the United States regarding commercial partnerships are the following:
> (i) To discourage actions by potential trading partners that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel.
> (ii) To discourage politically motivated actions to boycott, divest from, or sanction Israel and to seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on the State of Israel.
> (iii)To seek the elimination of state-sponsored unsanctioned foreign boycotts against Israel or compliance with the Arab League Boycott of Israel by prospective trading partners."

Significantly, Section 102(a)(20)(A) defines "'actions to boycott, divest from, or sanction Israel'' to mean actions by states, non-member states of the United Nations, international organizations, or affiliated agencies of international organizations that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in Israeli-controlled territories.

16.4. Key Consideration for Kenya

16.4.1. Foreign Policy in U.S. Trade Policy

Historically, the U.S. has used trade to advance important foreign policy goals. The Bush Administration viewed the U.S.-Morocco FTA "as a tool to support a moderate Muslim state in the region," and a "concrete signal to countries in the Middle East about the benefits of closer economic and political ties with the United States."[494] The USTR also saw many political advantages to a US-Morocco alliance:

> First, USTR officials stated that a trade agreement with Morocco would further the executive branch's goal of promoting openness, tolerance, and strong economic growth across the Muslim world. Second, Morocco has been a strong ally in the war against terrorism. Third, the FTA would ensure strong Moroccan support for U.S. positions in WTO negotiations. Fourth, USTR officials maintained that an FTA would help Morocco strengthen its economic and political reforms. Fifth, the agreement is expected to provide U.S. exporters and investors with increased market access.[495]

On October 1, 2002, then USTR Robert Zoellick sent Congress formal notification of the Administration's intention to begin FTA talks with Morocco. In his notification letter, Zoellick

[493] U.S. Trade Bill With EU Includes Landmark anti-BDS Provisions, Hareetz, 30 June 2020. https://www.haaretz.com/new-u-s-trade-bill-includes-landmark-anti-bds-provisions-1.5374720
[494] CRS Report for Congress: Morocco-U.S. Free Trade Agreement. Congressional Research Service. 2005
[495] CRS Report for Congress: Morocco-U.S. Free Trade Agreement. Congressional Research Service. 2005.

stated that the completion of an FTA with Morocco would "support this Administration's commitment to promote more tolerant, open and prosperous Muslim societies."[496]

16.4.2. The Israel Question in Kenya-U.S. FTA

The U.S. does not hide its interest in protecting the interest of Israel in any future trade deal with Kenya. In negotiating a trade deal with Kenya, among the U.S. negotiating objectives are the goals of: (i) discouraging actions that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel; (ii) discouraging politically motivated actions to boycott, divest from, and sanction Israel; (iii) seeking the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel; and (iv) seeking the elimination of state-sponsored unsanctioned foreign boycotts of Israel, or compliance with the Arab League Boycott of Israel. What is surprising is that while the U.S. explicitly addressed the Israel issue in its negotiating objectives, Kenya's is very silent on the issue. It is not entirely clear how the U.S. plans to "discourage" politically motivated actions to boycott, divest from, and sanction Israel. One approach could be to unilaterally punish Kenyan companies that refuse to do business with Israeli settlements in the West Bank.

16.4.3. The Non-market Country Question in Kenya-U.S. FTA

A non-market country provision appears in the U.S.' summary of negotiating objectives. China's growing influence in SSA is a major concern for the U.S. and many Western governments. Since 2000, China-Africa trade has grown exponentially, even as U.S.-Africa trade has declined. There are concerns that China's involvement in Africa has eroded Western, developed countries' interests and influence on the African continent. There are additional concerns that China is undermining U.S. and European efforts to maintain a level playing field for foreign investors and is also undermining U.S. effort to promote good governance and human rights in Africa. When former U.S. Secretary of State Mike Pompeo's visited Africa in 2019, many thought that his trip was more about China than about Africa.[497] During his trip, Pompeo warned countries in Africa to be wary of Beijing's investments in the region. "Not every nation doing business in Africa from outside the continent adopts the American model of partnership. Countries should be wary of authoritarian regimes with empty promises," Pompeo said. "They breed corruption, dependency, they don't hire the local people, they don't train, they don't lead them. They run the risk that the prosperity and sovereignty and progress that Africa so needs and desperately wants won't happen," Pompeo added.[498]

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[496] Office of the U.S. Trade Representative Home Page. Found at [http://www.ustr.gov/Document_Library/Letters_to_Congress/2002/Morocco_FTA_Senate_Notification_Letter.html] and [http://www.ustr.gov/Document_Library/Letters_to_Congress/2002/Morocco_FTA_House_Notification_Letter.html]

[497] Mike Pompeo's Africa trip is about China, not Africa, The Africa Report. 17 February 2020. https://www.theafricareport.com/23526/mike-pompeos-africa-trip-is-about-china-not-africa/

[498] Id.

16.5. Key Recommendations

16.5.1. On Sovereignty Grounds, Resists a Non-market Provision in Any Future Agreement

A state's sovereignty over issues that are essentially within its domestic jurisdiction is firmly established under customary international law, in the U.N. Charter, and the Montevideo Convention on the Rights and Duties of State. On political and economic grounds, it is recommended that the Kenyan government reject a non-market country provision in any future agreement. Although there are many issues that need fixing in China-Africa trade and investment arrangements, to ignore China or make binding commitments not to enter into an FTA with China in the future is arguably not in Kenya's best interest. The Asian continent is important to Africa. What is more, Kenya cannot afford to ignore growing economic partnerships with key Asian economies. In 2019, 30.5% of Kenya's exports by value were delivered to importers in Asia. Regarding China, few countries today can afford to completely ignore China given China's dominance in global trade. Consider that:

- Based on Nominal GDP Rankings by Country, China now ranks # 2 (after the United States) with a GDP of 13.4 trillion.[499]
- China has already usurped the U.S. as the world's most dominant trading partner.[500]
- China ranks No. 1 on the list of the World's top export countries.[501] In 2019, China exported approximately $2.5 trillion in goods and services.
- China ranks No. 2 on the list of leading import countries worldwide in 2019. In 2019, China imported $2.08 trillion worth of goods and services.
- In 2009, China surpassed the U.S. to become Africa's largest trade partner.
- According to the World Investment Report 2020, in terms of FDI outflow, China ranks No. 2 on the list of Top 20 home economies. FDI outflow from China was $117 billion in 2019 and $143 billion in 2018.

United, China and Global Trade at a Glance (2018)

Countries	Import (Millions$)	% of Global Imports	Export (Millions $)	% of Global Exports
China	2,134,982	11.37	2,494,230	13.45
United	2,611,432	11.92	1,665,302	8.98

Source: CSIS[502]

Given current geopolitics, Kenya and other countries in Africa must tread carefully. African countries cannot afford to become pawns in 'wars' between the global powers.

16.5.2. On Sovereignty Grounds, Resists Efforts to Direct and/or Influence Kenya-Israel Relations or Kenya's Position on Israel

Article 2(7) of the United Nations Charter states that nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the

[499] https://worldpopulationreview.com/countries/countries-by-gdp
[500] Is China the World's Top Trader? https://chinapower.csis.org/trade-partner/
[501] http://www.worldstopexports.com/worlds-top-export-countries/
[502] Is China the World's Top Trader? https://chinapower.csis.org/trade-partner/

domestic jurisdiction of any state.[503] The Montevideo Convention on the Rights and Duties of State also declares that "States are juridically equal, enjoy the same rights, and have equal capacity in their exercise" (Article 4) and that "[n]o state has the right to intervene in the internal or external affairs of another" (Article 8). Regardless of Kenya's position on the Question of Palestine, Kenya must resist attempts by foreign powers to encroach on its domestic policy space. Because a similar provision appears in the U.S.' negotiating objectives relating to the U.S.-U.K. trade agreement, it would be interesting to see how the U.K. and other countries in the same situation navigate this particular issue.

16.5.3. Review Negotiation Objective Relating to Israel

It is recommended that the Kenyan government review its negotiating objective as it relates to the Israel Clause. It is important that the Kenyan government reaffirm Kenya's sovereign right to direct its own foreign affairs. Significantly, a similar provision appears in the *United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives* (2019) .[504]

Israel Provision

Negotiating Objectives (Kenya)	Negotiating Objectives (United States)
Silent	With respect to commercial partnerships: Discourage actions that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel; Discourage politically motivated actions to boycott, divest from, and sanction Israel; Seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel; and Seek the elimination of state-sponsored unsanctioned foreign boycotts of Israel, or compliance with the Arab League Boycott of Israel.

16.5.4. Review Negotiating Objectives Relating to Non-Market Country

A detailed review of the economic arrangement between China and Kenya or between China and the rest of Africa is beyond the scope of this paper. However, against the backdrop of China's growing relations with countries in Africa, it is recommended that Kenya review its negotiating objectives. At the very least, it is important that the Kenyan government reaffirm Kenya's sovereign right to direct its own foreign affairs. Significantly, a similar provision

[503] https://www.hrw.org/news/2019/04/23/us-states-use-anti-boycott-laws-punish-responsible-businesses
[504] https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf

appears in the *United States-United Kingdom Negotiations: Summary of Specific Negotiating Objectives* (2019) .[505]

Non-market Country Provision

Kenya (Negotiating Objectives)	**United States (Negotiating Objectives)**
Silent	General Provisions …. - Provide a mechanism to ensure transparency and take appropriate action if Kenya negotiates a free trade agreement with a non-market country.

[505] https://ustr.gov/sites/default/files/Summary_of_U.S.-UK_Negotiating_Objectives.pdf

Administration and Enforcement of US Trade Policy

17. Administration and Enforcement of US Trade Policy

17.1. Introduction

The U.S. takes the administration of its trade laws very seriously. The U.S. administers a host of trade laws including import relief laws, laws against unfair trade practices, national security investigations, trade adjustment assistance programs, and tariff preference programs. The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was signed into law on February 24, 2016.[506] Some of the special investigations include:

- ✓ Safeguard actions under sections 201–204 of the Trade Act of 1974;
- ✓ Investigations under section 301 of the Trade Act of 1974;
- ✓ Special 301 action and the USTR released its annual Special 301 Report;
- ✓ Antidumping duty investigations;
- ✓ Countervailing duty investigations;
- ✓ Section 129 investigations;
- ✓ Section 337 investigations; and
- ✓ Section 232 national security investigations.

17.2. U.S. Trade Laws

The U.S. has a plethora of trade laws and regulations. The coverage of U.S. trade laws are extensive and include import relief laws, laws against unfair trade practices, laws authorizing national security investigations, as well as laws relating to trade adjustments assistance programs and tariff preference programs. A brief overview of U.S. trade policy law is important. In the past few years, particularly under the Trump Administration, the U.S. appears to have shifted towards greater use of domestic trade laws and less reliance on the WTO rules.

17.2.1. Import Relief Laws

Import relief generally refers to governmental measures designed to temporally restrict imports of a product or commodity in order to protect domestic producers from competition. Countries take different approaches in designing their import relief measures. Import relief measures include the measures adopted to strengthen domestic producers such as subsidies, educational assistance to workers, training assistance to workers, low interest loans to producers, tax relief to producers etc. An important U.S. legislation in this area is the sections 201–204 of the Trade Act of 1974 (19 USC §§ 2251-2254).

[506] P.L. 114-125

17.2.2. Laws Against Unfair Trade Practices

The U.S. has several laws aimed at addressing unfair foreign practices affecting U.S. exports of goods and services. One of the principal U.S. statutes in this regard is Sections 301-310 of the Trade Act of 1974 (19 USC §§ 2411-2420).[507] Section 301 of the Trade Act of 1974 (19 U.S.C. §2411) grants the Office of the USTR a range of responsibilities and authorities to investigate and take action to enforce U.S. rights under trade agreements and respond to certain foreign trade practices. Section 301 is considered a comprehensive policy instrument that can be used to enforce U.S. rights under bilateral and multilateral trade agreements.

17.2.3. Special 301 Law

The Special 301 law is set forth in section 182 of the Trade Act of 1974, as amended (19 U.S.C. § 2242). Special 301 law is specifically focused on intellectual property rights. The law mandates the USTR to identify and sanction countries that "(A) deny adequate and effective protection of intellectual property rights, or (B) deny fair and equitable market access to United States persons that rely upon intellectual property protection." 19 U.S.C. § 2242(d)(4) offers two important definitions:

> "A foreign country denies adequate and effective protection of intellectual property rights if the foreign country denies adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such foreign country to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights, trade secrets, and mask works."
>
> "A foreign country denies fair and equitable market access if the foreign country effectively denies access to a market for a product protected by a copyright or related right, patent, trademark, mask work, trade secret, or plant breeder's right, through the use of laws, procedures, practices, or regulations which—
> (A) violate provisions of international law or international agreements to which both the United States and the foreign country are parties, or
> (B) constitute discriminatory nontariff trade barriers."

Significantly, "[a] foreign country may be determined to deny adequate and effective protection of intellectual property rights, **notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights**.[508]

17.2.4. Antidumping and Countervailing Duty Laws

The U.S. antidumping law is enshrined in Title VII of the Tariff Act of 1930, as amended.[509] The law is designed to enforce U.S. antidumping policies and offers relief to U.S. industries that are materially injured by imports that are dumped in the U.S. market. The U.S. countervailing duty law is also enshrined in Title VII of the Tariff Act of 1930, as amended.[510]

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[507] Title III of the Trade Act of 1974 (Sections 301 through 310, 19 U.S.C. §§2411-2420), titled "Relief from Unfair Trade Practices," is often collectively referred to as "Section 301."
[508] Section 182(d)(4) of the Trade Act of 1974, as amended (19 U.S.C. § 2242(d)(4)). Emphasis added.
[509] 19 U.S.C. § 1673 et seq.
[510] 19 U.S.C. § 1671.

17.2.5. The Trade Facilitation and Trade Enforcement Act of 2015

The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) is reportedly the first comprehensive authorization of U.S. Customs and Border Protection (CBP) since the Department of Homeland Security was created in 2003. The overall objective of the TFTEA is to ensure a fair and competitive trade environment.[511] Title IV, Section 421 of TFTEA is commonly known as the Enforce and Protect Act of 2015 and it establishes formal procedures for submitting, and investigating antidumping or countervailing allegations of evasion against U.S. importers.

17.3. Key U.S. Trade Agencies

17.3.1. USTR

The Office of the USTR is responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries.[512] The USTR is a Cabinet member who serves as the president's principal trade advisor, negotiator, and spokesperson on trade issues. USTR coordinates trade policy, resolves disagreements, and frames issues for presidential decision. The USTR traces its origin to the Trade Expansion Act of 1962 in which Congress called for the President to appoint a Special Representative for Trade Negotiations to conduct U.S. trade negotiations. It is believed that in calling for the appointment of a Special Representatives for Trade Negotiation, the Trade Expansion Act of 1962 "reflected Congressional interest in achieving a better balance between competing domestic and international interests in formulating and implementing U.S. trade policy."[513] The history of the USTR highlights the role of Congress in shaping U.S. trade policy. According to information on the USTR's website:

> In 1963, President Kennedy created a new Office of the Special Trade Representative (STR) in the Executive Office of the President….
> In the 1970s, the Congress substantially expanded STR's responsibilities. Section 141 of the Trade Act of 1974 provided a legislative charter for STR as part of the Executive Office of the President, making it responsible for the trade agreements programs under the Tariff Act of 1930, the Trade Expansion Act of 1962, and the 1974 act. The act also made STR directly accountable to both the President and the Congress for these and other trade responsibilities and elevated the Special Trade Representative to cabinet level.
> ….
> USTR's authority was further enhanced under the Omnibus Trade and Competitiveness Act of 1988.
> ….
> The Uruguay Round Agreements Act, enacted in 1994, specifies that USTR has lead responsibility for all negotiations under the auspices of the WTO.
> ….
> The Trade and Development Act of 2000 created two new posts in USTR Chief Agricultural Negotiator and Assistant United States Trade Representative for African Affairs. [514]

Judging by the biographies of key officials of the USTR, the U.S. devotes a considerable amount of resources to trade policy development and implementation. Many of USTR's senior officials are lawyers and economists with extensive backgrounds in trade law. The senior staff of the USTR includes about 30 key officials appointed by the USTR who supervise trade

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[511] https://www.cbp.gov/trade/trade-enforcement/tftea
[512] https://ustr.gov/about-us/about-ustr
[513] https://ustr.gov/about-us/history
[514] https://ustr.gov/about-us/history

negotiations, monitor trade disputes, enforce laws, and keep a constant flow of communication with Congress, industry, nongovernmental organizations and the public on U.S. trade policy. Among the senior staff are:

- the Chief Agricultural Negotiator,
- the Assistant United States Trade Representative (AUSTR) for Agricultural Affairs and Commodity Policy,
- the AUSTR for Africa,
- the AUSTR for Trade Policy and Economics,
- the AUSTR for Monitoring and Enforcement,
- the AUSTR for Labor,
- the AUSTR for Textiles,
- the AUSTR for Innovation and Intellectual Property, and
- the AUSTR for Small Business, Market Access, and Industrial Competitiveness.[515]

17.3.2. The United States International Trade Commission[516]

The USITC was established in 1916[517] and is an independent, nonpartisan, quasi-judicial federal agency that fulfills a range of trade-related mandates. The USITC's core mission is to "Investigate and make determinations in proceedings involving imports claimed to injure a domestic industry or violate U.S. intellectual property rights; provide independent analysis and information on tariffs, trade and competitiveness; and maintain the U.S. tariff schedule."[518] The USITC carries out three main functions: investigation/adjudication; research and analysis; and maintaining the Harmonized Tariff Schedule.[519] The USITC publishes *The Year in Trade* which is *a* series of annual reports submitted to the U.S. Congress under section 163(c) of the Trade Act of 1974 (19 U.S.C. 2213(c)). Section 163(c) states that "the International Trade Commission shall submit to the Congress at least once a year, a factual report on the operation of the trade agreements program."

17.3.3. U.S. Customs and Border Patrol[520]

The U.S. Customs and Border Patrol (CBP) is considered one of the world's largest law enforcement organizations. One of the mission priorities of the CBP is to 'Enable fair, competitive and compliant trade and enforce U.S. laws to ensure safety, prosperity and economic security for the American people.'[521] In furtherance of its mission, the CBP routinely issues 'Withhold Release Orders' against offending foreign imports. Regarding child labor Withhold Release Orders,

[515] https://ustr.gov/about-us/biographies-key-officials
[516] https://www.usitc.gov/
[517] H.R. 16763
[518] About USITC. https://www.usitc.gov/press_room/about_usitc.htm
[519] Id.
[520] https://www.cbp.gov/
[521] About CBP. https://www.cbp.gov/about

- On December 30, 2020, the CBP issued Withhold Release Order on palm oil produced by forced labor in Malaysia.[522]
- In September 2020, CBP issued a separate Withhold Release Order against another Malaysian palm oil producer, FGV Holdings Berhad.
- During Fiscal Year 2020, the CBD issued at least 13 child labor Withhold Release Order[523]

CBP has created 10 industry-specific Centers to increase uniformity at the ports, facilitate the timely resolution of trade compliance issues nationwide, and further strengthen the agency's knowledge about industry practices.[524] The CBP has already mapped its strategy for the next five years.[525] Strategic Objective 1.3 (Secure and Compliant Trade) is to "Anticipate, identify, and address threats that inhibit cross-border commerce."[526] To accomplish its goals, the CBP plans to focus on strengthening core capabilities —

> [E]nabling digital, frictionless trade; enhancing risk-based enforcement through advanced analytics and intelligence driven enforcement; leveraging new technologies for detection and verification; optimizing international attaché networks and intelligence capabilities to provide improved situational awareness; creating a new paradigm for trade enforcement in light of emerging trends and expanded authorities; and effectively escalating consequence delivery to protect the revenue and to bring about secure and compliant trade.

