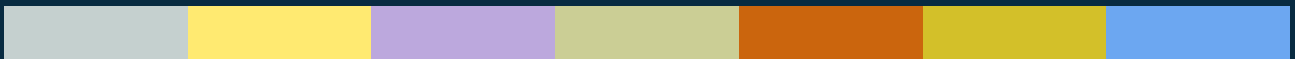


An Analysis of Corporate Comments Submitted Regarding the US-Kenya STIP



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Introduction

The United States - Kenya Strategic Trade and Investment Partnership (USKESTIP) was officially launched on July 14, 2022.¹ The United States Trade Representative (USTR) and Kenya's Ministry of Industrialization, Trade, and Enterprise Development Cabinet Secretary virtually launched the STIP negotiations, months after the last communication of its predecessor the US-Kenya FTA (USKEFTA), noting that they would begin earnest negotiations of the USKESTIP in three months. While there was no direct mention of the USKEFTA in the launch of the STIP, it is deemed the predecessor of this agreement. The USKESTIP is also seen as 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.² The agreement will also have a special focus on digital trade.³ The USTR, as part of the launch of the negotiations, sought public comments on matters relevant to specified trade areas, including U.S. interests and priorities, in order to develop objectives and positions for enhanced engagement and subsequent negotiation.⁴ This is a review of the comments submitted on or before 16 September 2022 to the USTR. Our review focuses on the area of digital trade with a specific emphasis on the comments on privacy, cross-border data flows, and data localization. We were also interested in comments made about the Africa Growth and Opportunities Act (AGOA) and the Africa Continental Free Trade Agreement (AfCFTA) which has a Digital Trade Protocol currently under negotiation. The interest in the AGOA stems from the fact that it has been the main justification for the push towards the negotiation of bilateral agreements with Kenya by the US, as it is often mentioned that its term is soon running out. While with regard to the AfCFTA, Kenya is a member state of this continental agreement which will have ramifications for its digital trade landscape.



Our review focuses on the area of digital trade with a specific emphasis on the comments on privacy, cross-border data flows, and data localization.

¹Office 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>.

²Virussha Subban “Kenya: Shared Prosperity -the United States and Kenya sign Strategic Trade Investment Partnership” Global Compliance News: Baker McKenzie available at <https://www.globalcompliance.com/2022/08/04/kenya-shared-prosperity-the-united-states-and-kenya-sign-strategic-trade-and-investment-partnership200722/>.

³Lawder 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/>.

⁴Federal Register “A Notice by the Trade Representative, Office of United States on 08/05/2022” <https://www.federalregister.gov/documents/2022/08/05/2022-16798/us-kenya-strategic-trade-and-investment-partnership>.

Summary of key points

It is useful to review the comments from corporations and industry associations, as these could become the basis for U.S. negotiating positions. In the analysis of the corporate comments, we have concentrated on 7 key areas that are particular to digital trade, Kenya and the US. This includes the mention of the phrase digital trade within the comments. We highlight here some key points with regard to these areas and the trend emerging from the comments analysed.

- **Privacy:** Lack of security was often attributed to data localization. Comments that made this attribution mostly surmised that privacy and security are important elements that should be included in the text of the proposed STIP by adopting language from other US FTAs. While other commentators recognised that the proposed STIP may be able to compromise consumer privacy and security in favour of US business interests.
- **AGOA:** AGOA was highlighted as a successful agreement however its future was deemed uncertain. Most concluded that it was set to expire in 2025 and some commentators cast doubt as to whether the proposed STIP will meet the goals of AGOA if it is concluded. There was also uncertainty as to whether or not Kenyan traders will gain anything if the proposed STIP replaced AGOA. STIP is expected to establish a broader economic partnership that goes beyond AGOAs ambit.
- **Cross-border data flows:** A majority of the comments analysed opposed the prohibition of cross-border data flows and called for the harmonization of Kenyan (Data Protection law which prohibits cross-border data flows in certain instances) with similar provisions in other US FTAs.
- **AfCFTA:** A number of the comments called for the proposed STIP to build upon and facilitate the implementation of the AfCFTA. The views of how and what this should achieve differed, while some called for the STIP to avoid undermining the efforts of regional integration others called for the proposed STIP to be a model agreement that the US may utilise to influence other regional agreements within the AfCFTA
- **Digital Trade:** Most comments suggested that STIP provides an opportunity to establish a digital trade framework in Africa that is similar to others such as USMCA. While silent on the benefits of STIP to the Kenyan digital economy, submissions urged the US to set standards that would be consistent with US digital priorities in extant agreements and to advance the abilities of **American business and markets to grow.**
- **Data localization:** Strong opposition to the implementation of rules that would encourage data localization were a feature of the majority of comments with very few comments seeking for the proposed STIP to limit prohibitions on data localization.



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There were also comments that called for the encryption of data without mentioning a balance for consumer protection or data protection interests but rather for business interests.

Submissions of concern

Following the analysis above, this section tabulates and provides links to the submissions that primarily highlighted the promotion of American business interests, especially through the inclusion of terms similar to other US trade agreements in the proposed text of STIP. They also sought for changes in Kenyan domestic laws to reflect other US FTAs and to favour US small business while there is no mention of what such changes would have for Kenyan small business or the Kenyan populace at large. There were also comments that called for the encryption of data without mentioning a balance for consumer protection or data protection interests but rather for business interests. Within this document we have highlighted (in orange) the submissions of concern below **for ease of** reference.

