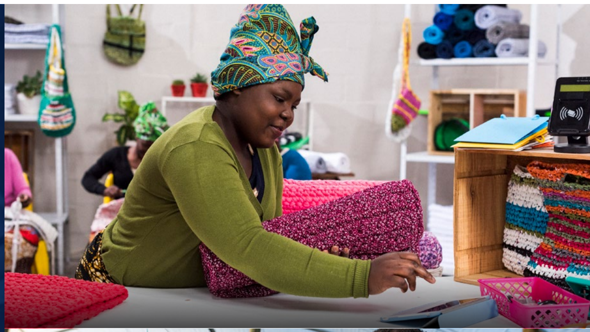
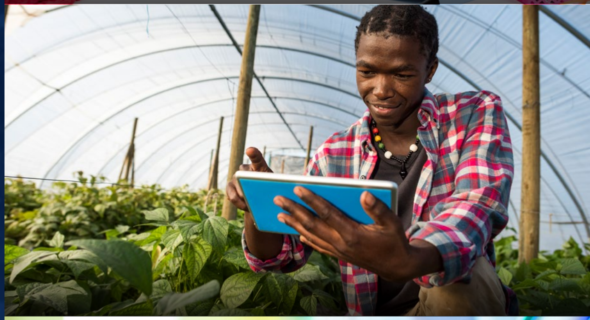
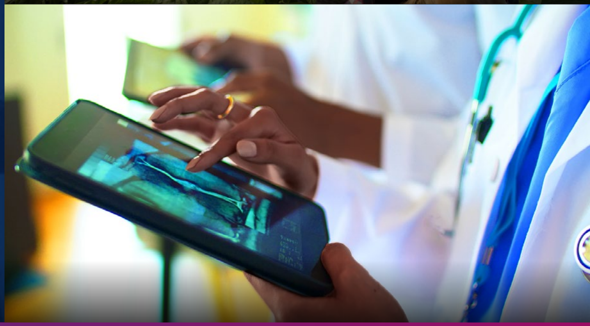
THE UNITED STATES-KENYA FREE TRADE AGREEMENT NEGOTIATIONS







Creating value investing in Africa's infrastructure.

TABLE OF CONTENTS

THE UNITED STATES-KENYA FREE TRADE AGREEMENT NEGOTIATIONS

ABBREVIATIONS

ACFTA	African Continental Free Trade Area
AGOA	African Growth Opportunity Act
CS	Cabinet Secretary
CSIS	Center for Strategic and International Studies
DC	District of Columbia
EAC	East African Community
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GSP	Generalized System of Preferences
FTA	Free Trade Agreement
ILO	International Labor Organization
ITA	International Trade Commission
LDC	Least Developed Countries
NAFTA	North America Free Trade Agreement
TBT	Technical Barriers to Trade
TIWG	Trade and Investing Working Group
TPA	Trade Promotion Authority
USTR	United States Trade Representative
WTO	World Trade Organization

INTRODUCTION

Kenya has been a beneficiary of the African Growth and Opportunity Act (AGOA) which provides qualifying products made in eligible African 'beneficiary' countries preferential, duty-free access to the U.S. market. Through the AGOA, Kenya was one of the first eligible countries to export apparel under separate apparel provisions. According to Trade Law Center's report[1], AGOA built upon and extended preferences available under the United States Generalized System of Preferences (GSP), "by significantly expanding the list of qualifying products (including sensitive categories such as textiles and apparel) and by removing competitive need limitations (CNL) which potentially capped preferences when United States' imports exceeded a certain threshold." The same Trade Law Center's report notes that the AGOA also provides "longer-term preferences that are not subject to the same periodic expiry and renewal requirements of the GSP." With the expiry of the AGOA fast approaching in 2025, Kenya's options to trade with the United States will be through:

i. The GSP, a United States trade preference program that provides opportunities for developing nations to improve their economies through trade. Established by the Trade Act of 1974, the GSP is the largest and oldest United States trade preference program. The program promotes economic activity and sustainable development by eliminating duties on thousands of products when imported from one of 119 designated beneficiary countries and territories.

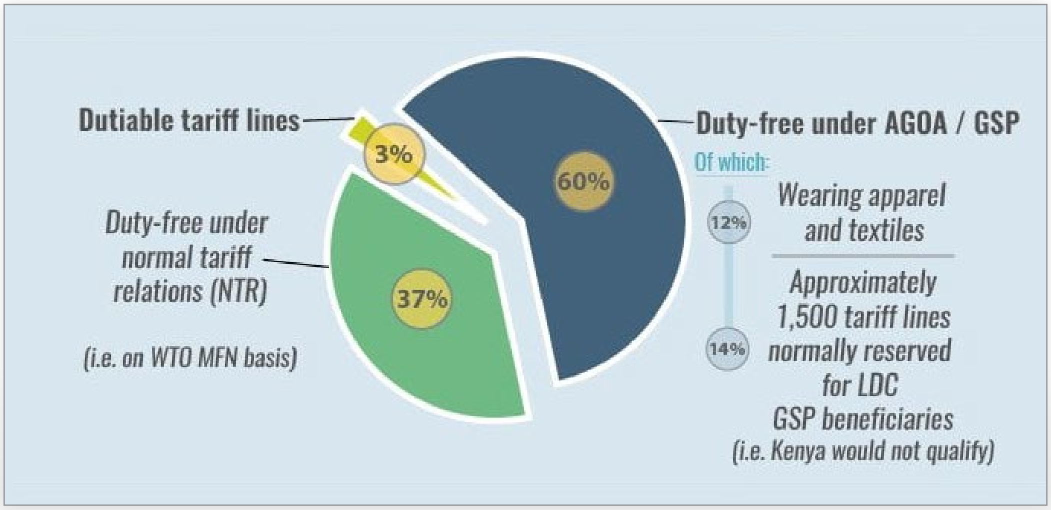
or

ii. A trade arrangement under Free Trade Area as provided by the World Trade Organization (WTO).