17.3.4. U.S. Court of International Trade[527]

The United States Court of International Trade (formerly the United States Customs Court) is a federal court that traces its existence to Article III Section I of the U.S. Constitution which states that "[t]The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The Customs Court Act of 1980 replaced the former United States Customs Court with the United States Court of International Trade. The Court sits in New York City, although it is authorized to sit elsewhere, including in foreign nations.

The Court's history dates back to 1890 when a Board of General Appraisers was established to exercise "supervision over appraisements and classifications, for duty, of imported merchandise as may be needful to secure lawful and uniform appraisements and classifications at the several ports."[528] In 1926, the Board of General Appraisers was renamed the United States Customs Court. With the passing of the Customs Courts Act of 1980, Congress changed the name of the court from the United States Customs Court to the United States Court of International Trade and effectively expanded and clarified the jurisdiction of

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[522] CBP Issues Withhold Release Order on Palm Oil Produced by Forced Labor in Malaysia. https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-palm-oil-produced-forced-labor#

[523] All Withhold Release Orders are publicly available and listed by country on CBP's Forced Labor Withhold Release Orders and Finding page. See Withhold Release Orders and Findings. https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings

[524] Centers of Excellence and Expertise. https://www.cbp.gov/trade/centers-excellence-and-expertise-information

[525] See *U.S. Custom and Border Patrol Strategy 2021-2026.* https://www.cbp.gov/document/publications/cbp-strategy-2021-2026.

[526] Id., p. 13.

[527] https://www.cit.uscourts.gov/about-court

[528] Customs Administrative Act, Ch. 407, §§ 12-13, 26 Stat. 131, 136 (1890)

the court. The court's subject matter jurisdiction is limited to particular international trade and customs law issues. As Gregory W. Carman explains:

> The Court's jurisdiction, which is civil in nature, includes civil suits arising from numerous types of actions by agencies as the result of import transactions. The Court's authority pertains to the classification and valuation of merchandise, charging duties and fees on the importation of merchandise, the exclusion of merchandise from entry under provisions of the customs laws, the liquidation of entries, the refusal to pay drawback, and challenge to antidumping and countervailing duty cases. In addition, the Court has jurisdiction over actions to review the denial, revocation, or suspension of a customs broker's license, determinations concerning eligibility for trade adjustments under the Trade Act of 1974, and penalty cases.[529]

17.3.5. The Committee on Foreign Investment in the United States (CFIUS)

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that formally established in 2007, pursuant to the Foreign Investment and National Security Act of 2007 (P.L. 110-49), to oversee the national security implications of foreign direct investment.[530] CFIUS has the mandate to review certain transactions involving foreign investment in the U.S. and certain real estate transactions by foreign persons, in order to determine the effect of such transactions on the national security of the U.S. Over the years, largely as a result of perceived threat from China, Congress adopted a new legislation aimed at strengthening and modernizing CFIUS. The Foreign Investment Risk Review Modernization Act (FIRRMA) of 2018 (Title XVII, P.L. 115-232), was signed into law on August 13, 2018.[531] The members of CFIUS include the heads of the following departments and offices: Department of the Treasury (chair), Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defense, Department of State, Department of Energy, Office of the U.S. Trade Representative and Office of Science & Technology Policy.

An exhaustive listing and discussion of U.S. trade laws and the agencies involved in implementing U.S. trade policy is beyond the scope of this report. Also involved in the implementation of U.S. trade policy are U.S. trade finance and promotion agencies including the Export-Import Bank of the United States and the U.S. International Development Finance Corporation (created in 2018 to replace the Overseas Private Investment Corporation).

17.4. U.S. Trade Enforcement Actions

17.4.1. Safeguard Action

Safeguard actions generally provide temporary relief from import surges of goods that the U.S. believes are traded unfairly. The USITC administers global safeguard provisions in sections 201–204 of the Trade Act of 1974, and the statutes implementing safeguard provisions in various free trade agreements involving the United States.[532] Under the section 201 of the Trade Act of 1974, if the Commission determines that an article is being imported into the U.S.

[529] Gregory W. Carman, Jurisdiction and the Court of International Trade: Remarks of the Honorable Gregory W. Carman at the Conference on International Business Practice Presented by the Center for Dispute Resolution on February 27-28, 1992, Northwestern Journal of Law and International Business (Fall 1992).
[530] Although formally established in 2007, CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended (section 721), and as implemented by Executive Order 11858, as amended, and the regulations at chapter VIII of title 31 of the Code of Federal Regulations.
[531] https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius
[532] 19 U.S.C. §§ 2251-2254.

in such increased quantities as to be a substantial cause of serious injury or threat of serious injury to a domestic industry producing an article like or directly competitive with the imported article, it can recommend to the President relief that would remedy the injury and facilitate industry adjustment to import competition. Relief may take the form of increased tariffs, tariff-rate quotas, quotas, adjustment measures (including trade adjustment assistance), and negotiation of agreements with foreign countries. In making its determination, the Commission is not required to find an unfair trade practice.[533] The U.S. does not shy away from administering its safeguard laws. Although the Commission conducted no new safeguard investigations during 2019 under sections 201–204 of the Trade Act of 1974, two safeguard measures were in place during 2019. Under section 301 of the Trade Act of 1974, the Commission continued with two ongoing investigations and two new investigations in 2019.

17.4.2. Section 301 Investigations

Under Section 301 of the Trade Act of 1974, interested persons may petition the USTR to investigate foreign government policies or practices, or USTR may initiate an investigation itself. The investigation is to determine: (i) whether the rights of the U.S. under any trade agreement are being denied; (ii) whether an act, policy, or practice of a foreign country violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (iii) whether an act, policy, or practice of a foreign country is unjustifiable and burdens or restricts United States commerce.[534] The USTR has broad powers to act if the investigated practice is found to meet the standards set in the statute. Powers of the USTR include the power to suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country. Some memorable section 301 investigations include: (i) Section 301 investigation into EU measures concerning meat and meat products;[535] (ii) Section 301 investigation regarding EU subsidies on large civil aircrafts;[536] (iii) Section 301 investigation into a French law taxing the revenue of digital services companies earned from French users;[537] and (iv) a Section 301 investigation into China's laws and policies related to technology transfer.[538]

17.4.3. Special 301 Review

Section 182 of the Trade Act of 1974 requires the USTR to identify annually countries that deny adequate and effective IP protections or deny fair and equitable market access to U.S. persons who rely on IP protection. Based on the reviews, the USTR is required to determine which, if any, of these countries to identify as "Priority Foreign Countries". Also, trading partners that present the most significant concerns regarding IPRs are placed on 'priority Watch List' or 'Watch List.' In the 2019 Special 301 Report, 36 countries were on the list. On

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[533] USITC, "Global and Special Safeguard Investigations" (accessed August 14, 2019).
[534] 19 U.S. Code § 2411(a).
[535] WTO, "Dispute Settlement: DS26; European Communities—Measures Concerning Meat and Meat Products" (accessed December 1, 2020).
[536] USTR, Initiation of Investigation; Notice of Hearing and Request for Public Comments: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute, 84 Fed. Reg. 15028 (April 12, 2019).
[537] USTR, *Report on France's Digital Services Tax Prepared in the Investigation under Section 301 of the Trade Act of 1974*, December 2, 2019, 8; See also USTR, "Section 301 Hearing in the Investigation of France's Digital Services Tax Transcript," August 19, 2019; USTR, *2020 Trade Policy Agenda and 2019 Annual Report*, March 2020, 46.
[538] USTR, *Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation under Section 301 of the Trade Act of 1974,* March 22, 2018.

December 15, 2020, the USTR published, in the *Federal Register*, a "request for comments and notice of public hearing" [Docket Number USTR-2020-0041] for its 2021 review.[539]

17.4.4. Antidumping Duty Investigations

Antidumping remedies provide relief from injurious imports that are sold at less than fair value. Antidumping investigations are mandated by the Tariff Act of 1930[540] and are carried out by the USTIC.[541] If the USITC determination is affirmative, the Secretary of Commerce issues an antidumping order (in a dumping investigation) which is enforced by the U.S. Customs Service. In 2019, the Commission instituted 37 new antidumping investigations and made 33 preliminary determinations and 33 final determinations in 2019. Antidumping duty orders were issued by the U.S. Department of Commerce (USDOC) in 33 final investigations on 20 products from 15 countries.

17.4.5. Countervailing Duty Investigations

Countervailing duty remedies provide relief from injurious imports that are subsidized by a foreign government. Countervailing duty investigations re required by section 753, Tariff Act of 1930, 19 U.S.C. 1675b. If the USITC determination is affirmative, the Secretary of Commerce issues a countervailing duty order (in a subsidy investigation), which is enforced by the U.S. Customs Service. During 2019, the Commission instituted 21 new countervailing duty investigations and made 17 preliminary determinations and 21 final determinations. During 2019, the USDOC issued countervailing duty orders in 20 final investigations on 16 products from five countries. According to a Congressional Research Service report, as of September 23, 2019, there were 507 AD/CVD orders affecting imports from 51 countries.

17.4.6. Section 337 investigations

Under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), the USTIC conducts investigations into allegations of certain unfair practices in import trade. Section 337 identifies a host of actions that are deemed unlawful and if found to exist, must be dealt with. Although most section 337 investigations involve allegations of patent or registered trademark infringement, the list of unlawful acts is quite extensive and include: misappropriation of trade secrets, trade dress infringement, passing off, false advertising, and violations of the antitrust laws. Section 337 deals with the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—

- infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17; or
- are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.
- The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United

[539] Request for Comments and Notice of a Public Hearing Regarding the 2021 Special 301 Review. https://www.govinfo.gov/content/pkg/FR-2020-12-15/pdf/2020-27515.pdf

[540] See section 731 et seq. of the Tariff Act of 1930, 19 U.S.C. 1673 et seq. For further information on countervailing duty investigations, see section 701 et seq. of the Tariff Act of 1930, 19 U.S.C. 1671 et seq.)

[541] https://www.usitc.gov/press_room/usad.htm

States trademark registered under the Trademark Act of 1946 [15 U.S.C. 1051 et seq.].

- The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of a semiconductor chip product in a manner that constitutes infringement of a mask work registered under chapter 9 of title 17.
- The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consigner, of an article that constitutes infringement of the exclusive rights in a design protected under chapter 13 of title 17.

Section 337 also deals with unfair methods of competition and unfair acts in the importation of articles into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is (i) to destroy or substantially injure an industry in the United States; (ii) to prevent the establishment of such an industry; or (iii)to restrain or monopolize trade and commerce in the United States. Fifty-nine new section 337 proceedings were instituted in 2019. According to the USITC, during calendar year 2019, there were 128 active section 337 investigations and ancillary proceedings alleging unfair import practices, such as patent infringement. In sum, the USITC completed a total of 63 investigations and ancillary proceedings under section 337 in 2019.

17.4.7. Section 232 national security investigations

Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862) empowers the U.S. President to impose restrictions on certain imports based on an affirmative determination by the Department of Commerce (Commerce) that the product(s) under investigation "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." [542] Regarding investigations, 19 U.S. Code § 1862(b)(1)(A):

> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the "Secretary") shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.[543]

During 2019, USDOC completed two investigations under section 232 on certain automobiles and parts and on uranium. Furthermore, the USDOC instituted one new investigation under section 232, on titanium sponge.

17.5. Inter-Agency Coordination

The U.S. trade policy is shaped and implemented by an Interagency Trade Policy Mechanism, a USTR-led system that Congress first established in 1962, to assist with the implementation of these responsibilities.[544] USTR executes its institutional interagency role through two processes, the Trade Policy Review Group (TPRG) and the Trade Policy Staff

[542] Section 232 Investigations: Overview and Issues for Congress Updated August 24, 2020. https://fas.org/sgp/crs/misc/R45249.pdf
[543] 19 U.S. Code § 1862(b)(1)(A).
[544] https://ustr.gov/about-us/interagency-role

Committee (TPSC) - both chaired by USTR. Twenty agencies make up the Trade Policy Review Group and the Trade Policy Staff Committee including:

- The Office of the U.S. Trade Representative[545]
- Department of Commerce[546]
- U.S. Department of Agriculture
- U.S. Department of Labor[547]
- U.S. Department of Health and Human Services
- U.S. Department of Homeland Security
- U.S. Department of Treasury
- U.S. International Development Finance Corporation
- Export-Import Bank
- International Trade Commission
- Small Business Administration
- U.S. Agency for International Development
- U.S. Trade and Development Agency

The Office of Policy Coordination is responsible for convening members of the TPRG and TPSC.

17.6. Key Recommendations

Global trade and investment are growing at an unprecedented rate. Given the changing global environment, it is imperative that Kenya and other countries in Africa take a serious look at their trade policy tools and enforcement apparatus. A serious review and revamping of trade policy goals, strategies, laws and implementation tools are called for.

17.6.1. Upgrade Kenya's Trade Policy Tools: Pertinent Questions

When it comes to revamping and upgrading Kenya's trade policy instruments and infrastructure, there are many questions that need to be addressed. For example:

- Is Kenya's trade policy adequate for trade in the 21st century?
- Are Kenya's trade laws adequate for reciprocal trade arrangements in the 21st century?
- Does the Kenyan government have enough adequate trade policy tools to take care of the country's offensive and defensive interests?
- Is Kenya's trade law and policy coherent or is it more like a jigsaw puzzle with so many moving pieces and so many missing pieces?
- Are Kenyan courts involved in trade policy? Are the courts ready and equipped for a potential growth in trade-related lawsuits?
- Do relevant trade agencies in Kenya have the power, expertise and capability to *inter alia*:
    - support trade negotiations;
    - combat other countries' industrial policy;

[545] https://ustr.gov/
[546] https://www.commerce.gov/
[547] https://www.dol.gov/

- o execute required sector reviews;
- o address trade remedy issues;
- o provide economic, policy and industry expertise in the review of other government's objectionable trade practices;
- o Provide innovative market intelligence products and services that provide critical information to the public and businesses; and
- o Determine the existence of domestic competition of imported products?

17.6.2. Learn from Other Emerging Market Economies

In the last two decades emerging market economies like China, India, Vietnam, South Africa, and Brazil have had to retool and roll out new trade policies and strategies in a bid to become major player in global trade. Even without the "benefit" of FTAs and IIAs, some of these countries have, over the past decade or two, emerged as strong players in the trade and investment space. Kenya can learn valuable lessons relating to development of export infrastructure, export incentivization and promotion, and sector-focused initiatives among others. Consider that,

- according to the USTR, in 2019, Brazil's FDI in the United States (stock) was $4.6 billion, up 83.7% from 2018, and U.S. FDI in Brazil (stock) was $81.7 billion in 2019, a 3.4% increase from 2018.
- According to the USTR, in 2019, Indonesia's FDI in the U.S. (stock) was $399 million, up 16.0% from 2018.
- In 2017 (latest data available), sales of services in Brazil by majority U.S.-owned affiliates were $40.2 billion, while sales of services in the U.S. by majority Brazil-owned firms were $2.7 billion.
- Thailand was reportedly the leading source of imports entered under the GSP program in 2019, followed by India and Indonesia. Together, Thailand, India and Indonesia, accounted for about half of all U.S. imports under GSP in 2019. Five countries – Thailand, India, Indonesia, Brazil, and Philippines – accounted for about three-fourths of GSP imports.[548]

17.6.3. Policy Coherence

Ensuring policy coherence in trade policy is a non-negotiable imperative for participation in global trade in the twenty-first century. Trade affects all aspects of a country's economy, values, and way of life. It is thus important that a country's trade policy is developed through a collaborative inter-agency process. This begs the question, is trade policy development in Kenya a cooperative undertaking, involving all the key agencies and departments? In the U.S., Congress first established the Advisory Committee System in 1974 in order to incorporate public and private input into U.S. trade policy. The system is comprised of 26 committees (with up to 700 advisors) including,

- Advisory Committee for Trade Policy and Negotiations
- Agricultural Policy Advisory Committee
- Agricultural Technical Advisory Committee
- Intergovernmental Policy Advisory Committee

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[548] Id.

- Labor Advisory Committee
- Industry Trade Advisory Committee
- Trade Advisory Committee on Africa
- Trade Policy Advisory Committee
- Trade and Environment Policy Advisory Committee

The Trade and Environment Policy Advisory Committee (TEPAC) is jointly administered by the USTR and the Environmental Protection Agency. [549] TEPAC is required by its charter to be "broadly representative of key sectors and groups of the economy, with an interest in trade and environment policy issues." TEPAC includes representatives from environmental and consumer interest groups, agriculture, services, and non-federal governments.[550] TEPAC meetings are announced through Federal Register notices and are published on the USTR's website.

[549] https://ustr.gov/about-us/advisory-committees/trade-and-environment-policy-advisory-committee-tepac
[550] U.S. Trade and Investment Policy Making Process. https://www.epa.gov/international-cooperation/us-trade-and-investment-policy-making-process

18. Final Thoughts

Global trade is an important engine of the global economy and of the economy of Kenya. According to Kenya's Vision 2030, Kenya's exports have been on a steady increase since the early 1990's in response to the Government's economic liberalization and other reform measures.[551] The Kenyan government acknowledges that the export sector "is critical to the performance of Kenya's economy as well as her fiscal and monetary stability" and that strong performance of the export sector "has direct correlation to the stability in the financial sector and other macroeconomic aggregates such as exchange rates, inflation and price levels and employment."[552] The Kenyan government also acknowledges that Kenya's export sector "is vulnerable as it depends on global markets, which include the OECD countries such as the European Union, United States of America, and Japan" and "is heavily dependent on a few products for exports."[553] What is more, relatively lower value agricultural commodities dominate Kenya's export basket. Kenya's main exports consist of tea, horticulture (cut-flowers, vegetables, and fruits), articles of apparels, coffee, vegetable oils, petroleum oil products, and iron & steel products, among others. Kenya's export basket shows high product concentration; about 10 export products accounted for about 58 percent of total exports in 2012. There is thus, an urgent need to expand and diversify Kenya's export product base. Presently, SSA plays a relatively small role in GVCs and lags behind other region significantly. What is more, "[t]he majority of SSA's participation in GVCs [is] in the form of providing raw materials and primary inputs (e.g., crude petroleum, agricultural products, ores, or base metals) to other countries for downstream processing and export production."[554]

18.1. AGOA Revisited

Based on recent reports from the United States International Trade Commission, there is good news and bad news when it comes to AGOA.

