Before the United States Trade Representative

Docket Number USTR-2022-0008

"United States-Kenya Strategic Trade and Investment Partnership"

Written Comments from Rethink Trade

September 16, 2022

Rethink Trade thanks the United States Trade Representative (USTR) for the opportunity to submit comments with regard to Biden administration plans to develop a United States-Kenya Strategic Trade and Investment Partnership (STIP).

Rethink Trade is a program of the American Economic Liberties Project (AELP). AELP, a non-profit research and advocacy organization, is a thought leader in the anti-monopoly movement and promotes policy changes to address today's crisis of concentrated economic power. The Rethink Trade program of AELP was established to intensify analysis and advocacy regarding the myriad ways that today's trade agreements and policies must be altered to undo decades of corporate capture and to deliver on broad national interests. This includes resilient supply chains and fair markets, creation and support of good jobs with workers empowered to earn decent wages, the public health and safety delivered by strong consumer and environmental protections and the ability for those who will live with the results to decide the policies affecting their lives.

The Biden administration's worker-centered trade policy represents a long overdue reckoning with the chasm between the grand promises made in support of past trade policies and their actual outcomes, which have proved deeply damaging to workers and communities, many domestic businesses and independent farmers and our nation's economic resilience and security. Despite overwhelming evidence of such results, for decades during Republican and Democratic administrations alike the same trade agreement model and trade-policy perspective were pursued as various prominent commercial interests were able to dominate the process.

The Office of the USTR earns high praise for turning away from that rut in favor of a new approach that very sensibly starts with goals and then develops policies designed to deliver on those goals. Namely, the Biden administration has prioritized ensuring all Americans have economic security by creating a more inclusive and equitable economy with less corporate concentration and more opportunity and access to affordable healthcare and medicines. The administration has committed to combatting the looming climate crisis and strengthening the resilience of our economy and supply chains both to provide affordable access to goods for consumers and to ensure our national security. Plus, Ambassador Katherine Tai has emphasized the importance of promoting a trade policy that not only benefits American workers, consumers

and small businesses, but that contributes to the wellbeing of people around the world and, particularly, the inclusive development of our less economically developed partners. The fundamental question with respect to the U.S.-Kenya STIP and every other trade negotiation venue the administration is pursuing is how – and in some instances if – trade tools can be used to achieve those goals.

Rethink Trade questions whether a U.S.-Kenya STIP is the best vehicle to promote a new model that is premised on trade policy as an instrument to contribute to social welfare, equality and economic security, and promote our values at home and abroad, instead of treating trade as an end in itself.

One of the main reasons why Kenya sought to negotiate a free trade agreement (FTA) with the previous government was the insinuation that African Growth and Opportunity Act (AGOA) tariff preferences would not continue for African countries because the Trump administration would remove specific countries from the program and/or Congress would not reauthorize the program.[1] Indeed, then-Kenyan President Uhuru Kenyatta's statements when visiting the United States, perusal of the Kenyan press since, and interviews with Kenyan civil society groups suggest that a U.S. trade agreement was viewed as necessary to defend against that threat, not because it offered gains. Given all AGOA-qualified countries, including Kenya, have duty-free access to the U.S. market for almost all goods now under AGOA, Kenya did not stand to gain from a U.S. trade agreement.

By contrast, this administration has been clear about its commitment to keep engaging with the continent and supporting African countries' efforts to use AGOA as a vehicle to attract investment, create jobs, and enhance their export competitiveness.[2] Considering this renewed commitment, which is in line with the past practices of Republican and Democratic administrations alike, it is unclear what the upside would be for the people in Kenya – and U.S. consumers and workers – from negotiating a deal that appears to be mainly focused on imposing new rights for Big Tech interests and deregulations of various consumer and food security protections.

The U.S.-Kenya STIP agenda includes several policy domains in which Kenya would be required to make concessions from a developmental perspective. Particularly so, if these negotiations are influenced by corporate interests that seek to lock in limits on public interest policies and impose a hands-off approach to regulating the digital economy. For instance, in contrast to the United States, Kenya already has enacted privacy and data security policies that would be undermined if a prospective STIP includes the sorts of free-flow-of-data guarantees Big Tech demands and has obtained in some past pacts.

It is true that, not being a traditional U.S. FTA, at least Kenya will not be required to alter its laws to guarantee commercial interests are granted expansive intellectual property (IP) rights that limit affordable access to medicines and information or investor rights that undermine

[1] Wroughton, Lesley. "Trump administration's Africa policy in focus at AGOA trade talks," Reuters, 8 August 2017. https://www.reuters.com/article/us-usa-trade-africa-idUSKBN1AO108.

[2] Ambassador Katherine Tai to Host African Growth and Opportunity Act Ministerial Meeting During Africa Leaders Summit on December 13, 2022. 26 July 2022. Available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/ambassador-katherine-tai-host-african-growth-and-opportunity-act-ministerial-meeting-during-africa; Readout of Ambassador Katherine Tai's Participation in the Virtual AGOA Ministerial Meeting, 20 October 2021. Available at: https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/readout-ambassador-katherine-tais-participation-virtual-agoa-ministerial-meeting.

developmental policies and create multimillion liabilities that could jeopardize its fiscal balance through attacks using Investor-State Dispute Settlement provisions. Yet, corporate interests will use STIP negotiations to push for bans on many critical consumer and environmental safeguards, such as Kenya's regulations on genetically modified seeds and foods or single-use plastics.[3] And the massive U.S. Big Tech corporations will push for "digital trade" rules that would undermine, among other policies, Kenya's privacy legislation, developmental strategies, and regional integration efforts. This digital agenda would also undermine initiatives now being considered by U.S. agencies and Congress to rein in on Big Tech companies' abuses and their overwhelming monopoly power.

An additional consideration USTR should weigh is the impact that such negotiations could have on regional economic integration projects in Africa, and how such interference will be perceived across Africa. The United States must avoid undermining Kenya's current primary trading bloc, the East African Community (EAC). The EAC includes Kenya, Uganda, Rwanda, Tanzania, Burundi, and South Sudan. The EAC Customs Union Protocol Article 37 (Trade Arrangements with Countries and Organisations Outside the Customs Union) explicitly requires each country to "co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade."