[1] Kenya-United States FTA. From AGOA Towards a Bilateral Free Trade Area. https://www.tralac.org/documents/resources/infographics/4234-kenya-us-fta-brochure-agoa-info-december-2020/file.html

Until the AGOA expires, Kenya still has duty free access to the United States for 97% of possible traffic lines.

KENYA'S CURRENT UNITED STATES MARKET ACCESS UNDER AGOA



Source: Trade Law Centre

Source: Trade Law Centre

To sustain and improve export performance to the United States, Kenya's Ministry of Industrialization, Trade and Enterprise Development would need an arrangement that guarantees duty-free quota-free market access for Kenya's products to the United States. **In 2018, both the Kenyan and the United States governments began conversations about a Free Trade Agreement (FTA)**. On the 6th of February 2020, both countries publicly announced their intent to negotiate and conclude an FTA, and in March 2020, the Trump Administration notified Congress about its intent to negotiate a trade agreement with the Republic of Kenya, in accordance with the Trade Priorities and Accountability (TPA) Act. Both countries set up a Trade and Investing Working Group (TIWG) to lead the negotiations.

BACKGROUND

In its announcement to Congress and as reported by the United States Trade Representative (USTR), the Trump Administration noted that this potential agreement with Kenya was in response "to Congress' support, as expressed in the AGOA, to negotiate reciprocal and mutually beneficial trade agreements that serve the interest of both the United States and the counties of Africa."

Kenya has a long-standing relationship with the United States tracing back to since Kenya gained independence from Great Britain in 1963. The Kenyan Cabinet Secretary (CS) for Trade and Industrialization, Betty Maina, noted in an interview with KBC that Kenya considers the United States a key trading partner, with the latter being Kenya's third export market (after Uganda and Pakistan). The United States has also been one of Kenya's main investors especially in social services sectors such as healthcare. During the interview, the Kenyan CS mentioned that the United States reached out to East African Countries seeking to implement better channels for trade and economic activity between both nations. While the rest of the East African Community (EAC) has been rather slow in response, Kenya sees this as an opportunity to advance the ongoing conversations initiated by the United States.

While both countries are yet to sign a deal and we are yet to know the stance of the new United States Administration on this FTA, it is clear that the Biden administration is ready to partner with African countries. A recent message[2] from President Biden during the 34th African Union summit expressed his "eagerness to rebuild partnerships around the world and re-engage with international institutions like the African Union." However, it remains unclear whether the new Administration will revisit the United States-Kenya negotiations. A report by African Business[3] released in December 2020 before the January inauguration indicated that President Biden may be focused on "multilateral trade relationships and less on bilateral trade talks." The report mentioned that "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)."

The USTR under the Trump Administration projected that an agreement between Kenya and the United States would be a model for future trade agreements between the United States and other countries and that it would prompt regional integration with the East African Community (EAC) and the AfCFTA. On the other hand, The African Business report mentioned above notes that Harry Broadman, chair of Emerging Markets Practice at the Berkley Research Group and former chief of staff for President's Council of Economic Advisers under George H.W. Bush warns that "a focus on bilateral negotiations might weaken the AfCFTA." Mr. Broadman points out that "when you pick off bilateral agreements with countries as important as Kenya, you start to deflate the balloon for the AfCFTA, and I think it is the single most important economic policy investment objective that the US should see for Africa." Consequently, it is yet to be known whether the new Administration will restart the bilateral negotiations.

[2] President Biden's message to African Union Summit Participants. U.S. Embassy. https://ke.usembassy.gov/president-bidens-message-to-african-union-summit-participants/
[3] Biden Faces Decision on US-Kenya Free Trade Deal. African Business. https://african.business/2020/12/trade-investment/biden-decision-on-us-kenya-trade-deal-looms/

PRINCIPLES OF NEGOTIATIONS

The FTA provides that such an agreement shall be compatible with the WTO's objectives for trade and will allow for "Special and Differential Treatment"[4]. The trade agreement will also be respectful of each country's previous commitments, whether on multilateral, continental, regional and / or bilateral levels. Additionally, by virtue of the fact that Kenya is a member of the East African Customs Union, the negotiations will be open to any East African Community partner who did not participate from the outset (although this will be subject to terms and conditions already agreed to). Further, given that Kenya is a developing nation while the United States is a developed nation, Kenya has indicated in its objectives that this must be a **development enhancing agreement** in the areas of trade, economic and commercial cooperation.

Negotiations and Timeline

The Trade Promotion Authority (TPA) includes a list of objectives that the United States' Congress has mandated the Administration to pursue in trade negotiations. According to the Center for Strategic and International Studies (CSIS) – a District of Columbia (D.C.) based think-tank, the objectives cover issues beyond tariffs and quotas including: services, investment, intellectual property, labor, the environment, non-tariff barriers, dispute settlement, digital trade, and state-owned enterprises.

The USTR has identified 24 chapters on which it plans to negotiate, and Kenya's Ministry of Industrialization, Trade, and Enterprise Development has identified 22 chapters it intends to negotiate with the United States. The Trade Law Centre[5] notes that although both countries' objectives present a "high degree of correlation in the thematic areas (more details on themes raised are highlighted below), the specific objectives and approached raised often differ." Both the United States'[6] and Kenya's[7] objectives indicate that they intend the negotiations to be based on:

Theme	Description*
i.) Services: telecommunications, financial services, digital trade in goods and services and Cross-Border Data Flows	Commitments on digital trade; open and fair conditions for service trade; special and differential treatment*
ii.) Intellectual Property	Reduction of IP barriers; effective IP protection; cooperation and capacity building

[4] The WTO Agreements contain special provisions which give developing countries special rights, and which give developed countries the possibility to treat developing countries more favorably than other WTO Members. World Trade Organization. https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm

[5] Kenya-United States FTA. From AGOA Towards a Bilateral Free Trade Area. https://www.tralac.org/documents/resources/infographics/4234-kenya-us-fta-brochure-agoa-info-december-2020/file.html

[6] Summary of the U.S.-Kenya negotiating objectives. Office of the USTR. https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf

[7] Proposed Kenya – United States of America Free Trade Agreement. Ministry of Industrialization, Trade, and Enterprise Development. Republic of Kenya. https://www.tralac.org/documents/resources/external-relations/us-agoa/3787-proposed-kenya-us-fta-agreement-negotiating-principles-objectives-and-scope-22-june-2020/file.html

Theme	Description*
iii.) Technical Barriers to trade	National treatment of conformity assessment bodies and mutual recognition; application of WTO TBT decisions; to build on US-EAC Cooperation Agreement
iv.) Customs and Trade Facilitation	Elimination of tariffs and non-tariff barriers. Rules of Origin[8]; customs valuation; adoption of WTO trade facilitation disciplines
v.) Environment	Enforceable environmental obligations; multilateral collaboration
vi.) Labor	Cooperation with International Labor Organization (ILO) Standards
vii.) State-owned and Controlled Enterprises (SOEs)	Commercial principles vs. asymmetric treatment; recognition of important role that SOEs play
viii.) Small and Medium-Sized Enterprises (SME)	Cooperation on SME issues of mutual interest
ix.) Sanitary and Phytosanitary (SPS)	Deeper cooperation; science-based adoption of standards
x.) Trade remedies	Recognition of WTO trade remedy provisions
xi.) Legal and Transparency	Greater transparency around regulations; enforcement; combating corruption
xii.) Government Procurement	Mutual opportunities; commitments asymmetry
xiii.) Competition Policy	Rules around anti-competitive business conduct; competition law enforcement
xiv.) Dispute Settlement	Efficient and transparent dispute settlement mechanisms
xv.) Economic and Technical Cooperation	Support development of export-focused value chains

*Descriptions Source: Trade Law Centre

While the deal closure timeline is unknown, to speed up negotiations and implementation of a deal, "the Administration could decide to seek an agreement in phases, as it did in the case of a Free Trade Agreement with Japan, which might mean that no congressional action would be necessary for a modest first phase" (CSIS)[9].

[8] The World Trade Organization (WTO) defines Rules of Origin as "the criteria used to define where a product was made" and are important for implementing other trade policy measures including trade preferences (preferential rules of origin), quotas, anti-dumping measures and countervailing duties (non-preferential rules of origin). Africa Renewal. https://www.un.org/africarenewal/magazine/january-2021/afcfta-africa-now-open-business

[9] Going Solo: What is the Significance of a U.S.-Kenya Free Trade Agreement? Center for Strategic and International Studies. https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement

Through these negotiations, the United States aims to:

i.) Complete an agreement with Kenya that can serve as a model for additional agreements in Africa and that leads to a network of agreements that will eventually promote Africa's objectives for regional integration

ii.) Create an agreement that builds on the objectives of the AGOA

iii.) Provide a foundation to expand the United States-Africa trade and investments

iv.) Lay the foundation for stronger, more resilient economies to address the current and future health crises

v.) Address both tariff and non-tariff barriers and achieve fairer and more balanced trade

vi.) Ensure fair, balanced and reciprocal trade with Kenya

vii.) Increase transparency in import and export licensing procedures

Through these negotiations, Kenya looks to:

i.) Enter into a bilateral trade and development cooperation negotiation with the United States which is a global economic powerhouse

ii.) Ensure continuation of an open market for Kenyan goods in the United States after expiration of the AGOA

iii.) Enter into a development enhancing agreement

SUMMARY OF THE MAJOR DEAL COMPONENTS

This section highlights a few of the major themes that are part of the United States-Kenya negotiations. These themes touch on various factors such as barriers that have previously impeded trade between both nations, essential regulatory measures to ensure fair channels of trade between both nations and new developments (such as digital taxes and the United States' increased focus on Environment) that will impact implementation of the bilateral agreement.

Anti-corruption

One of the main hindrances to trade between developed and developing nations is the prevalence of corruption. These trade negotiations seek to secure provisions committing Kenya to criminalize corruption (including in government) and to provide adequate penalties to those engaging in corrupt activity. The United States has strong Anti-Money Laundering regulations (AML) set to enable the detection and reporting of suspicious activity that leads to money laundering and terrorist financing. By negotiating this agreement, and in order to reduce corrupt trade practices, the United States aims to apply the Foreign Corrupt Practices Act (a U.S. statute that prohibits firms and individuals from paying bribes to foreign officials to close business deals) as the new standard for deals. In the same way, in negotiating this FTA with Kenya, the United States aims to have Kenya enforce strong regulations against corruption. In addition to calling for the creation of codes of conduct and the development of tools to promote high ethical standards among public officials, the deal also requires the adoption and maintenance of requirements for companies to keep accurate books and records among other measures to curb corruption.

Technical Barriers to Trade

Barriers to trade have been one of the largest impediments to economic activity between both countries. The targeted deal will streamline import and export activities to avoid trade imbalance. The statement of objectives presented by the USTR[10] mentions that the deal will "require application of decisions and recommendations adopted by the World Trade Organization Technical Barriers to Trade Committee that apply to standards, conformity assessment, transparency, and other areas." The United States will also seek Kenya's commitment that the country "will not foreclose export opportunities to the United States with respect to third-country export markets by requiring third countries to withdraw or limit the use of any relevant standard, guide or recommendation developed in accordance with the Technical Barriers to Trade Committee Decision." Finally, with respect to trade-barrier-negotiations, the negotiations call for the establishment of an active 'Technical Barriers to Trade' Chapter Committee to table bilateral and third-party trade concerns, facilitate regional and multilateral activities and to implement good regulatory practices.

Government Procurement

Government procurement is a substantive issue for both nations because of the need to maintain security and quality of their purchases as well as enable the local producers to maintain adequate and reliable supply chains.