18.1.1. AGOA/GSP: Some Good News

- In 2019, imports entering the U.S. exclusively under AGOA (excluding those entered under GSP) were valued at $7.3 billion, accounting for 35.3 percent of U.S. imports from AGOA countries.[555]
- In 2019, the value of U.S. imports that entered free of duty from beneficiary countries under AGOA (including imports under GSP) was $8.4 billion, a 30.1 percent decline from 2018.

[551] Vision 2030: Sector Plan for Trade 2013 – 2017. http://vision2030.go.ke/wp-content/uploads/2018/05/SECTOR-PLAN-FOR-TRADE-2013-2017.pdf
[552] Id.
[553] Id.
[554] United States International Trade Commission, The Year in Trade, 2019, p. 29.
[555] United States International Trade Commission, The Year in Trade, 2019.

- In 2019, imports entering the United States under AGOA and GSP accounted for 40.5 percent of total imports from AGOA countries in 2019.[556]
- Kenya was one of the top 5 suppliers of duty-free imports under AGOA in 2019 and accounted for 7.0 percent.[557]
- Collectively, six countries (Nigeria, South Africa, Angola, Kenya, Ghana, and the Republic of Congo) accounted for 85.0 percent of total U.S. imports under AGOA.[558]

Major suppliers of duty-free U.S. imports under AGOA in 2019

Country	Share of total AGOA imports
Nigeria	42.7%
South Africa	16.7%
Angola	7.4%
Kenya	7.0%
Ghana	5.7%
The Republic of Congo	5.6%
Total	85.0%

Source: United States International Trade Commission

- Between 2016–18, U.S. agricultural imports from SSA countries under AGOA saw some increased. In 2018, U.S. imported $542 million worth of spices from SSA, up from $436 million in 2017 and $242 million in 2016.[559] Overall, U.S. imports of spices from SSA increased by $300 million (49.7 percent CAGR) with majority of the value coming from vanilla from Madagascar.
- Under AGOA, between 2016 and 2018, U.S. imports for consumption from Kenya grew at an annual growth rate of 8.9% and was $470 million in 2018, up from $408 million in 2017 and $396 million in 2016.

18.1.2. AGOA/GSP: Some Bad News

- There is a noticeable decline in the value of U.S. imports under AGOA. In 2019, the value of U.S. imports that entered free of duty from beneficiary countries under AGOA saw a 30.1 percent decline from 2018.[560]
- In 2019, total imports under AGOA (as a share of all imports from AGOA countries) was 40.5%, down from 54.5% in 2017.[561]
- According to the USITC, the decline in U.S. imports under AGOA in 2019 compared to 2018 is largely as a result of decline in the value of imports of crude petroleum and

[556] Id.
[557] Id.
[558] Id.
[559] Id.
[560] Id.
[561] Id.

refined petroleum products, as well as a decline in imports of passenger motor vehicles under the program.

U.S. imports for consumption from AGOA beneficiaries, 2017-2019

Item	2017	2018	2019
Total import from AGOA countries (million $)	24,868	24,524	20, 763
Total imports under AGOA (millions $)	13,550	12,025	8,400
Total imports under AGOA, excluding GSP (million $)	12,235	10,791	7,328
Total imports under AGOA (as a share of all imports from AGOA countries) was 40.5%, down from 54.5% in 2017.	54.5	49.0	40.5

Source: United States International Trade Commission

- In general, U.S. imports under preference programs have declined in recent years. Indeed, from 2018 to 2019, total preference program imports declined by 21.0 percent.[562]
- U.S. imports under GSP also saw declines, dropping 12.5 percent from $23.8 billion in 2018 to $20.9 billion in 2019. Significantly, in 2019, GSP accounted for only 8.9 percent of imports from all GSP-eligible countries, down from 10 percent in 2018.[563]

United States' Import (2019): A Sampling

Goods/Services	Value
Trade in Merchandise (total)	$2.5 trillion
EU (Merchandise)	$514.7 billion
Trade in Services (Total)	$571.3 billion
EU (cross-border) services	$209.8 billion
Trade with FTA Partners	$874 billion
Trade (NAFTA)	$677.8 billion
Total U.S. imports for consumptions from GSP beneficiaries	$234.6 billion[564]
Total imports under GSP	$20.8 billion
Value of U.S. imports under AGOA (including imports under GSP)	$8.4 billion
Value of U.S. imports under AGOA (excluding those that entered under GSP)	$7.3 billion
Total imports from AGOA countries	$20.7 billion

Source: United States International Trade Commission

[562] Id.
[563] Id.
[564] Note that the leading sources of U.S. imports under GSP in 2019 were: Thailand (#1), India (#2), Indonesia (#3). Together, Thailand, India and Indonesia, accounted for about half of all U.S. imports under GSP in 2019.

18.2. A David and Goliath Tale

An FTA between Kenya and the U.S. will be a deal between the world's largest trading economy and a developing country that does not feature on the list of the world's top 100 trading economies.[565] Kenya will be concluding a deal with a country that:

- is the largest importer in the world in goods trade;
- is the second largest exporter in the world in goods trade (with a 9% share of global goods export);
- is the largest exporter in the world in services trade (with a 14% share of global services);
- is the world's No. 1 source of FDI. In 2019, on an annual basis, U.S. direct investment abroad, or new spending by U.S. firms on businesses and real estate abroad stood at approximately $148 billion;[566]
- is the world's No. 1 destination of FDI. In 2019, the U.S. attracted approximately $261 billion in FDI in 2019;
- in 2018, exported information and communication technology (ICT) goods and services valued at $148 billion and $80 billion, respectively, according to the U.S. Bureau of Economic Analysis; and
- spent $790 million in FY2019 on trade adjustment assistance, with resources going primarily into training, trade readjustment allowances, employment and case management services, job search allowance, and relocation allowance.

Kenya's total exported goods represent 1.8% of its overall GDP for 2019 ($191.3 billion valued in Purchasing Power Parity US dollars). In comparison, in macroeconomic terms, the United States' total exported goods represent 7.7% of its overall GDP for 2019 ($21.439 trillion valued in Purchasing Power Parity U.S. dollars).[567] In 2019, Kenya exported an estimated US$3.44 billion worth of products around the globe, reflecting a in dollar amount a -41.9% decrease since 2015 and a -43.1% dip from 2018 to 2019.[568] In 2019, Kenya's top 10 exports accounted for 83.6% of the overall value of its global shipments. In a trade deal with the Kenya the U.S. will be looking for among other things,

- o market access for its huge merchandise export; in 2019, the value of U.S. merchandise total export was $1.6 trillion.
- o market access for its energy-related products; from 2018 to 2019, export of energy related products from the U.S. rose by $7.5 billion, while imports fell by $31.2 billion over the same period. Today, the U.S. is one of the world's largest producers of natural gas and of crude oil. The U.S. became a net exporter of natural gas in 2017, and a net exporter of crude oil in 2019.
- o market for its services; in 2019, the U.S. private services export increased by 2.2. percent, from $805.7 billion to $823.7 billion; and

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[565] In 2019, the top-five largest trading economies (in terms of the value of goods and services trade) were: the United States, China, Germany, Japan, and the United Kingdom. However, if the 28 EU members are treated as a single trading bloc, the EU would be the largest trading economy in the world.

[566] http://www.oecd.org/investment/FDI-in-Figures-April-2020.pdf

[567] United States Top 10 Exports. http://www.worldstopexports.com/united-states-top-10-exports/

[568] Kenya's Top 10 Exports. http://www.worldstopexports.com/kenyas-top-10-exports/#:~:text=by%20FlagPictures.org%20Located%20on,dip%20from%202018%20to%202019.

- Market access for its digital products; the value of U.S. export of information technology in 2018 was $148 billion, while the value of U.S. export of ICT in 2018 was $80 billion.

Key Indicators: United States v. Kenya

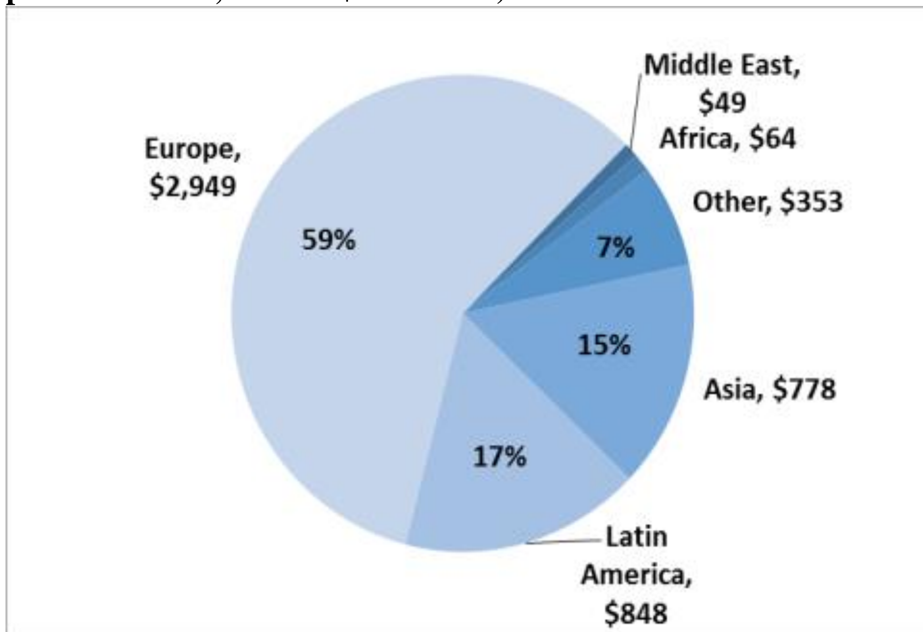
	United States	**Kenya**
Nominal GDP (IMF '19)	$20.20 tn	$109.12 bn
GDP Per Capita	$66, 678	$1, 984
Population (2019)	332,915,073	54,985,698
Export of Goods and Services	# 2 ($ 2,498,032 million) - 2019	# 94 ($10,440 million) - 2017[569]
Best Country to Invest 2020	# 7	# 153
MGI Connectedness Index 2014	# 3 (score: 52.7)	# 118 (score: 1.3)
The Global Enabling Trade Index 2016	# 22	# 77
Human Development Index (2019)	# 17	# 143
2020 Environmental Performance Index	# 24 (score 69.3)	# 132 (score: 34.7)
Gender Inequality Index (2019)	# 46	# 126
2020 Corruption Perception Index	# 25 (score 67)	# 124 (score 31)

18.3. Kenya's Offensive and Defensive Interests Vis-à-Vis the United States

Kenya needs to pursue a proactive and development-friendly trade strategy and must define its goals very clearly. A deal with the U.S. arguably presents an opportunity for the whole Kenyan economy. The deal could potentially create a substantial increase in trade with the U.S., boost employment and workers' wages in Kenya, and lower prices on key consumer goods imported from the U.S. A deal with the U.S. could also potentially lead to increased FDI from the U.S.; presently, U.S. FDI is concentrated in Europe and is growing significantly in Latin America and in Asia.

[569] https://en.wikipedia.org/wiki/List_of_countries_by_exports

U.S. Direct Investment Abroad by Major Area, 2015 (in Billions of $, percent of total; Total = $5.0 trillion)



Source: Congressional Research Service

Presently, all bilateral investment activity in Kenya-U.S. relations is comprised of U.S. FDI in Kenya, valued at $380 million in 2018.[570] Recent suggest that majority-owned foreign affiliates of U.S. multinational firms employed 5,900 people in Kenya in 2017.[571] On whether an FTA with the U.S. will lead to increased FDI from the U.S., it is notable that the U.S. has not concluded BITs with three countries in Africa that represent the three largest destinations for cumulative FDI in SSA: Mauritius ($9.5 billion), South Africa ($7.6 billion), and Nigeria ($5.6 billion). Analysts agree that to a great extent, U.S. FDI in Africa is driven by natural resources; in Africa overall, as much as 31.7 percent of U.S. investment is in the mining sector, 29.0 percent in nonbank holding companies, and 8.8 percent in manufacturing.

In a trade deal with the U.S., Kenya should be looking to protect a wide range of defensive and offensive interests. Regarding Kenya's defensive interest, consider that:

- The sectors in which U.S. exports of goods to SSA experienced the most growth in absolute value terms between 2016 and 2018 were petroleum products; aircraft, spacecraft, and related equipment; certain motor vehicle parts; motor vehicles; natural gas and components; and poultry.[572]

- In 2018, the U.S. exported $465 million worth of poultry to the Africa, up from $433 million in 2017 and $282 million in 2016. Overall, U.S. exports of poultry to SSA increased by $182 million (28.3 percent CAGR) to $465 million during 2016–18.[573]

[570] Congressional Research Service, U.S.-Kenya FTA Negotiations, In Focus, May 28, 2020. https://crsreports.congress.gov/product/pdf/IF/IF11526
[571] Congressional Research Service, U.S.-Kenya FTA Negotiations, In Focus, May 28, 2020. https://crsreports.congress.gov/product/pdf/IF/IF11526
[572] USITC, U.S. Trade and Investment with Sub-Saharan Africa (March 2020)
[573] USITC, U.S. Trade and Investment with Sub-Saharan Africa (March 2020)

Although most of U.S.'s poultry export to SSA go to South Africa and Angola, U.S. will be seeking to exploit market opportunities in other countries in Africa, including Kenya.

- US export of services to Africa is also growing particularly in in services sectors such as finance, air transportation, professional and management consulting, and travel. According to the USITC, "U.S. exports of private services to all African countries rose by $1.6 billion (6.0 percent CAGR) to $14.8 billion during 2016–2018."[574]

- The USITC has identified mining (including petroleum and natural gas extraction), transportation equipment (including motor vehicles), and agriculture and agribusiness as among the key value chains in SSA that present opportunities for deepening U.S. firms' integration.[575]

- The list of Kenya's NTBs of concern to the U.S. is very long and include, IP issues, SPS issues, transparency issues, regulation and regulatory processes, government procurement, and corruption.

There are lots of opportunities to expand export of goods, services and capital to the U.S. for countries that are willing, able, and have well-defined trade agenda. Increasingly, many countries in Asia and Latin America are aggressively exploiting market opportunities in the U.S. with and without the benefits of a preference program. Regarding Kenya's offensive interests, beyond the export of apparels and a handful of lower value agricultural products, Kenya should be examining how to capture a share of U.S. import of merchandise, services, digital products, foreign capital, to mention a few. Consider that:

- in 2019, the value of U.S. merchandise general imports totaled $2.5 trillion;
- in 2019, U.S. private services import increased by 5.0 percent from $544.3 billion to $571.3 billion.
- In 2019, U.S. private services imports increased by 5.0 percent from $544.3 billion to $571.3 billion. Kenya is not among the leading U.S. import markets for private services. In 2019, leading U.S. import markets for private services by share, were: EU (37%), Canada (7%), Japan (5%), India (5%), Mexico (5%), China (3%), South Korea (2%), Singapore (2%), Taiwan (1%) and Brazil (1%).

Kenya's interest in an FTA with the U.S goes beyond economic calculations of the costs and benefits, in financial terms, of trade liberalization. Trade agreements implicate societal values and ideologies in fundamental ways. For example, if critics are right that "Good regulatory practices" are, at their core, an ideology of how and when government should intervene in the market, a set of institutional arrangements for regulating in a pro-business way, determining Kenya's offensive and defensive interests on a whole host of issues that would be covered in comprehensive FTA with the U.S. will be a difficult and complex exercise.[576]

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[574] Id.
[575] Id.
[576] https://www.tni.org/files/publication-downloads/international_regulatory_cooperation-web.pdf

18.4. U.S. GSP Program: Uncertainties. Sanctions. Graduation

One of the strongest arguments in favor of a Kenya-U.S. FTA is the great uncertainty surrounding the U.S. GSP program and the AGOA program. In sum, (i) GSP beneficiary status can be lost; (ii) a country can graduate out of the U.S. GSP program; (iii) AGOA beneficiary status can be lost; and (iv) with AGOA set to expire in 2025, the future of AGOA is very much in doubt. Under the U.S. GSP program, countries are designated as "beneficiary developing countries."

18.4.1. Loss of GSP Beneficiary Status Due to Violations

Pursuant to section 502(d)(1) of the Trade Act of 1974, as amended (19 U.S.C. 2462(d)(1)), the President may withdraw, suspend, or limit the application of the duty-free treatment accorded under the GSP with respect to any beneficiary developing country. In taking any action under section 502(d)(1) of the 1974 Act, the President shall consider the factors set forth in sections 501 and 502(c) of the 1974 Act (19 U.S.C. 2461 and 2462(c)). A country can lose its designation as "beneficiary developing countries" if the interagency GSP subcommittee finds the existence of country practices that violate the provisions of the GSP statute, including inadequate protection of IPRs or of internationally recognized worker rights. Complaints alleging country practice allegations are brought to the attention of the GSP subcommittee by a petition process.[577] The following are some recent examples of terminations and/or suspensions:

- Through Proclamation 9902 issued on May 31, 2019, the U.S. President terminated India's designation as a beneficiary developing country, effective June 5, 2019, based on India's failure to provide the United States with equitable and reasonable access to its markets.[578]

- On October 25, 2019, USTR announced that the U.S. will suspend $1.3 billion in trade preferences under the GSP for Thailand (about a third of Thailand's GSP benefits) based on its failure to adequately provide worker rights.[579]

- On October 25, 2019, USTR announced that it was opening new GSP-eligibility reviews for South Africa, based on IP protection and enforcement concerns.[580]

- On October 25, 2019, USTR announced that it was opening new GSP-eligibility reviews for Azerbaijan, based on worker rights concerns.[581]

- On November 19, 2019, USTR announced a GSP country practice review hearing that would focus on country practices in Azerbaijan, Ecuador, Georgia, Indonesia,

[577] See USTR, "Generalized System of Preferences (GSP)" (accessed March 31, 2020).
[578] Proclamation 9902, 84 Fed. Reg. 26323 (June 5, 2019).
[579] USTR, "USTR Announces GSP Enforcement Actions and Successes for Seven Countries," October 25, 2019.
[580] USTR, "USTR Announces GSP Enforcement Actions and Successes for Seven Countries," October 25, 2019.
[581] USTR, "USTR Announces GSP Enforcement Actions and Successes for Seven Countries," October 25, 2019.

Kazakhstan, Thailand, South Africa, and Uzbekistan.[582] The hearing was held in January 2020.

Increasingly, the U.S. deploys GSP reviews and sanctions to enforce wide range of trade policies including, enforcement of IPR, enforcement of arbitral awards, promotion of workers' rights, trade and investment liberalization. Regarding the USTR's November 19, 2019, announcement regarding a GSP country practice review of eight countries – Azerbaijan, Ecuador, Georgia, Indonesia, Kazakhstan, Thailand, South Africa, and Uzbekistan – the U.S. cited various violations. According to the announcement,

> These reviews will focus on whether: (1) Azerbaijan, Georgia, Kazakhstan, and Uzbekistan are meeting the GSP eligibility criterion requiring that a GSP beneficiary country afford workers in that country internationally recognized worker rights; (2) Ecuador is meeting the GSP eligibility criterion requiring a GSP beneficiary country to act in good faith in recognizing as binding or in enforcing applicable arbitral awards; (3) Indonesia and South Africa are meeting the GSP eligibility criterion requiring adequate and effective protection of intellectual property rights; (4) Indonesia and Thailand are meeting the GSP eligibility criterion requiring a GSP beneficiary country to provide equitable and reasonable access to its markets and basic commodity resources; and (5) Laos meets all of the GSP eligibility criteria and should be newly designated as a GSP beneficiary country.[583]

18.4.2. Loss of GSP Status Due to Economic Development

A country can lose its GSP designation based on its level of economic development, including its per capita gross national product, the living standards of its inhabitants, and any other economic factors that the President deems appropriate. Through Proclamation 9887 issued on May 16, 2019, the U.S. President terminated Turkey's designation as a beneficiary developing country, effective May 17, 2019, based on its level of economic development.[584] In Executive Order 11888 of November 24, 1975, the President designated Turkey as a beneficiary developing country for purposes of the Generalized System of Preferences. In 2018, Turkey was the fifth leading GSP beneficiary.