Similarly, the African Continental Free Trade Agreement (AfCFTA) entered into force in 2019. The AfCFTA is an ambitious economic integration initiative that encompasses all of the 54 African nations and covers trade in goods, trade in services, investment, intellectual property, and competition policy. This initiative is being negotiated and implemented in phases, with Phase II covering IP, investment and competition policy and Phase III being devoted to digital trade.[4] These negotiations are ongoing and the Biden administration must be mindful of not demanding commitments, particularly with regard to digital trade, that could negatively impact the economic framework that the peoples of Africa are building for their continent.

The U.S.-Kenya STIP cannot continue the practice of diplomatically legislating wide swaths of non-trade policy via closed-door negotiations in favor of particular commercial interests. Thus, it must not include constraints on government action on numerous "behind-the-borders" non-trade policy issues, including many that were and are extremely controversial and subject to intense domestic political debate. This includes limits on food and product safety, the regulation of digital platforms and data, consumer privacy, and even the processes by which domestic regulatory policy is made, such as those that were included in the "Good Regulatory Practices" chapter of the revised North American Free Trade Agreement (NAFTA).

In sum, Rethink Trade supports the administration's new approach to trade policy and the underlying goals it seeks to further. We are uncertain how this negotiation will further those goals. If negotiations proceed, then in this submission we offer objectives that should guide the talks and underscore the areas of the U.S.-Kenya STIP proposed agenda where progress on these goals could be endangered. This submission includes comments on:

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[3] Wemanya, Amos. "Three takeaways as Kenya marks 4 years since the ban on single-use plastic bags," Greenpeace, 25 August 2021. Available at: https://www.greenpeace.org/africa/en/press/48964/three-takeaways-as-kenya-marks-4-years-since-the-ban-on-single-use-plastic-.
bags/#:~:text=Later%20on%2C%20in%202020%20June,in%20tackling%20the%20plastics%20challenge.

[4] Chidede, Talkmore. "AfCFTA Phase II and III Negotiations – Update," tralacBlog, 10 Feburary 2021. Available at: https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html.

- The importance of any negotiations being transparent, including draft texts being public, and the policymaking process from the development of opening texts through negotiation and congressional consideration being inclusive so as to promote beneficial outcomes.
- The problems associated with the explosion of the digital economy and online commerce conducted across borders and elements of Big Tech's "digital trade" agenda that the U.S.-Kenya STIP must not replicate.
- The issues associated with existing "Good Regulatory Practices" provisions designed to slow down and/or kill public interest regulations.
- The principles that should guide agriculture-related talks to promote balanced agricultural trade to strengthen rural communities and not undermine the democratic processes by which countries set their food safety standards.

1. Any U.S.-Kenya STIP must embody the administration's new worker-centered trade policymaking approach.

USTR clearly states in its notice that the administration is not seeking to cut tariffs in these negotiations. Thus, at issue is whether the non-tariff rules that USTR proposes to negotiate will give primacy to special commercial interests and goals or promote public interest objectives.

The previous standard U.S. free trade agreement did the latter. The Biden administration is wise to replace this version of corporate-led hyperglobalization. This model has led to wide disarray, furthered offshoring of good-paying – often unionized – manufacturing jobs to jurisdictions with lower labor and environmental standards, affected food and product safety, promoted deregulation in financial services and public utilities, and constrained procurement policy by undermining domestic content preferences.

Increasingly, the American public has become aware and angered by these outcomes. Some experience the problem as workers in communities across the country facing the absence of 70,000 manufacturing facilities that once supported middle-class lives for the large portion of working Americans who do not have college degrees as well as the tax base for communities' schools, public safety services, hospitals and more. Some experience the problem as consumers facing shortages of key goods and/or price spikes, including the shock of the United States being unable to make or get critical goods needed to keep their families safe and well during the peak of the COVID-19 crisis. Others focus on the hollowing out of U.S. production capacity and the weakening of U.S. economic resilience as a national security threat.

All of these perspectives are based on specific outcomes that are undeniably linked to policies and practices that have left the United States largely dependent on other countries in general and overly reliant on China in particular for access to the most essential goods. Decades of hyperglobalization as implemented by a particular model of trade agreements and trade policies have undermined our independence and resilience, as all Americans were forced to recognize during the peak of the COVID-19 crisis. With our economy organized to serve a production model focused almost exclusively on "efficiency" and reliant on long, brittle global supply chains and production of many goods in too few countries – often by too few firms after decades

of global consolidation – today even the world's wealthiest countries find themselves vulnerable to untenable risks.

A core feature of this model is a "race-to-the-bottom" through which countries were positioned to compete to attract increasingly mobile investment capital by keeping taxes low, backsliding environmental safeguards and undermining workers' wage gains and/or their efforts to fight for better wages. In response, worldwide legislators, academics, unionists, small business leaders, independent farmers, and civil society representatives have demanded the inclusion of standards related to production of traded goods and services that reverse these trends and guarantee "a floor of decency" undergirding commercial relationships that reflect the commitment sovereign nations have made domestically and through the International Labor Organization Conventions, multilateral environmental agreements, including the Paris Agreement, and other treaty instruments.

The U.S.-Kenya STIP must be constructed on such a floor of required conduct that incorporates and reinforces the obligations for workers and the environment to which both countries have committed. These obligations and those related to countries' human rights, health, and other public interest protection treaty obligations must underpin the STIP initiative. And, nothing in the agreement must limit countries' abilities to enact and enforce strong labor, environmental, health or other public interest standards.