In addition to ensuring reciprocity in market access opportunities for both nations, this section of the deal negotiations highlights the United States' desire to "keep in place domestic preferential purchasing programs" such as:

- Preference for small businesses, women, minority owned-businesses (including Native Americans), service-disabled veterans, and distressed areas
- "Buy America" requirements on Federal assistance to state and local projects, transportation services, food assistance and farm support and key Department of Defense Procurement

The United States intends to "maintain ability to provide for labor, environmental, and other criteria to be included in contracting requirements". Kenya on the other hand plans to use Procurement as an instrument to build entrepreneurship in the Kenyan economy and to "secure commitment for Kenya's participation in the United States' Government procurement process."

Small and Medium-Sized Enterprises (SME)

SME issues, including participation in the ongoing implementation of the June 2018 Memorandum of Understanding between the Government of Kenya and that of the Unites States[11], are of mutual interest. The memorandum concerns implementation of the "Big Four Agenda[12]" which is an initiative by Kenya's current president Uhuru Kenyatta to improve the country's key target areas in food security, affordable housing, manufacturing and

[10] United States-Kenya Negotiations. USTR. https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf

[11] In 2018, the then Kenya National Treasury Cabinet Secretary, Henry Rotich, and then U.S. Under Secretary of Commerce for International Trade Gilbert Kaplan signed the U.S.-Kenya Memorandum of Understanding (MOU) to promote U.S. commercial participation and investment between the two countries. The MOU will focus on collaboration between both governments to attract and support American companies to provide the goods, services, and investment required to achieve the Big Four goals and to build critical infrastructure in Kenya. The 2018 MOU was an update to the previous MOU executed in 2015 that had focused exclusively on infrastructure. https://blog.trade.gov/2018/07/26/advancing-both-u-s-and-kenyan-economic-interests-in-transportation-healthcare-and-infrastructure/

[12] The Big Four Agenda is an initiative of Kenya's current President—Uhuru Kenyatta to transform the Kenyan economy through improved manufacturing industry, increased affordable housing, Universal Health Coverage and Food Security. https://big4.delivery.go.ke/

healthcare. For instance, Kenya's stance, (and ultimately the agreements' conclusion) on trade of GMO foods could impact Small and Medium-Sized enterprises mainly in the agriculture sector.

In its negotiations, the United States hopes to "cooperate on SME issues of mutual interest as a means of exchanging timely information on and enhancing trade and investment opportunities." Further, the United States also hopes to "establish an SME Dialogue in the Agreement that may include the private sector, NGOs and other SME stakeholders to provide views and information to the SME Committee."

Labor and Humanitarian Issues

Although Kenya is making moderate advancement towards the elimination of child labor, the Bureau of Labor affairs reports[13] that the country is "yet to ratify the UN Convention on the Rights of the Child Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography". The government has also yet to commit sufficient resources to child labor law enforcement. The CSIS reports that the United States will therefore have to take a new approach to labor negotiations, "perhaps through technical assistance, a work plan, and phased-in obligations. These negotiations will not only address the issue of low wages but also child labor laws as well."

Seeing that this prospective agreement includes *labor* and *agriculture* within its scope of objectives, we expect that the United States and Kenya will create a deal that addresses child labor mitigation especially within the agricultural industry in which it is has been prevalent[14] "and is used for other low-wage, low skill tasks." It is important to note however that Kenya does have laws and institutions to address child labor but faces challenges in enforcing these laws due to lack of funding and manpower.

Trade in Industrial Goods

Both countries would like to continue their current relationship with respect to these import / export prerogatives:

Textile and apparel tax benefits: the USTR notes in its objectives that it aims among other things to "secure duty-free access to U.S. textile and apparel products and to improve competitive opportunities for exports of U.S. textile and apparel products while taking into account U.S. import sensitivities." According to the United States Fashion Industry Association which works to eliminate barriers that impede the fashion industry, the United States-Kenya Free Trade Agreement presents vast opportunities for trade expansion between both nations through the elimination of tariff and non-tariff barriers. Similarly, a report by London-based Just-Style Apparel Sourcing Strategy[15] suggests that the fashion industry strongly supports the United States-Kenya FTA since, "for many companies, Kenya is the single largest apparel sourcing base in sub-Saharan Africa, accounting for one-third of the region's total apparel exports to the United in 2019." On the other hand, Apparel Business Systems argues[16] that apparel manufacturing is gradually shifting back to the United States. The leader in software solutions dedicated to the sewn products industry cites, "decreased shipping time and improved

13 Child Labor and Forced Labor reports. Bureau of International Labor Affairs. https://www.dol.gov/agencies/ilab/resources/reports/child-labor/kenya

14 Going Solo: What is the Significance of a U.S.-Kenya Free Trade Agreement? Center for Strategic and International Studies. https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement

15 US-Kenya trade deal-Here's what the apparel industry wants. https://www.just-style.com/analysis/us-kenya-trade-deal-heres-what-the-apparel-industry-wants_id138771.aspx

16 Made in America: 3 Reasons Apparel Manufacturing is returning to the US. Apparel Business.

oversight, rising costs of offshoring and improvements in enterprise resource planning" as some of the reasons apparel manufacturing may be "coming back home" to the U.S. While this may be the case, the United States still remains one of Kenya's key export markets for textile and apparel.

Therefore, to maintain market access of Kenyan clothing to the U.S and to protect Kenyan manufacturers, the fashion and apparel industry has urged that the proposed FTA preserves the existing supply chain established around AGOA including duty-free access to the United States for Kenya apparel exports. Some industry stakeholders even argue that without the AGOA-like liberal rules of origin, Kenya may not survive as a sourcing destination for United States' fashion companies. The Conversation[17], advises that the FTA be modelled on the "Jordanian qualified industrial zones model" which allows foreign owned companies situated in select export processing zones to qualify for duty free exports to the United States. "With apparel as Kenya's principal target export, the success of its negotiating dexterity will be judged on how well it integrates the inputs and outputs of its export processing zones" (The Conversation). Consequently, an agreement that "considers all apparel exports "Kenyan" irrespective of ownership and input source for a reasonable duration should be the target" (The Conversation).

Remanufactured goods: the USTR aims to "Expand market access for remanufactured goods / exports by ensuring that they are not classified as goods that are restricted or banned.

