

U.S.-Kenya Trade Agreement Comments

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Thank you, Chairman and Commissioners, for inviting me to submit comments in response to the above-mentioned investigations concerning the U.S.-Kenya Trade Agreement. My name is Katrin Kuhlmann, and I am a Visiting Professor of Law at Georgetown University Law Center, where my academic work focuses on international economic law, law and development, and diverse models for economic rulemaking at the national, regional, and international levels. I am also the President and Founder of New Markets Lab (NML), a non-profit law and development center that works to build deeper understanding of flexible approaches to the design and implementation of economic law and regulation in order to advance social and economic development. In addition, I am a member of the Trade Advisory Committee on Africa of the Office of the U.S. Trade Representative. The views expressed in my testimony are my own and are based on my research and experience.¹

I have previously testified before this committee about the importance of considering a new approach to “standard” trade agreements as the trading relationship between the United States and African nations grows to possibly extend beyond trade preferences under the African Growth and Opportunity Act (AGOA). We are now at a turning point as the discussions begin on the U.S.-Kenya Trade Agreement and models for the agreement are considered, which presents an opportunity to consider how this agreement could and should be designed in order to fully unlock trade’s potential over time.² Without question, this historic agreement – the first between the

¹ I would like to extend special thanks to Akinyi Lisa Agutu, Legal Fellow at the New Markets Lab and previously my Research Assistant at Georgetown University Law Center, for her research support.

² See, e.g., Anabel González, “U.S.-Kenya Trade Negotiations: A Chance to Get it Right,” Peterson Institute for International Economics, February 12, 2020; see also Moses Agutu, “Caught Between Africa and the West: Kenya’s Proposed U.S. Free Trade Agreement,” Africa Portal, June 19, 2020, available at

United States and a sub-Saharan African nation (the United States does have a Free Trade Agreement (FTA) with Morocco) – should be created to enable broad-based economic and social benefit for years to come, while also recognizing Kenya’s important role within Africa’s regional and continental trading blocs. Although it is not clear what precisely the model for this agreement will look like,³ as I have testified in the past, a customized, flexible model should be considered, which could incorporate elements of other trade agreements, including African trade agreements,⁴ and also take into account that many factors will evolve over time, including the U.S.-Kenya economic relationship, Africa’s harmonization initiatives, and markets themselves. Flexibility, as my testimony will highlight, can mean different things in different contexts, and my comments today will assume a somewhat expansive definition of flexibility that allows for differentiation, incorporation of diverse good regulatory practices, variable application within a rules-based system, and alignment with social and economic development goals.⁵ My remarks will elaborate on what such a flexible approach could entail and how different areas of law might be approached in this context, although both of these aspects will require further focus, research, and consultation.

Assessing the Proposed Agreement in the Context of African Regional Integration

Africa’s trade agreements are notable examples of flexible legal models,⁶ and this flexibility is also taking on new dimensions with the landmark African Continental Free Trade Area (AfCFTA).⁷ The AfCFTA, which has been signed by 54 African Member States and ratified by 30, stands to be an unparalleled development both in terms of market potential and international

<https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/>

³ As a recent Congressional Research Service report noted: “The Trump Administration describes the talks as an opportunity to develop a “model” FTA, but has not specified what changes from past practice this may entail. U.S. FTA talks with the South African Customs Union, which were suspended in 2006 in part due to divergent views over scope, highlight the importance of establishing clear parameters for the negotiations at the outset.”

Congressional Research Service, *US-Kenya FTA Negotiations*, May. 28, 2020.

⁴ See James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C.J. Int’l L. & Com. Rel. 572 (2010), Arinze Bryan Okiche, *Reconsidering the Flexibility Paradigm of African Regional Trade Agreements and Informal Trade Arrangements*, *Afronomics Law*, July 8, 2020 (James Thuo Gathii, Olabisi D. Akinkugbe, and Nthope Mapefane, eds.), and the work of Timothy Masiko.

⁵ My testimony will align with the United Nations 17 sustainable development goals (SDGs), 169 sub-goals, and 232 targets. See Katrin Kuhlmann, Chantal Line Carpentier, Tara Francis, and Malou le Graet, *Trade Policy for Resilient, Sustainable, and Inclusive Development in a New International Economic Order*, July 2020, available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_f27341b095b2408db0c207713f71fae4.pdf

⁶ *Supra*, note 2.

⁷ See Katrin Kuhlmann and Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, forthcoming, 51 *Georgetown J. Int’l Law* 4, 2020.

law. The AfCFTA follows a flexible design and is an example of a “progressive” or “incremental” trade agreement which phases in commitments over time based on countries’ priorities and capabilities.⁸ This trade agreement model bears some similarity to existing African RTAs,⁹ which incorporate a level of flexibility and variable geometry,¹⁰ and it incorporates a differentiated approach to special and differential treatment (S&D), as discussed below.

The U.S. approach to trade agreements with African nations and regions will need to take into account Africa’s own trade arrangements for a number of reasons. Because the AfCFTA will move forward in stages, Africa’s trading partners will also need to incorporate flexibility into their approaches in order to work in parallel and not in conflict with this significant agreement. As noted, other African trade agreement models, including the agreements establishing the East African Community (EAC) and Common Market for Eastern and Southern Africa (COMESA), to which Kenya is a party, also exhibit flexibility in design and implementation. These models reflect the needs of the countries involved and build meaningful change in areas ranging from customs and trade facilitation to non-tariff measures and agricultural market regulation over time. Not only would alignment with Africa’s trade agreements support progress in advancing these critical legal rules, it would also establish a more meaningful trading relationship and help establish long-term buy-in and better implementation.