Ensuring this is the case will require special diligence in the context of negotiating rules covering the digital sector. The "digital trade" agenda promoted by Big Tech firms seeks to effectuated a form of labor "misclassification" via trade agreement that is premised on the Original Sin of the digital economy. Namely, that somehow having a transportation, hotel, retail, or other services provided by online means transforms a firm into a communications platform or computing service that is not required to meet the standards of its actual industry nor treat its employees as employees with respect to unionization, contributions to social insurance programs, hours of service and the like. Labor and other laws of general application that are enforced through the prospective loss of operating authority could be characterized as illegal limits on market access or censorship while facially neutral policies that have a disparate impact on a specific firm because it is the dominant player in a sector could be deemed to be discriminatory.

Adding labor standards and enforcement mechanisms that could redress or at least stop further damage being done was one of the highlights of NAFTA's renegotiation in 2019. That pact also was also largely without new market access incentives, as NAFTA had zeroed out most tariffs. The revised NAFTA, a.k.a. USMCA, in addition to bringing improved labor standards to the core of the text, has innovative facility-specific labor enforcement provisions called the Rapid Response Mechanism conceived to deal with violations of the right of free association and collective bargaining, including in the service sector. The system does not rely on new tariff cuts and snap backs, but uses fines and denial of access for goods as penalties. We commend USTR's leadership in using these provisions to fight for workers' rights in Mexico, which already has generated material gains in the facilities that were the focus of the first actions.[5]

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[5] Statements from Office of the USTR on votes by workers in Silao, Matamoros, Reynosa and Frontera, Mexico available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/february/statement-ambassador-katherine-tai-february-1-2-vote-workers-silao-mexico, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/march/statements-ambassador-katherine-tai-and-secretary-marty-walsh-vote-tridonex-workers-

With regard to the environment, rising to the challenge presented by the looming climate crisis requires a serious realignment of existing international trade rules and agreements. The U.S.-Kenya STIP is an appropriate venue to negotiate a climate "peace clause" to ensure that governments' efforts to invest in a sustainable global economy and to reduce pollution, e.g. through bans of highly pollutant products, are free from challenges based on trade agreements.[6] This peace clause should cover any commitment made via the STIP and the WTO Agreements. Kenya has emerged as a world leader in climate adaptation, committing to fully transition to clean energy by 2030.[7] Any trade arrangement between the United States and Kenya should support these ambitions, instead of entrenching past trade pacts' tradition of undermining climate policies.

President Biden's worker-centered trade policy reflects the broadly supported demand to replace the existing trade policies that have made us less resilient, have undermined many workers, farmers and small business owners' economic security and exacerbated health and environmental threats in favor of creating a new model of trade agreements, laws and regulations that can deliver broader benefits in line with domestic policy goals.

However, in order to achieve this, the Biden administration must commit to a transparent and participatory process, the complete opposite of the opaque and corporate-dominated processes that produced trade agreements under previous administrations. To date, more than 400 official U.S. trade advisers representing corporate interests have held a privileged role in developing our past trade deals while the public and Congress were locked out. This has not only resulted in the same special-interest pacts being negotiated over decades, but as the damaging results of past pacts became evident it resulted in deals like the Trans-Pacific Partnership (TPP) being unable to gain a majority in Congress and thus never being enacted.

Unfortunately, to date the Indo-Pacific Economic Framework (IPEF) negotiations that were announced at the end of last year have not been characterized by such a transparent and participatory process. Perversely, civil society organizations, lawmakers, and the general public have had even less access to the initial rounds of negotiations in IPEF compared to past trade agreements, such as TPP.

We urge the Office of the USTR to create a new process for the U.S.-Kenya STIP negotiations, but also applicable to IPEF and any other trade negotiating venue, that includes regular public consultation mechanisms on specific policy approaches and texts; publication of U.S. opening offers and related documents in line with European Union practices before the start of the Trans-Atlantic Trade and Investment Partnership negotiations; and making negotiated texts publicly available, with opportunity for comment, after each negotiating round.

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matamoros-mexico, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-panasonic-auto, and https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/august/united-states-announces-successful-resolution-rapid-response-labor-mechanism-matter-auto-parts.

[6] See the Sierra Club's "A New, Climate-Friendly Approach to Trade," Available at: https://content.sierraclub.org/creative-archive/sites/content.sierraclub.org.creative-archive/files/pdfs/1433%20New%20Trade%20Report%2005_low.pdf?_ga=2.145857587.66931597.1649715705-57273439.1649715705, page 6.

[7] Mbenywe Mactilda. "Kenya will fully transition to clean energy by 2030 – Uhuru Kenyatta," The Saturday Standard, December 2021. Available at:

Additionally, civil society organizations, Congress and the public must be invited to help formulate U.S. positions and comment on draft U.S. proposals not just via this public comment period, but throughout the entire course of the negotiations. Specifically, the U.S. must publish draft versions of its STIP proposals and solicit public comment upon them prior to tabling them. U.S.-Kenya STIP negotiating rounds should be announced in advance and include public stakeholder engagement and interactions with negotiators from both nations. Lastly, U.S. and Kenyan proposals, related materials and any consolidated texts must also be quickly published after each negotiating round so that the public can review and comment on the latest proposals while there is still opportunity to make real changes.

These procedural measures are necessary not only to ensure U.S.-Kenya STIP outcomes that align with the Biden administration's goals on worker rights, climate change, racial justice, durable, broad-based economic growth, consumer protection and other areas, but to rebuild public faith in trade policymaking generally after years of backroom deal making. International trade is an important part of our economy, connects us with the rest of the world and if conducted under the right terms can deliver broad benefits to people here and in other countries. It's worth devoting the time and care needed to ensure that if there is a STIP, its rules work for everyone, and not just commercial special interests.

2. Problems associated with the explosion of online commerce conducted across borders and elements of Big Tech's "digital trade" agenda that any U.S.-Kenya STIP must not replicate.

