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BEFORE THE UNITED STATES TRADE REPRESENTATIVE
Docket Number USTR-2020-0011-0001

COMMENTS FROM PUBLIC CITIZEN CONCERNING A PROPOSED U.S.-KENYA TRADE AGREEMENT
APRIL 28, 2020

Public Citizen welcomes the opportunity to comment on the Office of the U.S. Trade Representative's (USTR) proposal to enter into negotiations for a U.S.-Kenya trade agreement. Public Citizen is a nonprofit consumer advocacy organization with more than 500,000 members. A mission of Public Citizen is to ensure that in this era of globalization, a majority can enjoy economic security; a clean environment; safe food, medicines and products; access to quality affordable services; and the exercise of democratic decision-making about the matters that affect their lives. We have conducted extensive analysis of U.S. trade and investment agreements and their outcomes, starting in 1991 during the initial North American Free Trade Agreement (NAFTA) negotiations.

Public Citizen questions why the U.S. government would initiate negotiations for a new trade agreement with Kenya, and particularly at this time. The COVID-19 crisis already was emerging when the administration notified Congress of its intent to start talks. Now, as the world grapples with dire economic and health consequences, the U.S. government should prioritize initiatives that offer solutions to these unprecedented problems. A trade pact with Kenya, even a deal that surpasses the highest expectations, would not improve either U.S. or Kenyan prospects of countering or recovering from this crisis.

Indeed, the priority trade challenge that many countries should be discussing now is how to restore some of their production capacity and thus economic resilience that they have lost after decades of hyperglobalization implemented under the current trade regime. To the extent trade negotiations are part of the response, they should be aimed at enacting policies that counter the concentration of production for many essential goods in too few venues, including overreliance on China as the world's factory. Such concentration and the long, thin supply chains inherent to hyperglobalized productions have contributed to mask and medicine shortages. Thus, trade talks that facilitate the creation of domestic and regional supply chains in eastern Africa and among North American and Caribbean nations to maximize access to urgently needed medical equipment, supplies and medicine would be a priority.

In addition to the discordance of starting U.S.-Kenya trade agreement talks in the middle of a global pandemic, the administration has yet to clarify the purpose and goals for such talks or any resulting agreement. In Public Citizen's view, the first goal of any trade deal should be to deliver meaningful benefits to most people in the involved countries.

If a purpose of the pact is to raise incomes, the focus should be production, not deregulation or expansion of corporate power. Thus, it is Public Citizen's view that negotiating a standard U.S. Free Trade Agreement (FTA) with Kenya is a terrible idea. Instead of employing the standard model, which would require Kenya to alter its laws to guarantee commercial interests are granted expansive intellectual property rights that limit affordable access to medicines and information and investor rights that undermine development and forbid many critical consumer and environmental safeguards relating to the financial and energy sectors, genetically modified seeds and foods, e-commerce and privacy and more, in crafting the U.S. negotiating objectives, USTR should consider where there are potential opportunities for actual trade for which there are U.S.-Kenya compatibilities, needs and special challenges. This would seem to go without saying, but the history of most past U.S. trade agreements proves otherwise.

Yet, on the basis of such an analysis, the United States and Kenya are improbable partners for a closer comprehensive economic partnership that could provide major new economic opportunities for workers, farmers or firms in either country. Nor is it clear how Kenyan workers, farmers or firms would not lose, rather than benefit, from replacing the current trade terms of the Africa Growth and Opportunity Act (AGOA) with anything resembling the standard U.S. FTA.

The size of Kenya's economy and its trade with the United States and with the world are relatively small. Except for several years with anomalous aircraft exports, total of U.S. exports to Kenya have been under a billion dollars, while imports to the United States from Kenya have been in the $500-700 million range.

U.S.-Kenya Goods Trade Balance

Year	Value of Exports (Adj)	Value of Imports (Adj)	Balance (Adj)
2009	$ 787,361,116	$ 338,020,604	$ 449,340,512
2010	$ 444,838,925	$ 368,738,407	$ 76,100,518
2011	$ 530,251,836	$ 438,452,129	$ 91,799,707
2012	$ 640,072,344	$ 438,467,702	$ 201,604,643
2013	$ 705,271,785	$ 501,756,139	$ 203,515,647
2014	$ 1,791,462,008	$ 645,615,500	$ 1,145,846,508
2015	$ 1,028,832,673	$ 624,957,734	$ 403,874,939
2016	$ 428,058,533	$ 595,038,492	$ (166,979,959)
2017	$ 478,649,449	$ 603,420,193	$ (124,770,744)
2018	$ 376,243,666	$ 662,127,617	$ (285,883,951)
2019	$ 395,315,272	$ 674,541,980	$ (279,226,708)

Source: U.S. Census Bureau

Kenya's main exports to the United States are apparel, knitted apparel, fruits and nuts, and ores. About 71% of Kenya exports to the United States are entered using AGOA, with apparel, macadamia nuts, and cut flowers being the main products. Other goods enter duty-free under the Generalized System of Preferences or under the World Trade Organization (WTO) Most Favored Nation schedule. The main U.S. exports to Kenya are aircraft, plastics, machinery and cereals.

To the extent that a trade agreement between the two nations makes sense, it would be a pact limited to trade in goods that locks in the AGOA market access terms Kenya now has in exchange for preferential market access in Kenya for U.S. goods that do not compete with those made in Kenya. However, that approach may conflict with WTO requirements. Yet a comprehensive FTA of the standard U.S. model would provide few benefits and many downsides to most people in both countries, which again suggests that the pursuit of a U.S.-Kenya FTA is ill-advised.

Top 20 U.S. Imports From Kenya (2019)

Rank	Import Category	Value (Adj)	HS Code
1	General Apparel	$ 288,806,211.20	62
2	Apparel, Knit/Crocheted	$ 169,898,925.86	61
3	Edible Fruits & Nuts	$ 55,705,539.09	8
4	Ores, Slag & Ash	$ 52,588,221.75	26
5	Coffee, Tea, Spices	$ 41,635,463.63	9
6	NESOI - special classification	$ 13,059,113.78	98
7	Cosmetics, Perfumes, Essential Oils	$ 10,572,488.15	33
8	Animal/Vegetable Oils	$ 6,989,224.02	15
9	Live Trees & Plants	$ 5,201,114.19	6
10	Prepared Foods	$ 4,647,432.24	21
11	Toys, Games & Sporting Goods	$ 3,334,784.45	95
12	Precious Stones & Metals	$ 2,904,553.28	71
13	Prepared Feathers & Artificial Flowers	$ 2,483,659.44	67
14	NESOI - special imports	$ 2,440,077.45	99
15	Artwork & Antiques	$ 2,414,127.83	97
16	Dye, Paint, Putty	$ 1,751,042.56	32
17	Oil Seeds, Grains, Seed	$ 1,065,714.90	12
18	Plaster, Earth, Stone, Salt	$ 1,012,866.35	25
19	Prepared Fruits and Vegetables	$ 943,721.94	20
20	Medical, Surgical, and Optical Equipment	$ 918,541.67	90

