30th May 2023

MR. EDGAR ODARI
EXECUTIVE DIRECTOR
ECONEWS AFRICA
NAIROBI-KENYA

DR. ALFRED KOMBUDO
PRINCIPAL SECRETARY
MINISTRY OF INVESTMENTS, TRADE AND INDUSTRY
REPUBLIC OF KENYA

Dear Sir

RE: SUBMISSION OF MEMORANDUM BY ECONEWS AFRICA

The above matter refers:

Following your letter dated 23rd May 2023 inviting stakeholders for a consultation and submission of memoranda on the ongoing Kenya/United States Strategic Trade and Investment Partnership (STIP), I am happy, on behalf of Econews Africa, to submit our memorandum.

This memorandum has been developed after consultations with stakeholders drawn from various segments but especially from consultations with the Kenya Small Scale Farmers' Forum whom we support in our work. From these consultations, there are real concerns over the decision by the Kenyan Government to negotiate a chapter on agriculture. While arguments have been made that the country is not negotiating markt access in the STIP, our understanding of what the American Government wants, based on expert analysis, shows that they are still after accessing the Kenyan market. The consequences for farmers such as chocken farmers and the respective value chains including companies such as Kenchic will be devastating. For that reason, our position is that Kenya should not negotiate a chapter on agriculture in the STIP.

Finally, we would like to point out the lack of transparency in the process and the fact that the texts shared by the United States Trade Representative (USTR) have not been shared by the Government. In fact, we have only had a glimpse of what is in the texts through a summary shared by the USTR. Econews Africa has about 30 years experience undertaking trade negotiations from the formation of the World Trade Organization (WTO) and the negotiation of the Economic Partnership Agreements (EPAs) with the European Union. (EU). The Kenya Post Lome Trade Programme (KEPLOTRADE) under which the EPAs were negotiated with the EU remains the benchmark of how trade negotiations should be undertaken as stakeholders had access to texts and could contribute substantively before negotiations proceeded.

We therefore demand a greater level of transparency and accountability from your good offices in the STIP negotiations. We hereby attach our memorandum for your attention.

Sincerely,
EDGAR ODARI

MEMORANDA ON THE UNITED STATES – KENYA STRATEGIC TRADE AND INVESTMENT PARTNERSHIP

Pursuant to the invitation to a virtual consultative meeting published by the Ministry of Investments, Trade and Industry, as well as the invitation to send memoranda on the ongoing negotiations, EcoNews Africa on behalf of itself and the Kenya Small Scale Farmers Forum submits the following memoranda on the negotiating objectives for a U.S.-Republic of Kenya Strategic Trade and Investment Partnership.

Executive Summary

Econews Africa (ENA) is a not-for-profit non-governmental organization registered in the Republic of Kenya under the NGO Coordination Act of 1990. It was founded in 1992 and incorporated as a legally registered entity in 1996. It is an indigenous organization, working in Kenya as a facility to backstop reflection and action by local groups on causes and consequences of poverty and disempowerment of large sections of the Kenyan communities.

ENA was founded with a vision to grow to be a Pan-African research and advocacy organization which works to bridge the local, national, regional, and global information gaps on development issues, resource management, environmental integrity, globalization, and an overarching need for access to timely and relevant information. It has played this role since her formation in 1992, and its focus has been on strategic development issues facing Africa in the globalization era such as trade and investment, Structural Adjustment Programs (SAPs), debt, extractives, international finance, the environment, and climate change as well as gender and systemic inequality. ENA is committed to looking for alternatives to the neoliberal model of development.

Background

It was on 14th July 2022 that the Kenyan and United States Governments announced the launch of the Strategic Trade and Investment Partnership (STIP), as a placeholder for a Free Trade Area that was unable to be negotiated by the governments.[1]

Some of goals of the STIP include: enhanced engagement, high standard commitments, an ambitious roadmap for enhanced cooperation, the goal of negotiating high-standard commitments in order to achieve economically meaningful outcomes.[2] From a legal standpoint, we found these statements to be vague as they did not give any insight into what the actual negotiating objectives under the STIP would be.

We understand that the STIP is not backed by the United States Bipartisan Congressional Trade Priorities and Accountability Act, therefore, the result of the negotiations will be, at best, an executive agreement. The terms of which, will still be binding.

