



Institute for
Agriculture &
Trade Policy



April 28, 2020

Ambassador Robert Lighthizer
Office of the United States Trade Representative
600 17th Street, NW
Washington, D.C. 20508

Re: Comments on Negotiating Objectives for the Proposed U.S.-Kenya Trade Agreement, Docket Number: USTR-2020-0011 submitted by the Institute for Agriculture and Trade Policy and the National Family Farm Coalition (submitted electronically through Regulations.gov)

Dear Ambassador Lighthizer:

The Institute for Agriculture and Trade Policy (IATP) and the National Family Farm Coalition (NFFC) appreciate the opportunity to comment on the proposed Negotiating Objectives for a U.S.-Kenya Trade Agreement. IATP is a non-profit organization based in Minneapolis, Minnesota with offices in Washington, D.C.; Hallowell, Maine; and Berlin, Germany. We work locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems. The National Family Farm Coalition is an alliance of 30 grassroots farmer- and advocate-led groups representing the rights and interests of independent family farmers, ranchers and fishermen in Washington, DC since 1986. Our organizations have submitted detailed comments on recent trade agreements and continue to track negotiations and outcomes.

Unlike previous negotiations, these talks would occur in the midst of a global pandemic, when the attention of policymakers and civil society is centered on that situation and its potential impacts on all of our lives and economies. This is a particularly bad time to enter into sensitive trade negotiations, when it will be even more difficult than normal to have an informed public debate on the right rules to govern trade between our nations.

Kenya is also confronting a severe infestation of locusts that adds to the threats to food security. The U.S. government should refrain from putting any pressure on Kenya — whether as part of the trade talks or in other foreign assistance programs — that undermine locally determined solutions to that crisis. Over the longer term, it should support efforts to enhance biodiversity and resiliency and advance the right to food. We urge you to postpone negotiations until the locust emergency and the COVID-19 situation have improved and stabilized.

We also question why the U.S. would negotiate only with Kenya instead of with the East African Community as a bloc. The EAC is the result of decades of progressive efforts to strengthen regional integration in ways that enhance national economies and sustainable development. Rather than undermining that important initiative, the U.S. should consider how to improve trade and economic relations with the bloc as a whole, without the pressure of completing a hasty trade agreement. It would benefit the U.S. much more to achieve stability and prosperity in the region than to advance particular corporate interests in a free trade agreement between the U.S. and Kenya.

If you decide to move forward with these talks, USTR must take proactive actions immediately to encourage greater public debate through electronic means. Stakeholder groups, including those not granted the preferential access of official trade advisory committees, must be able to review proposed draft text if they are to give meaningful input in a time-sensitive manner. USTR should publish all draft proposals, negotiating texts, reports and supporting documents about the U.S.-Kenya agreement in as close to real time as possible following each negotiating session to assure ongoing substantive consultation.

While we believe the negotiations must wait, should you proceed, we urge you to set negotiating objectives for an agreement between the U.S. and Kenya that aim to establish the highest possible public health, food security, environmental and labor standards, and that promote sustainable and equitable development in both countries. We recognize the progress made in the U.S.-Mexico-Canada Trade Agreement (USMCA) to afford greater protections for internationally recognized labor rights and hope that this agreement can build on that achievement. We also appreciate the new limits on Investor State Dispute Settlement (ISDS) in USMCA. Any trade agreement between the U.S. and Kenya must not include ISDS. That system, which allows panels of three private sector lawyers to order taxpayer-funded compensation to firms that claim that a country's policies undermine their expected future profits, must be eliminated entirely. In addition to the many concerns we have raised about ISDS in previous trade agreements,¹ we note that the costs of defending such cases would be prohibitive to the Kenyan government, adding to pressures to approve investment projects despite risks to sustainable development and public health.

While we recognize the advances in USMCA on labor rights and ISDS, that agreement failed to establish adequate safeguards for environmental protection or any incentives to promote climate adaptation or mitigation.² It also set new limits on governments' ability to enact fair and sustainable farming systems, through its provisions that streamline agricultural biotechnology, among others. We oppose efforts to replicate these harmful provisions in a U.S.-Kenya agreement. We are also concerned that an agreement with Kenya designed along the lines of USMCA would itself serve as a template for agreements with other African nations, which could further extend these dangerous provisions and undermine efforts to develop regional solutions to food security, sustainable development and rural livelihoods.