Source: U.S. Census Bureau

Top 20 U.S. Exports to Kenya (2019)

Rank	Export Category	Value (Adj)	HS Code
1	Aircraft & Parts	$ 59,178,964.17	88
2	Plastics	$ 58,716,567.91	39
3	Machinery & Parts	$ 41,017,720.45	84
4	Cereals	$ 30,488,793.04	10
5	NESOI - special classification	$ 29,076,302.70	98
6	Electric Machinery	$ 24,869,642.02	85
7	Medical, Surgical, and Optical Equipment	$ 20,240,697.43	90
8	Paper Products	$ 17,725,607.89	48
9	Energy Products	$ 13,681,064.63	27
10	Chemical Products	$ 13,101,810.15	38
11	Pharmaceuticals	$ 11,734,304.00	30
12	Textile Art	$ 9,161,595.14	63
13	Animal/Vegetable Oils	$ 7,383,630.40	15
14	Vehicles & Parts	$ 6,440,634.34	87
15	Vegetables, Roots, Tubers	$ 4,902,203.19	7
16	Arms and Ammunition	$ 4,826,189.23	93
17	Wood Pulp & Recovered Paper	$ 4,589,410.54	47
18	Iron/Steel Articles	$ 4,208,107.37	73
19	Edible Preparations	$ 3,894,646.47	21
20	Rubber	$ 3,069,840.09	40

Source: U.S. Census Bureau

Kenyan President Uhuru Kenyatta's statements when visiting the United States, perusal of the Kenyan press since, and interviews with Kenyan civil society groups suggest that a U.S. trade agreement is viewed as necessary to defend against a potential threat, not because it offers prospects of great gains. Indeed, given all AGOA-qualified countries, including Kenya, have duty-free access to the U.S. market for almost all goods now under AGOA, it is unclear what more benefit Kenya could gain from a U.S. trade agreement. Thus, it is notable that President Kenyatta left his early February 2020 White House meeting with the strong impression that Kenya's AGOA duty-free access was going to be terminated. That outcome is, in fact, quite improbable, but that impression would be a motivation to consider a U.S. trade agreement as a means to not lose existing U.S. duty-free access.

Whatever President Donald Trump's motivation both to make such an assertion about AGOA and to launch these negotiations, the bullying claim about AGOA's demise requires special examination. First, Congress, not the executive, has the authority to renew AGOA. There was no opposition to AGOA in 2015 when Congress extended AGOA's initial 15 years for an additional 10 years. Nor was there congressional opposition in 2004 when the original eight-year term for the program enacted in 2000 was extended to 2015. While of course no one can predict with 100% certainty what Congress will or will not approve, there is no movement in Congress nor in the private sector to end AGOA. Second, barring a coup and even assuming a second term, Trump will not be president when the current AGOA program requires extension prior to its September 30, 2025 end date. Thus, if his comments about the demise of AGOA were a veiled threat that he would veto an extension, he will not be in office to do so.

Alternatively, Trump could have suggested that the United States would remove Kenya from AGOA benefits because the nation had "graduated" from the program. Whether AGOA would be a permanent program for all countries or a pathway to some other trade relationship has been a question since AGOA's 2000 start. But there currently is no plan or even active discussion in Congress about creating an AGOA graduation track. Indeed, both South Africa and Nigeria have much greater trade flows with the world in general and also much greater trade values under AGOA than Kenya, which is fourth in AGOA use after Chad and followed closely by Ghana at fifth. Yet none of these other countries is queuing up for a U.S. trade pact on the basis of fearing graduation from AGOA.

Perhaps one reason why is that countries signing trade agreements with the United States have to make major anti-development concessions, which in the case of African countries now trading under AGOA would mean taking on onerous new obligations only to get U.S. market access they already have now. U.S. trade agreements typically require adoption of extreme intellectual property policies that raise prices for essential goods such as medicines, textbooks, and more. Required e-commerce rules limit government regulation of online retailers and other mega-platforms and limit privacy and data protections. Service sector rules forbid limits on the size and types of services offered by U.S. banks, retailers, energy and other firms, that obtain new rights to establish operations in trade partners countries.

And all of that does not take into account that Kenya would be required to make major trade liberalization commitments that would limit its policy space to ensure food security and do targeted industrial diversification. Kenya currently has the world's eighth largest gap between a country's bound and applied tariff rates. That "water" means Kenya has flexibility within the WTO system to raise and lower tariff rates with the U.S. and all nations as it sees fit. That flexibility as well as Kenya's relatively high applied most favored nation tariff rate mean it would be required to give major concessions – even more than others in the region – if it replaces AGOA market access with a U.S. trade agreement.

Given the data suggests that mutually beneficial trade gains are not the motivation for a U.S.-Kenya trade agreement, then is the goal geopolitical? During his visit to Washington, President Kenyatta noted that

Kenya could have close relationships with the United States and with China. China has made major loans and some investments in Kenya as part of its "Belt and Road" initiative. Kenya now owes $5.3 billion to China, of which $3.2 billion is for a standard gauge railway connecting Nairobi with the port of Mombasa and portions of a Kenya-Uganda railway. China is Kenya's largest external creditor with some 22% of the country's external debt. As well, Chinese imports into other east African countries is replacing Kenya sales. If the U.S. goal is to offer Kenya (and other African countries for which a prospective U.S.-Kenya agreement could become a model) economic partnership options preferable to those China offers, that will require a type of agreement different from past U.S. FTAs that actually benefits people rather than mainly the U.S. commercial interests that have an outsized role in shaping U.S. trade pacts' terms.

Yet, despite growing concerns in Africa about a Chinese debt trap, to some in Africa the Trump administration's efforts to launch trade agreement talks with Kenya represent a new threat – using negotiations with one African country to break African trade policy unity, not only using one country to undermine the logic undergirding the AGOA, but also undermining Kenya's current primary trading bloc, the East African Community (EAC). The EAC includes Kenya, Uganda, Rwanda, Tanzania, Burundi and South Sudan. The EAC Customs Union Protocol established duty-free trade among the six member countries and sets a common external tariff on goods from non-EAC nations. Article 37 of the Protocol, "Trade Arrangements with Countries and Organisations Outside the Customs Union," explicitly requires each country to "co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade." A trade agreement with the European Union that Kenya signed and ratified in 2016 remains shelved because other EAC partner countries do not support that pact's terms, viewed as detrimental to development and growth. Requiring a compromise on regional unity as a condition for trade has deteriorated their relationship with the EU.

To some observers in Africa, President Trump's apparent threats about the end of AGOA appear to replicate the debacle of the European Union's fateful decision to revoke trade preferences for African nations under the Lomé Convention, which weakened Europe's geopolitical interests in the region. In 2000, the European Commission announced that the Lomé program, which functions like the AGOA, would be terminated, and negotiations would begin to establish reciprocity-based Economic Partnership Agreements (EPAs).[1] The divide-and-conquer approach of negotiating EPAs with former Lomé Convention members, plus the revocation of its special preferences as pressure to agree to unfavorable EPA terms, not only harmed the economies of many African and other Lomé Convention countries. It also proved to be a political blunder, generating bitterness from the involved countries toward the European Union.

