

**Comments by the
National Milk Producers Federation
and the U.S. Dairy Export Council
to the Office of the United States Trade Representative
Concerning Negotiating Objectives for a U.S.-Republic of Kenya Trade Agreement
Docket Number: USTR-2020-0011
April 28, 2020**

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 Negotiating Objectives for a United States – Republic of Kenya Trade Agreement (USTR-2020-0011). 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 support the pursuit of a Free Trade Agreement (FTA) with the Republic of Kenya that establishes a strong precedent for open market access and elimination of non-tariff barriers in Africa. 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 nearly \$50 million of dairy products from the world in 2019.

Market access restrictions for U.S. dairy product exports into Kenya center upon prohibitively high tariff rates and onerous certification requirements for importers. The Kenyan government maintains these

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

market impediments to protect its domestic dairy industry, which it deems “sensitive.”² We encourage USTR to pursue an FTA that fully opens this market by:

- Eliminating all tariffs on U.S. dairy product exports,
- Removing current non-tariff 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 creating a strong SPS chapter and safeguards for the use of common food names.

A fully comprehensive trade agreement with Kenya should serve as a template for future trade agreements with other African trading partners.

Kenya Dairy Market Access

U.S. access to the Kenyan dairy market is severely restricted, due in key part to high most-favored nation (MFN) tariff rates and burdensome certification 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 12.8 percent for all imported products. USTR should ensure that the agreement eliminate these sizable barriers to U.S. exporters’ ability to access the Kenyan dairy market.

- While we seek the complete elimination of all dairy tariffs, we urge USTR to place particular focus, in terms of phase-in timing and volume levels, on access for skim milk powder (0402.10), whole milk powder (0402.21 & 0402.29), whey (0404 & 3502.20), and lactose (170110, 170190). In addition, Given Kenya’s consistent GDP and population growth, U.S. dairy producers and manufacturers also are highly interested in securing increased access for butter (0405) and cheese (0406), as well as other dairy products.

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. Based on information gleaned from FAS and U.S. Department of Commerce research into the Kenya market, the following barriers to trade exist:

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

- Kenyan dairy importers are required to complete a standardized sanitary certificate and attain a “Letter of No Objection to Import” permit from the Kenyan Department of Veterinary Services (DVS). 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 dairy facilities already approved for operation in the U.S.
- 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.³
- Kenyan food imports are required to have a minimum of 75 percent shelf life remaining on the label. 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.

Both the high tariff rates and excessive certification processes discourage U.S. dairy exports from entering the Kenyan market. These market restrictions must be resolved during negotiations.

Sanitary and Phytosanitary (SPS) Chapter

A U.S.-Kenya trade agreement should build upon the SPS provisions in the USMCA, which is more comprehensive than any SPS chapter previously captured in a U.S. FTA. These provisions help provide greater transparency and stronger scientific grounding for countries’ SPS rules while also establishing a forum to resolve concerns that still arise. They also direct parties to “consult on matters and positions” for the SPS Committee and other relevant international standard setting organizations such as Codex and OIE (see Article 9.17 3b). As this agreement will serve as a template for future trade agreements with other African trading partners, we stress the unique importance of maintaining and expanding this robust

³ https://www.kebs.org/images/pdf/new/IMPORT_STANDARDIZATION_MARK_GUIDELINES.pdf

language. Prioritizing coordination and collaboration with African nations in these standard setting organizations is essential to mitigating increasing efforts of our competitors to misuse them to advance their own regulatory interests and unfairly benefit their exporters. We urge USTR to use the USMCA SPS chapter as a base and evaluate whether further improvements upon that strong foundation are needed with this specific trading partner.

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 U.S. Barriers to the use of terms such as "parmesan," "asiago," "feta", "romano", "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:

- The establishment of a new 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;
- 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;
- 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.