The Initial Areas of negotiation are: agriculture, anti-corruption, digital trade, environment and climate action, good regulatory practices, micro, small, and medium-size enterprises. protecting worker's rights and protections, supporting the participation of women, youth, and others in trade, standards collaboration, and trade facilitation and customs procedures.[3] As ENA, we ask – why are these termed as "initial" – does this mean that there will be added areas of negotiation?

[1] https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-and-kenya-announce-launch-us-kenya-strategic-trade-and-investment-partnership

[2] *Ibid.*

[3] *Ibid.*

Agricultural Sector

ENA represents the Kenya Small Scale Farmers Forum - a network of community based small-scale farmer groups across the country, established in 2002. It is in their interest, as a stakeholder in the STIP to have more precise and concrete information on the areas of negotiation, agriculture being one of them.

ENA takes note that the Goal for the negotiation on Agriculture in the STIP is – that the United States and Kenya will consider measures to facilitate agricultural trade and enhance transparency and undertaking of the application of science and risk based sanitary and phytosanitary measures.[4] We further take not that tariffs are not on the table for negotiation within the STIP. We therefore ask what are the above measures that will facilitate agricultural trade? What is the scope of this facilitation?

In terms of negotiations on agriculture, we understand that non-tariff barriers, Sanitary and Phytosanitary measures and technical barriers to trade are to be on the table in terms of negotiation, [5]however, we have received no confirmatory information on exactly what measures will be included within these areas.

Kenya Small Scale Farmers have the following concerns: as part of the STIP launch statement's considering 'measures to facilitate agricultural trade', the STIP may be used to abolish/undermine Kenya's:

- Quotas to limit imports of agricultural products and stabilize domestic prices.
- Refusal (via failure to issue no-objection letters) to allow imports of meat/dairy/poultry because of local availability of similar products.
- Restrictions on imported corn because of low aflatoxin and moisture limits
- Ban on imports of US lentils (and whole peas)
- Office of the Director of Veterinary Services' requirements on import of bovine embryos

Furthermore, as part of the STIP launch objectives, both the United States and Kenyan Governments have agreed to consider measures to facilitate agricultural trade.[6] In our opinion, this is presumably not about trade facilitation (TF) since there is already a separate paragraph in the launch announcement on TF. Kenya has several laws/regulations/policies ('measures') which reduce imports of agricultural products (including from the USA) into Kenya. The US may try to ban these Kenyan measures as part of the STIP in order to 'facilitate agricultural trade' i.e., increase imports of US agricultural products into Kenya.

Some examples of these Kenyan measures which the US may target in the STIP negotiations since they are listed in the US government's 2022 report on foreign trade barriers include:

- In instances where domestic agricultural production exceeded projections, the Ministry of Agriculture has imposed quotas to limit imports and stabilize domestic prices.

[4] Agoa.info, USTR releases summaries from US-Kenya STIP negotiations https://agoa.info/news/article/16200-ustr-releases-summaries-from-us-kenya-stip-negotiations.html, May 2023.