Even as the timing for the launch of any new trade agreement negotiations are inauspicious and the goals unclear, what the recent debate over the renegotiated NAFTA spotlighted is that public opinion around what can and cannot be in a U.S. trade agreement has changed. It bears noting that the support the new NAFTA received from both parties in both chambers of Congress and from some sectors of civil society was in the context of revising an existing agreement. Trying to fix an existing bad deal like NAFTA to reduce its ongoing damage is very different from creating a truly good trade deal that generates jobs, raises wages and protects the environment and public health. Any new U.S. trade agreement being negotiated from scratch – including a potential agreement with Kenya – must build from the floor set by the new NAFTA.

That is because the measure of such a new agreement will be whether it can actually benefit people, *with the alternative being no agreement*. In contrast, the alternative to the new NAFTA was the status quo of the old NAFTA. For a *tabla rasa* deal to enjoy support, the bar will be higher than the revised NAFTA. That means no special protections for foreign investors or Big Pharma, stronger rules to stop race-to-the-bottom outsourcing of jobs and pollution, binding climate standards, and no limits on the policymaking processes or public interest protections needed to ensure that our food and products are safe, our privacy is protected, monopolistic online firms are held accountable and big banks do not crash the economy again.

Worryingly, with the public and Congress entirely distracted with the COVID-19 crisis, there is little prospect for meaningful engagement on U.S.-Kenya FTA negotiations, which is critical if a resulting agreement is to enjoy broad support.

The Negotiating Process Must Be Transparent and Inclusive, Replacing the Past Processes Dominated by 500 U.S. Trade Advisors Representing Corporate Interests

If the 500 official U.S. trade advisers representing corporate interests who have had a privileged role in developing our past trade deals[2] maintain their privileged role in shaping U.S. positions and opening offers and have exclusive access to reviewing confidential texts, then U.S.-Kenya negotiations could result in a deal that not only would be more damaging to working people, but – like the NAFTA 2.0 Trump signed in November 2018 – would become impossible to enact.

It was only after the release of the text in October 2018 that the public and even most members of Congress became aware of the unacceptable terms that the text contained. The lack of transparency and public input in the process facilitated the negotiation of a deal that added new monopoly protections for Big Pharma to lock in high medicine prices, and contained labor and environmental terms insufficient to counteract NAFTA's ongoing outsourcing of jobs and pollution and downward pressure on wages.

When the secret terms finally became public, the deal was dead on arrival in Congress. House Speaker Nancy Pelosi announced there would be no vote unless labor and environmental terms and their enforcement were strengthened, and the Big Pharma goodies were eliminated. For a year, as the NAFTA trade deficit exploded, the administration refused to make the changes needed so that a revised pact night be enacted.

One of the fundamental reasons why the original NAFTA, the 2018 NAFTA 2.0 and the Trans-Pacific Partnership (TPP) were such terrible deals is because they were negotiated under the influence of hundreds of corporate advisors while the public and Congress were locked out. Terms needed for the deal to benefit most Americans were traded away in favor of special protections for the special interests that had access. The resulting deals did not prioritize creating good jobs, raising wages or safeguarding our democratically achieved health and environmental policies. A successful U.S.-Kenya negotiation must replace the corporate advisory system with an on-the-record public process, including public hearings, to formulate U.S. positions and obtain comment on draft and final U.S. text proposals. U.S.-proposed texts and draft consolidated texts after each negotiating session must be made public. Strict conflict of interest rules must be enforced. Only by issuing detailed goals and making draft texts available will the American public know in whose interest the negotiations are being conducted.

Simply put, for a prospective U.S.-Kenya agreement to succeed in terms of policy or politics, it cannot merely mirror past U.S. agreements, including the revised NAFTA. If there is to be a U.S.-Kenya trade agreement that can enjoy broad support, it must meet build from the floor set by the new NAFTA and meet the following criteria.

1. **Imported food and goods and all services and service providers must meet U.S. consumer and environmental standards.**

Since the original NAFTA, U.S. trade agreements have included many chapters that set rules unrelated to trade and to which all U.S. federal, state and local laws must conform. Under these terms, tribunals can authorize trade sanctions against the United States or order cash compensation from the U.S. Treasury for laws democratically passed by Congress, state legislatures and city councils that have been approved by U.S. courts, even if such policies apply equally to U.S. and foreign goods, firms and services. Effectively, these FTA negotiators created an expansive body of law outside of normal democratic procedures.

As a result, U.S. FTAs require us to import meat that does not conform to U.S. safety or inspection standards. And NAFTA subjects numerous other service sector policies – U.S. financial, energy and other safeguards – to challenge before tribunals that can authorize trade sanctions or orders for cash compensation if our domestic policies do not comply with rules unrelated to trade in such services. These rules not only threaten the health and wellbeing of consumers here, but also undermine U.S. jobs by making it easier for companies to move jobs and operations to facilities abroad.

Such anti-public-interest terms must be abandoned in favor of a simple rule: Imported products must meet the same standards as domestic products, and all service providers who operate within the United States – whether those providers are domestic or foreign, or that deliver services for consumption here – must equally comply with U.S. environmental, land use, safety, privacy, transparency, professional qualification and licensing, and consumer access laws and regulations to ensure high-quality products and services, as well as high-quality jobs.

The reciprocal terms must apply for U.S. imports into Kenya and U.S. firms operating there. What level of public interest protection a country chooses to establish is a matter for their own domestic, democratic processes so that policies reflect domestic preferences and goals. The only issue that is relevant for a trade and investment agreement is whether domestic policies intentionally discriminate against foreign goods and firms, with the instances in which domestic preferences or domestic ownership requirements are required a matter for which there must be flexibility based on countries' goals.

Thus, any new U.S. trade agreement must explicitly affirm the right for each country involved to impose non-discriminatory standards designed to protect public health and safety unless it can be clearly demonstrated that such standards do not protect the public health or safety. Future U.S. pacts must also affirm the right for each country to provide consumer information labels, such as Country of Origin Labels for meat, dairy and seafood and labels identifying Genetically Modified products and more. (The 2020 NTE report lists as a foreign trade barrier Kenya's ban on imports of genetically engineered food and feed imports.)

And, a new "carve out" must be included to protect non-discriminatory domestic regulatory policies so as to deter attacks and provide an early defense against challenges to our health, safety, environmental, energy, land use and other non-trade policies. As well, the agreement must not require privatization of public services or otherwise limit the ability of federal, state or local governments to establish whatever service delivery mechanisms can best ensure quality, affordable service. The 2020 NTE report laments that Kenya "has been slow to open public infrastructure to competition because the government considers state-owned companies that control infrastructure to be 'strategic' enterprises." Such decisions should be made domestically and democratically, not via trade agreement.