Agricultural goods: this will certainly be a key area of negotiation given that back in 2012, Kenya banned GMO imports. However, we should note that Kenyan scientists and policymakers are viewing a recent statement on genetically modified crops as an indication that the country may completely lift its GMO ban (Alliance for Science)[18]. In fact, Bt Cotton (which is a genetically modified pest resistant plant) is gaining tremendous momentum in Kenya as it was recently approved and its first shipment of seed received in the last quarter of 2020. In its objectives, the USTR hopes to "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." However, to successfully lift and implement the GMO ban, Kenya would need to create legislation to allow for trade of products developed through agricultural biotechnologies.

Kenya aims to ensure that the FTA provides for safeguards, and exceptions to protect the country's nascent industrial and agricultural sectors.

Technology and digital trade

To earn more revenue from digital transactions, Kenya recently imposed two taxes: a 1.5 percent digital services tax and "an earlier withholding tax charged on marketing, sales promotion and advertising services provided by non-resident persons" (Brookings). The United States is expected to push back on these taxes which American technology companies are said to have found discriminatory. In its objectives, the United States aims to "ensure non-discriminatory treatment of digital products

[17] Kenya-US free trade talks are under way: what Nairobi must get right from start. The Conversation. August, 2020. https://theconversation.com/kenya-us-free-trade-talks-are-under-way-what-nairobi-must-get-right-from-start-144129

[18] Will Kenya lift its GMO ban as its agriculture falters? Cornell Alliance for Science. October 2019. https://allianceforscience.cornell.edu/blog/2019/10/will-kenya-lift-gmo-ban-agriculture-falters/

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." Kenya's objectives on the other hand aim to garner support for e-commerce platforms and the country's growing Innovation and Entrepreneurship sectors. An agreement between both nations will reveal their plan to cooperate given their particular concerns regarding this theme. We can however expect that the United States will push to have fewer restrictions on digital transactions and even possibly impose this as a condition for its support to Kenya's need for support in e-commerce.

Compliance with Environmental Standards

Both countries are expected to negotiate a deal that covers compliance with environmental standards regulated by the United States Environmental Protection Agency (EPA)—for the United States, and by the National Environment Management Authority (NEMA)—for Kenya. This topic is of utmost importance to the new United States' Administration which has created a new cabinet-level position of Presidential Envoy for Climate in hopes to convince the world of its credibility on climate change and its increased commitment to protecting the environment. The U.S. Special Presidential Envoy for Climate is a position in the Executive Office of the President of the United States with authority over energy and climate policy. It is currently held by John Kerry, who is the inaugural Envoy. The United States' objectives indicate the country's unwavering requirements that Kenya strongly enforce protective environmental measures including providing "appropriate sanctions or remedies of environmental laws". In its FTA objectives, Kenya's brief statement on this issue requires that both nations "support the Multilateral Environment Agreements (MEAs) that each country is party to."

The Organization for World Peace reports[19] that the American Chemistry Council (includes Exxon Mobil, Chevron, Shell, and Dow Chemical) recently sent a letter to the USTR urging that both countries, in their bilateral trade negotiations, "prohibit placing domestic limits on chemicals and plastic production or consumption." These recommendations stem from the fact that the lobbyists anticipate Kenya could become a future hub for supplying U.S.-made chemicals and plastics to the rest of Africa. It is to be noted that the global fight against climate change has led to significant decline in profits for the Plastics and Petroleum industries.

On the other hand, Kenya banned plastic bags in 2017 and the country is part of the Basel Convention which impedes shipment of plastic waste to developing countries. Additionally, the World Peace's report notes that environmental activists in Africa "are not going to allow" the continent to become "dumping grounds for plastics". These activists view the FTA negotiations as an opportunity to seek enforcement of environmental protective measures. Consequently, the United States and Kenya will need to strike a deal that considers the issues raised on both sides.

Summary: Deal Components

According to a report by The Conversation[20], "constraints to Kenya's exports to the United

19 US Industry Lobbying Against Kenyan Plastic Laws. The Organization for World Peace. https://theowp.org/reports/us-industry-lobbying-against-kenyan-plastic-laws/

20 Kenya-US free trade talks are under way: what Nairobi must get right from start. The Conversation. August, 2020. https://theconversation.com/kenya-us-free-trade-talks-are-under-way-what-nairobi-must-get-right-from-start-144129

States are not primarily tariff based. These trade talks are less about tariff and trade, than they are about attracting direct foreign investment into Kenya." One of the most beneficial outcomes of this Free Trade Area will therefore be the extent to which Kenya is able to draw "manufacturing foreign direct investment from the United States (and other countries) into its economic processing zones." This affirms Kenya's CS Betty Maina's point stated above that the agreement between the two counties must be "a development enhancing agreement" for Kenya. To promote foreign investment through this agreement, The Conversation advises that Kenya should negotiate for liberal rules of origin measures that do not unduly limit investors "to the use of only United States' or Kenyan inputs for Kenyan exports to qualify for duty free entry to the United States. A rule of origin of more than 30% value add should be the target." If negotiated well, this agreement can rapidly boost Kenya's foreign industrial investment and its gross export volumes. Kenya must therefore view the role of this agreement as more than a tariff-centered pact, but also as an investment-boosting-vehicle.

PROJECTED BENEFITS OF THE UNITED STATES-KENYA FREE TRADE AGREEMENT

The Kenyan CS noted that for Kenya to capture a larger U.S. market for its usual exports, there needs to be a predictable trading agreement that guarantees preferential market access for Kenyan products in the United States. The AGOA is a unilateral agreement that expires in 2025 and it remains unknown whether the United States' Congress would renew the agreement. Additionally, of all the East African Community member countries, Kenya is the only one without a Least Developed Countries (LDC) designation. The Center for Strategic and International Studies (CSIS)[21] explains that under the GSP, "LDC countries receive additional access to export goods duty-free to the United States." Because of Kenya's lack of LDC designation, the GSP excludes some of Kenya's trade exports such as textiles and apparel (products covered under the AGOA). The CSIS also notes that many of Kenya's agricultural products would be duty-free if it were an LDC country, and "as a result, Kenya faces a greater risk than neighboring EAC countries should AGOA expire without replacement." With a deal such as the Free Trade Agreement that provides predictability into the trading environment, we can expect that trade between both nations would be bolstered as suppliers have confidence their goods can continue to find market. Other benefits of the FTA are listed below.