Organisation	Link to comment
American Chamber of Commerce - Kenya	Comment from American Chamber of Commerce Kenya
Information Technology Industry (ITI)	Comment from Information Technology Industry
National Association of Manufacturers	Comment from National Association of Manufacturers
United States Council for International Business	Comment from US Council International Business
PhRMA	Comment from PhRMA
Advanced Medical Technology Association (AdvaMed)	Comment from Advanced Medical Technology Association (AdvaMed)
National Foreign Trade Council	Comment from National Foreign Trade Council
IBM	Comment from IBM
ACT App Association	Comment from ACT The App Association
Computer and Communications Industry Association	Comment from Computer and Communications Industry Association
The Coalition of Services Industries (CSI)	Comment from Coalition of Services Industries

Review of Comments

Issue	Organisation	Submission	Analysis
PRIVACY	<p>Information Technology Industry (ITI) - Global advocate for technology representing innovative companies and promoting public policies and industry standards that advance competition and innovation worldwide.</p>	<p>Recommended that the USKESTIP ('STIP') should comprise core disciplines that: Ensure the protection of personal data, taking into account best international practices for privacy and the importance of globally harmonised regulatory frameworks</p>	<p>We observed that most comments submitted that privacy and security were important elements that should be included in the text of the proposed STIP. It was interesting to note that some comments attributed a lack of security to the inclusion of data localisation provisions and that security would be more likely secured from cloud computing (see American Chamber of Commerce-Kenya comments). Moreover, most of the comments suggested that privacy and security would be achieved by adopting language from other US FTAs including the United States-Mexico-Canada Agreement (USMCA). These comments rarely make reference to the enshrining of privacy within the Kenyan legal landscape where it is part of the Bill of Rights under the Kenyan Constitution and how data protection is viewed to stem from the right to privacy. It is encouraging that some comments do recognise that the proposed STIP may have the ability to compromise consumer privacy and security in favour of US business interests (see Citizens Trade Campaign comments).</p>
	<p>American Chamber of Commerce - Kenya - A business chamber comprised of American and Kenyan businesses committed to and invested in the US - Kenya business commercial relationship.</p>	<p>Submitted that privacy and security standards are a critical underpinning to build trust in digital trade, and the agreement can help ensure that privacy protections apply in the digital marketplace, providing for interoperable privacy and security protection, acknowledging legitimate grounds for transferring data and demonstrating a clear intent to achieve interoperability with other privacy regimes. Commitments that engender greater consumer trust in the digital economy by enhancing privacy and cyber security through the adoption of legal frameworks to protect personal information and that promote industry best practices, international standards, and other cooperative mechanisms and encourage parties to strengthen cyber security capabilities and cooperation and adopt risk-based approaches to cyber security regulation should also be addressed.</p>	

Issue	Organisation	Submission	Analysis
		By prohibiting data localization measures, the agreement will help facilitate the adoption of cloud technologies in the Financial Services sector which will have multiple benefits for efficiency, cyber security, and privacy.	It is also further encouraging to see the call for provisions in the STIP that would promote the adoption of legal frameworks to protect personal information and promote industry best practices, international standards and other cooperative mechanisms to strengthen privacy and data protection (See IBM Comments).
	<p>National Association of Manufacturers - Advocacy group for all manufacturing in the US.</p>	The administration should ensure that STIP digital trade provisions build on standards in other key U.S. trade agreements, including the USMCA and the Information Technology Agreement, and also align with key international frameworks, such as the Asia-Pacific Economic Cooperation organization's Cross-Border Privacy Rules system, to secure the highest possible digital trade protections and opportunities for manufacturers in the U.S	
	<p>United States Council for International Business - pro-trade and pro-market liberalisation organisation that promotes American business views and solutions on a wide range of issues directly to US and international policy makers.</p>	<p>[A digital trade chapter in STIP] should draw from the USMCA for important provisions including those related to source code and algorithms, e-signatures, privacy, cyber security, data flows, and storage.</p> <p>A financial services chapter should ensure the free flow of data for the financial services sector and prohibit data localization or storage measures. USMCA serves as a starting point, however the standard used for the privacy exception in the computing facility provision should be changed from an avoidance standard to be no more burdensome than necessary. The prohibition of data localization should be technology neutral.</p>	

Issue	Organisation	Submission	Analysis
	<p>Coalition of Services Industries - represents the interests of the American service economy.</p>	<p>The U.S.-Kenya trade initiative should seek to promote trust in data flows, as well as cooperation on privacy and cybersecurity, while ensuring that businesses can transfer data across borders through interoperable data transfer mechanisms.</p>	
	<p>The App Association - global trade association for small and medium-sized technology companies. Membership consists of entrepreneurs, innovators, and independent developers within the global app ecosystem</p>	<p>Generally, with respect to digital trade, The App Association prioritises the following principles:</p> <ul style="list-style-type: none"> • The ability to utilize strong encryption techniques to protect end user security and Privacy: Global digital trade depends on the use of strong encryption techniques to keep users safe from harms like identity theft. However, some governments continue to demand that backdoors be built into encryption keys for government access. These policies jeopardize the safety and security of data, as well as the trust of end users, by creating known vulnerabilities that unauthorized parties can exploit. • Antitrust/competition laws and software distribution platforms: Inconsistent regulation of digital platforms on the international level will upend this harmonious relationship enjoyed by small business app developers and mobile platforms, undermine consumer privacy, and ultimately serve as significant trade barriers. 	

