

**Comments by the
National Milk Producers Federation
and the U.S. Dairy Export Council
to the Office of the United States Trade Representative
Concerning the U.S.-Kenya Strategic Trade and Investment Partnership
Docket Number: USTR-2022-0008
September 9, 2022**

The National Milk Producers Federation (NMPF) and the U.S. Dairy Export Council (USDEC) submit the following comments in response to the notice of request for public comments concerning the U.S.-Kenya Strategic Trade and Investment Partnership (USTR-2022-0008). Our organizations appreciate the opportunity to present their views on this important issue.

NMPF develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of dairy producers on Capitol Hill and with government agencies. NMPF provides a forum through which dairy farmers and their cooperatives formulate policy on national issues that affect milk production and marketing. NMPF's contribution to this policy is aimed at improving the economic interests of dairy farmers, thus assuring the nation's consumers an adequate supply of pure, wholesome, and nutritious milk and dairy products.

USDEC is a non-profit, independent membership organization representing the global trade interests of U.S. dairy farmers, dairy processors and cooperatives, dairy ingredient suppliers and export trading companies. Its mission is to enhance U.S. global competitiveness and assist the U.S. industry to increase its global dairy ingredient sales and exports of U.S. dairy products. USDEC and its 100-plus member companies are supported by staff in the United States and overseas in Mexico, South America, Asia, Middle East and Europe.

Summary

NMPF and USDEC believe that pursuing a free trade agreement with Kenya would offer the stronger pathway to deepening collaboration between our countries and to removing the sizable impediments to American-made products that exist in Kenya.

We recognize that the Administration has chosen not to seek an FTA with Kenya at this time, however. Given that, we support the pursuit of a Strategic Trade and Investment Partnership with Kenya in light of the opportunity it offers to establish a useful precedent for trade facilitation and elimination of nontariff barriers in the region. Kenya presents a largely untapped market opportunity for American dairy producers and manufacturers, with a developing middle-income economy and a population growth

rate nearly twice the global average.¹ Outlined in Annex 1, Kenya imported only \$101 million of dairy products from the entire world in 2021. This represents an extremely low level of openness to trade.

Market access restrictions for U.S. dairy product exports into Kenya center upon prohibitively high tariff rates and onerous import documentation requirements for importers. The Kenyan government maintains these market impediments to protect its domestic dairy industry, which it deems “sensitive.”² We urge USTR to pursue an agreement that addresses dairy trade impediments to the market by:

- Seeking the reduction of WTO Most-Favored Nation (MFN) duties on dairy products,
- Removing current nontariff barriers to U.S. dairy exports in this market, and
- Instituting concrete measures to guard against future unjustified restrictions on U.S. export opportunities including by establishing robust market access protections for the use of common food names.

Kenya Dairy Market Access

U.S. access to the Kenyan dairy market is severely restricted, due in key part to high MFN rates and burdensome import documentation requirements.

Tariffs:

The East African Community (EAC) free trade area and customs union, of which Kenya is a member, classifies all dairy product imports as “sensitive items” and subsequently applies *ad valorem* duties no less than 25 percent on imports of those goods. For dairy products in particular, Kenya maintains high tariff rates of up to 60 percent on the majority of dairy HTS lines. In comparison, Kenya’s average MFN tariff rate is 13.5 percent across all imports. USTR should work to lower these sizable barriers to U.S. exporters’ ability to access the Kenyan dairy market via reduction of Kenya’s MFN tariff rates. Pursuit of targeted MFN tariff reductions is a tool this Administration has embraced in other contexts, and we urge its inclusion here as well.

