ITI Promoting Innovation Worldwide

ITI Comments on the U.S.-Kenya Trade Agreement Negotiation

April 27, 2020

The Information Technology Industry Council (ITI) is pleased to respond to the Federal Register Notice "Request for Comments on Negotiating Objectives for a United States-Republic of Kenya Trade Agreement," Docket number USTR-2020-0011. We believe that these trade negotiations present a unique opportunity for the U.S. Government to create a new global benchmark for a modern, comprehensive, and digitally focused trade agreement that clearly demonstrates the benefits of digital trade for development, innovation, and global competitiveness.

ITI is the premier global advocate and thought leader for the technology industry. ITI's membership is comprised of more than 70 of the leading innovation-driven companies from all corners of the information and communications technology (ICT) sector, including hardware, software, digital services, semiconductor, network equipment, Internet companies, financial services, and more. We commend USTR for its tireless work in addressing barriers to U.S. exports, including through the publication of the yearly National Trade Estimate (NTE). We appreciate the focus that the 2020 NTE gives to barriers to trade in Kenya, and hope that through these negotiations many of the identified uncertainties and restrictions can be alleviated. Our members are deeply invested in the success of U.S. trade policy and value the leadership that USTR has continually shown in creating a global free and fair trade environment while championing new and innovative provisions on digital trade.

A U.S.-Kenya Trade Agreement is a key opportunity to continue this work. At a time when barriers to digital trade are proliferating and a wide range of economies – both developed and developing – are engaged in the negotiation of digital trade commitments at the WTO, the initiation of negotiations with Kenya is timely. Kenya's information and communications technology sector has been growing at an average rate of 10.8 percent since 2016 and is poised to be the hub for digital technology on the continent. Through this trade agreement, the U.S. can demonstrate that, beyond facilitating trade, investment and connectivity, high-standard digital trade provisions can drive development and improve standards of living. In doing so, the U.S. is poised to craft a new standard model for agreements with additional countries in Africa and developing countries around the world.

We look forward to working with USTR throughout the negotiating process both to share the views of our members and to explore new and innovative ways to reach a high-standard trade agreement with Kenya. We offer recommendations for strong, modern commitments in the following areas:

- Digital Trade;
- Regulatory Compatibility and Technical Barriers to Trade;
- Services and Goods Market Access;
- Taxation;
- Customs and Trade Facilitation;
- Electronic Payment Services;
- Competition Policy;
- Intellectual Property;

Global Headquarters
700 K Street NW, Suite 600
Washington, D.C. 20001, USA
+1 202-737-8888

Europe Office
Rue de la Loi 227
Brussels - 1040, Belgium
+32 (0)2-321-10-90

info@itic.org
www.itic.org
@iti_techtweets

- Government Procurement; and
- Capacity Building and Technical Assistance.

Digital Trade

The U.S. government has long been the global leader in championing ambitious, state-of-the-art digital provisions. ITI encourages USTR to build on that success by working toward a digital trade chapter that breaks new ground and sets a new benchmark for facilitating inclusive trade in the digital era between developed and developing countries. To achieve this level of ambition, a U.S.-Kenya Trade Agreement must build on the successes of the U.S.-Mexico-Canada agreement (USMCA) Digital Trade Chapter by incorporating the essential principles of digital trade while exploring additional ways to encourage American exports, in particular those that:

- Strengthen bilateral data flows and prohibit data localization;
- Prohibit tariffs and customs formalities on electronic transmissions and enshrine non-discriminatory treatment of digital products;
- Ensure protection of personal data, taking into account best international practices for privacy and interoperability;
- Strengthen and expand good regulatory practices for digital trade, including as a means to promote emerging technologies like artificial Intelligence (AI) and machine learning;
- Promote risk-based cybersecurity and vulnerability disclosure in alignment with international standards;
- Prohibit requirements to disclose source code, algorithms, and proprietary information relating to cryptography;
- Establish limitations to intermediary liability for users and suppliers of interactive computer services to support and safeguard digital supply chains;
- Facilitate access to and use of open public data in minable, machine-readable formats to spur adoption of AI and other emerging technologies; and
- Enshrine acceptance of electronic contracts, signatures and authentication.

