CompTIA

April 15, 2020

Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

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

Dear Sir or Madam:

The Computing Technology Industry Association (CompTIA),[1] the leading association for the global information technology (IT) industry, respectfully submits these comments to the Office of the United States Trade Representative (USTR) in response to the above-captioned Request for Comment.[2]

CompTIA and its member companies encompass a wide cross-section of the IT sector, including software, technology services, telecommunications services, and device and infrastructure companies. CompTIA's member companies provide the critical technical infrastructure needed to power the American economy through their applications and tooling, hardware components, IoT devices, and telecommunications services. All these services and more play an essential role in maintaining U.S. technological and economic global leadership.

A comprehensive, high-standard free trade agreement between the United States and Kenya has the potential to provide unprecedented digital trade commitments and economic prosperity for the U.S. and African continent. These trade negotiations provide a unique opportunity to address the longstanding issues in Kenya by reducing or eliminating trade barriers and result in a mutually beneficial outcome for both countries. Furthermore, a high-standard agreement will advance trade capacity building and signal economic reform across the African continent. In fact, the U.S.-Kenya trade agreement will complement and enhance the ongoing in the African Continental Free Trade Agreement and will set a framework for future comprehensive trade agreements in the African continent.

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[1] CompTIA supports policies that enable the information technology industry to thrive in the global marketplace. We work on behalf of our 120-plus member companies to promote investment and innovation, market access, robust cybersecurity solutions, commonsense privacy policies, streamlined procurement, and a skilled IT workforce. Visit www.comptia.org to learn more.

[2] [[Fed Register Citation]], https://ustr.gov/sites/default/files/enforcement/301Investigations/Request_for_Comments_Concerning_the_Extension_of_Particular_Exclusions_March_17.pdf

Priority negotiating objectives for CompTIA members in U.S.-Kenya trade agreement negotiations include: market access, customs and trade facilitation, rules of origin, government procurement, digital trade, telecommunications and intellectual property. Further information on each objective is provided below.

I. INTRODUCTION

The IT sector is one of the largest industry sectors in the U.S. economy. The IT sector market is $3.7 trillion globally, with $1 trillion in the United States alone. To put into perspective, the gross output of the technology sector exceeds the individual output of the legal services industry, the automotive industry, the airline industry, the motion picture industry, the hospitality industry, the agriculture industry and the restaurant industry, just to name a few examples.[3]

According to CompTIA's Tech Trade Snapshot 2019,[4] exports of IT products and services by the U.S. tech industry totaled an estimated $338 billion in 2018. Exports account for approximately $1 out of every $4 generated in the nation's tech industry; and directly support half of tech manufacturing jobs.

Nationally, tech exports directly supported 858,000 jobs in 2018, with exports directly supporting approximately 50 percent of U.S. tech manufacturing jobs. Many of those U.S. tech jobs are directly supported by U.S. tech exports to Kenya.

II. GENERAL PRINCIPLES

CompTIA urges that U.S. trade negotiations rise to the objectives established by Congress in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA 2015). Consistent with the TPA 2015 statute, the overall trade negotiating objectives of the United States are "to obtain more open, equitable, and reciprocal market access" and to "obtain the reduction or elimination of barriers and distortions" related to trade and investment. To that end, CompTIA recommends that the United States prioritize the following objectives.

III. MARKET ACCESS

The Kenyan market is important for ICT goods, and market access commitments will create a greater opportunity for the industry.

A. Duty Free Treatment of ICT Goods

[3] U.S. Bureau of Economic Analysis
[4] Please see https://www.comptia.org/docs/default-source/memberresources/comptia-tech-trade-snapshot-2019.pdf

Kenya is currently not a member of the World Trade Organization's Information Technology Agreement (ITA). Under the ITA, Members receive duty-free treatment for trade in information and communications technologies (ICT) products. USTR should seek a commitment from Kenya to become a signatory to ITA prior to finalizing the trade negotiations. CompTIA reiterates its support for this important policy tool to ensure free trade in ICT goods.

