



## KENYA PRIVATE SECTOR CONSORTIUM COMMENTS ON KENYA'S NEGOTIATING OBJECTIVES ON THE U.S. - KENYA TRADE AGREEMENT

Version 1

These comments are submitted in response to the open invitation by the Cabinet Secretary, Ministry of Industrialisation, Trade and Enterprise Development to submit comments to enrich the Kenya-U.S. Free Trade Agreement (FTA) Negotiations.

The Private Sector Consortium is a working group setup purely to provide private sector input to the FTA. The Consortium comprises of representatives from the American Chamber of Commerce Kenya, the Kenya Private Sector Alliance, the Kenya National Chamber of Commerce and Industry, the Kenya Association of Manufacturers and select industry experts.

As private sector we view the FTA as an opportunity to drive mutual economic growth through predictable, increased trade and investment, creation of quality jobs, increased innovation, and enhanced productivity. We thus welcome this opportunity to submit our comments.

### ON THE PRINCIPLES

In so far as the FTA will serve as an operating model/approach for future regional Trade Agreements with the U.S. and set a base so to speak, for the important balance between existing regional trade dispensations (e.g. EAC/COMESA/AfCFTA) and bi-lateral Trade Agreements.

- It is recommended that strong and explicit support for optimal *complementarity* of trade dispensations be secured as a founding principle of the FTA.
- Kenya and the U.S. should jointly strengthen the global rules-based trading system embodied by the World Trade Organization (WTO).

### ON THE OBJECTIVES

The objectives are clear, and the priority areas reflect the key sectoral planning elements well.

- As this is developed further, we will be keen to see how we can integrate the various sectoral pillars for ease of planning and attract private sector investment due to scale and create opportunities. An example is the nexus between Agriculture and Health, as

agriculture and all value chains are part of nutrition, with the consumption of protein as an important development indicator, therefore the approach should also create scenarios where Education, Health, and Agriculture are linked.

- Ensure the expansion and transfer of technology in value chains, especially in manufacturing, production and in value addition.
- The reference to ‘... paying fidelity to commitments and obligations with existing Multilateral, Regional and Bilateral trade agreements...’ under overall objectives and sub-objectives is supported.

## ON THE SPECIFIC OBJECTIVES

The Agreement should build on learnings from AGOA’s overall impact positive/negative e.g. improved market access, African capacity deficiencies and implications, and identify the measures necessary to sustain Kenya’s competitiveness in the global market.

### Focus on Agriculture

We are already appropriately guided by 4.1.2 which captures value chains as there is a link between food, health/phytosanitary, and producers.

*Matters to be considered:*

- Agriculture is a big employer and contributor to GDP and therefore we have to be careful not to hurt the sector.
- Establishing a high value market entry of Kenyan products into the U.S. For example, identify foods which can be designated as traditional foods (e.g Dolichos (Njahi) which will compete with the black beans from Central America. Establish niche markets for nuts with specific varieties which would enter high value markets in the U.S. Utilize the *Neighborhood effect*: look at contracting growers in neighboring countries to supplement volumes and therefore increase return on investment.
- In the Kenyan agriculture network, soft infrastructure is guided by KEPHIS, KALRO, and PCPB, and KEBS on trade. Our exporters use the existing framework through licensing and standards which are provided by the recipients in the export market end which we need to meet.
- Kenya will need to ensure that we negotiate based on country of origin license recognition to avoid time wasted in verification on the recipient market for the horticulture and flower sector. Some small quantities have been exported to the U.S. and we will interview them to provide learnings from them to build business friendly models. This requires engagement with FPEAK & Kenya Flower Council to look at aspects which are increasing the cost of doing business to attract further investment.
- Review regulations on registration and licensing which works well within the Kenyan context but needs to identify/inform special and differential treatment if required of the products flowing Kenya-U.S. and U.S.-Kenya.