The U.S.-Kenya trade agreement should have no chapter on regulatory coherence (also called cooperation or convergence) nor “Sectoral Annexes” imposing health, safety and environmental deregulation and imposing new corporate rights in any sector. While cooperation among regulators is not inherently a bad idea, it is very dangerous for such cooperation to happen in the context of trade negotiations that have explicitly prioritized reducing costs for businesses over any protection of consumers or the environment. The biggest banks, agribusiness, chemicals and pharma corporations have made clear in past trade negotiations what consumer and environmental protections they intend to undermine in the name of such “regulatory cooperation.” The regulatory cooperation chapter is one of the most obvious places to look in a trade pact text to find terms addressing non-tariff barriers. “Non-tariff barriers” is trade-speak for any domestic policy or regulation that can affect multinational corporations’ ability to move goods or services across borders. Many consumer, health, or environmental safeguards we rely on to protect people and the environment are considered “non-tariff barriers” by business interests. The USTR’s March 17, 2020 notice to Congress of intent to start negotiations with Kenya expressly stated that non-tariff barriers were on the agenda for these talks.[3]

Any services terms must create a floor and not a ceiling on regulation of service sectors. In particular, they must not limit governments’ ability to effectively regulate banks, insurance companies, hedge funds and other financial service providers. The agreement must preserve the right of the parties and their sub-federal governments to maintain essential public services, to establish new public services and to regulate, for the benefit of the public, services provided to consumers. The service sectors subject to the obligations must enumerated in a positive list. This includes explicit recognition in a pact’s service sector chapter that a regulatory ban is not a market access barrier: any future U.S. trade agreement must have a general exception allowing each country to maintain or establish bans on services that country considers harmful to public health or safety, the environment, or public morals, so long as that ban applies to domestic and foreign services alike.

2. Do not limit regulation of digital trade and online firms or their practices or undermine consumer privacy protections

Rules limiting data and privacy protections, setting Internet Service Provider liability and safeguard rules, and related enforcement measures, and border measures should not be locked in via trade agreements. And specifically, the new NAFTA’s limits on financial, digital trade and other service sector consumer safeguards should not be part of any future U.S. trade agreement.

The rise of artificial intelligence and big analytics, monopolization of services, the internet of things and billions of devices scattered around the globe raise major challenges to privacy, competition, consumer protection and taxation. There are many unknowns regarding the technological advances ahead, and therefore the digital economy. For years, dominant internet companies have taken advantage of the weak U.S. regime personal data protections. Today, many Americans are concerned about how companies collect and use their online data. Given the constant technological developments and the moving boundaries of consumer threats, rather than having current U.S. industry-favored ruled locked in via trade agreements, such policies must be made in democratic processes that provide opportunities to revisit and revise decisions as circumstances change. Even without constant technological change in this sector, on the basis of shifting public and policymaker opinions alone, it is entirely inappropriate to lock the current U.S. policies into place through a trade agreement: Trade agreement rules on digital trade should not shrink the policy space of U.S. regulators and the U.S. Congress.

Yet the digital trade rules in the new NAFTA could do just that, undermining efforts to protect people’s privacy, personal data and security. For example, one rule in the new NAFTA requires governments to allow the transfer of consumers' data – including financial or medical data subject to privacy protections in the countries' laws – outside their borders. Policies to protect privacy by restricting where or how data may move or be stored would be subject to challenge as "illegal trade barriers" and face significant prospects of being found to violate the pact. The new NAFTA also forbids governments from requiring companies to disclose their source code or algorithms. This could increase the monopoly power of tech companies and thwart efforts to investigate and regulate anti-competitive and discriminatory behavior. As well, the Financial Services Chapter in the new NAFTA reversed the U.S. position in TPP negotiations that governments must be allowed to mandate where financial data is stored. This exception to the general TPP prohibition on governments requiring data to be stored locally was pushed by the U.S. Treasury Department based on the agency's concerns about being able to access information during financial crises and was supported by consumer groups concerned about the security of sensitive and confidential data stored offshore and the ability to obtain redress in the case of a data security breach occurring in another country.

None of these terms from the new NAFTA should be included in future U.S. trade agreements. Thus, the U.S.-Kenya trade agreement should not require cross-border data transfers and data-processing across all service sectors without adequate safeguards. Data protection and privacy are not non-tariffs barriers to trade, but rather fundamental rights and strong safeguards that must be put in place to protect consumers.

Another controversial provision in the new NAFTA is its liability waiver for online platforms with respect to their content, similar to §230 of the U.S. Communications Decency Act. This issue is subject to a vigorous debate domestically, with proponents and opponents of the current policy in both political parties. This is also precisely the sort of policy that should not be locked into place in a trade agreement, establishing a form of international preemption with one-size-fits all international standards locked in, usurping the role of Congress and state legislatures.

In addition to protecting U.S. regulatory policy space, these issues should be off the table so U.S. negotiators do not push for any weakening of Kenya's laws in this realm. Kenya's digital ecosystem, particularly digital loans and payments, has grown rapidly in last decade. Because of the lack of privacy protections and the absence of meaningful accountability structures, Kenyan consumers have been exposed to data exploitation. Kenya's first data protection legislation, the Data Protection Act, shares many features with the European Union's General Data Protection Regulation (GDPR). The Act establishes the office of the Data Protection Commissioner with independent authority and enforcement capabilities (Section 5 & 6). It governs how consumer data can be collected, processed, shared and stored, and provides robust protection for personal data (Section 26). This law is an important step in a global movement toward data privacy. It raises the bar for protection of personal data and sets the standard for Africa.

However, the 2020 National Trade Estimates (NTE) Report on Foreign Trade Barriers, which catalogues policies in other countries that U.S. commercial interests consider to be trade barriers, describes Kenya's Data Protection Act as "unclear … potentially restrictive … [and] burdensome." U.S. pressure on this issue could be seen as an attempt to undermine the consumer-driven initiative of a country with some of the best data protection laws in the region, to which other countries in Africa and beyond aspire. This Kenyan policy was also spotlighted as a "barrier" to trade in the 2020 NTE report's accompanying fact sheet on digital trade.[4]

Future U.S. trade agreements must recognize that protection of personal data and privacy is fundamental to human dignity and welfare, and essential for building consumer trust online and that protections in one country are rendered ineffective if data is transmitted to a country without such protections. Any terms requiring cross-border transmission of data must be conditioned on every signatory to an agreement establishing and enforcing transparent, strong and meaningful protections and safeguards for consumers and workers with respect to all digital products and services irrespective of the channel of acquisition, whether in physical form or over the internet.