18.5. AGOA: Uncertainties. Sanctions. Reviews. Expiration

Kenya was one of the major suppliers of duty-free imports under AGOA in 2019.The top six major suppliers of duty-free U.S. imports under AGOA in 2019 were Nigeria (42.7 percent of total AGOA imports), South Africa (16.7 percent), Angola (7.4 percent), Kenya (7.0 percent), Ghana (5.7 percent), and the Republic of the Congo (5.6 percent). Collectively, the six countries accounted for 85.0 percent of total imports by value under AGOA in 2019. Despite the many successes of AGOA, there is much uncertainty surrounding the program. *First*, the AGOA preference scheme is currently set to expire on September 30, 2025; whether AGOA will be renewed is a big unknown. *Second*, AGOA is subject to an annual review process. The U.S. President is required each year to consider whether individual SSA countries

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[582] 84 Fed. Reg. 63955 (November 19, 2019). https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-24947.pdf

[583] 84 Fed. Reg. 63955 (November 19, 2019). https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-24947.pdf

[584] Proclamation 9887—To Modify the List of Beneficiary Developing Countries Under the Trade Act of 1974 May 16, 2019. Proclamation 9887, 84 Fed. Reg. 23425 (May 21, 2020). https://www.govinfo.gov/content/pkg/DCPD-201900315/pdf/DCPD-201900315.pdf

are, or remain, eligible for AGOA benefits based on the eligibility criteria. A determination can always be made that a country is no longer meeting one or more of AGOA's eligibility criteria.[585] Consider that:

- The annual eligibility review conducted in 2019 resulted in the termination of Cameroon's AGOA eligibility as of January 1, 2020. On October 31, 2019, President Trump announced plans to terminate Cameroon's eligibility for AGOA trade preference benefits, due to gross violations of internationally recognized human rights.[586] With Cameroon out, thirty-eight (38) countries are eligible for AGOA benefits in 2020 (**Appendix IV**).[587][588]

- On March 30, 2018, President Trump determined that Rwanda was out of compliance with AGOA's eligibility requirements due to insufficient progress toward the elimination of barriers to U.S. trade and investment with respect to apparel. As "punishment," the Trump Administration issued a proclamation suspending the application of duty-free treatment for all AGOA eligible apparel products from Rwanda, effective July 31, 2018.[589]

18.6. Low Preference Utilization

Presently, Africa's share of the U.S. import apparel market is less than 2 percent.[590] In an interview with America.gov, Assistant U.S. Trade Representative for African Affairs Florie Liser lamented the fact that Africa's share of the U.S. import apparel market was low compared to other developing countries and regions. Liser noted that depending on the product, Bangladesh exports to the United States three to five times the amount of apparel that is exported to the United States by all sub-Saharan African countries combined. "That shows you that they [the Africans] have huge potential but somehow that is not being advanced" Liser added.[591] Kenya is yet to fully utilized the opportunities available under AGOA and the GSP. As noted in Kenya – AGOA Strategy:

> Despite trade opportunities arising from tariff preferences provided under the AGOA and the General System of Preferences (GSP), Kenya is yet to fully exploit the U.S. market. For instance, in 2016, the U.S. imported apparel worth US$83 billion while Kenya only exported US$340 million worth of apparel to the U.S. during the same period. In 2016, U.S. home décor and accessories imports amounted to US$18.1 billion of which Kenya's exports only accounted

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[585] AGOA eligibility criteria are set forth in section 104 of AGOA (19 U.S.C. § 3703) and section 502 of the Trade Act of 1974 (19 U.S.C. § 2463).

[586] USTR (2019). Cameroon. https://ustr.gov/countries-regions/africa/cameroon; USTR (2019), President Trump Terminates Trade Preference Program Eligibility for Cameroon. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/october/president-trump-terminates-trade

[587] USTR (2019). AGOA Eligible and Ineligible Countries – 2020. https://ustr.gov/issue-areas/preference-programs/african-growth-and-opportunity-act-agoa/list-eligible-countries

[588] USTR (2019), Africa Growth and Opportunity Act. https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa

[589] Reuters (2018). Trump suspends duty-free status for clothes imports from Rwanda. https://www.reuters.com/article/us-usa-trade-rwanda-idUSKBN1KK2JN

[590] https://ustr.gov/about-us/policy-offices/press-office/blog/trade-key-africa%E2%80%99s-economic-growth

[591] "Trade Is Key to Africa's Economic Growth". https://ustr.gov/about-us/policy-offices/press-office/blog/trade-key-africa%E2%80%99s-economic-growth

for a total of US$3.1 million, demonstrating a significant opportunity for Kenya to work with stakeholders to expand its U.S. market share.[592]

Although Kenya is one of AGOA's top five exporters to the U.S., compared to the performance of some U.S. GSP beneficiary countries in Asia and Latin America, Kenya's performance is poor. Under AGOA, Kenya exports a limited range of products and most of Kenya's export are low-value raw agricultural products and textile with little added value.

- In 2019, the U.S. imported agricultural products from India valued at about $2.6 billion and during the same period imported agricultural products valued at $126 million from Kenya.
- U.S. total imports of agricultural products from Vietnam totaled $2.0 billion in 2019; Vietnam is now the U.S.' 21st largest supplier of agricultural imports.
- U.S. total imports of agricultural products from Indonesia totaled $3.0 billion in 2019. In 2019, Indonesia was the 10th largest supplier of agricultural import to the U.S.
- A growing number of countries are exporting the same goods to the U.S. as Kenya. Leading categories of Vietnam's export to the U.S. now include tree nuts ($1.1 billion), unroasted coffee ($277 million), spices ($194 million), and processed fruit & vegetables ($53 million).

Apparel

- In 2019, the U.S. top import categories (2-digit HS) from Vietnam were: electrical machinery ($22 billion), knit apparel ($7.7 billion), furniture and bedding ($7.2 billion), footwear ($7.0 billion), and woven apparel ($5.8 billion).
- In 2019, Vietnam, for the first time in history, ranked the world's seventh-largest textile exporter ($8.8bn of exports, up 8.3% from a year earlier).

18.7. Arguments in Favor of a FTA

There are good arguments in favor of a Kenya-U.S. FTA. *First*, with AGOA presently set to expire in 2025, there could be real benefits in securing permanent preferential access to one of the world's largest economies and Kenya's second largest export market. *Second*, an FTA may serve a signaling function in the sense that it could signal Kenya's commitment to liberal economic policies. *Third*, analysts speculate that an FTA could help bolster Kenya's strategic relationship with the U.S. and consequently boost Kenya's position vis-à-vis regional rivals.[593] Fourth, Kenya is not the UN List of Least Developed Countries and hence, does not qualify for additional preferences reserved for LDCs under the U.S. GSP.[594] Should AGOA expire without a replacement, Kenya would face a greater risk than neighboring EAC countries regarding access to U.S. market for some of Kenya's key exports.

It is important to note that an FTA is not likely to create more market access opportunities for Kenya than it currently enjoys under U.S. GSP and AGOA. Under AGOA, a

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[592] Id. Kenya Ministry of Industry, Trade and Cooperatives (2018). The Kenya National African Growth and Opportunity Act (AGOA) Strategy and Action Plan (2018 – 2023).
[593] Congressional Research Service, U.S.-Kenya FTA Negotiations, In Focus, May 28, 2020. https://crsreports.congress.gov/product/pdf/IF/IF11526
[594] UN List of Least Developed Countries (as of December 2020). https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/ldc_list.pdf

significant percentage of Kenya's key exports already enter the U.S. duty free. Over the past ten years, the U.S. has become one of Kenya's top export market. In 2019, "nearly 80% of U.S. imports from Kenya entered duty-free under either AGOA or GSP, and remaining imports were largely duty-free on an MFN basis." Furthermore, "[t]he U.S. average effective applied tariff (total imports divided by duties) on Kenyan imports was 0.1% in 2019."[595] While a comprehensive FTA will liberalize sectors such as services, investment, and digital trade, Kenya is not likely to utilize market access openings in these sectors anytime soon.

In the final analysis, the decision to negotiate an FTA should be based on sound assessment of readiness and careful cost-benefit analysis. Countries in SSA must resist attempts by other countries to railroad them into ratifying trade deals that they are neither ready for nor are able to implement or fully utilize.

18.8. A Post-AGOA Agenda

Countries in Africa can and should pressure U.S. lawmakers and the Biden Administration to extend AGOA which is presently set to expire in 2025. However, regardless of whether AGOA is extended beyond its current 2025 deadline or not, countries in Africa, particularly the more developed economies in the continent, must begin to earnestly plan and prepare for a post-AGOA trading arrangement with the U.S.

18.8.1. Why a Post-AGOA Plan May be Inevitable?

First, Congress never intended AGOA to become a permanent program and has repeatedly stressed the need for post AGOA arrangements. Of course, it is up to individual countries in Africa to decide whether a FTA is in their best interest and when is the right time to negotiate such an agreement. In the Trade Preferences Extension Act of 2015, Congress once again reiterated that it is the policy of the U.S. to seek to deepen and expand trade and investment ties between SSA and the U.S. including through BITs and FTAs.

> SEC. 108. DEEPENING AND EXPANDING TRADE AND INVESTMENT TIES BETWEEN SUB-SAHARAN AFRICA AND THE UNITED STATES.
>
> It is the policy of the United States to continue to—
>
> (1) seek to deepen and expand trade and investment ties between sub-Saharan Africa and the United States, including through the negotiation of accession by sub-Saharan African countries to the World Trade Organization and the negotiation of trade and investment framework agreements, bilateral investment treaties, and free trade agreements, as such agreements have the potential to catalyze greater trade and investment, facilitate additional investment in sub-Saharan Africa, further poverty reduction efforts, and promote economic growth;
>
> (2) seek to negotiate agreements with individual sub-Saharan African countries as well as with the Regional Economic Communities, as appropriate;
>
> ….reiterated; and
>
> (4) promote the negotiation of trade agreements that cover substantially all trade between parties to such agreements and, if other countries seek to negotiate trade agreements that do not cover substantially all trade, continue to object in all appropriate forums.

[595] Congressional Research Service, U.S.-Kenya FTA Negotiations, In Focus, May 28, 2020. https://crsreports.congress.gov/product/pdf/IF/IF11526

Second, as countries in Africa get into more reciprocal arrangements with third countries, the justification for AGOA arguably diminishes and U.S. law makers will come under increased pressure to demand more from countries in Africa. In 2016, then USTR Michael Froman noted that "[a]s more reciprocal arrangements go into effect within sub-Saharan Africa and between African countries and other developed country partners, the pressure to consider more stable, permanent, and mutually beneficial alternatives to AGOA will grow in the United States as well."[596]

18.8.2. Basic Contours of a Post-AGOA Agenda

Over the years, three options for a post-AGOA U.S.-Africa trade arrangement have emerged and are frequently tossed around: (i) FTAs between the U.S. and individual countries in Africa; (ii) FTAs between the U.S. and regional economic communities in Africa; (iii) a continental FTA between the U.S. and the African Union. An assessment of the pros and cons of each option is beyond the scope of this report. Whatever the option(s) decided upon, all sides would have to contend with very thorny issues including the timing, scope, method, and sequencing of liberalization.[597] It would appear that the Africa Union (AU) favors the third option, that is, negotiating a continental FTA with the AU. According to a joint U.S.-AU statement delivered during the 2019 AGOA Forum in Abidjan, Côte d'Ivoire, on August 5, 2019, "[t]he U.S. and the AU share a mutual desire to pursue deeper trade and investment ties beyond the [AGOA]…eventually leading to a continental trade partnership between the United States and Africa that supports regional integration."[598] On the second option, it would be recalled that the Southern African Customs Union (SACU) is an African regional economic organization. Negotiations to launch a FTA between the U.S. and the five members of SACU (Botswana, Lesotho, Namibia, South Africa, and Swaziland) began on June 3, 2003. Although negotiations were initially scheduled to conclude by December 2004, talks stalled and resumed but generally moved at a very slow pace. In 2006, negotiations between the U.S. and SACU were suspended "due to divergent views on the scope and level of ambition for an FTA."[599]

In a 2016 report, *Beyond AGOA: Looking to the Future of U.S.-Africa Trade and Investment*, the USTR makes the case for developing new policies to strengthen the trade and investment relationship between the United States and Africa and discusses potential structural and strategic options for moving beyond AGOA. According to the USTR:

> [P]olicymakers will need to consider policy instruments that are most appropriate for U.S.-Africa trade and investment. AGOA has supplied the policy architecture for nearly two decades. **But, while AGOA has had important successes, our experience suggests that it is unlikely to be sufficient for achieving transformative changes in trade and investment. To deepen and expand the U.S.-African trade and investment relationship over the long term, we will need more effective mechanisms to address both tariff and non-tariff constraints to trade, at the border and beyond**. The United States, the European Union, sub-Saharan trading partners, and others have used a number of different policy instruments to seek to deepen trade and investment ties, from: (1) comprehensive U.S.-style trade agreements, which may be an

596 USTR (2016), Beyond AGOA: Looking to the Future of U.S.-Africa Trade and Investment. https://ustr.gov/sites/default/files/2016-AGOA-Report.pdfId., p. iv.
597 What Kenya should consider in free trade deal with America. Business Day (Kenya), 24 June 2020. https://bilaterals.org/?what-kenya-should-consider-in-free
598 https://agoa.info/news/article/15636-joint-statement-between-the-us-and-the-african-union-concerning-the-development-of-the-afcfta.html
599 https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/southern-african-customs-union-sacu

> option for sub-Saharan African partner countries that are willing and able to undertake the generally higher standards of such an approach; to (2) limited, asymmetrical EU-type agreements, which have no precedent in the United States and may offer limited benefits on both sides; to (3) collaborative arrangements like Trade Africa that may be useful "stepping stones" for countries with limited capacity to undertake comprehensive trade agreements in the near term; to (4) preference programs with policy-based eligibility criteria. U.S. and African policymakers should consider the advantages and disadvantages of the full spectrum of approaches in determining a way forward.[600]

Clearly, the option that the U.S. is presently pursuing with Kenya – deep and comprehensive FTA – is not the only possible option for a post-AGOA arrangement with the U.S. U.S. policy documents, including documents emanating from the U.S.T.R. clearly envisage the possibility of other options. In the short term, effort should be made to get the U.S. Congress to extend AGOA. In the long term, it is important that Kenya, and other countries in Africa, carefully weigh all possible options for a post-AGOA arrangement with the U.S. For example, there are many good reasons why a limited asymmetrical rather than a deep, comprehensive FTA may be in Kenya's best interest at least in the medium to long term.

[600] USTR, *Beyond AGOA: Looking to the Future of U.S.-Africa Trade and Investment* (2016), p. iii. Emphasis added.

Concluding Recommendations

19. Concluding Recommendations

AGOA EXTENSION. AGOA UTILIZATION. POST-AGOA AGENDA

19.1. AGOA Extension. A More Effective Use of AGOA Forum. A Post-AGOA Agenda

Countries in Africa can and should pressure U.S. lawmakers and the Biden Administration to extend AGOA but with the understanding that AGOA cannot and is not likely to support a long-term trade arrangement between the U.S. and Africa. Since 1974, Congress has created six trade preference programs aimed at assisting developing countries. Of the six programs, five are still in effect and are: (i) the Generalized System of Preferences; (2) Caribbean Basin Economic Recovery Act (CBERA); (3) the Caribbean Basin Trade Partnership Act (CBTPA); (4) the African Growth and Opportunity Act; and (5) Nepal Trade Preference Act (NTPA). Most of the preference programs have either expired or are about to expire. It is recommended that countries in Africa keep a keen eye on which programs are extended and the arguments presented in Congress for and against extension. It is expected that the U.S. GSP will be extended with or without additional eligibility criteria. Although expired, this is not the first time the U.S. GSP has expired without reauthorization. The GSP program has reportedly lapsed prior to its reauthorization in 10 of the 14 times it was extended. In the past, Congress has extended the U.S. GSP retroactively from the original expiration date, so that importers are refunded (without interest) for the duties incurred during the lapse.[601]

U.S. Preference Programs and Dates of Expiration

U.S. Preference Program	Expiration	Renewal Action
U.S. GSP	December 31, 2020[602]	None Yet. Reauthorization expected.
NTPA	December 31, 2025[603]	None Yet.
CBERA	September 30, 2020[604]	Reauthorization bills pending
CBTPA	September 30, 2030	Reauthorized in October 2020[605]
AGOA	September 30, 2025	None Yet,

Source: Author's Compilation

[601] Congressional Report Service, Generalized System of Preferences (GSP) (2021).
[602] 19 U.S.C. 2465. Division M, Title V of the Consolidated Appropriations Act, 2018 (P.L. 115-141).
[603] Proclamation 9555, 81 Fed. Reg. 92499 (December 20, 2016).
[604] H.R. 991 (introduced in the House of Representative on February 6, 2019) and S.2473 (introduced in Senate on September 12, 2019) would extend CBTPA preference until September 30, 2030.
[605] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/ambassador-robert-lighthizer-issues-statement-concerning-caribbean-basin-economic-recovery-act

19.2. A More Effective Use of AGOA Forum. A Post-AGOA Agenda

While AGOA survives, it is important that countries in Africa develop concrete strategies on how AGOA can support deeper regional integration in Africa. The AGOA Forum offers a great platform for conducting serious discussions about how AGOA could be improved.[606] Unfortunately and sadly, Africa's participation in AGOA Forum in the past has been very weak and did not involve private sector and civil society representatives nor did they involve lawmakers from countries in Africa. According to one report, at the 2019 meeting,

> "Participants from the U.S. side included senior government officials, members of Congress, and private sector and civil society representatives. Participants from the African side were mainly trade and commerce ministers from the AGOA-eligible countries, heads of African regional economic communities, and representatives from the private sector and civil society."[607]

First, it is suggested that African states take the next few meetings seriously and be ready to engage with participants from the U.S. side on a wide range of issues.

Second, it is recommended that from the Africa side, the delegation should include trade scholars, private sector and civil society representatives, and law makers.

Third, it is suggested that careful study be made of how countries in other regions are utilizing the U.S. trade preference programs and how they can make better use of AGOA individually and in furtherance of the goal of regional integration.