[5] *Ibid.*

[6] https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf

- Kenya has maintained a ban on genetically engineered (GE) food and feed imports since November 2012. Kenya's GE ban has blocked both U.S. Government food aid and U.S. agricultural exports derived from agricultural biotechnology. The restriction affects U.S. exports of processed and unprocessed foods and feed ingredients, such as soy, corn, and distiller dried grains with soluble. The GE import ban also affects trans-shipment; as a result, U.S. Government 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.
- Kenya's Office of the Director of Veterinary Services (DVS) and the U.S. Department of Agriculture Animal and Plant Health Inspection Service agreed on veterinary requirements and certificate attestations for the importation of bovine embryos from the United States. However, in May 2020, DVS proposed additional requirements, beyond those previously agreed by the two agencies. Technical work is ongoing.
- Kenya maintains complex, non-transparent, and costly requirements for the importation of all meat, dairy, and poultry products including a "Letter of No Objection to Import Permit" (no-objection letter) from DVS under the Ministry of Agriculture, Livestock, and Fisheries. Before issuing a no-objection letter, DVS requires an importer to explain the reason for importation through a "Letter of Application to Import" and to specifically address the market need the import would meet. DVS issues the no-objection letter for meat, dairy, and poultry products at its discretion on a case-by-case basis. Importers have reported that DVS has at times provided them with non-sanitary-related grounds for denying permits, such as the local availability of a similar product.'
- Kenya subjects imported and domestically produced corn to a total aflatoxin limit of 10 parts per billion (ppb) and a 13.5 percent maximum moisture content. As a result, most U.S. exports are denied permits for importation. Kenya's aflatoxin limit is lower than the U.S. Department of Health and Human Services Food and Drug Administration action level of 20 ppb. Under special circumstances, such as food shortages, Kenya has allowed higher moisture content for imported corn, which must then be dried and milled immediately upon arrival to reduce the risk of aflatoxin contamination. For U.S. corn exports that are permitted under special circumstances, the costs associated with the additional processing requirements make U.S. corn exports largely uncompetitive.
- Kenya also restricts popcorn imports to a six percent maximum moisture requirement. The U.S. limit is 12.5 percent to 15 percent. Kenya does not permit whole pea imports due to concerns about the Pseudomonas pisi fungus but permits the import of split peas. Kenya also prohibits bean imports from the United States due to the occurrence of Corynebacterium flaccumfasciens bacteria in some parts of the country. Kenya also prohibits lentils from the United States due to the risk of darnel weed; although, this weed already exists in Kenya.
- The United States and Kenya will consider measures to . . . enhance transparency and understanding of the application of science- and risk-based Sanitary and Phytosanitary (SPS) measures. The two sides share an interest in . . . creating an enabling environment for innovative agricultural technologies. It is clearly a US government priority to get Kenya to accept GE etc products, e.g. the 2022 USTR report notes that 'The U.S. Government continues to engage the Kenyan Government and stakeholders to support the adoption of GE and other emerging technologies.'3 US companies such as CropLife4 and Monsanto/their industry associations5 have also been pushing for science-based regulations in the equivalent6 Indo-Pacific Economic Framework (IPEF) negotiations

occurring between the Biden Administration and 13 other countries. Are these Kenyan measures highlighted in the USTR 2022 report:8 science-based (and enabling innovative technologies)

- Kenya's GE Gypsophila flower (baby's breath) ban? Especially since Kenya's commercialization of GE Gypsophila flower (baby's breath) intended for export, including to the United States, is stalled due to concerns that it could potentially jeopardize Kenya's market access to the European Union.[7]

We further state that the US may propose the biotechnology provisions from Section B of the United States, Mexico and Canada Agreement (USMCA) agriculture chapter which US multinational companies have used to pressure Mexico to approve GMOs: 'Bayer has been making the case both publicly in the media and privately to government officials that Mexico's refusal to approve its new genetically engineered corn variety violates the agricultural biotechnology provisions of USMCA.[8]

These claims were repeated by BIO's McMurray-Heath in her testimony before the U.S. Senate; because of the USMCA agricultural biotechnology provisions, she averred, "Mexico must resume the approval process for all agricultural biotechnology products" and "immediately rescind its anti-USMCA decree banning the import of biotech corn and begin creating a gene editing framework that conforms with international norms and trade agreement commitments."[9]

Industry complaints about Mexico's permitting process have been echoed by members of Congress in several letters sent to both U.S. Department of Agriculture Secretary Tom Vilsack and U.S. Trade Representative Katherine Tai. A joint letter from Senate Finance Committee Chair Ron Wyden and ranking member Mike Crapo calls for the U.S. to "take enforcement steps if necessary" under the USMCA because, they claim, "Mexico has failed to properly consider or approve applications for innovative U.S. biotech products" and "announced its intention to eliminate biotech corn for human consumption by 2024, a troubling step that would adversely impact access to the largest U.S. export market for corn."[10]

The Kenyan Government should negotiate concrete agricultural provisions that safeguard domestic agricultural policy and protect local small-scale farmers. The Kenyan Government should fight for limited market access for US agricultural products. We should use the North American Free Trade Area (NAFTA) as a guiding example. While NAFTA liberalized trade in food and agricultural products, it didn't curb farm subsidies in US and Canada – leading to an uneven playing field and devastating impacts for poor farmers in poor countries. Furthermore, the grant of significant market access led to the destruction of Mexico's agricultural sector. Mexico was flooded with cheap agricultural imports which led to the displacement of farmers.[11]

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[7] United States Trade Representative, 2022 National Trade Estimate Report on Foreign Trade Barriers https://ustr.gov/sites/default/files/2022%20National%20Trade%20Estimate%20Report%20on%20Foreign%20Trade%20Barriers.pdf

[8] https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between

[9] https://www.iatp.org/documents/understanding-agricultural-biotechnology-provisions-us-mexico-canada-agreement

[10] *Ibid.*

[11] 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

Key Recommendations

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 cometo 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 beverageexport to the world exceeded $43 billion.