- Universities have a very big role in intellectual property management of agriculture in the U.S. as they conduct R&D on behalf of the private sector. A partnership between the Kenyan government and Private Sector on this would be very important as it results in both knowledge transfer and job creation.
- Linking Kenya's regulations to the current Intellectual Property review now underway will ensure all benefits are captured in the context of the FTA. Examples/Cases:
  - a) Potato seeds IP is held at KEPHIS through breeders' rights and form part of the license to produce specific varieties for both resident and non-resident companies.
  - b) Universities in the U.S have Seed Development Foundations which create an interface for private sector investment, thus creating jobs and ensuring availability of seed for both public & private sector. Other Universities have direct investment options for private sector for certain seed varieties (e.g. The University of Eldoret and Kenya Breweries have a relationship on the commercial rights to Barley). This will be a way to add value within Kenya's agriculture value chain
  - c) The Kenya Seed Company can be the model to study for government owned entities which influence the subsidy market.

### **Focus on Healthcare**

Given the current and expected healthcare environment, there is concern that Healthcare (pharma, med devices, health system strengthening, capacity building etc.) has not been explicitly highlighted as an area of importance to ensure that lifesaving technologies and services can be more easily facilitated through increased U.S. exports and improving the Kenyan population's disease burden and associated mortality. It is our assumption that these will be thoroughly addressed in Trade in Goods (4.1.1) and Services (4.5.1).

### **ON THE REGULATORY PRACTICE**

- We recommend that regulatory changes include sufficient advance notice and comment periods as well as in-depth stakeholder engagements, and especially for tax collection measures. Formalize a joint commitment by the FTA partners to follow good regulatory practices, including in-depth stakeholder engagement and sufficient advance notice.
- The notion of meaningful consultation is supported. However, it is recommended that regulatory measures be required to include both in-country and regional industry bodies/forums engagement e.g. Regional Food & Beverage Associations.
- In addition, regulatory impact assessments with comprehensive stakeholder inputs and consideration as well as socio-economic impact assessments should accompany any process of regulatory amendment/introduction. No general amendments/passing of

tax/regulatory changes should take place during periods of national emergency/disaster. Such changes should be limited and specific to addressing exclusively such disaster related eventualities.

- It is recommended that formal consideration be given to harmonization of any new measures with regional EAC (and wider) regulatory measures. The FTA should encourage regional linkages and strengthen regional economic integration.

## COMMENTS/INPUT ON NEGOTIATING CHAPTERS

Chapter/Area	Specific Comments/Recommendations
4.1.1 TRADE IN GOODS	<p>Agreement should reduce/eliminate all tariffs on industrial goods traded between the United States and Kenya.</p> <p>Processed foods should attract higher tariffs, but the machinery that will be used to process foods from local products should be exempted from taxation.</p> <p>The Agreement should explicitly recognize direct selling as a legitimate and beneficial distribution service that expands consumer choice, encourages entrepreneurship and labor market flexibility, and broadens economic opportunity. Both Governments should acknowledge that up-line payments based on product sales shall not be prohibited.</p> <p>Trade in secondhand goods, especially clothing does not support the quest for agricultural and industrial development.</p>
4.1.2 FOOD AND AGRICULTURE/SANITARY & PHYTOSANITARY (SPS) MEASURES	<p>On phytosanitary standards and regulations, we recommend that the WTO BPS Agreement serve as the source from which to derive these standards.</p> <p>Given likely future reference to this FTA in other regional negotiations a common standards base would be beneficial.</p> <p>It should be explicitly clarified that 'food' includes 'beverages'.</p>

#### 4.2.1 CUSTOMS

The agreement should streamline and modernize customs processes by encouraging the use of electronic customs forms, electronic signatures and authentication, and secure on-line payments.

The U.S. and Kenyan governments should collaborate for capacity building on the Kenyan side and to develop a trade facilitation program for low-value shipments, most of which are traded via e-commerce.

