



The USKEFTA and the USKESTIP: A fresh start?

Authors: Dr. Melissa Omino | Joanna Kahumbu

Executive Summary

The United States - Kenya Free Trade Agreement (USKEFTA) and the United States - Kenya Strategic Trade and Investment Partnership (USKESTIP hereafter also STIP) seem to encompass different objectives and aim to achieve slightly different outcomes. The two proposed agreements do have notable similarities and differences in the approach leading up to negotiations so far. The USKEFTA was intended as a blueprint for trade agreements across Sub Saharan Africa and while the negotiations around STIP have not explicitly laid out this objective too, it may have an impact on Kenya's policies regarding key areas including digital trade. To this end, this policy brief includes recommendations of how Kenya should approach the negotiations and what factors to keep in mind.

Introduction

On 14 July 2022, the new US administration and Kenya launched USKESTIP. The USKESTIP is part of the US Prosper Africa Initiative, which aims to increase trade between the US and Africa, especially in sectors such as infrastructure, energy, climate solutions, healthcare, and technology.¹ The agreement will also have a special focus on digital trade.² The two governments were to start work within three months of the launch to develop a roadmap for enhanced cooperation, and following the installation of Kenya's new Cabinet Secretary in the Ministry of Industrialization, Trade, and Enterprise Development there have been consultative meetings held with the Assistant US Trade Representative for Africa, Constance Hamilton on STIP.³ While there was no direct mention of the USKEFTA in the launch of the STIP, it is deemed the predecessor of this agreement.

The USKEFTA was formally negotiated beginning in July 2020 with the release of each party's negotiating objectives.⁴ The negotiations were intended to culminate in a traditional FTA which would allow duty-free access for the two countries into each other's markets. Further, the FTA was to form a model agreement for future US FTAs with other African countries. Kenya already enjoys duty-free access to the US market via the Africa Growth and Opportunities Act (AGOA), which is currently set to expire in 2025. The Trump administration promoted USKEFTA as an ostensibly necessary replacement

for AGOA, but the U.S. Congress has repeatedly reauthorized the program on a bipartisan basis.⁵ The bilateral negotiations were paused in the wake of the American presidential elections in November 2020 and did not pick up again.

President Biden and his USTR describe their approach to trade as "worker-centred," and often speak of a new vision for trade that responds to the mistakes of the past corporate-dominated model. It still remains to be seen exactly what this "worker-centred" trade will be. The administration has launched a handful of trade talks that eschew the traditional FTA model, containing no terms on tariffs, intellectual property or investor-state dispute settlement. The most developed of these is the 14-nation Indo-Pacific Economic Framework (IPEF).

This Policy Brief sets out key findings in relation to the negotiation of both agreements, with regard to digital trade aspects especially, and proposes recommendations that the Kenyan government ought to consider while negotiating STIP.

Methodology

We carried out a comparative analysis of the publicly available documents from both sides that indicate what the contents of the agreement would ultimately be. We evaluated the negotiation objectives shared for the USKEFTA from the US and the Kenyan governments. We then compared this to the Press Release issued by the US and Kenyan governments on the STIP.⁶

¹Virusha Subban "Kenya: Shared Prosperity -the United States and Kenya sign Strategic Trade Investment Partnership" Global Compliance News: Baker McKenzie available at <https://www.globalcompliancencenews.com/2022/08/04/kenya-shared-prosperity-the-united-states-and-kenya-sign-strategic-trade-and-investment-partnership200722/>.

²Lawder and Gallagher "U.S., Kenya launch non-tariff trade and investment partnership talks" Reuters July 15 2022 available at <https://www.reuters.com/world/us-kenya-launch-trade-investment-partnership-ustr-2022-07-14/>.

³The current Cabinet Secretary of Industrialization, Trade, and Enterprise Development is Hon. Moses Kiarie Kuria. See [Moses Kuria appointed Trade and Industry CS](#) 27 September 2022.

⁴See [United States-Kenya Negotiations Summary of Specific Negotiating Objectives May 2020](#) and [Proposed Kenya - United States of America Free Trade Area Agreement Negotiation Principles, Objectives, and Scope](#).

⁵See [Joint Statement between the United States and Kenya on the Launch of Negotiations towards a Free Trade Agreement 8 July 2020](#).

⁶Office of the United States Trade Representative "United States and Kenya Announce the Launch of the U.S.-Kenya Strategic Trade and Investment Partnership" July 14 2022 available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/july/united-states-and-kenya-announce-launch-us-kenya-strategic-trade-and-investment-partnership>. See also for the Kenyan governments identical press release: Official Twitter account of the State Department for Trade, Ministry of Trade, Investments & Industry https://twitter.com/Trade_Kenya/status/1547616998527365121

Key Findings

Overall, the analysis identified the following similarities and gaps between the two proposed agreements:

USKEFTA	STIP
<p>US Negotiating Objectives indicated that the vision is to conclude an agreement with Kenya that can serve as a model for additional agreements in Africa.</p>	<p>At present, the utilisation of STIP as a blueprint for the conclusion of agreements with the rest of Sub-Saharan Africa has not been explicitly set out.</p>
<p>The areas of focus highlighted under the US Negotiating Objectives included a long list of issues that were to be tackled such as:</p> <ul style="list-style-type: none"> ● Trade in goods ● Sanitary and Phytosanitary Measures ● Customs and Trade Facilitation ● Rules of Origin ● Technical Barriers to Trade ● Good regulatory Practices ● Transparency, Publication, and Administrative Measures ● Trade in Services ● Digital Trade in Goods and Services and Cross-Border Data Flows ● Investment ● Intellectual Property ● Procedural Fairness for Pharmaceuticals and Medical Devices ● State-Owned and Controlled Enterprises ● Subsidies ● Competition Policy ● Labour ● Environment ● Anti-corruption ● Trade Remedies ● Government Procurement Small and Medium-sized Enterprises 	<p>The list of issues seems to have been reduced. This could indicate that items will be collapsed under different broader headings if they have not been abandoned altogether. The objectives, as presently stated, envisage a good governance partnership with commitments for new disciplines such as digital trade, climate change issues, and regulatory harmonisation. However, this differs from the USKEFTA owing to the lack of clarity on the legal basis under which trading will occur. It is important for the two countries to identify what form of agreement STIP will take, including tackling tariff reductions at this early stage. Initial issues identified by the USTR and Kenya’s Ministry include:</p> <ul style="list-style-type: none"> ● Agriculture ● Anti-corruption ● Digital Trade ● Environment and Climate Change Action ● Good Regulatory Practices ● Micro, Small, and Medium Enterprises ● Promoting Workers’ Rights and Protections ● Supporting Participation of Women, Youth, and Others in Trade ● Standards Collaboration ● Trade Facilitation and Customs Procedure

<p>The USA undertook a public participation exercise involving a call for comments from different sectors following the publication of their Negotiating Objectives whereas Kenya did not.</p>	<p>The USA undertook a public participation exercise which involved a call for comments following the publication of information of about the prospective STIP whereas Kenya has not.</p>
<p>There was an emphasis on cross border data flows when discussing Digital Trade.</p>	<p>There is no explicit mention of cross border data flows in the documents shared so far from both governments. In relation to digital trade it was emphasised that the two countries will discuss measures to support digital inclusion, including accessibility, and online consumer protection. The two countries will also monitor global discussions on emerging issues in digital trade which are of mutual interest.</p>
<p>Based on the Negotiating Objectives, the USKEFTA was to be similar to other FTAs that the USA had concluded on the basis of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Trade Promotion Authority, 2015).</p>	<p>The prospective agreement, based on the initial issues identified for negotiation, has a heightened focus on sustainability, innovation, and good governance. The Biden administration will likely claim that this agreement does not need congressional approval, but that will depend on the eventual terms of the deal.</p>
<p>In light of the possible expiry of AGOA in 2025 and the apprehension that it may not be renewed by Congress, the USKFTA sought to put in place a bilateral agreement that would enable both the USA and Kenya to enjoy duty free access to each other's markets.</p>	<p>The prospective STIP will pursue high-standard commitments with goals such as increasing investment and promoting sustainable and inclusive economic growth, however, there has been no mention of lowering tariff barriers as yet.</p>



Policy Recommendations

The following policy recommendations are proposed to ensure the negotiation of STIP aligns with Kenya's trade policy and produces the best outcome for the country:

- Public participation in Kenya is a constitutionally mandated exercise. In order for the negotiations to encompass a range of perspectives and produce a meaningful outcome, it is essential for Kenya to solicit participation from the public and provide stakeholders with an opportunity to have their views and interests reflected. This may be done by engaging relevant organisations or bodies as well as adhering to the treaty making process that has been outlined in various sources of Kenyan law including judicial precedent.
- The Kenyan government ought to take cognizance of the East African Court of Justice Judgment in *Christopher Ayieko & Another v The Attorney General of the Republic of Kenya & The Secretary General of the East African Community*⁷ released on 2 December 2022, which found that “EAC Partner States should adhere to the negotiation and participation arrangements under Article 37(4) of the Customs Union Protocol in concluding trade agreements with foreign countries. Common negotiated positions on part of the EAC Partner States strengthens the trade in the Common Market.”
- Kenyan negotiators ought to put in place a framework for negotiating STIP, especially on their key areas of focus for any eventual agreement and the objectives the country seeks to achieve during the negotiations. This was the same case with USKEFTA whereby the USA published detailed Negotiating Objectives which comprehensively set out the USTRs approach, whereas the Ministry in Kenya released a far less substantial document that did not solicit input from stakeholders. This position ought to change with STIP as it provides Kenya with an opportunity to pursue a more inclusive and robust approach to trade negotiations.
- Kenya has a vast array of policies including the 2019 Digital Economy Blueprint, which ought to have an impact on the negotiation of the STIP with particular regard to issues of Digital Trade. Amongst the enablers of a digital economy according to the Digital Economy Blueprint include: consumer protection, data protection, and cybersecurity. For this reason, there needs to be a concerted effort and emphasis from the Kenyan side on these issues within the STIP.

⁷See the full case here: <https://www.eacj.org/?cases=christopher-ayieko-another-v-the-attorney-general-of-the-republic-of-kenya-the-secretary-general-of-the-east-african-community>

Photos

Image (World Trade Center) by Donny Jiang @dotnny from Unsplash <https://unsplash.com/photos/42gFAgdIUC8>
Image (Containers) by Paul Teysen @hooverpaul55 from Unsplash <https://unsplash.com/photos/bukjsECgmeU>

Made possible by

DIGITAL TRADE
ALLIANCE



Supported by