As members of Citizens Trade Campaign, we share the concerns they have raised about the possible erosion of existing preferential access for Kenyan goods to the U.S. under the African Growth and Opportunity Act (AGOA). Preferential access for Kenyan goods that meet labor, environmental and consumer standards should continue and be made permanent. It is unnecessary and unreasonable for market access between the two nations of such different sizes and levels of development to be reciprocal. In addition, we raise the following issues:

Any agreement should protect food sovereignty and prioritize safe food and enhanced consumer protections. A U.S.-Kenya trade agreement must respect governments' ability to implement fair and sustainable food and farm systems that support sustainable livelihoods for farmers and food workers and healthy, affordable foods for consumers. Likewise, nations must be able to protect themselves from agribusiness export dumping and other unfair trade practices that force farmers off their land and otherwise undercut local food production. Trading partners must be free to establish facially non-discriminatory food safety, nutrition and labeling standards that meet the objective of the highest levels of consumer protection and environmental and ethical considerations that are stronger than any harmonized norm set in a trade agreement.

The current situation of unstable agricultural markets and disruption of supply chains points to the need for grain reserves, supply management and other tools to stabilize national and local food supplies. We note that Kenya, unlike the U.S., has a grain reserves program designed to achieve greater stability in supplies and prices. We urge you to consider the lessons from that experience and how it might be strengthened, especially considering the new challenges to food security brought on by COVID-19. Trade rules must not undermine that program.

The U.S. and Kenya will each need to determine the best way to achieve their specific goals for food security and sustainable development. Those solutions must not be derailed by sudden imports of cheap grains into Kenya that could displace local farmers, especially small and medium scale farmers who are most vulnerable to volatile prices and markets. Under USMCA, countries agreed to give up their rights to agricultural safeguards (temporary tariff protections during import surges or price drops) under the WTO. That or similar provisions that limit governments' ability to stabilize food price volatility have no place in this agreement.

Decisions on the use or import of agricultural biotechnology should be not be constrained by commitments in a trade agreement. Kenya maintains restrictions on the planting and import of genetically modified corn, soy and distillers' grains. We are concerned that the U.S. will seek to replicate provisions in USMCA that streamline the approval of such crops — as well as those produced using gene editing and other new technologies with unknown impacts on local ecosystems and crop varieties. USMCA also removes restrictions on unspecified low-level presence of agricultural biotechnology products that have not been approved in the importing country.³ Kenyan authorities must not be obliged to accept similar measures in a trade agreement. This kind of provision could undermine Kenyan efforts to promote local food security and advance rural livelihoods.

The Kenyan government also requires labeling of foods produced with genetically modified organisms.⁴ Trade commitments or agreements on technical barriers to trade must not undermine consumers' right to know about what is in their food, where it is produced and its nutritional value.

The intellectual property provisions of an agreement must not limit farmers' access to seeds, hide information on agricultural pesticides, or increase healthcare costs and availability. A trade agreement with Kenya must not replicate the approach in USMCA and other recent trade deals where intellectual property provisions protect corporate-led technologies over more sustainable, open source innovations of seeds and plants. Trade-related patent rules and extended claims of "Confidential Business Information" must not be used to keep safety and public health data on pesticides secret. These provisions promote corporate-controlled agriculture while undermining sustainable and organic practices, and would affect the health and safety of farmworkers, backyard gardeners and consumers of produce, while also limiting effective regulation of toxins in the environment.

An agreement with Kenya must also reject the extreme corporate rights proposed by pharmaceutical patent holders in other trade negotiations. We appreciate that the final USMCA agreement did not include the unfair extension of data protection periods on biologic medicines and very much hope that is the default position for this and other new trade talks. An agreement with Kenya must not include provisions on pharmaceutical and medical device pricing "transparency", as in USMCA and other recent agreements, that limit governmental tools to assure affordable healthcare. Especially now, U.S. trade policy should promote products and programs to protect and improve human health not only in our own country, but also around the world. Any agreement with Kenya must reflect this humanitarian,

ethical and cost-effective approach, rather than prioritize the interests of health product corporations and shareholders.

The investment provisions must not include land as a form of covered investment. We note with concern that USTR's 2020 National Trade Estimate Report on Foreign Trade Barriers lists restrictions in the Kenyan constitution banning foreign ownership of land as an investment barrier⁵ (and observe that six U.S. states also ban foreign ownership of land and others are considering similar restrictions⁶). Kenya has a painful history of land grabs, including by foreign investors, that have robbed local farmers and their families of their homes and lands and undermined food production for the sake of speculative land investments. Immovable property and related property rights are included as a form of investment in USMCA and other U.S. free trade agreements, subject to dispute settlement through ISDS or state-to-state mechanisms. Land or real estate should be excluded from the definition of covered investment. National-level land tenure reforms must be driven by national-level democratic institutions, with an extensive process of community-based consultation with rights-holders, and in line with international law and standards such as the Committee on World Food Security's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security⁷ and United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas⁸ (which Kenya has endorsed).