The program should include:

- A simplified set of procedures for clearance, taxation and return of goods under a simplified common threshold, with the aim of reducing time, cost and complexity in trade.
- A common Standard for E-Commerce Trusted Trader Accreditation which helps to manage the risk of illicit shipments and support the implementation of the above-mentioned trade facilitation measures.

Given Kenya's commitments to the WTO agreement, there is significant opportunity to promote access to global value chains by streamlining customs operations, leveraging technology solutions to support greater efficiency and aligning infrastructure upgrade opportunities with critical commercial operations. To continue to promote export expansion, priorities should include:

- Promotion of meaningful industry consultation and good practices of publishing draft regulations; opening comment before finalizing, transition period.
- Customs/Rules of origin - ensure the efficiency of ROO by harmonizing with existing American agreements such as US/ Australia, US/Korea, US/Chile which are less burdensome to originate under. For Chapters 28 to 39, ensure maximum flexibility to qualify substantial exports including the chemical reaction rule as well as the active ingredient being considered in the origination instead of just Net Cost or Regional Value Content.

	<ul style="list-style-type: none"> <li>• Ensuring inclusion of streamlined duty drawback provisions.</li> <li>• Aligning domestic infrastructure projects with trade priorities, especially removing bottlenecks to access and competition such as upgrading rail, port and transport infrastructure.</li> <li>• Modernizing transport security requirements to allow for same drivers or single transport across the border.</li> </ul>
4.2.2 RULES OF ORIGIN	<p>Promote Electronic Certificates of Origin (eCO) dispensation. It is recommended that Electronic Certificates of Origin (eCO) dispensation be formally recommended for EAC adoption.</p> <p>This will support trade and overcome Non-Tariff Barriers to trade particularly in an extended COVID environment (a multi-year COVID landscape). This has already been adopted in COMESA.</p>
4.2.3 TRADE REMEDIES	
4.3 TECHNICAL BARRIERS TO TRADE (TBT)	<p>Ensure harmonization of standards in the U.S. as regards Kenyan products so that specific State Rules in the U.S. do not impair access to markets.</p>
4.4.1 EXISTING LEGAL OBLIGATIONS	
4.4.2 ANTI-CORRUPTION	<p>The agreement should contain various transparency obligations to be fulfilled by the U.S. Government and the Kenyan Government. These include obligations to:</p> <ul style="list-style-type: none"> <li>• Participate in the development of technical regulations, standards, and conformity assessment procedures on a non-discriminatory basis.</li> <li>• Transmit regulatory proposals notified under the TBT Agreement directly to the other Party.</li> <li>• Describe in writing the objectives of and reasons for regulatory proposals; and</li> <li>• Accept and respond in writing to comments on regulatory proposals.</li> </ul>

	<ul style="list-style-type: none"> <li>• These provisions become effective no later than five years after the Agreement's entry into force.</li> </ul>
4.5.1 TRADE IN SERVICES	<p><b>The agreement should promote binding commitments to ensure open access to services markets, including obligations for new services and national treatment.</b></p> <p>The agreement should include core obligations found in earlier trade agreements relating to trade in services such as national treatment and most-favoured nation treatment.</p> <p>On market access, it should bar parties from limiting the number of suppliers or requiring a supplier from another country to establish an office or affiliate in its territory with a specific legal form such as a joint venture in order to supply a service.</p> <p>It should encourage cooperation on licensing recognition and other regulatory issues.</p> <p><u><i>Express Delivery Services</i></u></p> <p>The agreement should ensure that U.S. and Kenya consumers and businesses retain access to world-class delivery service options. It should require fair, non-discriminatory treatment of non-postal service providers through the inclusion of a delivery services.</p> <p>The agreement should require the two parties to ensure the U.S. and Kenya remain world leaders in effective postal regulation.</p> <p><u><i>Financial Services</i></u></p> <p>The agreement should ensure the free flow of data for the financial services sector. In the USMCA Financial Services Chapter, Article 17.19: Transfer of Information is a good example of a strong free flow of data provision that a U.S.-Kenya trade agreement can draw upon.</p>



The agreement should prohibit data localization measures. This will help facilitate the adoption of cloud technologies in the Financial Services sector which will have multiple benefits for efficiency, cyber-security, and privacy.