Given the strong shared commitment for the AfCFTA, it will be a significant factor in how negotiations between Kenya and the United States proceed, and Kenya has already been criticized

⁸ Katrin Kuhlmann and Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, forthcoming, 51 *Georgetown J. Int’l Law* 4, 2020, at 6. See also Katrin Kuhlmann, *Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship*, Testimony before the U.S. International Trade Commission, Washington, D.C., January 28, 2016 and New Markets Lab and Harvard Law and International Development Society, “Harvard Law School Trade Innovation Initiative Summary of Findings on Trade and Development in Free Trade Agreements,” 2015, available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/7cb5a0_37610cba6cde4f02afb3d0cfa3ab7fb8.pdf

⁹ Some African scholars note the limitations in “flexibility” of the African RTAs are not considered flexible, particularly in terms of institutional arrangements.

¹⁰ Flexibility in the context of Africa’s trade regimes encompasses several factors: (i) flexible cooperation vs. “rules requiring scrupulous and rigorous adherence,” (ii) variable geometry, with steps for commitments, (iii) “a broad array of social, economic, and political objectives,” (iv) objectives “regarding development of common resources,” (v) “commitment to the equitable distribution of gains from trade” and limitations on non-discrimination and trade liberalization, and (vi) multiple and overlapping membership. James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 *N.C.J. Int’l L. & Com. Rel.* 572 (2010).

for possibly moving ahead (and outside) of the AfCFTA and EAC.¹¹ Article 4 of the AfCFTA Protocol on Goods requires that AfCFTA Member State offer equal preferences to all Member States;¹² therefore, concessions offered to the United States under a possible trade agreement would have to be extended to AfCFTA Member States on a reciprocal basis. In a recent webinar hosted by the Atlantic Council, Kenyan President Uhuru Kenyatta reaffirmed Kenya's commitment to the AfCFTA and stressed that it is a major priority for Kenya that the U.S-Kenya FTA must be conducted in a manner that "does not hinder obligations under the AfCFTA."¹³ With implementation of the AfCFTA postponed until January 1, 2021 due to the pandemic, and discussions on substantive issues under Phase II of the AfCFTA accordingly also delayed, this would signal that significant progress with the United States would need to follow progress on the AfCFTA.¹⁴

Kenya is also a member of the EAC, which is a Customs Union within which Partner States must maintain a uniform external tariff. Article 37 of the Protocol on the Establishment of the East African Community Customs Union (EAC Common Market Protocol) outlines that EAC Partner States may enter into trade agreements with a foreign country so long as the terms of the agreement are not in conflict with the provisions of the EAC Common Market Protocol. It also requires that an EAC Partner State notify the EAC Secretary General of the terms of any trade deal once it "intends to conclude or amend an agreement" with a third party in order to allow for comments and proposals from the EAC Partner States.¹⁵ Article 37 of the EAC Common Market Protocol further requires that Partner States "adopt common negotiating positions in the development of mutually beneficial trade agreements with third parties and promote participation and joint representation in international trade negotiations."¹⁶ In addition, a 2019 Extraordinary Meeting of the Sectoral Council on Trade, Investment, Finance, and Industry (SCTIFI) called on EAC Partner

¹¹ See Moses Agutu, "Caught Between Africa and the West: Kenya's Proposed U.S. Free Trade Agreement," Africa Portal, June 19, 2020, available at <https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/>

¹² The Agreement Establishing the African Continental Free Trade Area, Protocol on Trade in Goods, Article 6, 2019.

¹³ President of Kenya Uhuru Kenyatta, *Strengthening U.S.-African Ties Through Trade*, discussion facilitated by the Atlantic Council, June 18, 2020.

¹⁴ Omar Mohammed, *Kenya's President Says Talks on Trade Deal with U.S. delayed*, June 18, 2020. <https://www.reuters.com/article/us-kenya-usa-trade/kenyas-president-says-talks-on-trade-deal-with-us-delayed-idUSKBN23P2VR>

¹⁵ East African Community Secretariat, *Protocol on the Establishment of the East African Community Customs Union*, Article 37.

¹⁶ East African Community, *Protocol on the Establishment of the East African Community Common Market*.

States to engage with the US at a regional level in order to maintain the strength and integrity of the Customs Union.¹⁷ In addition to the EAC, Kenya is a party to the Common Market of Eastern and Southern Africa (COMESA) and the Tripartite Free Trade Agreement (TFTA), which will bring together the EAC, COMESA, and the Southern African Development Community (SADC).

The Kenyan Ministry of Industrialization, Trade and Enterprise Development recently released guiding principles and objectives to inform negotiations of the U.S.-Kenya Trade Agreement, which also reflect a number of the elements discussed above.¹⁸ In particular, Kenya has noted several principles to guide the trade agreement, several of which are particularly relevant to this testimony, namely that the agreement should be:¹⁹ (i) WTO compatible and allow for application of Special and Differential Treatment (S&D); (ii) “an instrument for economic and trade development”; (iii) respect the commitments that Kenya has taken at the multilateral (WTO), continental (AfCFTA), regional (EAC, COMESA, TFTA), and bilateral levels; (iv) “preserve and build on [the] AGOA acquis;” (v) cover substantially all trade (this would be in accordance with Article XXIV of the General Agreement on Tariffs and Trade);²⁰ and (vi) structured such that any EAC Partner State not party to the agreement at its outset can join the negotiations “subject to the terms and conditions already agreed or accede to the concluded FTA.”²¹ A tailored and flexible model for the U.S.-Kenya trade agreement will need to incorporate these considerations, both in structure and approach to the rules themselves, as discussed below.

