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The United States-Kenya Free Trade Area (FTA): insights into the bilateral trade relationship and early progress on setting terms for an FTA

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ABSTRACT

On 6 February 2020, United States (US) President Donald Trump announced the United States' (US) intention to initiate negotiations with Kenya on a bilateral Free Trade Area (FTA). This followed a meeting between President Trump and Kenyan President Uhuru Kenyatta at the White House during a state visit by Kenyatta to the US.

An FTA between the US and any country would be noteworthy, but even more so when it potentially involves the first country in Sub-Saharan Africa (SSA) and only the second on the African continent after Morocco. The US-Morocco agreement entered into force in 2006 and is considered a comprehensive agreement that has seen bilateral trade between the countries grow significantly (with the US enjoying a substantial trade in goods surplus with Morocco).

A Kenya-US agreement would be remarkable for many reasons, including some issues and challenges that are potentially complex in the light of other existing arrangements and dynamics. In terms of US-African trade, Kenya was 'only' the seventh largest source of (imported) goods by the US from Sub-Saharan Africa during 2019, by comparison accounting for less than 10% of South Africa's exports to the US, with South Africa being the largest SSA exporter to the US.

This working paper looks at the planned Kenya-US FTA mainly from the perspective of the current trade relationship, reviewing developments and growth in Kenya's US-bound exports since 2000 when the African Growth and Opportunity Act (AGOA) began to offer expanded preferences to Kenyan exporters, and also the extent to which Kenya utilises and perhaps relies on such preferences. It also analyses patterns in US exports to Kenya, which take place on standard Most Favoured Nation (MFN) terms, and for some context provides a snapshot of Kenya's imports from other global sources as well as the EU with which it has previously concluded a reciprocal free trade agreement, albeit not yet fully operational. Finally, it looks at the legislative framework and related guidelines for the US to conclude new free trade agreements with third countries, and the manner in which such policy objectives relate to the planned US-Kenya FTA.

About the Author

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1. Introduction

On 6 February 2020, United States (US) President Donald Trump announced the United States' (US) intention to initiate negotiations with Kenya on a bilateral Free Trade Area (FTA).[1] This followed a meeting between President Trump and Kenyan President Uhuru Kenyatta at the White House during a state visit by Kenyatta to the US.

An FTA between the US and any country would be noteworthy, but even more so when it potentially involves the first country in Sub-Saharan Africa (SSA) and only the second on the African continent after Morocco. The US-Morocco agreement entered into force in 2006 and is considered a comprehensive agreement that has seen bilateral trade between the countries grow significantly (with the US enjoying a substantial trade in goods surplus with Morocco).

A Kenya-US agreement would be remarkable for many reasons, including some issues and challenges that are potentially complex in the light of other existing arrangements and dynamics. In terms of US-African trade, Kenya was 'only' the seventh largest source of (imported) goods by the US from Sub-Saharan Africa during 2019, by comparison accounting for less than 10% of South Africa's exports to the US, with South Africa being the largest SSA exporter to the US.

Then there are also a few elephants in the room; for example, the fact that Kenya belongs to an existing customs union – the East African Community (EAC). The EAC has been notified to the World Trade Organisation (WTO) as a customs union. This type of regional community by definition maintains a common external tariff on imports from third parties and, at least in theory, facilitates the free

[1] USTR (2020). *President Trump Announces Intent to Negotiate Trade Agreement with Kenya*. 6 February 2020. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya

circulation of goods, meaning that individual member states cannot, ordinarily, negotiate trade agreements with third parties on their own. And what about the track record of concluding an FTA with the European Union (EU) (EU-EAC EPA), yet with still only Kenya and Rwanda having signed (and Kenya ratified) – at this stage – the agreement on the African side? Or divergent industrial policies and policy decisions, for example on the second-hand clothing issue, where countries like Kenya and Uganda repudiated decisions to ban or substantially restrict the importation of worn clothing, including from the US, while Rwanda enforced it? Can it be argued, perhaps, that the East African Community (EAC) does not as yet have the integrity of a fully-fledged and functioning customs union, but is in some respects still a work in progress?

Then there is the African Continental Free Trade Area (AfCFTA) – which was launched in 2019 and was expected to be operational later in 2020. While being a signatory to the AfCFTA, which is essentially an FTA, this in no way cedes a country's right to engage with third parties for purposes of concluding a preferential trade agreement. The established position of the African Union (AU), of which Kenya is a member, has been that a future trade agreement with the US (or another third country) should preferably be negotiated in some coordinated manner or under the auspices of the continental bloc, rather than by individual state parties on their own. But this is, arguably, more of a political than a legal position. The AfCFTA agreement does not establish any institutions with a mandate to negotiate trade agreements on behalf of the member states, and countries retain the policy space to negotiate trade agreements with third parties. They have not, by joining the AU or being a party to the AfCFTA, 'transferred their national treaty-making powers to the continental body'.[2]

This working paper looks at the planned Kenya-US FTA mainly from the perspective of the current trade relationship, reviewing developments and growth in Kenya's US-bound exports since 2000 when the African Growth and Opportunity Act (AGOA) began to offer expanded preferences to Kenyan exporters, and also the extent to which Kenya utilises and perhaps relies on such preferences. It also analyses patterns in US exports to Kenya, which take place on standard Most Favoured Nation (MFN) terms, and for some context provides a snapshot of Kenya's imports from other global sources as well as the EU with which it has previously concluded a reciprocal free trade agreement, albeit not yet fully

[2] Erasmus, G (2020). *Does the AfCFTA enable Africa to speak with one voice on trade issues?* tralac Trade Brief No S20TB03/ 2020. Stellenbosch: tralac (p. 3)

operational. Finally, it looks at the legislative framework and related guidelines for the US to conclude new free trade agreements with third countries, and the manner in which such policy objectives relate to the planned US-Kenya FTA.

2. Kenya and the African Growth and Opportunity Act

The African Growth and Opportunity Act (AGOA) is legislation originally introduced to the United States House of Representatives in February 1999, by a Republican representative from the s of Illinois, Philip Crane. By May 2020 it had passed, with amendments, the respective committees in the House of Representatives and the Senate, and the final conference report (the House and Senate versions must be consistent prior to presenting for signature to the president) was passed by an overwhelming majority of 77 – 19.[3] Enjoying wide bipartisan support, AGOA was signed into law by the then President Bill Clinton on 18 May 2000 and subsequently became part of US legislation.

AGOA authorised a new trade and investment policy Sub-Saharan Africa. It paved the way for a significantly deeper and more beneficial trade and political relationship, and in terms of preferential access to the US market, provided substantially enhanced product coverage for goods that would be exempt from US import duties when produced by and shipped from an AGOA beneficiary country. Only countries from Sub-Saharan Africa are eligible for AGOA preferences, and only countries that meet AGOA's eligibility criteria can obtain beneficiary status. Consequently, the list of beneficiaries is reviewed and revised annually. Currently, 38 countries enjoy AGOA beneficiary status.[4]

While AGOA preferences potentially extend to wearing apparel, textiles, as well as certain traditional/ folklore fabrics, these are subject to additional and separate provisions. Wearing apparel, one of Kenya's main exports to the US, requires that a country first obtains approval for a special apparel visa system to allow tracing and management of input materials for the fabrics used (this relates to the very flexible rules of origin (RoO) that are a key aspect to this provision). Kenya and Mauritius were the first two

[3] United States Senate (2000). *Roll Call Vote 106th Congress – 2nd Session (AGOA).* https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=2&vote=00098
[4] AGOA.info. (2020). https://agoa.info/about-agoa/country-eligibility.html

countries to obtain clearance for apparel exports to the US under AGOA on 18 January 2001, with a handful of other countries following later that year.

2.1 Trade preferences under AGOA

AGOA broadened and extended the trade preferences previously available to Kenya and other beneficiaries in different yet important ways:

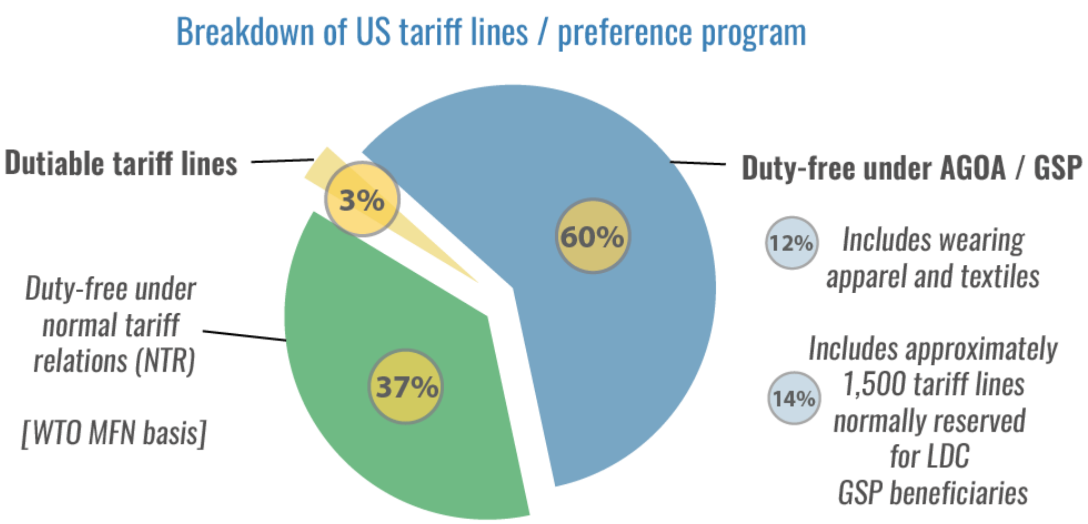
- The product coverage of the US Generalised System of Preferences (GSP) was in effect absorbed into the AGOA coverage and relevant tariff code designation. This afforded AGOA beneficiaries greater certainty with respect to product coverage, since the GSP has to be renewed fairly regularly (usually every two to three years) and over the past decade, for example, lapsed a few times, often for considerable time periods and leading to much uncertainty for traders.
- Linked to the previous point is the greater certainty of AGOA preferences compared to Generalised System of Preferences (GSP) preferences, since AGOA preferences initially were set to expire in 2008, then 2015, and now 2025.
- AGOA also in effect absorbs GSP tariff lines that were reserved for Least Developed Countries (LDC) countries only (A+ designation), which excludes Kenya; approximately 1 500 tariff lines currently have AGOA status and GSP A+.[5]
- AGOA does away with the Competitive Need Limitations (CNLs) for imports under the programme. The US GSP scheme limits (and then excludes) products imported into the US from beneficiary countries beyond an annual limit, or where the share of imports under the GSP scheme exceeds 50% of all imports of that product into the US. While AGOA does not do away with quantitative quotas, the CNLs do not apply to imports under the arrangement.

Many tariff lines not previously eligible for GSP or other preferences are now covered by the AGOA scheme, including a number of animal and vegetable products, chemicals, manufactured goods, and textiles and clothing subject to the 'wearing apparel' provisions referred to earlier. For example, certain handbags were previously not under any preference (20% MFN duty, 45% non-MFN duty), or certain

[5] AGOA.info (2020). https://agoa.info/about-agoa/products.html

footwear with rubber soles (48% MFN duty, or 84% non-MFN duty), but are now duty-free under AGOA[6].

The benefits for a non-LDC country under AGOA are enhanced by virtue of the fact that the US GSP does not apply equally to all beneficiary countries. Kenya's potential benefits from AGOA are therefore greater than for some other countries, even though all benefit from the relatively higher level of certainty that AGOA provides, notwithstanding the fact that countries can be graduated out of AGOA due to non-compliance with its provisions.



Source: Author's calculation based on US Harmonized Tariff Schedule, Revision 10 (2020)

The combination of AGOA preferences, special apparel preferences (AGOA, but subject to additional criteria) and duty-free tariff lines means that as a WTO member and AGOA beneficiary, virtually all of Kenya's potential exports to the US are currently able to enter the country duty-free, subject as always to adherence with the RoO (see following section). With AGOA preferences potentially ending in five years (October 2025), unless renewed or otherwise updated, this could potentially mean a loss of duty-free preferences for Kenya in all 'new' AGOA tariff lines (i.e. products that did not previously benefit from the GSP) but also in those tariff lines reserved for LDCs under the US GSP. Only standard GSP lines (approximately 3,000 products) would then still be eligible for preferential market access to the US.

[6] Examples: HTS 64029969 (footwear); HTS 42022990 (handbags).

For Kenya, the loss of preferences for its clothing manufacturing sector would be particularly tough since it forms the leading 'preference receiving' sector, while preference margins (the difference between normal tariffs and duty-free AGOA preferences) can often be in excess of 30% ad valorem. Kenya's utilisation of preferences is analysed in a later section.