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	<p>Citizens Trade Campaign - national coalition of environmental, labour, consumer, family farm, religious, and other civil society groups founded to oppose NAFTA.</p>	<p>Specifically, a U.S.-Kenya deal must not include any provisions that: prioritize corporate interests ahead of labour rights, anti-offshoring measures and the protection of gig economy workers; help corporations hide the discriminatory effects of source code and algorithms through secrecy provisions; undermine consumer privacy and data security by prohibiting limits on data flows or rules on the location of computing facilities; shield firms from corporate accountability via overly broad content liability waivers; or promote corporate consolidation by banning limits on the size and services offered by tech conglomerates or by limiting other antitrust measures in any form. Utilizing cookie-cutter “digital trade” or “e-commerce” language from past U.S. trade pacts is a special threat to Kenya, which has strong online consumer privacy protections that those of us in the United States only wish we had safeguarded our rights.</p>	
	<p>National Foreign Trade Council - American trade association advocating an open, rules-based international trade system.</p>	<p>STIP must include the following:</p> <ul style="list-style-type: none"> • Encryption is a critical tool to protect privacy and security in the digital ecosystem. Trade agreements should protect innovation in encryption products to meet consumer and business demand for product features that protect security and privacy while allowing law enforcement access to communications consistent with applicable law. 	

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	<p>IBM - American multinational technology corporation.</p>	<p>Encryption is a critical tool in protecting privacy and enhancing security in the digital ecosystem. The STIP should strive to build confidence in the data economy by protecting innovation in encryption products that enhance security and privacy while allowing law enforcement access to communications consistent with applicable law.</p> <p>The STIP should require Parties to adopt legal frameworks to protect personal information and promote industry best practices, international standards and other cooperative mechanisms to strengthen privacy and data protection.</p>	
<p>AGOA</p>	<p>American Chamber of Commerce - Kenya - A business chamber comprised of American and Kenyan businesses committed to and invested in the US - Kenya business commercial relationship.</p>	<p>Urged the Administration to pursue a modern and substantive, rules-based agreement to ensure more concrete outcomes that will expand and create robust opportunities for bilateral trade and investment with Kenya, building on the successes of AGOA, bridging its shortcomings and taking advantage of growing opportunities afforded by regional integration on the continent</p>	<p>We were interested in comments on AGOA, which was ostensibly a major reason that the Kenyan government entered into negotiations with the US under the Trump Administration. The comments around AGOA and the STIP are interesting as AGOA is mentioned often as a successful agreement. Yet it also submitted that it has an uncertain future as it is set to expire in 2025, but has been reauthorized by Congress repeatedly on a bipartisan basis. Some comments cast doubt as to whether the STIP would meet the goals of AGOA if it is concluded (see MaryKnoll Comments). Preliminary indicators do not seem to indicate that the STIP would consider issues that made AGOA successful.</p>
	<p>United States Council of International Business - pro-trade and pro-market liberalisation organisation that promotes American business views and solutions on a wide range of issues directly to US and international policy makers.</p>	<p>A comprehensive STIP agreement would be a step forward for African trade modernization, reaching high standards and rules that can serve as a 2 model for other African countries seeking enhanced trade relations with the United States. STIP can serve as a deep and a stable foundation for trade and investment, offering stability vis-à-vis AGOA, a preference program that faces an uncertain future and is set to expire in 2025.</p>	

Issue	Organisation	Submission	Analysis
		<p>With regards to supporting efficient Rules of Origin (RoO) to encourage more cross border trade, a point for inclusion in the agreement should be maintaining over time the existing AGOA benefits for apparel products to allow for vertical integration of the country and region, eventually moving to a yarn-forward rule of origin.</p>	<p>(See Kenya Association of Manufacturers Comments) Moreover it is submitted that there is uncertainty if Kenyan traders will not lose from the proposed STIP replacing AGOA. Finally, there is the expectation that the STIP should establish a broader economic partnership that goes beyond AGOA's unilateral preferences and addresses more than just tariffs and goods market access.</p>
	<p>Northwest Horticultural Council - operates as a non-profit organization focused on advocating for the plant cultivation industry.</p>	<p>In the event the U.S.-Kenya Strategic Trade and Investment Partnership serves as a template for future trade and investment agreements with other African nations, including countries currently benefiting from the African Growth and Opportunity Act (AGOA), the NHC requests exemptions or maximum back-loaded phase-out periods for the U.S. tariff rate of 15.3 percent on canned pears (HTS 2008.40.00).</p>	
	<p>Maryknoll Office for Global Concerns - A collaborative ministry of the Maryknoll Sisters, Maryknoll Fathers and Brothers, and the Maryknoll Lay Missionary that brings experience to important public debates in the UN, the US and other governments, the World Bank and International Monetary Fund, and the corporate world.</p>	<p>The organisation expressed concerns that STIP will not address key developmental priorities in Kenya, such as the global distribution of resources, any more than AGOA did.</p>	
	<p>African Coalition for Trade, Inc. - headquartered in the US, ACT is a non-profit trade association</p>	<p>STIP should incorporate the AGOA terms of trade, especially for apparel as this industry is an AGOA success story.</p>	

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		<p>Incorporating AGOA's duty-free access provisions in the Kenya Partnership will be a first step toward fulfilling Congress's policy goal of creating mutually beneficial, reciprocal trade agreements with the AGOA beneficiaries, and would serve as a model for future similar arrangements with other AGOA beneficiaries.</p>	
	<p>Madagascar Export Processing Zone Association (GEFP) - association that promotes free enterprises and both their local and international business partners.</p>	<p>STIP should incorporate the AGOA terms of trade especially for apparel.</p>	
	<p>Citizens Trade Campaign - national coalition of environmental, labour, consumer, family farm, religious, and other civil society groups founded to oppose NAFTA.</p>	<p>Neither the Kenyan nor US government has made a convincing case that STIP would be better for a majority of the people in either country than continuing the trading relationship developed under decades of AGOA.</p>	
	<p>Institute for Agriculture and Trade Policy - organisation that advocates for policy in the public interest at the state, federal, and international level and envisions agriculture, trade, and food systems that are good for people, farmers, and food system workers, ecosystems, and social justice globally.</p>	<p>It is unclear why such an accord between Kenya and the U.S. would be better for a majority of the people in either country than continuing the trading relationship developed under decades of AGOA.</p>	
	<p>Public Citizen - Non-profit consumer advocacy organisation that champions the public interest.</p>	<p>It is unclear how Kenyan workers, farmers, or firms would not lose, rather than benefit, from replacing the current trade terms of AGOA with a bilateral agreement. History has shown that countries signing trade agreements with the</p>	