Flexibility in Trade Agreement Models

When it moves forward, the U.S.-Kenya Trade Agreement will play a role in setting and shaping new trade rules, both through the structure of the agreement itself and the changes to rules that it might generate, taking into account Africa’s own models and approaches as discussed above. I would also propose considering two interconnected aspects of flexibility in rulemaking: (1)

¹⁷ Moses Agutu, “Caught Between Africa and the West: Kenya’s Proposed U.S. Free Trade Agreement,” Africa Portal, June 19, 2020, available at <https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/>

¹⁸ Ministry of Industrialization, Trade and Enterprise Development Republic of Kenya, *Proposed Kenya - United States of America Free Trade Area Agreement: Negotiation Principles, Objectives, and Scope*, June 22, 2020.

¹⁹ Ministry of Industrialization, Trade and Enterprise Development Republic of Kenya, *Proposed Kenya - United States of America Free Trade Area Agreement: Negotiation Principles, Objectives, and Scope*, June 22, 2020.

²⁰ Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

²¹ Ministry of Industrialization, Trade and Enterprise Development Republic of Kenya, *Proposed Kenya - United States of America Free Trade Area Agreement: Negotiation Principles, Objectives, and Scope*, 2020.

flexibility incorporated into the model that the trade agreement takes and (2) flexibility in the design and implementation of the rules the agreement proposes, supports, and perhaps establishes. I will describe both of these below, drawing upon some examples from research and practice. Because this research is ongoing, the discussion will not be exhaustive, but I hope that it will serve as a useful illustration.

While many nations, including the United States, follow established models for economic agreements, there is actually quite a bit of (sometimes “hidden”) flexibility in these models as well. This provides an opportunity to both tailor agreements to particular circumstances and the needs of different stakeholders and also allows the agreement the potential to adapt as markets and stakeholder needs change over time.

In addition to Africa’s trade agreements, which are particularly relevant in the context of the U.S.-Kenya Trade Agreement, other, perhaps more limited, examples of flexibility in trade agreements can be found as well, including in U.S. trade agreements, as I have previously testified before this committee.²² Flexibility can take different forms and incorporate different elements, including the following:

- *Incremental or Staged Approach*: The parties to a trade agreement do not always need to finalize agreement on every issue at the same time. Staging of commitments has become more common and is reflected in the AfCFTA and agreements forming the African regional economic communities (RECs) briefly discussed above. Flexibility is also inherent in the WTO Trade Facilitation Agreement (TFA), which allows countries to prioritize and undertake commitments over time.²³ It can also be found in the U.S.-Morocco FTA, which, for example, staged in commitments in the agricultural sector over time, which was an important feature of the agreement given the importance of agriculture to the Moroccan

²² See Katrin Kuhlmann, *Post-AGOA Trade and Investment: Policy Recommendations for Deepening the U.S. Trade and Investment Relationship*, Testimony before the U.S. International Trade Commission, Washington, D.C., January 28, 2016 and New Markets Lab and Harvard Law and International Development Society, “Harvard Law School Trade Innovation Initiative Summary of Findings on Trade and Development in Free Trade Agreements,” 2015, available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/7cb5a0_37610cba6cde4f02afb3d0cfa3ab7fb8.pdf

²³ The WTO TFA provides that countries can prioritize commitments depending upon needs, capacity, and resources (Categories A, B, and C) “recognizes differences in countries’ regulatory systems and capabilities and both phases in reforms and links to aid funding,” Katrin Kuhlmann, *The Human Face of Trade and Food Security: Lessons on the Enabling Environment from Kenya and India*, Center for Strategic and International Studies, 2017, at 37.

economy. The Cooperation Agreement Among the Partner States of the East African Community and United States of America on Trade Facilitation, Sanitary and Phytosanitary Measures and Technical Barriers to Trade (EAC-U.S. Cooperation Agreement) is also an example of a flexible, staged model, and, notably, the EAC-U.S. Cooperation Agreement is referenced in Kenya’s negotiating objectives, which also call for ensuring that “the negotiations on trade in goods, trade in services, investment, and other areas will be conducted in an agreed sequence to ensure a balanced outcome.”²⁴

- *Development Focus:* Increasingly, trade agreements are incorporating social and economic development into their structures, in recognition of the fact that trade agreements are not about market dynamics alone. The AfCFTA, for example, references sustainable development in its objectives,²⁵ and all of Africa’s trade agreements are notable in their development focus. This aspect of flexibility is also noted in Kenya’s negotiating objectives.
- *Stakeholder Participation and Transparency:* Some trade agreements include mechanisms for comprehensive and inclusive input or participation from private stakeholders, including businesses, experts, and those who have been marginalized economically. These stakeholders typically provide the best knowledge of specific development challenges, and enhancing engagement in trade and participation in the rulemaking process can enable trade to unfold in a more inclusive manner, building support for trade agreements and ensuring that the benefits of trade are not unevenly distributed. Past U.S. trade agreements have included stakeholder consultation provisions in environmental chapters, for example.²⁶
- *Focus on Priority Sectors and Stakeholders:* All trade agreements can be tailored to particular sectors of opportunity as well as to the needs of different stakeholders. The example of the U.S.-Morocco FTA above highlights how a sector like agriculture, which is important to many countries, can receive special focus within a trade agreement context. Given the importance of agriculture and food security to Kenya, it should also be prioritized

²⁴ Ministry of Industrialization, Trade and Enterprise Development Republic of Kenya, *Proposed Kenya - United States of America Free Trade Area Agreement: Negotiation Principles, Objectives, and Scope*, 2020, at 7. The negotiating objectives also call for “progressively eliminating tariff and non-tariff barriers on substantially all trade,” at 8.