B. Pre-Approved Radio Frequency (RF) Device Importation:

CompTIA asks that the U.S. seek a commitment from Kenya allowing imported radio frequency (RF) devices that do not have regulatory authorization into Kenya for purposes of testing, development, and demonstration. For global companies where engineering is completed in multiple countries, it is necessary in the development process to be able to import devices that have not yet received their regulatory authorizations for local testing purposes. This will ensure that the end product will function as intended in the local conditions. CompTIA proposes the following text:

Allowance for Testing, Evaluation and Demonstration of Radiofrequency Devices:

a) The Parties recognize that as radiofrequency devices become more complex and widespread, the need for in-market testing, evaluation and demonstration becomes greater and the number of devices that may be needed to successfully accomplish such testing and evaluation becomes larger. Mindful that implementing and upholding less trade-restrictive approaches to conformity assessment and approval procedures are important goals of this Agreement, each Party shall permit imports of radiofrequency devices into its territory for testing and evaluation prior to their receipt of regulatory approval ("pre-approval device"). In such cases, each Party shall:

i. Allow multiple units of preapproval devices to be imported and used in the territory of that Party for testing and evaluation to determine the device's compliance with applicable technical regulations, to obtain necessary regulatory approvals, and to determine the device's suitability for marketing; and

ii. Allow multiple units of preapproval devices to be imported and used in the territory of that Party to permit further product development including software or aps, compatibility for interconnected devices, and to permit further development and testing for accessories; and

iii. Permit imports and use of preapproval devices in sufficient quantities to make such testing and evaluation activities commercially and technically practicable while not generating harmful interference to already authorized devices or services; and

iv. Allow multiple units of preapproval devices in sufficient quantities to permit demonstration in the territory to promote further product and companion device development.

b) *Preapproval devices subject to this section shall not be offered for sale or lease*
c) *In imposing or maintaining any quantitative limitations on imports of preapproval devices for testing and evaluation, each Party shall:*
   i. *Seek to authorize the largest volume of imports possible while not undermining the effectiveness and fundamental purpose of any such limitations;*
   ii. *Prevent differences in the quantitative limitations adopted by any Party from becoming a barrier to trade between the Parties by adopting uniform levels among the Parties of any such quantitative limitations; and*
   iii. *Ensure that provisions and exceptions thereto are neutral in application and administered in a fair and equitable manner.*

C. Treatment of Goods for Repair or Alteration

CompTIA members support the U.S.-Mexico-Canada Agreement (USMCA) provision concerning the ability to export and import for repair and urges USTR to seek this provision with Kenya. Such provisions are crucial for the ICT industry to efficiently repair or alter products as needed without incurring additional costs.

CompTIA also supports the USMCA provision related to remanufactured goods and asks USTR to also seek this provision with Kenya. The technology industry seeks to prolong the useful life of its products through repair, refurbishment, remanufacturing and reuse. It is important that the industry be able to continue to trade in remanufactured products in order to pursue economic and environmental goals.

IV. CUSTOMS AND TRADE FACILITATION

CompTIA has a Customs Committee which consists of 240 customs compliance and policy professionals from our member companies. Given Kenya is an important market for ICT products, modernizations to customs procedures at each border should be trade facilitative, transparent, simplified, and predictable. Such provisions will support companies that frequently import and export ICT products and parts. CompTIA emphasizes that the provisions concerning customs procedures should require each Party to utilize the current version of the Harmonized Tariff Schedule (HTS) nomenclature for classification purposes.

A. Merchandise Processing Fee

CompTIA urges USTR to table a provision eliminating originating merchandise from the application of the merchandise processing fee (MPF) and all other border or customs processing fees.

B. Risk Assessments

CompTIA urges USTR to adopt a risk assessment methodology for trusted traders to demonstrate to government agencies their risk level. To this end, we would encourage that the agreement establishes a U.S.-Kenya Risk Assessments Committee to bring together the many relevant government agencies that are involved with imports and exports to create standards around audits.