Rules of Origin

Strong dairy-specific rules of origin that mirror those captured in USMCA are necessary in an agreement with Kenya to ensure that the benefits of the deal are focused solely on the U.S. and Kenya. These rules should establish that notable dairy-content products traded under the benefits of the agreement be produced from milk that originated in the exporting country. Such protections are necessary to ensure our European Union and Oceania competitors are unable to benefit from any preferential access granted in the deal by shipping dairy ingredients to Kenya for further manufacturing and ultimate export to the U.S. Our organizations view strong rules of origin as a critical component of any trade deal so that U.S. dairy producers and manufacturers utilizing U.S. milk/dairy products – and

dairy producers and manufacturers using locally produced milk/dairy products in the FTA trading partner's market – may realize the full benefits of a negotiated agreement.

Conclusion

A successful U.S.-Kenya trade agreement can set an important precedent for trade negotiations going forward that secures free and fair market access for U.S. dairy exporters. Removing tariff and non-tariff 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.

Point of Contact

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Annex 1: Kenya Dairy Imports from World⁴

Value of Kenya's Dairy Imports by HTS Line						
HTS Code	Product Description	2015	2016	2017	2018	2019
Total Dairy Imports		\$38,704,402	\$20,967,975	\$56,957,112	\$37,206,335	\$49,927,544
0402.10.00	Milk and cream in solid forms, of a...	\$20,464,960	\$9,374,388	\$32,308,441	\$17,982,832	\$33,695,443
0402.29.00	Milk and cream in solid forms, of a...	\$7,987,592	\$6,385,361	\$11,431,646	\$9,601,799	\$6,316,003
1901.10.00	Food preparations for infant use, p...	\$3,271,803	\$3,270,271	\$3,651,324	\$4,098,618	\$4,891,149
3501.10.00	Casein...	\$809,850	\$399,733	\$1,141,474	\$848,777	\$1,315,222
0405.90.00	Fats and oils derived from milk, an...	\$232,999	\$69,327	\$2,353,623	\$1,707,848	\$1,095,284
0406.30.00	Processed cheese, not grated or pow...	\$157,053	\$99,900	\$303,394	\$293,151	\$653,493
0405.10.00	Butter (excl. dehydrated butter and...	\$254,478	\$174,861	\$1,244,749	\$698,586	\$647,942
0402.99.00	Milk and cream, concentrated and sw...	\$28,036	\$56,190	\$271,905	\$530,258	\$492,938
1702.11.00	Lactose in solid form and lactose s...	\$238,130	\$255,286	\$173,028	\$530,923	\$372,402
0404.90.00	Products consisting of natural milk...	\$73,466	\$6,104	\$10,812	\$5,398	\$160,410
0406.20.00	Grated or powdered cheese, of all k...	\$1,511	\$7,476	\$27,195	\$90,029	\$126,538
0401.50.00	Milk and cream of a fat content by ...	\$54,662	\$44,688	\$35,407	\$59,896	\$60,043
0403.90.00	Buttermilk, curdled milk and cream,...	\$34,064	\$11,906	\$17,137	\$14,706	\$29,839
0406.10.00	Fresh cheese "unripened or uncured ...	\$45,106	\$10,144	\$8,731	\$28,143	\$29,046
1702.19.00	Lactose in solid form and lactose s...	\$12,424	\$20,304	\$87,183	\$34,548	\$19,033
0406.40.00	Blue-veined cheese and other cheese...	\$1,656	\$876	\$3,218	\$2,135	\$6,364
0402.91.00	Milk and cream, concentrated but un...	\$14,796	\$655,399	\$61,234	\$108,490	\$4,161
0403.10.00	Yogurt, whether or not flavoured or...	\$1,858	\$15	\$188	\$12,518	\$3,421
3502.20.00	Milk albumin "lactalbumin", incl. c...	\$78,548		\$3,941		\$3,241
0402.21.00	Milk and cream in solid forms, of a...	\$18,418	\$4,755	\$1,487,963	\$35,778	\$2,558
0405.20.00	Dairy spreads of a fat content, by ...	\$12,022			\$260	\$1,588
0401.10.00	Milk and cream of a fat content by ...	\$4,904,336	\$110,164	\$847,888	\$521,644	\$1,424
0401.40.00	Milk and cream of a fat content by ...	\$6,634	\$10,829			
0402.29.10	Milk and cream in solid forms, of a...			\$150,650		
0402.29.90	Milk and cream in solid forms, of a...			\$1,335,981		

⁴ Kenya National Bureau of Statistics