²⁵ Agreement Establishing the African Continental Free Trade Area, Article 3.

²⁶ See United States-Peru Trade Agreement, February 1, 2009.

in the context of the U.S.-Kenya Trade Agreement, as supported by Kenya’s negotiating objectives. Kenya’s negotiating objectives also highlight textiles and apparel as a priority sector, while the U.S. negotiating objectives highlight pharmaceuticals and medical devices. Other areas of focus that have appeared in trade agreements include energy regulation, banking, and services more broadly. Some of the European trade agreements with emerging market partners, for example, have also focused on transportation, tourism, and energy.²⁷ In terms of stakeholders, trade agreements may include chapters and provisions on gender,²⁸ marginalized and indigenous communities, and small and medium-sized businesses (SMEs)²⁹ or micro, small and medium-sized businesses (MSMEs), as discussed in greater detail below.

- *Special and Differential Treatment*: Special and differential treatment is also a way of building flexibility into trade agreements. S&D can take a number of forms, including non-reciprocal treatment, special safeguards, longer transition periods to implement legal requirements, preferential trade arrangements with developed markets, and aid for trade.³⁰ I have argued that S&D should expand to take on additional normative dimensions,³¹ and the AfCFTA reflects this by building upon traditional S&D to create the space for a differentiated, progressive, rules-based approach to S&D.³² Notably, the AfCFTA

²⁷ See New Markets Lab and Harvard Law and International Development Society, “Harvard Law School Trade Innovation Initiative Summary of Findings on Trade and Development in Free Trade Agreements,” 2015, available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/7cb5a0_37610cba6cde4f02afb3d0cfa3ab7fb8.pdf

²⁸ See, e.g., Canada-Chile, Chile-Uruguay, and Canada-Israel FTAs, all of which have gender chapters and provisions in USMCA and the AfCFTA (General Objectives).

²⁹ Focus on SMEs is noted in the negotiating objectives of both the United States and Canada and has some precedent in recent trade agreements. See Ministry of Industrialization, Trade and Enterprise Development Republic of Kenya, *Proposed Kenya - United States of America Free Trade Area Agreement: Negotiation Principles, Objectives, and Scope*, 2020; Office of the United States Trade Representative, Executive Office of the President, *United States Kenya Negotiations Summary of Specific Negotiating Objectives*, May 2020.

³⁰ The WTO categorizes S&D provisions based on a six-fold typology: (1) *Provisions Aimed at Increasing Trade Opportunities of Developing Country Members*, including trade preference programs; (2) *Provisions to Safeguard the Interests of Developing Country Members*, including around 100 provisions related to development across disciplines and WTO agreements; (3) *Flexibility of Commitment, of Action, and Use of Policy Instruments*; for example, GATT Article XVIII and flexibilities under the WTO Agreement on Subsidies and Countervailing Measures; (4) *Transitional Time Periods*; (5) *Technical Assistance*; and (6) *Provisions Relating to LDCs*, with a note to Paragraph 2 (d) of the Enabling Clause. WTO, *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WT/COMTD/W/239.

³¹ Katrin Kuhlmann, *Reframing Trade and Development: Building Markets Through Legal and Regulatory Reform* World Economic Forum and International Centre for Trade and Sustainable Development (November 2015).

³² Katrin Kuhlmann and Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, forthcoming, 51 *Georgetown J. Int’l Law* 4, 2020.

represents more of a “differentiated” or “customized” S&D model,³³ which is driven by particular economic, geographic, and even legal circumstances, with S&D tailored based on need. Trade capacity building assistance is also part of S&D and has become closely linked with trade agreements, such as the U.S.-CAFTA-DR FTA and WTO TFA, as noted above. Capacity building could also be focused in key areas, such as building legal, judicial, and technical expertise, which could correspond, for example, to anti-corruption efforts; this aspect is integrated into the U.S.-Mexico-Canada Agreement (USMCA), for example, and is also referenced in the U.S. and Kenyan negotiating objectives.

By adopting a flexible approach, U.S. trade policy with Kenya and, eventually, U.S. trade policy with the African continent, could focus on an active partnership designed to unlock market potential, build well-functioning and inclusive legal and regulatory systems, and support Africa’s historic harmonization efforts that are already underway.

Flexibility in Development of Trade Rules

Flexibility could also be incorporated within the approaches to the priority areas of negotiation. For the rules areas themselves, flexibility can be part of the design of a trade agreement, as discussed above, and is also relevant in the context of the trends and patterns in African rulemaking. Both Kenya and the United States have identified a number of negotiating priorities for rules areas, including food and agriculture/sanitary & phytosanitary (SPS) measures; technical barriers to trade (TBT); customs and trade facilitation (as Kenya’s negotiating objectives note, SPS, TBT, and trade facilitation should build upon the EAC-U.S. Cooperation Agreement); transparency and legal and administrative issues; intellectual property; digital trade; services; labor; environment; state-owned enterprises; government procurement; investment; and anti-corruption.³⁴ This is a thorough list which in large part tracks with previous trade agreements, including the EAC-U.S. Cooperation Agreement as noted and African RTAs. The AfCFTA is addressing rules issues in a progressive manner, and Phase II will focus on investment,

³³ See James Bacchus and Inu Manak, *The Development Dimension: What To Do About Differential Treatment in Trade*, Policy Analysis No. 887, Cato Institute, Washington, D.C., April 13, 2020, <https://doi.org/10.36009/PA.887>.