Rethink Trade wholeheartedly supports the way in which USTR Katherine Tai has outlined the Biden administration approach to negotiations related to the digital economy:

> "*Our approach to digital trade policy must be grounded in how it affects our people and our workers. We must remember that people and workers are wage earners, as well as consumers. They are more than page views, clicks, and subjects of surveillance. They are content creators, gig workers, innovators and inventors, and small business entrepreneurs. This means they have rights that must be protected – both by government policy and through arrangements with other governments.*"[8]

The fourth industrial revolution has the potential to unleash unparalleled economic growth and opportunities for humanity. Seizing the advantages of the digital economy can increase efficiency, reduce information asymmetries, promote global cooperation, and narrow the differences between the haves and the have-nots, both in the United States and abroad. Yet, in the absence of U.S. digital governance policies and with lax anti-monopoly enforcement, the most rapacious collectors and exploiters of peoples' personal data that have crushed or bought out competitors and used enormous computing power, shady algorithms and toxic business models have become the few overwhelmingly dominant online platforms. These mega-platforms

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[8] U.S. Trade Representative Katherine Tai, Speech on Digital Trade for the Georgetown University Law Center, Nov. 2021. Available at: https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/november/remarks-ambassador-katherine-tai-digital-trade-georgetown-university-law-center-virtual-conference.

kill competition and their prospective competitors, manipulate and surveil users, and undermine democratic institutions.

Policymakers around the world acknowledge that determining how to deal with this paradox is one of the existential policy questions of our times and are developing laws, rules and regulations to try to reign in digital giants. In response, one way Big Tech interests are trying to preserve their market power and influence is attempting to use trade negotiating venues to lock in binding international rules that limit governments from regulating digital firms' behavior in the public interest and from fighting corporate concentration and monopoly power. The mega-platforms seek to quickly establish international agreements that quietly undermine regulatory efforts here and abroad. To obscure this, they have misbranded their attack against the very notion of digital governance as "e-commerce" or "digital trade" policy initiatives. In a race against time, Big Tech's aim with their "digital trade" agenda is to excavate the policy space out from under Congress and various U.S. agencies before they can act. At the same time, Big Tech aspires to roll back digital governance initiatives taken by the governments of countries worldwide by imposing binding constraints in "digital trade" pacts against a wide array of digital governance tools or getting such policies labeled as "illegal trade barriers" subject to review, listing and sanction through strategies like extending Special 301 procedures to cover digital regulation.

If this "digital trade" ploy succeeds, Big Tech interests could weaken existing policies worldwide and stop future U.S. policies that constrain digital entities' monopolistic abuses and anticompetitive market power, that protect privacy and individual rights over personal and non-personal data, that fight algorithm discrimination, that hold platforms liable for dangerous products and violent incitement, and that protect gig workers' labor rights.

Meanwhile, past "digital trade" agreements have failed to address the real trade problems that result from actual cross-border commerce that is generated online. This includes an abject failure of U.S. customs policies to reflect the reality of hundreds of millions of packages annually of imported goods that consumers have ordered online that skirt normal U.S. Customs procedures including inspection, documentation, taxation or prohibition for forbidden goods and enter the United States. These problems are not unique to the United States. Indeed, many countries' customs systems, like those of the United States, remain geared toward containerized ocean shipping or containerized rail or truck shipping. But the volume of packages of foreign-produced goods purchased online and express delivered directly to U.S. consumers has exploded. Tens of billions of dollars of goods are crossing borders without inspection, much less the prohibition of dangerous or banned goods, or taxation or the collection of tariffs, or even being accounted for in national accounts data.

Instead of focusing on the updating of customs procedures to suit the new realities of large-scale international flows of goods valued in the billions broken into small shipments, past "digital trade" agreements have imposed limits on governments' regulation of digital platforms that undermine policies to protect gig economy workers, civil rights, consumer safety and privacy and to counter platforms' anti-competitive practices.

USTR's objectives for any U.S.-Kenya STIP negotiations related to the digital sphere must be the opposite of past "digital trade" talks. Any rules resulting from U.S.-Kenya STIP negotiations must preserve domestic policy space to adopt measures to guarantee that the digital economy works for everyone and not just a few dominant online platforms. That means that the administration must reverse the past Big Tech "digital trade" agenda and, instead, ensure that both the United States and Kenya preserve full policy space for digital standards that protect

workers, consumers, small businesses and civil rights. To the extent that a U.S.-Kenya STIP is to impose any standards in these areas, they must be a floor of workers and consumer protections and fair market rules without imposing ceilings on countries' ability to enact and enforce stronger measures.

Finally, given the constantly-changing nature of the digital sector and the fact that the U.S. Congress and agencies are now fast at work trying to catch up to the rest of the world in establishing digital governance and anti-monopoly enforcement policies, locking in policies in an international agreement is entirely inappropriate. Whatever one thinks should be the proper policies in this sphere, certainly all can agree that cementing into place policies in a pact that cannot be changed but for consent by all signatories is a terrible idea at a time when domestic policymakers are yet to determine our domestic policies on these matters.

a. Negotiate digital standards that safeguard consumers and are respectful of the policy space needed to protect them

- **The U.S.-Kenya STIP should not include standards that undermine citizens' rights, such as consumer privacy and data security by prohibiting limits on data flows or location of computing facilities.**

Peoples' every move on the internet and via cell phone is increasingly tracked, stored, bought and sold — as are interactions with the growing "internet of things." Many people may not even be aware of this nor have a feasible way to opt out. Trade pacts should not restrict governments from acting on the public's behalf in establishing rules regarding under what conditions individuals' personal data may be collected, where it can be processed or transmitted, and how or where it is stored. Yet corporate interests are pushing for the inclusion of provisions that guarantee "free flow" of data without constraint or the absence of rules on the location of computing facilities,[9] both of which would handcuff governments and prevent them from developing policies with respect to where and how data is processed, stored or transmitted to protect citizens.

And such terms could undermine good policies countries have enacted. This is of special relevance to negotiations with Kenya because it already has both national and international rules that provide some form of limitation on the locations where Kenyan data is processed and located. These existing policies would directly collide with corporate "digital trade" demands related to free flow of data.

