



PROPOSED KENYA - UNITED STATES OF AMERICA FREE TRADE AREA AGREEMENT

NEGOTIATION PRINCIPLES, OBJECTIVES, AND SCOPE.

**Ministry of Industrialization, Trade and
Enterprise Development
Republic of Kenya**

Kenya and the U.S. in February 2020 jointly announced their intent to initiate negotiations on a Free Trade Agreement (FTA) between themselves.

Towards this end, the Ministry of Industrialization, Trade and Enterprise Development having consulted and heard from various stakeholders developed Negotiating Objectives and Principles to guide the negotiations for this first bilateral FTA between Kenya and the U.S.

This is now made available for public review.

The Ministry looks forward to receiving comments to enrich our preparations for the Negotiations.

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1. INTRODUCTION

- 1.1 Kenya and United States of America (U.S.) have held strong and deep-rooted diplomatic relations since 1964. This is demonstrated by Kenya hosting one of the largest U.S. diplomatic missions in Africa. Similarly, Kenya has an Embassy in Washington DC.
- 1.2 On the trade front, U.S. and Kenya have strong trade relations demonstrated by growing exports and imports which have grown over the years. U.S. is the fourth significant market destination for Kenya, a position that has been sustained over the years after the East Africa Community (EAC), European Union (EU) and Common Market for Eastern and Southern Africa (COMESA). Kenya's excellent export performance in the U.S. is mainly attributed to the duty-free market access preferential treatment under Africa Growth Opportunity Act (AGOA).
- 1.3 Since AGOA expires in 2025, Kenya's option for trading with U.S. will be in accordance to the WTO, to be either under Generalized System of Preferences (GSP) because of Kenya's status as a developing country or a trade arrangement under Free Trade Area as provided under WTO's Article XXIV of General Agreement on Tariffs and Trade (GATT) 1994.
- 1.4 Sustaining current export performance to U.S. will require a trade arrangement that would guarantee duty free quota free market access for Kenyan products to U.S.
- 1.5 It is in this spirit that on 27th August 2018, H.E. President Uhuru Kenyatta and H.E. President Donald Trump, announced the commencement of negotiations leading to a conclusion of a Free Trade Area Agreement (FTA). As a first step, both countries set up a Trade and Investment Working Group (TIWG) to spear head the negotiations.
- 1.6 The TIWG came up with four objectives covering the following thematic areas:
 - i. Maximizing the remaining years of AGOA;

- ii. Strengthening commercial cooperation between the two countries;
 - iii. Development of short-term solutions to reduce barriers to trade and investment; and
 - iv. Exploratory talks on future Kenya – US bilateral trade and investment relations.
- 1.7 Pursuant to the above development, the proposed FTA is based on the thematic area on 'exploratory talks on future Kenya – U. S. bilateral trade and investment relations'.
- 1.8 On 6th February 2020, H.E. President Uhuru Kenyatta and H.E. President Donald Trump in Washington, D.C. jointly and publicly announced the intent for Kenya and U.S. to negotiate and conclude the proposed FTA. Ahead of the announcement, both sides had identified Trade in Goods, Trade in Services, Intellectual Property Rights, including investment and other trade related areas as possible areas for negotiations.
- 1.9 Kenya-U.S. FTA negotiations provide the country with a unique opportunity to enter into a bilateral trade and development cooperation negotiations with one of the global economic powerhouses -the United States of America which is Kenya's fourth largest export market and seventh overall trading partner.
- 1.10 The negotiations will also make good use of the fraternal relationship between Kenya and the U.S. and especially for Kenya as one of the key non-oil African trading partner of United States.

2. PRINCIPLES

The following principles will be articulated and guide the negotiation:

- i. The FTA will be WTO compatible and will allow for application of the 'Special and Differential Treatment';
- ii. The FTA will be an instrument for economic and trade development;
- iii. The FTA negotiations shall respect the commitments that Kenya has taken at Multilateral (WTO), Continental (AfCFTA), Regional (EAC, COMESA, TFTA) and Bilateral level;
- iv. The FTA will preserve and build on AGOA *acquis*;
- v. The Negotiations shall cover substantially all trade; and

- vi. Any EAC Partner State that did not participate in these negotiations at the outset should be allowed to join the negotiations, subject to terms and conditions already agreed or accede to the concluded FTA.

