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United States – Kenya bilateral trade negotiations: From a Free Trade Area to a Strategic Trade and Investment Partnership

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Bilateral trade between the United States (U.S.) and Kenya commenced through the enactment of the African Opportunity and Growth Act (AGOA) as Title I of The Trade and Development Act, signed in the year 2000[1]. Kenya is the second-largest beneficiary of AGOA's tariff benefits, excluding crude oil, and is a major beneficiary of U.S. security and foreign assistance as well as a hub for U.S. security initiatives. The U.S., on the other hand, is Kenya's 4th largest trading partner and 3rd largest export market[2].

In 2021, U.S. exports totalled at USD 551 million and were concentrated in petroleum products, pharmaceutical products and aircrafts. U.S. imports totalled USD 685 million and consisted of apparel, macadamia nuts and coffee. U.S. imports from Kenya have grown by more than 10% annually since 2001 when the AGOA benefits took effect[3]. AGOA is set to expire in 2025, pushing countries like Kenya to negotiate bilateral preferential trade agreements with their 3rd largest export market. For the U.S., a Free Trade Area (FTA) could fulfil a shared goal of Congress and successive U.S. Administrations to expand ties with trading partners in Africa. An FTA would also help reduce Kenyan trade barriers and help U.S. firms maintain their competitiveness in the Kenyan market, especially in light of the signing of the Kenya – United Kingdom Economic Partnership Agreement.

On 6 February 2020, (now former) President of the U.S. Donald Trump announced the U.S.'s intention to initiate bilateral negotiations for an FTA in order to proceed and extend the trade relationship both countries enjoy under the AGOA. The target of the U.S – Kenya FTA was to allow continued duty- and quota-free access for Kenyan goods into the

[1] About AGOA, AGOA.info https://agoa.info/about-agoa.html
[2] U.S.-Kenya FTA Negotiations, Congressional Research Service, May 27 2022.
[3] Ibid.

U.S., and increase predictability in trading with the U.S., thus modelling for the rest of the Sub-Saharan African countries[4].

Bilateral negotiations consequently commenced on 7 July 2020. However, negotiations were halted due to the American presidential elections that saw President Biden being sworn in as U.S. President in January 2021. As a result, a period of uncertainty commenced over continuation of trade negotiation due to President Biden's pursuit of reversal of policies that had been undertaken by the Trump administration[5].

In July 2021, the U.S. renewed its Prosper Africa Initiative which sought to increase trade and investment between the U.S. and African Countries. The focus of the Initiative was centred on trade, investment, infrastructure, energy and climate solutions, healthcare as well as technology.

At the World Trade Organisation's (WTO) 12th Ministerial Conference in June 2022 pursuant to the Initiative, Kenya and the U.S. revisited trade negotiations and agreed that a list of areas be developed for further economic engagement.

During a virtual meeting on 14 July 2022, U.S. and Kenya Trade Representatives met and launched the United States – Kenya Strategic Trade and Investment Partnership (STIP) which would act as a "placeholder" for a full FTA. STIP contains the following negotiation objectives:

- agriculture
- anticorruption
- digital trade
- environment and climate action
- good regulatory practices
- micro, small and medium enterprises
- promoting workers' rights and protections
- supporting participation of women, youth and other in trade
- standards collaboration
- trade facilitation

[4] The Proposed Kenya- USA FTA, African Growth and Opportunity Act, AGOA.info https://agoa.info/bilaterals/kenyausa.html
[5] Eckart Naumann, The U.S.-Kenya Free Trade Area (FTA): insights into the bilateral trade relationship and early progress on setting terms for an FTA, tralac, June 2020 https://www.tralac.org/publications/article/14663-the-united-states-kenya-free-trade-area-fta-insights-into-the-bilateral-trade-relationship-and-early-progress-on-setting-terms-for-an-fta.html

- customs procedures[6]

Kenya's and the U.S.'s governments, based on STIP, asked firms from Kenya and America to share their views on the proposed areas that will be the basis for a new trade deal. In response to the request for comments by the Office of the U.S. Trade Representative (USTR), the U.S. Computer & Communications Industry Association (CCIA) – representative of various American technology companies – raised several comments on the way forward for the bilateral negotiation.

Along with welcoming the desire to expand trade opportunities in Kenya by the Biden Administration, the CCIA stated that the U.S. should pursue customs and trade facilitation commitments with Kenya that set eligibility for *de minimis* shipments in a manner that facilitates e-commerce, including potential green lanes for shipments that arrive with greater advance data; avoiding unnecessary trade import licenses for import of digital hardware and software; requirements on information sharing between government and private sector entities on seizures; strengthening informal entry language; and providing unified entry process. The CCIA also advocated for strong digital trade rules within the agreement. The priorities that they listed pursuant to digital economy-related matters are as follows:

a. Enabling cross-border data flows and trust in digital services

The CCIA stated that the U.S. should continue to pursue rules that prohibit governments from interfering with data flows or the exchange of information online, and prohibit regulations or standards that condition market access, procurement or qualification for widely-used certifications based on nationality of ownership, location of corporate headquarters or size of company.

Rules should prohibit governments from imposing data localisation or local presence requirements on data controllers or processors, as well as linking market access and/or commercial benefits to investment in or use of local infrastructure.