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		<p>United States have to make major anti-development concessions, which in the case of African countries now trading under AGOA would mean taking on onerous new obligations for little in return.</p>	
	<p>Corporate Council on Africa - US business association focused on connecting business interests in Africa.</p>	<p>It is important that STIP establishes a broader economic partnership that goes beyond AGOA's unilateral preferences and addresses more than just tariffs and goods market access. CCA acknowledges that STIP does not at this phase address market access, but note that this is important for both the Kenyans and the U.S. – potentially locking in the preferential access Kenya now enjoys under AGOA while also offering U.S. companies market access comparable to that which Kenya has negotiated with other countries (including the EU under the Economic Partnership Agreement and a trade agreement with the U.K). STIP should allow the continuation of AGOA benefits to Kenya's micro-, small-, and medium-sized enterprises.</p>	
	<p>American Apparel and Footwear Association - trade association for public policy in the apparel and footwear industry.</p>	<p>Under the general negotiating objectives for the contemplated agreements, the Association recommends that STIP should continue AGOA benefits. Extension of AGOA for another 10 years past the 2025 expiration would ensure certainty and continued investment in the local industry. Further, AGOA should</p>	

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		<p>be a bridge to trade agreements between the U.S. and countries in the region.</p> <p>It is critical that in addition to being able to benefit from AGOA during a phase-in period, Kenya should still be able to draw upon the benefits from other AGOA countries especially for the apparel and footwear industry. Moreover, AGOA countries must still be able to partner with Kenya. In the end, regionalization will encourage more AGOA countries to pursue trade agreements with the U.S.</p>	
	<p>Kenyan Association of Manufacturers - business association that unites industrialists and offers a common voice for businesses.</p>	<p>The Kenyan experience under AGOA can be termed as a success story; though with opportunities missed by the Kenyan and US private sector; but one that holds huge promises for the future of the 2 countries in line with the current growth trajectory. The proposed US-Kenya strategic trade and investment partnership has the promise to scale up the gains made under AGOA and enhance commercial, social, and political cooperation between the 2 countries. However, the preliminary communication on the partnership is silent on Trade in Goods, an important element in the commercial relationship between the 2 countries that is supported by the duty free, quota free market access to the US under AGOA. It is our request that this element be considered in the proposed strategic partnership or be addressed in an AGOA renewal embracing the US - Sub-Saharan Africa relationship.</p>	

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<p>CROSS-BORDER DATA FLOWS</p>	<p>Information Technology Industry (ITI) - Global advocate for technology representing innovative companies and promoting public policies and industry standards that advance competition and innovation worldwide.</p>	<p>STIP should comprise core disciplines that:</p> <ul style="list-style-type: none"> Promote international data flows by codifying into domestic laws the Global Cross-Border Privacy Rules (CBPR) as a valid basis for transfers of personal data 	<p>The prohibition of cross-border data flows was vehemently opposed in majority of the corporate comments. Provisions that determine how cross border data transfers may occur are included in the Kenyan Data Protection Act (see Part VII of the Data Protection (General) Regulations and Part VI of the Data Protection Act). By the dint of most of these comments, these provisions and regulations are “barriers to trade” and call for the harmonization between other US FTAs and the Kenyan legislation. The National Foreign Trade Council submitted that it was concerned with the Kenyan Data Protection Act and termed its provisions on transfer of data as a potential restrictive trade measure. Very few comments considered the issue of data protection in the context of the proposed STIP. Those that do recognise that seeking to do away with conditions on cross border data flows would be harmful protocols that undermine privacy and the data protection of Kenyan citizens. (See Public Citizen, Trade Justice Education Fund)</p>
	<p>American Chamber of Commerce - Kenya - A business chamber comprised of American and Kenyan businesses committed to and invested in the US - Kenya business commercial relationship.</p>	<p>[The Administration] should also pursue commitments to adopt anonymization, tokenization, blockchain, and other technology and process means to facilitate trusted cross border exchange of any sensitive health-related data in a safe and secure manner. Digital trade provisions of the agreement should ensure Electronic Payment Services (EPS) suppliers are able to transfer information across borders and prohibit requirements to use or locate computing facilities in a party’s territory as a condition for supplying EPS in that country.</p>	
	<p>National Association of Manufacturers - Advocacy group for all manufacturing in the US.</p>	<p>Specific priority areas under digital trade include:</p> <ul style="list-style-type: none"> Facilitating cross-border data flows and prohibiting forced data localization measures 	

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		that negatively impact the global operations of manufacturers in the US	
	PhRMA - trade group representing companies in the pharmaceutical industry in the US.	<p>Specific policy recommendations to eliminate digital trade barriers include the following:</p> <ul style="list-style-type: none"> Prohibit unnecessary data localization requirements and other restrictions on cross-border data flows. Barriers to the cross-border movement of data and digital health services and products often take the form of provisions that (i) directly or indirectly prohibit a company from exporting any or certain types of data; (ii) require a company to store within a national territory data that the company stores or intends to store abroad, resulting in duplicative practices and significant resource diversions; and/or (iii) other 5 conditional restrictions that prohibit or impede a company's ability to transfer data beyond a geographic border (e.g., sending data to a regional data centre for storage or to a third-party vendor for processing). Restrictions, if any, on data flows should be transparent, implemented clearly, only as restrictive as necessary and developed based on legitimate policy objectives and input from all stakeholders. 	