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 barriersto U.S agricultural exports. It is imperative that Kenya assess the risks to Kenya's agriculturalsector 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 topromote 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 tradepolicy 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. wheat export.[12]

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

[12] 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

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.

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 comprehensiveeconomic, social and environmental assessment of the impact of liberalization of Kenya's agricultural Sector is strongly recommended.[13] The Kenyan government should carry out impact assessment of the potential impact of an agricultural deal on the Kenyan farm sector aswell 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 Commissionconcluded 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'sexports of sugar and SCPs to the United States."[14]The study also concludes that the USMCA "will likely increase annual U.S. agricultural and food exports to the world by $2.2 billion (1.1percent) when fully implemented."[15] The USTIC's simulation that considered only the effects of the agriculture market access provisions in USMCA showed increased U.S. agriculture andfood exports to the world of $435 million.[16]

Assess the Potential Benefits of an FTA

Agriculture is one of the cornerstones of the Kenyan economy and the Kenyangovernment hopes

[13] 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

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

[15] https://www.usitc.gov/publications/332/pub4889.pdf

[16] https://www.usitc.gov/publications/332/pub4889.pdf

to encourage agricultural transformation in Kenya. Kenya's key agriculturalexports already enter the U.S. market duty free. A trade deal with one of the largest economiesin 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 productswill benefit Kenya unless steps are taken to make Kenya's agricultural sector and agriculturalexport 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.[17] 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.
- 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

[17] Note that not all Indonesia's export to the U.S. qualify for the U.S. GSP scheme.

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.[18]

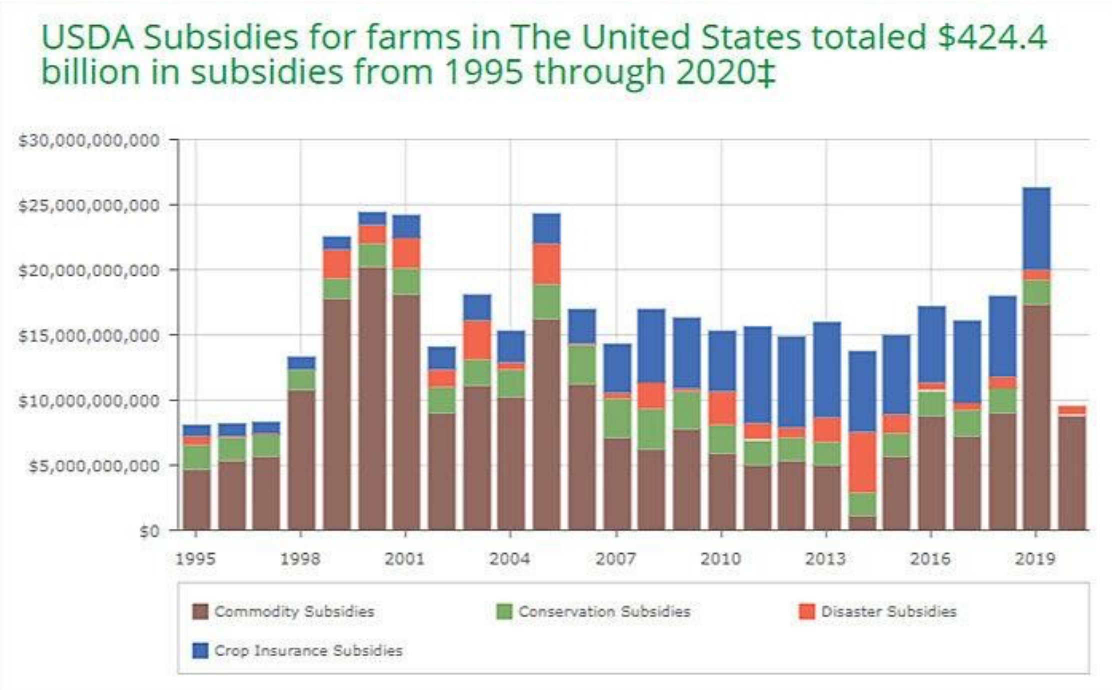
Consider the Likely Impact of U.S. Agricultural Subsidies

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.[19] 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, farmbusinesses in the U.S. receive massive subsidies (about $ 20 billion annually) from the federalgovernment. It is estimated that 39 percent of the 2.1 million farms in the U.S. receive subsidies.[20] 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),
- 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,

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

- 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).[21]



Source: CATO Institute; USDA.