2.2 AGOA Rules of Origin

AGOA waives standard import duties on all eligible products when shipped from an AGOA beneficiary country in compliance with the AGOA RoO requirements. RoO are the criteria that specify what local processing activities or local value addition must take place before a product can obtain the economic origin of the 'preference-receiving' exporter country.[7] The primary purpose of RoO is to prevent trade deflection and transhipment, whereby goods produced elsewhere are shipped through a country benefiting from special market preferences in order to unduly benefit from these preferences in the final export market. If the RoO criteria under an agreement or special trade arrangement are not complied with along with relevant proof of origin, then a product would not be granted preferential market access.

The AGOA legislation has essentially two sets of RoO, one applicable to clothing, and one for the rest. Additionally, products that are the growth or manufacture (in their entirety) of the exporting country are also considered as originating. These would include minerals extracted from the soil, or vegetable products grown and harvested in the exporting country, and so forth.

The wearing apparel RoO were ground-breaking at the time that AGOA became law as they considered not only the manufacturing situation in Sub-Saharan Africa (and associated weaknesses in upstream textile provision) but also the realities of the textile-clothing value chain globally, including, particularly, the needs of US retailers and brand owners. The rules recognised that Sub-Saharan African countries for the most part did not have a textile manufacturing sector that would reliably and competitively cater to many of the types of products that would be ultimately be required by downstream US-based importers of clothing. These RoO allowed a great deal of flexibility with respect to materials sourcing by

[7] Technically, the importer claims and receives the preference on importation, but international sales are often concluded on the basis of a product being subject to a certain duty-free status (or with the duty level known and essentially incorporated).

the sector, in effect providing for unfettered access to global textile sources without compromising the origin status of the garment articles. This was the primary enabler for the Kenyan garment manufacturing sector to flourish and become one of the largest exporters of garments to the US in Sub-Saharan Africa.

While a detailed analysis of the AGOA RoO including all technical detail is beyond the scope of this paper, the key details of the two 'streams' of RoO are essentially as follows:

2.2.1 Wearing apparel RoO

A number of RoO categories have been developed in the classification system (including special HTS codes under HTS 9819.11.xx[8]) each specifying different qualifying conditions for AGOA-eligible imports. The most important one – in terms of utilisation and trade – is 9819.1112, namely apparel from foreign fabric made in a lesser developed country. This rule permits exporters to use fabric sourced from any third country, with only the local final assembly of the garment (the conversion from fabric to garment) having to be undertaken within the exporting country. Producers and exporters in AGOA beneficiary countries can thus operate off a relatively competitive cost base in Africa, in a sector that requires comparatively low capital investment, while still being flexible and responsive to the requirements of US importers and unconstrained by the prevailing buyer-driven value chain dynamics that often 'require' sourcing of materials of specific fabric types or from international locations.

It should be noted that the reference to 'lesser developed country' in this RoO covers each AGOA beneficiary country with the exception of South Africa[9] and is not to be conflated with the term 'least developed country' or 'LDC' used commonly in development indicators. Other RoO categories under AGOA include apparel from regional fabric from US or African yarn (HTS 9819.11.09), which can be utilised by any AGOA beneficiary but it is the main rule that South Africa (as a non-'lesser developed' country) is limited to.

[8] USITC (2020). *Harmonized Tariff System Codes*. Chapter 98: https://hts.usitc.gov/view/Chapter%2098?release=2020HTSARevision9. It should be noted that the descriptions used above are abbreviated; the full RoO category descriptions can be found in Chapter 98, Subchapter XIX of the HTS nomenclature in the above link.
[9] Botswana, Namibia and Mauritius were each included under these flexible RoO provisions through special dispensations early on during AGOA's life.

Additional RoO under AGOA appear to be, at least in part, geared to established domestic capacities and weaknesses (i.e. where these do not fulfil local demand) in the US and allow other types of processing to confer origin status, including cashmere sweaters knit to shape, merino wool sweaters knit to shape, apparel from fabric or yarn not available in commercial quantities, handloomed, handmade and folklore articles and at the other end of the RoO spectrum, apparel cut and assembled from US fabric, yarn and thread where only the assembly takes place in Africa while all materials are sourced from the US.

In summary, although the vast majority of garment exports to the US utilise the *third-country fabric* provisions, the number of different RoO categories provide a significant deal of flexibility under AGOA. While textile exports to the US under AGOA are of a much lower magnitude compared to garments, this sector does not benefit from similar single-stage transformation RoO as does the clothing sector. Exports from the designated 'lesser developed beneficiary countries' nevertheless benefit from duty-free access to the US albeit only when input materials are sourced from domestic sources or other beneficiary countries, rather than from non-AGOA third countries.[10]

Finally, irrespective of the RoO described above, AGOA sets annual quantitative limits on any products shipped under the apparel RoO. These are based on the volume (square metre equivalent) of total imports of all apparel articles into the US in the previous year, and is set at 7% of the total (for apparel using local or regional fabric), and 3.5% for apparel utilising the third-country fabric provisions. None of these limits have, in the history of AGOA, been breached and thus are in reality not an actual quantitative restriction on qualifying exports.

2.2.2 Non-apparel RoO

For all non-apparel (and non-textile) goods, where these are not fully sourced or produced within an AGOA beneficiary country and thus wholly obtained there, different RoO apply. Essentially, qualifying goods must be the growth, product or manufacture of an AGOA beneficiary country (under the regional cumulation provisions, which can involve more than one AGOA beneficiary), so that the direct cost or

[10] The textile RoO of AGOA are specified under the special sub-heading HTS 9819.11.33.

value of the local materials used, together with the direct cost of processing in an AGOA beneficiary country, equals at least 35% of the appraised value of the goods at the US port of entry.

Under the bilateral cumulation rules, up to 15% of the 35% 'local' content requirement (i.e. almost half) may in turn comprise US-originating inputs, which potentially provides greater flexibility to exporters in meeting AGOA's local content requirements.

3. Background to the Kenya-US FTA

Kenya has been a leading beneficiary of AGOA preferences and since AGOA's inception in 2000, its exports to the US have increased six-fold in dollar terms, from \$109m to \$667m in 2019. More than three quarters enter the US under AGOA (see profile of Kenya's exports to the US in a later section). The US market has played an important role in Kenya's trade expansion and industrialisation in some sectors. Kenya's interest in locking in preferential market access to the US beyond what might be offered by AGOA or other non-preferential arrangements is therefore fairly obvious.

From a US perspective, despite current trade volumes (and exports to Kenya) being less than those to some other African countries, there are likely to be numerous trade, investment and strategic interests in a closer partnership. Driving factors could include purely offensive trade and market access interests, the regional trade context, levels of economic and social development in Kenya, the broader business climate and levels of technological innovation in Kenya, strategic cooperation interests in the context of national security and Kenya's unique geo-political location and position in East Africa, and last – but not least – the considerable and competing inroads being made by China into Kenya's as well as the broader regional economy.

Kenya and the US have, for a long time, enjoyed strong bilateral relations and mutually advantageous cooperation in different spheres. In 2009, Kenya hosted the annual US-Africa AGOA Forum. Nairobi has been the location of the USAID East Africa Trade and Investment Hub. When Kenya (and others in the region) threatened to ban the importation of second-hand clothing in order to protect its clothing manufacturing sector, it changed course again not long after, thereby preserving its full AGOA beneficiary status (unlike Rwanda, which lost its preferential market access in the US for apparel exports).[11]

While different factors were at play in Kenya, including domestic politics, elections, and socioeconomic impacts associated with the second-hand clothing (*mitumba*) trade,[12] there was also considerable pressure from the US not to implement a ban (which would also result in a likely breach of AGOA's country eligibility requirements). Second-hand clothing imports are also less of a competitive factor (than one might assume) in Kenya for domestic producers since the majority of the productive sector is situated in export-processing zones (EPZs) and is export-focused rather than focused on the local market.

As a developing country, Kenya's opportunity cost of potentially losing the preferences offered by AGOA is greater than it is for many other African countries, not only because of its successful utilisation of preferences particularly by the employment-intensive clothing manufacturing sector, but also because of its far more limited access to US GSP, given that many are reserved for LDC countries (albeit currently with AGOA classification) and the fact that the GSP periodically expires.

Kenya is also a party to various regional preferential trade arrangements, including the Common Market for East and Southern Africa (COMESA) FTA, the Tripartite FTA and the AfCFTA. None of these exclude Kenya from negotiating a bilateral agreement with the US. The main issue is Kenya's membership of the East African Community (EAC) customs union, with its own common external tariff and purportedly free movement of goods within the region, making is inherently problematic and with implications and potential knock-on effects for the regional configuration. If it is argued that the EAC is still a work in progress, then Kenya might use this as a rationale for effectively going alone into these negotiations.

At the political level, the African Union has long favoured an approach that would see something akin to a continental Africa-wide trade agreement with the US, as opposed to bilateral agreements between

[11] Maersk (2020). In April, Kenya again banned the importation of used clothing (mitumba) albeit in the context of the COVID19 pandemic. See https://www.maersk.com/~/media_sc9/maersk/news/advisories/files/2020/04/mitumba-2nd-april-2020.pdf

[12] See, for example, discussion in Emily Anne Wolff (2020): 'The global politics of African industrial policy: the case of the used clothing ban in Kenya, Uganda and Rwanda', *Review of International Political Economy* (pp. 8-10) DOI: 10.1080/09692290.2020.1751240. https://www.researchgate.net/publication/340718356_The_global_politics_of_African_industrial_policy_the_case_of_the_used_clothing_ban_in_Kenya_Uganda_and_Rwanda

individual countries and the US.[13] This position has been a prominent one on the part of African representation for some time, particularly at different AGOA forums (such as Washington DC in 2018 and Abidjan in August 2019), where it has remained a constant theme. Notwithstanding, the US position has been similarly consistent over a significant period of time in that the country would seek – and remains interested in – exploring and concluding bilateral free trade deals with African countries or regions willing and able to do so. At the 2018 AGOA Forum held in Washington DC, United States Trade Representative (USTR) Robert Lighthizer explicitly referred to '… the Trump Administration's desire to negotiate a model free trade agreement with a sub-Saharan African country'[14].

Earlier in the same year, Lighthizer noted that '… before very long we're going to pick out an African country, properly selected, and enter into a free trade agreement with that country…. and then that, if done properly, will become a model for these other countries'.[15] In a way, this sentiment was reaffirmed by the US Congress in 2015 when it renewed the AGOA legislation, reaffirming its policy position in Sec 108 (emphasis added):[16]

> *It is the policy of the United States to continue to—*
>
> *(1) seek to deepen and expand trade and investment ties between sub-Saharan Africa and the United States, including through the negotiation of accession by sub-Saharan African countries to the World Trade Organization and the negotiation of trade and investment framework agreements, bilateral investment treaties,* ***and free trade agreements****, as such agreements have the potential to catalyse greater trade and investment, facilitate additional investment in sub-Saharan Africa, further poverty reduction efforts, and promote economic growth;*

[13] It should, however, be noted that while the AfCFTA has formally entered into force, having reached the requisite minimum number of countries that have ratified the agreement, only 28 member states have ratified the agreement at this point (May 2020) with another two countries having completed the domestic approval processes but have yet to deposit their respective instruments of notification with the AUC. Regional economic communities (RECs), such as the EAC and COMESA, will also continue to exist.