Section 50 of Kenya's Data Protection Act of 2019 allows the Cabinet Secretary to determine that certain types of processing may only be conducted through a server or data center located in Kenya on the basis of strategic interests or for the protection of revenue. Moreover, there is a requirement that health data should not be stored outside Kenyan territory. Additionally, the African Union Convention on Cyber Security and Personal Data Protection, which still requires the ratification from some countries to enter into force, prohibits the transfer of personal data to non-member states unless the third-party state ensures an adequate level of protection of the privacy, freedoms, and fundamental rights of the data owner. Any attempt to push Kenya to

[9] See the U.S. Chamber of Commerce's "The Digital Trade Revolution: How U.S. Workers and Companies Can Benefit from a Digital Trade Agreement." Available at https://www.uschamber.com/assets/documents/Final-The-Digital-Trade-Revolution-February-2022_2022-02-09-202447_wovt.pdf, page 18.

repeal the aforementioned rule of its Data Protection Act or to undertake a commitment that would contradict African regional law would backfire against the United States' own efforts to enact a comprehensive federal privacy law.

If U.S.-Kenya STIP negotiations are to include rules on data flows, processing and storage, these rules must protect the public interest. One way to do so is if the default rule is in favor of free flows and freedom to process and store data in the locations of choice of the platform, then such a provision must include broad and effective exceptions that safeguard governments' policy space. The United States should be unencumbered if it wishes to adopt policies to safeguard data privacy and security that mandate that data can only be transferred to places where adequate standards of protection are in place. And Kenya's existing safeguards must be protected. A U.S.-Kenya STIP "digital trade" deal must not obstruct African countries' efforts to develop local digital industries by encouraging companies to set up data centers or processing operations locally. All of these might require limits on data flows or localization conditions, hence, the need for effective exceptions designed to guarantee the policy space required to enact such policies.

One instance is provided by the approach in the Regional Comprehensive Economic Partnership (RCEP), where parties negotiated specific *self-judging* exceptions to the "location of computing facilities" and "cross-border transfer of information by electronic means" provisions.[10] This exception empowers the country invoking it to determine whether a policy that might require some degree of data localization in its territory or limitation to cross-border data flows is necessary to achieve a public policy objective. Another example could be taken from the Argentina–Chile FTA, which establishes as default rule the parties positive obligation to allow cross-border data flows but with an open-ended exception that allows them to adopt restrictions to achieve legitimate policy objectives.[11] Plus, with regard to data localization, the South American countries "*recognize the importance of not requiring a person of the other Party to use or locate the computer facilities in the territory of that party, as a condition for conducting business in that territory,*" and pledged to undertake to exchange good practices, experiences, and current regulatory frameworks regarding location of servers.[12]

These are examples of digital trade provisions where countries acknowledged the importance of data movement for the function of the digital economy and also tried to regulate in the public interest, as opposed to the past U.S.-led digital trade deals where previous governments flacked for special interests headquartered in the United States without due regard to the rights and wellbeing of U.S. citizens.

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[10] See RCEP Agreement, Articles 12.14.3(a) and 12.15.3(a): "3. Nothing in this Article shall prevent a Party from adopting or maintaining: (a) any measure inconsistent with paragraph 2 that it considers necessary to achieve a legitimate public policy objective[12] provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade; (…) [12]For the purposes of this subparagraph, the Parties affirm that the necessity behind the implementation of such legitimate public policy shall be decided by the implementing Party."

[11] See Argentina-Chile Free Trade Agreement, Article 11.6: "(…) 2. Each Party will allow cross-border transfer of information by electronic means where such activity is for the conduct of the business of a person from one Party. 3. The Parties can establish restrictions to cross-border transfer of information by electronic means to achieve a legitimate policy objective, provided that the measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade." (Informal translation.)

[12] See Argentina-Chile Free Trade Agreement, Article 11.7: "1. The Parties recognize the importance of not requiring a person of the other Party to use or locate the computer facilities in the territory of that party, as a condition for conducting business in that territory. 2. To that end, the Parties are committed to exchange good practices, experiences and current regulatory frameworks regarding location of servers." (Informal translation.)

b. Negotiate digital standards that promote fair and competitive markets, instead of undermining them

- **Any use of the trade "non-discrimination" concept must focus on discriminatory intent, not disparate effects that reflect a company's size so as to protect governments' right to regulate markets and level the playing field.**

The "digital trade" framework promoted by Big Tech is premised in part on importing trade terms and concepts, like "discrimination" and "market access" to serve the goal of limiting digital governance. It is a sly approach. Who is for "discrimination"? Yet, the terms of past agreements have included provisions against domestic measures that have a discriminatory *effect*. Any policy of general application will have a bigger effect on a dominant platform not because the policy is discriminatory, but because the platform is larger than its competitors. As well, the relevant trade discrimination standard is a construct based on equal treatment with respect to "like" products or services. Yet, leading players in transportation, hospitality, retail, education, healthcare and other industries that provide services online categorize themselves as communications platforms and their service not like their brick-and-mortar counterparts.

The mega-platforms tend to fight against governments that insist that domestic policies that generally apply to protect the rights of workers and consumers in the transportation, retail and other sectors apply to them as well. The fact that Big Tech has largely managed to escape regulation gives platform companies an unfair competitive advantage that contributed to their rise and dominance over world markets. Now, many countries, states, and cities worldwide are starting to tear down this unfair state of affairs by requiring large ride-sharing companies to meet driver hours-of-service-rules or respecting limits on the number of active drivers. U.S.-Kenya STIP rules must not give such firms new grounds to claim that application of such policies of general application violate "trade" rules.

As well, the lack of anti-monopoly enforcement here and worldwide has allowed a few rapacious collectors and exploiters of peoples' personal data to crush or buy out competitors and use algorithms designed to preference their own products and services, as well as rules designed to squeeze out prospective competitors to develop globally dominant online platforms. In response, scores of countries, including the United States, are implementing or considering changes to their competition policies to redress the anticompetitive harm done and intervene in digital markets' structure to further competition. Online platforms are fighting back by claiming that these policies are illegal "discriminatory trade barriers."