This will require the United States to improve its domestic policies to be in line with best practices, such as policies limiting data collection, processing, use and sharing; requiring data minimization and deletion, confidentiality and security and providing purpose specification and access and correction rights. It will require enactment of robust minimum standards for cybersecurity for consumers, devices and networks such as strong authentication mechanisms and requiring platforms and services to default to the strongest privacy settings. Plus, consumers must have meaningful redress options, including a private right of action and other means for fair settlement of claims, compensation for misrepresentation, fraudulent and/or deceptive products/services or unsatisfactory products/services.

In sum, future agreements should contain no terms diminishing privacy and data protections afforded by the countries' respective laws, including by establishment of a horizontal and self-standing exception for domestic measures that protect privacy and establish and enforce data protection, with special protections for children and young people. And future agreements must ensure algorithmic transparency and accountability, including prohibition of discrimination against protected classes; remove barriers to due process; ensure accountability prevails over trade secrets; establish mechanisms for human oversight and control; and establish remedies for the adverse impacts of artificial intelligence systems on human rights and social justice, including but not limited to, ensuring effective privacy safeguards for large-scale datasets, collective complaint mechanisms, quality oversight, effective technical protection mechanisms and meaningful algorithmic auditing.

3. No U.S. trade agreement should have Investor-State Dispute Settlement (ISDS), and a U.S.-Kenya agreement should have no investment chapter.

The new NAFTA made important progress reigning in the ISDS regime that makes it less risky and less costly for U.S. firms to relocate jobs offshore. The ISDS investor protections and enforcement regime also simultaneously threaten democratic policymaking at home and abroad.

The new NAFTA eliminates ISDS between the United States and Canada and establishes a new process between the United States and Mexico that addresses some of the concerns of longtime critics such as Public Citizen. The logic behind the modified regime, was that investors relied on the original NAFTA investor protections when making these investments. This was also the logic undergirding the highly problematic U.S.-Mexico-Canada Agreement Annex that preserves the ability of nine U.S. investors with 13 contracts with the Mexican federal government for oil and gas concessions to use the full set of investor protections. Thus, even as the policy of the United States shifted against providing foreign investors here special extra-judicial ISDS rights or incentivizing U.S. firms to outsource jobs using ISDS as no-cost risk insurance, these limited threads of NAFTA's ISDS regime were retained.

In contrast to the NAFTA context, there is no ISDS or other investment regime currently in place between the United States and Kenya, and thus no expectation of such protections. Therefore, as with any future U.S. trade pact, a U.S.-Kenya trade agreement should have no ISDS. However, in addition, such a pact should have no investment chapter at all.

There are two strong grounds for such an approach. First, the obligations of such a chapter would impose additional burdens on Kenya in exchange for Kenya merely obtaining the goods trade market access it already has under AGOA. Kenya would have to alter policies pertaining to foreign land ownership and more. If the goal of this agreement is to offer an alternative to Chinese economic partnership for east African countries, then imposing obligations that make it easier for foreign firms to buy up Kenyan resources and dominate financial and other sectors is counterproductive. Second, the actual FDI trends in Africa show that there is no correlation between countries having bilateral investment treaties (BITs) or ISDS-enforced free trade agreements and investment. The African countries with which the U.S. has BITS (Morocco, Mozambique, Rwanda and Senegal) are not among the main venues for U.S. investment in Africa. Similarly, Kenya ranks as the sixth largest venue for Chinese investment, which is mainly loans as explained in the methodological note below, yet a BIT China negotiated with Kenya in 2001 never went into force.

U.S. & Chinese "Investment" in Africa[1]

Chinese Investment and Project Loans (2005-2019)

Rank	Country	Total Investments
1	Nigeria	$ 46,470,000,000
2	Egypt	$ 26,110,000,000
3	Ethiopia	$ 24,520,000,000
4	Angola	$ 24,420,000,000
5	Algeria	$ 23,610,000,000
6	Kenya	$ 17,020,000,000
7	Zambia	$ 16,870,000,000
8	DR Congo	$ 14,660,000,000
9	South Africa	$ 14,150,000,000
10	Cameroon	$ 13,260,000,000
11	Congo	$ 12,400,000,000
12	Tanzania	$ 12,310,000,000
13	Ghana	$ 11,410,000,000
14	Mozambique	$ 10,510,000,000
15	Guinea	$ 10,080,000,000
16	Zimbabwe	$ 9,820,000,000
17	Uganda	$ 8,740,000,000
18	Chad	$ 8,280,000,000
19	Sudan	$ 7,520,000,000
20	Niger	$ 6,050,000,000
21	Sierra Leone	$ 5,990,000,000
22	South Sudan	$ 5,950,000,000

U.S. Investment in Africa (FDI Stock, 2018)

Rank	Country	Total Investments
1	Mauritius	$ 9,544,000,000
2	Egypt	$ 8,384,000,000
3	South Africa	$ 7,621,000,000
4	Nigeria	$ 5,630,000,000
5	Algeria	$ 3,571,000,000
6	Ghana	$ 1,661,000,000
7	Tanzania	$ 1,444,000,000
8	Libya	$ 1,134,000,000
9	Equatorial Guinea	$ 908,000,000
10	**Morocco**	$ 408,000,000
11	Angola	$ 394,000,000
12	Kenya	$ 380,000,000
13	**Mozambique**	$ 332,000,000
14	Tunisia	$ 251,000,000
15	Liberia	$ 236,000,000
16	Congo (Kinshasa)	$ 80,000,000
17	Guinea	$ 74,000,000
18	Malawi	$ 52,000,000
19	Zambia	$ 47,000,000
20	Uganda	$ 41,000,000
21	**Senegal**	$ 22,000,000
22	Sao Tome and Principe	$ 21,000,000

[1] DATA NOTES: U.S. and Chinese investment data is not an apple-to-apple comparison. U.S. investment data is FDI outbound stock (meaning the cumulative stock of U.S. FDI to Kenya) and is comprised primarily of equity while Chinese investment data is primarily comprised of debt from infrastructure projects. Nevertheless, comparing U.S. FDI outbound stock and Chinese project financing is a helpful study in comparing those countries' investment influence in the regions study. U.S. outbound investment data is sourced from the U.S. Department of Commerce (DOC) Bureau of Economic Analysis (BEA). Chinese outbound investment data is sourced from the American Enterprise Institute's (AEI) China Global Investment Tracker. None of the data is inflation-adjusted. U.S. outbound FDI stock data is from 2018, the most recent year country-level data is available. Chinese investment data is from projects financed between 2005 and 2019. Countries without data listed in the tables and maps either have no investments, have insignificant investments, or have investment data that is not publicly available to protect the privacy of individual investors.

