Before the United States Trade Representative
Docket Number USTR-2022-0008

Comments From Public Citizen Concerning a Proposed
United States-Kenya Strategic Trade and Investment Partnership (STIP)

September 16, 2022

Public Citizen welcomes the opportunity to comment on the proposed U.S.-Kenya Strategic Trade and Investment Partnership (STIP). Public Citizen is a nonprofit consumer advocacy organization with more than 500,000 members. A mission of Public Citizen is to ensure that in this era of globalization, a majority can enjoy economic security; a clean environment; safe food, medicines and products; access to quality affordable services; and the exercise of democratic decision-making about the matters that affect their lives. We have conducted extensive analysis of U.S. trade and investment agreements and their outcomes, starting in 1991 during the initial North American Free Trade Agreement (NAFTA) negotiations.[1]

We were also heavily involved in the public education campaign that raised awareness about the harms of the proposed Trans-Pacific Partnership (TPP), leading to its eventual collapse. The mainstream understanding of our trade policies and their effects has come a long way since then. More recently, through our work with unions, other civil society groups and congressional and administration allies, we were part of the movement that replaced NAFTA with the U.S.-Mexico-Canada Agreement (USMCA). The USMCA, while an improvement over NAFTA, is not a template for future agreements; rather, it sets the floor from which we will continue the fight for good trade policies that put working people and the planet first. These comments provide guidance for U.S. negotiating objectives for the U.S.-Kenya STIP based on our extensive knowledge of the damaging terms of the TPP and NAFTA, as well as the improvements in the USMCA that should be expanded upon.

Regarding the US.-Kenya STIP, the administration has yet to clarify the purpose and goals for such talks or any resulting agreement. This initiative 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.

U.S. Trade Representative (USTR) Katherine Tai has stated repeatedly that the Biden administration's vision for trade will not repeat the past mistakes of prioritizing efficiency above all else, but will serve workers, consumers, and the environment. This is a welcome change after decades of U.S. trade policies that privileged large business interests, leading to job offshoring to

[1] For more on our vision for trade policies that would help the United States to build back better, please see our January 2021 Transition Memo on Trade Policy, jointly written with the United Brotherhood of Carpenters and Joiners of America.

countries with exploitative labor conditions, encouragement of polluting industries, and constraints on domestic policymaking to protect consumers.

It remains to be seen, however, whether these stated goals will be realized in this STIP, as several recent USTR initiatives give cause for concern. For example, it has been nearly a year since the administration announced it would pursue an Indo-Pacific Economic Framework (IPEF), and there has been no word about what the public and Congressional consultation process will look like, or if, how, and when any text may be made public. We appreciate that the administration is seeking a new trade model, but pursuing executive agreements with even less transparency than is usually required by Trade Promotion Authority gives cause for concern.

It is unclear how Kenyan workers, farmers, or firms would not lose, rather than benefit, from replacing the current trade terms of the Africa Growth and Opportunity Act (AGOA) with a bilateral agreement. History has shown that countries signing trade agreements with the 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.

It would be helpful for this administration to further distinguish the goals of this initiative from those of the Trump Kenya FTA. In Public Citizen's 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. This STIP with Kenya could be seen as doing just this — both by singling out one country to undermine the logic undergirding AGOA, and by undermining Kenya's current primary trading bloc, the East African Community (EAC). The EAC includes Kenya, Uganda, Rwanda, Tanzania, Burundi and South Sudan. The EAC Customs Union Protocol established duty-free trade among the six member countries and sets a common external tariff on goods from non-EAC nations. Article 37 of the Protocol, "Trade Arrangements with Countries and Organisations Outside the Customs Union," explicitly requires each country to "co-ordinate its trade relations with foreign countries so as to facilitate the implementation of a common policy in the field of external trade." A trade agreement with the European Union that Kenya signed and ratified in 2016 remains shelved because other EAC partner countries do not support that pact's terms, viewed as detrimental to development and growth. Requiring a compromise on regional unity as a condition for trade has deteriorated their relationship with the EU.

Given the information shared about the prospective STIP at this stage, our detailed comments center on the six areas described below.