Subsidies in rich countries are controversial.[22] Subsidies in rich countries arguably harm agricultural producers in poor countries and is an issue that has been raised repeatedly inthe WTO.[23] 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 achievegrowth through trading. But U.S. and European farm subsidies and agricultural import barriersundermine progress on free trade….

The Kenyan government is fully aware of the problems agricultural subsidies in rich countries pose forcountries 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.[24]The critical questions are:

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[21] https://crsreports.congress.gov/product/pdf/R/R46263
[22] Agricultural Subsidies, The Economist (September 12, 2012). https://www.economist.com/economic-and-financial-indicators/2012/09/22/agricultural-subsidies
[23] See CRS Report RS22522, Potential Challenges to U.S. Farm Subsidies in the WTO: A Brief Overview.
[24] DS265, DS266, and DS283.

- Does the Kenyan government plan to address agricultural subsidies in a Kenya-U.S. FTAand 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 regardingthe 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 rigorouslyenforce existing laws. A recent report found that foreign trade remedy investigation of U.S. agricultural export is on the rise.[25]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.[26]

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 tradedeal with the U.S., Kenya must take drastic action to improve the performance of its agriculturalsector. 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 foodand 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.
- 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.[27]

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[25] Congressional Service Report, Foreign Trade Remedy Investigations of U.S. Agricultural Products (November10, 2020).
[26] Congressional Service Report, Foreign Trade Remedy Investigations of U.S. Agricultural Products (November10, 2020).
[27] https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58394

- 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).[28]

Adopt A National Strategy to Boost Agricultural Export

To stand a chance of benefiting from a trade deal with the U.S., the Kenyan governmentmust 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 accountedfor 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….[29]

The U.S. import shares (based on value) "have been higher for manufactured products than for nonmanufactured products."[30] 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 topexporters 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?

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.

[28] https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at- a-glance/
[29] https://www.ers.usda.gov/topics/international-markets-us-trade/us-agricultural-trade/us-agricultural-trade-at- a-glance/
[30] 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/

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 parliamentrepresent 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 tradepolicy. 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 aremany 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.

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 totackle agricultural dumping and unlawful agricultural subsidies? Even if the laws on the booksare 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 aplethora 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.

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.

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.[31]
- According to the same study, adulteration accounted for 57% of all FDA import refusals during the 2005- 2013 period (totaling 80,825 import refusals).[32] 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.[33]
- 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).[34]
- In making decisions about which food import shipment to inspect, the FDA reportedly uses a risk-based prediction algorithm to determine whether shipments 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.[35]
- In FY2018, the Food and Drug Administration (FDA) examined more than 16.9 million import lines of FDA-regulated foods.[36]
- The FDA has 13 foreign offices structured to enable U.S. authorities make decisions about products entering the U.S.[37]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.

Address Sensitive Issues and Protect Sensitive Sectors

It is important that the Kenyan government address sensitive issues at the intersectionof trade and public health, as well as trade and human rights. Over the years, the United Nations

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[31] 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
[32] *Ibid.*
[33] *Ibid*
[34] *Ibid*
[35] *Ibid*
[36] *Ibid*
[37] 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).

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.

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. Climatechange issues and challenges can no longer be treated as an isolated problem that only deservea 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.

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 worstimpacts. These groups are the worst hit because they are heavily dependent on lands and naturalresources 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 levelsof 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.

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 thatarise in the bilateral relationship. - Seek to facilitate the exchange of information and to expand cooperation with respect to subsidy issues outside ofthe bilateral relationship. - Seek to develop disciplines that addressthe creation or maintenance of capacity inconsistent with market principles.

Digital trade

The STIP launch announcement states that the United States and Kenyan Governments share an interest in addressing discriminatory practices. ENA notes that it is unclear what this will cover. Discrimination could be the Kenyan government treating Kenyan companies/citizens better than US companies/citizens (e.g., in landownership/government procurement etc.), i.e., not providing national treatment. Or it could be the Kenyan government treating state-owned enterprises (SOEs) whether foreign or domestic, better than private companies.

Based on past US free trade agreements (FTAs), removal of 'discriminatory practices' could mean STIP provisions such as: removing any Kenyan requirements to store data locally (e.g. by mandating cross-border data flows) because requirements to store data domestically could be seen to be 'discriminatory' because it can violate national treatment commitments.

