



Cross-Border Data Policies under the US-Kenya Free Trade Agreement

April 28, 2020

The Global Data Alliance¹ welcomes the opportunity to provide these comments pursuant to the request of the Trade Policy Staff Committee for written submissions regarding trade negotiations between the United States and the Republic of Kenya (Kenya). The Alliance urges USTR to negotiate a Free Trade Agreement (FTA) with Kenya that includes, among other digital trade rules, robust provisions that require countries to promote responsible movement of data across borders and refrain from implementing rules mandating broad data or infrastructure localization requirements.

The Global Data Alliance is a cross-industry coalition of companies, headquartered in different regions of the world, that are committed to high standards of data privacy and security. Alliance companies rely on the ability to transfer data responsibly around the world to create jobs and make local industries more competitive. Cross-border data transfers power innovation and growth across the globe and all sectors of the economy — from manufacturing and farming to local start-ups and service providers. Data transfers enable the digital tools and insights that are critical to enabling entrepreneurs and companies of all sizes to create jobs, boost efficiency, drive quality, and improve output.

The US-Kenya FTA presents an important opportunity for the United States and Kenya to enshrine their shared commitment to innovation and open digital trade in an ambitious, high-standard trade agreement that meets the standards of previous free trade agreements, such as the United States-Mexico-Canada Agreement (USMCA). Both the United States and Kenya should capitalize on this historic opportunity to build a strong economic relationship that leverages the benefits provided by the responsible free flow of data between both countries.

As part of the agreement USTR is seeking in trade negotiations with Kenya, the Global Data Alliance urges USTR to include digital trade provisions that:

- Obligate the Parties to permit the cross-border transfer of data while protecting personal information; and
- Prohibit data localization requirements.

¹ The Global Data Alliance is a cross-industry coalition of companies that are committed to high standards of data responsibility and that rely on the ability to transfer data around the world to innovate and create jobs. The Alliance supports policies that help instill trust in the digital economy while safeguarding the ability to transfer data across borders and refraining from imposing data localization requirements that restrict trade. Alliance members include BSA members and American Express, Amgen, AT&T, ITB360, Mastercard, Panasonic, United Airlines, Verizon, Visa, and WD-40 Company. BSA | The Software Alliance administers the Global Data Alliance.

Given TPA guidance² and the importance of the data economy to the future of the United States, USTR has pursued updated provisions advancing the above policy objectives in ongoing or recent trade negotiations including those under the auspices of the WTO Joint Statement Initiative digital trade talks, the US-Japan Digital Trade Agreement, and the United States-Mexico-Canada Agreement (USMCA). These efforts provide a foundation for modernizing US-Kenya commitments on policies that support data flows. We urge USTR in these negotiations to build upon the data flow and data localization provisions in USMCA and the US-Japan Digital Trade Agreement.

We outline below several key commitments for the US-Kenya negotiations.

Free Movement of Data Across Borders: The Agreement should obligate governments to refrain from imposing barriers to the cross-border transfer of data. Recognizing that a government may seek, for public policy purposes including privacy or security, to adopt or maintain measures that are not consistent with this obligation, the Agreement should stipulate that any such measures not discriminate against foreign service providers; must not constitute a disguised restriction on trade; and must be necessary to achieve the specific objective. Furthermore, if a Party treats domestic data transfers differently from cross-border data transfers, such differential treatment must not result in less favorable treatment to a foreign service provider. Finally, a dispute settlement mechanism also must be available to allow close scrutiny and enforcement of measures that derogate from the cross-border data transfer obligation.

No Localization Requirements: The Agreement should preclude governments from using data localization requirements as a market access barrier in any sector of the economy. For example, a government should not require that a data center be built inside its borders as a condition for doing business in its territory.

The Agreement should prohibit a government from requiring, as a condition of doing business, that a service provider use or locate computing facilities in its territory. Recognizing that a government may seek, for public policy purposes including privacy or security, to adopt or maintain measures that are not consistent with this obligation, the Agreement should stipulate that such measures must not discriminate against foreign service providers or constitute a disguised restriction on trade, and must be narrowly tailored to achieve the specific objective. A dispute settlement mechanism also must be available to allow close scrutiny and enforcement of measures that derogate from this obligation.

Financial Services: Rules specific to any specific sector, such as financial services, which have in past agreements been addressed in separate chapters of free trade agreements, must be substantially the same as the rules of general applicability on cross-border data flows and localization.

² Congress incorporated digital trade into the principal negotiating objectives identified in the 2015 Trade Priorities and Accountability Act. Section 102(b)(6)(C) provides that agreements should “ensure that governments refrain from implementing trade-related measures that impede digital trade in goods and services, restrict cross-border data flows, or require local storage or processing of data.” Section 102(b)(6)(D) provides that “where legitimate policy objectives require domestic regulations that affect digital trade in goods and services or cross-border data flows, to obtain commitments that any such regulations are the least restrictive on trade, nondiscriminatory and transparent, and promote an open market environment.”

This approach is consistent with the joint statement, recently issued by the United States and Singaporean governments³, through which both governments recognize the benefits of rules that ensure that financial service suppliers can transfer data across borders, and that refrain from requiring data or infrastructure localization. The US-Kenya FTA provides an important opportunity to ensure this approach will also apply to policies regulating financial data flows between the United States and Kenya.

Conclusion

The Global Data Alliance welcomes the opportunity to provide this submission to inform the Administration's development of specific negotiating objectives for the US-Kenya trade negotiations. We look forward to working with USTR and the other agencies represented on the Trade Policy Staff Committee to measures supporting data flows and prohibiting data localization key elements of the negotiations. Ensuring companies can leverage the benefits created by data flows will benefit US economy and allow Global Data Alliance members to continue supporting current jobs and creating new ones in the United States.

³United States – Singapore Joint Statement on Financial Services Data Connectivity issued on February 5, 2020. Available at <https://home.treasury.gov/news/press-releases/sm899>