REGIONAL INTEGRATION ISSUES

19.3. Support Regional Market and Regional Integration

It is imperative that any trade deal reinforce regional integration with rules of origin that allow for greater production-sharing among AfCFTA producers. Flexible rules of origin will enhance regional competitiveness by increasingly co-production relationships and greater economies of scale. This is particularly so as regards the textiles and apparel sector. AGOA's Third-Country Fabric provisions is credited with generating thousands of jobs in SSA and sustaining the apparel industry in countries like Kenya and Madagascar. In 2012, while making a case for the extension of the Third-Country Fabric provision, the USTR noted that apparel trade under AGOA depended on the Third-Country Fabric provision and warned that "failing to extend the [Third-Country Fabric] provision … means that apparel buyers are preparing to move production out of AGOA beneficiary countries, which will likely result in significant job losses and factory closures in Africa."[608] Further, the USTR warned that "[t]he potential collapse of AGOA apparel exports – if third country fabric is not extended – will also have a negative impact on the cotton and textiles inputs, and would significantly weaken the prospects

[606] The U.S.-Sub-Saharan Africa Trade and Economic Cooperation Forum (also known as the AGOA Forum) was established pursuant to Under Section 105 of AGOA (19 U.S.C. § 3704) to discuss trade, investment, and development at an annual ministerial-level meeting with AGOA-eligible countries.

[607] USTR, Year in Trade 2019 (2020).

[608] https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/urgent-need-extend-agoas-third-country-fabric-provision-and-i

for the development of a viable and more vertically integrated African cotton-to-apparel value chain."[609]

19.4. *Address the AfCFTA Question*

Kenya cannot afford to ignore its regional market. In 2019, 35.2% of Kenya's exports by value were delivered to African countries compared to 24% worth of goods that went to Europe, and 8.4% that went to North America (8.4%). Kenya cannot afford to ignore the AfCFTA. 54 African countries signed the AfCFTA in March 2018. The AfCFTA entered into force in May 2019 and is binding on the 34 countries (including Kenya) that have ratified it.[610] Start of trading under the AfCFTA Agreement began on 1 January 2021. Tariff offers have been exchanged. EAC is offering 79.4% of tariff lines which is below the threshold of 90%. Negotiations are on-going on this, in view of the Summit expected around June 2021. To be sure, the AfCFTA does not establish a customs union and is still largely aspirational. However, a custom union is in the horizon and the AfCFTA is considered a stepping-stone towards an African customs union. Although the AfCFTA does not appear to preclude countries from concluding bilateral trade deals with third countries, a possible U.S.-Kenya trade deal is raising concerns in many quarters.

First, a bilateral trade deal may make it more difficult for AfCFTA member states to set the terms of a post-AGOA U.S.-Africa trade relations. This is particularly so given the declared intent of the previous administration to use a Kenya-U.S. FTA as a "model" for the rest of Africa. Given the wide disparity in the economies of countries in Africa, modeling future FTAs off a template with any one country would be is a very bad idea.

Second, the U.S. has repeatedly expressed support for regional integration in Africa and for the AfCFTA. According to the August 2019 *Joint statement between the US and the African Union concerning the development of the AfCFTA*, the U.S. and the AU,

- "share a common goal of enhancing the African Union's efforts to increase continental trade and investment under the [AfCFTA],"
- "share a mutual desire and common goal to deepen dialogue and cooperation on trade and investment matters and to increase trade and investment between the United States of America and Africa," and
- "intend to work together with respect to the AfCFTA to promote a sound trade policy environment, regional economies of scale, and the increased flow of goods and services on the continent in order to increase both continental trade and investment, as well as trade and investment between the United States and Africa."[611]

[609] https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2012/urgent-need-extend-agoas-third-country-fabric-provision-and-i

[610] As at 5 December 2020, 34 countries have deposited their instruments of ratification. Ghana, Kenya, Rwanda, Niger, Chad, Eswatini, Guinea, Côte d'Ivoire, Mali, Namibia, South Africa, Congo, Rep., Djibouti, Mauritania, Uganda, Senegal, Togo, Egypt, Ethiopia, Gambia, Sahrawi Arab Democratic Rep., Sierra Leone, Zimbabwe, Burkina Faso, São Tomé & Príncipe, Equatorial Guinea, Gabon, Mauritius, Central African Rep., Angola, Lesotho, Tunisia, Cameroon and Nigeria.

[611] https://agoa.info/news/article/15636-joint-statement-between-the-us-and-the-african-union-concerning-the-development-of-the-afcfta.html

19.5. Address the EAC Question

Kenya's EAC membership would and should shape any Kenya-U.S. FTA negotiations including negotiations over tariffs, customs, and trade facilitation. Article 37 of the EAC Common Market Protocol poses a challenge to a Kenya-U.S. FTA.[612] Article 37 is titled "Co-ordination of Trade Relations" and provides:

> 1. The Partner States shall coordinate their trade relations to promote international trade and trade relations between the Community and third parties.
> 2. For the purposes of paragraph 1, the Partner States shall adopt common principles in particular in relation to:
> (a) tariff rates;
> (b) conclusion of tariff and trade agreements;
> (c) the achievements of uniformity of measures of liberalisation;
> (d) export promotion strategies ; and
> (e) trade remedies.
> 3. The Council shall establish a mechanism for the co-ordination of trade relations with third parties and shall:
> (a) adopt common negotiating positions in the development of mutually beneficial trade agreements with third parties; and
> (b) promote participation and joint representation in international trade negotiations.

A full and detailed assessment of the implications of the implications of the EAC Common Market Protocol for a Kenya-U.S. FTA is beyond the scope of this report. To be sure, Article 37 does not appear to explicitly prohibit EAC member states from negotiating FTAs with third countries. However, a bilateral trade agreement between an EAC member state and a third country arguably violates the spirit if not the letter of Article 37.

U.S. FREE TRADE AGREEMENT: LESSONS

19.6. Study the Operation of U.S. FTA Partners

Should Kenya and the U.S. agree to a FTA, Kenya will join a growing number of countries that have signed FTAs with the U.S. It is recommended that the Kenyan government and all relevant stakeholders study not only the content of U.S. FTAs but their implementation and enforcement. As of December 31, 2020, the U.S. was party to 14 FTAs involving a total of 20 U.S. trading partners. Starting with the most recent, U.S. FTAs in force as of January 2021 with the year they entered into force are as follows: the U.S.-Panama Trade Promotion Agreement (TPA) (2012); the U.S.-Colombia TPA (2012); the U.S.-Korea FTA (2012); the U.S.-Peru TPA (2009); the U.S.-Oman FTA (2009); a multiparty FTA, the Dominican Republic-Central America FTA (CAFTA-DR) involving the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua (for which the agreement entered into force 2006–07) and Costa Rica (2009);[613] the U.S.-Bahrain FTA (2006); the U.S.-Morocco FTA (2006); the U.S.-Australia FTA (2005); the U.S.-Chile FTA (2004); the U.S.-Singapore FTA (2004); the U.S.-Jordan FTA (2001); NAFTA, with Canada and Mexico (1994); and the U.S.-Israel FTA (1985). In 2019, Canada and Mexico accounted for $1.2 trillion, or 74.7 percent, of

[612] Protocol on the Establishment of the East African Community Common Market. file:///C:/Users/uchee/Downloads/EAC%20Common%20Market%20Protocol%20(1).pdf

[613] CAFTA entered into force for El Salvador on March 1, 2006, for Honduras and Nicaragua on April 1, 2006 and for Guatemala on July 1, 2006.

total U.S. merchandise trade with its FTA partners, while U.S. merchandise trade with its non-NAFTA FTA partners was valued at $415.0 billion.

While no two trade agreements are exactly alike, it is advisable for the Kenyan government to study FTA's involving the U.S. to understand U.S. attitude and policies on issues such as trade and investment liberalization, trade remedies, trade enforcement, special and differential treatment, and dispute settlement. A study of U.S. FTAs, particularly FTAs involving developing countries, might help Kenya reevaluate the costs and benefits of an FTA with the U.S. and appreciate the full extent of the United States' WTO-plus agenda. With respect to the CAFTA-DR, a Congressional Research Service report states that "[m]ore sophisticated and higher-value exports from CAFTA- DR countries have grown since the agreements, entry into force, while exports of light manufactures such as apparel have stagnated or declined." The report states further:

> Agricultural trade has increased moderately. The share of apparel exports from CAFTA-DR to the United States has declined slightly over the past 10 years, while trade in higher-value products such as medical equipment has increased. However, because most U.S. imports from the region had already been duty free under normal trade relations or trade preference programs and imports from CAFTA-DR countries represents a small portion of overall U.S. imports, CAFTA-DR's effect on the U.S. economy has been small.[614]

19.7. U.S.-Morocco FTA: What Lessons?

The U.S.-Morocco FTA was signed June 15, 2004, and entered into force on January 1, 2006. It is expected that the agreement will be fully implemented on January 1, 2023. Total U.S. merchandise export to Morocco was $2,218 million (2017), $3,011 (2018) and 3,479 million (2019). Total U.S. general import of merchandise from Morocco was $1,237 (2017), $1,553 (2018), and $1,581 (2019). The U.S. merchandise trade balance with Morocco was $982 million (2017), $1,458 million (2018), and $1,898 million (2019).

There are very few studies on the economic and social impact of the U.S.-Morocco FTA. The joint committee that monitors the U.S.-Morocco FTA appears to be pleased with the progress.[615] On the occasion of the 6th session of the joint committee in 2019, it was revealed that U.S. FDI in Morocco increased from 2012 to 2018 and now represent about 5.2% of total FDI inflows to Morocco. It was also revealed that during the period 2006-2018, the volume of trade between Morocco and the U.S. more than quadrupled. Trade between Morocco and the U.S. reached %5.44 billion in 2018, compared to $1.34 billion in 2006. During this period, Morocco's export to the U.S. rose from $0.26 billion in 2006 to $1.38 billion in 2018. Morocco's import from the U.S. also rose, from $1.08 billion in 2006 to $4.06 billion in 2018.[616] Significantly, implementation of the U.S.-Morocco FTA continues more than 16 years after it was negotiated an indication of the long-term nature of commitments countries assume when they ratify comprehensive FTAs.

- ✓ A June 2019 meeting of the Agriculture and SPS Subcommittee resulted in an agreement to improve access for U.S. wheat by increasing tenders and improving the administration of the FTA's wheat tariff-rate quota.[617]

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[614] https://crsreports.congress.gov/product/pdf/IF/IF10394
[615] https://en.yabiladi.com/articles/details/81141/joint-committee-monitors-morocco-us-free.html
[616] Id.
[617] USTR, *2020 Trade Policy Agenda and 2019 Annual Report*, February 6, 2020.

- ✓ A June 2019 meeting of the Agriculture and SPS Subcommittee also led to the finalization of certificates allowing U.S. exports of bovine genetics and egg products into Morocco.[618]
- ✓ The U.S. has repeatedly raised concerns regarding labor conditions in Morocco including during the 2017 and 2019 Joint Committee meetings. Morocco is responding through legislation such as the 2016 Law on Trafficking in Human Beings and the 2019 domestic worker law.

In a 2017 report, the Moroccan American Center for Policy, a think thank whose main objective is to promote relations between the U.S. and Morocco, concluded that the U.S.-Morocco FTA "has surpassed moderate expectations for its economic impact, and has been a success story for both sides" [619] According to the report:

> [T]he US-Morocco FTA has quietly proved itself to be an economic success story. Both countries' exports experienced an immediate jump in value in the first year, as bilateral trade shot up 47 percent. By the following year, US exports had already surpassed growth estimates, led by surges in agricultural products, transportation equipment, computer and electronic products, and chemicals, among others. States such as Texas, Washington, Louisiana, California, Ohio, Missouri, and Wisconsin experienced huge boosts in their exports to Morocco—in most cases more than doubling their 2005 export value in the first year of FTA implementation. Overall, US exports to Morocco have now increased by 286 percent. Moroccan exports to the US also grew, albeit more modestly at 125 percent, resulting in an expanding trade relationship between the two countries while maintaining a positive trade balance for the US.[620]

TRADE POLICY: OBJECTIVES, TOOLS & STRATEGIES

19.8. Review Trade Policy Objectives and Functions

As the volume and value of global trade and investment continues to grow, states are giving careful consideration to their trade policy. In consultation with all relevant stakeholders, and against the backdrop of their unique situation and circumstance, states are giving careful consideration to the development of their respective trade policies. To formulate a coherent trade policy, a state must consider a wide range of issues including, (i) trade policy and functions; (ii) role of different stakeholders including the parliament, the judiciary, the executive branch, the private sector, marginalized groups and the civil society; and (iii) trade policy tools and instruments.

Kenya does not appear to have a clear and coherent trade policy. Before concluding any new FTA, particularly a deep, comprehensive and high standard FTA, it is recommended that the Kenyan government review, and possibly update, Kenya's trade policy. Careful consideration must be given to a long list of questions including:

- Who is Kenya's trade policy for?
- What are the overall objectives of Kenyan's trade policy?
- What are the key functions of Kenya's trade policy?
- Who should be involved in shaping Kenya's trade policy?

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[618] USTR, *2020 Trade Policy Agenda and 2019 Annual Report*, February 6, 2020, I.20.
[619] Exceeding Expectations: The US-Morocco FTA. https://moroccoonthemove.com/2017/05/22/exceeding-expectations-us-morocco-fta/
[620] Exceeding Expectations: The US-Morocco FTA (2018), p. 1-2. Footnotes omitted.

- What is the role of the Parliament in making trade policy in Kenya?
- Does the Kenyan Parliament currently exercise any authority over trade policy?
- Does the private sector in Kenya have any formal role in the formulation of trade policy in Kenya? Is this role understood by relevant stakeholders?
- Does the private sector have any informal role in the in the formulation of trade policy in Kenya?
- Are domestic courts in Kenya involved in trade? Are domestic courts in Kenya equipped to engage fully on trade issues?
- What trade policy tools are available to the Kenyan government? Are available tools suitable and adequate for the 21st century?
- What are the main trade remedy laws in Kenya? Are the laws suitable and adequate for the 21st century? Is implementation of the laws adequate?
- Does Kenya have a functioning trade adjustment assistance program designed to provide assistance to workers, farmers and firms that are adversely affected by trade?[621]

19.9. Wither the Multilateral Trading System?

As Kenya wades into the world of reciprocal bilateral trade arrangements, careful consideration must be given to the state of the multilateral trade system and to where the multilateral trading system fits in Kenyan's overall trade policy. Will the multilateral system remain one of the main cornerstones of Kenya's trade policy? Are bilateral arrangements in Kenya's best interest or should more efforts be devoted to reforming the WTO and reviving the Doha Development Agenda? Many experts believe that when trade rules are developed outside the WTO in hundreds of separate bilateral and regional arrangements, the resulting incoherence has a tendency to complicate trade and raise implementation costs, especially for vulnerable countries. The closed and secret approach to FTA negotiations is a major problem as it tends to put weaker countries at a significant disadvantage, limit vital inputs from stakeholders, and encourage informational asymmetry.

19.10. Review Investment Policy

Attracting FDI is an important policy objective for most countries. African countries in general and Kenya in particular can and should probably do more to attract a greater share of global FDI flows which in 2019, stood at $1.54 trillion. Against the backdrop of the sustainable development goals, of the values enshrined in the Kenyan Constitution and of the changing landscape of international investment agreements, it is recommended that the Kenyan government review and reform its international investment treaty regime with a view to mainstreaming the SDGs in Kenya's investment policy. It is also recommended that the Kenyan government revamp its investment promotion strategies with a view to enhancing SDG-investment in Kenya. Until such a review is carried out, it is recommended that any effort to negotiate an investment chapter in a Kenya-U.S. FTA be put on hold.

Given the impressive technological developments of the last decades and related transformation of international production, experts are now predicting tougher competition for FDI in the years ahead. Countries need to constantly review, and possibly revise, their

[621] In the U.S., the Trade Adjustment Assistance (TAA) programs are authorized by the Trade Act of 1974, as amended, and, in 2015, were reauthorized by the Trade Adjustment Assistance Reauthorization Act of 2015 (Title IV of P.L. 114-27).

investment policies if they are to capture the opportunities available while confronting perceived challenges. To UNCTAD, a change in the investment-development paradigm is needed as is a shift in investment promotion strategies towards infrastructure and services. According to UNCTAD:

> Confronting the challenges and capturing the opportunities requires a change in the investment-development paradigm: (i) From a focus on export-oriented efficiency-seeking investment in narrowly specialized GVC segments to an "export-plus-plus" focus – plus investment in production for regional markets, plus investment in a broader industrial base. (ii) From cost-based competition for single-location investors to competition for diversified investments based on flexibility and resilience. And (iii) from prioritizing large-scale industrial investors with "big infrastructure" to making room for small-scale manufacturing facilities and services with "lean infrastructure".[622]

The need for countries, particularly developing countries, to channel investment to SDG sectors is becoming increasingly urgent. While the strategy of promoting investment towards exploiting factors of production, resources, and low-cost labor contributed to the economic development of many countries, experts now believe that "the pool of such investment is shrinking" and are calling for "rebalancing towards growth based on domestic and regional demand and on services."[623] "Investment in the green economy and the blue economy, as well as in infrastructure and domestic services, presents great potential for contributing to achieving the Sustainable Development Goals (SDGs)" UNCTAD asserts.[624] Unfortunately, while most countries in Africa have adopted national strategies on sustainable development, only a handful have developed concrete and coherent strategies for promoting investment in the SDGs. Worse, in most countries in Africa, existing investment promotion instruments applicable to the SDGs are very limited in number.[625] There are many questions that need to be addressed. For example,

- Will a Kenya-U.S. FTA help Kenya mobilize more U.S. funds and actually channel those funds to the 10 SDG sectors: infrastructure, climate change mitigation, food and agriculture, health, telecommunication, and ecosystems and biodiversity?
- Are sustainable development goals effectively mainstreamed in Kenya's investment policy?
- Are the sustainable development goals fully and effectively integrated into Kenya's trade and investment agreements?
- Will the SDGs be fully and effectively integrated into a Kenya-U.S. FTA? How?
- Are the SDGs fully and effectively integrated into all investment contracts involving Kenya?
- Are national security concerns fully integrated into Kenya's investment policy? More and more countries including the U.S. are integrating national security concerns broadly defined into their investment policies. According to UNCTAD, in 2019, the policy trend of recent years towards more stringent foreign investment screening related to national security continued.[626]

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[622] UNCTAD, World Investment Report 2020, p. xv.
[623] Id.
[624] Id.
[625] Id.
[626] Id.

19.11. Sustainable Development in Trade

It is recommended that a Kenya-U.S. FTA contain strong provisions on sustainable development. While stand-alone chapters on sustainable development could be a good place to start, it is equally important that sustainable development considerations are integrated into all aspects of an FTA. It is also important that provisions on sustainable development are strong. A growing number of countries are making great efforts to integrate sustainable development objectives into their trade policy and to make trade an effective tool to promote sustainable development. There is a growing realization economic growth, to be meaningful, must go hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection.