³⁴ See Ministry of Industrialization, Trade and Enterprise Development Republic of Kenya, *Proposed Kenya - United States of America Free Trade Area Agreement: Negotiation Principles, Objectives, and Scope*, 2020; Office of the United States Trade Representative, Executive Office of the President, *United States Kenya Negotiations Summary of Specific Negotiating Objectives*, May 2020.

competition, and intellectual property following conclusion of Phase I negotiations and implementation of the agreement.

Kenya's guidelines specifically note that any legal provisions in these areas will need to take into account Kenya's existing and planned multilateral, continental, regional, and national obligations. While a comprehensive review of these obligations and trends in national law is outside of the scope of this testimony, several considerations are worth noting. First, assessment of domestic and regional law in the context of an upcoming trade agreement can also incorporate elements of flexibility in design discussed above, such as the degree to which rules are crafted to advance development goals, including the SDGs, and how rules are tailored to a country's particular circumstances and stakeholders. Of course, transparency and consistency in application of the rules will be important, even if more flexible approaches are pursued. As my research has shown, differentiated and flexible approaches may relate to the requirements for market entry, rules for introducing new products and services into the market, tailored non-tariff measures, shorter and more transparent regulatory processes, mutual recognition and alignment with other African trade agreements, and greater emphasis on implementation of the rules. In addition, my research has indicated that differentiation and flexibility also exist in good regulatory practices (an area that the U.S. negotiating objectives highlight as a priority), signaling that a broader view of what constitutes good regulatory practices should be taken that incorporates African good practices as well. I will refer to examples of good regulatory practices in African legal systems below and have additional work forthcoming in this area.

While implementation is not the primary focus of this testimony, it is important to consider even at the outset of negotiations, since the framework established by any trade agreement will often require further legal and regulatory change at the national and possibly sub-national levels. This is true in areas as diverse as trade facilitation, SPS and TBT measures, digital rules, and services. As I have testified in the past, negotiation and rulemaking each of these areas contains a number of actions, trade-offs, benefits, and good practices that must be considered as rules are developed.³⁵ Implementation will also be a factor in predictability and transparency for investment, expanded market potential, reduced market risk, and rule of law, to the benefit of individuals and

³⁵ Katrin Kuhlmann, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the U.S. International Trade Commission, Washington, D.C., July 30, 2019.

communities.³⁶ Implementation is an important consideration even as trade agreements and economic rules are designed. Based on my research and experience, four aspects of implementation bear mention, namely: efficiency of rules and regulations; regulatory preconditions or gateways (the extent to which one regulatory process hinges upon completion of another); inclusive rulemaking; and effectiveness of rules and regulations.³⁷ In order to provide some illustration of the considerations important to negotiation of the rules areas, I will briefly focus on digital regulation, agricultural regulation and food security, and intellectual property.³⁸

Digital Regulation

Digital trade is highlighted as a priority in both countries' negotiating objectives, and the digital realm has only become more central to trade following the pandemic. Digital issues will very likely also be prioritized in a subsequent stage of the AfCFTA. Underscoring the importance of this area, the World Bank has estimated that digital transformation has the potential to increase per capita growth by 1.5 percent per year and reduce poverty by 0.7 percent per year, with some of the most significant gains predicted for Africa.³⁹ The positive benefits of digital transformation are significant, such as creating jobs, encouraging entrepreneurship, integrating women into the workforce, and improving access to finance and food.⁴⁰ In order for this potential to be realized, the legal and regulatory framework for the digital economy will have to be carefully considered at the national, regional, and international levels. As I have testified in the past, a well-functioning enabling environment in the digital economy could have positive effects in achieving most if not all of the SDGs, including Goal 1 (No Poverty), Goal 5 (Gender Equality), Goal 9 (Industry, Innovation and Infrastructure), and Goal 10 (Reduced Inequalities), among others.

In 2018, my non-profit organization, the New Markets Lab, partnered with the Center for International Private Enterprise (CIPE) on a guide to the enabling environment for the digital

³⁶ *Ibid.*

³⁷ See New Markets Lab, 2019, available at <https://www.newmarketslab.org/about>.

³⁸ Katrin Kuhlmann, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the U.S. International Trade Commission, Washington, D.C., July 30, 2019.

³⁹ World Bank, "Digital Economy for Africa Initiative: Every African Individual Business and Government to be Digitally Enabled by 2030", June 2019, available at <http://pubdocs.worldbank.org/en/312571561424182864/062519-digital-economy-from-africa-initiative-Tim-Kelly.pdf>.

⁴⁰ Katrin Kuhlmann, President and Founder, New Markets Lab, Visiting Professor, Georgetown University Law Center, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the United States International Trade Commission, (July 30, 2019).

economy that highlights regulatory trends and emerging good practices in four cross-cutting areas: (a) consumer protection, (b) data privacy and protection, (c) cybersecurity, and (d) electronic transactions.⁴¹ It also provides comparative examples of how different countries around the world have approached regulation of each of these four areas, and these comparative examples and good regulatory practices will become more important as the AfCFTA moves forward.