Regulatory Impediments to Trade:

In addition to high tariff rates, Kenya further restricts access to its dairy market via the maintenance of complex and non-transparent certification requirements for dairy goods, including the following barriers to trade:

- Kenyan dairy importers are required to submit a standardized sanitary certificate and obtain a “Letter of No Objection to Import” permit from the Kenyan Department of Veterinary Services (DVS).³

¹ <https://www.fas.usda.gov/data/strengthening-us-kenya-trade-relationship-grow-us-agricultural-exports-east-africa>

² https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf

³ https://apps.fas.usda.gov/newgainapi/api/Report/DownloadReportByFileName?fileName=Food%20and%20Agricultural%20Import%20Regulations%20and%20Standards%20Country%20Report_Nairobi_Kenya_KE2022-0007.pdf

- Letter of No Objection to Import Permits are reviewed on a case-by-case basis. As part of that process, the DVS requires importers to submit a “Letter of Application to Import” and specify the market need for the product. Applications for milk and dairy products must satisfy the requirement that the processing facility be approved by the “highest veterinary authorities of the country of origin.” Once an application is submitted, importers may only begin receiving product if the DVS issues a no-objection letter. Although the Kenyan government claims applications to import are only rejected over sanitary concerns, importers have reported that the DVS has informally cited local availability of certain dairy products as grounds to reject an import application. Our organizations view the import application as an unnecessary barrier to trade and encourage broad recognition of all dairy facilities already approved for operation in the United States.
 - With respect to Kenya’s sanitary certificate, we recommend USTR work to secure agreement on the use of the standard AMS certificate for U.S. products as this provides all the reasonable assurances necessary.
- Further impeding ease of access for U.S. products into Kenya is a required Certificate of Conformity from a Kenya Bureau of Standards appointed “pre-export verification of conformity” partner and the obligation to obtain an Import Standards Mark (ISM) for certain sensitive imports. Goods subject to this requirement include dairy products and related food preparations of HTS 0401-0406, infant formula (HTS 1901), ice cream (HTS 2105), and dairy-based beverages (HTS 2202.90). Imports entering Kenya without a Certificate of Conformity are subject to a destination inspection penalty fee of 15% of the customs value and only allowed entry into the market after completion of tests.⁴ We recommend USTR seek removal of this requirement; it appears to be yet another regulatory tool used to impede access for sensitive products rather than a food safety control measure.
 - Kenyan food imports are required to have a minimum of 75 percent shelf life remaining on the label.³ Given the highly perishable nature of some dairy products and long U.S. lead times for shipments, the regulation serves as a *de facto* prohibition of certain dairy product imports. Moreover, it this shelf-life requirement is notably higher than is typical and certainly exceeds what is needed from a food safety perspective. We urge USTR to negotiate shelf-life standards more in keeping with standard practices.

Kenya’s high tariff rates and excessive import documentation processes, as well as other regulatory burdens, greatly discourage U.S. dairy exports from entering the Kenyan market. These market restrictions should be resolved during negotiations.

⁴ https://www.kebs.org/images/pdf/new/IMPORT_STANDARDIZATION_MARK_GUIDELINES.pdf

Safeguards for Commonly Used Food Names

NMPF and USDEC encourage USTR to incorporate and build upon the advances made in the USMCA with respect to commonly used food names and geographical indications (GIs). These proactive measures are aimed to slow the European Union's predatory GI policies that erect *de facto* prohibitions on the import of many non-EU products into third-party countries. U.S. dairy producers and manufacturers seeking to export product to Kenya should have assurances that their exports will not be blocked and that the full value of U.S. market access rights will not be undermined due to restrictions on terms widely used by major cheese producers around the world, including in the United States. Barriers to the use of terms such as "parmesan," "asiago," "feta," "romano," and "gorgonzola" constitute technical barriers to trade and should not be tolerated.