The CCIA specified that Kenya's existing data protection laws present an obstacle for firms operating in the country. The 2019 Kenyan Data Protection Act imposes restrictions on data transfers. These limitations to data protections include: requiring all data to be processed in data centres in Kenya prior to transfer abroad; providing a Data Commissioner with widespread power to block data

[6] U.S. and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership, Office of the U.S. Trade Representative, 14th July 2022.

transfers or prove sufficient data protection in the destination country; and broad requirements to enable data transfers such as necessity of sending the data abroad and adequacy promises from a foreign regulator.

In 2021, the Office of the Data Commissioner issued draft regulations proposing that data processed for "actualising a public good" shall be processed in a server and data centre based in Kenya[7]. The CCIA argued that such data localisation mandates are a barrier to cross-border digital trade, and the forced local equity ownership requirement limits market access opportunities for U.S. companies operating in Kenya.

b. Prohibition on customs duties for electronic commerce

The CCIA maintained that imposing customs requirements on purely digital transactions creates significant and unnecessary compliance burdens on nearly all enterprises, including small and medium-sized enterprises (SMEs). They further stated that the U.S. should embed in the STIP commitments resulting in a permanent ban on the imposition of customs duties on electronic transmissions in the trade agreements.

c. Prohibition on unilateral and discriminatory taxation rules

The CCIA emphasised that tax measures play a significant role in the global competitiveness of U.S. companies. They pointed out that in 2021, Kenya imposed a 1.5% Digital Services Tax (DST). The DST is levied on income derived or accrued in Kenya from services offered through a digital market place. The CCIA stated that the US – Kenya STIP should include commitments not to pursue unilateral and discriminatory digital taxation measures and that Kenya should phase out its existing DST.

d. Online content regulations and addressing state-censored practices

The CCIA stated that Kenya and the U.S. should use the negotiations of the U.S – Kenya STIP to address digital authoritarianism and state censorship practices that pose threats to open Internet and Freedom of Expression. The U.S – Kenya STIP should include strong commitments to promote free expression and combat content takedowns in digital and content-creating spaces.

[7] This would include, but not be limited to, data related to civic registration and national identification systems; primary and secondary education; elections; health; electronic payments and public revenue administration.

e. Securing digital communications and devices

As per the CCIA comments, the U.S – Kenya STIP should contain commitments to promote encrypted devices and connections. The U.S – Kenya STIP should prevent countries from compelling manufacturers or suppliers to use a particular cryptographic algorithm or to provide access to a technology, private key, algorithm specification or other cryptographic design details. Similarly, it should prohibit governments from conditioning market access, with appropriate exceptions, on their ability to demand access to cryptographic keys or source code.

f. Fostering innovation in emerging technologies

The CCIA stated that both parties should foster innovation in emerging technologies such as artificial intelligence (AI), machine learning and quantum computing.

Both Parties should aim to implement a trade-rules that can facilitate the responsible cross-border growth of AI technologies, remove localisation requirements, encourage governmental investment in and release of open data, identify and share best practices for the responsible use of AI etc.

Additionally, both Parties should also agree to avoid adopting any measures that discriminate against U.S. suppliers who excel in this area by providing less favourable treatment to AI products or applications than they give to like products or applications without an AI component.

g. Following global practices on internet access and interconnection policies

In the comments, the CCIA stated that the U.S. should work to protect the global internet architecture that enables cross-border data flows, support principles of non-discrimination and market access to telecommunications networks, and enable stakeholders to negotiate the nature of services to be delivered across the network.

Further, the U.S. should seek to include assurances that internet-based telecommunications service providers and application providers are able to negotiate with the other party on a voluntary, market-driven basis in this agreement.

h. Addressing technical barriers to trade

The CCIA argued that U.S. technology exporters face a growing number of non-tariff barriers such as technical regulations, conformity assessment practices and standards-based measures. Parties should adopt global standards to ensure regulatory coherence and avoid country-specific standards that deter market entry.

i. Provisions to enable trade in electronic services

Electronic payment systems which are interoperable across borders should be implemented to enable the growth of cross-border digital trade. Additionally the U.S. – Kenya STIP should include provisions on electronic signatures, electronic authentication and paperless trading[8].

The CCIA comments to the USTR give an insight into what STIP negotiations might look like, especially on digital trade matters. Their comments are all in obvious favour of American technology companies given that they want legislation (such as the Kenyan Data Protection Act), taxes (such as the Kenyan Digital Services Tax), imposition of customs duties on electronic commerce and online content regulation all done away with due to their effect on competitiveness of American technology companies in the Kenyan market.

Kenya has yet to be seen sharing comments on the proposals from the CCIA to the USTR. Most of the areas on digital economy matters, such as cross-border data flows which are under the 2019 Data Protection Act, and the imposition of customs duties and taxes, are within the purview of its state sovereignty. Not to mention, eliminating the aforementioned customs duties and taxes could lead to a major forfeit of government revenue and hamper the growth of Kenyan companies in their infancy. It will be interesting to note how Kenya will balance its state sovereignty over its territory and domestic affairs as well as the privacy of its citizens with their own economic needs.

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[8] Comments Of the Computer & Communications Industry Association (Ccia), Before the Office of the U.S. Trade Representative Washington, D.C, released on 16th September 2022.

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