The agreement should commit to deepened regulatory cooperation and coherence in Fin-Tech developments, complementing multilateral and other bilateral efforts aimed at promoting cross-border financial technology development and growth.

Financial regulatory cooperation commitments in a U.S.-Kenya trade agreement should include robust transparency obligations that ensure stakeholders have the opportunity to review and comment on proposed measures. The agreement should also set clear rules regarding how regulators will engage with applicants for a license, including timelines and fees.

The agreement should discipline subsidies to financial services firms. Provisions in the financial services chapter should discipline the granting of subsidies to state-owned financial institutions with limited exception for certain programs.

#### *Electronic Payment Services*

The agreement should follow the financial services commitments in the USMCA, providing for both market access and national treatment, with regard to establishing a level playing field for domestic and foreign-based suppliers of Electronic Payment Services (EPS) in both markets.

Regulation should account for, and be respectful of, different business models, encouraging a diverse set of players in the payments space. This competition among players will not only result in greater consumer choice, but will also spur innovation, contributing to a more robust payments ecosystem that will allow all market participants to develop and supply a wide range of payment services with differing product features and value propositions.

The agreement should include a commitment to ensuring and safeguarding an open and global payment system in which transactions are processed by global networks without any requirements for local switching or processing of transactions.

	<p>Digital trade provisions of the agreement should ensure EPS suppliers are able to transfer information across borders and prohibit requirements to use or locate computing facilities in a party's territory as a condition for supplying EPS in that territory.</p>
<p>4.5.2 DIGITAL TRADE IN GOODS AND SERVICES AND CROSS-BORDER DATA FLOWS</p>	<p><b>The agreement should promote the free flow of information.</b> The ability to transfer and access information is critical to all economic sectors, and when information is restricted, all exporters and other stakeholders are hurt. Cross-border data flows have grown 45-fold since 2005, are a key medium for small and large businesses to reach new foreign customers, and have been at least as important as the flow of goods to economic growth in recent years.<sup>1</sup> Including a trade measure to promote the free flow of information can ensure that digital flows of information, online video, communication, commercial transactions, and intracompany traffic are not disrupted.</p> <p>Source Code</p> <p><i>USMCA Article 19.11: Cross-Border Transfer of Information by Electronic Means</i></p> <ol style="list-style-type: none"> <li>1. <i>No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered person.</i></li> <li>2. <i>This Article does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure:</i> <ol style="list-style-type: none"> <li>(a) <i>is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and</i></li> <li>(b) <i>does not impose restrictions on transfers of information greater than are necessary to achieve the objective</i></li> </ol> </li> </ol> <p><i>USMCA Article 19.12: Location of Computing Facilities</i></p> <p><i>No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory.</i></p> <p><b>The Agreement should prohibit data localization requirements:</b> Forced data localization requirements -- which compel companies to manage, store, or process data locally -- significantly increase costs for</p>

<sup>1</sup> [Digital globalization: The new era of global flows](#)

businesses and consumers; harm local businesses that are seeking access to a globally competitive network of service providers; decrease the security of user data; inhibit cross-border cooperation; and threaten the open, transnational nature of the internet.<sup>2</sup>

**Ensure technology choice and encourage open digital architectures<sup>3</sup>:** Innovative companies should be able to utilize the technology that works best and suits their needs. The use of closed architectures can prevent interoperability and competition, limiting the ability of companies to use the best, most cost-effective, secure, and innovative technologies. Requirements to utilize local technologies similarly restricts the ability of companies to take advantage of best-in-class technologies. Trade agreements should include technology choice provisions to ensure that companies are not required to purchase and utilize local technology. Agreements should also encourage the widespread use of open architectures to drive innovation in key technologies, including cloud computing, Artificial Intelligence and 5G telecommunications.