1. Negotiating Process

If the current trade advisory system, that gave 500 official U.S. trade advisers representing corporate interests a privileged role in shaping U.S. positions and exclusive access to reviewing

confidential texts,[2] remains in place, then STIP negotiations will likely result in a deal that not only would be more damaging to working people, but – like the TPP and NAFTA 2.0 text Trump signed in November 2018 – would be unacceptable politically. It was only after the release of Trump's NAFTA text in October 2018 that the public and even most members of Congress became aware of the unacceptable terms within. The lack of transparency and public input in the process facilitated the negotiation of a deal that added new monopoly protections for Big Pharma to lock in high medicine prices, and contained labor and environmental terms insufficient to counteract NAFTA's ongoing outsourcing of jobs and pollution and downward pressure on wages. When the secret terms finally became public, the deal was dead on arrival in Congress. House Speaker Nancy Pelosi announced there would be no vote unless labor and environmental terms and their enforcement were strengthened, and the Big Pharma favors were eliminated. For a year, as the NAFTA trade deficit exploded, the administration refused to make the changes needed so that a revised pact might be enacted.

One of the fundamental reasons why the original NAFTA, the 2018 NAFTA 2.0 and the TPP contained such damaging terms that made them so unpopular is that they were negotiated under the influence of hundreds of corporate advisors while the public and Congress were locked out. Terms needed for the deals to benefit most Americans were traded away in favor of special protections for the corporate interests that had access. The resulting deals did not prioritize creating good jobs, raising wages or safeguarding our democratically achieved health and environmental policies. A successful STIP negotiation must replace the corporate advisory system with an on-the-record public process, including public hearings, to formulate U.S. positions and obtain comment on draft and final U.S. text proposals. U.S.-proposed texts and draft consolidated texts after each negotiating session must be made public. Strict conflict of interest rules must be enforced. Only by issuing detailed goals and making draft texts available will the American public know in whose interest the negotiations are being conducted. Simply put, if there is to be a STIP that can enjoy broad support, USTR must ensure a truly transparent and participatory process as outlined above.

These procedural measures are necessary not only to ensure STIP outcomes that align with the Biden administration's goals on worker rights, climate change, racial justice, consumer protection and other areas, but to rebuild public faith in trade policymaking generally after years of backroom deal making.

2. Digital Economy-Related Matters

In a November 2021 speech, Ambassador Tai stated that:

> Our approach to digital trade policy must be grounded in how it affects our people and our workers. We must remember that people and workers are wage

[2] Howard Schneider, "Trade deals a closely held secret, shared by more than 500 advisers," Washington Post, Feb. 28, 2014. Available at: https://www.washingtonpost.com/business/economy/trade-deals-a-closely-held-secret-shared-by-more-than-500- advisers/2014/02/28/7daa65ec-9d99-11e3-a050-dc3322a94fa7_story.html

> earners, as well as consumers. They are more than page views, clicks, and subjects of surveillance. They are content creators, gig workers, innovators and inventors, and small business entrepreneurs. This means they have rights that must be protected – both by government policy and through arrangements with other governments.[3]

This is precisely the outlook that must be at the core of U.S. decisions around "digital economy-related matters" in STIP and beyond. However, many supporters of the status quo trade regime are pushing policies through the "digital trade" framework aimed at helping massive global retail, advertising, transportation, hotel and other businesses evade regulation and oversight.

The so-called "digital trade" proposals Big Tech is pushing (as evidenced, for example, in their comment submissions on IPEF) are not focused on remedying actual problems related to the online sale of imported goods, such as tariff evasion and product safety. Instead, Big Tech interests have promoted binding international rules to limit governments worldwide from regulating online platforms in the interest of workers, consumers or smaller business competitors. Misbranding constraints on government regulatory authority as "e-commerce" or "digital trade" agreements has helped them to evade scrutiny and quietly undermine certain worker protections, policies that constrain entities' size or market power and promote fair competition, and civil rights, privacy and liability policies being considered by your administration, many in Congress from both parties and other governments worldwide. By hijacking common trade-pact concepts, such as "non-discrimination," the largest digital firms seek to secure their monopolistic dominance by labeling as illegal trade barriers countries' labor, competition and other domestic policies of general application simply because such policies may have greater impact on the largest firms because of the firms' size.