Kenya and a number of other African nations now have regulatory systems in place (or under development) for the digital economy; however, regulatory approaches vary, and countries have adopted different good regulatory practices tailored to particular circumstances.⁴² Kenya has decided to regulate under separate legal instruments covering electronic transactions,⁴³ cybercrimes,⁴⁴ consumer protection, and data protection and privacy.⁴⁵ In contrast, other countries, have put in place umbrella laws that regulate a number of different aspects of the digital economy. Rwanda's laws, for example, cover electronic transactions, data privacy, and cybercrimes under one umbrella law, with consumer protection regulated separately. Regulating through individual legal instruments may provide flexibility as markets and technology change and could also give rise to more specialized agencies (like a consumer protection bureau, or a data protection agency); however, regulating through an umbrella law may streamline institutions, rights, and obligations. As differences in U.S. and European approaches to digital trade have shown, regulatory practices also vary globally, and further study is needed of the implementation effects of these different regulatory approaches.

Without question, the enabling environment in this area will be essential to further trade and investment, and some issues are worth highlighting for ongoing focus. One important factor to consider will be data localization requirements, which tend to include both data storage requirements that mandate the local storage of certain types of data and data processing

⁴¹ New Markets Lab and Center for International Private Enterprise, "Digital Economy Enabling Environment Guide: Key Areas of Dialogue for Business and Policymakers", October 2018, available at <https://www.cipe.org/wp-content/uploads/2018/10/Digital-Economy-Guidebook-FINAL-PDF.pdf>

⁴² Katrin Kuhlmann, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the U.S. International Trade Commission, Washington, D.C., July 30, 2019; see also New Markets Lab and Center for International Private Enterprise, "Digital Economy Enabling Environment Guide: Key Areas of Dialogue for Business and Policymakers", October 2018, available at <https://www.cipe.org/wp-content/uploads/2018/10/Digital-Economy-Guidebook-FINAL-PDF.pdf>

⁴³ Kenya, Information and Communications Act, 2019; Electronic Transactions Regulations, 2009.

⁴⁴ Kenya, Computer Misuse and Cybercrimes Act No. 5, 2018.

⁴⁵ Kenya, Data Protection Act, 2019.

requirements that require that certain type of activities like processing, manipulation, and management of data take place locally.⁴⁶ Within Africa, data localization is receiving increasing attention, and countries including Kenya, Rwanda, and Nigeria have adopted data storage requirements for all subscriber and consumer data as well as government data.⁴⁷ Balancing data privacy considerations has been central to these rules, and there are regional implications as well, such as the Economic Community of West African States (ECOWAS) rules on data protection that limit cross-border data transfers to countries that provide “an adequate level of protection for privacy, freedoms and the fundamental rights of individuals.”⁴⁸ Bearing in mind the ongoing AfCFTA negotiations, these regional practices will be important to consider in the context of the U.S.-Kenya Trade Agreement. Another issue will be clearly providing for consumer protection in the digital space, as both the USMCA and Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) include in their provisions.⁴⁹

Regulation of the digital economy is intrinsically systemic, and successful implementation will be essential economy-wide. Since most countries’ legal instruments are relatively new, they have not been fully tested in practice, which could present challenges. Ensuring coordination between the different ministries and agencies in charge of enforcing digital economy regulations will also be important; in many jurisdictions the ministries of trade, finance, and information and communication technology (ICT), to name a few, have overlapping responsibilities for enforcement of regulations dealing with electronic transactions, consumer protection, data protection and privacy, and cybersecurity.⁵⁰ In addition, reducing or eliminating import duties on digital products and components, including computing components, 3D printing technology, and semiconductors, for example, could facilitate e-commerce and digital innovation.⁵¹

⁴⁶ Claire Scharwatt, “The Impact of Data Localization Requirements on the Growth of Mobile Money-enabled Remittance”, GSMA, March 2019, available at https://www.gsma.com/mobilefordevelopment/wp-content/uploads/2019/03/GSMA_Understanding-the-impact-of-data-localisation.pdf.

⁴⁷ See Mona Farid Baran and Rizwan Tufail, *Economic Impact of Data Localization in Five Selected Countries, an Empirical Study*, Strathmore University, available at https://pic.strathmore.edu/wp-content/uploads/2019/03/PIC_RANITP_Economic_Impact_of_Data_Localization_in_5_selected_African_Countries.pdf

⁴⁸ Economic Community of West African States (ECOWAS) Supplementary Act A/SA.1/01/10 on Personal Data Protection within ECOWAS (2010), available at <http://www.statewatch.org/news/2013/mar/ecowas-dp-act.pdf>.

⁴⁹ See Comprehensive and Progressive Trans Pacific Partnership, 2018, Article 14.4.

⁵⁰ Katrin Kuhlmann, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the U.S. International Trade Commission, Washington, D.C., July 30, 2019.

⁵¹ Ashley Hope, *AfCFTA and Digital Trade Today*, Trade Law Centre, pg. 6 (February 2019).

Finally, the Digital Economy Partnership Agreement recently signed by Chile, New Zealand, and Singapore includes important provisions on data inclusion, which specifically reference indigenous communities, women, rural populations, and low socio-economic groups.⁵² This addition of digital inclusion presents a notable new good practice that should be considered for all trade agreements now under discussion.