*Proposed Language: Ensure Technology Choice and Encourage Open Architecture (based on USMCA Article 18.15)*

- 1. No Party shall prevent a supplier of a service from choosing the technologies it wishes to use to supply its services, subject to requirements necessary to satisfy legitimate public policy interests, provided that any measure restricting that choice is not prepared, adopted, or applied in a manner that creates an unnecessary obstacle to trade.*
- 2. For greater certainty, if a Party adopts a measure restricting choice referred to in paragraph 1, it shall do so consistent with Article XX (Transparency).*
- 3. The Parties shall endeavour to encourage the adoption of open architectures to drive innovation and competition.*

**Provide for interoperable privacy and security protections:** Privacy and security standards are a critical underpinning to build trust in digital trade, and trade agreements can help ensure that privacy

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<sup>2</sup> [United States – Singapore Joint Statement on Financial Services Data Connectivity](#)

<sup>3</sup> Open architectures are design specifications for hardware or software components that any manufacturer or developer can use to develop components that can easily interoperate with components developed by other manufacturers and developers.

protections apply in the digital marketplace. Privacy rules in trade agreements should encourage global interoperability by acknowledging legitimate grounds for transferring data and demonstrate a clear intent to achieve interoperability with other privacy regimes.

**Encourage cross-border data protocols to accelerate pandemic response and medical research during global public health crises.** Data is vital to accelerate the development of medicines and digital innovations to respond to global public health crises. Trade agreements should foster negotiation of protocols that encourage the safe and secure sharing of medical data, such as vaccine and research data, to accelerate medical research and data-driven innovations that can save lives and further promote public health before, during or after a global health crisis. Emerging data privacy and security technologies, such as anonymization, tokenization and blockchain, should be leveraged to the full extent possible to facilitate trusted exchange of sensitive health-related data in a safe and secure manner.

*Proposed Trade Language:*

1. *Recognizing the threat presented by pandemics and global health emergencies, each Party shall strive to develop protocols, frameworks and other cooperative mechanisms to support research and information exchange related to vaccine development, medical treatments, and other measures that aim to protect global public health.*
2. *This Article does not prevent a Party from adopting or maintaining a measure inconsistent with paragraph 1 that is necessary to achieve a legitimate public policy objective, provided that the measure:*

*(a) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; and*

*(b) does not impose restrictions on transfers of information greater than are necessary to achieve the objective*

3. *The parties shall endeavor to adopt anonymization, tokenization, blockchain and other technology and process means to facilitate trusted cross border exchange of any sensitive health-related data in a safe and secure manner.*

**Promote a “reasonable care” approach to promote safety and security and welfare online:** Blanket liability protection for internet media companies – which was developed at time when the internet was in its infancy – has come under increasing scrutiny as governments around the world consider the best

frameworks for reducing harmful and illegal content. National governments should modernize their laws to ensure consumer focused internet media companies take greater responsibility for what is posted on their platforms. A “reasonable care” standard provides strong incentives for companies to limit illegal and illicit behavior online, while also being flexible enough to promote continued innovation. Trade agreements should encourage governments to work together to develop such standards.

*Digital Economy Partnership Agreement Article 5.2: Safety and Security Online*

1. *The Parties recognize that a safe and secure online environment supports the digital economy.*
2. *The Parties shall cooperate to advance collaborative solutions to global issues affecting safety and security online.*
3. *The Parties recognize the importance of taking a multi-stakeholder approach to addressing online safety and security issues.*

**Promote open access to Government-generated public data:** Large government data sets can enable innovation in commercial applications and services. Trade agreements should encourage governments to share data sets in machine-readable and accessible forms for use by the public.