[14] USTR (2018). *Statement of USTR Robert Lighthizer at the Opening Plenary of the 2018 U.S.-Sub-Saharan Africa Trade and Economic Cooperation Forum (AGOA Forum).* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/july/statement-ustr-robert-lighthizer-0

[15] InsideTrade.com (2018). 'USTR Lighthizer: US will soon select an African country for a 'model' free trade deal'. https://agoa.info/news/article/15348-ustr-lighthizer-u-s-will-soon-select-an-african-country-for-a-model-free-trade-deal.html

[16] United States Congress (2015). *Trade Preferences Extension Act of 2015. Public Law 114-27.* https://agoa.info/images/documents/15386/plaw-114publ27.pdf

> (2) *seek to* ***negotiate agreements with individual sub-Saharan African countries as well as with the Regional Economic Communities****, as appropriate;*
>
> *...*
>
> (4) *promote the* ***negotiation of trade agreements*** *that cover substantially all trade between parties to such agreements and, if other countries seek to negotiate trade agreements that do not cover substantially all trade, continue to object in all appropriate forums.*

This position is not new nor inconsistent with prior policy. When one refers back to the original AGOA legislation enacted on 18 May 2000, Sec. 103 contains a similar statement of policy of the US Congress,[17] as contained in the quote below:

> *Congress supports—*
>
> (1) *encouraging increased trade and investment between the United States and sub-Saharan Africa;*
>
> (2) *reducing tariff and nontariff barriers and other obstacles to sub-Saharan African and United States trade;*
>
> (3) *expanding United States assistance to sub-Saharan Africa's regional integration efforts;*
>
> (4) *negotiating reciprocal and mutually beneficial trade agreements, including the possibility of* ***establishing free trade areas*** *that serve the interests of both the United States and the countries of sub-Saharan Africa;*
>
> (5) *focusing on countries committed to the rule of law, economic reform, and the eradication of poverty;*
>
> *etc.*

But negotiations between the US and the Southern African Customs Union (SACU) did not progress far: they began in 2003 and stalled not long after (mainly due to disagreement on the depth and coverage of such an agreement), and were finally abandoned in 2006. Another attempt towards a closer reciprocal trade and investment relationship was undertaken later and concluded with the signing of a

[17] United States Congress (2000). *Trade and Development Act of 2000*. https://agoa.info/images/documents/2385/AGOA_legal_text.pdf

Trade and Investment Development Cooperation Agreement (TIDCA).[18,19] Essentially this agreement provided for a consultative group to explore a deeper relationship and cooperation, but it did not lead to a further binding comprehensive trade agreement.

Despite 20 years having passed, the 2006 bilateral FTA between the US and Morocco remains the only such agreement between the US and an African country, with no agreement yet with an AGOA beneficiary.

3.1 Initial processes and timelines, and notification of Congress

In August 2018, Kenya's President Uhuru Kenyatta visited the US on an official state visit.[20] While the focus of the visit was primarily (the) closer collaboration on security issues of mutual concern, as well as investment, it also resulted in undertakings towards closer economic and trade ties. While investment and financing deals were announced,[21] the visit also led to the creation of a Bilateral Strategic Dialogue (BSD) that would meet biannually and, inter alia, a 'review progress in the implementation of agreed areas of cooperation, explore new areas of engagement and modalities for strengthening the growing diverse bilateral relations between Kenya and the USA'.[22]

During 2019, preparatory work in advance of a possible formal negotiation process towards a FTA began with the constitution of a US-Kenya Trade and Investment Working Group, separate from the BSD referred to above, which held its first meetings 3-8 April of that year.[23] One of its objectives was to 'pursue exploratory talks on a future bilateral trade and investment framework'. A second meeting, which focused on many trade-related themes including services trade, digital trade, intellectual

[18] USTR (2020). Southern African Customs Union (SACU). https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/southern-african-customs-union-sacu
[19] SACU (1998). *SACU-US TIDCA 16 July 2008*. https://agoa.info/images/documents/15389/agreement.pdf
[20] The White House (2018). *Joint Statement*. https://ke.usembassy.gov/joint-statement-from-president-donald-j-trump-and-president-uhuru-kenyatta/
[21] Kenya Presidency (2018). *President Kenyatta witnesses signing of investment deals worth $238 million in Washington DC*. https://www.president.go.ke/2018/08/27/president-kenyatta-witnesses-signing-of-investment-deals-worth-238-million-in-washington-dc/
[22] Kenya Ministry of Foreign Affairs (2019). *Inaugural bilateral strategic dialogue (BSD) in Washington*. http://www.mfa.go.ke/?p=2622
[23] USTR (2019). *Inaugural Meeting of the U.S.-Kenya Trade and Investment Working Group*. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/inaugural-meeting-us-kenya-trade-and

property, agriculture and so forth, took place 31 October to 4 November 2019.[24] A third round of meetings was held in the first week of February 2020.

On 6 February 2020, President Trump announced the US intention to initiate trade agreement negotiations with Kenya.[25] The announcement also specifically referred to the EAC customs union as well as the AfCFTA, alluding to 'complementarity' between an FTA and these existing arrangements, and pledged continued support of the AfCFTA (note the initial joint statement at the AGOA Forum in Côte d'Ivoire on this).[26] The announcement also directed the USTR Robert Lighthizer to formally notify the US Congress in line with the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Trade Promotion Authority) which relates inter alia to the range of objectives that such agreements should pursue, while also subjecting 'trade agreements to congressional oversight and approval, consultations….'[27]

On 17 March 2020, USTR Lighthizer formally notified the US Congress that the Trump Administration would pursue negotiations for a trade agreement with Kenya. Under the congressional oversight provisions, the USTR must also publish the objectives of the proposed trade agreement at least 30 days before any trade negotiations can begin. While publication by the USTR of the objectives has not taken place yet at the time of writing, the course has firmly been set for the commencement of negotiations.

4. US sourcing from SSA – where does Kenya fit in?

The US imported $2,502 billion ($2.5 trillion) worth of goods globally during the year 2019. Of this, $21.3 billion was sourced from Sub-Saharan Africa (SSA), which equates to 0.85% of total US imports. A little over 3% of this ($667m) came from Kenya. In the grand scheme of things, SSA accounts for very few US imports, and within this configuration, Kenya is a relatively small player (albeit one of the few leading suppliers of goods apart from natural resources such as oil). Nevertheless, from the perspective of Kenya, the US has become an increasingly important market over the years.

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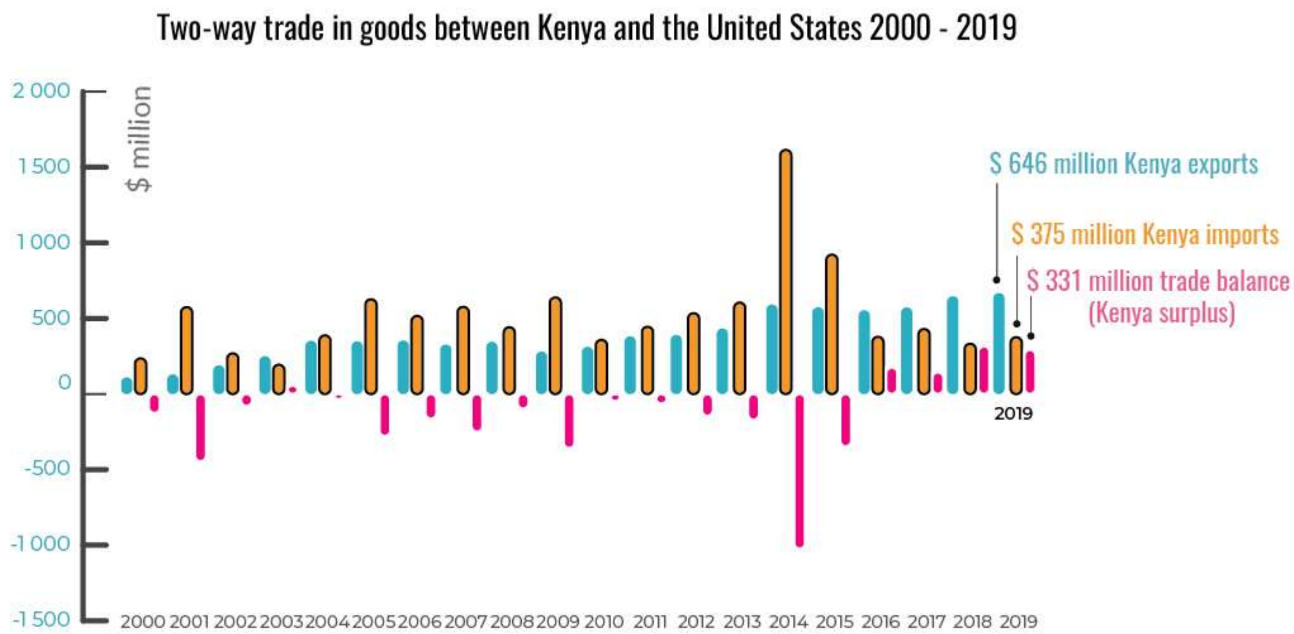
[24] USTR (2019). *Second Meeting of the of the U.S.-Kenya Trade and Investment Working Group*. https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/november/united-states-and-kenya-hold
[25] USTR (2020). *President Trump Announces Intent to Negotiate Trade Agreement with Kenya* (note 1 above).
[26] AGOA Forum (2019). *Joint statement between the US and the African Union concerning the development of the AfCFTA.* https://agoa.info/forum/agoa-forum-downloads/15642.html
[27] United States Congress (2015). https://www.congress.gov/bill/114th-congress/senate-bill/995

Exports from Kenya to the US have grown more than six-fold in dollar terms between 2000 and 2019, from $109m to $667m. 2019 exports to the US were valued higher than any previous year, and for the past few years Kenya has enjoyed a trade surplus with the US. US exports to Kenya grew from $235m to $375m over the same period, peaking in 2015 ($1.6 billion) and 2016 ($920m).

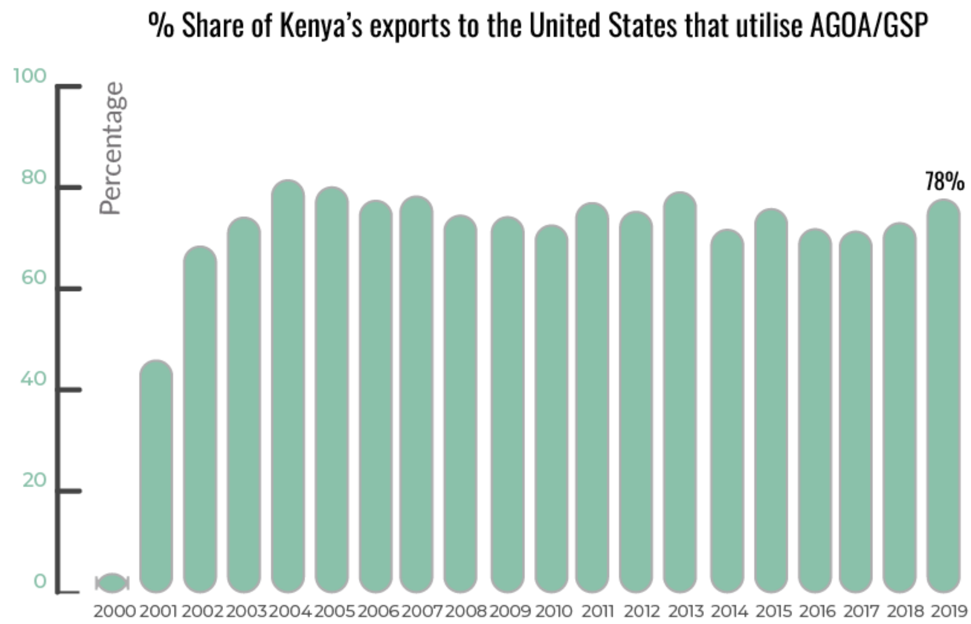


Source: Author's projection. Data extracted from USITC Dataweb database (2020).

4.1 Kenya's utilisation of US trade preferences

The majority of Kenya's exports to the US enter their destination free of import duty. At a broad level, during 2019, 77% of Kenya's US bound exports was cleared at their destination under AGOA (the 'D' customs designation of the AGOA programme). Within three years of AGOA's inception this was raised to and has remained consistently in the 70%-80% range. This proportion of trade attracted no import duty in the US.

An insignificant share of trade also entered the US under its GSP. However, most of these would also be AGOA-eligible products but were simply cleared under GSP. For example, a third of Kenya's 'GSP' exports of $5.8m in 2019 was in unrooted cuttings and slips of live plants – HTS 06021000 – and this tariff line enjoys both GSP as well as AGOA eligibility, as indicated by the 'A' and 'D' designators in the current US tariff schedule.[28] Since 2016 less than 1% of total exports by Kenya were cleared under GSP preference. The combined AGOA/GSP duty-free exports to the US in 2019 thus accounted for 78% of all its exports to the US.



Source: Extracted from USITC Dataweb database (2020).

The remaining 20%-25% of Kenya's imports into the US took place under normal tariff relations (NTR). This means that US importers did not claim any preferences; some of this trade can include trade in tariff lines that are duty-free under a preferential arrangement but without preferences being claimed, for example because the RoO requirements were not met or there was insufficient proof provided of Kenyan origin status. Most would simply be in tariff lines where the US duty is 0% when imported from a country under NTR.

This is the designation attributed to trade that takes place on a WTO MFN basis, in other words, is sourced from a WTO member state such as Kenya. Similar US imports from a country like Ethiopia, when preferences are not claimed or not available, would then happen under so-called 'Column 2' tariffs, which are often much higher than (any) NTR tariffs. This implies that the 'opportunity cost' of not utilising AGOA is overall, potentially, much higher for a country that is not a WTO member.