3. NEGOTIATING OBJECTIVES

3.1 GENERAL OBJECTIVES

- a. Initiate, negotiate and conclude a WTO compatible Free Trade Area (FTA) Agreement based on the International and WTO General principles that promotes preferential and mutually beneficial trade, investment and economic relations. The negotiations shall also be consistent with GATT 1994 Article XXIV, Part IV on Trade and Development and GATS Article V;
- b. Ensure that Kenya benefits from the American foreign policy towards Africa and Kenya in particular with a view to reaping the benefits of first mover advantage of such trade agreement with the U.S.;
- c. Ensure that the FTA agreement pays fidelity to Kenya's commitments and obligations with existing Multilateral, Regional and Bilateral trade agreements for which Kenya has signed and ratified;
- d. Make sure that the FTA provides for safeguards, and exceptions to protect Kenya's nascent industrial and agricultural sectors;
- e. Increase the inflow of U.S. Foreign Direct Investment into Kenya that will improve vertical and horizontal linkages in the Kenyan economy;
- f. Take advantage of the opportunities created within the negotiations that will provide market access for identified goods and services;
- g. Take advantage of the opportunities created within the negotiations that provide for national and regional advantages arising from foreseen commercial consequences associated with global health, economic and social dynamics;
- h. Promote Kenya's position as a transit hub for goods and services that has been availed by the expansion of land, sea and air transport infrastructure to attract investments;
- i. Ensure the expansion of value chains, especially in production, value addition, transit trade and create demonstrable economic benefits to the Kenyan economy especially creation of decent jobs and sustainable livelihoods;

- j. Make sure that the outcome of the negotiations will become the basis of future FTAs with other African Countries, Kenya and the U.S. will endeavour to brief interested African Countries periodically;
- k. Ensure the outcome of the negotiations contains provisions for technical assistance and capacity building which will be made available to enable Kenya to fully participate in the negotiations and implement obligations under the FTA;
- l. Ensure that the negotiations on trade in goods, trade in services, investment and other areas will be conducted in an agreed sequence to ensure a balanced outcome; and
- m. Create a framework through which any EAC Partner State that did not participate in these negotiations at the outset is allowed to join the negotiations, subject to terms and conditions that would be agreed between Kenya and the U.S.

3.2 SPECIFIC OBJECTIVES

- i. Ensure that there is no disruption of Kenya's market access into the U.S. after AGOA expires on September 30, 2025;
- ii. Secure a predictable trade regime with the U.S. that is AGOA Plus;
- iii. Enhance and diversify exports of goods and services into the U.S. under predictable and preferential terms;
- iv. Stimulate industrial, agricultural and service industry development through targeted production of goods and services that are aligned to market opportunities in the U.S.;
- v. Support development of value chains, especially in production, value addition and creation of demonstrable economic benefits to the Kenyan economy especially creation of decent jobs and sustainable livelihoods;
- vi. Strengthen and promote Kenya's regional, continental and global market access through revamped production and supply capacity arising from the U.S. investments triggered by the FTA; and
- vii. Use expanded markets to attract investments targeting production and exports into the Global markets.

4.0 SCOPE

Kenya is seeking to have the FTA deliver on the above general and specific objectives. The Kenya-U.S. FTA will include the following fourteen (14) areas of negotiations:

- i. Goods Market Access;
- ii. Food and Agriculture/Sanitary & Phytosanitary (SPS) Measures;
- iii. Technical Barriers to Trade (TBT);
- iv. Customs Procedures, Rules of Origin and Trade Remedies;
- v. Transparency and Legal Issues;
- vi. Services, Digital Trade and Investment;
- vii. Intellectual Property (IP);
- viii. AGOA Utilization;
- ix. Textile and Apparel;
- x. Commercial Cooperation;
- xi. Labour;
- xii. State Owned Enterprises;
- xiii. Environment; and
- xiv. Government Procurement.