Actions to address climate change should not be subject to trade disputes. Even though the U.S. will officially withdraw from the Paris Agreement at the UNFCCC later this year, many U.S. states continue to advance innovative programs to promote renewable energy and reduce emissions from agriculture in ways that advance climate goals and support rural livelihoods. These programs have already been subject to trade complaints at the WTO as unfairly benefiting local communities over foreign investors.⁹ In addition, ISDS cases have been brought against many countries seeking to limit harmful mining and energy projects. Under rules in the North American Free Trade Agreement, TransCanada sued the U.S. government for \$15 billion over its rejection of the controversial Keystone XL Pipeline. We reiterate that ISDS should not be included in this agreement, but the point remains that state-to-state dispute resolution mechanisms in trade agreements have also been used to challenge democratically determined measures to reduce emissions and promote a transition to sustainable energy, agricultural and industrial production.

While comprehensive solutions to this problem will need to be determined at the WTO, the U.S. and Kenyan governments should use this opportunity to discuss ways to utilize existing authority under that accord to protect local and national governments' ability to advance legitimate programs to respond to the climate emergency. Article XX, section b of the General Agreement on Tariffs and Trade allows for exceptions for measure related to the protection of human lives and health, and section g allows for exceptions related to the conservation of natural resources.¹⁰ Like many developing countries, Kenya has contributed very little to greenhouse gas emissions but is already suffering from the impacts of climate change. Whether or not the U.S. and Kenya eventually enter into a free trade agreement, the two governments should open public discussions on how to utilize and expand on this Article XX authority.

This is no time to repeat the mistakes of the past. Previous trade agreements have undermined family farmers and increased corporate concentration in agriculture in the U.S. and its trading partners. Trade agreements and trade policy must change course to support democratic decision making, sustainable production and improved livelihoods for all the nations involved.

We appreciate the opportunity to comment on these negotiations and would welcome the opportunity for further discussions on economic relations between the U.S. and Kenya and with the East African Community as a whole.

Sincerely,



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¹ See, for example, Sharon Treat, [More than 300 State Legislators Urge Removing Corporate-Friendly ISDS Provisions from NAFTA](#), September 14, 2018, and Shiney Varghese, [Investor-State Dispute Settlement: Millstone around the right to water?](#), December 2017.

² Sierra Club: Trump's NAFTA 2.0 Sells Out Our Communities, Children, and Future, Leading Senators Vote No, Call for a New Climate-Friendly Model of Trade, January 16, 2020. <https://www.sierraclub.org/press-releases/2020/01/sierra-club-trump-s-nafta-20-sells-out-our-communities-children-and-future>

³ Steve Suppan, Food safety and GMOs in the "new NAFTA", Institute for Agriculture and Trade Policy, October 17, 2018. <https://www.iatp.org/documents/food-safety-and-gmos-new-nafta>

⁴ USDA Foreign Agriculture Service, Kenya: Exporters Guide, Report #KE2019-0010, April 21, 2020. https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Exporter%20Guide_Nairobi_Kenya_12-31-2019

⁵ U.S. Trade Representative, [2020 National Trade Estimate Report on Foreign Trade Barriers](#), p. 310.

⁶ Johnathan Hettinger, As foreign investment in U.S. farmland grows, efforts to ban and limit the increase mount, Midwest Center for Investigative Reporting June 3, 2019. <https://investigatamidwest.org/2019/06/03/as-foreign-investment-in-u-s-farmland-grows-efforts-to-ban-and-limit-the-increase-mount/>

⁷ <http://www.fao.org/3/i2801e/i2801e.pdf>

⁸ <https://www.geneva-academy.ch/joomlatools-files/docman-files/UN%20Declaration%20on%20the%20rights%20of%20peasants.pdf>

⁹ Ben Lilliston, Did Obama's trade legacy just hammer the Green New Deal?, July 16, 2019, <https://www.iatp.org/blog/201907/did-obamas-trade-legacy-just-hammer-green-new-deal>

¹⁰ John S. Odell, Our Alarming Climate Crisis Demands Border Adjustments Now, International Centre for Trade and Sustainable Development, February 2018, p. 12.