[21] Going Solo: What is the Significance of a U.S.-Kenya Free Trade Agreement? Center for Strategic and International Studies. https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement

FREE TRADE AGREEMENT OPPORTUNITIES

Kenya	United States
• Secure duty-free access to the United States ahead of the AGOA expiring	• Support higher paying jobs in the United States
• Creation of decent jobs and increased job availability to strengthen the value chains that will boost businesses in the country	• Grow the United States' economy by improving opportunities for trade and investment with Kenya as a window to expand into other African countries
• Increased economic activity through the production and export of goods that are aligned in the United States' market • Boost agricultural and service industry development	• Increased business opportunities for United States' consumers, businesses, farmers, ranchers, and workers as they sell their products and services to Kenya
• Revamped production and supply capacity leading to strengthened regional, continental and global market access	• Removal of barriers that impede exchange of goods and services between the United States and Kenya
• Expanded markets are likely to attract investments targeting production and exports into other global markets	• Developed rules of origin will incentivize production within the Unites States
• Attract Foreign Direct Investment from the United States to strengthen Kenya's economy	• Provide important rights consistent with U.S. legal principles and practice for United States'-investors-in-Kenya

CHALLENGES TO THE UNITED STATES-KENYA FREE TRADE AGREEMENT

On July 8th, 2020, the USTR and the Kenya Cabinet Secretary for Industrialization, Trade and Enterprise Development officially launched trade agreement negotiations between both nations. Despite Kenya being the United States' 98th trading partner, the official commencement of conversations signaled the United States' acknowledgement of the vast opportunity to deepen economic and commercial ties between both nations. However, one of the key concerns is how a United States—Kenya FTA will impact efforts to implement the African Continental Free Trade Area. AfCFTA member countries have previously expressed concerns that a better deal among the United States and other African countries would be formed than a bilateral one between the U.S. and Kenya.

However, representatives of both nations emphasize that rather than cause conflict, the success of the United States-Kenya Free Trade Agreement would set precedent for such trade talks between the United States and other African countries. The USTR's response to this concern was "the United States will support regional integration, where appropriate" (Brookings). The Brookings report[22] further noted that groups such as the United States Chamber of Commerce are in support of both the FTA talks and the AfCFTA, and that the two agreements would "mutually reinforce Kenya's growth and development goals." In her interview with KBC, CS Betty Maina concurred with the USTR and noted that because the United States does not have many countries with whom it has such a trade deal, this Free Trade Agreement would ensure that the U.S. forms a deal with Kenya "that can be attractive for other African countries." Kenya's president Kenyatta also dispelled fears that a bilateral agreement with the United States would undermine the AfCFTA. Brookings reports that according to President Kenyatta, "Kenya's trade deal with the United States will assist the continent more broadly by creating a reference upon which other African nations can negotiate bilateral arrangements within the AfCFTA framework going forward."

Another possible issue involves concerns about conflicts emanating from Kenya's obligations as a member of the East African Community (EAC) Customs Union. Some leaders are concerned that "Like its fellow EAC members, Kenya applies a common external tariff and may have limited latitude to negotiate concessions in that area"[23]. However, the Protocol on the Establishment of the East African Customs Union[24], provides that countries "may separately conclude or amend a trade agreement with a foreign country" provided that there are no conflicts with the EAC's protocol. Further, in pursuit of this trade agreement, the Protocol only requires that a country send its proposed agreement or amendment to the EAC Secretary General. Consequently, in its pursuit of an FTA with the United States, Kenya is not in violation of EAC protocol. However, the implications of the EAC Secretary General's review of the FTA are yet to be known.

22 The US and Kenya launch negotiations of a free trade agreement. Will they succeed? Brookings. https://www.brookings.edu/blog/africa-in-focus/2020/07/29/the-us-and-kenya-launch-negotiations-on-a-free-trade-agreement-will-they-succeed/

23 The US and Kenya launch negotiations of a free trade agreement. Will they succeed? Brookings. https://www.brookings.edu/blog/africa-in-focus/2020/07/29/the-us-and-kenya-launch-negotiations-on-a-free-trade-agreement-will-they-succeed/

24 Protocol on the Establishment of the East African Customs Union. East African Secretariat. https://www.ifrc.org/Global/Publications/IDRL/regional/Protocol%20on%20the%20Establishment%20of%20the%20East%20African%20Customs%20Union.pdf

ANALYSIS: COMPARISON BETWEEN THE US-KENYA FREE TRADE AGREEMENT WITH OTHER IMPLEMENTED AGREEMENTS

Below, we elaborate on the African Continental Free Trade Area (AfCFTA) and the United States-Morocco Trade Agreement—the only other trade agreement between the United States and an African nation. By comparing these agreements, we seek to corroborate the prospective benefits of the United States-Kenya FTA to both countries if the scope of the FTA is implemented in a similar manner to that of the United States-Morocco Agreement and that of the AfCFTA (which began in January 2021).

THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA)

In 2018, African heads of state signed the African Continental Free Trade Area—an agreement that would strengthen African regional and international trade. The AfCFTA is the largest trading agreement in the world since the creation of the World Trade Organization. It was signed in May 2019 and as of December 2020, 36 African countries had ratified the treaty. Trading under the agreement had been set to begin in July 2020 but was halted due to the pandemic and instead began in January 2021. The AfCFTA will cover a market of up to 1.3 billion people across Africa with a combined GDP of USD $3T. Most vital for African nations will be the improvement of market access for their agricultural goods which has been limited "in part because of the huge distorting subsidies that wealthy nations provide their farmers"[25]. The AfCFTA's large scope includes among other objectives: to reduce tariffs among member countries and cover policy areas such as trade facilitation and services. The scope also covers regulatory measures including sanitary standards and technical barriers to trade.

