Before the
Office of the United States Trade Representative
Washington, D.C.

In re:
Request for Comments on Negotiating Objectives for a U.S.-Kenya Trade Agreement — Docket Number USTR-2020-0011

COMMENTS OF INTERNET ASSOCIATION

Internet Association (IA)[1] represents over 40 of the world's leading internet companies. IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. IA respectfully submits the following comments in support of USTR formulating Negotiating Objectives for a U.S.-Kenya Trade Agreement.

A U.S.-Kenya free trade agreement (FTA) with strong digital provisions is an opportunity for both countries. The U.S. and Kenya have the ability to set a high standard on digital trade for others to emulate – especially other countries in Africa. This is important at a time when countries like China and Russia are pushing alternative models of digital trade. The U.S. and Kenya can leverage the recent U.S.-Mexico-Canada Agreement (USMCA) deal and continue to build out a next-generation template for digital trade.

A U.S.-Kenya FTA should be a strong digital agreement – Kenya was ranked by the World Intellectual Property Organisation as the second-best innovation hub in Sub-Saharan Africa.[2] And, thanks to its technology and digital innovation, Kenya is nicknamed the "Silicon Savannah."[3] For the last decade the Kenyan government has focused on internet infrastructure and now the country is one of the most wired nations in Africa.[4] At the same time, venture capital funding for startups in Kenya jumped from $92.7 million in 2016 to $147 million in 2017, the second-highest level on the continent after South Africa, demonstrating the increasing potential of its economy.[5] The combination of investment, tech hubs, and incubators led to the development of digital startups that focus on a wide variety of services including mobile money services, crisis-mapping, and agricultural tracking apps.[6]

While there are some strong economic indicators out of Kenya's emerging digital sector, it is important that Kenya not develop digital policies that run counter to facilitating growth in its digital economy.[7] A U.S.-Kenya FTA has the potential to ensure that both the U.S. and Kenya remain leading digital economies.[8] Strong digital provisions in the FTA will ensure that Kenya's emerging innovation and digital sectors can grow into an important part of the global economy.

[1] https://internetassociation.org/our-members/
[2] https://www.wipo.int/global_innovation_index/en/2019/
[3] https://www.businessdailyafrica.com/corporate/tech/Kenya-ranked-top-tech-hub-in-sub-Saharan-Africa/4258474-5235558-5nocvhz/index.html
[4] https://www.dw.com/en/mobile-solutions-a-catalyst-for-internet-penetration-in-kenya/a-47078206
[5] https://qz.com/africa/1211233/how-much-did-african-startups-raise-in-2017-partech-disrupt-africa/
[6] https://ventureburn.com/2018/09/kenya-tech-startup-ecosystem/
[7] https://internetassociation.org/files/ia_national-trade-estimate-2020_ustr-2019-0012_10-31-2019_trade/
[8] https://www.newsweek.com/how-kenya-became-cradle-africas-ict-innovation-534694

DATA FLOWS AND DIGITAL SERVICES

Cross-border data flows have grown 45 times larger since 2005 and are projected to grow another nine times larger in the next 5 years as digital flows of commerce, information, searches, video, communication, and intracompany traffic continue to surge.[9] The internet is the key medium for businesses to reach new foreign customers and to purchase software and services that allow them to improve productivity.

An overarching issue impacting data flows and digital services between the U.S. and Kenya is the importance that the U.S. be recognised as adequate from a data protection perspective under S.48 of the new Kenyan Data Protection Act.[10] To encourage innovation and internet-led economic growth, negotiators should prioritize the following issues as key objectives for a new U.S.-Kenya FTA digital economy chapter.

Promote the free flow of information. The ability to transfer and access information across borders is critical to all economic sectors and when information is restricted, the economy and exports are hurt. Data flows contribute hundreds of billions of dollars to the global economy.[11]

- The U.S.-Kenya FTA should prohibit governments from restricting the movement of information across the internet.