Policymakers have key opportunities in particular as concerns:

Strengthening Bilateral Data Flows and Prohibiting Data Localization*.* The free flow of data is the lifeblood of all industries and all sectors in both the United States and Kenya. A U.S.-Kenya Trade Agreement should provide businesses with the certainty that they will be able to continue to move and store data, including financial data, between the two countries, thereby enabling continued access to the innovative products and services necessary for small and large firms alike to grow their businesses and improve their products. Data-related provisions in a U.S.-Kenya Trade Agreement should underscore that strong trade provisions on cross-border data flows and data localization are key to empowering digital industries and entrepreneurs in the developing world.

Strengthening and Expanding Good Regulatory Practices (GRPs) for Digital Trade. When exploring novel methods to address specific issues with new and innovative services, both governments should commit to taking approaches that are targeted, proportionate, and developed in a fit-to-purpose manner that facilitates trade, innovation, and strong protections. Such approaches must also ensure ample opportunity for broad stakeholder input, stipulate reliance on global, industry-driven, voluntary consensus standards,[1] due consideration of the technical and economic feasibility of requirements, and publication of an impact assessment encompassing a range of considerations to ensure the appropriateness, efficiency, and effectiveness of a direct regulatory approach. By broadening application of these and other good regulatory practices, both governments can leverage the maximum range of existing tools to address legitimate public policy objectives in a manner that prevents unnecessary policy fragmentation, avoids new non-tariff barriers to trade, minimizes conflicts of laws for companies engaged in digital trade, facilitates the implementation of new technologies, and demonstrates U.S. and Kenyan leadership through the creation of a framework worthy of emulation in Africa and around the world.

Promoting emerging technologies, like AI and machine learning**.** Emerging technologies like AI and machine learning are increasingly prevalent in the way companies do business, including small businesses that use AI tools to increase productivity and find new markets abroad, and industries that build and export AI technologies across borders. To strengthen public trust in AI and enable next-generation innovation to flourish, it is important to develop responsible and internationally aligned AI governance frameworks and, where appropriate, risk-based regulatory approaches that are sufficiently flexible to account for new opportunities and challenges. Accordingly, consistent with OECD principles on AI,[2] the U.S. and Kenya should agree to adopt targeted, risk-based, technology neutral, sector-specific approaches to the governance and potential regulation of AI, while recognizing the extent to which potential risks can be mitigated or addressed using existing instruments and regulatory frameworks. This agreement is also an opportunity to advance non-discriminatory regulation of AI applications, while promoting interoperability, including through reliance on global, industry-driven, voluntary consensus standards. In addition, the U.S. and Kenya should engage in bilateral and international cooperation to promote the development and deployment of AI, including cooperation on AI deployments that can address global challenges in areas such as public health, humanitarian assistance, and disaster response.

Promoting Risk-Based Cybersecurity and Vulnerability Disclosure in Alignment with International Standards. A U.S.-Kenya Trade Agreement should promote risk management approaches to cybersecurity that rely on consensus-based standards and best practices by encouraging the Parties to develop voluntary cybersecurity frameworks that incorporate NIST Cybersecurity Framework principals to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events. In addition, the United States and Kenya should require the Parties to promote voluntary processes for coordinated vulnerability disclosure and handling based on international standards and best practices. This should include, but not be limited to, coordinated disclosure and handling processes for both known and unknown ("zero-day") security vulnerabilities between private sector organizations, as well as between governments (i.e., CERT-CERT cooperation), for the purpose of improving the likelihood of mitigation. With regards to Internet of Things (IoT) devices, governments should collaborate on IoT baseline security through

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[1] Governments should promote the broadest degree of flexibility through consideration of all standards that adhere to principles laid out in the TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations (TBT Committee Decision, November 2000, G/TBT/9), regardless of *where* the standard is developed and whether the developing body is non-governmental or inter-governmental.

[2] https://www.oecd.org/going-digital/ai/principles/

aligned approaches to baseline cybersecurity standards. The U.S. and Kenya should also explore creating collaboration structures on emerging security research and development.

