

New thinking about a US-Kenya Trade Deal

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When in February 2020 the then US President, Donald Trump, and President Uhuru Kenyatta of Kenya announced that the two countries would start formal trade talks aimed at concluding a bilateral trade and investment agreement within two years, it was an important but not entirely unexpected development. Kenya has a long-standing policy to promote its global trade relationships. The 2000 WTO Trade Policy Review of Kenya, for example, notes that Kenya's trade policy is to promote regional integration through the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA), as well as strengthening and increasing overseas market access for Kenyan products, especially processed goods, and further integration into the world economy.¹ Kenya has signed an Interim Economic Partnership Agreement (EPA) with the European Union (EU)² and a replica of the EPAs with the United Kingdom after Brexit. It has put in place temporary measures for its exports to the EU to benefit from duty free-quota free trade with the EU after talks to establish an EU-EAC EPA had stalled.

Kenya wants a reciprocal free trade agreement with the United States to secure its market access benefits enjoyed under the Africa Growth and Opportunity Act (AGOA), which is an American unilateral trade preference program for sub-Saharan African countries, based on US legislation. It expires in September 2025.³ In May 2020 the Office of the United States Trade Representative issued a detailed summary of specific Negotiating Objectives.⁴

¹ WTO. *Kenya: January 2000*. Trade Policy Reviews: First Press Release, Secretariat and Government Summaries. https://www.wto.org/english/tratop_e/tpr_e/tp124_e.htm

² Kenya moves to secure duty-free trade deal with EU after stalled EPAs talks. *The East African*, 13 May 2022. <https://www.theeastafrican.co.ke/tea/business/kenya-moves-to-secure-duty-free-trade-deal-with-eu-3807038>

³ U.S., Kenya launch non-tariff trade and investment partnership talks. *Reuters*, 15 July 2022. <https://www.reuters.com/world/us-kenya-launch-trade-investment-partnership-ustr-2022-07-14/>

⁴ *United States-Kenya Negotiations: Summary of Specific Negotiating Objectives*, May 2020.

“Our vision is to conclude an agreement with Kenya that can serve as a model for additional agreements in Africa, leading to a network of agreements that contribute to Africa’s regional integration objectives. In addition, our goal is to conclude an agreement that builds on the objectives of AGOA⁵ and will serve as an enduring foundation to expand U.S.-Africa trade and investment across the continent.”

These bilateral talks paused in the wake of the American presidential elections in November 2020. Mr Biden was sworn in as US President in January 2021. On 14 July 2022, the new US Administration and Kenya launched the *Kenya-United States Strategic Trade and Investment Partnership (STIP)*. The two governments will start work within three months to develop an ambitious roadmap for enhanced cooperation with the goal of negotiating “high-standard commitments” in order to achieve economically meaningful outcomes.

The following have been identified as areas where agreement will be sought:

- **Agriculture.** They will consider measures to facilitate agricultural trade and enhance transparency and understanding of the application of science- and risk-based Sanitary and Phyto-sanitary (SPS) measures.
- **Anti-Corruption.** The two governments want to prevent and combat bribery and other forms of corruption. They will engage in information sharing of best practices to prevent and combat bribery and corruption and will explore negotiating specific commitments.
- **Digital Trade.** The two countries share an interest in fostering consumer, business, and worker trust in the digital economy, ensuring access to information, promoting the development and use of resilient and secure digital infrastructure, promoting competition and the participation of micro, small, and medium enterprises (MSMEs), and addressing discriminatory practices. They will support digital inclusion, including accessibility, and online consumer protection. They will also monitor global discussions on emerging issues in digital trade which are of mutual interest.
- **Environment and Climate Change Action.** Common values will be promoted with respect to environmental protection, a commitment to conservation, pursuing measures to support

⁵ The African Growth and Opportunity Act. Visit [AGOA.info](https://www.agoa.info) for more information

climate change adaptation and mitigation, and the importance of the sustainable use and management of each country's natural resources as they strengthen their trade and investment relations.

- **Good Regulatory Practices.** High-level commitments will be explored on proposed regulations; transparency; posting of proposed regulations for review by interested stakeholders; basing regulatory decisions on best available information, science, and evidence, including undertaking risk analysis and regulatory impact assessment as appropriate. The two sides will also explore negotiating provisions on services domestic regulation.
- **Micro, Small and Medium Enterprises (MSMEs).** The success of MSMEs is a key element to promote sustained economic growth, including for women-owned enterprises. The two countries will discuss approaches to integrate MSMEs into international trade and will initiate periodic technical best practices exchanges and roundtables on micro, small and medium enterprises.
- **Promoting Workers' Rights and Protections.** They share a desire to work together to advance and protect labour rights through compliance with labour laws, promotion of social dialogue, and protecting labour in global supply chains.
- **Supporting Participation of Women, Youth, and Others in Trade.** Kenya and the United States are committed to promoting economic opportunities for women and youth and to develop and adopt trade policies that promote and facilitate their participation in international trade and to promote good paying, high-quality jobs, and sustainable livelihoods.
- **Standards Collaboration.** The two governments will discuss the role of standards, conformity assessment procedures and technical regulations that have a significant impact on trade, including opportunities to reduce impediments to trade due to differences in their respective systems.
- **Trade Facilitation and Customs Procedures.** They recognise the pandemic's impact on supply chains and the demonstrated benefits of streamlining border procedures and accelerating WTO Trade Facilitation Agreement implementation for trade in goods. They will discuss opportunities to simplify procedures, especially those that allow new entrants to engage in trade. They will

consider customs practices, transparency and cooperation on customs enforcement to inform mutual understanding, including the Agreement between the US and Kenya Regarding Mutual Assistance between their Customs Administrations, signed at Washington on August 6, 2014, as well as exploring other topics of engagement, including trusted trader benefits for demonstrated low-risk importers, particularly those that participate in their respective country's Authorised Economic Operator (AEO) program.

These are early days and the roadmap for how the proposed negotiations between Kenya and the US will unfold and be conducted must still be decided. This seems to be the beginning of a new chapter in Washington's future relations with the Africa. There is a strategic aim as well and countering Chinese influence in Africa is part of that.

One could describe the objectives as presently stated to envisage a good governance partnership with substantive commitments for new disciplines such as digital trade, climate change issues and regulatory harmonisation. At some point the post AGOA rules for trade with the US will have to figure. The latest initiative between the US and Kenya does not explicitly mention tariff reductions or the conclusion of a new Free Trade Area (FTA) Agreement. However, the detail in respect of the new commitments will have to be worked out in order to secure a binding agreement. And tariff matters will figure, for trade in agriculture for example.

The original Kenyan decision to negotiate a bilateral trade deal with the US was controversial. Kenya was criticised for breaking ranks and that under the African Continental Free Trade Area (AfCFTA) it should not conclude such deals, despite the fact that AfCFTA Protocol on Trade in Goods explicitly states that the State Parties are not prevented from "*concluding or maintaining preferential trade arrangements with Third Parties...*"⁶ The more complex issue is the compatibility of a bilateral FTA which would exclude the other EAC Partner States, and how to reconcile such a development with the functioning of the Common External Tariff of the EAC customs union. There was even an application filed with the Court of Justice of the EAC for an order to prevent Kenya from continuing.

It has to be seen what the responses to the latest development will be but an agreement on better trade governance and tackling new generation issues should be viewed as necessary and beneficial for all concerned. It should have positive effects on intra-African trade in goods and services too. However,

⁶ Art 4(2) AfCFTA Protocol on Trade in Goods.

at some point the legal basis for trade in goods with the US will have to be put on the agenda. AGOA expires in 2025.

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