The U.S. government must ensure that any "non-discrimination" standard discussed in STIP's digital economy negotiations does not lead to forbidding domestic digital policies that *may* have a "discriminatory effect" due to the market dominance that certain firms might have over a market and which is precisely the reason behind the policies being questioned.

An example is the Korean law to end anti-competitive app store practices. It is similar to U.S. House and Senate proposals with bipartisan support. Notably, the Senate version, the Open App Markets Act, was approved by the Judiciary Committee on February 3, 2021.[13] Senior

[13] Lauren Feiner, "*Senate Committee advances bill targeting Google and Apple's app store profitability,*" CNBC, Feb. 3, 2022. Available at: https://www.cnbc.com/2022/02/03/senate-committee-advances-open-app-markets-act.html

Republican members of Congress have app store legislation as a top legislative priority,[14] showing that the enactment of U.S. legislation similar to the Korean law is a real possibility and not just a Democratic Party goal. In spite of this, Apple and Google pushed U.S. trade officials to attack the Korean legislation as "discriminatory" while it was being considered by South Korea's parliament, because it would affect them more than other businesses based on their monopoly practices.[15] The South Korean parliament passed the bill on August 30, 2021.[16] Regulations implementing the new law were published in March 2022.[17] And, although initially both Apple and Google announced that they would abide by the law, recently, South Korean regulators determined that Google is not complying with the new policy since it is still charging commissions to app developers even when users opt for third-party payment systems.[18] This latest development indicates that Big Tech interest in generating controversy over the new law is not over. While the existing language of the "Electronic Commerce" chapter of the Korea-U.S. Free Trade Agreement (KORUS) does not provide a solid foundation for attacks against the app store law, the terms that Big Tech has managed to get inserted in other recent deals with "digital trade" chapters, such as the USMCA, are considerably more intrusive and could help dominant digital firms in their crusade against policies that aim to leveling the playing field. Hence the importance of not replicating them in a U.S.-Kenya STIP deal.

Similarly, Big Tech-backed groups have furiously attacked a recently enacted Australian law that enables media outlets to negotiate collectively with digital platforms given the evident power imbalances between news media businesses and the few online platforms that draw most of the online traffic searching for news.[19] The law, which resembles the U.S. Journalism Competition and Preservation Act (JCPA) bill, has faced a sustained assault by digital platforms' lobbyists and other industry groups.[20] The JCPA was introduced last year by bipartisan coalitions in both chambers and now a draft amendment, which draws more elements from the Australian model, is

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[14] John Hendel, "*Tech antitrust optimism to kick off April,*" POLITICO, Apr. 1, 2022. Available at: https://www.politico.com/newsletters/morning-tech/2022/04/01/tech-antitrust-optimism-to-kick-off-april-00022252. David O. Williams, "*Ken Buck Battles Big Tech With Bill to Unlock App Stores' Rules,*" Colorado Times Reporter, Sept. 24, 2021. Available at: https://coloradotimesrecorder.com/2021/09/ken-buck-battles-big-tech-with-bill-to-unlock-app-store-rules/39899/

[15] David McCabe and Jin Yu Young, "*Apple and Google's Fight in Seoul Tests Biden in Washington*," The New York Times, Aug. 23, 2021. Available at: https://www.nytimes.com/2021/08/23/technology/apple-google-south-korea-app-store.html?searchResultPosition=10

[16] Chae Yun-hwan, "*S. Korea passes bill to curb sway of Google, Apple in app store fees*," Yonhap News Agency, Aug. 31, 2021. Available at: https://en.yna.co.kr/view/AEN20210830007800320

[17] Joyce Lee, "*South Korea approves rules on app store law targeting Apple, Google*," Reuters, Mar. 8, 2022. Available at: https://www.reuters.com/technology/skorea-approves-rules-app-store-law-targeting-apple-google-2022-03-08/

[18] Simon Sharwood, "*Google snubs South Korea's app store law*," The Register, Apr. 6, 2022. Available at: https://www.theregister.com/2022/04/06/google_south_korea_app_payments_illegal/. Mariella Moon, "*Korean authorities tell Google it can't remove apps that link to external payment*," Yahoo!Finance, Apr. 6, 2022. Available at: https://finance.yahoo.com/news/korea-kcc-app-store-law-google-external-payments-114054384.html

[19] See Australia Communications and Media Authority's "News media bargaining code." Available at: https://www.acma.gov.au/news-media-bargaining-code#:~:text=The%20News%20Media%20and%20Digital,platforms%20and%20Australian%20news%20businesses

[20] Disruptive Competition Project's "The Dangers of Australia's Discriminatory Media Code" (Feb. 19, 2021). Available at: https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/

being socialized before being formally introduced in Congress.[21] Tellingly, even though the Australia-United States Free Trade Agreement (AUSFTA) includes a non-discrimination provision in the "electronic commerce" chapter, industry groups are relying on AUSFTA's services and investment chapters to argue that the novel News Media and Digital Platforms Mandatory Bargaining Code is inconsistent with Australia's trade obligations.[22]

The following table presents a side-by-side of the relevant provisions from AUSFTA, KORUS and USMCA's "e-commerce" or "digital trade" chapters:

AUSFTA	KORUS	USMCA
Article 16.4: Non-Discriminatory Treatment of Digital Products	Article 15.3: Digital Products	Article 19.4: Non-Discriminatory Treatment of Digital Products
1. Neither Party may accord less favourable treatment to some digital products than it accords to other like digital products: (a) on the basis that the digital products receiving less favourable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms outside its territory; (b) on the basis that the author, performer, producer, developer, or distributor of such digital products is a person of the other Party or a non-Party; or (c) so as to otherwise afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.	(…) 2. Neither Party may accord less favorable treatment to some digital products than it accords to other like digital products (a) on the basis that: (i) the digital products receiving less favorable treatment are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in the territory of the other Party, or (ii) the author, performer, producer, developer, distributor, or owner of such digital products is a person of the other Party; or (b) so as otherwise to afford protection to other like digital products that are created, produced, published, stored, transmitted, contracted for, commissioned, or first made available on commercial terms in its territory.	1. No Party shall accord less favorable treatment to a digital product created, produced, published, contracted for, commissioned, or first made available on commercial terms in the territory of another Party, or to a digital product of which the author, performer, producer, developer, or owner is a person of another Party, than it accords to other like digital products. (…)