Agricultural Regulation

The World Bank predicts that agriculture will be a \$1 trillion sector in Africa by 2030.⁵³ Agriculture is both a critically important sector to many African nations, including Kenya, and a complex sector, with many different regulatory components that interact and often intersect with trade agreement obligations. These include regulation of markets, finance, transport, ICT, customs, standards, and cross-border trade. The enabling environment for agriculture also includes land tenure, regulation of agricultural inputs (seed, fertilizer, and other inputs), rules related to labor and the environment (including, for example, environmental regulations, international standards, regulation of farmer producer organizations, and contractual arrangements), water, contracts, and infrastructure (irrigation, rural roads, storage, trucks, machinery, etc.), many of which are not typically covered by trade agreements. Both the EAC and COMESA include extensive provisions on agriculture, however, including regulation of food safety standards, transport, packaging, and cross-border trade,⁵⁴ all of which would need to be studied and considered in the context of the proposed U.S.-Kenya Trade Agreement.

It will also be important to look at agricultural trade in the broader context of food security. Food security is embedded in Kenya's constitution, which incorporates the right to be free of hunger and access food of acceptable quality,⁵⁵ and regional trade has played an increasingly important role in food security. Viewing trade negotiations through the lens of food security requires taking a broader look at the rules, policies, and programs of trading partners, including

⁵² Digital Economy Partnership Agreement, Singapore, Chile, and New Zealand, June 12, 2020.

⁵³ World Bank, "Africa's Food Markets Could Create One Trillion Dollar Opportunity by 2030", press release, March 2013, available at <https://www.worldbank.org/en/news/press-release/2013/03/04/africas-food-markets-could-create-one-trillion-dollar-opportunity-2030>.

⁵⁴ See Katrin Kuhlmann, "The Human Face of Trade and Food Security", Center for Strategic and International Studies, December 2017, available at https://csis-prod.s3.amazonaws.com/s3fs-public/publication/171206_Kuhlmann_HumanFaceFoodSecurity_Web.pdf?UIIn_uS4Z6IoUMSi727Q8QrUyHfGneh1

⁵⁵ Constitution of Kenya, Art. 43 1 (c) (2010).

developed country trading partners like the United States,⁵⁶ as well as other issues related to food insecurity, such as farmers' needs and access in relation to agricultural inputs,⁵⁷ agricultural finance,⁵⁸ biodiversity, agricultural aspects of competition law and policy, and market restrictions.⁵⁹

A comprehensive and systemic approach to trade and food security could help achieve SDG Goal 2 (Zero Hunger), Goal 9 (Industry, Innovation and Infrastructure), and Goal 13 (Climate Action), among others. Here, flexibility might involve designing trade agreement provisions that balance the desire for market entry with food security; taking into account existing international, regional, and national provisions; anticipating ways in which African regulation is developing to address agriculture and food security; and focusing on measures for engaging small enterprises and farmers as markets develop.⁶⁰

Intellectual Property

With intellectual property highlighted as a Phase II issue for the AfCFTA and a priority area for the TFTA, it is clearly an area of particular importance in the context of the U.S.-Kenya Trade Agreement. In relation to the SDGs, IP, like digital trade, impacts many aspects of sustainable development in particular SDG 1 (No Poverty), SDG 2 (Zero Hunger), SDG 3 (Good Health and Well-being), SDG 7 (Affordable and Clean Energy), SDG 8 (Decent Work and Economic Growth), SDG 9 (Industry, Innovation, and Infrastructure), and SDG 11 (Sustainable Cities and Communities), among others.

⁵⁶ See Michael Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945-2017*, Springer Nature Switzerland, 2020, in J.D. Haskell and A. Rasulove (eds.) *New Voices and New Perspectives in International Economic Law*, European Yearbook of International Economic Law, available at https://link.springer.com/chapter/10.1007%2F978-3-030-32512-1_3.

⁵⁷ This area of law is included in a number of existing RTAs, including COMESA, ECOWAS, and SADC, with legislation at an advanced stage in the EAC as well; however, the approaches across these RECs do differ somewhat, even though common legal elements exist. See, e.g., Katrin Kuhlmann, *Harmonizing Regional Seed Regulations in Sub-Saharan Africa: A Comparative Assessment*, Syngenta Foundation for Sustainable Agriculture 2015.

⁵⁸ See Edward Katende and Katrin Kuhlmann, *Building a Regulatory Environment for Agricultural Finance*, Paper Presented to Uganda Banker's Association, June 2019, available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_a0e1d52d6040405c86334e2bfd8084dc.pdf

⁵⁹ Katrin Kuhlmann and Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, forthcoming, 51 *Georgetown J. Int'l Law* 4, 2020. See also Katrin Kuhlmann, *The Human Face of Trade and Food Security: Lessons on the Enabling Environment from Kenya and India*, Center for Strategic and International Studies, 2017.

⁶⁰ See Katrin Kuhlmann and Bhramar Dey, *Regulatory Flexibilities to Bridge Gaps Between Informal and Formal Seed Systems*, June 2020, available at www.agrilinks.org

As I testified in 2019, while Kenya has a relatively robust IP law regime, many countries in Africa are still building a system of rules on IP, and regional rules also vary.⁶¹ Regionally, there are several regional and international agreements on IP, namely the African Regional Intellectual Property Organization (ARIPO), of which Kenya is a member, and the African Intellectual Property Organization (OAPI). The Pan-African Intellectual Property Organization (PAIPO) is also moving forward. In addition, nearly all African nations are members of the World Intellectual Property Organization (WIPO) and the WTO, which makes them party to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

Despite the overlap in adherence to these international and regional rules, it is not yet clear how Africa as a continent will decide to approach IP law,⁶² which is a factor that should be considered in the context of the U.S.-Kenya Trade Agreement. For example, there are notable differences in Africa's regional regimes, with members of OAPI following a model that overrides national systems, consistent with civil law traditions, and members of ARIPO, most of which follow common law, required to domesticate regional rules through national law.⁶³

The scope of IP provisions will be relevant in the context of the U.S.-Kenya Trade Agreement as well. Kenya's negotiating objectives specifically refer to genetic resources, folklore, traditional knowledge, and benefit sharing,⁶⁴ consistent with the Convention on Biodiversity⁶⁵ and other international legal instruments, including the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol),⁶⁶ International Treaty on Plant Genetic

⁶¹ Katrin Kuhlmann, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the U.S. International Trade Commission, Washington, D.C., July 30, 2019. See also Y Mupangavanhu, *African Union Rising to the Need for Continental IP Protection? The Establishment of the Pan-African Intellectual Property Organization*, 59 J. Afr. L., 1 (2015).