Sustainable development chapters are beginning to appear in FTAs. Recent FTAs involving the EU include provisions on trade and sustainable development. Whether these provisions are actually implemented and whether they will achieve their desired objectives is a subject of intense debate. Chapter 22 of the EU-Canada CETA is entitled 'Trade and Sustainable Development.' In Article 22.1, the Parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations." Article 26.2.1. established a Committee on Trade and Sustainable Development tasked with among other things reviewing the impact of the agreement on sustainable development, and addressing in an integrated manner any matter of common interest to the Parties in relation to the interface between economic development, social development and environmental protection.

19.12. Review the Role of Parliament in Trade Policy

Serious consideration should be given to the idea of enhancing the role of the Kenyan Parliament in trade policy in a manner consistent with the provisions of the Kenyan Constitution. Around the world, particularly in Western democracies, parliamentarians are increasing playing a greater role in the development and implementation of trade policy. UN human rights bodies have consistently called on law makers to get more involved in trade and investment policy making largely because closer monitoring by national parliaments is necessary to recast trade in a human rights-friendly framework and "[t]he role of parliaments is crucial in ensuring human rights protection while promoting trade."[627] Parliament should also be more involved in trade policy because a FTA, depending on scope and depth, could require major changes to the domestic laws, policies, and practices of a state. Given wide disparities between the Kenyan economy and the U.S. economy, and their respective levels of development, it can be expected that a FTA with the U.S. would entail much more than merely clarifying or reconfirming existing laws in Kenya.

Law makers participate in trade policy in a wide variety of ways including by (i) defining trade policy priorities; (ii) ensuring that trade priorities are reflected in trade agreement negotiating objectives; (iii) ensuring that the executive branch adheres to trade negotiating objectives by requiring periodic notification and consultation with parliament; (iv) consistent with their respective constitution, defining the terms, conditions, and procedures under which

[627] A/HRC/33/40 (12 July 2016).

the executive branch may enter into trade agreements; (v) exercising general oversight of trade policy; (vi) considering legislation to implement specific trade agreements; (vii) and authorizing trade programs. With expansion in the scope of bilateral, regional and multilateral trade agreements, the number of policy issues deserving serious and careful consideration has grown considerably nd now include:

- Tariffs and nontariff barriers,
- Import and export policies,
- Regional integration,
- Impact of trade and trade agreements on domestic economy and jobs,
- The intersection of trade and national security, trade and environment, trade and technology, as well as trade and human rights,
- Monitoring and enforcement of trade laws,
- Monitoring and enforcement of trade agreements,
- Trade and environment interaction,
- Preparedness for an evolving global economic landscape,
- The interaction between trade and foreign policy, and
- Trade and economic relations with specific regions and countries.

The approach to parliamentary involvement in trade policy vary from country to country and generally rest on both formal and informal powers. Furthermore, in most countries, parliamentary role in trade policy is not static but evolve over time. In the U.S., Congress has formal (constitutional) competence over international trade policy. Under the U.S. Constitution, Congress has primary authority over trade policy while the President directs overall trade policy in the executive branch. Article 1, Section 8, of the U.S. Constitution grants Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises" and the power "[t]o regulate Commerce with foreign Nations, and among the several states." Congress also has the residual power to make all laws which shall be necessary and proper to carry out the function granted to it under the Constitution. The U.S. Trade Priorities and Accountability Act also addresses the participation of Congress in trade policy. Congress participates in trade policy in a number of ways including by setting out trade negotiation objectives, receiving timely and periodic briefings on trade negotiation, receiving and reviewing reports from key agencies, and approving budgets. Regarding consultation, 19 USC 4203 mandates the USTR to consult with Congress in the course of negotiations as well as prior to exchanging notes providing for the entry into force of a trade agreement. The law requires the USTR and relevant Congressional committees to develop written guidelines on enhanced coordination with Congress. Among other things, the goal is to ensure "timely briefings upon request of any Member of Congress regarding negotiating objectives, the status of negotiations in progress conducted under this title, and the nature of any changes in the laws of the United States or the administration of those laws that may be recommended to Congress to carry out any trade agreement or any requirement of, amendment to, or recommendation under, that agreement."

In the EU, the European Parliament has both formal and informal powers over trade policy. Formally, the European Parliament "has the right to be informed at all stages of the mandating and negotiating process, as well as veto power at the ratification stage."[628]

[628] https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603477/EXPO_STU(2019)603477_EN.pdf

Additionally, "many informal practices have developed to supplement these formal competences, including writing resolutions, channels of information exchange and the development of technical expertise to participate in discussions of negotiation."[629]

19.13. Towards a Transparent Trade Policy

It is recommended that the Kenyan government adopt a more transparent approach to trade policy. A growing number of states are moving in this direction with better results. States, developing as well as developed, are moving towards more transparent trade policy by *inter alia* publishing trade negotiation proposals, publishing periodic "progress reports", holding regular briefings, and involving representatives of different stakeholders in some meetings.

In the EU, the belief is that transparency "should apply at all stages of the negotiating cycle from the setting of objectives to the negotiations themselves and during the post-negotiation phase."[630] Three main plans were laid out in the EU's Trade for All. First, at launch, the European Commission invites the Council to disclose all FTA negotiating directives immediately after their adoption. Second, during negotiations, publish EU texts online for all trade and investment negotiations and make it clear to all new partners that negotiations will have to follow a transparent approach. Third, after finalising negotiations, publish the text of the agreement immediately, as it stands, without waiting for the legal revision to be completed.

19.14. Greater Involvement of Civil Society and Industry Groups in Trade Policy

A growing number of countries and economies acknowledge that the civil society have an important role to play in shaping a country's trade policy. The case for greater involvement of civil society in trade policy is strong. First, given their ever-widening scope including increased focus on regulatory issues, trade agreements have the potential to intrude impermissibly into domestic regulatory space. Second, because of their broad scope, trade and investment agreements also have the potential to impinge on constitutionally protected rights and interests. Third, around the globe trade policy is more debated today than ever before. Fourth, particularly in developing countries, the perception that trade and investment agreements are primarily designed to support the narrow objectives of large businesses rather than broader public interest is growing and need to be addressed.

The U.K. government established the Strategic Trade Advisory Group (STAG) in April 2019, to provides a forum for high-level strategic discussions between government, and stakeholders representing a cross-section of interests from all parts of the UK on trade policy matters.[631] According to the U.K. government, "STAG's principal purpose is for the government to engage with stakeholders, helping to shape our future trade policy and realise opportunities across all nations and regions of the UK through high level strategic discussion."[632]

The Article 22.5 of the Canada-EU CETA is titled 'Civil Society Forum' and obliges the Parties to "facilitate a joint Civil Society Forum composed of representatives of civil society organisations established in their territories … in order to conduct a dialogue on the sustainable

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[629] https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603477/EXPO_STU(2019)603477_EN.pdf
[630] https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf
[631] https://www.gov.uk/government/groups/strategic-trade-advisory-group
[632] https://www.gov.uk/government/groups/strategic-trade-advisory-group

development aspects of this Agreement. Pursuant to Article 22.5.2., the Parties are required to promote a balanced representation of relevant interests, including independent representative employers, unions, labour and business organisations, environmental groups, as well as other relevant civil society organisations as appropriate.

In July 2020, the U.K. government created the Trade Advisory Groups (TAGs).[633] The TAGs' principal purpose "is to provide the blend of strategic and technical expertise required to ensure the United Kingdom's trade negotiations are able to progress at pace."[634] So far eleven new trade advisory groups covering key sectors considered vital to the prosperity of the British economy have been established. The TAGs formed in August 2020 cover the following sectors: Agri-food, Automotive, aerospace and marine, British manufactured and consumer goods, Telecoms and technology, Chemicals, Life sciences, Creative industries, Investment, Transport services, Professional advisory services, and Financial services.

19.15. Assess National Interests. Link Trade Negotiating Objectives to National Interests

States conclude trade and investment agreements in their sovereign capacity and based on their perceived national interest. Consequently, the decision whether or not to conclude an FTA must be based on a careful balancing of interests and only after meaningful impact assessment. Democracies negotiate FTAs for a broad range of reasons including to open up new markets, secure competitive advantage for domestic firms, increase access to lower-cost imports, strengthen alliances, deepen influence in a particular region, or influence the foreign policy of other states. It is for African states, including Kenya, to consistently and clearly spell out their objectives when it comes to international trade and investment agreements and put in place the legal and institutional infrastructure needed to achieve articulated objectives.

Ideally, the articulation of a country's trade negotiation objectives should be a joint effort involving multiple stakeholders including the executive branch, the legislative branch, the business community, civil society organizations, as well as marginalized groups and communities. Furthermore, a country's broad trade negotiating objectives can be established long before the country is confronted with negotiating a particular agreement. In the Trade Promotion Authority, 2015, Congress, as it had done several times in the past, spelt out the goals and objectives to guide the negotiation of U.S. trade agreements. The broad goals set out by Congress are inter alia:

> (1) to obtain more open, equitable, and reciprocal market access;
> (2) to obtain the reduction or elimination of barriers and distortions that are directly related to trade and investment and that decrease market opportunities for United States exports or otherwise distort United States trade;
> (3) to further strengthen the system of international trade and investment disciplines and procedures, including dispute settlement;
> (4) to foster economic growth, raise living standards, enhance the competitiveness of the United States, promote full employment in the United States, and enhance the global economy;
> ….
> (10) to ensure that trade agreements reflect and facilitate the increasingly interrelated, multi-sectoral nature of trade and investment activity;
> (11) to recognize the growing significance of the Internet as a trading platform in international commerce;

[633] https://www.gov.uk/government/publications/trade-advisory-groups-tags/trade-advisory-groups-membership
[634] https://www.gov.uk/government/publications/trade-advisory-groups-tags/trade-advisory-groups-membership

(12) to take into account other legitimate United States domestic objectives, including, but not limited to, the protection of legitimate health or safety, essential security, and consumer interests and the law and regulations related thereto….

19.15.1. Review Kenya's Trade Defense Policy. Review and Revamp Trade Remedy Laws

Kenya is presently not an active users of trade defense policy globally or even among developing economies. Across the globe, major trading nations, including developing countries, use trade remedies mitigate the adverse impact of various foreign trade practices on domestic industries and workers. As Kenya contemplates a FTA with the U.S. and other countries, it would be necessary to review its trade defense policy and infrastructure and to upgrade if necessary.

Trade enforcement is a key priority of the U.S.[635] According to the Trade Promotion Authority, 2015, the principal negotiating objectives of the U.S. with respect to trade remedy laws are:

> [T]o preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, **and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies**, or that lessen the effectiveness of domestic and international safeguard provisions, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions.

The U.S. is not averse to using trade remedy tools at its disposal to address perceived unfairness in the trade policies and practices of its trade partners. Over the past two or three decades, the U.S. has frequently used its antidumping laws and countervailing duty laws to address perceived unfairness in trade using a plethora of trade remedies law including:

- Title VII or the Trade Act of 1930 (19 U.S.C. 1671-1677n, as amended) – focusing on antidumping and countervailing duties;
- Section 201 of the Trade Act of 1974, which focuses on import surges of fairly traded goods;
- Section 301 of the Trade Act of 1974, which focuses on violations of trade agreements or other foreign practices found to be unjustifiable and restrict U.S. commerce; and
- Section 337 of the Trade Expansion Act of 1962, which focuses on patent and copyright infringements, and counterfeit goods.

It is recommended that the Kenyan government make an assessment of its trade remedy tools both in terms of laws that provide for trade remedies and in terms of the human and technical capacity to enforce available laws.

19.15.2. Assess Kenya's Trade Enforcement Apparatus

A country contemplating concluding a high-standard, comprehensive and reciprocal trade agreement must seriously consider how to monitor compliance and what to do when a trade partner violates the terms of the agreement. This begs several questions: (i) What tools are at Kenya's disposal for enforcing compliance? (ii) When diplomatic intervention fail, will Kenya proceed to use available dispute resolution processes? (iii) Is Kenya able to stand firm

[635] Icso, "Blumenauer Cites USMCA Enforcement, WTO Reform Among Trade Panel's 2020 Priorities," Inside World Trade, January 31, 2020.

against unfair trade practices through judicious use of anti-dumping and anti-subsidy measures? These questions are pertinent. The U.S. uses its trade remedy laws forcefully and effectively. The EU believes that ensuring that its partners play by the rules and respect their commitments "is an economic as well as a political imperative." Consequently, when diplomatic interventions fail, "the EU does not hesitate to use the dispute settlement procedures of the WTO" and "is one of the most active and successful users of WTO dispute settlement, prioritising cases based on legal soundness, economic importance and systemic impact."[636]

In the past few years, key U.S. trading partners have imposed retaliatory tariffs on U.S. exports. For example,

- In April 2018, China raised tariffs on certain U.S. imports, including agricultural products such as pork, fruit, and tree nuts.[637] By September 2019, "China had levied retaliatory tariffs on almost all U.S. agricultural products, ranging from 5% to 60%."[638]
- In June 2018, in reaction to U.S. tariff on steel and aluminium from Mexico, the Mexican government retaliated by imposing tariffs ranging from 15% - 25% on a wide variety of products from the U.S. including U.S. sausages, certain cheeses, apples, potatoes, cranberries, whey, blue-veined cheese, and whiskies.[639]
- In July 2018, Canada imposed a retaliatory tariff on a wide range of agricultural products from the U.S. including dairy, poultry, beef products, bottled water, prepared food products and whiskies.
- In response to the U.S. tariff on European steel and aluminium, In June 2018, the EU imposed a 25% tariff on imports of a wide range of U.S. agricultural products including U.S. corn, rice, sweetcorn, kidney beans, peanut butter, orange juice, whiskies, cigars, and other tobacco products.[640]

Significantly, most of the countries that have imposed tariffs on U.S. exports in recent years have been major economies with significant leverage. China is an example. In 2016 and 2017, the U.S. reportedly supplied over one-third of China's total soybean imports, almost all of China's distillers' grain imports (primarily used as animal feed), and most of China's sorghum imports.[641] The EU accounts for about 8% of the value of all U.S. exports and is reportedly the fifth largest market for U.S. food and agricultural exports in 2019.[642] In 2019, the top five largest markets for U.S. food and farm exports were Canada (#1), Mexico (# 2), China (# 3), Japan (#4) and the EU (# 5). In 2018, Kenya was the United States' 110th largest goods export market. What this means is that Kenya does not have significant economic leverage vis-à-vis the U.S. Consequently, it is imperative that Kenya give careful consideration to (i) whether it is in Kenya's interest to conclude a FTA with a major trading partner like the U.S. at the present time and (ii) how to address the

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[636]Trade for All: Towards a More Responsible Trade and Investment Policy. https://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

[637] FAS, "China Responds to U.S. 301 Announcement with Revised Product List," GAIN Report Number: CH 18034, June 21, 2018

[638] CRS Report R45929, China's Retaliatory Tariffs on U.S. Agriculture: In Brief.

[639] FAS, "The Phasing In Of Mexican Retaliatory Tariffs," GAIN Report Number: MX8028, July 11, 2018

[640] FAS, "EU Imposes Additional Tariffs on U.S. Products," GAIN Report Number: E18045, June 21, 2018.

[641] Major Agricultural Trade Issues in 2020, p. 5 https://www.everycrsreport.com/files/20200227_R46242_75a1814cb3e5349bdd0c32ca2e3d963e4a045e82.pdf

[642] Id., at 11.

monitoring, compliance and enforcement challenges that will likely arise in the event that an agreement is concluded.

19.16. Capacity Building and Technical Assistance Should be Fully and Effectively Integrated into Any Future Agreement

It is recommended that a FTA between the U.S. and Kenya include clear and binding obligations on capacity building and technical assistance. Such an agreement should also establish a mechanism to monitor the obligations relating to capacity building and technical assistance. It would be very risky for a developing country like Kenya to accept major and binding obligations in an FTA based on vague promises of technical assistance or promises of technical assistance that come with a long list of difficult conditions and requirements. The good news is that U.S. trade law already makes provision for capacity building and technical assistance. Several provisions in U.S. trade statutes provide for capacity building. The Section 102(c) of the Trade Promotion Act addresses capacity building and provides:

> (c) CAPACITY BUILDING AND OTHER PRIORITIES.—
>
> In order to address and maintain United States competitiveness in the global economy, the President shall—
>
> (1) direct the heads of relevant Federal agencies—
>
> (A) to work to strengthen the capacity of United States trading partners to carry out obligations under trade agreements by consulting with any country seeking a trade agreement with the United States concerning that country's laws relating to customs and trade facilitation, sanitary and phytosanitary measures, technical barriers to trade, intellectual property rights, labor, and the environment; and
>
> (B) to provide technical assistance to that country if needed;
>
> (2) seek to establish consultative mechanisms among parties to trade agreements to strengthen the capacity of United States trading partners to develop and implement standards for the protection of the environment and human health based on sound science….

The good news also is that the U.S. devotes a considerable amount of resources towards trade capacity building. In FY2016, the U.S. reportedly invested about $1.2 billion in 651 trade capacity building projects across 134 countries. For what it is worth, provisions relating to capacity building are beginning to appear in FTAs. Chapter 19 of the U.S.-Peru Agreement is titled "Administration of the Agreement and Trade Capacity Building."[643] In recognition that trade capacity building assistance is a catalyst for the reforms and investments necessary to foster trade-driven economic growth, poverty reduction, and adjustment to liberalized trade, the agreement establishes a Committee on Trade Capacity Building, comprising representatives of each Party (Article 19.4.1.). The Committee is to:

- seek the prioritization of trade capacity building projects at the national or regional level, or both;
- invite appropriate international donor institutions, private sector entities, and nongovernmental organizations to assist in the development and implementation of trade capacity building projects in accordance with the priorities set out in each national trade capacity building strategy;

[643] https://www.nytimes.com/2020/10/19/business/economy/us-brazil-limited-trade-deal.html

- work with other committees or working groups established under this Agreement, including through joint meetings, in support of the development and implementation of trade capacity building projects in accordance with the priorities set out in each national trade capacity building strategy;
- monitor and assess progress in implementing trade capacity building projects; and
- provide a report annually to the Commission describing the Committee's activities, unless the Committee otherwise decides.

The bad news is that in FTAs, capacity building provisions are rarely ever binding and adequately monitored. Lack of transparency is also frequently an issue. It is recommended that the Kenyan government study the approach to technical assistance and capacity building in other FTAs and draw valuable lessons from those agreements.

19.17. Mainstream Human Rights into Kenya's Trade Agreements and Trade Policy

Against the backdrop of Chapter 4 of the Kenyan Constitution (The Bill of Rights), it is recommended that human rights be effectively mainstreamed into Kenya's trade policy and into each individual agreement. Increasingly, U.N. human rights bodies are calling on states to mainstream human rights into their trade and investment agreements. "It is high time to mainstream human rights into all trade agreements and World Trade Organization (WTO) rules and regulations, so that trade representatives and dispute-settlers know that trade is neither a 'stand alone' regime nor an end in itself," the United Nations Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, recommended in a 2016 report.[644] "In case of conflict, priority must be given to advancing the public interest rather than continuing the current emphasis on profit expectations of investors and transnational corporations," Alfred de Zayas added. In consultation with stakeholders and experts, the Kenyan government should explore the various options for mainstreaming human rights and environmental issues into Kenya's trade policy.