[28] USITC (2020). *Harmonized Tariff Schedule* (2020 Revision 10). https://hts.usitc.gov

Goods exported by Kenya that are cleared into the US under AGOA (or GSP) attract no import tariffs. Of the remaining tariff lines, up to approximately 4,000 tariff lines are also duty-free under NTR. Import duties are applicable to less than 500 tariff lines. Of these, Kenya trades in only a small number.

Over the past five years, less than 2% of Kenya's exports to the US were subject to import duties (see the following table). In 2019, $11.5m in trade was dutiable with a tariff (out of $667m total US exports), with $0.63m duties having to be paid overall, for an effective average rate of 5.5%. In contrast, in 2000 dutiable exports came to $49.6m (of $109m exports) with duties of $7.9m paid, for an effective average rate of 15.9%. The following table shows trade data for selected dates between 2000 and 2019 – the first two dates being when AGOA preferences were introduced, over and above GSP preferences. The lower proportion of dutiable trade in the latter years is likely due to various factors including a shift in trade towards duty-free tariff lines (most of the growth has been in duty-free exports of clothing), to a removal of duties in certain tariff lines. The lower effective average duty rate is likely be related to some changes in the composition of exports (with different tariffs), and possibly a reduction in duties in certain lines over the years.

It should be noted that dutiable trade in this instance does not represent the flip-side of preferential trade; rather, it is simply that share of trade under normal tariff relations (NTR) on which the US maintains a positive rate of duty.

Table 1: Kenya's exports to the US showing dutiable trade, duties paid and effective average duty rates

Kenya: Values in $ million	2000	2001	2005	2010	2015	2019
Total trade	109.39	128.58	347.75	311.14	573.21	667.04
Dutiable trade	49.56	17.07	12.31	5.93	10.85	11.45
Duties paid	7.88	2.41	0.91	0.46	0.48	0.63
Proportion of dutiable trade	45.31%	13.28%	3.54%	1.91%	1.89%	1.72%
Nominal average duty rate*	15.90%	14.12%	7.39%	7.76%	4.42%	5.50%

* Calculated by dividing total duties paid into dutiable trade for each year

In summary, Kenya's US-bound exports take place largely in tariff lines that are included under AGOA/GSP preferences, within the range of 70-80% throughout much of AGOA's existence. These tariff lines are covered by AGOA and therefore may enter the US duty-free, instead of paying US import duties that, for articles such as certain garments, can be as high as 32% *ad valorem* (for example certain baby garments HTS 61113020, T-shirts of HTS 61099010, and others).

The remaining 20%-30% of trade takes place under normal tariff relations, of which the vast majority range under duty-free tariff lines. In effect, US importers of Kenyan-made goods across all categories and tariff lines paid a combined total of 0.09% import tariff in 2019. This is a very low number and useful for illustrative purposes, but hides the fact that in some tariff lines (products), certain importers will be paying far higher duty rates. Given the fact that only a small number of tariff lines are not duty-free for Kenya (through AGOA/GSP or 0% duties under NTR trade), it is unlikely that any significant amount of trade overall is potentially impacted. However, a sizeable amount of Kenya's trade by value – as the next section will show – would potentially be impacted in the absence of AGOA/GSP preferences or any other new arrangement.

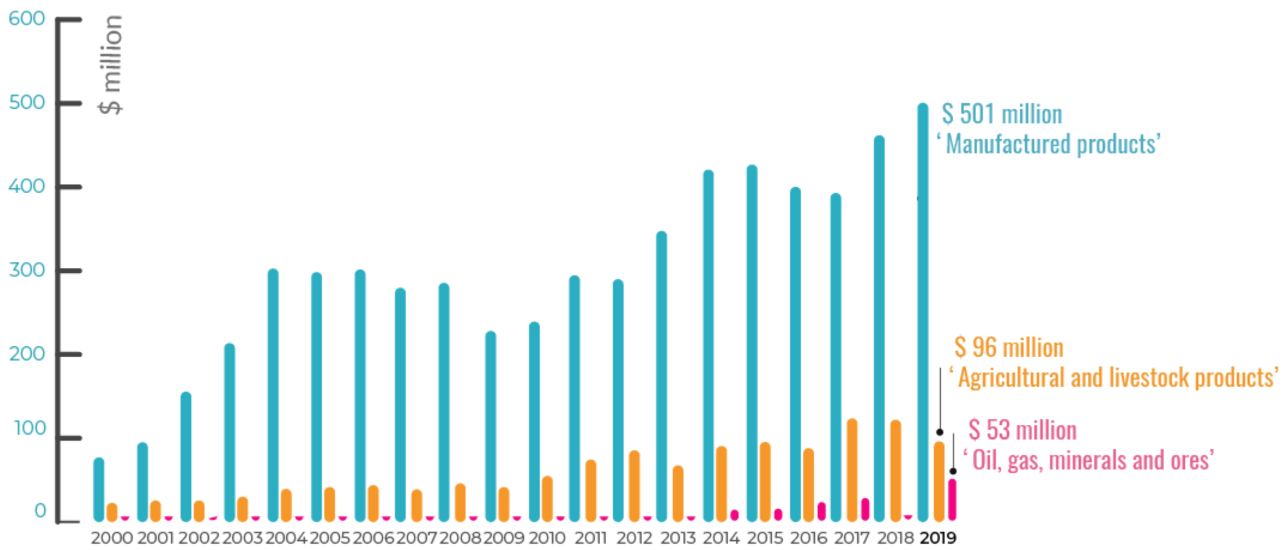
4.2 Profile of Kenya's exports to the US

Using trade data based on the North American Industrial Classification System (NAICS), Kenya's exports to the US comprise mainly manufactured products (2019: 77%), with agriculture and livestock (2019: 15%) and oil, gas, minerals and ores (2019: 8%) accounting for much smaller shares. This breakdown between broad sectors has been consistent since the inception of AGOA in 2000, with manufactured products (dominated by fast-rising garment exports) accounting for the greatest share of US-bound exports from Kenya. There are significant differences between the NAICS and HTS classification systems, which are addressed below in the chart.

Some periods of decline amid the strong growth overall can be observed, most notably in manufactured exports. Given the dominance of clothing exports (more on this later), Kenya's exports are intricately tied with global developments. The strong growth up to 2005 was driven by the competitive advantage that AGOA preferences provided on the back of the global textile and apparel quota system (Multi-Fibre Agreement) which allowed key importing markets to maintain quantitative restrictions on the exports of fast-growing producer economies such as China; instead, US buyers sought sourcing opportunities in countries that were not quota-constrained, such as Kenya and other African countries.

The opening of global trade from 2005 onwards (albeit with temporary limited restrictions on imports from China) meant that US buyers now had greater access to highly competitive sourcing opportunities in China and elsewhere, which often complemented value chain dynamics, particularly through large design houses and corporate headquarters based in the Far East. Sourcing from Kenya did not stop, but this development put paid to the growth rates experienced in preceding years. Then, in 2008/2009 the global economic crisis caused a large drop in demand from countries such as the US, resulting in orders from African countries (and elsewhere) falling back, albeit likely not nearly as much as from other countries. 2016/2017 again saw a decline in sourcing manufactured goods from Kenya, and can probably at least in part be attributed to social unrest and political uncertainty that gripped the country in the year preceding national elections, and the immediate period thereafter (the contested elections in August 2017 were eventually annulled, and new elections were held later that year). 2018/2019 saw strong export growth, with year 2019 manufactured exports significantly exceeding previous years, while agricultural exports declined somewhat.

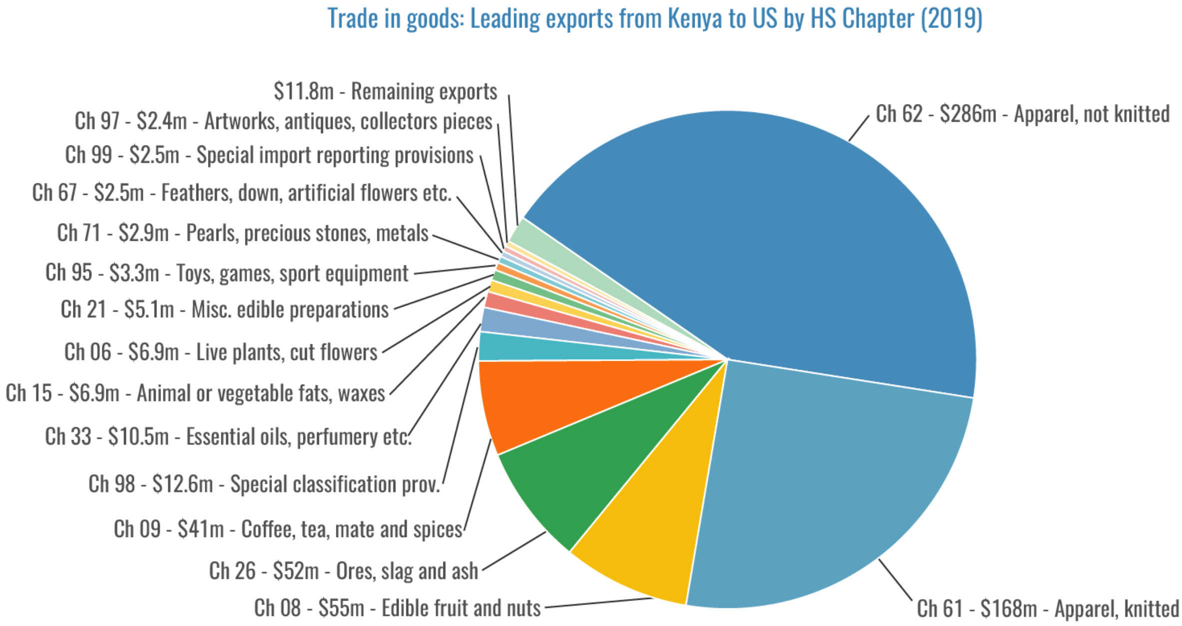
Kenya's exports to the US by NAICS-2 category 2000 - 2019



Source: Author's projection. Data extracted from USITC Dataweb database (2020).

The chart above shows US imports of goods classified according to the NAICS, which differs from the Harmonised System (HS) nomenclature commonly used for trade data purposes. The key difference lies in the fact that the one system, the North American Industry Classification System (NAICS) is designed to record industrial and business activity (including agriculture) whereas the HTS is used mainly for international trade classification. For example, flour, soybean oil, sugar, chocolate, processed dairy products, etc. are considered manufactured products (under one of the three manufactured product classifications 31, 32 and 33), whereas under the HTS these would be classified within chapter 1-24 which is generally considered to represent the agricultural sector (both raw materials, as well as processed and refined goods).

The 'agricultural and livestock' product classification in the NAICS would include sectors and products such as cotton, tobacco, sugarcane, wheat, nuts, etc. Nevertheless, the above breakdown provides a useful broad overview of the breakdown of unprocessed and processed products being exported by Kenya to the US.



Source: Author's projection. Data extracted from USITC Dataweb database (2020).

Reviewing Kenya's US exports by HTS chapter, the dominance of clothing exports (chapter 61,62) is very obvious. The following pie chart maps Kenya's top 15 exports to the US for the year 2019, by HTS chapter, showing apparel accounting for a combined $454m out of total exports of $667m in that year, or 68%. All of this apparel depends on the use of third-country fabric. Of the remaining exports, chapter 08 (edible fruit and nuts, 8% of total), chapter 26 (ores, slag and ash, 8% of total) and chapter 09 (coffee, tea, 6% of total) each account for significant export volumes. The remaining exports consist of agricultural categories (including processed goods), some manufactured goods, and some resourcebased materials of chapter 71. Agricultural exports of chapter 1-24, as well as manufactured exports, are analysed in greater detail further along.

4.2.1 Agricultural exports

Agricultural exports for the purposes of this more disaggregated analysis are those classified within chapter 1-24. While exports within these categories are lower in value compared to manufactured exports (specifically, exports of apparel), they remain the most important export sector outside the highly preference-dependent sector. Kenya has also shown itself to be the second most important foreign supplier to the US of macadamia nuts, a product that benefits from duty-free access to the US market as a result of AGOA.

The table below shows the top 25 agricultural exports by Kenya to the US, at the HTS8 digit level of disaggregation. These top 25 exports accounted for 99% of Kenya's total agricultural exports to the US in 2019. Two products stand out: macadamia nuts and coffee. While coffee has an NTR (MFN) 0% duty into the US, macadamia nuts benefit from preferential market access. Macadamia nut exports to the US began in 2012 and have grown rapidly. In 2019, Kenya was the second-largest foreign supplier of macadamia nuts to the US, holding an import market share in this tariff line of 22% (South Africa held 49%). A year previously, both Kenya and South Africa each held 36% of the US import market share, after which Kenya's exports fell while South Africa's grew further.

