June 10, 2020

Chairman David Johanson
U.S. International Trade Commission
500 E St. SW
Washington DC 20436

RE: Investigation Nos. TA-131-046 and TPA-105-007, U.S.-Kenya Trade Agreement: Advice on the Probable Economic Effect of Providing Duty-free Treatment for Currently Dutiable Imports

Dear Chairman Johanson:

The American Chemistry Council appreciates the opportunity to provide comments on the probable economic effect of providing duty-free treatment for currently dutiable imports. Our comments also outline our overall priorities and recommendations for U.S. efforts to negotiate a free trade agreement with Kenya.

ACC represents a diverse set of companies engaged in the business of chemistry. An innovative, $553 billion enterprise, we work to solve some of the biggest challenges facing our nation and our world. Our mission is to deliver value to our members through advocacy, using best-in-class member engagement, political advocacy, communications and scientific research. We are committed to fostering progress in our economy, environment and society.

ACC sees significant, long-term value in negotiating a trade agreement with Kenya, a member of the World Trade Organization (WTO) and a leading country in sub-Saharan Africa on trade and investment issues. Kenya borders five countries (Ethiopia, Somalia, South Sudan, Tanzania, and Uganda) and is a founding member of the East African Community[1]. Kenya and twenty-seven other countries in Africa are party to the African Continental Free Trade Area (AcFTA), which entered into force on 30 May 2019.

A high-standard, comprehensive, market-opening trade agreement between the United States and Kenya will be an important model for EAC members and the CFTA parties to consider as they negotiate new provisions and add new parties. With this foothold, the United States can play an influential role in shaping trade policy across Africa, demonstrating that rules-based trade can spur economic growth and development. The United States can also use this agreement to build a platform for U.S. chemical manufacturers to expand exports to enter new growth markets throughout sub-Saharan Africa.

Importantly, for the U.S.-Kenya trade agreement to succeed and benefit both parties and their citizens and businesses, the United States should accompany the agreement with a whole-of-

[1] Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda

government capacity building approach. This approach would leverage existing Administration aid programs, including the Standards Alliance, the Millennium Challenge Corporation, the U.S. International Development Finance Corporation, the U.S. Agency for International Development, and the U.S. Trade Development Agency. It should focus on building Kenya's capacity to implement and enforce its trade agreement commitments, involve industry wherever possible, work toward commercially meaningful outcomes, and lay the groundwork for long-term economic growth and market expansion in both Kenya and in East Africa. A whole-of-government approach will prepare the U.S. government for supporting future trade agreement negotiations with African trading partners with robust capacity building and technical assistance. Additionally, this approach will build expertise, training and meaningful transparency and consultation practices within Kenya. In turn, these measures will ensure strong commercial outcomes from an agreement and ongoing consultation to resolve challenges and expand on opportunities.

Below, ACC offers our recommendations on objectives for U.S. negotiations with Kenya.

1. **Tariff Elimination and Market Access:** Kenya's average most favored nation (MFN) tariff rate for chemicals is 3.6 percent according to the World Trade Organization (WTO) Tariff Profiles 2019; its average WTO bound rate is 38.4 percent. However, Kenya has bound only 2.4 percent of its chemical tariffs in its WTO goods market access schedule, which means that for 97.6 of its chemical tariffs, it could raise its tariffs to whatever rates are legally allowed under Kenya law. Kenya also maintains MFN tariff peaks as high as 17.5 percent for key chemicals of U.S. export interest.

   In this light, ACC seeks full tariff elimination between the United States and Kenya –without any transition periods or staging of tariff reductions – in order to provide new market access for U.S.-made exports of chemicals and plastics (HTS Chapters 28-39). Full, binding, and enforceable tariff elimination between the United States and Kenya would provide greater certainty for U.S. chemical manufacturers exporting to Kenya, investing there, and building supply chains in the region.

   The Administration should also secure a commitment by Kenya to participate in the WTO Chemical Tariff Harmonization Agreement, whereby Kenya would bind all its tariffs at certain levels in its WTO goods market access schedule. This would provide additional certainty for U.S.-Kenya chemicals trade.