*Proposed Language (based on USMCA Article 19.1)*

1. *The Parties recognize that facilitating public access to and use of government information fosters economic and social development, competitiveness, and innovation.*
2. *To the extent that a Party chooses to make government information, including data, available to the public, it shall endeavour to ensure that the information is in a machine-readable and open format and can be freely searched, retrieved, used, reused, and redistributed.*
3. *The Parties shall endeavour to cooperate to identify ways in which each Party can expand access to and use of government information, including data, that the Party has made public, with a view to enhancing and generating business opportunities, especially for SMEs.*

**Engender greater consumer trust in the digital economy by enhancing privacy and cyber security:** Trade agreements should require Parties to adopt legal frameworks to protect personal information that promote industry best practices, international standards and other cooperative mechanisms and encourage Parties to strengthen cybersecurity capabilities and cooperation and adopt risk-based approaches to cybersecurity regulation.

*USMCA Article 19.8: Personal Information Protection*

1. *The Parties recognize the economic and social benefits of protecting the personal information of users of digital trade and the contribution that this makes to enhancing consumer confidence in digital trade.*
2. *To this end, 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, such as the APEC Privacy Framework and the OECD Recommendation of the Council concerning Guidelines governing the Protection of Privacy and Transborder Flows of Personal Data (2013).*
3. *The Parties recognize that pursuant to paragraph 2, key principles include: limitation on collection; choice; data quality; purpose specification; use limitation; security safeguards; transparency; individual participation; and accountability. The Parties also recognize the importance of ensuring compliance with measures to protect personal information and ensuring that any restrictions on cross-border flows of personal information are necessary and proportionate to the risks presented.*
4. *Each Party shall endeavor to adopt non-discriminatory practices in protecting users of digital trade from personal information protection violations occurring within its jurisdiction.*
5. *Each Party shall publish information on the personal information protections it provides to users of digital trade, including how (a) a natural person can pursue a remedy; and (b) an enterprise can comply with legal requirements.*
6. *Recognizing that the Parties may take different legal approaches to protecting personal information, each Party should encourage the development of mechanisms to promote compatibility between these different regimes. The Parties shall endeavor to exchange information*
  1. *on the mechanisms applied in their jurisdictions and explore ways to extend these or other suitable arrangements to promote compatibility between them. The Parties recognize that the APEC Cross-Border Privacy Rules system is a valid mechanism to facilitate cross-border information transfers while protecting personal information.*

*USMCA Article 19.15: Cybersecurity*

1. *The Parties recognize that threats to cybersecurity undermine confidence in digital trade. Accordingly, the Parties shall endeavor to:*
  - i. *build the capabilities of their respective national entities responsible for cybersecurity incident response; and*
  - ii. *strengthen existing collaboration mechanisms for cooperating to identify and mitigate malicious intrusions or dissemination of malicious code that affect electronic networks, and use those mechanisms to swiftly address cybersecurity incidents, as well as for the sharing of information for awareness and best practices.*

2. *Given the evolving nature of cybersecurity threats, the Parties recognize that risk-based approaches may be more effective than prescriptive regulation in addressing those threats. Accordingly, each Party shall endeavor to employ, and encourage enterprises within its jurisdiction to use, risk-based approaches that rely on consensus-based standards and risk management best practices to identify and protect against cybersecurity risks and to detect, respond to, and recover from cybersecurity events.*

**Avoid unilateral and discriminatory taxation rules:** International trade requires a consistent and predictable international tax system. No matter whether trade is conducted over air, sea, or the internet, businesses depend on clear rules of the road for taxation, as well as consistency across jurisdictions. Unfortunately, some countries are pursuing unilateral and discriminatory taxes that uniquely target a subset of digital businesses and depart from long-established international tax rules. Instead of pursuing unilateral taxation measures, countries should work through the multilateral OECD discussions to update global taxation rules.

Digital trade across regional markets will be influenced by domestic digital trade taxes/policies. It is recommended that the Digital tax proposed in KE be considered in context of the negotiations, with the intent to reverse the decision for digital transaction taxation. It is imperative that KE ensure regional trade regulations be explicitly recognized and included as part of the overall support for regional commitments incorporated in the FTA.