Prevent data localization. Requirements that force companies to manage, store, or otherwise process data locally threatens the open transnational nature of the internet, while increasing cybersecurity and other operational risks; hindering risk management and compliance; and inhibiting financial regulatory and supervisory access to information. Additionally, policies that link market access or commercial benefits to investment or use of local infrastructure hurt businesses and consumers.

- The U.S.-Kenya FTA should prohibit governments from requiring data be stored or processed locally.

Protect privacy and consumers. Privacy and consumer protection are critical underpinnings of digital trade. Clear and interoperable rules on these issues will enhance consumer confidence in digital trade. Kenya's Data Protection Law was adopted in 2019 and establishes the Office of the Data Protection Commissioner, which regulates the processing of personal data, establishes data subject rights, and regulates data protection offenses. There are complex legal and operational issues regarding how to balance the interests of users and publishers, how to balance one user's privacy interests with another user's free expression and journalistic interests, and how to account for the broader public's right to know the truth and have access to accurate historical records. This compliance obligation would drastically reduce the possibility for new platforms, search engines, and internet services – including local services – to enter the Kenyan market.

- The U.S.-Kenya FTA should ensure that enforceable privacy protections will apply to the digital marketplace. The FTA should include clear language stating that the U.S. is recognized as adequate from a data protection perspective. In addition, the U.S.-Kenya FTA should include mechanisms to promote compatibility between different privacy regimes, giving users and companies greater assurance that privacy will be protected on a cross-border basis.

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[9] McKinsey Global Institute. "Digital globalization: The new era of global flows." http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows.
[10] http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionAct__No24of2019.pdf
[11] Ibid.

Promote intermediary liability protections. Intermediary liability protections enable the development of digital platforms and the free flow of information. These protections ensure cloud and other internet services can host third-party content and communications without the service provider being considered the publisher or speaker. Intermediary liability protections enable features such as customer reviews, which have been essential to building customer trust for e-commerce businesses in the U.S. and Kenya. Without intermediary liability protections, internet services would not be able to function as open platforms for trade and communication.

- The U.S.-Kenya FTA should prohibit governments from making online services liable for third-party content.

Ensure encryption and source code integrity. Other countries require access to encryption keys or source code as a condition for letting technology imports into their market. Such measures, if left unchallenged, would compromise technology and hurt exports.

- The U.S.-Kenya FTA should prohibit governments from requiring access to encryption keys and source code as a condition for market access.

No customs duties on digital transmissions. World Trade Organization members have only agreed to a temporary moratorium on imposing customs duties and other customs processes on digital products. The U.S.-Kenya FTA should ensure that governments cannot impose tariffs on the flow of music, video, software, e-books, games, and information as they move across borders. This will continue to benefit the creators, artists, and entrepreneurs who depend on online sales to succeed.

- The U.S.-Kenya FTA should prohibit governments from imposing customs duties and other customs formalities on digital transmissions.

No unnecessary regulation of online services. Foreign governments are seeking to limit market access by imposing complex and unnecessary licensing requirements on online services. This makes little economic sense. Unlike traditional public utility infrastructure, online service markets typically have no serious barriers to new market entrants and have low switching costs. Sharing economy services also face significant market access and operational barriers in markets that limit the ability to supply or consume services offered by these platforms.

- The U.S.-Kenya FTA should prohibit governments from imposing unnecessary or facilities-based regulatory, licensing, or operational requirements on providers of online services and applications.

Non-discriminatory taxation of the digital economy. Countries around the world are proposing and implementing discriminatory digital services taxes that disproportionately impact U.S. technology firms by design. In many cases, these taxation measures contradict longstanding global consensus-based practices (e.g., by taking gross revenues instead of income) and would result in double taxation on American businesses.

- The U.S.-Kenya FTA should ensure that each government provides full non-discriminatory treatment to digital services and service providers of the other party, and does not apply taxation measures in a way that discriminates against digital services or is not technologically neutral. The agreement should reaffirm the commitment of the two governments to reach a multilateral solution to tax challenges arising from the digitalization of the economy.