Establishing Limitations to Intermediary Liability for Suppliers or Users of Interactive Computer Services. Internet services rely on a complex supply chains and have enabled small businesses and consumers in the U.S. and Kenya to reach a global customer base in ways never before possible. Businesses are building trust with customers through a range of activities, many of which are unseen by end users but crucial to the sustainability of the online ecosystem. A fundamental reason that services have been able to play this role is their open nature: internet services, including intermediaries, can facilitate communications and transactions among millions of businesses and people, enabling them to connect directly on a global basis. The U.S. should secure an agreement ensuring that intermediaries can continue to enable engagement and transactions with limited exposure to non-IP legal liability for all interactive computer services for the intermediary activities they perform, ranging from content hosting and distribution to user review and other e-commerce activities. A U.S.-Kenya Agreement would not prevent governments' work to combat illegal activity, and could, for example, also encourage companies to work with public authorities to ensure a safe online environment.

Facilitate Access to and Use of Open Public Data. Making government data available for use by the private sector – especially SMEs – can promote economic development by encouraging innovative commercial applications and services based on large data sets. By making government data available in an open, machine-readable format, governments spur the inclusive adoption of AI and other emerging technologies and encourage innovative new uses that bring about positive economic and social impacts. The U.S. and Kenya should leverage the benefits of emerging technology by committing to facilitate public access to and usage of government data.

Regulatory Compatibility and Technical Barriers to Trade

Beyond more specific applications referenced above, a U.S.-Kenya Trade Agreement chapter on GRPs should seek to strengthen and build upon commitments like those in the USMCA.

Technical Barriers to Trade. In line with the promotion of good regulatory practices for the regulation of emerging technology, U.S.-Kenya Trade Agreement commitments should build upon approaches in the USMCA with regard to technical barriers to trade in order to enable regulatory compatibility, foster convergence with respect to the regulation of digital services and emerging technologies, and provide regulators with the broadest range of tools to pursue fit-to-purpose solutions. Expanding disciplines ensuring regulatory consideration of the broadest range of global, industry-driven, voluntary consensus standards – including services standards – would be extremely meaningful in facilitating the kind of regulatory compatibility necessary to allow for the expanded exchange of goods, services, and information in the modern economy. In doing so this agreement could pioneer TBT commitments for the digital age, enabling regulators to leverage broad industry expertise and better keep pace with advances in technology.

Acceptance of Test Reports. Where governments deem it necessary to consider the use of conformity assessment as a component of potential regulatory approaches to emerging technology, the U.S. and Kenya could be global leaders in the development of strengthened provisions that facilitate the mutual acceptance of test results and certifications through reliance on existing international schemes, including the International Laboratory Accreditation Collaboration (ILAC) Mutual Recognition Arrangement (MRA) and International Accreditation Forum (IAF) Multilateral Recognition Arrangement (MLA). Each of these schemes provides for a rigorous peer-review process that ensures the quality of test results produced by CABs and certification bodies accredited by MLA and MRA members. The IEC System of Conformity Assessment Schemes for Electrotechnical Equipment and Components (IECEE) CB Scheme is another example of a successful international system for mutual acceptance of test reports and certificates that has yielded global benefits for the ICT industry. Expanding reliance on these entities would not only facilitate greater trade, but would have positive ramifications for safety, quality, and consistency, both by broadening the range of acceptable, trustworthy results, and allowing regulators and market surveillance authorities to concentrate resources in the most efficient manner possible.

Supplier's Declaration of Conformity. The ICT industry has a proven, global track record in leading in the development of safe, high-quality, and state-of-the-art products. As such, in product areas where third-party testing requirements are unlikely to lead to improved regulatory outcomes, we promote supplier's declaration of conformity (SDoC) as the ideal attestation choice both for the satisfaction of regulatory requirements and the facilitation of trade. A greater reliance on SDoC in the marketing of ICT products would maintain regulatory and market surveillance assurances on the quality and safety of products while allowing for a focus on those classes of products with the greatest risk profiles. Bilateral negotiations should further explore where SDoC can be implemented as an effective means to ensure that products meet regulatory requirements while minimizing delays and impediments to market access.

Electronic Labeling (E-Labeling). Allowing the display of regulatory and other product information via electronic means is a sensible solution that ensures labels do not inhibit product innovation while helping to minimize cost and maximize consumer convenience.[3] We urge USTR to build on the text on e-labeling contained in the ICT Annex of the USMCA in the U.S-Kenya Trade Agreement. Requiring Parties to allow electronic display of regulatory information (e.g., radio frequency, compliance markings) rather than traditional physical labels on devices, which may no longer be feasible with new device sizes and designs, would ensure alignment with global best practices. E-labeling is widely used for screen devices, but the ICT industry has also sought other methods of e-labeling for various device types to better accommodate new, increasingly small product types and an increasing number of certification labels.