Governments can promote growth and innovation in the digital economy by avoiding nationality-based discrimination. Trade agreements should require each Party to accord non-discriminatory treatment to the services, service suppliers, and digital products of the other Party, including for new and innovative digital products and services.

**Ensure that electronic transmissions are not subject to customs duties.** It's critical to maintain the longstanding global rule against applying customs duties or tariffs on cross-border digital transactions (software, digital music, B2B data services, app sales, e-books, etc) and on the data flows underlying those

transactions. Imposing tariffs on electronic transmissions would be counterproductive to governments' goals of promoting digitally driven economic growth, and also technically complex. The OECD and other analyses have demonstrated that any revenue from these customs duties would be significantly outpaced by the economic damage associated with new tariffs.<sup>4</sup>

**Provide protections that enable platforms to facilitate trade at scale:** Millions of small businesses and consumers are taking advantage of user review sites, customer support and feedback mechanisms, digital marketing platforms, and other new tools for online trade to reach far beyond local markets. However, for these trade-enabling tools to function, intermediary services need some level of assurance that they will not be held liable for communications that arise between businesses and consumers using these tools.

**Require copyright safe harbors:** A 'safe harbor' system protects the interests of copyright holders, online service providers, and users – imposing responsibilities and rights on each. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, Internet access providers, and many other businesses. By creating clear rules for the removal of infringing content (with roots in US and EU law), safe harbors balance strong IP protection with the right framework to allow for technological development and online innovation. Where safe harbors are not in place, venture capital investors are 81% less likely to invest in online services.<sup>5</sup>

**AI governance:** AI and machine learning technologies increasingly impact trade - from small businesses using AI tools to increase productivity and find new markets abroad to industries building and exporting AI technologies across borders. Trade agreements can be a channel to promote responsible AI governance

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<sup>4</sup> [Electronic transmissions and international trade – Shedding new light on the Moratorium Debate; The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions](#)

<sup>5</sup> [The Impact of Internet Copyright Regulations on Early-Stage Investment](#)



frameworks that are internationally aligned, as well as risk-based regulatory approaches so as to strengthen public trust and enable next-generation innovation to flourish.

**Bar forced technology transfers:** Trade agreements should prohibit Parties from requiring companies to transfer their technology, IP, production processes, or other proprietary information as a condition for accessing the market.

*USMCA Article 19.16: Source Code*

1. *No Party shall require the transfer of, or access to, a source code of software owned by a person of another Party, or to an algorithm expressed in that source code, as a condition for the import, distribution, sale or use of that software, or of products containing that software, in its territory.*
2. *This Article does not preclude a regulatory body or judicial authority of a Party from requiring a person of another Party to preserve and make available the source code of software, or an algorithm expressed in that source code, to the regulatory body for a specific investigation, inspection, examination, enforcement action, or judicial proceeding, subject to safeguards against unauthorized disclosure.*

*USMCA Article 20.69: Protection of Trade Secrets*

*Each Party shall ensure that persons have the legal means to prevent trade secrets lawfully in their control from being disclosed to, acquired by, or used by others (including state-owned enterprises) without their consent in a manner contrary to honest commercial practices.*

#### 4.5.3 INVESTMENTS

**Reduce barriers to foreign direct investment, eliminate forced technology transfers and ensure non-discriminatory treatment of Kenyan investors in the U.S. and vice versa.**

The agreement should protect both Kenyan and U.S. investments from non-discriminatory treatment, direct and indirect expropriation, under the minimum standard of treatment, including fair and equitable treatment, performance requirements and ensure free transfers. These obligations should be enforced via investor-state dispute settlement (ISDS) provisions, which provide for neutral arbiters to uphold these investment protections. The agreement should ensure that all sectors are afforded the same level of protection.

