The Kenya/US Strategic Trade Agreement Needs to Be Negotiated with Transparency Not Urgency

By:

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23 September, 2024

From September 16-27, 2024, U.S. and Kenyan negotiators held their eighth negotiating round of the US/Kenya Strategic Trade and Investment Partnership in Washington DC. The trade talks for a stand-alone Free Trade Agreement kicked off under the Trump and Kenyatta administrations following an August 2018 meeting of the two Presidents. The Biden administration relaunched the negotiations in July 2022. At the time, the Biden Administration identified protecting American firms in its new industrial policy of increasing manufacturing to counter China. It also sought access to the Kenyan market for American genetically modified crops and dealing with corruption to ensure transparency in public procurement for American businesses as key objectives. In the meantime, President William Ruto, who was elected as Kenya's fifth President in August 2022, continued pursuing a trade deal with the U.S. with zeal.

After settling down, the Biden Administration claimed it was abandoning pursuing a free trade agreement with tariff concessions with Kenya. Instead, the U.S. decided to focus on removing non-tariff barriers that hamper market access for US products and services in Kenya. At the time, the United States Trade Representative Katherine Tai noted that this focus on non-tariff barriers was consistent with the Biden administration's new policy stance against negotiating tariff concessions in trade agreements. Yet, given the very broad scope of the Strategic Trade Partnership negotiations with Kenya belies the U.S.'s claim that it is not negotiating a full-scale traditional trade agreement.

Since I first reviewed the early iterations of these trade talks in February 2020, nothing much has changed by way of publicly available negotiation drafts. There have been a couple of proforma listening sessions hosted about the talks in Nairobi and Washington DC, and a few very brief summaries of proposed negotiating texts by the United States have been released. But that is about it. Therefore, in response to the upcoming Stakeholder Listening Session with the Office of the United States Trade Representative on Wednesday 25th September 2024 at 10:00 AM EST in Washington D.C., it is notable that:

1. The U.S.-Kenya Strategic Trade and Investment Partnership (STIP) negotiations have continued in secrecy, with little public transparency, accountability or any meaningful public consultation by both the government of Kenya and the government of the United States. The entirety of the draft texts of the chapters being negotiated have at no point during negotiations been released to the Kenyan public or even to the National Assembly of Kenya, or for that matter the American public. The 2010 Constitution of Kenya requires public officials to consider the views of the general public both when making important decisions that affect the public, as well as when implementing them. So far, the Government of Kenya has failed in its Constitutional obligation to undertake any meaningful public participation. As such, the U.S.-Kenya STIP lacks both legitimacy and a constitutional foundation. The lack of public access to detailed information about the negotiations is also inconsistent with Kenya's Access to information Act, 2016 which gives effect to Article 35 of Kenya's 2010 Constitution that requires disclosure

and access to information by public and private entities. Further, in December 2022, the East African Court of Justice held that Kenya had violated the principles of rule of law, transparency, and cooperation for mutual benefit guaranteed under Articles 6 and 7 of the Treaty Establishing the East African Community (EAC). The secrecy of the STIP negotiations also sits in stark contrast with the demands for transparency and accountability exhibited in the Gen Z Revolution of 2024.

2. The negotiations on an inclusivity chapter in the STIP stand in sharp contrast to the lack of inclusivity in consulting with stakeholders on the Kenyan side, whose interests are likely to be adversely affected. For example, negotiations on good regulatory practices are very likely focusing on barriers that the U.S. government has identified in its 2024 National Trade Estimate Report on Foreign Trade Barriers. One such barrier that has been identified for removal is the restriction on foreign ownership of land. That constitutional restriction on foreign ownership of land is based on the fact that a majority of Kenyans derive their livelihoods from land-based activities. Negotiations focusing on an issue such as land would not only be unconstitutional, since that limitation is provided in the 2010 Kenyan Constitution, but would also adversely affect issues of food security in Kenya if U.S. investors were allowed to buy off unlimited swaths of land.