[21] Alexandra Bruell and Keach Hagey, "*Bill Would Let Small Publishers Use Baseball-Style Arbitration to Settle Disputes With Google and Facebook*," The Wall Street Journal, Apr. 5, 2022. Available at: https://www.wsj.com/articles/bill-would-let-small-publishers-use-baseball-style-arbitration-to-settle-disputes-with-google-and-facebook-11649190805?st=fwyrf2nyq0lehl2&reflink=desktopwebshare_twitter

[2222] Disruptive Competition Project's "The Dangers of Australia's Discriminatory Media Code" (Feb. 19, 2021). Available at: https://www.project-disco.org/21st-century-trade/021921-the-dangers-of-australias-discriminatory-media-code/

Leaving aside the potential differences in coverage arising from disparate definitions of "digital products," it seems clear that U.S. negotiators for AUSFTA and KORUS carefully drafted the non-discrimination provisions in the electronic commerce chapters of these deals to exclude de facto national treatment discrimination claims, unless the complaining party could prove that the alleged less favorable treatment had protectionist intent – hence, the "as to otherwise afford protection" clause. Conversely, USMCA's overly broad provision could be the basis for attacks against policies that might incidentally have a disparate effect on foreign digital products due to their market dominance, in spite of lack of protectionist intent.

Any U.S.-Kenya STIP "digital trade" chapter must not include the broad "non-discrimination" obligations of USMCA, must focus on discriminatory intent and must ensure that these disciplines do not obstruct governments' policies to regulate markets and level the playing field.

c. Negotiate digital standards respectful of civil rights

- **The U.S.-Kenya STIP should not grant new extreme secrecy rights to Big Tech that could undermine investigations of discriminatory source code and algorithms, intrusive surveillance practices and violent incitement online**.

Everyday decisions made by artificial intelligence (AI) components of online platforms affect which individuals and communities access public and private services ranging from home loans to job postings to medical treatments — enabling a sort of high-tech redlining. Governments are likewise increasingly turning to private corporations for aid with "predictive policing" and other surveillance, law enforcement and security functions. These deeply concerning trends have led to oversight efforts from Congressional committees, scholars and public investigators that have tried to review applications' source code and related data to identify racist, sexist and other practices deserving of scrutiny, criticism and correction. Perhaps more importantly, a growing movement calls for AI governance in order to give governments the tools to be able to not only sanction the above-mentioned discriminatory practices, but also prevent them. Experts recommend, for instance, enacting regulation enabling effective external audits of AI systems, particularly those labeled as high-risk, to monitor compliance with civil and consumers rights.[23] This will require government agencies responsible for enforcing such policies to have access to algorithms and code. U.S. trade deals must not establish new obstacles for those seeking to enforce their civil rights in court by making it more difficult for plaintiffs to gain access to information needed to prove companies' discriminatory practices with respect to discriminatory treatment that they have experienced online.

However, some existing "digital trade" provisions forbid governments from enacting laws or regulations that would require access to, or transfer of, the source code of software, with very limited exceptions. Corporate interests have made it clear that they would like to see these barriers to governmental regulatory powers included in any "digital trade" agreement negotiated by the current administration.[24] In addition to the fact that source code provisions are at odds

[23] Irion, Kristina (2021). AI regulation in the European Union and Trade Law: How Can Accountability of AI and a High Level of Consumer Protection Prevail over a Trade Discipline on Source Code? (Jan. 26, 2021). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786567

[24] The U.S. Chamber of Commerce has announced in its "digital trade priorities" that it wants rules that would guarantee that "companies should not be forced to transfer their technology—including source code and proprietary

with AI governance principles, there is no rationale that justifies granting these special interest private rights. Digital firms that wish to protect their proprietary source code and algorithms can rely on existing intellectual property and trade secrets legislation. Kenya, as a World Trade Organization (WTO) Member, already has the obligation to enforce IP and trade secrets rights due to the already onerous terms of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

It is worth noting that of the 60 existing trade agreements negotiated between developing countries since 2000, none of them ban countries from requiring access to, or the transfer of, source code of software owned by a person, as a condition for the import, distribution, sale, or use of such software.[25] This shows how controversial this provision is for developing countries. It would be truly egregious if the U.S. government were to bully Kenya into accepting it through a trade deal that is supposed to support the African country's sustainable and inclusive economic growth.

- **The U.S.-Kenya STIP agreement should not shield Big Tech firms from corporate accountability via overly broad content liability waivers.**

How to address the ways in which certain online business practices, algorithms and moderation stoke racial and ethnic violence and contribute to other antisocial behavior is a hotly debated topic. While solutions may not yet be widely agreed upon, what is absolutely true is that this rapidly evolving area of public policy must not be restrained via trade agreements. Further, policies such as Section 230 of the Communications Decency Act, which was created to protect free speech online, have been stretched to allow massive corporations to evade liability for dangerous and deadly goods sold online. Using trade pacts to require countries to enact policies that insulate online sale platforms from product liability is unacceptable. As the U.S. Congress grapples with whether Section 230 should be altered and how, U.S. trade negotiators must not export the policy by obliging other countries to provide liability shields to online entities under trade agreements.

3. The U.S.-Kenya STIP must not include "Good Regulatory Practices" provisions designed to slow down and/or kill public interest regulations.

Rethink Trade urges U.S. negotiators not to include in any U.S.-Kenya STIP provisions from the so-called "Good Regulatory Practices" chapter found in the USMCA. Co-opting important values of transparency and stakeholder participation as cover, these USMCA provisions award large corporations specific roles in virtually every step of the regulatory policymaking process and grant corporations new avenues for attacking regulations they do not like — not only after regulations take effect, but before they are even crafted. To the extent that there will be

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algorithms—to competitors or governments." This is code for the type of source code provisions that would prevent governments from demanding access to source on behalf of the public interest. Available at: https://www.uschamber.com/assets/documents/Final-The-Digital-Trade-Revolution-February-2022_2022-02-09-202447_wovt.pdf at page 19.