23	Senegal	$	4,670,000,000
24	Ivory Coast	$	4,330,000,000
25	Equatorial Guinea	$	3,360,000,000
26	Namibia	$	3,150,000,000
27	Libya	$	2,600,000,000
28	Mali	$	2,540,000,000
29	Morocco	$	2,300,000,000
30	Gabon	$	1,920,000,000
31	Madagascar	$	1,880,000,000
32	Djibouti	$	1,720,000,000
33	Botswana	$	1,640,000,000
34	Mauritius	$	1,470,000,000
35	Benin	$	1,040,000,000
36	Mauritania	$	1,010,000,000
37	Rwanda	$	960,000,000
38	Malawi	$	810,000,000
39	Togo	$	730,000,000
40	Liberia	$	690,000,000
41	Eritrea	$	500,000,000
42	Guinea Bissau	$	450,000,000
43	Tunisia	$	110,000,000
44	Lesotho	$	100,000,000

Source: American Enterprise Institute

23	Cameroon	$	14,000,000
24	Sierra Leone	$	13,000,000
25	**Rwanda**	$	11,000,000
26	Lesotho	$	3,000,000
27	Benin	$	2,000,000
28	UK Islands, Atlantic	$	2,000,000
29	Burundi	$	1,000,000

Source: U.S. Bureau of Economic Analysis

4. Exclude rules that raise medicine prices.

No new monopoly rights for pharmaceutical firms should be included in a U.S.-Kenya trade agreement, including intellectual property protections that would extend beyond those required in the existing WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) terms as modified by the Doha Declaration on the TRIPs Agreement and Public Health. Specifically, the trade agreement must not include additional terms on patentability standards and patent disclosure, special protections for biologic medicines, marketing exclusivity protections, linkage, or patent term extensions or other forms of patent evergreening. Nor should a pact limit the ability of either country to negotiate lower prices for government health programs like Medicare or Medicaid or to control the costs of pharmaceuticals or medical devices.

No future U.S. trade agreement should include an intellectual property (IP) chapter that serves as a forum for powerful lobbies to continue pushing for maximalist IP standards that fail to account for the interests of Americans or those in trade partner countries. This became the poison pill in the 2018 NAFTA 2.0 text. The initial revised NAFTA included special privileges designed to shield pharmaceutical firms from the market competition that brings down medicine prices for consumers. Those terms extended far beyond WTO terms and beyond the original NAFTA IP terms to lock in bad U.S. policies that keep prescription drug prices high and export those policies to Mexico and Canada. Such terms cannot be included in any future U.S. trade agreement.

The 2018 NAFTA 2.0 text would have required at least 10 years of government-granted marketing exclusivity – that is, longer monopoly protections – for cutting-edge biologic medicines, such as many new cancer treatments. The 10-year exclusivity period would have locked the United States into its current bad system that keeps cancer medicine prices sky-high and export it to Mexico, which does not provide any additional exclusivity period for biologic medicines, and to Canada, which now has an eight-year period. This was a shocking development given that a five-year biologics exclusivity term that was included in the TPP was considered so controversial that the remaining countries – including Mexico and Canada – suspended the provision after the United States withdrew from the TPP.

Terms in that text also violated the "May 10, 2007" standard that established a floor for access to medicines standards, which U.S. trade pacts largely met until the TPP. The 2018 deal not only established special marketing exclusivity periods for biologic drugs, but it also included expansive patent evergreening policies, each intended to provide additional monopoly protections to new uses, forms and combinations of older medicines. The countries were required to offer multi-year extensions on patent terms when reviews at the regulatory or patent office take longer than terms deemed "unreasonable," while the public gets no reduction in patent terms when these processes move quickly. That text also included provisions on patent linkage, a regulatory mechanism that links drug marketing approval to patent status. Under patent linkage, even spurious patents may function as barriers to generic drug registration. Patent linkage can facilitate abuse, since the financial benefits to patent holders of deterring generic market entry may outweigh risks of penalties.

Thanks to a concerted effort from the public and Congress, these harmful provisions were removed before the new NAFTA was passed. Public outcry over the inclusion of these terms in the 2018 NAFTA 2.0 made clear that Big Pharma monopolies have no business in a "trade" deal. Nor should any trade deal undermine this or future Congresses' ability to ensure Americans have access to affordable medicine.

However, the new NAFTA that Congress passed still comes dangerously close to enforcing limits on the U.S. government's ability to negotiate for lower prices for Medicare and Medicaid. The U.S.-Korea FTA imposes requirements that government health care programs pay "market-derived" prices to pharmaceutical firms. While that may sound uncontroversial, in fact it means that governments are obligated to pay the high prices pharmaceutical firms extract using the protection of lengthy patent monopolies, rather than governments being able to negotiate a discount for bulk purchases. The pharmaceutical industry pushed for these terms, which increase the costs to taxpayers of government health programs, to be included in the new NAFTA. The inclusion of such terms was so controversial in the TPP that the pricing standard was not made mandatory, and all of the provisions on so-called "transparency" on medicine and medical device pricing were excluded from being subject to enforcement.

The new NAFTA has an annex on "Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices" with terms requiring processes that reflect the current U.S. practice of giving drugmakers opportunities to intervene in and challenge some government healthcare programs' reimbursement decisions. It does not include the sort of pricing obligations found in the Korea FTA. But, unlike the similar terms in the TPP, the new NAFTA terms are subject to state-to-state enforcement. Such terms simply should not be included in future FTAs at all, but if they are, they should not be subject to enforcement claims.

5. Exclude copyright extensions that limit access to information.

Copyright terms in any new U.S. trade agreement should not extend beyond the terms in the WTO TRIPs text, which requires protection for 50 years after the death of the author. The terms of the new NAFTA should not be replicated in new agreements, meaning neither extended copyright terms nor vague limitations and exceptions should be locked in via a new U.S. trade agreement.

Many elements of the copyright rules in the new NAFTA were derived from controversial provisions in the TPP that were strongly opposed by those in the education and library fields. By requiring a copyright term of "life of the author plus 70 years," the new NAFTA copyright terms dramatically lengthened Canada's copyright term by 20 years. TRIPs requires protection for 50 years after the death of the author. Including such terms in the new NAFTA also locks the United States into long copyright terms that keep classic literary and artistic works of cultural importance under the monopoly control of Hollywood and recording and publishing giants.

Any future U.S. trade agreement must break from past pact's tendency to shift the balance of interests towards more protection of and less access to copyright protected works. In particular, developing countries like Kenya need a balanced copyright system that reflects local realities and promotes access to knowledge and education. Thus, for instance, to the extent any U.S. trade pact and certainly one with Kenya includes copyright terms, it also must include terms that provide the flexibilities afforded by the U.S. fair use principle. As well, any such terms in an agreement with Kenya must include explicit exceptions for educational uses, libraries and archives. Future U.S. trade agreements must also exclude provisions requiring the protection of "trade secrets" with respect to products that pose threats to public health, safety or the environment.