Services and Goods Market Access

Technology goods and services are essential for all industries, regardless of sector. Whether they be farmers, manufacturers, or logistics companies, they all rely on technology products and services to reach customers, manage processes, and drive operations. This is why liberalizing trade in technology goods and services would have an outsized impact on driving trade and development in the Kenyan market. We urge negotiators to prioritize the technology sector as market access negotiations commence, with specific attention to the below areas.

[3] https://itif.org/publications/2017/09/25/how-e-labels-can-support-trade-and-innovation-ict

Beyond the liberalization of services trade across the board, liberalization in key sectors including computer-related services, data processing, electronic payment services, advertising services, telecommunication services, audiovisual services, and postal and express delivery services will have significant, broader positive repercussions for bilateral digital trade. Further, consistent with a negative list approach and in the interest of facilitating trade in emerging services sectors, commitments should ensure that new sectors benefit from market access commitments without further negotiation.

Service negotiators should also pursue mutual recognition for professional qualifications. Non-recognition of qualifications in professional service areas creates barriers that increasingly affect the tech sector, especially as technology roles receive greater professional recognition in the form of licenses, accreditation and certification. We support provisions on the mutual recognition of qualification as a central objective of a services chapter.

With respect to goods trade, we would emphasize the productivity and economic growth gains of increased access to and use of ICT goods. Studies have shown that Kenya's accession to the WTO Information Technology Agreement (ITA) and its expansion would boost its economic growth by 1.29 percent.[4] Therefore, in addition to a general lowering of Kenya's bound tariff rates for U.S. exports, U.S. negotiators should obtain a commitment from Kenya to accede to the WTO Information Technology Agreement (ITA) and its expansion in the near term. In addition, rules of origin should be flexible and subject to reasonable content thresholds to enable technology producers to readily make use of them.

Taxation

Consistent with the spirit of deepening bilateral trade and investment engagement, the U.S. and Kenya should maintain their commitment to reach a multilateral solution to the tax challenges arising from the digitalization of the economy. Such commitment should entail the avoidance of any taxation measures that are discriminatory in nature and contravene long-standing principles of international taxation.

Customs and Trade Facilitation

E-commerce has played a revolutionary role in opening new opportunities for SMEs to sell goods across borders. For example, of all U.S. companies selling products on eBay, 97 percent export, as compared with less than 5 percent of all other firms.[5] There are tangible commitments that negotiators can pursue to expand opportunities for these firms to do business online. A U.S.-Kenya Trade Agreement should build on and strengthen customs and trade facilitation provisions in the WTO Trade Facilitation Agreement (TFA) and USMCA. Further simplifying customs clearance procedures – including through establishment of commercially meaningful de minimis levels, as well as informal clearance thresholds – would enable greater SME participation in international trade and send a clear message about the unambiguous economic benefits of such commitments.

[4] https://itif.org/publications/2017/05/22/how-joining-information-technology-agreement-spurs-growth-developing-nations

[5] https://www.ebaymainstreet.com/sites/default/files/ebay_global-report_usa.pdf.

Electronic Payment Services

ITI views the application of digital trade provisions to electronic payment services (EPS) suppliers as an essential feature of modern agreements, and EPS tools have been critical in facilitating development across a range of sectors in Kenya. We would echo the recent joint statement of the U.S. and Singaporean governments: data mobility in financial services supports economic growth and the development of innovative financial services and benefits risk management compliance programs.[6] Specifically, digital trade provisions in a U.S.-Kenya Trade Agreement should: a) ensure EPS suppliers are able to transfer and store information across borders; and b) prohibit requirements to use or locate computing facilities in a country's territory as a condition for supplying EPS in that territory.