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 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:

a. **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 digitaltrade….

b. **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 profitablyin 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 businessprocess 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'simplementation of this Act, it could serve as a serious barrier for internet platforms seeking to supply services in Kenya.[38]

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 protectionin 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. Disciplines on Digital Trade Protectionism Creates Winners and Losers

Discipline on digital trade protectionism clearly favors countries that are the major

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[38] *2019 National Trade Estimates Report.*

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.[39] 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.

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

Data localization 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."[40] "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."[41] Defenders take the vie

[39] Congressional Research Service, Digital Trade, 3 December 2020. https://crsreports.congress.gov/product/pdf/IF/IF10770

[40] *2019 National Trade Estimates Report*.

[41] Anupam Chander *, The Coming North American Digital Trade Zone, 9 October 2018. https://www.cfr.org/blog/coming-north-american-digital-trade-zone*

that rules that prohibit data localization significantly limits the ability of countries to protect their citizens.[42]

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."[43] 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**.[44]

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.[45] 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."[46] 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."[47]

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[42] 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

[43] Emphasis added.

[44] USMCA, Article 19.8.2. (foot note 4). Emphasis added.

[45] Michael Geist: How the USMCA falls short on digital trade, data protection and privacy, Washington Post, 3 October 2018.

[46] *Ibid.*

[47] *Ibid.*

3.0 Key Recommendations

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 efficienciesand 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 thatencourage innovation and entrepreneurship. Mainstream digital technologies and services intoKenya's development policy is of paramount importance. Kenya and countries in Africa mustembrace 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 thatmay expose consumers to several risks during electronic transactions" and that the limitationsof 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."[48] The author of the articlesuggested that Kenya "may benefit immensely from borrowing standards of e-commerce set by international law and laws applied in other jurisdictions" and "needs to 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 questionis not whether a country should support digital trade but whether binding obligations related toe-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."[49] 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.[50]

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[48] 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

[49] Congressional Research Service, Digital Trade, 3 December 2020/ https://crsreports.congress.gov/product/pdf/IF/IF10770

[50] World Trade Report, World Trade Report 2020, p. 25.

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.[51]

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 athow 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.

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 anddeveloping 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 theshort 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 numberof 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, itis 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 thedomestic policy space of African countries and constrain their ability to industrialise. Specifically, the Africa Group: (i) questioned the propaganda that new e-commerce rules willbe 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 meaningfullyaddress 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.[52]

[51] https://www.wto.org/english/res_e/booksp_e/wtr20_e/wtr20-2_e.pdf
[52] The WTO Work Programme on Electronic Commerce, Statement by the Africa Group (JOB/GC/144).

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 comprehensivepolicy 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.[53]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.

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.[54] According to reports, participating members seek to achieve a high-standard outcome that builds on existing WTO agreements and frameworks.[55] 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.[56]

Presently, only a handful of countries in Africa are participating in the WTO E- Commerce negotiations.[57] African countries in general have expressed concerns about a

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[53] 2017/2065(INI). 'Towards a digital trade strategy', 12 December 2017. https://www.europarl.europa.eu/doceo/document/TA-8-2017-0488_EN.html

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

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

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

[57] 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.

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."[58] Developing countries' hesitation to participate in the e-commerce plurilateral is understandable. However, if the choice is betweenbinding 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.

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 KenyanParliament 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.

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."[59]

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." [60]

Address Digital Rights

Trade agreements can be a lever to improve digital rights. Conversely, trade agreementscan undermine digital rights. Consequently, it is recommended that the Kenyan government bevery 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. TheKenyan 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**

[58] JOB/GC/144.
[59] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf
[60] 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

to trade negotiations,"[61]and that "the protection of personal data **is non-negotiable in trade agreement**."[62]

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 dividein 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?

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 inorder to bridge the digital divide. The Kenyan government should also consider provisions thatrequire 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 Tradepolicy 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 assistancein 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.[63]

Address key Questions

It is recommended that before accepting binding disciplines on digital trade, theKenyan 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

[61] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf. Emphasis added
[62] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf. Emphasis added.
[63] https://www.europarl.europa.eu/doceo/document/A-8-2017-0384_EN.pdf

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

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

Review and Upgrade Kenya's Negotiation Objectives

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

Digital Trade

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 flowin line with the Countries development agenda in particular contribution of this trade to economic development[.] Support Kenya in strengthening E-Commerceand 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 andguarantee 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 thatKenya does not impose measures that restrictcross-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 adoptnon-discriminatory measures for legitimate public policy objectives or that are necessaryto protect public morals.