6. Include strong, enforceable human rights, labor and environmental standards.

Any new U.S. trade agreement must build from the labor and environmental terms and the new enforcement mechanisms for them included in the new NAFTA. With respect specifically to Kenya, the U.S. State Department's 2019 Trafficking in Persons Report ranks Kenya as Tier 2, meaning that it does not meet the minimum standards of the Trafficking Victims Protection Act of 2000, but that it is making significant efforts toward compliance. The report also notes that "children are subjected to forced labor in domestic service, agriculture, fishing, cattle herding, street vending, and begging."[5] The State Department's 2019 Country Report on Human Rights Practices describes rampant impunity, corruption and a range of significant human rights violations in Kenya, including:

> Unlawful killings, including extrajudicial killings by the government or on behalf of the government and by al-Shabaab; forced disappearances by the government or on behalf of the government; torture by the government; harsh and life threatening prison conditions; arbitrary arrest and detention by the government; arbitrary interference with privacy; censorship; widespread crimes of violence against women and girls, which the government took inadequate action to prevent or prosecute; widespread acts of government corruption; and the existence and use of laws criminalizing consensual same-sex sexual conduct between adults.[6]

The AGOA annual review criteria include human rights and labor conditions. To continue such standards going forward if Kenya's AGOA-based access is to be replaced by a U.S. trade agreement, such a pact must include strong human rights provisions in its core text and prohibit waiving or other derogations of laws and regulations relating to the fundamental human rights specified in the United Nations Universal Declaration of Human Rights. Such a pact must provide that failure to meet human rights standards is subject to effective dispute resolution and enforcement mechanisms and penalties that are included in the core text and that are at least as effective as the mechanisms and penalties that apply to the commercial provisions. It also must provide for the establishment of a commission composed of representatives specializing in international and comparative human rights, including representatives of independent human rights organizations in the U.S. and Kenya to receive, investigate, review, and participate in the adjudication of any complaints filed under the human rights provisions, with authority to rule on compliance and obligations by signatory countries to cooperate fully with investigations by the commission.

Any U.S.-Kenya agreement must also include special provisions to address the ongoing issue of child labor within specific Kenyan industries, including a requirement for Kenya to ratify, implement and enforce the United Nations Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Any U.S.-Kenya trade agreement must also explicitly prohibit all trade in goods made, in whole or in part, by forced labor or the worst forms of child labor (as outlined in ILO Convention 182 on the Worst Forms of Child Labour (1999)), regardless of the source of such goods. The pact must also establish an obligation prohibiting both countries from procuring goods, regardless of the source of such goods, made with forced labor or the worst forms of child labor.

U.S. trade agreements since the George W. Bush administration have included labor and environmental standards in their core texts as part of the "May 10" standard. The ostensible goal of these terms was to raise standards in trade partner countries. But these terms have proven ineffective. The absence of effective labor and environmental standards created race-to-the-bottom incentives for U.S. firms to offshore production and slammed U.S. firms and workers with a flood of imports subsidized by environmental and social dumping.

LABOR STANDARDS: The labor standards of any new U.S. trade pact must be strengthened and improved relative to the standards included in the new NAFTA. Public Citizen supports the position on labor standards described in the comments of the AFL-CIO.

As has been the consistent demand of unions, any future U.S. trade agreement must level the playing field by conditioning trade benefits on parties adopting, maintaining and implementing in their domestic laws the policies needed to ensure the four core labor rights enshrined in the eight fundamental Conventions of the International Labour Organization (ILO). This includes Convention 87 on Freedom of Association and Protection of the Right to Organise (1948) and Convention 98 on the Right to Organise and Collective Bargaining (1949); Convention 29 on Forced Labour (1930) and Convention 105 on the Abolition of Forced Labour (1957); Convention 138 on Minimum Age for Entry into Employment (1973) and Convention 182 on the Worst Forms of Child Labour (1999); and Convention 100 on Equal Remuneration (1951) and Convention 111 on Discrimination in Employment and Occupation (1958). And future agreements must ensure, in law and in practice, that all workers, regardless of the workers' citizenship, immigration status or national origin, have the rights and freedoms guaranteed in the eight ILO Core Conventions.

As well, all new U.S. trade pacts must include provisions that require countries to effectively enforce their labor laws related to core labor standards and acceptable conditions of work with respect to minimum wages, hours of work, wages and benefits owed; worker representation; termination of employment; gender-based violence; and occupational safety and health. Future pacts must also prohibit signatory countries from reducing, waiving or otherwise derogating from their laws and regulations relating to the core labor standards and acceptable conditions of work. This must include derogation by misclassification such that workers are excluded from the required rights by virtue of being classified as a temporary worker, contract worker, or the like, which has proved to be a significant problem under past U.S. pacts.

Any new agreement must establish floor wages to ensure a level playing field such that workers — regardless of sector — have the right to receive wages sufficient for them to afford, in the region of the signatory country where the worker resides, a decent standard of living for the worker and her or his family. (This is not a call for a fixed minimum wage that would apply uniformly in each country, but rather for floor wages to be required that reflect the remuneration needed to support a decent standard of living including to provide food, water, housing, education, health care, transportation, clothing and other essential needs.)

Any new pact also must explicitly deem the work of all workers in the economy to be trade-related and therefore subject to the pact's labor obligations given the impact of systemic abuse of worker rights on the ability of all workers in an economy to make fair wages. It also must forbid threats, acts of intimidation or acts of violence against a worker or workers exercising, or attempting to exercise, any of the rights and freedoms protected by this agreement and deem such action to be a violation of the underlying right or freedom. Any new pact must designate a failure to investigate or prosecute any such threat, act of intimidation or act of violence as a failure to enforce the underlying right or freedom.

ENVIRONMENTAL STANDARDS: As environmental groups have previously recommended, and Public Citizen concurs, environmental terms in any U.S. trade agreement must prohibit the signatories from weakening, eliminating, or failing to enforce domestic environmental or other public health or safety standards. A new U.S. trade agreement must also require each country to adopt, maintain, and implement laws, regulations, and other measures to fulfill its Nationally Determined Contribution to the Paris Agreement under the United Nations Framework Convention on Climate Change. It must require each country to adopt, maintain, and implement laws, regulations, and other measures to limit the level of priority air, water, and land pollutants to the lowest maximum level found in the laws and regulations of any signatory to an agreement and require each country to adopt, maintain, and implement laws, regulations, and all other measures to prohibit the harvest, take, or trade of wild flora and fauna, including parts and products, in violation of domestic or international conservation obligations, including timber, fish, wildlife, minerals, and other environmentally sensitive goods. As well, any trade agreement must require each country to adopt, maintain, and implement laws, regulations, and other measures to fulfill its obligations under priority Multilateral Environmental Agreements.

ENFORCEMENT OF LABOR AND ENVIRONMENTAL STANDARDS: Any new U.S. trade agreement must provide that the failure to meet the labor or environmental standards be subject to dispute resolution and enforcement mechanisms and penalties that are at least as effective as the mechanisms and penalties that apply to the commercial provisions of the trade agreement. Labor and environmental enforcement terms must cover goods and services traded between the signatory countries, and goods and services that compete in the territory of a party with a good or a service of the other party and facilities producing goods and services traded between the parties, and goods and services that compete in the territory of a party with a good or a service of the other party.