The AfCFTA's scope has some similarities to that of the envisioned United States-Kenya FTA—including reduction of barriers to trade and creation of more job opportunities. Given these similarities, we can expect that while the magnitude of the benefits from the both agreements to member countries may vary, the United States-Kenya FTA could lead to similar leaps and bounds in national economic improvement for Kenya and the United States as is anticipated from implementation of the AfCFTA. The removal of trade barriers and the reduction of trade costs will enable cheaper production of goods and lead to easier and faster transition of goods within the member countries. The World Bank reports that the implementation of the AfCFTA would "reshape markets and economies across the region and boost output in the services, manufacturing and natural resources sectors." We can expect that a bilateral agreement would yield similar benefits to Kenya and the United States.

[25] What Africa expects of the new WTO Director-General. Africa Renewal. https://www.un.org/africarenewal/magazine/march-2021/what-africa-expects-new-wto-director-general

World Bank's Projected benefits of the AfCFTA[26]

- Lift 30 million people out of extreme poverty and 100 million out of poverty
- Boost Africa's regional income by 7% or $450 billion by 2035 while adding $76 billion to the income of the rest of the world
  - Of the $450 billion, $292 billion would come from stronger trade facilitation such as measures to reduce trade barriers, simplified customs procedures, and reduced compliance costs for businesses engaged in trade
  - USD tariff liberalization and a reduction in non-tariff barriers (quotas and rules of origin) would boost income by 2.4% or about $153 billion
- Increase Africa's exports by USD $560 billion, mostly in manufacturing
- Spur larger wage gains for women (10.5%) than for men (9.9%) by 2035
- Boost wages for both skilled and unskilled workers—10.3% for unskilled workers and 9.8% for skilled workers
- Reduce the number of people living in extreme poverty across Africa in the following ways:
  - By 12 million people in West Africa
  - 9.3 million people in Central Africa
  - 4.8 million people in Eastern Africa
  - 3.9 million people in Southern Africa
- Cushion the negative effects of the COVID-19 pandemic on economic growth through the reduction of trade costs
- Help African countries increase their resiliency in the face of future economic shocks
- Economic Commission for Africa (ECA) estimates large potential gains for Eastern Africa[27] including "an increase in intra-African exports by over US$1 billion and creation of nearly 2 million jobs"

Free trade agreements can lead to increased efficiency as they encourage competition and thereby production of high-quality goods at lower costs. Efficiency is also promoted when because of increased competition, countries specialize and produce only the products or goods for which production is most efficient. This leads to profit maximization. The elimination of trade barriers through trade agreements ensures that these goods already produced at low costs can then be transported efficiently to member countries. Consequently, the implementation of similar trade policies through the United States-Kenya FTA just as has been done through the AfCFTA, would be ideal to boost Kenya's economic productivity.

26 Trade Pact Could Boost Africa's income by $450 Billion, Study Finds. https://www.worldbank.org/en/news/press-release/2020/07/27/african-continental-free-trade-area

27 AfCFTA strategy to chart a path for lifting millions out of poverty in DRC. ECA. https://www.uneca.org/storys/afcfta-strategy-chart-path-lifting-millions-out-poverty-drc

THE UNITED STATES-MOROCCO FREE TRADE AGREEMENT

The United States-Morocco Free Trade Agreement is the only FTA between the United States and an African nation. The agreement—set to run from 2006 to January 2023—supports significant economic and political reforms in Morocco and provides for improved commercial opportunities for U.S. exports to Morocco by reducing trade barriers. The U.S. Customs and Border Protection notes that under this agreement, most Moroccan goods enter the United States duty free. Further, the Agreement which was signed in June 2004 but took effect in January 2006 was reported by the USTR[28], to have boosted the United States' goods trade surplus with Morocco to $1.8 billion in 2011 from $79 million in 2005 (the year prior to entry into the agreement). This was a 4.4% increase in goods trade surplus in 6 years. According to a more recent USTR report[29], the trade surplus was $1.9 billion in 2019—32.2% increase over surplus in 2018. Morocco is currently the United States' 63rd largest goods trading partner with $5.1 billion in total (bilateral) goods traded during 2019. Other benefits of the United States—Morocco FTA as detailed by a 2016 International Trade Commission (ITA) report[30] are listed below.

- 95% of U.S. consumer and industrial goods exported to Morocco no longer need to pay a tariff. Tariffs on U.S. goods exports to Morocco will be phased out entirely by 2024

All forms of investment are protected under the FTA, including enterprises, debt, concessions, contracts and intellectual property

- Consequently, U.S. investors enjoy in almost all circumstances the right to establish, acquire and operate investments in Morocco on an equal footing with Moroccan investors, and with investors of other countries