The table also reveals that of the leading 25 agricultural exports, 'only' 10 had an MFN tariff, meaning that in these ten tariff lines Kenya obtained preferential market access under AGOA. Of these 10 tariff lines that are AGOA eligible, three had a GSP A+ indicator,[29] meaning that GSP duty-free preferences are only available to countries that have an LDC development status. This would exclude Kenya if AGOA were not available. Kenya's leading agricultural exports (macadamia nuts), as well as the seventh largest tariff line (nuts, not elsewhere specified or included) both fall into the GSP A+ category and would be particularly vulnerable to a loss of AGOA preference. Almost half of Kenya's agricultural exports, however, take place in MFN 0% categories.

[29] The US GSP has different sub-indicators: 'A' denotes all GSP eligible countries qualify, A+ denotes only LDC countries, and A* denotes that certain individual countries are excluded.

Three products worth pointing out further are coffee, tea, and cut flowers. Kenya is known globally for the quality of its coffee (and tea), and coffee is Kenya's second-largest export to the US ($34.5m). The vast majority of its exports comprises unroasted coffee beans, where these are used by US coffee roasters for further processing and distribution in the US. A small fraction of total coffee exports to the US ($0.16m in 2019) comprises already roasted coffee.

While the case is often made for greater local processing and value addition, in the case of coffee this ignores the fact that the distances involved and the time to market often do not make this a feasible option and certainly not wanted by more discerning consumers who appreciate the freshness of the roast and as the case may be the skills of the (local) roaster to bring out different nuances of the coffee bean, as much as origin plays a vital part in extracting higher value and prices (this is a discussion not for this analysis). The point is, however, that coffee is not subject to import duty under US MFN rates, and since origin status of raw coffee beans would always be Kenya, coffee cannot typically be considered a vulnerable product in the context of market access to the US for Kenyan producers post-AGOA. However, tariffs remain the prerogative of the importing country and an FTA could potentially lock in zero-duty tariff lines for greater long-term certainty and predictability.

For tea the situation is similar. Tea, including black tea, green tea and tea extracts combined. are the third largest agricultural exports to the US by value in 2019. Like coffee, tea is also not subject to duties on an MFN basis and is not included under the AGOA or GSP schemes.

Cut flowers, albeit still a relatively small category with respect to the US market (most of Kenya's cut flowers are exported to Europe), benefit from AGOA preferences while being excluded from the GSP and, for example, cut roses are subject to relatively high US import duties of 6.80% if not claiming AGOA status. Other plant material, for example cuttings and slips of live plants, is also subject to MFN duty rates while being part of AGOA (and GSP). Many of these products – the same applies to other perishables such as vegetables and fruit – depend on efficient air transportation links. Late in 2018, the first direct commercial flights between Kenya and the US commenced under an air transport agreement between the two countries,[30] although an amendment agreement signed in February 2020 added all-

[30] US Chamber of Commerce (2018). 'New Direct Flights Between the U.S. and Kenya Unlock Opportunities for Business'. https://www.uschamber.com/series/above-the-fold/new-direct-flights-between-the-us-and-kenya-unlock-opportunities-business

cargo flights to this route.[31] which should in time have a significant positive impact on bilateral trade, especially with regard to perishable products where speed to market is of critical importance.

Table 2: Top 25 agricultural exports to the US at selected time-points, including AGOA indicator, GSP indicator, and MFN tariff (data in $ million)

HTS8 code	AGOA (Y/N)	GSP	NTR (MFN) tariff	Product description (abbr.)	2000 ($m)	2010 ($m)	2015 ($m)	2019 ($m)
0802.62.00	Yes	A+	5c/kilo	Macadamia nuts, shelled	0	0	42.89	52.18
0901.11.00	No	No	Free	Coffee, not roasted, not decaffeinated	13.11	32.2	41.82	33.64
0902.40.00	No	No	Free	Black tea (fermented) and partly fermented tea, exceeding 3 kg	9.77	6.25	7.08	5.54
1515.90.80	Yes	A	3.20%	Fixed vegetable fats and oils and their fractions nesoi, whether or not refined, not chemically modified	0	0.14	1.95	4.75
2101.20.20	No	No	Free	Extracts, essences or concentrates of tea or mate	1.27	11.17	12.45	4.52
0603.11.00	Yes	No	6.80%	Sweetheart, spray and other roses, fresh cut	0	1.75	4.79	2.73
0802.90.98	Yes	A+	5c/kilo	Nuts nesoi, fresh or dried, shelled	0.07	0	1.51	2.35
0602.10.00	Yes	A	4.80%	Unrooted cuttings and slips of live plants	0.53	0.37	0.9	1.92
1521.90.40	No	No	Free	Insect waxes, other than bleached beeswax	0	0	0.93	1.13
1515.90.21	No	No	Free	Nut oils, whether or not refined, not chemically modified	0	0.164	1.3	1
0902.30.00	No	No	Free	Black tea (fermented) and partly fermented tea, not exceeding 3 kg	0.18	0.28	0.46	0.78
2009.49.40	Yes	A+	1c/litre	Pineapple juice	0	1.57	1.89	0.72
0901.12.00	No	No	Free	Coffee, not roasted, decaffeinated	0.5	0.71	1.87	0.65
0801.32.00	No	No	Free	Cashew nuts, fresh or dried, shelled	0.16	1.85	1.7	0.57
0106.49.00	No	No	Free	Live insects other than bees	0	0	0.17	0.35
0902.20.90	No	No	Free	Green tea in packages over 3 kg, not flavoured	0	0.18	0.49	0.33
0301.11.00	No	No	Free	Live ornamental freshwater fish	0	0	0.25	0.3

[31] Business Daily Africa (2020). 'Kenya upbeat on direct cargo flights deal with US'. February 7, 2020. https://www.businessdailyafrica.com/news/Kenya-upbeat-on-direct-cargo-flights/539546-5447326-kecstx/index.html

HTS8 code	AGOA (Y/N)	GSP	NTR (MFN) tariff	Product description (abbr.)	2000 ($m)	2010 ($m)	2015 ($m)	2019 ($m)
1209.91.60	No	No	Free	Pepper seeds of a kind used for sowing	0	0	0	0.27
1209.91.80	Yes	A	1.5c/kg	Vegetable seeds, nesoi, of a kind used for sowing	0	0.01	0.11	0.25
0602.90.90	Yes	A	4.80%	Other live plants nesoi, other than those with soil attached to roots	0	0.01	0	0.21
2008.19.90	Yes	A	17.90%	Other nuts and seeds nesoi, excluding mixtures, nesoi	0	1.93	1.33	0.21
0901.21.00	No	No	Free	Coffee, roasted, not decaffeinated	0.01	0	0.01	0.16
1212.99.92	No	No	Free	Fruit stone & kernel (not apricot/peach/plum) & other vegetable products used primary human consumption, nesoi	0	0	0	0.16
1209.30.00	Yes	A	1c/kg	Seeds of herbaceous plants cultivated principally for their flowers	0.16	0.07	0.06	0.15
0301.19.00	No	No	Free	Live ornamental fish, other than freshwater	0	0	0.04	0.14
				TOTAL agricultural exports	$35m	$78m	$137m	$116m

Source: Extracted from USITC Dataweb database (2020).

4.2.2 Apparel exports

Apparel is Kenya's most important export product to the US. As indicated earlier, 68% of Kenya's aggregate US-bound goods exports in 2019 consisted of apparel. In terms of the country's non-agricultural exports to the US, apparel represents 82% of its 2019 exports.

The key driver of Kenya's success in penetrating the US market is the favourable RoO regime related to apparel under AGOA, when produced in a so-called 'lesser developed country' per the RoO provisions (see earlier section on RoO). The following table reveals Kenya's utilisation of AGOA preferences into the US market for apparel, and the RoO category under which these shipments are cleared. Almost all of Kenyan apparel is cleared in the US under the RoO code 9819.11.12, being one of the available options and the only one permitting the use of third-country (non-AGOA beneficiary) fabric. Kenya's apparel manufacturers focused on the US market source fabric almost entirely from Asia, assemble the garment locally (mostly in special EPZs), and ship these to the US where they receive duty-free and quota unconstrained access.[32]

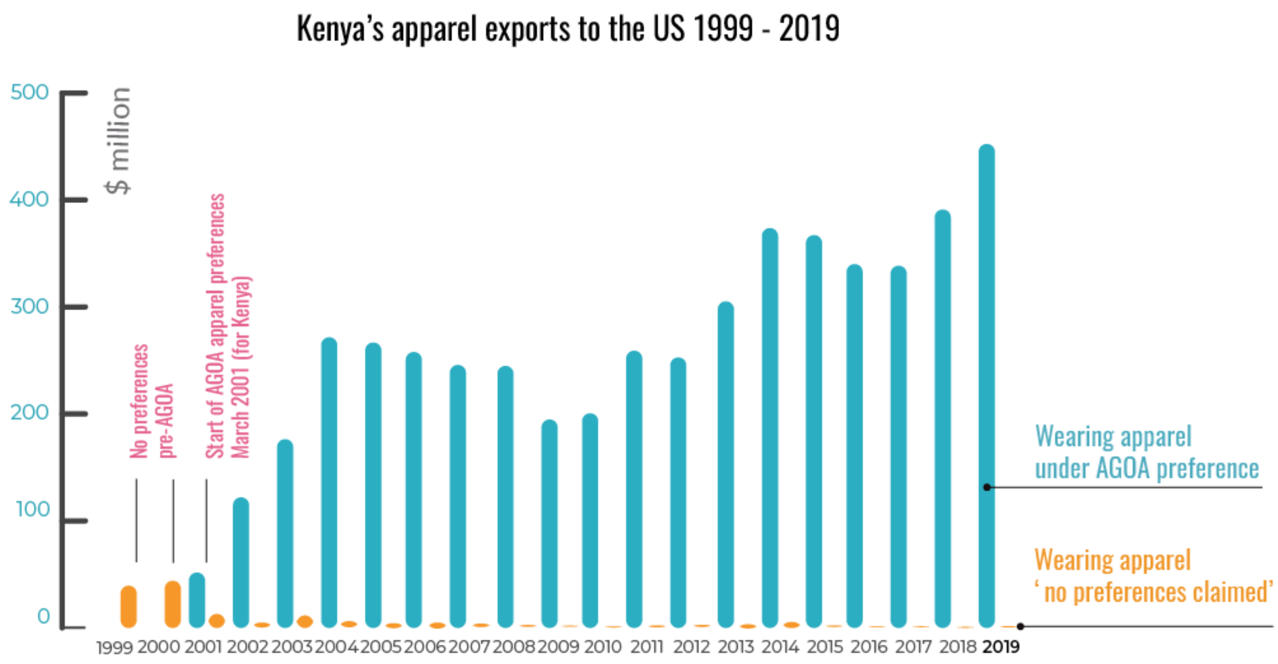
Table 3: US imports of apparel from Kenya, by RoO category[33]

HTS / RoO Category	Rules of Origin category / description	2018 ($m)	2019 ($m)
--	US imports of apparel from Kenya (total)	386.3	453.8
--	Imports under preference (AGOA)	385.5	451.3
9819.11.09	Apparel from regional fabric from US or African yarn	0.061	0.165
9819.11.12	**Apparel from foreign fabric made in a lesser developed country**	**382.3**	**450.9**
9819.11.21	Apparel from fabric or yarn N/A in commercial quantity	3.069	0
9819.11.27	Handloomed, handmade and folklore articles	0.003	0

Kenya's apparel exports to the US have risen rapidly under AGOA. While trade pre-dates AGOA, rapid growth followed once Kenya's apparel was able to access the US market duty-free and with highly flexible RoO conditions, allowing access to third-country imported fabric. The following chart includes the years 1999 and 2000, 1999 being the year pre-AGOA while 2000 was AGOA's inception year (May 2000). Note that that the wearing apparel provisions which gave Kenyan exporters access to this product category as well only became applicable to Kenya when the country had satisfactorily implemented a textile 'visa' tracing system (January 2001). Exports grew rapidly under the dual benefit of AGOA preferences, and the relative protection offered by the MFA quota system, which constrained textile and clothing exports from some of the largest exporters globally.

In 2019, Kenya was by far the largest exporter of apparel among the AGOA beneficiary countries ($454m), far ahead of Lesotho ($303m), Madagascar ($245m) and Ethiopia ($210m).

