



# **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 US, 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 US.

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 (USA) have strong and deep-rooted diplomatic relations which have existed since 1964. This is demonstrated by Kenya hosting one of the largest US diplomatic missions in Africa. Similarly, Kenya has an Embassy in Washington DC.
- 1.2 On the trade front, USA and Kenya have strong trade relations demonstrated by growing exports and imports which have grown over the years. USA is the third significant destination market 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 USA is mainly attributed to the duty-free market access preferential treatment under Africa Growth Opportunity Act (AGOA).
- 1.3 As AGOA expires in 2025, Kenya's option for trading with the USA 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 the USA will require a trade arrangement that would guarantee duty free quota free market access for Kenyan products to the USA.
- 1.5 It is in this spirit that on 27<sup>th</sup> August 2018 His Excellency President Uhuru Kenyatta and President 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 the 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 – U.S.A. bilateral trade and investment relations
- 1.5 Pursuant to the above development, the proposed FTA is based on the thematic area on 'exploratory talks on future Kenya – U.S.A. bilateral trade and investment relations'.
- 1.6 On 6<sup>th</sup> February 2020, H.E President Uhuru Kenyatta and H.E. President Donald Trump in Washington, DC jointly and publicly announced the intent for Kenya and USA to negotiate and conclude an 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.

- 1.7 Kenya-USA 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 State of America which is Kenya’s third largest export market and seventh overall trading partner.
- 1.8 The negotiations will also make good use of the fraternal relationship between Kenya and USA and especially for Kenya as one of 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
- (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) To initiate, negotiate and conclude a WTO compatible Free Trade Area (FTA) Agreement based on the International and WTO General principles and one 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) To ensure that Kenya benefits from the American foreign policy towards Africa and Kenya in particular with a view to reaping the benefits of first mover advantage of such trade agreement with USA
- c) To ensure that the FTA agreement pays fidelity to Kenya’s commitments and obligations with existing Multilateral, Regional and Bilateral trade agreements for which Kenya has signed and ratified.
- d) To make sure that the FTA provides for safeguards, and exceptions to protect Kenya’s nascent industrial and agricultural sectors.

- e) To increase the inflow of USA Foreign Direct Investment into Kenya that will improve vertical and horizontal linkages in the Kenyan economy.
- f) To take advantage of the opportunities created within the negotiations to provide market access for identified goods and services.
- g) To take advantage of the opportunities created within the negotiations that provide for national and regional advantages arising from foreseen commercial consequences associated with global health, economic and social dynamics;
- h) To promote Kenya's position as a transit hub for goods and services that has been availed by the expansion of land sea and air transport infrastructure to attract investments
- i) To ensure the expansion of value chains, especially in production, value addition and transit trade and to create demonstrable economic benefits to the Kenyan economy especially creation of decent jobs and sustainable livelihoods.
- j) To make sure that the outcome of the negotiations will become the basis of future FTAs with other African Countries, Kenya and the USA will endeavour to brief interested African Countries periodically.
- k) To make sure that the outcome of the negotiations contains provisions for technical assistance and capacity building which will be made available to enable Kenya to fully participate in the negotiations, implement obligations under the FTA.
- l) To make sure that the negotiations on trade in goods, trade in services, investment and other areas will be conducted in an agreed sequence to ensure a balanced outcome.
- m) To create a framework through which any EAC Partner State that did not participate in these negotiations at the outset is allowed to join the negotiations, subject to terms and conditions that would be agreed between the USA and Kenya.

### 3.2 SPECIFIC OBJECTIVES

- (i) To ensure that there is no disruption of Kenya's market access into the USA after AGOA expires on September 30, 2025
- (ii) To secure a predictable trade regime with the USA that is AGOA Plus
- (iii) To enhance and diversify exports of goods and services into the USA under predictable and preferential terms.
- (iv) To stimulate industrial, agricultural and service industry development through targeted production of goods and services that are aligned to market opportunities in the USA
- (v) To support development of value chains, especially in production and value addition and creation of demonstrable economic benefits to the Kenyan economy especially creation of decent jobs and sustainable livelihoods.

- (vi) To strengthen and promote Kenya’s regional, continental and global market access through revamped production and supply capacity arising from USA investments triggered by the FTA.
- (vii) To use expanded markets to attract investments targeting production and exports into the Global markets.

## 4.0 SCOPE

The Kenya-USA FTA will include the following areas of negotiations under which Kenya is seeking to have the FTA deliver on the above general and specific objectives.

- (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
- (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 USA 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 USA and EAC.

### 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 USA 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 cummulation across the existing regional blocs;
- Establish flexible rules of origin that allows for wider cummulation provision, including extended cummulation;
- Rules that recognizes the different levels of development between the USA and Kenya and therefore allow asymmetrical rules.
- Establish rules of origin that incentivize development of the nascent agricultural and industrial sector in Kenya.

#### 4.2.3 TRADE REMEDIES

- The FTA negotiations will be based on the following WTO Trade Remedies laws, namely Subsidies and countervailing measure, 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.
- Seek to build on the existing transparency principles in the SCM Agreement.
- Seek to establish a consultative mechanism to discuss subsidy issues that arise in the bilateral relationship.
- Seek to facilitate the exchange of information and to expand cooperation with respect to subsidy issues outside of the bilateral relationship

### 4.3 TECHNICAL BARRIERS TO TRADE (TBT)

Negotiations on TBT, shall be based on the existing Cooperation Agreement between the USA and EAC.

- Ensure national treatment of conformity assessment bodies without conditions or limitations and encourage the use of international conformity assessment systems, including mutual recognition arrangements.
- Obtain commitments that the U.S.A will not foreclose export opportunities to Kenya with respect to third-country export markets, including by requiring third 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

- 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;
- Any additional obligation, drawn from an International Treaty shall only be applicable if both countries are party to the Treaty.
- Nothing in this Agreement shall require Kenya to ratify any international agreement in order to fully implement the FTA.
- The USA shall notify Kenya of its intention to ratify any treaty that may in any way affect the implementation of existing obligations under the FTA.
- 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 small 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)
- 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 Countries development agenda in particular contribution of this trade to economic development
- Support Kenya in strengthening E-Commerce and digital platforms for Trade in goods and services
- Provide framework to strengthen the Kenyan Innovation and Entrepreneurship ecosystem and upgrading of innovation startups
- Support in strengthening the infant incubation, acceleration and innovation hubs for innovative start-ups in Kenya

### 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 - USA FTA shall aim to reduce IP-related barriers to trade and investment by promoting economic integration and cooperation in the utilization, protection and enforcement of intellectual property rights. It shall cover other intellectual property areas covered by Convention on Biodiversity, including genetic resources, folklore, traditional knowledge, and benefit sharing.

- Capacity Building and technical assistance will be provided to Kenya in order to fully implement the Agreed provisions on IPR

#### **4.7 STATE-OWNED AND CONTROLLED ENTERPRISES (SOES)**

- The FTA recognition of 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 USA
- 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

#### **4.8 LABOR**

- Undertake to support and cooperate at the ILO as labour is a very important factor for 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 foras

#### **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 USA 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**

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Ministry of Industrialization, Trade and Enterprise Development

KENYA US FTA – NEGOTIATION OBJECTIVES

22.06.2020

- Economic development and technical cooperation under the FTA will aim at enhancing development in Kenya and maximizing benefits from the implementation of the Kenya – USA FTA agreement. The economic and technical cooperation provisions in the Kenya – USA FTA shall build upon existing economic cooperation arrangements between Kenya and the USA paying particular attention to the development of various value chains of export interest to Kenya.

#### 4.12 DISPUTE SETTLEMENT

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