   Chemicals comprise about 17 percent of all goods exported to Kenya. More than 80 percent of chemicals exported to Kenya are resins: polyvinyl carbonate and high density polyethylene (HDPE). While U.S.-Kenya bilateral trade in chemicals and plastics today is relatively small, it has grown rapidly in recent years and presents opportunities for continued expansion. Total chemicals trade between the U.S. and Kenya was $77 million in 2019.

   We anticipate that Kenya could serve in the future as a hub for supplying U.S.-made chemicals and plastics to other markets in Africa through this trade agreement. Kenya is growing its ground transportation network of railways and roads, has a port that meets international standards in Mombasa on the Indian Ocean, and boasts three international airports. Kenya's increasing logistics capacity can support an expansion of chemicals trade not just between the United States and Kenya, but throughout East Africa and the Continent.

As chemicals touch on 96 percent of all manufacturing, U.S. exports can play a critical role in supporting the development of Kenya's manufacturing sector and regional supply chains in Africa. Duty-free trade between the U.S. and Kenya will reduce costs for chemical manufacturers and promote innovation, job creation, and competitiveness -- not only between both parties, but also more broadly in the EAC and throughout the CFTA. Encouraging more manufacturing, with U.S. inputs, will build a stronger domestic economy for the Kenyan tax base, job creation, and sourcing competitive products for growing middle class consumers.

We also recommend that a U.S.-Kenya trade agreement allow companies to engage in duty drawback, which emphasizes that imports, especially those that are necessary inputs to further domestic manufacturing, are essential to U.S. export competitiveness. We also recommend that Kenya provide duty-free treatment to U.S. exports of chemicals and plastics that are transshipped through non-U.S. ports but have not undergone substantial transformation.

Furthermore, ACC urges the United States and Kenya to:

- Prohibit imposition of domestic limits on production or consumption of chemicals and plastic and restrictions on cross-boundary trade of materials and feedstocks;
- Enable trade in waste for the purposes of sound management and recycling consistent with relevant international commitments; and
- Promote valuation of waste including plastics as potential recycled feedstock material to support further innovation.

2. **Regulatory Cooperation:** In today's trade environment, non-tariff barriers are often the bigger impediment to market access relative to tariffs. For the chemical industry, regulatory divergences can represent a substantial barrier to market access and a barrier to growth, job creation, and commercializing US-driven innovation. The U.S.-Kenya trade agreement negotiations have the potential to set a benchmark in Africa to promote a regulatory framework based on a science- and risk-based approach, which takes into account both the severity of hazard and the extent of exposure potential to chemicals.

   At a time when the use of hazard-based approaches is rising elsewhere, the U.S. and Kenya have an opportunity to play a leadership role in Africa. They can do this by demonstrating the value and practicality of chemical regulatory approaches that ensure a high level of protection of human health and the environment -- while ensuring both competitiveness and innovation.

   We recommend that a trade agreement between the U.S. and Kenya contain provisions on regulatory cooperation to guide Kenya's development of a chemical management regime. The regulatory cooperation provisions on chemical substances in the Sectoral Annexes Chapter can inform negotiations. These provisions should outline a step-by-step approach, increasing complexity over time. Kenya could build on its Draft Environment Management and Coordination (Toxic and Hazardous Chemicals and Materials Management) Regulations, 2019, by establishing a chemical inventory (i.e., an inventory of chemicals in commerce in Kenya) and a trade- and investment-friendly registration scheme. We also recommend that the Administration provide significant technical assistance and capacity building for Kenya to help it develop and implement this regime, with a view to helping Kenya reach the high standard of the USMCA regulatory cooperation provisions.