V. RULES OF ORIGIN

CompTIA members support rules of origin that remain consistent. In general, CompTIA members support the TPA 2015 statute that recommends the Administration should seek rules that: avoid value-content thresholds, avoid process-based rules, and confer origin based on classification changes. USMCA establishes a Committee on Rules of Origin and Origin Procedures. This appears to be an opportunity to consider any matters that arise regarding rules of origin. We recommend this should also be considered in a U.S.-Kenya trade agreement.

VI. GOVERNMENT PROCUREMENT

CompTIA urges USTR to secure commitments from Kenya to open a significant portion of its government procurement on a non-discriminatory basis to U.S. In 2015, the Kenyan government issued "Buy Kenyan Build Kenya" mandating that at least 40 percent of government procurement supplies come from local industries. CompTIA members urge USTR to prioritize increased market access and transparency in government procurement negotiations because in many countries around the world, the countries themselves are the largest purchaser of U.S. technologies.

VII. DIGITAL TRADE

CompTIA urges USTR to make digital trade a priority the negotiations with Kenya, drawing from provisions in the USMCA. The importance of digital trade to the continued growth of the U.S. and global economy cannot be understated. Kenya is a priority market for U.S. technology companies and CompTIA urges USTR to seek commitments on a key number of provisions of importance to the digital economy.

A. Data Flows and Location Requirements

CompTIA urge both governments to refrain from mandating local data storage or imposing localization requirements on data infrastructure and facilities which impede cross-border data flows. CompTIA members support the USMCA provisions in the Digital Trade Chapter that address these two high priority objectives: Article 19.11 which includes the commitment that the Parties shall not prohibit or restrict the cross-border transfer of information by electronic means, including personal information, and Article 19.12 which introduces a commitment that no Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory. Furthermore, it is pertinent that the U.S.-Kenya Agreement create provisions aimed at cultivating innovated approaches to testing new technologies using data (e.g. sandboxes). CompTIA urges the agreement to provide guidance and a framework that fosters a new generation of technology instead of impeding on technological growth and development.

B. Privacy

The U.S.-Kenya negotiations offer an important opportunity to recognize both countries' commitments to protecting privacy. CompTIA members support the USMCA provision in the Digital Trade Chapter Article 19.8 that address personal information protection. Similar to commitments made in USMCA, both parties should enshrine a commitment to recognizing that personal data can be transferred between the two countries without any additional transfer mechanisms. Negotiations should take into consideration existing U.S. privacy protections, and the current Privacy Shield framework in the development of this provision. The Parties should also work together to expand the interoperability of privacy frameworks across the globe, as laid out in the USMCA.

Likewise, CompTIA urges USTR to ensure protections for U.S. companies with regards to Kenya's 2019 Data Protection Act during negotiations. In the Part IV of S48, it mentions the transfer of personal data outside of Kenya and requires that: *"(b) the data controller or data processor has given proof to the Data Commissioner of the appropriate safeguards with respect to the security and protection of personal data, and the appropriate safeguards including jurisdictions with commensurate data protection laws…"* The Act also requires the data subject to consent for the cross-border transfer of the broadly defined "sensitive personal data". [5] These conditions act as non-tariff barriers for U.S. ICT companies and CompTIA strongly urges USTR to prioritize mitigating these issues in their trade negotiations.

C. Permanent Moratorium on E-Commerce Duties

CompTIA also urges USTR to seek agreement from Kenya on the permanent prohibition of customs duties on digital products, taxes, and other barriers to digital products and services as well as ensure non-discriminatory treatment of digital products transmitted electronically. An important factor in the explosive growth of digital trade has been the WTO moratorium on customs duties on electronic transmissions that creates a commitment by WTO Members to not impose customs duties or taxes on cross-border electronic transactions. However, this moratorium must be renewed by WTO Members every two years. Any trade agreement between

[5] The Data Protection Act (2019): http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2019/TheDataProtectionAct__No24of2019.pdf

the United States and Kenya should permanently formalize this commitment to ensure that duties do not impede the free flow of software, ebooks, videos, and other digital products between the countries.