Promote open government data. Small and large companies are increasingly using public data to build innovative commercial applications and services, improve their ability to navigate global markets, and build machine translation and image recognition systems that rely on access to text and images. By releasing data in an open format that can be searched, retrieved, used, reused, and redistributed, governments can assist local companies in building these cross-border services.

- The U.S.-Kenya FTA should encourage the release of government data in an open and machine-readable format.

Promote the growth of electronic payment systems. E-payments systems which are interoperable across borders are critical in enabling the growth of cross-border digital trade. The adoption of open e-payment models such as Real-Time Payments (RTP) systems and the promotion of open Application Programming Interfaces (APIs) can help drive open innovation in this marketplace on a cross-border basis.

- The U.S.-Kenya FTA should encourage competition in the e-payments ecosystem through the adoption of open e-payment models such as RTP systems and open Application Programming Interfaces (APIs) to allow for interoperability, third party participation, and innovation. Parties should ensure that e-payments regulations are technology-neutral and function-based to enable the introduction of new financial and e-payment products and services by incumbents and new entrants.

Promote regulatory cooperation on artificial intelligence (AI) and emerging technologies. AI and other emerging technologies increasingly impact trade, including for small businesses that use AI tools to increase productivity and find new markets abroad, and industries that build and export AI technologies across borders. To strengthen public trust in AI and enable next-generation innovation to flourish, it is important to develop responsible and internationally aligned AI governance frameworks, as well as risk-based regulatory approaches that are sufficiently flexible to account for new opportunities and challenges.

- The U.S.-Kenya FTA should promote the responsible growth of AI and machine learning technologies through a commitment to adopt good regulatory practices, including risk-based, technology-neutral, and sector-specific approaches to AI governance that are sufficiently flexible to account for new opportunities and challenges, while recognizing the extent to which potential risks can be mitigated using existing regulatory frameworks.

INTELLECTUAL PROPERTY

The global economy is now intrinsically tied to the digital economy. As industries like manufacturing, agriculture, and financial services embrace the internet for their operations and to export, it is more critical than ever to promote frameworks that are tailored for the digital environment. Future economic growth in nearly every sector is now reliant on internet innovations like cloud computing, artificial intelligence, machine learning, internet of things, computational analysis, text and data mining, and the use of snippets. Critical to these innovations are balanced, innovation-oriented intellectual property frameworks that support exporters.

As more exporters leverage the internet to trade goods and services and use a number of these innovative practices, copyright limitations and safe harbors, tailored for the digital environment, have become even more critical to the growth of the entire economy.

Negotiators should prioritize the following intellectual property issues that are essential for the digital environment as crucial objectives for a U.S.-Kenya FTA.

Promote innovation through protecting "fair uses" of copyright material. A strict regime of strong copyright protection and enforcement – without limitations and exceptions like the 'fair use' of copyrighted material – would doom the internet economy. Machine learning, computational analysis, text and data mining, online search, and cloud-based technologies all involve making copies of copyrighted content without the explicit consent of the copyright holder. These types of innovative activities are possible under copyright law because of robust limitations and exceptions. Fair use industries account for 16 percent of the U.S. economy, generate $5.6 trillion in annual revenue, employ 18 million U.S. workers, and drive $368 billion in annual exports.[12]

- The U.S.-Kenya FTA should require governments to adopt clear copyright limitations and exceptions, including fair use and text and data mining rules, to enable innovative uses of copyrighted material.

Copyright "safe harbors" for online service providers. A "safe harbor" system that protects the interests of copyright holders, online service providers, and users by imposing responsibilities and rights on each is important. Safe harbors are critical to the functioning of cloud services, social media platforms, online marketplaces, search engines, internet access providers, and many other businesses. A safe harbor system also provides incentives for service providers to cooperate with rights holders.

- The U.S.-Kenya FTA should require governments to adopt strong copyright safe harbors from liability for online service providers, along the lines of America's Digital Millennium Copyright Act system, which has been the cornerstone of U.S. innovation and rights holders' protection.