Important provisions enshrined in the USMCA that we urge USTR to incorporate and build further upon in negotiations with Kenya include:

- Explicit assurances of free use for common names through a non-exhaustive list of commonly used terms. On this point we note the ground-breaking nature of this USMCA provision yet urge an approach that yields even stronger language and a broader list of common food names during negotiations with Kenya. This is the most important element and is vital to preserving a level market access playing field in the future.
- The establishment of a robust due process system that provides parties opposing a GI application with greater tools to object to a term's registration and transparency into the scope of those determinations. Such a system must ensure that GIs considered through all avenues – including international agreements – are subject to the same review and rigor; this is something that in practice many countries are not doing so FTA GIs circumvent countries' due process procedures either directly or in practice by allowing trade negotiators to determine which terms to register or not.
- Mandated government to government discussions should the prospect of GI restrictions arise in trade negotiations with a third-party country and a directive to use those discussions to seek a "mutually agreeable solution" that ensures that the free use of common food names is not encroached upon.

Conclusion

A successful U.S.-Kenya Strategic Trade and Investment Partnership can set an important precedent for trade negotiations going forward that secures free and fair market access for U.S. dairy exporters in Kenya and other Sub-Saharan African markets. Removing barriers to trade and establishing robust safeguards to guard against future unjustified trade restrictions are imperative to achieving an agreement that delivers tangible opportunities for U.S. dairy producers and manufacturers. NMPF and USDEC appreciate the opportunity to submit our comments related to this important matter and look forward to collaborating with USTR throughout the negotiating process.

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Annex 1: Kenya Dairy Imports from World⁵

⁵ Kenya National Bureau of Statistics

Kenya Dairy Imports by HTS Code					
HTS Code	Description	2018	2019	2020	2021
0401.20	Fluid Milk (1-6% Fat)	\$72,412,477	\$96,719,390	\$44,483,288	\$40,714,512
0402.10	Skim Milk Powder	\$17,982,832	\$33,695,443	\$30,348,628	\$33,683,076
1901.10	Infant Formula	\$4,098,618	\$4,891,149	\$10,751,829	\$15,594,653
0402.29	Whole Milk Powder, Other	\$9,601,799	\$6,316,003	\$3,182,347	\$3,099,717
3501.10	Casein	\$848,777	\$1,315,222	\$1,997,441	\$2,287,547
0405.90	Butter, Other	\$1,707,848	\$1,095,284	\$1,404,679	\$1,261,812
2105.00	Ice Cream	\$686,086	\$729,895	\$783,010	\$940,159
0402.91	Milk Powder, Other	\$108,490	\$4,161	\$300,641	\$638,519
1702.11	Lactose	\$530,923	\$372,402	\$551,463	\$575,615
0404.90	Whey, Other	\$5,398	\$160,410	\$342,254	\$478,445
0406.30	Processed Cheese	\$293,151	\$653,493	\$651,199	\$459,537
0402.21	Whole Milk Powder	\$35,778	\$2,558	\$117,146	\$245,507
0406.90	Cheese, Other	\$447,614	\$300,587	\$218,488	\$224,725
0405.10	Butter	\$698,586	\$647,942	\$355,683	\$215,320
0404.10	Whey	\$137,967	\$149,459	\$252,211	\$200,853
0406.10	Fresh Cheese	\$28,143	\$29,046	\$98,926	\$119,646
3502.20	Milk Albumin		\$3,241	\$75,090	\$108,206
0402.99	Milk Powder, Other	\$530,258	\$492,938	\$73,671	\$70,829
0401.50	Fluid Milk (>10% Fat)	\$59,896	\$60,043	\$81,683	\$54,736
1702.19	Lactose, Other	\$34,548	\$19,033	\$77,879	\$43,636
3501.90	Casein, Other	\$6,514	\$35,291	\$35,735	\$10,035
0406.20	Grated or Powdered Cheese	\$90,029	\$126,538	\$6,973	\$7,066
0401.10	Fluid Milk (<1% Fat)	\$521,644	\$1,424	\$4,859	\$1,597
0406.40	Blue-Veined Cheese	\$2,135	\$6,364	\$982	\$1,226
0403.90	Yogurt, Other	\$14,706	\$29,839	\$20,337	\$678
0403.10	Yogurt	\$12,518	\$3,421	\$1,405	\$513
0401.40	Fluid Milk (6-10% Fat)				\$34