D. Digital Tax Issues

CompTIA asks that the U.S. secure commitments from Kenya to not draft and implement digital services taxes (DST). DSTs fail to meet the basic international trade principals of non-discrimination and national treatment as they continue to tax companies on worldwide revenue instead of income. DSTs violate well-established international tax norms, creates uncertainty for U.S. companies, and deliberately discriminates against the U.S. tech sector which has invested billions of dollars into Kenya's economy, fostering mutually beneficial economic growth for both countries. It is imperative that Kenya commits to not create DSTs and to adhere to the multilateral tax standard is reached at the Organisation for Economic Co-operation and Development (OECD). This is an opportunity for Kenya and the U.S. to lead together at the OECD towards a global solution.

E. Non-IP Intermediary Liability Protections

A U.S.-Kenya FTA should include clear non-IP intermediary liability protections that are consistent with U.S. law, and Article 19.17 of USMCA, to ensure that no party adopts measures that would impose liability as a publisher, creator, or speaker of information on third party distributors or intermediaries of that information.

F. E-Signatures

The ability for CompTIA members to rely on electronic signatures and electronic authentication methods is a backbone of the international business landscape. CompTIA supports the USMCA provision on e-signatures and encourages its inclusion in all U.S. trade agreements.

G. Risk-Based Approaches to Cybersecurity

CompTIA also supports language such as that included in the USMCA recognizing the impact of cybersecurity on confidence in digital markets. A provision that encourages risk-based cybersecurity approaches, rather than prescriptive regulation, would further support the digital economy. In addition, a U.S.-Kenya trade agreement should encourage Parties to secure bilateral agreement under the U.S. CLOUD Act for law enforcement requests for data. Additionally, both governments should collaborate on IoT security through agreements on or structure to develop baseline cybersecurity standards for IoT devices. The U.S.-Kenya Agreement could serve as the gold standard on international IoT security principles as security is increasingly becoming more vital to ensure economic stability and growth. CompTIA would also like to see provisions in the agreement allowing both governments to create structures for collaborating on emerging security

R&D. The U.S. and Kenya have a unique opportunity to write the rules of the road by including a framework within a free trade agreement to collaborate on emerging security technologies.

H. Coordinated Vulnerability Disclosure

Additionally, CompTIA urges USTR to expand upon the USMCA cybersecurity provision to include a commitment from Kenya to coordinate vulnerability disclosure between relevant stakeholders, adhere to, and encourage the voluntary adoption of relevant, widely-adopted international standards and industry best practices and processes for coordinated vulnerability disclosure. Accordingly, such processes may require mitigation of vulnerabilities as quickly as possible, considering the severity of the vulnerability and the completeness and effectiveness of the proposed mitigation, but shall not require specific timelines for vulnerability mitigation or disclosure to specific entities. This should include establishing a formal process for government bodies to disclose cybersecurity vulnerabilities which were not previously disclosed to the public and are unknown to the affected parties, if the government bodies determine it is appropriate to do so.

I. Artificial Intelligence Cooperation

CompTIA urges the U.S. and Kenya to agree to work together to promote artificial intelligence (AI) and remove barriers to trade and innovation on emerging technologies like AI. CompTIA is encouraged by the Administration's continued leadership in prioritizing AI through the American Artificial Intelligence Initiative as well as signing onto the OECD's Global AI Principles. The U.S. and Kenya should reaffirm the OECD principles to show global leadership on AI and work together towards global, industry-driven, voluntary consensus standards. By way of example, the U.S. Office of Management and Budget's (OMB) Draft Memorandum on "Guidance for Regulation of Artificial Intelligence Applications" (Draft Memo) -- which creates a framework guiding U.S. agency engagement on applications for machine learning (ML) and AI technologies -- does not provide a one-size-fits-all approach to AI, rather, the Draft Memo creates a sector or application specific, risk-based set of guidelines which could be adopted in a free trade agreement with Kenya.

VIII. TELECOMMUNICATIONS

CompTIA members recognizing the importance of the Kenyan market to telecommunications, and a trade agreement with Kenya should aim to increase market access and trade for U.S. providers, much like the USMCA telecommunications chapter.