A U.S.-Kenya Trade Agreement should also emulate and strengthen the financial services commitments in the USMCA that provide market access and national treatment across modes of supply, ensuring a level playing field for domestic and foreign-based suppliers of EPS in both markets. Robust, high-standard commitments for EPS will ensure and safeguard an open and competitive market for EPS, by discouraging requirements for local switching or processing of transactions, and duplicative or otherwise burdensome licensing requirements. Such commitments are particularly relevant and necessary for the United States' first FTA with a country in Sub-Saharan Africa, where secure and innovative payments methods are key to expanding financial inclusion, reducing graft and formalizing the gray economy, and building trust in the financial system.

Regulation in connection with EPS should account for, and be respectful of, different business models, encouraging a diverse set of players in the payments space. This competition among players would not only result in greater consumer choice, but would also spur open innovation and interoperability, contributing to a more robust payments ecosystem that would allow all market participants to develop and supply a wide range of payment services with differing product features and value propositions. Market-based policies that support service suppliers' decisions to open Application Programming Interfaces (API) and share data with others in the payments ecosystem help to foster an enabling environment which promotes innovation and competition, which will in turn scale and improve the quality of e-payment services for consumers and merchants.

As electronic commerce and digital payments evolve, the U.S. and Kenya can and should adopt an approach that fully upholds legitimate public interest objectives while allowing space for innovation and growth, premised on the shared view that there is no inherent inconsistency between these ends. In line with broader GRPs, transparency and reasonable opportunity for stakeholders to comment and consult on proposed regulations will go a long way in ensuring that such regulations are fit-for-purpose and do not inadvertently stifle innovation and competition.

Competition Policy

A U.S.-Kenya Trade Agreement should reflect the modern competition policy commitments included in USMCA. Competition policy provisions should ensure transparent, fair, and non-discriminatory application of competition policy tools, including with respect to proposed mergers. The Parties should commit to affording affected persons the opportunity to obtain all necessary

[6] https://home.treasury.gov/news/press-releases/sm899

information regarding the national competition authority's concerns, to be heard and present evidence, and to pursue adequate appeal where necessary. Similarly, rules governing extraterritorial application of competition law enforcement should be applied consistently and transparently, with a clear link to national interest and country nexus. Building on existing rules, provisions in a U.S.-Kenya Trade Agreement should commit governments to avoiding definitions and standards that apply differently to digital and non-digital businesses.

Also, innovative companies should be able to utilize the technology that works best and suits their needs, based on open architecture and standards. The agreement should include technology choice provisions to ensure that companies are not required to purchase and utilize local technology and encourage open architecture and standards to enable greater security and drive innovation in key technologies, including cloud computing, Artificial Intelligence and 5G telecommunications.

Intellectual Property

The nature of content creation, and the tools and platforms used to share that content, has shifted dramatically over the past decade. ITI member companies are creators, disseminators, and sharing platforms that rely on innovative business models to reach global consumers. We urge negotiators to pursue a balanced approach that includes strong copyright protections while allowing for robust limitations and exceptions, and strong text- and data-mining exceptions. Similarly, for online service providers that provide a platform for content sharing and that have systems in place to address copyright infringement, the agreement should contain a commitment to a strong copyright safe harbor that limits the liability of innovative companies for the abuse of their services by third parties.

Government Procurement

As the U.S. and Kenyan governments continue to modernize, become more efficient and productive, and provide more online services to citizens, access to high-quality and trustworthy ICT products and services grows in importance. A U.S.-Kenya Trade Agreement should reflect strong rules-based commitments while maintaining and expanding government procurement market access to enable companies to compete and to broaden government access to a range of innovative and productivity-enhancing tools.

Technical Assistance and Capacity Building

Recognizing that the high standard trade provisions outlined in this submission can be a challenge to implement for many economies, we recommend that USTR work with interagency partners and Kenyan counterparts to identify areas in which continued technical assistance from the U.S. Government could aid Kenya in building capacity and crafting world-class technology policy. Existing U.S. mechanisms, such as USAID's Center for Digital Development, as well as public private partnerships could prove useful in this regard. For example, a dialogue on creating trust in digital products and services through the creation and implementation of high-standard privacy protections in Kenya could spur greater investment and technology adoption, driving bilateral digital trade. Similar engagements in the areas including cybersecurity, GRPs, standardization policy, conformity assessment regimes and taxation could assist in building strong regulatory regimes in Kenya while easing and preventing the emergence of non-tariff barriers to trade for both goods and services for both countries.