In the regulatory cooperation provisions for chemical substances Kenya should take a building block approach and work with U.S. agencies to build capacity in key areas such as:

Globally Harmonized System for Chemical Classification and Labeling (GHS)

- Promoting the domestic implementation of GHS – as referenced in the draft Environment Management and Coordination (Toxic and Hazardous Chemicals and Materials Management) Regulations, 2019.
- Fostering initiatives to raise awareness and uptake of GHS in Kenya and with regional trading partners.
- Encouraging regulatory authorities to enforce the GHS among companies.
- Working towards global harmonization of definitions and requirements, other than those defined in the GHS.

Inventory/registration scheme

- Leveraging existing available commercial inventories, such those in the United States and Canada.
- Focusing the inventory/registration scheme on discrete chemical substances, i.e. no mixtures.
- Distinguishing between existing and new substances under the scheme.
- Including existing substances in its national chemical inventory through a simple nomination process based on the submission of a basic set of information about chemicals in commerce in Kenya.
- Basing criteria for the notification/registration of new substances on a tiered risk based approach, avoiding hazard- or volume- (only) based criteria).

3. **Good Regulatory Practices (GRP), Technical Barriers to Trade (TBT), and Standards:** ACC recommends that a U.S.-Kenya trade agreement reflect the USMCA GRP and TBT chapters. We also encourage the United States to provide robust technical assistance and capacity building (e.g., through the Standards Alliance) to support Kenya's implementation of its GRP and TBT commitments, including with respect to conducting public consultations (e.g., TBT notifications, providing at least 60 days for public comments, and taking comments from interested parties into account); coordinating regulatory work internally; undertaking regulatory impact assessments; and providing sufficient time for companies to comply with final regulations before adoption and entry into force.

   The U.S. and Kenya should work to build streamlined, open and transparent standard-setting procedures that incorporate industry consultation and engagement. Standards should be performance-based, flexible, and supportive of the most sustainable, resource-efficient technology. Both governments should promote international voluntary consensus standards as the basis for technical regulations, and prevent the use of standards as a means of discrimination.

4. **<u>Rules of Origin for Chemical Substances</u>**: Chemical manufacturers will benefit from duty-free trade only if the rules of origin for chemical substances are flexible, simple, and transparent. In this regard, we propose a menu-based approach that has the fewest number of exceptions as possible. We recommend that a U.S.-Kenya trade agreement reflect the USMCA rules of origin under HTS Chapters 28-39 and harmonize with existing U.S. trade agreements (e.g., Australia, South Korea, and Chile). In particular, we recommend that the agreement 1) ensures that the chemical reaction rule is available to traders for conferring origin; and 2) avoids mandatory regional value content requirements.

5. **<u>Digital Trade</u>**: We recommend that the United States in a trade agreement with Kenya replicate the digital trade outcomes of the USMCA and strengthen them where possible, which will enhance U.S. global competitiveness. The United States is the world's digital trade leader, with companies in all sectors transforming their operations through digital technologies. Digital trade based on the free flow of data across borders is critical to chemical manufacturers, which generate data for regulatory compliance, technical innovation, employee development and workplace safety, and global customer management. State-of-the-art provisions on promoting data privacy, enabling open cross-border data flows, prohibiting data localization requirements, particularly as a requirement for investment, and strengthening cybersecurity while respecting intellectual property rights will be critical. Data flows are essential for establishing and maintaining global value chains. They are, therefore, essential for strengthening manufacturing in both the United States and in our trading partners. They are also vital for the downstream industries that the business of chemistry supports (e.g., agriculture and building and construction).

6. **<u>Trade Facilitation</u>**: ACC recommends that the United States reflect USMCA provisions on customs and trade facilitation in its agreement with Kenya. This includes promoting digital trade, allowing electronic filing and digital signature for filing and auditing requirements; targeting infrastructure projects to remove bottlenecks on the movement of exports; modernizing transport security requirements; and harmonizing clearance procedures.

   We recommend that the Administration provide enhanced capacity building to help Kenya implement as many commitments of the WTO Trade Facilitation Agreement (TFA) as possible. Given Kenya’s TFA commitments, there is significant opportunity to promote access to global value chains by streamlining customs operations, leveraging technology solutions to support greater efficiency, and aligning infrastructure upgrade opportunities with critical commercial operations.