⁶² See United Nations Economic Commission for Africa, African Union, African Development Bank and United Nations Conference on Trade and Development, *Assessing Regional Integration in Africa IX: Next Steps for the Continental Free Trade Agreement in Africa*, Addis Ababa, Ethiopia, 2019.

⁶³ Katrin Kuhlmann, *U.S. Trade and Investment with Sub-Saharan Africa: Recent Trends and New Developments*, Testimony before the U.S. International Trade Commission, Washington, D.C., July 30, 2019.

⁶⁴ Ministry of Industrialization, Trade and Enterprise Development Republic of Kenya, *Proposed Kenya - United States of America Free Trade Area Agreement: Negotiation Principles, Objectives, and Scope*, 2020, at 11.

⁶⁵ Convention on Biological Diversity, available at <https://www.cbd.int/convention/text/>

⁶⁶ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Convention on Biological Diversity, available at <https://www.cbd.int/abs/text/>

Resources for Food and Agriculture (ITPGRFA)),⁶⁷ and ARIPO Swakopmund Protocol focused on traditional knowledge and traditional cultural expressions.⁶⁸

Traditional knowledge, which is defined by WIPO as a living body of knowledge passed down within a community that becomes an essential part of its traditions and identity,⁶⁹ is likely to be a significant issue in the AfCFTA's treatment of IP and, therefore, should be integrated into any bilateral trade agreements with African nations as a party. Due to the nature of traditional knowledge and the stakeholders involved, trade agreements will need to balance innovation, IP protection, and investment potential with opportunities for local and indigenous populations and preservation of biodiversity.⁷⁰ Provisions on traditional knowledge could also include mandatory disclosure requirements, a sound system for patent research, and traditional knowledge registries, such as Kenya's, that identify rightsholders of genetic resources and traditional knowledge and protect cultural rights and biodiversity.⁷¹

Conclusion and Next Steps

This testimony presented a very brief summary of some of the flexible design elements and rules considerations that should be assessed as the U.S.-Kenya Trade Agreement moves forward. Much more research is needed, however, particularly on the way in which the proposed U.S.-Kenya Trade Agreement could be designed and implemented in a way that complements and does not contradict the work to align markets and legal systems that is already underway in Africa. I would like to conclude with a few brief final observations and suggestions for further study and dialogue:

⁶⁷ International Treaty on Plant Genetic Resources for Food and Agriculture, available at: <http://www.fao.org/3/a-i0510e.pdf>.

⁶⁸ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore Within the Framework of the African Regional Intellectual Property Organization, Aug. 9, 2010.

⁶⁹ WIPO, "Traditional Knowledge and Intellectual Property-Background Brief", available at https://www.wipo.int/pressroom/en/briefs/tk_ip.html.

⁷⁰ See John Mugabe, "Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse", WIPO, 1998, available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf.

⁷¹ Katrin Kuhlmann and Akinyi Lisa Agutu, *The African Continental Free Trade Area: Toward a New Legal Model for Trade and Development*, forthcoming, 51 *Georgetown J. Int'l Law* 4, 2020; See also Council for Trade-Related Aspects of Intellectual Property Rights, *Joint Communication by the African Group: Taking Forward the Review of Article 27.3(B) of the TRIPS Agreement*, WTO Doc. IP/C/W/404 (June. 26, 2003).

- (1) The U.S.-Kenya Trade Agreement presents an opportunity to revise the traditional trade agreement model to incorporate different aspects of flexible design and a much stronger development focus, which will also need to be aligned with African trade agreements, including the AfCFTA and RECs, as well as trends in African law.
- (2) While a regional approach to the agreement would have been desirable, Kenya's position within the wider regional and continental market will shape both its relationship with the United States and Kenya's commitments now and in the future, so the regional implications of the agreement must be taken into account.
- (3) As changes to the rules are considered, better methods for measuring the impact of changes to economic rules and regulations are needed, particularly in the context of realizing development impact.⁷²
- (4) Inclusive implementation should be considered even before text is finalized and an agreement reached. This is particularly true in areas like regulation of the digital economy, agriculture, and IP, and I would recommend further study of good regulatory practices, including those arising within Africa, which will shape the dialogue going forward. Further, other areas that might be incorporated into the rules deserve greater study, in particular those that will help build inclusive markets and address inequalities in all respects.

I thank you again for allowing me to submit written comments, and I look forward to continued engagement in the areas covered by my testimony.

⁷² See Katrin Kuhlmann, Chantal Line Carpentier, Tara Francis, and Malou le Graet, *Trade Policy for Resilient, Sustainable, and Inclusive Development in a New International Economic Order*, July 2020, available at https://cb4fec8a-9641-471c-9042-2712ac32ce3e.filesusr.com/ugd/095963_f27341b095b2408db0c207713f71fae4.pdf