19.18. Prioritize Trade Adjustment Assistance Programs

Although trade liberalization may increase the overall economic welfare of the affected trade partners, it creates winners and losers and can cause major adjustment problems for firms, farmers, and workers facing import competition.[645] Trade adjustment assistance is considered among the least disruptive options for offsetting policy-driven trade liberalization and aims at providing assistance to workers and firms adversely affected by trade. Trade assistance takes different forms including funding for career services and training and income support. While developed economies devote a sizeable budget to trade adjustment assistance, many developing countries do not.

The U.S. has had a trade adjustment policy for over five decades. In FY 2019, the United States appropriated $790 million for trade adjustment assistance. In the U.S., the Trade Adjustment Assistance (TAA) program was first established in 1962 by the Trade Expansion

[644] Report of the Independent Expert on the promotion of a democratic and equitable international order. A/HRC/33/40. 12 July 2016.
https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20473&LangID=E

[645] The Trade Act of 1974, as amended. See also The Trade Adjustment Assistance Reauthorization Act of 2015 (Title IV of P.L. 114-27).

Act of 1962 (Pub. L. 87-793). Since 1962, the program has been expanded and repeatedly reauthorized. Pursuant to Title IV of the Trade Preferences Extension Act (TPEA)—the Trade Adjustment Assistance Reauthorization Act of 2015 (TAARA 2015)—the TAA has been amended and reauthorized for six years, until June 30, 2021. In the U.S., TAA goes to workers (administered by the U.S. Department of Labor), firms (administered by the U.S. Department of Commerce), and farmers (administered by the U.S. Department of Agriculture). In 2019, the U.S. spent $582.1 million on TAA to workers and $13 million on TAA to firms. The TAA to firms aims at providing technical assistance to help U.S. firms experiencing a decline in sales and employment to become more competitive in the global marketplace.

Trade adjustment assistance policies are not without controversy. Proponents argue that trade adjustment assistance promote economic efficient by facilitating the adjustment process and returning workers to work more quickly. Proponents also believe that providing trade adjustment assistance is the equitable thing to do as it essentially spreads the cost of trade liberalization by compensates those who lose out due to liberalized trade. On the other hand, critics of trade adjustment assistance "argue that assistance is costly and economically inefficient, reduces worker and firm incentives to relocate and adjust to increased competition, and may not be equitable given that many groups hurt by changing economic circumstances caused by factors other than trade policies are not afforded special economic assistance."

Before concluding a comprehensive FTA with the U.S., it is strongly recommended that the Kenyan government design and put in place a transparent trade adjustment assistance policy and program. Ideally, such a program should (i) be designed in consultation with Parliament and all relevant stakeholders; (ii) be backed by an act of Parliament; (iii) be adequately funded; and (iii) be administered by experts in consultation with all relevant stakeholders.

19.19. Develop a Strong and Forward-looking Export Promotion Policy

Negotiating a high-standard comprehensive FTA with one of the largest economies in the world signals to the world that Kenya is ready to play in the big league. This begs the question: how does the Kenyan government promote export and support Kenyan investors? Does Kenya's export promotion policy and practice need revamping? Is Kenya's export promotion policy tools ready for 21st century trade? What is the role of sub-regional governments in Kenya's trade policy and in promoting Kenyan export?

The U.S. has a plethora of laws designed to promote U.S. exports. In addition, over the years, the U.S. has created numerous agencies tasked with promoting U.S. exports. Key federal agencies include the Export-Import Bank (Ex-Im Bank),[646] the Department of Agriculture, and the Overseas Private Investment Corporation (OPIC). Enacted in October 2018, the Better Utilization of Investments Leading to Development Act of 2018 (BUILD Act), creates a new agency, the United States International Development Finance Corporation (Corporation). The purpose of the corporation is to "mobilize and facilitate the participation of private sector capital and skills in the economic development of less developed countries …, and countries

[646] Export-Import Bank Act of 1945, as amended). See the Export-Import Bank Reform and Reauthorization Act of 2015 (Division E, P.L. 114-94).

in transition from nonmarket to market economies, in order to complement the development assistance objectives, and advance the foreign policy interests, of the United States."

It is recommended that the Kenyan government review and possibly upgrade Kenya's export promotion laws and institutions. While large economies use export promotion program to advance commercial interests and foreign policy objectives, smaller economies use it to help private sector actors overcome identifiable market gaps and inefficiencies.

19.20. Reform

Economic and business rankings are controversial. Critics question the ideology that underpin most rankings as well as their methodology. Despite controversies surrounding economic and business rankings, they can be valuable tools for domestic reform. Based on some of the leading global indicators and rankings, although Kenya has made some progress over the past decade, the country still has a long way to go. Kenya ranked 77th (out of 136) on the *Enabling Trade Index 2016*, 95th (out of 141) on the *Global Competitiveness Index 2019*. Furthermore, Kenya scored 48/100 on the *2020 Freedom in the World 2020* index, ranked 143rd (out of 189) on the *Human Development Index 2020*, and ranked 126th (out of 189) on the Gender Inequality Index 2019, 109th (out of 153) on the *Global Gender Gap Index 2020*, as well as 132th (out of 180) on the *2020 Environmental Performance Index*.

Keeping aside important questions about methodology and ideology, the economic and social rankings highlighted above raise important questions about Kenya's readiness to engage with the No. 1 economy in the world, the potential negative impact of a Kenya-U.S. FTA on women and other vulnerable groups in Kenya, and the need for reform on multiple levels. Drawing on some of the reports, the Kenyan government could consider addressing some of the perceived weaknesses in Kenya's economic and social landscape before taking on binding obligations in a FTA. The Enabling Trade Index assesses the extent to which economies have in place institutions, policies, infrastructures and services facilitating the free flow of goods over borders. The ETI revolves around seven pillars: (i) domestic market access; (ii) foreign market access; (iii) efficiency and transparency of border administration; (iv)availability and quality of transport infrastructure; (v) availability and quality of transport services; (vi) availability and use of ICTs; (vi) operating environment. On the 2016 ETI, the good news is that Kenya moved up 10 places (from 86th in 2014 ETI). The bad news is that ranked 77th, Kenya still has a long way to go and compares poorly with the U.K. (8th), the country it just concluded a FTA with, and the U.S. (22nd), the country that it is in trade talks with. Kenya also compares poorly to some developing countries including Malaysia (37th), Mauritius (39th), Morocco (49th) and Rwanda (50th).

SOVEREIGNTY/CONSTITUTIONAL QUESTION

19.21. Address Key Constitutional Questions

A Kenya-U.S. FTA should pass the constitutional question – would any provision of the FTA violate the Kenyan Constitution or cause the Kenyan President to take any action that would violate any provision of the Constitution? The question is pertinent for at least three reasons. *First*, a comprehensive and high standard FTA has the potential to implicate several chapters of the Kenyan Constitution including, Chapter 1 (Sovereignty of the People and Supremacy of the Constitution), Chapter 4 (The Bill of Rights), and Chapter 5 (Land and

Environment). *Second*, the U.S. government has raised concern about several issues (e.g. land and land ownership) that are explicitly addressed in the Kenyan Constitution. *Third*, unlike the U.S. Constitution, the Kenyan Constitution guarantees a host of economic and social rights which could be undermined and seriously threatened if Kenya concludes an FTA with the U.S. that covers substantially all trade. *Fourth*, in the FTAs that it concludes, the U.S. government is careful to safeguard U.S. sovereignty and would never accept binding obligations that violate the provisions of the U.S. Constitution. In short, the sovereignty of the U.S. is never on the line in any trade negotiation. Section 108 of the Trade Promotion Authority, 2015 (19 USC 4207) is titled "Sovereignty" and provides:

> **SEC. 108. SOVEREIGNTY.**
>
> (a) UNITED STATES LAW TO PREVAIL IN EVENT OF CONFLICT.—
> No provision of any trade agreement entered into under section 103(b), nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States, any State of the United States, or any locality of the United States shall have effect.
>
> (b) AMENDMENTS OR MODIFICATIONS OF UNITED STATES LAW.—
> No provision of any trade agreement entered into under section 103(b) shall prevent the United States, any State of the United States, or any locality of the United States from amending or modifying any law of the United States, that State, or that locality (as the case may be).
>
> (c) DISPUTE SETTLEMENT REPORTS.—
> Reports, including findings and recommendations, issued by dispute settlement panels convened pursuant to any trade agreement entered into under section 103(b) shall have no binding effect on the law of the United States, the Government of the United States, or the law or government of any State or locality of the United States.

19.21.1. Reaffirm Constitutional Supremacy in Trade Policy

Pursuant to Section 2 of the Constitution of Kenya, the Constitution "is the supreme law of [Kenya] and binds all persons and all State organs at both levels of government." No person may claim or exercise State authority except as authorised under the Constitution. Section 2(4) explicitly states that "[a]ny law, including customary law, that is inconsistent with [the] Constitution is void to the extent of the inconsistency, and any act or omission in contravention of [the] Constitution is invalid." What is more, "[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under [the] Constitution."

Quite apart from their potential to encroach on the regulatory space of states, trade agreements have the potential to impinge on human rights protected under international law and under the Kenyan Constitution. Trade agreements have the potential to impact on a wide range of rights and interests already addressed in the Kenyan Constitution. The land issue is an obvious example. The U.S. has raised concerns about the treatment of land in the Kenyan Constitution and in particular Article 65 of the Kenyan Constitution (Landholding by non-citizens). Article 65(1) specifically provides: "[a] person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years." In a 2019 report, the USTR addressed Article 65. According to the USTR:

> The 2010 Kenyan Constitution prohibits foreigners from holding freehold land title anywhere in the country, permitting only leasehold titles of up to 99 years. The cumbersome and opaque

> process required to acquire land raises concerns about security of title, particularly given past abuses relating to the distribution and redistribution of public land. Complicated land transactions procedures, lack of adequate urban planning, and under-investment in land demarcation are exposing investors to the risk of being given fake title deeds or finding a plot with multiple titles and unauthorized sales for those tracts of land. There are some estimates that clear titles are unavailable for about two-thirds of Kenyan land. The 2016 Community Land Bill made it easier for communities to claim title over their ancestral land and receive documentation.[647]

19.22. Conduct Comprehensive Impact Assessments

The Kenyan government should carry out full impact assessment of future trade and/or investment agreement that it concludes. Governments are carrying out a wide range of impact assessments including human rights impact assessment, environmental impact assessment, sustainability impact assessment and social impact assessment. Before concluding a free trade agreement, it is important that the government fully assess (i) relevant barriers to trade, (ii) economic costs of tariff removal to Kenyan producers and consumers, (iii) product-specific barriers, (iv) customs issues, (iv) other nontariff barriers; and (v) social and environmental issues and implications.[648] The EU conducts sustainability impact assessment related to EU trade agreements.[649] In July 2020, EU's Ombudsman opened an inquiry into why the European Commission did not finalise an updated Sustainability Impact Assessment before the conclusion of the EU-Mercosur trade agreement.[650]

Regarding human rights impact assessment, increasingly, UN human rights bodies and regional human rights bodies call upon states to prepare human rights impact assessments of the trade and investment agreements that they conclude. The UN Special Rapporteur on the Right to Food rightly notes that "[h]uman rights impact assessments can be an important tool for States in negotiating trade and investment agreements, particularly to ensure that they will not make demands or concessions that will make it more difficult for them, or for the other party or parties, to comply with their human rights obligations."[651] Although there are considerable controversies surrounding the effectiveness of impact assessment of trade policies, a growing number of governments carry out impact assessment of their trade agreements. The EU routinely carries out impact assessments to inform its trade policies[652] and has developed n developed guidelines for the conduct of these impact assessments. According to the EU's "Trade for All" paper:

> [E]very significant initiative in the field of trade policy will be the subject of an impact assessment. During the negotiation of major trade agreements, the Commission carries out sustainability impact assessments which allow a more in-depth analysis of the potential economic, social and environmental impacts of trade agreements, including on SMEs, consumers, specific economic sectors, human rights and on developing countries. The Commission also analyses the economic impact of agreements after their conclusion and carries out ex post evaluations after they have been implemented. Impact assessments and evaluations are crucial for the formulation of sound, transparent and evidence-based trade policies.

[647] USTR, 2019 National Trade Estimate Report on Foreign Trade Barriers, 2019.
[648] 83 Fed. Reg. 57526 (November 15, 2018).
[649] European Union, Sustainability Impact Assessment. https://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/
[650] https://www.ombudsman.europa.eu/en/news-document/en/130053
[651] A/HRC/19/59/Add.5 (19 December 2011).
[652] Trade Sustainability Impact Assessment in support of FTA negotiations between the European Union and New Zealand Draft Inception Report 13th of March 2019 is available at: http://trade-sia-new-zealand.eu/images/reports/EU-NZ_SIA_Draft_Inception_Report.pdf.

Pursuant to the *Agreement Concerning Annual Reports on Human Rights and Free Trade between Canada and the Republic of Colombia*, Canada and Colombia carry out annual human rights assessments of their FTA [653] In 2006, Thailand's National Human Rights Commission conducted an ex-ante assessment of the human rights impacts of the Thailand-US trade agreement and published a draft report on the matter in 2006.[654] As noted, increasingly, UN human rights bodies are calling for impact assessment of trade and investment agreements. For example:

- In 2011, the Special Rapporteur on the Right to Food published the *Guiding principles on human rights impact assessments of trade and investment agreements* (A/HRC/19/59/Add.5)
- In 2018, the Independent Expert on the effects of foreign debt on human rights published the *Guiding Principles on Human Rights Impact Assessments of Economic Reforms* (A/HRC/40/57) (Guiding Principles).
- In 2019, the UN Human Rights Council adopted Resolution 40/8 which inter alia toke note of the Guiding Principles and encouraged States, United Nations bodies, specialized agencies, funds and programmes and other intergovernmental organizations to take them into account in developing and implementing economic reform policies.

A human rights impact assessment of Kenya's FTAs is imperative because the Kenyan Constitution guarantees a long list of economic, social and cultural rights. In addition, Kenya has ratified numerous international and regional human rights instruments range of human rights including the African Charter on Human and Peoples' Rights (ratified in 1982), the International Covenant on Civil and Political Rights (ratified 1972), the International Covenant on Economic, Social and Cultural Rights (ratified 1972), the Convention on the Elimination of All forms of Discrimination Against Women (ratified 1984), and the Convention on the Rights of the Child (ratified 1990). Kenya has also ratified a host of multilateral environmental treaties including the Convention on Biological Diversity, the Cartagena Protocol on Biosafety, the Vienna Convention for the Protection of the Ozone Layer, and the Montreal Protocol on Substances that Deplete the Ozone Layer.

NUTS AND BOLTS OF A KENYA-US FTA

19.23. Rethink the Idea of a Deep and Comprehensive FTA

The current negotiating agenda is too comprehensive. A country contemplating a comprehensive and high-standard FTA should determine what issue or issues are non-negotiable. This is particularly important when a relatively small economy is contemplating a FTA with a country that is one of the world's top global traders. Significantly, even large economies like China and the EU are careful to define and limit the scope of their FTA negotiations. The negotiation of the Transatlantic Trade and Investment Partnership (TTIP) was launched in 2013 but died in 2016 without an agreement. In April 2019, the EU Council approved the reopening of negotiations with the U.S. but limited talks to two agreements: (i) a

[653] 4 https://www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf.
[654] https://www.ohchr.org/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf.

trade agreement limited to the elimination of tariffs for industrial goods only, excluding agricultural products; and (ii) an agreement on conformity assessment that would have as its objective the removal of non-tariff barriers.[655] According to the Ștefan-Radu Oprea, Minister for Business Environment, Trade and Entrepreneurship of Romania and President of the EU Council:

> "[The] adoption of the EU negotiating directives gives a clear signal of the EU's commitment to a positive trade agenda with the US and the implementation of the strictly defined work programme agreed by Presidents Trump and Juncker on 25 July 2018. **But let me be clear: we will not speak about agriculture or public procurement. Another important element is that the environmental and social impact of the agreement will be fully taken into account during the negotiations**." (emphasis added).[656]

In the UK-U.S. trade talks, the UK government has reiterated that the National Health Service is off the table. As noted in one policy document:

> The Government has been clear that when we are negotiating trade agreements, the National Health Service (NHS) will not be on the table. The price the NHS pays for drugs will not be on the table. The services the NHS provides will not be on the table. The NHS is not, and never will be, for sale to the private sector, whether overseas or domestic.[657]

19.24. Integrate Sustainable Development Goals in Any Future FTA

Sustainability and sustainable development are not explicitly mentioned in Kenya's Negotiating objective. Considering that sustainable development goals are enshrined in national, sub-regional and continental policy documents, it is recommended that sustainability and sustainable development be fully integrated into any trade agreement between the U.S. and Kenya. It is also recommended that sustainability and sustainability are explicitly referenced in the preamble as well as the statement of treaty objectives.

It is not enough to reference sustainable development in the preamble, it is equally important that sustainable development is referenced as a treaty objective. The CAFTA-DR's statement of treaty "Objectives" does not mention sustainable development, human rights, policy coherence or environment but these goals are referenced in the preamble. Does it matter? The significance of this seemingly irrelevant legal omission is found in Article 1.2 of CAFTA-DR which provides a list of the treaty objectives and states that the treaty shall be interpreted in light of the stated objectives.

[655] https://www.consilium.europa.eu/en/press/press-releases/2019/04/15/trade-with-the-united-states-council-authorises-negotiations-on-elimination-of-tariffs-for-industrial-goods-and-on-conformity-assessment/
[656] Id.
[657] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869592/UK_US_FTA_negotiations.pdf

CAFTA-DR
Article 1.2: Objectives

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment, and transparency, are to:
> (a) encourage expansion and diversification of trade between the Parties;
> (b) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
> (c) promote conditions of fair competition in the free trade area;
> (d) substantially increase investment opportunities in the territories of the Parties;
> (e) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
> (f) create effective procedures for the implementation and application of this Agreement, for its joint administration, and for the resolution of disputes; and
> (g) establish a framework for further bilateral, regional, and multilateral cooperation to expand and enhance the benefits of this Agreement.
>
> 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

19.25. Lessons from On-going Trade Talks Involving the U.S.

Kenya could learn many useful lessons from on-going trade talks involving the U.S. The U.S. is currently in trade talks with several economies including the U.K., the EU, China, and Japan.

- **U.S. – Japan Trade Talks**

Japan has the third largest economy in the world with a nominal GDP of $4.97 trillion in 2019.[658] The U.S. and Japan have periodically affirmed their commitments to promote trade between the two countries.[659] In October 2018, the President officially notified Congress of his intent to negotiate a formal trade agreement with Japan.[660] Judging from the USTR's negotiating objectives, the U.S. hopes to conclude a comprehensive, high-standard FTA with Japan.[661] Given the many sensitive issues on the table, experts believe that a comprehensive agreement would be many years away. Both sides have had to settle for "mini-deals" in the interim. In October 2019, the U.S. and Japan signed two separate agreements: (1) the United States-Japan Trade Agreement (USJTA) and (2) the United States-Japan Digital Trade Agreement (USJDTA).