Kenya's Communication Authority, Kenya's telecommunications regulator, requires that licensed providers maintain 20 percent ownership and control for four years from the issuance of a license from Kenyan persons. Furthermore, U.S. telecommunication providers have experienced an unpredictable regulatory environment due to the drawn out delays in procuring a license. CompTIA members would like to see these issues addressed in a free trade agreement with Kenya.[6]

Furthermore, foreign governments are displaying increasing interest in subjecting U.S. online services and applications to heavy-handed regulations designed for telecommunications or broadcast companies. These measures —often called "Over-the-Top" or "OTT" regulations in foreign markets —take different forms globally. However, it is increasingly common for regulators to seek to require online services to register as telecommunications providers, contribute to universal service funds, comply with technically infeasible emergency calling requirements, guarantee a particular quality of service, comply with local presence or data retention requirements, or take other steps that are not economically reasonable or technically feasible for non-telecom and non-broadcast services to implement. We welcome these negotiations as an opportunity to address how such regulations are resulting in market access barriers for U.S. services within Kenya and taking steps to eliminate them.

Finally, U.S.-Kenya trade negotiations can also take a step forward in finding common regulatory approaches by establishing a commitment to refrain from applying consumer protection regulations to services offered to enterprises, whose terms are often different and set through negotiated contractual agreements.

IX. INTELLECTUAL PROPERTY

The intellectual property (IP) chapter of the USMCA reflects strong international norms, and we recommend the Administration draw from the USMCA to create provisions that ensure strong support for innovation with regard to the following sections of the USMCA IP chapter that impact the tech industry.

A. Trade Secrets Enforcement

CompTIA members urge that the U.S.-Kenya negotiations build on the USMCA provisions that establish criminal procedures and penalties for the willful misappropriation or disclosure of a trade secret.

B. Copyright Limitations, Exceptions, and Intermediary Liability Protections

CompTIA supports the copyright intermediary liability protections found in USMCA Article 20.89 and urges USTR to include such a provision that is consistent with evolving U.S. law while considering an adaptive and meaningful approach for Kenya based on their legal system. In addition, CompTIA supports strong trade commitments to innovation-oriented

[6] 2020 National Trade Estimate: https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf

copyright frameworks, including provisions such as fair use and allowances such as those needed for text and data mining and the development of artificial intelligence technologies.

While Kenya's Statute Law Act of 2018, includes provisions that improves copyright and trademark legislation, Kenya still has widespread counterfeit and pirated ICT goods and services. [7] USTR should seek commitments from Kenya to eradicate counterfeit and pirated ICT goods and services from its marketplace when entering a trade negotiation.

C. Committee on Intellectual Property Rights

The USMCA creates a Committee on Intellectual Property Rights. This appears to be an opportunity to address matters not previously considered part of the IP chapter implementation. CompTIA recommends a similar committee in a U.S.-Kenya trade agreement.

D. Intellectual Property

CompTIA members support the USMCA provision on the protection against involuntary disclosure of source code for software and algorithms. CompTIA would urge USTR to also include protections for encryption keys.

X. INVESTMENT

CompTIA members also are supportive of the agreement to include "white list" investments from either the U.S. or Kenya into the other country by minimizing investment reviews. Such reviews create unnecessary burdens to businesses by requiring companies go through red tape in order to invest. By minimizing the investment review process, it allows a more streamlined approach for companies meeting "white list" investment criteria. The U.S. has begun this process of making changes along these lines, but given the strong national security and defense ties, it is possible to go further to promote cross border investment with one of the U.S.'s defense allies.

Sincerely,

Stefanie Holland
Vice President, Federal and Global Policy
Computing Technology Industry Association (CompTIA)

Maggie Henkin
Manager, Global Trade & Market Access
Computing Technology Industry Association (CompTIA)

[7] 2020 National Trade Estimate: https://ustr.gov/sites/default/files/2020_National_Trade_Estimate_Report.pdf

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