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	<p>Coalition of Services Industries - represents the interests of the American service economy.</p>	<p>The U.S.-Kenya trade initiative should promote transparency in financial services regulation. It should prohibit requirements that computing facilities used for financial services must be located in a Party's territory as a condition for conducting business in that territory, or be subject to cumbersome pre-approval requirements, so long as the Party's financial regulatory authorities have access to the data being processed.</p> <p>Regarding environment and climate change, digital services support sustainability-related research, analysis and forecasts, and knowledge sharing. High-standard rules for digital and services trade, especially those that support cross-border data flows, are thus essential in promoting better decision making related to climate change mitigation and environmental protection.</p>	
	<p>The App Association - global trade association for small and medium-sized technology companies. Membership consists of entrepreneurs, innovators, and independent developers within the global app ecosystem</p>	<p>Generally, with respect to digital trade, The App Association prioritises the following principles:</p> <ul style="list-style-type: none"> • Cross-border data flows: The seamless flow of data between economies and across political borders is essential to the functioning of the global economy. Innovative app development companies must be able to rely on unfettered data flows as they seek access to new markets. <p>USMCA contains numerous provisions in its digital trade chapter, and others, that enable</p>	

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		<p>To the extent possible, the United States-Kenya STIP should leverage such provisions in order to advance harmonized policies across U.S. trading partners, enabling the U.S. app economy to grow and create more jobs, including ensuring cross-border data flows and reducing the potential of onerous data localization requirements.</p>	
	<p>Advanced Medical Technology Association (AdvaMed) - medical technology association representing device, diagnostics, and digital technology manufacturers.</p>	<p>AdvaMed recommends the establishment of a digital trade framework between the U.S. and Kenya consistent with corresponding provisions in the USMCA or the U.S.-Japan Digital Trade Agreement. Such a framework would prevent unnecessary barriers for the use and development of digital health technologies, a fast-growing segment in the industry. Our members wish to see the full use of digital health data within the global medical technology industry, with barriers on the cross-border exchange of health data removed.</p>	
	<p>Public Citizen - Non-profit consumer advocacy organisation that champions the public interest.</p>	<p>STIP should not require cross-border data transfers and data-processing across all service sectors without adequate safeguards. Data protection and privacy are not non-tariffs barriers to trade, but rather fundamental rights and strong safeguards that must be put in place to protect consumers. Any terms requiring cross-border transmission of data must be conditioned on every signatory to an agreement establishing and enforcing transparent, strong and meaningful protections and</p>	

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		<p>safeguards for consumers and workers with respect to all digital products and services irrespective of the channel of acquisition, whether in physical form or over the internet.</p>	
	<p>Corporate Council on Africa - US business association focused on connecting business interests in Africa.</p>	<p>Given Kenya's leading role in developing ICT innovations, including in e-commerce, e-finance and telehealth, it would be particularly useful if STIP could lead to agreements on how Kenya will treat cross-border data flows, in-country data retention requirements, security and safety of the internet and consumer protection.</p> <p>If STIP can facilitate getting the balance right in setting up vibrant ICT-related sectors that facilitate cross-border trade and investment while protecting consumers' safety and security, this would be a significant support for AfCFTA's goals of expanding cross-border trade and investment and greater continental economic integration.</p>	
	<p>National Foreign Trade Council - American trade association advocating an open, rules-based international trade system.</p>	<p>The National Foreign Trade Council is concerned with Kenya's Data Protection Act passed in November 2019, which includes potentially trade-restrictive measures related to the cross-border transfer of personal information.</p> <p>STIP should provide for coordination among regulators in the U.S. and Kenya to ensure a coherent regulatory approach that enables the cross-border value chains so important to supporting American jobs and exports.</p>	

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	<p>Trade Justice Education Fund - non-profit that sponsors public education programs designed to expand awareness about the worker rights, environmental and climate, and public health implications of US trade policy.</p>	<p>Harmful digital protocols that should not be included in STIP include undermining consumer privacy and data security by prohibiting limits on data flows or rules on the location of computing facilities.</p>	
	<p>IBM - American multinational technology corporation.</p>	<p>The STIP should include binding and enforceable digital trade provisions, including commitments on cross-border data flows, the protection of source code and algorithms, forced technology transfer, and cybersecurity protection. Digital technologies play a critical role in cross-border business negotiations and transactions, including encouraging growth and innovation in electronic payment technologies and infrastructure, e-signatures and electronic contracts and invoicing. To further encourage the adoption of digital technologies and accelerate cross-border business activity, the STIP should include provisions encouraging interoperable electronic trade and invoicing frameworks, such as Peppol. The STIP should build on Articles 9 (Electronic Authentication and Electronic Signatures); 10 (Electronic Invoicing); and 11 (Electronic Payments) of the Australia-Singapore Digital Economy Agreement (DEA).</p>	