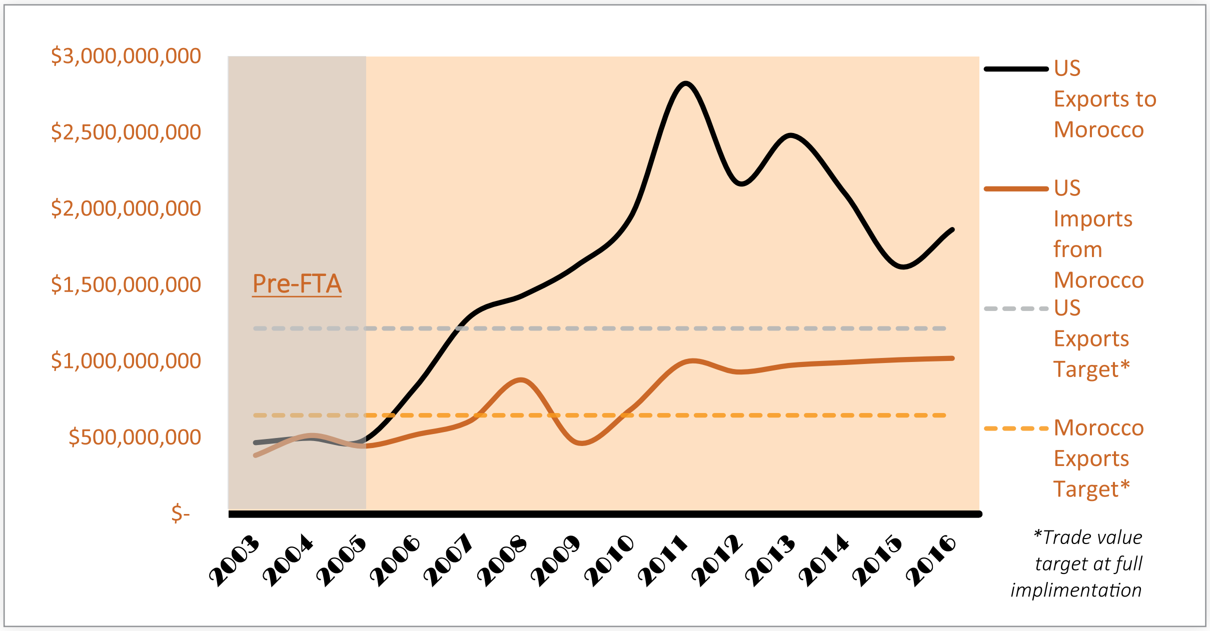
---

The ITA also reported that the Moroccan economy experienced a steady growth over the 10 years since the implementation of the Free Trade Agreement

- The country had a stable exchange rate, low inflation, moderate unemployment and a growth rate of 4% in 2010 (4 years after the trade agreement's implementation)
- U.S. exports to Morocco grew to 19% in 2010. The waste and scrap industry, apparel manufactures, food manufacture, electrical equipment and appliances, and nonmetallic mineral products were the fastest growing sectors after the implementation of the trade agreement

28 Morocco Free Trade Agreement. Office of the United States Trade Representative. https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta
29 Morocco. Office of the United States Trade Representative. https://ustr.gov/countries-regions/europe-middle-east/middle-east/north-africa/morocco
30 The U.S.—Morocco Free Trade Agreement (FTA). Helping U.S. Companies Export. https://2016.export.gov/fta/morocco/index.asp

A report[31] published by Morocco on the Move—an initiative of the Moroccan American Center for Policy (MACP) and The Moroccan American Cultural Center (MACC) notes that the United States-Morocco Free Trade Agreement "surpassed moderate expectations for its economic impact, and has been a success story for both sides." According to the report, bilateral trade increased 47%, United States' exports had by 2017 increased by 286% and Moroccan exports to the United States grew by 125%. Prior to the implementation of the FTA, the ITA predicted that United States' exports were likely to increase by $740 million and United States' imports from Morocco were likely to increase by $198.6 million after the complete actualization of the FTA. The report by the Morocco on the Move presents that "US exports were able to hit this target by 2007, in just its second year of implementation." Morocco on the Move notes that United States' exports to Morocco "have actually increased by about $1.4billion", amounting to the 286% percent boost mentioned above. The increase in trading activity which resulted from implementation of the United States-Morocco FTA is illustrated on the graph below.



Source: Moroccan American Center for Policy

Moroccan exports to the United States achieved their target in 2008, and despite the decrease in the following year, the Moroccan exports caught up and maintained consistent improvement. Similarly, the United States-Kenya Agreement can therefore be expected to trigger an increase in production and exchange of goods between both countries, eventually leading to sustained economic growth. "Although this figure is more modest than the U.S. export figure, Moroccan exports have experienced much less volatility" (Moroccan American Center for Policy).

[31] Exceeding Expectations: The US-Morocco FTA. The Moroccan American Center for Policy (MACP) and The Moroccan American Cultural Center (MACC). https://moroccoonthemove.com/2017/05/22/exceeding-expectations-us-morocco-fta/

It is to be noted that out of the six FTAs (Chile, Singapore, Bahrain, Morocco, Oman and Peru) which the United States signed between 2004 and 2010, the United States-Morocco FTA's success was most prominent, marked the highest growth in bilateral trade and also caused the highest increase in job-creation at an "estimated 101 percent increase in jobs in the United States supported by exports to Morocco" (Moroccan American Center for Policy). The report also notes that "despite the subdued outlook for the US-Morocco FTA at its outset, this trade deal has been significantly impactful for both parties."

We can therefore hope that the FTA with Kenya will yield similar benefits and even exceed expectations. If the new United States' Administration proceeds with the negotiations, and if Kenya can gain the support of its regional partners (who now think the country should focus on the AfCFTA as opposed to bilateral agreement with the United States), Kenya's trading activity, just as Morocco's, could witness an expansion and its unemployment numbers could drop among other benefits. This trade deal, if implemented, can be significantly impactful for both member countries' economies.

CONTACT INFORMATION

For further information on projects that Everstrong has been involved in and has in its pipeline to pursue, please refer to our website: www.everstrong.com. All interested parties can reach out to us at:

PHILIP DYK
Managing Partner
tel: +1 (203) 512 1110
philip.dyk@everstrong.com

HENRY KYANDA
Managing Director
tel: +254 722 843 866
Henry.Kyanda@everstrong.com

ERIK GRANSKOG
CEO Milele Energy
tel: +254 708 414 313
Erik.Granskog@mileleenergy.com

EVERSTRONG CAPITAL LLC
19 Old Kings Highway South, Suite 330
Darien, CT 06820, USA
Tel: +1 (203) 989 9900

EVERSTRONG CAPITAL KENYA LIMITED
4th Floor, Mara 1 Block
Eldama Park, Eldama Ravine Rd
Westlands, Nairobi, Kenya

MILELE ENERGY
4th Floor, Mara 1 Block
Eldama Park, Eldama Ravine Rd
Westlands, Nairobi, Kenya

EVERSTRONG Capital
CREATING LONG TERM VALUE