	<p>The trade agreement should prohibit measures that would require a financial institution to purchase or use a particular technology and include protection from such a performance requirement for all sectors, including financial institutions.</p> <p>Financial institutions must invest abroad to serve customers and clients and, in doing so, make significant investments under the prudential regime of the trading partner. These investments should be afforded the same level of protection in a U.S.-Kenya trade agreement as other investments.</p>
<p>4.6 INTELLECTUAL PROPERTY (IP)</p>	<p><b>Raise the bar for intellectual property (IP) rights and their enforcement since it relates to patents, copyrights, trademarks, and trade secrets to enhance U.S. and Kenya leadership in innovative industries.</b></p> <p>The agreement should prioritize world-class intellectual property (IP) protection and enforcement mechanisms to protect the proprietary knowledge of Kenyan companies working abroad.</p> <p>The agreement should include a strong base term and scope of protection for patents, copyrights, trademarks, designs, and establishment of a statutory commitment to protect trade secrets, exclusive rights for all forms of IP regardless of business models. It should be transparent, predictable, and with carefully defined rules for exceptions to rights across all forms of IP.</p> <p><b>Copyrights:</b> The agreement should require parties to provide effective remedies for online copyright infringement, including intermediary liability, with appropriately conditioned safe harbors.</p> <p><b>Trade secrets:</b> Civil and criminal causes of action and penalties for trade secrets theft are critically important.</p> <p>IP enforcement measures should also include fully effective injunctive relief, as well as deterrent-level civil and criminal remedies in law, backed up by effective enforcement efforts, including ex-officio authority to seize goods and enforcement for goods trans-shipped through a party's territory in order to combat trade in counterfeit goods.</p>

	<p>The agreement should state that no party shall require the transfer of, or access to, source code of software owned by a person of another party, or to an algorithm expressed in that source code, as a condition for the import, distribution, sale or use of that software, or of products containing that software, in its territory.</p>
4.7 STATE-OWNED AND CONTROLLED ENTERPRISES (SOES)	
4.8 LABOR	<p>The Agreement should place considerations for labor exchange and free movement of labor between the U.S. and Kenya</p>
4.9 ENVIRONMENT	<p>Trade and environmental policies must be mutually supportive.</p> <p>The Agreement must strive to boost the green / circular economy for an environmentally and socially sustainable future and address current challenges such as waste management.</p> <p>The Agreement should ensure effective enforcement of each country's environmental laws and strengthen the capacity of each country to protect the environment by promoting sustainable development.</p>
4.10 GOVERNMENT PROCUREMENT:	<p>The agreement should ensure open, transparent, and reciprocal access to U.S. and Kenyan procurement markets.</p>
4.11 ECONOMIC AND TECHNICAL COOPERATION	
4.12 DISPUTE SETTLEMENT	<p>Detailed procedures for the resolution of disputes between the two Parties over compliance with the Agreement should be set out. Those procedures should emphasize amicable settlements, relying wherever possible on bilateral cooperation and consultations. When disputes arise under provisions common to the Agreement and other agreements (e.g. the WTO Agreement), the complaining Party may</p>

choose the forum for resolving the matter. The selected forum is the exclusive venue for resolving that dispute.

*Consultations.* Either Party may request consultations on any matter that it believes might affect the operation of the Agreement. After requesting or receiving a request for consultations, each Party must solicit the views of the public on the matter. If the Parties cannot resolve the matter through consultations within 60 days, a Party may refer the matter to the Joint Committee, which will attempt to resolve the dispute.

*Panel Procedures.* If the Joint Committee cannot resolve the dispute within 60 days after delivery of the request, the complaining Party may refer the matter to a panel comprising independent experts that the Parties select. A side letter it provides that, in disputes related to a Party's enforcement of its labour or environmental laws, panellists other than those chosen by lot from a standing roster that the two governments will appoint, must have expertise or experience relevant to the subject matter that is under dispute. The Parties will set rules to protect confidential information, provide for open hearings and public release of submissions, and allow an opportunity for the panel to accept submissions from non-governmental entities in the Parties' territories.