3. The U.S. has also identified Kenya's 2019 import standards – the Verification of Conformity to Standards and Other Applicable Regulations of Imports, which Kenya enacted to address health, environmental, and security concerns – as a barrier. Negotiations that undermine Kenya's regulatory autonomy in this area are fundamentally inconsistent with Kenya's sovereignty and ability to protect its citizens. The U.S. has its own elaborate and stringent regime to protect its land and borders that Kenya could also arguably and credibly claim is unduly burdensome but that does not seem to be on the negotiating table. These examples illustrate the unbalanced nature of the negotiations since the publicly available information seems to indicate the US is setting the agenda with its demands.

4. The U.S. government has also identified the successful legal challenge before the Kenyan High Court that placed on hold the lifting of a 10-year ban on the import and commercialization of genetically modified products as a barrier to U.S. trade and investment in Kenya. In August 2023, the Kenyan Court of Appeal declined to lift the High Court order, placing on hold the lifting of the ban on the importation and commercialization of GMO products. An October 2023 decision of the High Court of Kenya found that the "regulatory barriers that govern importation and cultivation of GMOs remain in form, and the same are presumed to be constitutional until the contrary is proved." If Kenya must sacrifice its legitimate public policy regulations because they are inconsistent with the business interests of U.S. investors, then Kenyans must have access to the draft agreement and be able to express their views. The U.S. would never accept sacrificing its regulatory autonomy to protect its citizens in the manner it is asking Kenya to do. Further, the STIP negotiations contradict the Biden administration's Worker-Centered Trade Policy.

5. Other pillars of the U.S./Kenya bilateral relationship include defense cooperation, Kenya's role in addressing regional instability and global insecurity, such as in Haiti. These pillars seem to be driving this very complex set of trade negotiations on a very broad range of disparate issues at a breakneck speed. The speed and secrecy of the negotiations have left no time for a full public opportunity to properly evaluate if the STIP negotiations will undermine Kenya's commitments under its Constitution and laws, under the African Continental Free Trade Agreement, or even under East African Community law.

I therefore call upon the governments of the United States and Kenya to:

1. make the entirety of their negotiating texts public to allow for a full scrutiny and close examination of all the potential issues raised by the legal texts. Both governments should engage in meaningful public participation rather than having pro-forma listening sessions. It is only through meaningful public participation that it is possible to assess the

veracity of the benefits or otherwise that negotiators contemplate the STIP will provide;

2. to slow down negotiations so that they can be more inclusive and transparent. These negotiations must not sneak a trade agreement without Congressional oversight and authorization before or after the US elections in November 2024. The Biden administration is required by Section 2105(a)(4)(A) and (B) of the Trade Act of 2002 to disclose to the US Congress "[a]ny agreement or other understanding with a foreign government or governments (whether oral or in writing) that (A) relates to a trade agreement." Involving Congress as the law requires on the US side would avoid yet another trade deal sneaked under the radar.

3. focus on renewing the Africa Growth and Opportunity Act (AGOA) since all the data demonstrates that Kenya, and indeed African countries that benefit from AGOA, are more likely to benefit from the U.S.'s strategic goals in Africa through more effective AGOA utilization that is more likely to lead to the kind of structural transformation necessary than through the kind of pact Kenya and the US are negotiating.

Nothing short of the foregoing basic minimum goals of transparency and inclusivity in the negotiations will resolve the major legitimacy deficit the US/Kenya STIP talks currently suffer from. From all one can tell from the outside, big business interests have a seat at the table while everyone, especially those on the Kenyan side likely to bear the brunt of this agreement, are shut out from it. For example, if the US succeeds in having Kenya remove its GMO restrictions through this agreement, that will put out hundreds of thousands of Kenyan farmers who depend on corn for a livelihood out of business and result in massive displacements from rural areas as happened in Mexico following the North American Free Trade Agreement (NAFTA). Such a consequence is unacceptable for these farmers, and it would gravely undermine food security in Kenya. The Kenya/US STIP must, therefore, be negotiated in broad daylight and not in the cover of darkness in boardrooms far removed from those who would gravely suffer from its commitments.

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