[32] While AGOA's wearing apparel provisions contain a quota, based on total US imports of apparel, the quota is of sufficient magnitude not to have ever played a role in any AGOA beneficiary's exports to the US.
[33] Office of Textiles and Apparel (2020). *Country level imports report (Kenya).* https://otexa.trade.gov/msrcty/v7790.htm



Source: Author's projection. Data extracted from USITC Dataweb database (2020).

4.2.3 Other exports

The US sourced $97m worth of non-apparel/non-agricultural goods from Kenya in 2019. These include minerals, synthetic hair, artificial flies (for fly-fishing), precious stones, etc. Of the top 15 tariff lines (representing 75% of all exports in 2019 not falling within the agriculture or apparel chapters), none were subject to any import duty on clearance into the US.

Three of the leading 15 products – artificial baits and flies, semi-precious stone figurines, and certain imitation jewellery – are subject to MFN duties but are AGOA and GSP eligible. All three, were it not for AGOA, would be dutiable when imported into the US from Kenya as their duty-free status under the GSP is reserved for exports from LDC countries (GSP status A+). The leading two exports within this category – titanium ores and concentrates, and synthetic rutile – account for more than half of Kenya's non-agriculture/apparel exports to the US during 2019. The table below shows each of the leading products by value in this category, including AGOA/GSP status and MFN import tariff, where applicable.

Table 4: Top 15 non-agricultural non-apparel exports to the US in 2019, including AGOA indicator, GSP indicator, and MFN tariff (data in $ million)

HTS8 code	AGOA (Y/N)	GSP	NTR (MFN) tariff	Product description (abbr.)	2019
2614.00.60	No	No	Free	Titanium ores and concentrates, other than synthetic rutile	37.9
2614.00.30	No	No	Free	Synthetic rutile	14.1
3301.29.51	No	No	Free	Essential oils other than those of citrus fruit, other, nesoi	10.21
6704.19.00	No	No	Free	Wigs (partial), false beards etc., of synthetic textile materials	2.44
9507.90.70	**Yes**	**A+**	**9%**	Artificial baits and flies	1.6
9504.90.60	No	No	Free	Chess, checkers, backgammon, darts and other table games	1.54
9703.00.00	No	No	Free	Original sculptures and statuary, in any material	0.88
9701.10.00	No	No	Free	Paintings, drawings and pastels	0.86
6806.20.00	No	No	Free	Exfoliated vermiculite and similar expanded mineral materials	0.7
9030.82.00	No	No	Free	Instruments and apparatus for measuring or checking electrical quantities, etc.	0.59
7116.20.35	**Yes**	**A+**	**4.5%**	Semiprecious stone (except rock crystal) figurines	0.51
7103.10.20	No	No	Free	Precious stones (o/than diamonds) & semiprecious stones, unworked	0.44
7117.90.90	**Yes**	**A+**	**11%**	Imitation jewellery not of base metal or plastics	0.35
7103.91.00	No	No	Free	Rubies, sapphires and emeralds, worked	0.32
3203.00.30	No	No	Free	Mixtures of certain chemicals	0.28
				Rest	**24.3**
				TOTAL (non-agricultural, non-apparel)	**$97m**

Source: Extracted from USITC Dataweb database (2020).

5. Profile of the US exports to Kenya

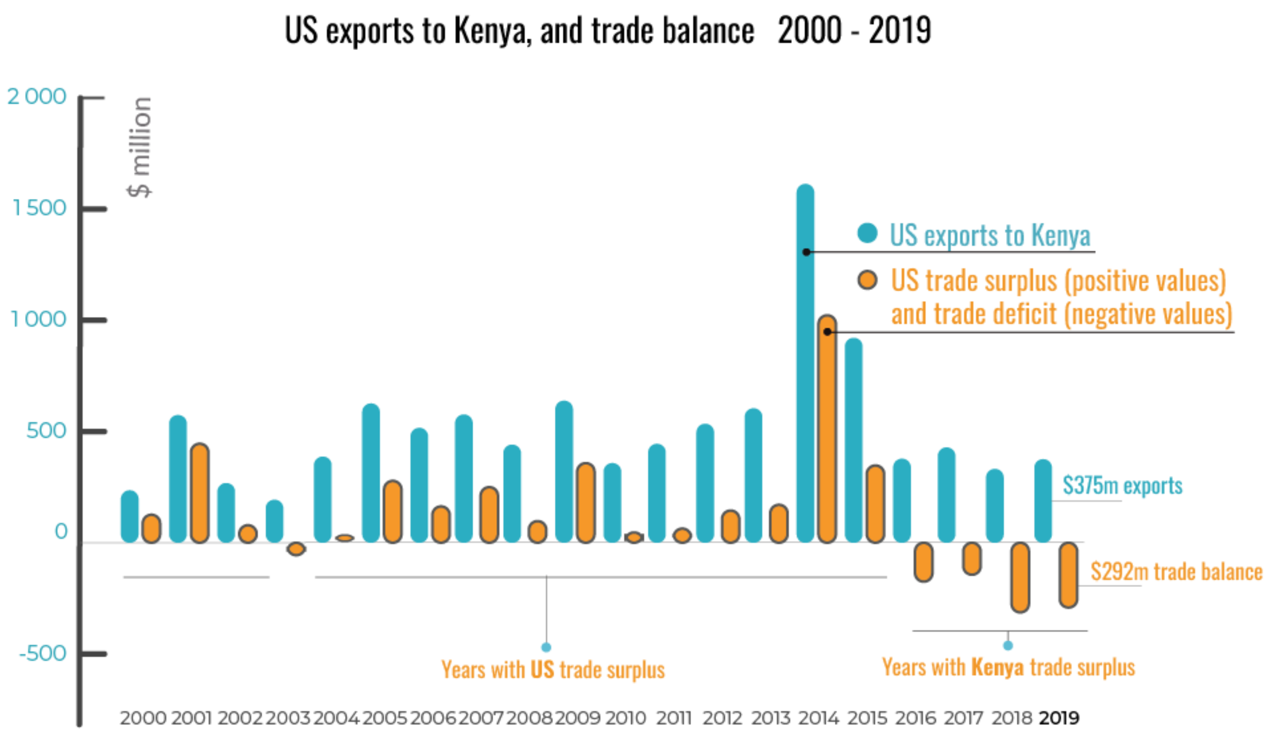
Since 2000, Kenya has recorded a trade-in-goods surplus with the US in only five years; this notably includes the past four years, with strong apparel exports by Kenya to the US a key contributing factor. Over the past decades, $18.2 billion in two-way trade took place between the US and Kenya, with US exports[34] since 2000 valued at $10.4 billion and US imports from Kenya at $7.8 billion over the same

[34] For purposes of this analysis, US 'domestic' exports was used, as opposed to 'total exports' which include goods transiting through the US via bonded warehouses, etc. 'Domestic exports' measure 'goods that are grown, produced, or manufactured in the United States, and commodities of foreign origin that have been changed in the United States'.

period. In 2019 alone, total two-way trade was valued at $1.04 billion, with Kenya's trade surplus reaching $292 million (2018: surplus $313 million) while US exports to Kenya were valued at $375 million. A chart mapping bidirectional trade between the countries since 2000 can be seen in Section 4 (Kenya's imports from the US). The following table and chart illustrate US exports to Kenya, as well as the balance of trade.

Table 5: Value of US exports to Kenya 2000 – 2019 ($ million)

	2000	2005	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
US exports to Kenya ($m)	235	626	358	444	534	604	1614	921	378	428	332	375



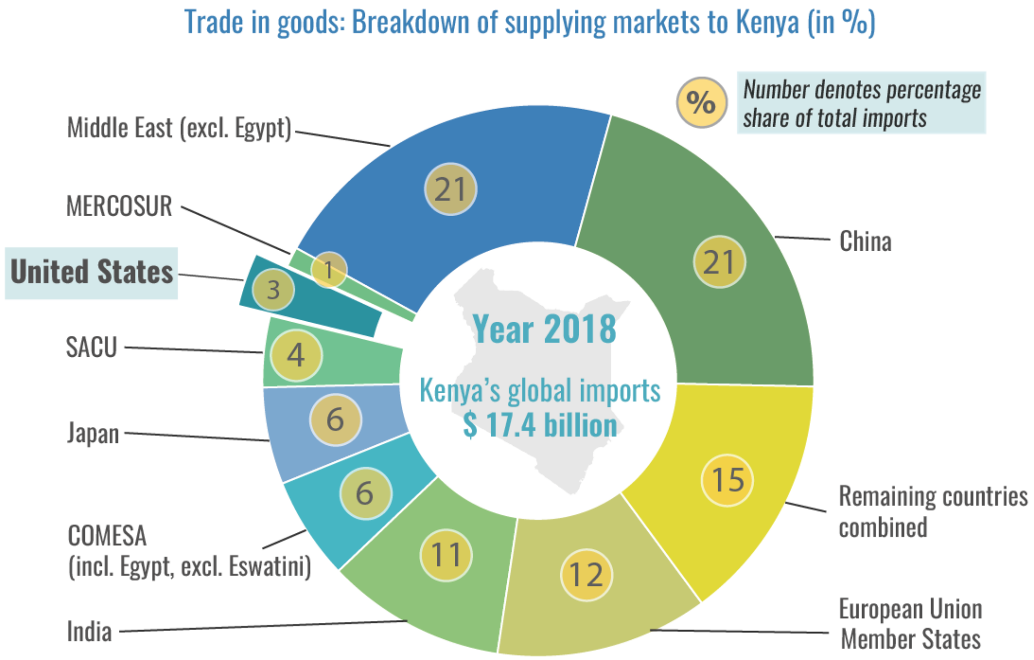
Source: Author's projection. Data extracted from USITC Dataweb database (2020).

One can contextualise Kenya's sourcing of goods from the US by analysing how the US compares to Kenya's other trade partners as a supplying market. This analysis uses data from the International Trade Center's *Trade Map*[35] data platform, which utilises national reported (Kenya National Bureau of Statistics) trade data, converted to US dollars. It is therefore not nominally comparable to US export

[35] ITC (2020). *Trade Map data platform*. https://www.trademap.org/

data to Kenya, not least due to exchange rate movements over time, but is useful for broad comparative purposes.

The data analysis below is limited to 2018 trade data to avoid inconsistencies across more recent data that is based on reported *and* mirror data. The breakdown of Kenya's global sourcing (imports) reveals that China is by far the country's largest individual supplier, while regionally, Middle Eastern countries combined account for a similarly large share of Kenya's imports (imports originate mostly in Saudi Arabia and the UAE, and involve predominantly mineral oil and fuel). The EU member states together account for 12% of Kenya's imports, while trade with COMESA countries is of a similar magnitude (the COMESA group includes EAC member states, which are not separately listed to avoid double-counting, and also includes sourcing from Egypt which has been excluded from the Middle East group, but excludes Eswatini as this is counted under SACU).



Source: Author's projection. Based on International Trade Center Trade Map database (national reported data) (2020)

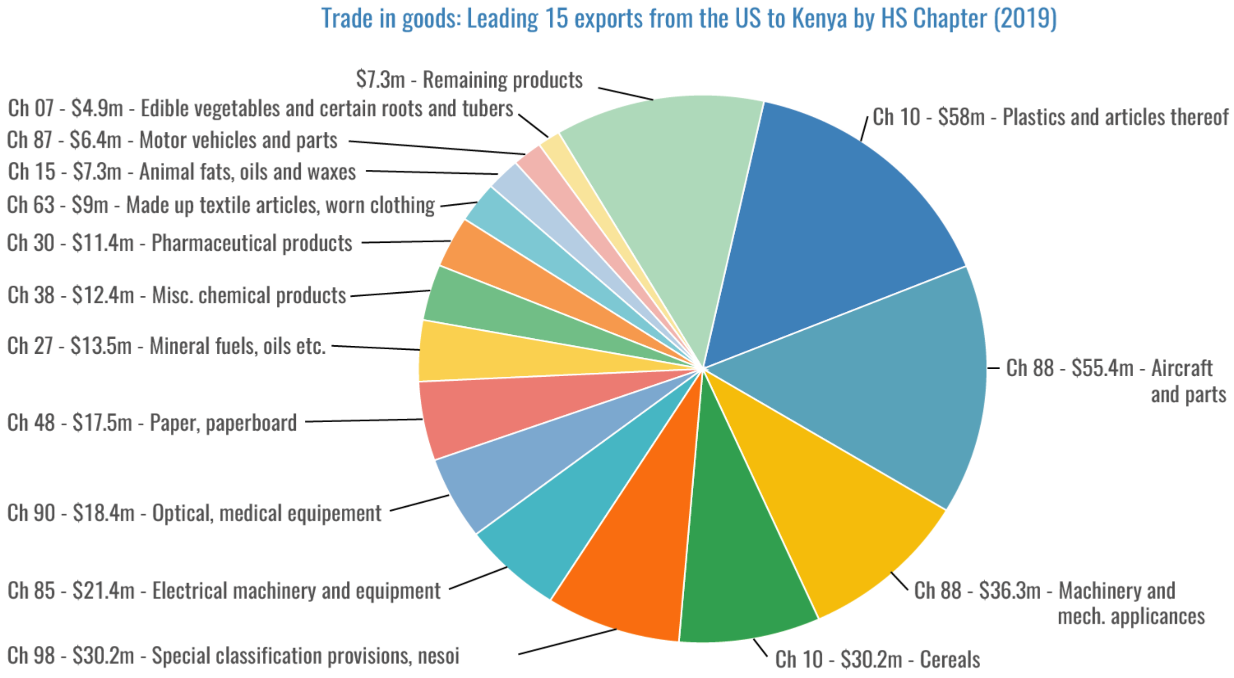
The US still counts for a relatively small share of Kenya's imports, at 3%, albeit only slightly behind SACU (4%), yet only approximately one quarter of the value of imports that Kenya sources from the EU. While Kenya is part of the reciprocal EAC Economic Partnership Agreement with the EU, and has signed and ratified the agreement (along with Rwanda which has signed it),[36] it is yet to enter into force as an insufficient number of countries of the EAC group have signed and ratified it (the share of EU-originating imports into Kenya is therefore not explained by the EPA on its own).