4.1 MARKET ACCESS

4.1.1 TRADE IN GOODS

- The US-Kenya FTA will aim at progressively eliminating tariff and non-tariff barriers on substantially all trade in goods in order to establish a free trade area among the parties. Tariff negotiations will be conducted on a comprehensive basis.
- Such negotiations should aim to achieve the high level of tariff liberalization, through building upon the existing liberalization levels between the two countries and through tariff elimination on a high percentage of both tariff lines and trade value.
- The scheduling of tariff commitments should seek to maximize the benefits of regional economic integration.

- Priority will be attached to early tariff elimination on products of interest to the Kenya.
- Negotiations on SPS, TBT and Trade Facilitation shall be negotiated on the basis of the Cooperation Agreement between the U.S. and EAC.

4.1.2 FOOD AND AGRICULTURE/SANITARY & PHYTOSANITARY (SPS) MEASURES

- Negotiations on SPS, shall be based on the existing Cooperation Agreement between the U.S. and EAC.

4.2 CUSTOMS PROCEDURES, RULES OF ORIGIN AND TRADE REMEDIES

4.2.1 CUSTOMS

- Negotiations on Customs shall be based on the existing Trade Facilitation Cooperation Agreement between the U.S. and EAC, and WTO Customs Valuation.

4.2.2 RULES OF ORIGIN:

- Develop simple and easy to implement rules of origin which ensure that the benefits of the Agreement go to products genuinely made in Kenya building on AGOA Rules of Origin.
- Establish rules of origin that encourages regional value chain by allowing cumulation across the existing regional blocs.
- Establish flexible rules of origin that allows for wider cumulation provision, including extended cumulation.
- Rules that recognizes the different levels of development between Kenya and the U.S and therefore allow asymmetrical rules.
- Establish rules of origin that incentivize development of the nascent industrial and agricultural sector in Kenya.

4.2.3 TRADE REMEDIES

- The FTA negotiations will be based on WTO Trade Remedies laws namely; Subsidies and Countervailing Measure (SCM), Anti-dumping and Safeguard.
- Establish a mechanism for resolving trade remedies violations before referring the matter to the Dispute Settlement Mechanism.
- Facilitate the ability to impose measures based on market distortions due to ongoing subsidization or dumping.
- Promote cooperation between trade remedies administrators, particularly with regard to the sharing of information that would improve the ability of administrators to effectively monitor and address trade remedies violations.
- Build on the existing transparency principles in the SCM Agreement.
- Establish a consultative mechanism to discuss subsidy issues that arise in the bilateral relationship.
- Facilitate the exchange of information and to expand cooperation with respect to subsidy issues outside of the bilateral relationship.

4.3 TECHNICAL BARRIERS TO TRADE (TBT)

Negotiations on TBT on the existing Cooperation Agreement between the U.S. and EAC shall be based on ensuring:

- i. National treatment of conformity assessment bodies without conditions or limitations and encourage the use of international conformity assessment systems, including mutual recognition arrangements.
- ii. Commitments that the U.S. will not foreclose export opportunities to Kenya with respect to third party country export markets, including by requiring third party countries to withdraw or limit the use of any relevant standard, guide, or recommendation developed in accordance with the TBT Committee Decision.

4.4 LEGAL AND TRANSPARENCY ISSUES

4.4.1 EXISTING LEGAL OBLIGATIONS

- i. Kenya affirms its existing rights and obligations with respect to its domestic laws and other existing bilateral, regional and multilateral agreements to which it is a party to;
- ii. Any additional obligation, drawn from an International Treaty shall only be applicable if both countries are party to the Treaty;
- iii. Nothing in this Agreement shall require Kenya to ratify any international agreement in order to fully implement the FTA;
- iv. The U.S. shall notify Kenya of its intention to ratify any treaty that may in any way affect the implementation of existing obligations under the FTA; and
- v. Obtain commitments that can facilitate market access by reducing regulatory obstacles.