[25] Banga, K., Macleod, J. and Mendez-Parra, M. (2021). Digital Trade Provisions in the AfCFTA: what can we learn from South-South trade agreements. Supporting Economic transformation (SET) working paper series. ODI, London.

negotiations on policymaking procedures, these must be limited to requiring on-the-record and transparent processes with opportunities for all stakeholders to have equal opportunities to engage.

In contrast, the terms in the "Good Regulatory Practices" chapter of the USMCA (Chapter 28), which have overly broad coverage to include all government practices "relating to the planning, design, issuance, implementation, and review of the Parties' respective regulation," reflect the most problematic elements of current U.S. regulatory regime. The chapter includes requirements on everything from the creation of "expert advisory groups" and "regulatory impact assessments" to the use of "sound statistical methodologies," and "retrospective review." Such provisions and related practices are designed to slow, weaken and/or prevent public interest regulations in the areas of climate, food safety, financial regulations, consumer privacy, labor rights, and more. Such terms must not be included in any U.S.-Kenya STIP.

The USMCA Chapter 28 approach would push problematic U.S. practices on Kenya, while also reinforcing U.S. obligations to stick with what are now largely informal practices or regulatory obligations. While many of the USMCA Chapter 28 terms were not binding, the direction of the provisions is decidedly deregulatory. For instance, calling on Kenya to centralize its regulatory regime à la USMCA Chapter 28, along the lines of the U.S. Office of Information and Regulatory Affairs (OIRA) review process, will likely result in the same problems that OIRA causes for the U.S. regulatory process. Namely, policies developed by subject-matter experts in agencies with expertise on a matter will be second-guessed, delayed, or derailed by a team of economists and others whose remit is imposing additional layers of cost-benefit analyses and reviews designed to derail new initiatives and sunset old ones. And, depending on the language in any final deal, terms in a prospective STIP could deliver an expansion of OIRA that corporate interests have long sought – the extension of OIRA reviews to independent agencies.

Establishing "expert advisory committees" all but ensures that "expertise" comes from commercial interests that have the resources to dedicate staff to such activities and perhaps will operate off-the-record. Unless the committee is considered to be covered by the Federal Advisory Committee Act (FACA), meetings and activities will not require public airing or even notice. And, FACA's application in the context of international negotiations has exceptions even when it applies in general. In contrast, asking for on-the-record public advice allows public interest groups to put forward their views by pooling resources, obtaining support from academics, and otherwise engaging in an open process. As well, aspects of Chapter 28 aimed at promoting a corporate-rigged version of cost-benefit analysis or promoting and regulatory sunset or review processes are also a one-way ratchet – against establishment and maintain of regulatory policies. There is no role for such biases in a worker-centered trade model.

4. The U.S.-Kenya STIP must promote balanced agricultural trade to strengthen rural communities and not undermine the democratic processes by which countries set their agricultural and food safety standards.

A U.S.-Kenya trade pact must respect governments' ability to implement programs that ensure farmers and other workers in the agriculture and food sectors receive fair compensation, and that consumers have access to safe and affordable foods and the right to know where and under what

conditions their food is produced. Likewise, nations must be able to protect themselves from dumping, land grabs, and other unfair trade practices that force farmers off their land.

Any prospective U.S.-Kenya STIP's agriculture terms must be designed with the goal of achieving fair and sustainable rural economies and food supplies.

No STIP terms must limit either countries' ability to democratically establish domestic farm policies that ensure that farmers are paid fairly for their crops and livestock, and other farm and food policies that protect farmers and consumers such as inventory management, strategic food reserves and import surge protections, and other mechanisms to protect the right of each country to prevent dumping of agricultural commodities at below the cost of production.

From 2018 to 2021, the third highest category of exports from Kenya to the United States was edible fruits and nuts ($66 million on average annually). Several other categories in the top 20 are also agricultural products, including coffee, tea, and spices at No. 4 ($54 million) and prepared foods at No. 8 ($8 million). However, according to the U.S. Department of Agriculture's Kenya Exporter Guide, Kenya is a net importer of agricultural commodities and food products.[26] The proposed trade agreement must have no terms undermining efforts to achieve food security and alleviate hunger.

Equally important is that any U.S.-Kenya STIP embrace a simple rule: Imported products must meet the same standards as domestic products. The reciprocal terms must apply for U.S. imports into Kenya. What level of public interest protection a country chooses to establish is a matter for their own domestic, democratic processes so that policies reflect domestic preferences and goals. The only issue that is relevant for a trade pact is whether domestic policies intentionally discriminate against foreign goods.

The U.S. National Trade Estimates reports has consistently targeted as a foreign trade barrier Kenya's ban on imports of genetically engineered food and feed imports. It would be ill-advised to bully Kenya into repealing this democratically chosen preference in the name of alleged "science-based" requirements for sanitary and phytosanitary measures.

Conclusion

Rethink Trade is a strong supporter of the Biden administration's goal of replacing decades of trade policy that have undermined American communities and our economic resiliency while also failing to support sustainable and inclusive development in our less economically developed partners. A worker-centered trade vision is essential to creating new rules for the global economy and at home that are responsive to the challenges of our times.

However, we are uncertain how a U.S.-Kenya STIP would contribute to these goals. If the negotiations proceed, it is critical that an open and inclusive process ensures that special interests cannot transform this negotiation into another venue for replicating digital, biotech, regulatory practices, or other past trade-pact rules that entrench special rights and privileges for multinational corporations without benefitting the people of the United States and Kenya.

[26] U.S. Department of Agriculture Foreign Agricultural Service. Kenya: Exporter Guide. Updated 3 January 2022. Available at: https://www.fas.usda.gov/data/kenya-exporter-guide-3