In addition, any new U.S. trade agreement must establish independent Labor and Environmental Secretariats, led and staffed by labor and environmental experts, respectively, with the duties of proactively monitoring compliance and rendering decisions on allegations of non-compliance. Any new U.S pact must also provide for the denial of entry for goods and service traded between the parties that fail to meet labor and environmental standards and the imposition of fines on the facility or entity or investor owning and controlling a facility that fail to meet the labor and environmental standards that produces goods and services that compete in the territory of a party with a good or a service of the other party and ensure access is denied to the government procurement market of the parties for a facility or entity or investor owning and controlling a facility that fails to meet the labor and environmental standards and ensure such penalties remain in place until such non-compliance to have ended. Ongoing market access benefits under any new U.S. trade agreement must be conditioned on sustained evidence that conditions on the ground with respect to human rights and labor and environmental conditions in each signatory country have improved, with withdrawal of trade benefits for backsliding.

In order for the benefits of trade agreements to flow to the workers in the countries that sign the pacts and play by the rules, any new U.S. trade agreement must have clear rules of origin (ROO) that can't be easily gamed. The new NAFTA includes some innovative ROOs that should be expanded upon in future pacts. For example, any new U.S. pact should build on the higher ROOs of the new NAFTA and expand them to more products, while maintaining the exclusion of provisions used to undermine strong ROOs like the "deemed qualifying" rule, cumulation and more.

7. U.S. trade agreements should not include procurement terms.

Past U.S. FTAs contain terms undermining the "Buy American" preferences that have been in place since the Franklin D. Roosevelt administration to ensure that American-made goods are purchased when the government spends our tax dollars on infrastructure projects or purchases vehicles, computers and other products. These previous trade-pact terms also forbid the U.S. government from requiring that firms operating government call centers or providing other government services employ U.S. workers. These rules offshore our tax dollars rather than investing them to create jobs and innovation at home. They also limit conditions for procurement contracts, like requiring workers on infrastructure and construction contracts be paid 'prevailing wages' or requiring recycled content in goods or renewable energy. If the U.S. government – or a state – does not conform its policies to these constraints, then the other countries that are part of the agreement can challenge our policies in foreign tribunals that can impose trade sanctions against the United States until the laws are eliminated or changed.

One would think that given the administration's declared "Buy American, Hire American" policy, it would object to trade pacts including terms, such as procurement national treatment rules, that require the waiving of Buy American procurement preferences. However, instead the 2020 NTE report lists the "Buy Kenyan Build Kenya" program as a foreign trade barrier. Every country should be free to determine how to spend its own tax dollars. Thus, any prospective U.S.-Kenya trade agreement should not have a procurement chapter.

The exclusion of procurement terms from future U.S. trade pacts should not be controversial. For many years, domestic manufacturers and many members of Congress have noted that given the much greater value of U.S. government procurement relative to almost every other trading partner, providing some U.S. firms with opportunities to bid on a smaller amount of government contracting in other countries did not seem like a sound trade-off for providing preferential access for foreign goods and firms to our larger pool of government contracts. This is especially the case given that national treatment access has been provided to any firms established in a trade partner country, meaning the subsidiaries of Chinese and other firms obtain such benefits. Certainly this would be the case with the trade agreement in question given the size of Kenya's prospective procurement market.

8. Include a meaningful sunset clause.

Negotiators should enhance democratic accountability and oversight by including a sunset clause in any U.S.-Kenya trade agreement. By requiring the deal to be affirmatively reauthorized every eight years, if outcomes do not improve, more changes can be made, or the pact can be ended. Losses will not continue indefinitely, as they have with previous pacts. The new NAFTA makes progress in this area but falls short.

The original U.S. sunset proposal for the new NAFTA provides a guide, in contrast to the terms that were ultimately included. Rather than requiring an affirmative vote to continue the pact after its first five years in effect, which was the U.S. proposal, the new NAFTA states that the new pact's term will be 16 years. The parties are to meet for a review after the first six years, at which point if they all agree, the pact is granted another 16-year timeframe and so on. If during any such six-year review, one party does not agree to the next 16-year extension, the joint reviews are to be conducted annually. At any point in that process, the parties can agree to another 16-year reset. Requiring a mandatory review process is better than the status quo, which requires no reviews. This will force some attention on the new deal's outcomes every six years.

But the "Review and Term Extension" provision does not deliver on the prospective benefits of an actual sunset clause. Even if it were not extended, the 16-year term is too long. The real test of renegotiations – whether an agreement is creating benefits for people – must be assessed more frequently. Establishing a limited time period to measure the results is critical. But most important was the possibility in the original U.S. proposal for any country that found the outcomes unacceptable to terminate the pact by simply refusing to approve another extension of it. Instead of requiring all three countries to take affirmative action to continue the new NAFTA, now countries must take action to terminate it. And, already in the original any country has the right to withdraw upon six-month notice, meaning the language ultimately included does not function like a real sunset. Any new U.S. pact should include a real sunset clause.

9. Promote balanced agricultural trade to strengthen rural communities.

A U.S.-Kenya trade agreement must respect governments' ability to implement programs that ensure farmers and other food workers receive fair compensation, and that consumers have access to safe and affordable foods and the right to know where and under what conditions their food is produced. Likewise, nations must be able to protect themselves from dumping, land grabs and other unfair trade practices that force farmers off their land.

The U.S.-Kenya trade agreement's agriculture terms must be designed with the goal of achieving balanced trade that supports fair and sustainable rural economies and food supplies.

All nations must have the right to democratically establish domestic farm policies that ensure that farmers are paid fairly for their crops and livestock, and other farm and food policies that protect farmers and consumers such as inventory management, strategic food reserves and import surge protections, and other mechanisms to protect the right of each country to prevent dumping of agricultural commodities at below the cost of production.

From 2015 to 2019, the third highest category of exports from Kenya to the United States was edible fruits and nuts ($116,000,000 on average annually). Several other categories in the top 20 are also agricultural products, including coffee, tea and spices at No. 4 ($109,000,000) and prepared fruits and vegetables at No. 9 ($11,000,000). However, according to the U.S. Department of Agriculture's Kenya Exporter Guide, Kenya is a net importer of agricultural commodities and food products. The proposed trade agreement must have no terms undermining efforts to achieve food security and alleviate hunger.

Conclusion

It is Public Citizen's view that negotiating a standard U.S. FTA with Kenya is a very bad idea in general, and doing any trade negotiations that are not focused on COVID-19 response at this time is counterproductive. If negotiations begin, then these comments describe the limited-scope pact that has the best chance of doing no harm. Public Citizen will closely monitor the negotiations and outcomes. We will ensure the public is apprised of how terms of a potential U.S.-Kenya trade agreement will affect peoples' jobs, health and safety and the environment. We will fight fiercely to sustain the improvements for which we have long advocated that were included in the new NAFTA and to promote the critical improvements that remain to be made so that any new U.S. trade agreement actually benefits most people, rather than replicating past failed trade-pact models that have benefited large commercial interests to the detriment of most.

ENDNOTES

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