   A U.S.-Kenya trade agreement could also align Kenya’s domestic infrastructure projects with its trade priorities, especially removing bottlenecks to access and competition, such as upgrading rail, port, and transport infrastructure. Furthermore, the agreement could help Kenya modernize its transport security requirements to allow for same drivers or single transport across the border.

7. **<u>Innovation</u>**: The United States and Kenya should capitalize on opportunities for innovation and deployment of sustainable technologies. For example, they could agree on joint steps to incentive further research and development; streamline and ensure efficient regulation to commercialize leading edge technologies and products; and establish policy that rewards constructive practices and investments. Both governments should work together to identify and promote an enabling agenda that both encourages further investment and streamlines access to third country markets worldwide in support of deployment and implementation of these products and technologies. Both governments should avoid restrictive or punitive policy that discourages innovation.

   An enabling policy agenda should:
   - Identify public policies and governmental programs that can spur innovation with respect to sustainability;
   - Build new partnerships between government-innovation programs and investors around challenges in building sustainable products and processes; and
   - Engage policymakers on regulatory and policy obstacles to innovation and adoption of new technologies to maximize societal impact.

8. **<u>Addressing Sources of Marine Litter</u>**: The United States is a world leader in addressing marine litter through market-based and innovative means. We recommend that the U.S.-Kenya trade agreement reflect the marine litter language in the USMCA Environment Chapter.

   There is a global need to support infrastructure development to collect, sort, recycle, and process used plastics, particularly in developing countries such as Kenya. Such infrastructure will create opportunities for trade and investment and help keep used plastics out of the environment, thereby reducing marine litter. Defining circular economy solutions that recognize the value of used plastics and other materials helps incentivize collection of plastics currently found in the environment.

   The U.S. and Kenya can play a strong role together in promoting innovative circular economy solutions in East Africa that enable universal access to better waste management capacity and for used plastics in all countries. They can also commit to promoting global and regional cooperation in facilitating trade in used plastics and prohibit restrictions on trade in such products for the purpose of being reused or recycled.

   As many countries lack adequate capacity to recycle used plastics, they and ship plastics to other areas for processing. Trade in used plastic enables efficient processing of those materials, while creating valuable new materials and business opportunities. Lastly, a U.S.-Kenya Trade Agreement should promote innovation by ensuring efficient regulatory treatment, including application and licensing process for innovative products made from recycled plastic.

9. **<u>Addressing Trade-Distorting Practices</u>**: Lastly, we believe that the United States must work with like-minded governments, such as Kenya, to address trade-distorting practices by

other countries. In specific, a U.S.-Kenya trade agreement should contain new rules on protecting and enforcing trade secrets; eliminating forced technology transfer; ensuring the free flow of data across borders; reducing barriers to foreign direct investment; avoiding discriminatory product labeling and certification requirements; and championing free markets over state-led capitalism, including by addressing state-owned enterprises and illegal subsidization of industries.

10. **Dispute Settlement**: The U.S. must maintain its leadership in the dispute settlement area. We recommend that the United States seek in its trade agreement with Kenya binding and enforceable state-to-state dispute settlement. We urge the United States to include high standard investor protections and provisions on investor-state dispute settlement that cover all sectors without limitations on the claims that investors can make on specific investment protections. There should also not be any requirements of exhaustion of remedies in Kenya's domestic courts. Outcomes that fall short of this standard will give U.S. trade partners ample reason to weaken the rule of law, due process, and transparency in their own domestic systems and in their trade agreements. High standard outcomes will inspire Kenya to replicate these provisions in its own new trade agreements, such as the CFTA.

11. **Duration of the Agreement**: U.S. trade agreements should stand the test of time in order to provide maximum predictability and certainty to investors and traders. We support making improvements to the agreement as international trade evolves, but recommend avoiding the inclusion of timeframes for an early termination or sunset of the agreement.

Thank you again for the opportunity to provide these comments. We look forward to working with the Commission on its investigation and are happy to provide more information to staff as necessary.

Sincerely,

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Director for International Trade