The geographic distance between the US and Kenya will likely play a considerable role in the flow of goods trade between the two countries, particularly with respect to perishables or other items where lead times play a critical role, or with respect to goods where shipping costs can quickly undermine the competitiveness of the landed product in the destination market. A review of shipping times – based on an online tool[37] – suggests that the transit time for a container to ship from the Port of Miami, Florida, to Mombasa, Kenya, is approximately 50 days, with freight estimate rates of approximately $2,000 for a 20 ft container. In contrast, shipping a 20 ft container from Spain to Mombasa appears to cost approximately one half of the Miami rate, with a transit time of around 30 days.

Based on 2019 export data[38], US exports to Kenya (2019: $375m) comprised mainly industrial goods, and a relatively small share ($51m: 14% of the total) of agricultural products, being those classified within HS chapters 1-24. Plastics (chapter 39) and aircraft and parts (chapter 88) are the two leading chapters with a combined 30% of total exports to Kenya. Of the leading 15 chapters, three are agricultural categories (cereals, animal or vegetable oils, and edible vegetables). Apart from the two industrial product categories mentioned above, the remainder comprise machinery, medical equipment, paper products, fuel, chemicals, pharmaceuticals, made-up textile goods and motor vehicles. The following chart shows the breakdown of US exports to Kenya by HS chapter.

US exports to Kenya are less concentrated than imports from Kenya, in other words, spread across a greater number of products (HS2 chapters). The leading five exports[39] (chapters) from the US to Kenya by value accounted for 54% of the total in 2019, whereas Kenya's top five exports (chapters) to the US comprised 90% of the total. US exports comprise more than $1m in 26 categories (chapters) whereas Kenya's exports to the US breach the same value threshold in 17 chapters.

[36] European Commission (2020). https://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/
[37] iContainers (2020). https://www.icontainers.com/quotes/FCL/USMIA/PORT/US/KEMBA/PORT/KE/ (accessed May 2020)
[38] USITC (2020). *Dataweb*. https://www.usitc.gov
[39] To be accurate, the 5th largest chapter comprises Chapter 98 – special provisions, which includes in the main the value of repairs to articles returned to Kenya, certain low-value shipments, donated medical equipment, and so forth. It is not included in the top five, but rather, the next chapter is used in its place for calculation purposes.



Source: Author's projection. Data extracted from USITC Dataweb database (2020).

Since data at the chapter level does not necessarily reveal sufficient detail about the actual products being traded, the table below identifies the key products (at the HTS6 digit level) for each of the leading ten export chapters from the US to Kenya.

While industrial products account for the bulk of US exports to Kenya, the agricultural sector would likely form an important target sector under a future FTA. The Kenya-US Trade and Investment Working Group, which has been engaging on some of the early preparatory work on a Kenya-US FTA, reported that a phytosanitary protocol had been adopted by Kenya that would provide access to American wheat growers from Washington State, Oregon and Idaho to the Kenyan market.[40] Each of these three states count among the top 10 wheat growing states in the US.[41]

US exports of wheat to Kenya have fluctuated over the past two decades but reached their highest value in 2019 ($27m). Wheat accounted for 90% of chapter 10 cereal exports in the table, in that year.

[40] USTR (2020). *President Trump Announces Intent to Negotiate Trade Agreement with Kenya* (note 1 above).
[41] Statista (2020). Leading wheat producing U.S. States from 2017 to 2019 (accessed May 2020). https://www.statista.com/statistics/190376/top-us-states-in-wheat-production/

Table 6: Leading exports from the US to Kenya by HS chapter, including leading products

HTS Chapter	Chapter and main products within chapter (top 10 by value)	2019 value ($ million)	% of total
39	Plastics and articles • POLYVINYL CHLORIDE • POLYETHYLENE	57.9	15.4%
88	Aircraft and parts • CIVILIAN AIRCRAFT, ENGINES, AND PARTS	55.4	14.8%
84	Machinery and mechanical appliances • INDUSTRIAL MACHINERY FOR FOOD AND DRINK • DIGITAL PROCESSING UNITS • MECHANICAL SHOVELS, EXCAVATORS, GRADERS	36.3	9.7%
10	Cereals • WHEAT AND MESLIN, NOT DURUM WHEAT, OTHER THAN SEED • GRAIN SORGHUM, OTHER THAN SEED	30	8%
98	Special classification provisions • VALUE OF REPAIRS OR ALTERATIONS OF PREVIOUSLY IMPORTED ARTICLES • LOW VALUE EXPORT SHIPMENTS	28.8	7.7%
85	Electrical machinery and equipment • MACHINES incl. SWITCHING APPARATUS/TELECOMMUNICATIONS • PARTS OF ELECTRIC STORAGE BATTERIES	21.4	5.7%
90	Optical, precision, medical equipment • OPTICAL DEVICES, APPLIANCES AND INSTRUMENTS, NESOI • SPECTROMETERS AND SIMILAR	18.4	4.9%
48	Paper and paperboard, articles thereof • KRAFTLINER, UNCOATED, UNBLEACHED, IN ROLLS OR SHEETS • PAPER AND PAPERBOARD, NESOI	17.5	4.7%
27	Mineral fuels and oils • BUTANES, LIQUEFIED • PROPANE, LIQUEFIED	13.5	3.6%
38	Miscellaneous chemical products • COMPOSITE DIAGNOSTIC OR LABORATORY REAGENTS • INSECTICIDES	12.4	3,3%

6. A simple goods deal or a comprehensive FTA?

6.1 Legal and broad political context

Apart from the US trade agreement with Morocco, no African country has to date concluded a preferential trade agreement with the US. There will be numerous reasons for this, including the non-reciprocal preferential access to the US market which most African countries have enjoyed under AGOA (and to a lesser extent under the US GSP before then), combined with favourable MFN rates (and zero-rates) on thousands of products under MFN; the often cautious policies followed by many African countries with respect to reciprocity; and, of course, generally low levels of appetite (on the part of African countries) to conclude comprehensive trade agreements (as traditionally favoured by the US) that might also span into thematic areas like services, government procurement, intellectual property rights as well as various other disciplines.

In the mid-2000s, the US and SACU failed to conclude an FTA mainly due to divergent views on how comprehensive such an agreement should be, as discussed earlier. More than a decade has passed since, and while US policies towards trade and non-reciprocity may have hardened somewhat over the years, there have been occasional signals regarding perhaps a greater realisation and recognition of a new approach: not necessarily one that regresses to a simple (or even an overly comprehensive) FTA but rather a hybrid model that is shaped by new and emerging realities (also) in Africa. This is certainly a message that has often been conveyed at US-Africa AGOA Forums.

Does this mean that the US is unlikely to be ambitious in its objectives? Or accept an outcome that is not comprehensive? This is highly unlikely. A strong clue was presented initially in the (albeit limited) formal process followed to date (including the notification of Congress, the Speaker of the House of Representatives and Senate leadership) of the intention to negotiate a free trade agreement with Kenya. In notifying Congress, the USTR as the lead agency on behalf of the US, is doing so expressly within the broad framework enacted through the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (also known as the Trade Promotion Authority and often referred to as the TPA-2015). This provides fairly clear guidance and high-level direction on US objectives for such trade agreements, as well as the required transparency and accountability standards relating to such trade agreements and negotiations, while still exerting clear congressional oversight over the process.

Kenya being a party to an existing customs union is bound to complicate matters in a number of ways and could impede the scale and scope of what is negotiated between the US and Kenya (or one that the remaining EAC parties accede to during or after the process). The EAC Protocol on the Establishment of the East African Customs Union[42] contains provisions that offer some guidance on negotiations (by individual member states) with third countries. Article 37 ('Trade Arrangements with Countries and Organisations Outside the Customs Union'), paragraph 2 states that 'community shall co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade' and in paragraph 4(a): 'A Partner State may separately conclude or amend a trade agreement with a foreign country provided that the terms of such an agreement or amendments are not in conflict with the provisions of this Protocol'.

Paragraph 4(b) further notes that '[w]here a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of this Article, with a foreign country the Partner State shall send its proposed agreement or amendment by registered mail to the Secretary General'. While at least some of these are relatively vague commitments, which to some extent relate to procedures to be followed once an agreement has been negotiated and the terms thereof are known, there certainly remains the general requirement to 'co-ordinate its trade relations'. As mentioned earlier, the customs union's track record with the EU EPA negotiations is such that four years after signature and ratification by Kenya (and signature of Rwanda), the agreement is still not in force because an insufficient number of countries have concluded their ratification processes on the African side. There have been other examples of somewhat disjointed policy, for example on the subject of worn clothing imports. Notwithstanding these issues, the EAC is considered as one of the 'older and better functioning Regional Economic Communities in Africa'.[43]

The case of overlapping membership between EAC members and different FTAs – as is the case of Tanzania (as a member state of the EAC but also party to the SADC FTA and not COMESA) – has also been an impediment to a fully functioning customs union. Political differences have likewise played their part in creating obstacles at various times, sometimes leading to trade restrictions between member states. Kenya may well be viewing the EAC as a work in progress and thus claim the freedom to negotiate FTAs with third parties on its own. 'Going solo' may be somewhat of a consequence of the

[42] EAC (2004). *Protocol Establishing the East African Customs Union*. See Article 37. https://www.tralac.org/documents/resources/eac/1337-protocol-on-the-establishment-of-the-east-african-customs-union-2-march-2004.html
[43] Erasmus, G. (2020). *The proposed US-Kenya Trade Deal: Context and Consequences*. tralac Trade Brief No S20TB04/2020. Stellenbosch: tralac (p. 7).

slow pace of these and similar developments, but might ultimately also guide the EAC towards closer consultation and (also) coordination on these matters in future.

6.2 US policy objectives and negotiating framework

Less uncertain are the objectives and the guidance provided to US negotiators for such agreements. The TPA-2015 supplements the powers of the US president to negotiate trade agreements, a task that is ordinarily the responsibility of Congress in line with the US Constitution ('The Congress shall have power to… regulate commerce with foreign nations…')[44], and provides for a framework within which the president is mandated to undertake such (trade) negotiations, while fast-tracking the process and setting defined timelines on how Congress should enact implementing legislation for such trade agreements. This avoids a scenario, essentially, whereby, for example, the US negotiates and agrees the terms of a trade agreement but Congress makes unilateral changes, or holds up implementation thereof for other possibly unrelated reasons. Nevertheless, the TPA does extend clear guiding objectives to any such agreements and provides a measure of oversight to the US Congress, as well as greater transparency over the process.