- **U.S. – EU Trade Talks**

The negotiation of the Transatlantic Trade and Investment Partnership (TTIP) was launched in 2013 but died in 2016 without an agreement on a single chapter after 15 rounds of negotiations. The two sides resumed talks in 2019 but the scope of their new trade talk is much more limited than originally planned.[662] The USTR held public hearings on December 14, 2018, and published negotiating objectives in January 2019.[663]

[658] https://worldpopulationreview.com/countries/countries-by-gdp
[659] USTR, "Statement on Meetings between the United States and Japan," August 8, 2018.
[660] USTR, "Intent to Negotiate Trade Agreements with Japan, the European Union and the United Kingdom," October 16, 2018.
[661] USTR, *United States-Japan Trade Agreement (USJTA) Negotiations: Negotiating Objectives*, December 2018.
[662] USTR, *United States-European Union Negotiating Objectives*, January 2019.
[663] USTR, TPSC, "U.S.-EU Trade Agreement Hearing," December 14, 2018.

- **U.S. – U.K. Trade Talks**

U.K. has the fifth largest economy in the world with a nominal GDP of $2.83 trillion in 2019. On November 16, 2018, the USTR announced a request for public comments on a proposed U.S.-UK trade agreement. Both sides have released public negotiating objectives and talks continue.

- **U.S.- Brazil Trade Talks**

Brazil has the ninth largest economy in the world with a nominal GDP of $1.87 trillion in 2019. U.S. goods and services trade with Brazil totaled an estimated $105.1 billion in 2019. Brazil is currently United States' 14th largest goods trading partner with $73.7 billion in total (two way) goods trade during 2019.[664] In 2019, U.S. goods exports to Brazil totaled $42.9 billion and its goods imports from Brazil totaled $30.8 billion. In October 2020, the U.S. and Brazil agreed to a bilateral "mini" trade deal. Essentially, the two sides agreed to a new Protocol that updates the 2011 Agreement on Trade and Economic Cooperation (ATEC) with three new annexes: (i) Annex I: Customs Administration and Trade Facilitation; (ii) Annex II: Good Regulatory Practices; and (iii) Annex III: Anticorruption.[665] While there are speculations that agricultural tariffs and trade barriers, among other issues, could be addressed in the second phase of U.S.-Brazil trade talks, it is not clear if and when new talks would be launched.

What lessons?

First, trade talks take time and should not be rushed unless absolutely necessary. The U.S.-E.U. trade talks continues more than seven years after it was first launched. Negotiation towards the FTA between Australia and the U.S. commenced in November 2002 and the agreed text was finalized in February 2004.

Second, transparency in trade negotiations is increasingly the norm. The European Commission periodically publishes "progress report" of the U.S.-EU talks.[666] The European Commission's latest report was published on 30 January 2019.[667]

Third, sometimes a limited trade deal – the so called "mini deal" – may make more sense than a colossal and comprehensive deal. The U.S. has had to settle for mini-deals with Japan, China and Brazil.

Fourth, as the history of the EU-U.S. trade talks demonstrate, sometimes trade talks can end without the parties reaching a deal. When trade negotiations end without a deal, this can provide opportunity for negotiating parties to review and possibly revise their respective negotiating objectives. At the relaunch of the EU-U.S. trade negotiations in 2019, the EU Council narrowed the scope of negotiations. The understanding now is that the negotiating directives for the TTIP agreed in June 2013 are obsolete and no longer relevant.

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[664] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/october/united-states-and-brazil-update-agreement-trade-and-economic-cooperation-new-protocol-trade-rules

[665] https://ustr.gov/sites/default/files/files/Press/Releases/ATEC%20Protocol%20Fact%20Sheet%20-%2010.19.20.pdf

[666] EC, "EU-U.S. Trade Talks: European Commission Publishes Progress Report," January 30, 2019. See also, EC, *Progress Report on the Implementation of the EU-U.S. Joint Statement*, July 25, 2019.

[667] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1975

CONCLUSION

For most countries and most regions in the world, participation in global trade is an imperative. In 2019, world merchandise trade totaled US$ 19.051 trillion, world trade in commercial services totaled US$ 5.898 trillion, and Global FDI flows were valued at $1.54 trillion. In the hope of gaining a better share of global trade and using the gains from trade to drive their respective transformative national agenda, countries are rethinking their trade policy and are revamping their trade policy tools and infrastructure. African countries need to continually signal to the world their support for a rule-based trading system and need to secure a greater share of global trade. Individually and collectively, countries in Africa need to reinforce strategic alliance with traditional partners and with emerging economies, even while fast-tracking regional integration. However, whether comprehensive and high-standard FTAs with external actors are the answer and which approach, bilateral or regional, is best requires careful considerations.

For Kenya the choice is either to remain within the framework of Article XXXVI, XXXVII and XXXVIII of GATT 1947 and continue trade on the basis of preferential trade schemes or to move towards reciprocal arrangements. In the short term, it is best for Kenya and countries in Africa to try to get AGOA extended. Although AGOA has been the cornerstone of U.S. trade relationship with SSA for two decades now, Kenya is clearly thinking of life beyond unilateral preferential schemes. With time, the question will not be whether countries in SSA should move to reciprocal trading arrangements but on what terms. This begs several questions. Is there a need to develop new policies and trade arrangements to strengthen trade and investment relationship between countries in Africa and traditional partners? Given a general global trend towards more stable, reciprocal trading arrangements, is there a risk to Africa of clinging to preferential trade schemes? In considering these questions, a number of trends are noticeable. *First*, key preference provider countries, such as the European Union and Canada, appear to be gradually moving away from preferences with all but the poorest countries and are moving towards FTAs. *Second*, as more and more beneficiaries of U.S. preference programs enter into reciprocal trading relationships with old and new partners, there is growing interest in the U.S. in reviewing unilateral trade preference approaches. Kenya's recent trade deal with the United Kingdom is likely to motivate the U.S. to press for a reciprocal trade deal of its own.[668] *Third*, even under the best conditions, trade preference programs have a built-in element of uncertainty that is problematic for many beneficiary countries. *Finally*, the U.S. is clearly thinking about possible post-AGOA arrangements.[669] Significantly, the theme of the 18th annual AGOA Forum was held in Abidjan, Côte d'Ivoire, on August 4–6, 2019 was "AGOA and the Future: Developing a New Trade Paradigm to Guide U.S.-Africa Trade and Investment."

The good news is that the landscape of reciprocal trade arrangements reveals much variation in the kinds of arrangements countries are able to craft, particularly as to scope, quality, and degree of implementation and enforcement. SSA countries must go into trade negotiations armed with all the legal, economic, and diplomatic tools they need to secure beneficial trade deals that have the potential to contribute to sustainable development.

[668] Star (2020). *UK to ink landmark trade deal with Kenya*. https://www.the-star.co.ke/news/2020-11-03-uk-to-ink-landmark-trade-deal-with-kenya/

[669] USTR (2016), Beyond AGOA: Looking to the Future of U.S.-Africa Trade and Investment. https://ustr.gov/sites/default/files/2016-AGOA-Report.pdf

Considering that in 2019, the U.S. had a nominal GDP of $20.49 trillion economy and was the world's No. 1 economy, a Kenya-U.S. FTA is likely to have major implications for Kenya, a country that in 2019 had a nominal GDP of $109.12 billion. A Kenya-U.S. FTA is also going to have a major impact on the East African Community and the African Continental Free Trade Area. African countries are not among U.S. largest trading partners. Even if NAFTA, and now the USMCA, has been good for Mexico, it must be remembered that Mexico is a high-income country with a nominal GDP, in 2019, of $1.30 trillion. In sum, even if it is conceded that NAFTA has been good for Mexico, an agreement modeled after NAFTA and the USMCA could be disastrous for a country like Kenya that is at the lower end of the economic scale.

Kenya's membership in the EAC and the AfCFTA are important considerations and should shape Kenya-U.S. FTA negotiations. The good news is that successive U.S. administrations have pledged support for regional integration in Africa. The bad news is that a Kenya-U.S. FTA that is modelled after the USMCA will have wide repercussions on regional integration efforts in Africa. Against the backdrop of a return to protectionism, unilateralism, the growing preference for bilateral negotiations, and power politics in trade, a regional approach offers important advantages to countries in Africa but also has its drawbacks.

Even if a trade deal is inevitable, bilateral trade deals are not the only options. Multilateral approach to Africa trade is not and should not be off the table. Unlike the Trump Administration which seemed to have a contempt for multilateral trade deals, a Biden Administration may be open to fresh ideas for successfully concluding the Doha Development Round. President Biden has promised a return to multilateralism and, judging from his cabinet appointments, may be open to alliance-building of different scopes and size. As one policy analysts put it:

> "Biden officials will focus more on multilateral trade relationships, and less on bilateral trade talks. It is therefore not clear whether a Biden Administration will continue ongoing bilateral free trade agreement negotiations with Kenya begun earlier this year by Trump officials.
>
> "A Biden Administration could instead seek to broaden these talks to an African regional agreement, or even target negotiations with the newly established African Continental Free Trade Area (AfCFTA)."[670]

A trade deal between the U.S. and Kenya, or indeed any country in SSA, would mark a shift in U.S. policy towards SSA as it would be the United States' first FTA with a sub-Saharan African country and its second with a country in Africa. The U.S. will be looking for increased market access for U.S. firms across all sectors. For Kenya, in theory, a FTA offers an opportunity to fast-track economic ambition articulated in Kenya's Vision 2030, solidify security cooperation with the U.S., and probably get ahead of other SSA countries if AGOA is not reauthorized beyond its expiration date of September 30, 2025. Should Kenya proceed with conclude a FTA with the U.S. it is important that the resulting agreement must among other things (i) recognize the disparities between the two economies; (ii) be of limited scope and be beneficial to Kenya in the medium- and long-term; (iii) not sacrifice any particular sector or sub-sector; (iv) have a strong social, environmental and sustainability component and, in particular, address Kenya's food insecurity and climate change challenges; (v) recognize and address the sensitive issues in key sectors included in the negotiation; (vi) have a built-in trade adjustment assistance program and mechanism; (viii) contain clear, unambiguous and binding

[670] https://african.business/2020/12/trade-investment/biden-decision-on-us-kenya-trade-deal-looms/

provisions on capacity building and technical assistance; (ix) address the cost of implementation meaningfully; (x) respect domestic policy space including through the use of exceptions, exemptions and carve out and limits on the scope and reach; and (x) include transitional and future-developments clauses including with respect to climate change and food insecurity.

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Appendix I

Kenya’s Membership in Regional Economic Communities

African Union (AU):

All African Countries

Common Market for Eastern and Southern Africa (COMESA):

Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, **Kenya,** Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, Zimbabwe.

East African Community (EAC):

Burundi, **Kenya**, Rwanda, South Sudan, Tanzania, Uganda.

The African Continental Free Trade Area Agreement:

The 30 countries that have deposited their instruments of AfCFTA ratification with the AUC Chairperson are: Ghana, **Kenya**, Rwanda, Niger, Chad, Congo Republic, Djibouti, Guinea, Eswatini, Mali, Mauritania, Namibia, South Africa, Uganda, Ivory Coast (Côte d'Ivoire), Senegal, Togo, Egypt, Ethiopia, The Gambia, Sierra Leone, Saharawi Republic, Zimbabwe, Burkina Faso, Sao Tome Principe, Gabon, Equatorial Guinea, Mauritius, Cameroon, and Angola.

Note: Although ratification has been approved for Somalia and Algeria, deposit of the instrument of ratification is still pending.

Appendix II

The United States FTA Partners (as of November 2019)

1. Australia
2. Bahrain
3. Canada
4. Chile
5. Colombia
6. Costa Rica
7. Dominican Republic
8. El Salvador
9. Guatemala
10. Honduras
11. Israel
12. Jordan
13. Korea
14. Mexico
15. Morocco
16. Nicaragua
17. Oman
18. Panama
19. Peru
20. Singapore

Appendix III

AGOA Eligibility Criteria Legislation

The eligibility criteria under AGOA are set forth in section 104(a) of the Africa Growth and Opportunity Act and sections 502(b) and (c) of the Trade Act of 1974, as amended (containing the GSP eligibility criteria).

SEC. 104. ELIGIBILITY REQUIREMENTS

(a) IN GENERAL -- The President is authorized to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country –

(1) has established, or is making continual progress toward establishing –

(A) a market-based economy that protects private property rights, incorporates an open rules based trading system, and minimizes government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets;

(B) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;

(C) the elimination of barriers to United States trade and investment, including by—

(i) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;

(ii) the protection of intellectual property; and

(iii) the resolution of bilateral trade and investment disputes;

(D) economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs;

(E) a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and

(F) protection of internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;

(2) does not engage in activities that undermine United States national security or foreign policy interests; and

(3) does not engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism and cooperates in international efforts to eliminate human rights violations and terrorist activities.

(b) CONTINUING COMPLIANCE.—If the President determines that an eligible sub-Saharan African country is not making continual progress in meeting the requirements described in subsection (a)(1), the President shall terminate the designation of the country made pursuant to subsection (a).

Appendix IV

AGOA Eligible Countries

1. Angola
2. Benin
3. Botswana
4. Burkina Faso
5. Cabo Verde
6. Central African Republic
7. Chad
8. Comoros
9. Republic of Congo
10. Côte d'Ivoire
11. Djibouti
12. Eswatini (Swaziland)
13. Ethiopia
14. Gabon
15. The Gambia
16. Ghana
17. Guinea
18. Guinea-Bissau
19. Kenya
20. Lesotho
21. Liberia
22. Madagascar
23. Malawi
24. Mali
25. Mauritius
26. Mozambique
27. Namibia
28. Niger
29. Nigeria
30. Rwanda
31. São Tomé and Príncipe
32. Senegal
33. Sierra Leone
34. South Africa
35. Tanzania
36. Togo
37. Uganda.

Appendix V

Key TRIPS-plus Provision in the USMCA

	TRIPS	USMCA
Patentable Subject Matter	patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Article 27	USMCA defines patentable subject matter as new products and processes, as well as new uses, methods, or processes of a known product
Patent Term	patented inventions must receive a minimum term of 20 years of protection. Article 33	USMCA requires adjustments of patent terms for "unreasonable" delays in the patent examination or regulatory approval processes.
Opposition System	None	USMCA includes a notification system and procedures (e.g., judicial or administrative proceedings) to assert patent rights or to challenge a patent's validity.
Trademarks – Sound marks	Sound marks not covered. "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark." Article 15	No Party shall require, as a condition of registration, that a sign be visually perceptible, nor shall a Party deny registration of a trademark only on the ground that the sign of which it is composed is a sound. Article 20.17 (Types of Signs Registrable as Trademarks)
Trademarks – Scent Marks	Sound marks not covered. "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark." Article 15	Additionally, each Party shall make best efforts to register scent marks.
Collective Marks and Certification Marks	Does not address collective marks or certification marks	Each Party shall provide that trademarks include collective marks and certification marks. A Party is not required to treat certification marks as a separate category in its law, provided that those marks are protected. Article 20.18 (Collective and Certification Marks)
Copyright – Term of Protection	Life + 50 Years. "The term of protection granted by this Convention shall be the life of the author and fifty years after his death." Article 7(1) of Berne	Life + 70. Each Party shall provide that in cases in which the term of protection of a work, performance, or

	Convention. Article 9, TRIPS Agreement.	phonogram is to be calculated: (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death. Article 20.62
Trade Secret	Silent on duration of trade secrets	Provides that Parties "shall not limit the duration of protection for a trade secret, so long as the conditions in Article 20.72 (Definitions) exist."

Source: Author's Compilation (Information from the USMCA and TRIPS Agreement)

Appendix VI

Kenya/U.S. Negotiating Objectives: Intellectual Property

Intellectual Property

Kenya (Negotiation Objectives)	United States (Negotiation Objectives)
• "The text on intellectual property in the Kenya - USA FTA shall aim to reduce IP-related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights. It shall cover other intellectual property areas covered by Convention on Biodiversity, including genetic resources, folklore, traditional knowledge, and benefit sharing. • Capacity Building and technical assistance will be provided to Kenya in order to fully implement the Agreed provisions on IPR."	- 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 a framework for effective cooperation between Parties on matters related to the adequate and effective protection and enforcement of intellectual property rights; • Promote transparency and efficiency in the procedures and systems that establish protection of intellectual property rights, including making more relevant information available online; • Seek provisions governing intellectual property rights that reflect a standard of protection similar to that found in U.S. law, including, but not limited to, protections related to trademarks, patents, copyright and related rights (including, as appropriate, exceptions and limitations), undisclosed test or other data, and trade secrets; 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, and in particular ensure that rights holders have the legal and technological means to control the use of their works through the Internet and other global communication media, and to prevent the unauthorized use of their works; • Prevent or eliminate government involvement in the violation of intellectual property rights, including cyber theft and piracy; • Secure fair, equitable, and nondiscriminatory market access opportunities for U.S. persons that rely upon intellectual property protection; • Prevent or eliminate discrimination with respect to matters affecting the availability, acquisition, scope, maintenance, use, and enforcement of intellectual property rights; • Respect the Declaration on the TRIPS Agreement and Public Health, adopted by the WTO at the Fourth Ministerial Conference at Doha, Qatar, on November 14, 2001, and ensure that the Agreement fosters innovation and promotes access to medicines, reflecting a standard similar to that found in U.S. law; • Prevent the undermining of market access for U.S. products through the improper use of Kenya's system for protecting or recognizing geographical indications, including any failure to ensure transparency and procedural fairness, or adequately protect generic terms for common use; and • Provide the means for adequate and effective enforcement of intellectual property rights, including by requiring accessible, expeditious, and effective civil, administrative, and criminal enforcement mechanisms. Such mechanisms include, but are not limited to, strong protections against counterfeit and pirated goods. **Procedural Fairness for Pharmaceuticals and Medical Devices:** - Seek standards to ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for U.S. products.

Appendix VII

Kenya/U.S. Negotiating Objectives: Labor

Labor

Negotiation Objectives (Kenya)	**Negotiation Objectives (United States)**
• Undertake to support and cooperate at the ILO as labour is a very important factor for production	- Require Kenya to adopt and maintain in its laws and practices the internationally recognized core labor standards as recognized in the ILO Declaration, including: • Freedom of association and the effective recognition of the right to collective bargaining; • Elimination of all forms of forced or compulsory labor; • Effective abolition of child labor and a prohibition on the worst forms of child labor; and • Elimination of discrimination in respect of employment and occupation. - Require Kenya to have laws governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health. - Establish rules that will ensure that Kenya does not waive or derogate from labor laws implementing internationally recognized core labor standards in a manner affecting trade or investment between the Parties. - 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. - Require Kenya to ensure that foreign workers are protected under labor laws. - Provide access to fair, equitable, and transparent administrative and judicial proceedings. - Ensure that these labor obligations are subject to the same dispute settlement mechanism that applies to other enforceable obligations of the Agreement. - Establish a means for stakeholder participation, including through public advisory committees, as well as a process for the public to raise concerns directly with their respective governments if they believe a Party is not meeting its labor commitments. - Establish or maintain a senior-level Labor Committee, which will meet regularly to oversee implementation of labor commitments, and include a mechanism for cooperation and coordination on labor issues, including opportunities for stakeholder input in identifying areas of cooperation.

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