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AFCFTA	<p>American Chamber of Commerce - Kenya - A business chamber comprised of American and Kenyan businesses committed to and invested in the US - Kenya business commercial relationship.</p>	<p>Recommended that the Agreement include considerations to harmonization of any new measures with regional EAC at minimum and the wider AfCFTA regulatory measures to encourage regional linkages, expand opportunities and strengthen regional economic integration.</p>	<p>The African Continental Free Trade Agreement (AFCFTA) and other regional agreements were mentioned in some comments. Most of the comments sought for the STIP to note, build upon, and facilitate the implementation of AfCFTA. While others submitted that the STIP should be cognizant of the efforts of AfCFTA and should not undermine those efforts of regional integration. While others still called for the STIP to be a model agreement that the US may utilise to influence other regional agreements within the AfCFTA area.</p> <p>It is encouraging that there is cognizance of the existence of the AfCFTA by these submissions. We hope that the negotiators will take the view that they should respect the efforts under AfCFTA and look to corroborate such efforts rather than undermine them.</p>
	<p>Advanced Medical Technology Association (AdvaMed) - medical technology association representing device, diagnostics, and digital technology manufacturers.</p>	<p>Recommended that the STIP elements be demonstrated as a pragmatic tool to facilitate, accelerate and deepen Kenya's efforts to implement and operationalize its commitments under the African Continental Free Trade Area (AfCFTA)</p>	
	<p>ACT App Association - global trade association for small and medium-sized technology companies.</p>	<p>Submitted that a successful United States-Kenya STIP can and should have positive wider influence on other important trade negotiations. They highlighted that the AfCFTA, if realized, would represent a major global economic trade block. Therefore, it is imperative that pro-digital economy policies are reflected in Kenyan and other SSA markets' domestic laws, as well as trade agreements amongst or including African markets including a future AfCFTA.</p>	
	<p>PhRMA - trade group representing companies in the pharmaceutical industry in the US</p>	<p>Recommended that it will be important to ensure that the negotiations under the USKESTIP complement and build on Africa's regional integration efforts, including the landmark African Continental Free Trade Area.</p>	

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	<p>Public Citizen - Non-profit consumer advocacy organisation that champions the public interest.</p>	<p>In its view, the first goal of any trade deal should be to deliver meaningful benefits to most people in the involved countries. It should not be to use negotiations with one African country to break African trade policy unity.</p>	
	<p>Computer and Communications Industry Association - international non-profit advocacy organisation which represents the information and communications technology industries.</p>	<p>Recommended that the USTR should use this opportunity to develop a model for future U.S. trade deals with the wider African Continental Free Trade Area, and throughout the region.</p>	
	<p>Trade In Services International - provides trade and development services in the form of research reports, policy briefs, training modules, proposals, and presentations.</p>	<p>Recommended that the U.S. and Kenya note the progress in AfCFTA protocols on investment, competition policy, intellectual property rights, and digital trade, which will influence continental trade in services development and integration</p>	
	<p>ReThink Trade - established to intensify analysis and advocacy regarding the ways that trade agreements and policies must be altered to undo decades of corporate capture and to deliver on broad national interests.</p>	<p>Suggested that since AfCFTA negotiations are ongoing, 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.</p>	
<p>US - KE FTA</p>	<p>The National Foreign Trade Council - American trade association advocating an open, rules-based international trade system</p>	<p>Highlighted that they strongly supported plans for a US-Kenya Free Trade Agreement in 2020 that would expand the existing U.S. - Kenya trading relationship. They were pleased the Biden Administration is taking a fresh look at opportunities to strengthen this important trading relationship through the STIP.</p>	<p>While some corporate comments on the USKEFTA called for the Biden Administration to build upon the foundations of this agreement, a compelling suggestion from civil society was to move away from the priorities and ambitions of the USKEFTA and distinguish the goals of the STIP</p>

Issue	Organisation	Submission	Analysis
	<p>Public Citizen - Non-profit consumer advocacy organisation that champions the public interest.</p>	<p>They submitted that [the administration] has yet to clarify the purpose and goals for [USKESTIP talks] or any resulting agreement. Further that the USKESTIP lives in the shadow of the Trump-initiated U.S.-Kenya FTA negotiations, which the Biden administration rightly shelved over misalignment with the previous negotiation’s priorities and ambitions.</p> <p>Suggested that the current US administration further distinguish the goals of this initiative from those of the Trump Kenya FTA.</p>	
	<p>Computer and Communications Industry Association - non-profit membership organization to promote open markets, open systems, and open networks in the computer and telecommunications industry.</p>	<p>Suggested that parties could build off the foundational progress of previous negotiations on a U.S.-Kenya Free Trade Agreement, both of which included details on trade in digital goods and services.</p>	
<p>DIGITAL TRADE</p>	<p>The Information Technology Industry Council (ITI) - Global advocate for technology representing innovative companies and promoting public policies and industry standards that advance competition and innovation worldwide.</p>	<p>Highlighted that the STIP presents a unique opportunity for the U.S. government to foster a new global benchmark for modern, comprehensive, and digitally focused commitments that clearly demonstrate the benefits of digital trade for development, sustainability, innovation, and global competitiveness.</p>	<p>We were interested in how the comments would view digital trade in general under the STIP and what would their best-case scenario would be for this area under the STIP. Most corporate comments suggested that the STIP provided an opportunity to be the vehicle to establish a digital trade framework in the region (Africa) that would be similar to the USMCA or</p>