4.4.2 ANTI-CORRUPTION

- Enforcement of anti-corruption legislation and the exchange of information on anti-corruption cases and initiatives
- Secure commitments by the Parties to provide information resources to help businesses navigate requirements for exporting to each other's market.

4.5 SERVICES, DIGITAL TRADE, AND INVESTMENT

4.5.1 TRADE IN SERVICES

- The negotiations shall aim to eliminate restrictions and/or discriminatory measures with respect to trade in services of export interests to Kenya.
- Rules and obligations on trade in services under the US-Kenya FTA will be consistent with the WTO General Agreement on Trade in Services (GATS) 1994.
- Negotiations will take into consideration the Special and Differential Treatment applicable to Kenya as a developing country.

4.5.2 DIGITAL TRADE IN GOODS AND SERVICES AND CROSS-BORDER DATA FLOWS

- Secure commitment to allow gradual regulations at facilitation of Digital trade in goods and services and cross-border data flow in line with the country's development agenda in particular contribution of this trade to economic development.
- Support Kenya in strengthening E-Commerce and digital platforms for Trade in goods and services.
- Provide framework to strengthen the Kenyan Innovation and Entrepreneurship ecosystem and upgrading of innovation startups.
- Support in strengthening the infant incubation, acceleration and innovation hubs for innovative start-ups in Kenya.

4.5.3 INVESTMENTS

- The negotiations shall aim at creating a liberal, facilitative, and competitive investment environment. Negotiations for investment shall cover the four pillars of promotion, protection, facilitation and liberalization.

4.6 INTELLECTUAL PROPERTY (IP)

- The text on intellectual property in the Kenya - U.S. FTA shall aim to reduce IP-related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights. It shall cover other intellectual property areas covered by Convention on Biodiversity, including genetic resources, folklore, traditional knowledge, and benefit sharing.
- Capacity Building and technical assistance will be provided to Kenya in order to fully implement the Agreed provisions on IPR.

4.7 STATE-OWNED AND CONTROLLED ENTERPRISES (SOEs)

- The FTA recognizes the importance of SOE in the development of the Kenyan economy.

- Secure commitment for ensuring asymmetry, especially for strategic SOEs where Kenya will need to be granted flexibility it will require in shielding such SOEs from the FTA commitments
- Secure commitment to ensure that SOEs do not distort trade, and especially for products and services of Kenya's market access interest in the U.S.

4.8 LABOR

- Undertake to support and cooperate at the ILO as labour is a very important factor of production.

4.9 ENVIRONMENT

- Recognize the importance of Environment and support the Multilateral Environmental Agreements (MEAs) that each country is party to and the two should continue working closely in those fora.

4.10 GOVERNMENT PROCUREMENT

- Take note of the Kenyan policy of using Procurement as an instrument to build entrepreneurship in the Kenyan economy.
- Secure commitment for cooperation and exchange of information on enhancing capacity and transparency of Government procurement.
- Secure commitment for Kenya's participation in the U.S. Government procurement process.
- Secure commitment for application of the principle of asymmetry geared towards non reciprocity in Government Procurement.

4.11 ECONOMIC AND TECHNICAL COOPERATION

- Economic development and technical cooperation under the FTA will aim at enhancing development in Kenya and maximizing benefits from the implementation of the Kenya – U.S. FTA agreement.
- The economic and technical cooperation provisions in the Kenya – U.S. FTA shall build upon existing economic cooperation arrangements between

Kenya and the U.S. paying particular attention to the development of various value chains of export interest to Kenya.

4.12 DISPUTE SETTLEMENT

- The Kenya – U.S. FTA shall include a dispute settlement mechanism that would provide an effective, efficient and transparent process for consultations and dispute resolution on trade issues.