Proportionality and due process in copyright enforcement. Copyright damage regimes – if not properly calibrated – can have a stifling effect on innovation and legitimate services, especially smaller providers and emerging services. Risks of significant damages can deter startups from developing new technologies, particularly when it comes to newer technologies such as machine learning and comprehensive digital media services that may not be squarely addressed by existing safe harbors and exceptions.[13]

- The U.S.-Kenya FTA should require proportionality and due process in copyright enforcement measures.

TRADE FACILITATION (INCLUDING CUSTOMS and ICT IMPORTS)

E-commerce and online marketplaces seamlessly connect buyers and sellers across the Atlantic Ocean. Small- and medium-sized businesses that, a generation ago, would have faced insurmountable barriers to participating in international commerce and trade are turning to the internet to reach global consumers and suppliers. Today, nearly $8 trillion is exchanged through global e-commerce annually.[14] In addition, with the help of e-commerce and online marketplaces, small businesses grow up to four times faster than businesses that do not embrace the internet, create twice as many jobs, are 50 percent more likely to be exporters, and bring in twice as much revenue through exports as a percentage of sales.[15]

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[12] http://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf
[13] Ibid.
[14] McKinsey Global Institute. "Internet Matters: The Net's Sweeping Impact on Growth, Jobs, and Prosperity." https://www.mckinsey.com/industries/high-tech/our-insights/internet-matters
[15] Internet Association. "TISA Should Address Intermediary Liability Protections – A Cornerstone of the Digital Economy." https://internetassociation.org/wp-content/uploads/2016/07/Internet-Association-TISA-Intermediary-Liability-2-Page-Handout.pdf.

Burdensome and complex customs procedures discourage or block online sellers altogether from these markets. In some cases, internet-enabled exporters are often unable to reach international customers because of outdated trade rules that do not accommodate package-level e-commerce exports.

- Negotiators should prioritize customs and trade facilitation issues as key objectives for a U.S.-Kenya FTA.

Establish de minimis thresholds consistent with U.S. level. E-commerce is powering trade by giving internet-enabled businesses the ability to find customers around the world. Unfortunately, burdensome, complex, costly and time-consuming customs procedures make it difficult to ship products across borders in a cost-effective way. These barriers are so significant that they can prevent small businesses from exporting all together – as firms with fewer resources cannot afford to navigate these complex rules on their own. Establishing commercially meaningful de minimis thresholds is key to enabling an environment conducive to e-commerce because it simplifies import requirements, reduces and makes transparent import costs, and expedites customs clearance for e-commerce shipments. Kenya does not have a de minimis threshold, so the entire purchase value is subject to tax and duty.

- USTR should seek commitments in the U.S.-Kenya FTA that harmonize de minimis levels with the current U.S. standard.

GOVERNMENT PROCUREMENT

Cloud computing has brought forth a new and more efficient means of managing government information technology resources. It has opened up avenues for modernization, innovation, cost savings, and improvements in cybersecurity. Commercial cloud computing in the public sector allows for the delivery of better citizen services, facilitates inter-agency collaboration for greater efficiency, results in faster deployment of mission-critical applications, increases operational continuity and business recovery, allows for enhanced budget control, decreases spending on legacy infrastructure, and increases overall IT efficiency while contributing to sustainability.

- The U.S.-Kenya FTA should include measures on implementation and maintenance of Cloud First and Cloud Smart policies. The inclusion of Cloud First policies in the FTA would set an important precedent for other agreements being negotiated. In addition, the U.S.-Kenya FTA should ensure that any measure regarding procurement of cloud services or digital services should use open tendering procedures for procurement and should ensure that such procedures are vendor-neutral and technology-neutral.

CONCLUSION

A U.S.-Kenya FTA represents a significant opportunity for the internet sector. IA appreciates USTR's focus on relevant digital trade, intellectual property, customs and trade facilitation, and government procurement issues in the request for comments and looks forward to playing a meaningful role during the negotiations. We also urge USTR to give all affected stakeholders the opportunity to provide input into the negotiating process, including draft text. Increased openness and transparency in U.S.-Kenya trade policy is likely to lead to better outcomes and more legitimacy.