Issue	Organisation	Submission	Analysis
	<p>Advanced Medical Technology Association (AdvaMed) - medical technology association representing device, diagnostics, and digital technology manufacturers.</p>	<p>Recommended the establishment of a digital trade framework between the U.S. and Kenya consistent with corresponding provisions in the USMCA or the U.S.-Japan Digital Trade Agreement.</p>	<p>the US Japan Digital Trade Agreement. Therefore, the submissions urged the US to set standards that would be consistent with the US digital priorities in those agreements and to advance the ability of American business and markets to grow. The benefits to the Kenyan digital economy are very rarely mentioned.</p>
	<p>ACT App Association - global trade association for small and medium-sized technology companies</p>	<p>Submitted that it is imperative that the United States set an example to the globe on the best ways to cooperate in facilitating digital trade and the growth of the digital economy and to enhance business environments through trade agreements with key trading partners like Kenya. Doing so will advance the ability of American small business innovators to grow into new markets to create more American jobs.</p> <p>They sought for a future United States-Kenya STIP to leverage Kenya’s pro-digital economy policies and laws to the extent that they are consistent with U.S. digital economy trade priorities in the USMCA, particularly those digital economy-and intellectual property-related.</p>	
	<p>The United States Council for International Business (USCIB) - pro-trade and pro-market liberalisation organisation that promotes American business views and solutions on a wide range of issues directly to US and international policy makers.</p>	<p>Recommended that a digital trade chapter in STIP should promote a legal and regulatory framework that both supports digital transformation and avoids discriminatory digital policies and other barriers that harm U.S. exports and workers.</p>	

Issue	Organisation	Submission	Analysis
	<p>Non-Computer and Communications Industry Association - non-profit membership organization to promote open markets, open systems, and open networks in the computer and telecommunications industry.</p>	<p>Recommended that applying strong existing digital trade provisions from agreements such as USMCA and the U.S.-Japan Digital Trade Agreement would be particularly important given the overall low level of concrete digital trade commitments struck between Kenya and other countries, as well as by other African countries more broadly to date</p>	
	<p>National Association of Manufacturers - Advocacy group for all manufacturing in the US</p>	<p>Recommended that the [US] administration should ensure that [the USKESTIP] digital trade provisions build on standards in other key U.S. trade agreements, including the USMCA and the Information Technology Agreement, and also align with key international frameworks, such as the Asia-Pacific Economic Cooperation organization’s Cross-Border Privacy Rules system, to secure the highest possible digital trade protections and opportunities for manufacturers in the U.S. Specific priority areas</p>	
<p>DATA LOCALIZATION</p>	<p>The Information Technology Industry Council (ITI) - Global advocate for technology representing innovative companies and promoting public policies and industry standards that advance competition and innovation worldwide.</p>	<p>Calls for the STIP to prohibit restrictions on the cross-border flow of data (allowing only for narrowly tailored exceptions) and forced localization of computing facilities, including for financial services and electronic payment services data;</p>	<p>Most of the comments are against the implementation of rules that would encourage data localization. Data localization is already enshrined in the Kenyan Data Protection Act and its regulations (Section 50 of the Kenyan DPA and Regulation 25 of the Data Protection (General) Regulations). In effect these comments that seek for the prohibition on</p>

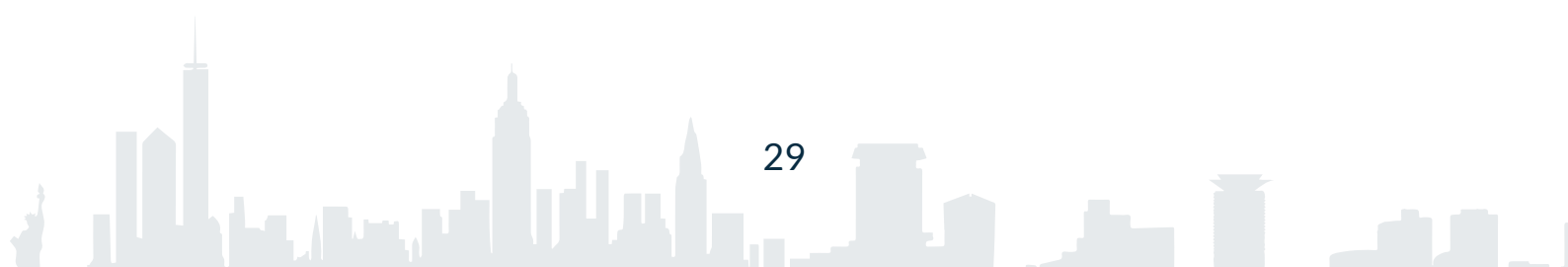
Issue	Organisation	Submission	Analysis
		<p>Stated that policies, which may mandate the localization of data, block market access, or enable internet shutdowns/blocking, directly detract from the ability of firms both small and large to foster growth and exports in key areas of the United States' comparative advantage, and are often based on the flawed premise that data restrictions and digital protectionism are necessary to achieve policy objectives.</p> <p>Emphasized that the STIP provides an opportunity to discourage practices like those in the 2020 National ICT Policy Guidelines that mandate local ownership and data localization.</p> <p>A study by the Information Technology Innovation Foundation found that data localization requirements around the world more than doubled over the last four years.⁷ Such requirements – including those in Kenya's Data Protection Act – directly hinder the ability of firms in all sectors and across the United States to effectively develop and export goods and services. The United States should seek to counter protectionist digital economy trends, safeguard the interests of U.S. workers, and bolster U.S. political, strategic, and economic equities and opportunities in Kenya, as well as set a model for the continent more broadly.</p>	<p>localization of data, also seek for the implied exemption from or implied amendment of the DPA to suit US business interests. Whereas a few civil society comments seek for such a request for prohibition be left out of the STIP (see Public Citizen comments). Where others call for the recognition of Kenyan's government policy space and calls for a balance of views. (See ReThink Comments).</p>