Essentially, the US president notifies Congress of an intention to negotiate a trade agreement (as has happened in February 2020 regarding Kenya), and is required to undertake consultations with the private sector throughout the negotiation process; in turn, Congress must also be consulted along the process while holding the president to the general – and specific – negotiating objectives set out in the TPA legislation. On the conclusion of the trade negotiations, the president then submits a draft 'implementing' bill to Congress, including the text of the trade agreement, in order for Congress to implement it.[45]

The 2015 TPA (which replaces the Bipartisan Trade Promotion Authority contained in the 2002 Trade Act)[46] expedites and streamlines the process through with legislation that implements US trade agreements (containing measures that address non-tariff barriers) is considered by Congress. The role

[44] United States Constitution. Article 1, Section 8. https://www.law.cornell.edu/constitution/articlei
[45] Congressional Research Service (2019). *Trade Promotion Authority: Frequently Asked Questions*. (p. 3). https://fas.org/sgp/crs/misc/R43491.pdf
[46] United States Congress (2002). *Public Law 107-210* https://www.congress.gov/107/plaws/publ210/PLAW-107publ210.pdf

of Congress is reduced, to an extent, to one of implementation (of agreements) once a trade agreement has been proposed that meets the relevant statutory requirements.[47]

The current TPA[48] was originally valid for three years to 1 July 2021, but has gone through a mandated three-year renewal extension option, which the current president requested[49]on 20 March 2018 (and which was granted by virtue of the fact that Congress did not deny this request within 60 days through a so-called disapproval resolution). Under the current TPA, the US can negotiate and sign a trade agreement within the fast-track period, and even present the legislation to Congress at a later date, after the TPA has expired. The necessary framework would, however, likely be in place to replace or extend the current TPA, if necessary.

The three key elements of the TPA can be summarised as follows:[50]

- It sets out the key trade policy priorities and negotiating objectives, as well as the framework for Congressional oversight and guidance.
- It provides guidance around notification and consultation by the Administration of Congress.
- It sets out terms and conditions that allow the Administration to negotiate and enter into trade agreements, as well as the procedures for congressional passage of the relevant implementing legislation.

Various negotiating objectives and priorities are set out in the TPA legislation. While an analysis of these is beyond the scope of this paper, the headline objectives allude to the comprehensive nature of US trade agreements as mandated and required by US legislation and the authority granted to the

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[47] Congressional Budget Office (2015). *S. 995, Bipartisan Congressional Trade Priorities and Accountability Act of 2015*. Cost estimate. https://www.cbo.gov/publication/50149
[48] United States Senate (2015). *Senate version of the legislation (S.995)*. https://congress.gov/bill/114th-congress/senate-bill/995. The equivalent House version is under Bill H.R. 1890. https://www.congress.gov/bill/114th-congress/house-bill/1890
[49] White House (2008). *Presidential Message to the Congress of the United States, 20 March 2018*. https://www.whitehouse.gov/briefings-statements/presidential-message-congress-united-states-3/
[50] USTR (undated). *Trade Promotion Authority*. https://ustr.gov/trade-agreements/other-initiatives/Trade-Promotion-Authority

President of the US to negotiate trade agreements. The relevant legislation is contained within Title 19 (Chapter 27) of the US legislative Code (USC).[51]

When the US Trade Administration announced the intent to negotiate a trade agreement with Kenya in February 2020, USTR Lighthizer emphasised that 'we look forward to negotiating and concluding a comprehensive, high-standard agreement with Kenya that can serve as a model for additional agreements across Africa,[52] while confirming, in the letters to Congress, that the process will follow the (comprehensive) model that is set out in the TPA through the range of negotiating objectives.[53] Notwithstanding these objectives, in order to be successful, an agreement with an African developing country should show flexibility, both in scope but also, for example, when it comes to implementing periods and technical assistance.[54] Meanwhile, other conclusions can be drawn from the stated outcomes of the second meeting (in November 2019) of the US-Kenya Bilateral Working Group, as mentioned earlier, which reportedly focused on themes including services trade, digital trade, intellectual property, agriculture and so forth.[55]

The overall trade negotiation objectives, in terms of US legislation, include (per Section 4201):

(1) to obtain more open, equitable, and reciprocal market access;

(2) to obtain the reduction or elimination of barriers and distortions that are directly related to trade and investment and that decrease market opportunities for United States exports or otherwise distort United States trade;

(3) to further strengthen the system of international trade and investment disciplines and procedures, including dispute settlement

…

(6) to promote respect for worker rights…

…

[51] US Code (undated). *19 USC 27. Customs Duties, Sections 4201 – 4210.* https://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter27&edition=prelim
[52] USTR (2020). *President Trump Announces Intent to Negotiate Trade Agreement with Kenya* (note 1 above).
[53] USTR (2020). See copy of letter sent to Speaker Pelosi: https://agoa.info/images/documents/15751/2020kenyaftacongressionalnotificationletter-pelosi.pdf
[54] Erasmus, G. (2020). *The proposed US-Kenya Trade Deal: Context and Consequences*. tralac Trade Brief No S20TB04/2020. Stellenbosch: tralac (p. 6)
[55] USTR (2019). *Second Meeting of the of the U.S.-Kenya Trade and Investment Working Group* (note 24 above).

> (8) *to ensure that trade agreements afford small businesses equal access to international markets, equitable trade benefits, and expanded export market opportunities, and provide for the reduction or elimination of trade and investment barriers that disproportionately impact small businesses…*

The legislation also includes a diverse range of principal trade negotiating objectives that span themes ranging from trade in goods and services, agricultural goods, investment, intellectual property, digital goods, labour and the environment, anti-corruption, trade remedy legislation, textiles trade and others.

6.3 Specific negotiating objectives for the US-Kenya FTA

Late in May 2020 the USTR published a document[56] setting out the negotiating objectives of the proposed FTA. The overall objectives include seeking 'a mutually beneficial trade agreement that can serve as a model for additional agreements across Africa', supporting 'regional integration, where appropriate', and to 'build on the objectives of the African Growth and Opportunity Act, (to) promote good governance and the rule of law'. It should be remembered that the AGOA legislation and the GSP on which it builds contain a number of eligibility criteria that address issues such as economic freedom, labour rights, political pluralism and governance standards.

With respect to trade in goods, the general objectives with respect to the Kenya FTA are to:

- ensure fair, balanced, and reciprocal trade with Kenya
- increase transparency in import and export licensing procedures
- discipline import and export monopolies to prevent trade distortions.

For industrial goods, the specific objective are listed as (to):

- secure comprehensive duty-free market access for US industrial goods and strengthen disciplines to address non-tariff barriers that constrain US exports

[56] USTR (2020). *United States – Kenya negotiations. Summary of Specific Negotiating Objectives*. May 2020. https://www.tralac.org/news/article/14637-summary-of-specific-negotiating-objectives-for-the-initiation-of-united-states-kenya-trade-agreement-negotiations.html

- expand market access for remanufactured goods exports by ensuring that they are not classified as used goods that are restricted or banned

- secure duty-free access for US textile and apparel products and seek to improve competitive opportunities for exports of US textile and apparel products while taking into account US import sensitivities

- secure commitments with respect to greater regulatory compatibility to facilitate US exports in key goods sectors and reduce burdens associated with unnecessary differences in regulation, including through regulatory cooperation where appropriate.

On agricultural goods, the specific objectives include, to:

- secure comprehensive market access for US agricultural goods in Kenya by reducing or eliminating tariffs

- provide reasonable adjustment periods for US import-sensitive agricultural products, engaging in close consultation with Congress on such products before initiating tariff reduction negotiations

- eliminate practices that unfairly decrease US market access opportunities or distort agricultural markets to the detriment of the United States, including:
    - non-tariff barriers that discriminate against U.S. agricultural goods; and
    - restrictive rules in the administration of tariff rate quotas.

- promote greater regulatory compatibility to reduce burdens associated with unnecessary differences in regulations and standards, including through regulatory cooperation where appropriate

- establish specific commitments for trade in products developed through agricultural biotechnologies, including on transparency, cooperation, and managing low-level presence issues, and a mechanism for exchange of information and enhanced cooperation on agricultural biotechnologies.

These are only the *trade in goods* objectives. The US has also published similar negotiating objectives for many other disciplines that it expects to form part of what appears very much to be a comprehensive agreement with Kenya as well as serving as a model for future negotiations with other African partner countries. In this context, in the introductory remarks to its published negotiating objectives,[57] the USTR states, that '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'.

Other negotiating objectives proposed for the Kenya FTA cover the following disciplines and thematic areas (with more detail provided in the document):

- Sanitary and Phytosanitary Measures (SPS)
- Customs and Trade Facilitation
- Rules of Origin
- Technical Barriers to Trade (TBT)
- Good Regulatory Practices
- Transparency, Publication, and Administrative Measures
- Trade in Services, including Telecommunications and Financial Services
- Digital Trade in Goods and Services and Cross-Border Data Flows
- Investment
- Intellectual Property
- Procedural Fairness for Pharmaceuticals and Medical Devices
- State-Owned and Controlled Enterprises (SOEs)
- Subsidies
- Competition Policy
- Labour
- Environment
- Anti-corruption
- Trade Remedies

[57] Ibid.

- Government Procurement
- Small and Medium-Sized Enterprises (SMEs)
- Dispute Settlement
- General Provisions
- Currency

These most recent developments are now beginning to paint a clearer picture of what might be covered by this bilateral and reciprocal FTA. This process gained structure and momentum with the announcement by the US administration of its intent to negotiate an FTA, the notification process with respect to Congress, the negotiating principles of the TPA legislation expressly referred to in the Congressional notification, and now the communication in May 2020 – by the USTR – setting out the negotiating principles in some detail. The negotiations are likely to be technical and time-consuming, not least given that they will be considered as precedent-setting. One of the many challenges will be to reach an outcome that helps facilitate trade and investment. Looking across to the US-Morocco FTA one finds the textile RoO, quotas and related technical detail (one of the themes forming part of the TPA regulations, and which will no doubt be included in the Kenya-US FTA) spanning almost 50 pages![58]

7. Concluding remarks

The announcement that the US and Kenya would pursue negotiations for an FTA was perhaps not expected but is also not really surprising. Negotiations follow a fairly lengthy 'romance' of sorts between Kenya and the US, with Kenya long enjoying a fairly warm relationship with the US. This was based not only on bilateral trade, but also cooperation in other areas, including security. Kenya is uniquely positioned in East Africa, politically and geographically, and has one of the more advanced economies with many progressive policies.

It has become known as a regional hub for innovation around information technology and financial systems and applications. While evidently not one of the largest exporters to the US – or importer of US goods – on the African continent, Kenya is nevertheless an attractive proposition when considering the full package of benefits and potential outcomes. An FTA also serves important defensive

[58] USTR (2004). *US-Morocco FTA. Final Text*. Chapter 4 Textiles and Apparel. https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file837_3828.pdf

considerations of the US in particular, given the growing influence of China in East Africa and elsewhere, both economically and politically.

Bilateral trade between Kenya and the US has grown steadily over the past two decades and now tops $1 billion. Noteworthy is the fact that Kenya now enjoys a significant trade surplus in terms of its goods trade with the US, a trend that began only a few years ago. Could this be a concern to the US? In spite of this, there are other drivers weighing on the negotiations, not least the fact that AGOA is set to expire in September 2025 and Kenya does not have a relatively secure fall-back position through, for example, GSP access as an LDC beneficiary (GSP benefits for non-LDC countries are more limited), or preferential access for its garment-manufacturing sector which has become one of the most important industrial sectors of the Kenyan economy.

While the US tariff regime offers duty-free market access to a large share of total tariff lines, in addition to a favourable number of GSP lines, most of Kenya's trade currently takes place under AGOA preference which would be at risk in the event of AGOA expiring without another similar arrangement being in place.

Geographic distance between the two countries will always play a role in trade flows, given the logistical constraints, but these same constraints might not apply to, for example, trade in services and greater market access and deregulation of sorts in this sphere. Likewise, issues such as trade remedies, intellectual property rights and enforcement, labour rights, textile negotiations (including worn clothing?), digital goods and others are likely to be important and often sensitive priorities for the US in particular.

There will be much pressure on these negotiations, apart from the previously mentioned issues around the EAC situation, the AfCFTA, African unity and so forth. Notwithstanding the fact that the US has already explicitly stated that these negotiations, and the outcome, will serve as a blueprint in other future bilateral or regional negotiations, this negotiation and outcome would in any case most certainly be expected to carry significant weight in other US-African engagement.

To some extent Kenya will be negotiating on behalf of Africa without the participation of other African countries. The TPA regulations under which the FTA negotiations have been notified to the US Congress set a high standard in the African context; the negotiating objectives published in May 2020 by the USTR confirm the significant scope and level of ambition intended for this agreement. Entering these negotiations with an individual African country, which is indeed party to an existing customs union, may, however, further expose, perhaps unintentionally, existing and emerging fault lines and weaknesses. But it may also help drive closer and more cohesive policy development, with improved coordination in disciplines such as services, goods trade, agriculture, dispute settlement, investment, and other thematic areas among African countries. The proposed Kenya-US FTA is without doubt an exciting and ambitious project in the context of existing developments in Africa, even if not without controversy, and one that without doubt will ultimately deliver important lessons, opportunities, challenges, and hopefully a multitude of beneficial outcomes both to Kenya and the US.

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