Issue	Organisation	Submission	Analysis
	<p>American Chamber of Commerce-Kenya - A business chamber comprised of American and Kenyan businesses committed to and invested in the US - Kenya business commercial relationship.</p>	<p>Recommended that digital trade provisions of the agreement should ensure EPS suppliers are able to transfer information across borders and prohibit requirements to use or locate computing facilities in a party's territory as a condition for supplying EPS in that territory.</p>	
	<p>Advanced Medical Technology Association (AdvaMed) - medical technology association representing device, diagnostics, and digital technology manufacturers.</p>	<p>Recommends that the STIP aids in the prevention of unnecessary/ burdensome health data/data localization silos within countries.</p>	
	<p>The Coalition of Services Industries (CSI) - represents the interests of the American service economy.</p>	<p>Submitted that, the Kenyan government has lent support to data localization policies and that such mandates act as a barrier to cross border digital trade. It further called for data localization prohibitions that cover all sectors.</p>	
	<p>The United States Council for International Business (USCIB) - pro-trade and pro-market liberalisation organisation that promotes American business views and solutions on a wide range of issues directly to US and international policy makers.</p>	<p>The agreement should include obligations that discourage policies requiring foreign companies to localize investments, production, services, data, or other activities, which suppress bilateral trade and investment both for goods and services</p>	
	<p>National Association of Manufacturers - Advocacy group for all manufacturing in the US.</p>	<p>Recommended that the administration should ensure that STIP included digital trade provisions prohibiting forced data localization measures that negatively impact the global operations of manufacturers in the U.S.</p>	

Issue	Organisation	Submission	Analysis
	<p>American Chamber of Commerce-Kenya - A business chamber comprised of American and Kenyan businesses committed to and invested in the US - Kenya business commercial relationship.</p>	<p>Recommended that digital trade provisions of the agreement should ensure EPS suppliers are able to transfer information across borders and prohibit requirements to use or locate computing facilities in a party's territory as a condition for supplying EPS in that territory.</p>	
	<p>The National Foreign Trade Council - American trade association advocating an open, rules-based international trade system.</p>	<p>Suggested that the STIP must ensure that it includes provisions that prohibit governments from requiring local storage of information, mandating the use of local infrastructure or building redundant data centres, or dictating the location of computing facilities; and ensure that such commitments apply fully to financial services and financial services providers.</p>	
	<p>IBM - American multinational technology corporation.</p>	<p>Recommended that requirements to localize data or infrastructure as a condition of market entry undermines American competitiveness and raises the costs of international business. Further, that the STIP should include provisions protecting (1) the movement of data across borders and (2) the ability of companies to operate without requiring them to use local infrastructure or build expensive and redundant data centres. The agreement should include USMCA Articles 19.11 (Cross-Border Transfer of Information by Electronic Means) and 19.12 (Location of Computing Facilities).</p>	

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	<p>Public Citizen - Non-profit consumer advocacy organisation that champions the public interest.</p>	<p>Recommended that the STIP should not require a prohibition on governments requiring data to be stored locally as is seen in the USMCA. Further, their position is that such terms from the USMCA should not be included in future U.S. trade agreements.</p>	
	<p>Computer and Communications Industry Association - international non-profit advocacy organisation which represents the information and communications technology industries.</p>	<p>Recommended that the U.S. should be ambitious in its negotiating objectives with respect to data flows and localization “barriers”.</p> <p>Submitted that studies have found that “for many countries that are considering or have considered forced data localization laws, local companies would be required to pay 30-60% more for their computing needs than if they could go outside the country’s borders.”</p> <p>Recommended specifically, rules should prohibit governments from imposing data localization 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, and this should extend to financial services</p>	

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	<p>ReThink Trade - established to intensify analysis and advocacy regarding the ways that trade agreements and policies must be altered to undo decades of corporate capture and to deliver on broad national interests.</p>	<p>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.</p>	



Conclusion

A majority of the comments submitted were from business and industry in the US, and were therefore concerned with US business interests. In this vein, the comments heavily skewed towards seeking provisions, and making recommendations that would suit this particular group set. While this seems obvious, it also indicates to us where the bargaining power in this agreement lies. Despite a representation of comments at the same scale from Kenyan interests the proposed STIP will have ramifications on the Kenyan digital economy, its data protection landscape, and even in the region. This is especially true as many comments suggested that the STIP (like the USKEFTA before it) would essentially become a model agreement for future negotiations between the US and the African region. The argument that the STIP is a logical next step as the AGOA is soon expiring was also suggested in the comments we reviewed. However, it was also pointed out that there was no clear indication that the STIP would meet the goals of AGOA or that those goals were even being considered in the preliminary negotiation texts. Additionally, there are several calls for the proposed STIP to model other US FTAs such as the USMCA which suggests that the lens the STIP is expected to take would not be specific to or consider the Kenyan landscape. This points us to believe that those who are encouraged by the negotiation of such an agreement seem to only consider the US perspective. It would thus have been beneficial to hear from other countries in the region about their insights to the agreement. Within the Kenyan context, data protection stems from the right to privacy that is enshrined in the Constitution. This lends itself to the measures considered to ensure consumers personal data is safeguarded when being processed, stored and transferred inter alia. I



Majority of the sector-specific comments submitted have a greater focus on the effects of the STIP on a US-based corporation or business.

t is indicative that a wide number of comments seek to either circumvent, or prohibit measures already implemented in Kenyan legislation that refer to cross border transfers and data localisation. Whereas comments that call for the safeguarding of the Kenyan governments regulatory policy space or even balance between US business interests and the interests of the government to ensure its data protection obligations are few and far between. The proposed USKESTIP should promote a digital trade policy in particular and a trade policy in general that not only benefits American workers, consumers, and small businesses, but that contributes to the well-being of Kenyans and is inclusive of the development goals of the Kenyan digital economy. Majority of the sector-specific comments submitted have a greater focus on the effects of the STIP on a US-based corporation or business. We agree with the sentiments of ReThink Trade and Public Citizen that many of U.S. Big Tech corporations are pushing for “digital trade” rules that would undermine, among other policies, Kenya’s privacy legislation, developmental strategies, and regional integration efforts.





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