This view was recently reinforced by 53 organizations representing labor, civil rights, consumer, and other constituencies – who joined together in a letter urging the administration not to enact any 'digital trade' rules that restrict or dissuade countries from regulating digital entities or that impose or lock in retrograde domestic digital governance policies.[4]

Rules limiting data and privacy protections, setting Internet Service Provider liability and safeguard rules, and related enforcement measures, and border measures should not be locked in via STIP or other trade agreements. And specifically, the USMCA's limits on financial, digital trade and other service sector consumer safeguards should not be part of any future U.S. trade agreement. The rise of artificial intelligence and big analytics, monopolization of services, the internet of things and billions of devices scattered around the globe raise immense challenges to

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[3] "Remarks of Ambassador Katherine Tai on Digital Trade at the Georgetown University Law Center Virtual Conference," USTR, Nov. 2021. Available at: https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/november/remarks-ambassador-katherine-tai-digital-trade-georgetown-university-law-center-virtual-conference

[4] "Organizational Sign-On Letter to President Biden on Digital Trade," Trade Justice Education Fund, Nov. 2, 2021. Available at: https://tradejusticeedfundorg.files.wordpress.com/2021/11/digitaltradeletter_final_110221-1.pdf?eType=EmailBlastContent&eId=406552ae-0f07-4cc5-8ebb-9a8fb7e0cfc7

privacy, competition, consumer protection and taxation. There are many unknowns regarding the technological advances ahead, and therefore the digital economy. For years, dominant internet companies have taken advantage of weak U.S. personal data protections. Today, many Americans are concerned about how companies collect and use their online data. Given the constant technological developments and the moving boundaries of consumer threats, rather than having current U.S. industry-favored rules locked in via trade agreements, such policies must be made in democratic processes that provide opportunities to revisit and revise decisions as circumstances change. Even without constant technological change in this sector, on the basis of shifting public and policymaker opinions alone, it is entirely inappropriate to lock the current U.S. policies into place through a trade agreement: Trade agreement rules on digital trade should not shrink the policy space of U.S. regulators and the U.S. Congress. Yet the digital trade rules in the USMCA could do just that, undermining efforts to protect people's privacy, personal data and security, and should not be used as a basis for STIP terms.

For example, one rule in the USMCA requires governments to allow the transfer of consumers' data – including financial or medical data subject to privacy protections in the countries' laws – outside their borders. Policies to protect privacy by restricting where or how data may move or be stored would be subject to challenge as "illegal trade barriers" and face significant prospects of being found to violate the pact. The USMCA also forbids governments from requiring companies to disclose their source code or algorithms. This could increase the monopoly power of tech companies and thwart efforts to investigate and regulate anti-competitive and discriminatory behavior. As well, the Financial Services Chapter in the USMCA reversed the U.S. position in TPP negotiations that governments must be allowed to mandate where financial data is stored. This exception to the general TPP prohibition on governments requiring data to be stored locally was pushed by the U.S. Treasury Department based on the agency's concerns about being able to access information during financial crises and was supported by consumer groups concerned about the security of sensitive and confidential data stored offshore and the ability to obtain redress in the case of a data security breach occurring in another country. None of these terms from the USMCA should be included in future U.S. trade agreements. Thus, the 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.

Another controversial provision in the USMCA is its liability waiver for online platforms with respect to their content, similar to §230 of the U.S. Communications Decency Act. This issue is subject to a vigorous debate domestically, with proponents and opponents of the current policy in both political parties. This is also precisely the sort of policy that should not be locked into place in a trade agreement, establishing a form of international preemption with one-size-fits all international standards locked in, usurping the role of Congress and state legislatures. This view was supported in a May 2021 letter to President Biden signed by over a dozen U.S. internet

accountability groups, including Public Citizen, Color of Change and the Center for Digital Democracy.[5]

There are some legitimate international trade concerns associated with e-commerce and the broader digital economy that negotiators should consider. Any STIP should ensure that goods purchased online across borders meet labor, environmental and consumer safety standards, including by raising de minimis levels. It should prevent corporate misclassification so that so-called "digital platforms" involved in transportation, hospitality, healthcare, retail, education and other industries cannot evade labor, consumer and other regulations imposed on "brick-and-mortar" businesses. To combat the growing high-tech discrimination in artificial intelligence, STIP should guarantee access to source codes and algorithms by congressional committees, government agencies, academic scholars, labor unions and nongovernmental organizations. STIP should also introduce corporate liability for personal data collected via computers, cell phones and the "Internet of Things" without consumers' explicit, informed permission, shared or sold without their permission, and/or stolen.

In addition to protecting U.S. regulatory policy space, these issues should be off the table so U.S. negotiators do not push for any weakening of Kenya's laws in this realm. Kenya's digital ecosystem, particularly digital loans and payments, has grown rapidly in the last decade. Because of the lack of privacy protections and the absence of meaningful accountability structures, Kenyan consumers have been exposed to data exploitation. Kenya's first data protection legislation, the Data Protection Act, shares many features with the European Union's General Data Protection Regulation (GDPR). The Act establishes the office of the Data Protection Commissioner with independent authority and enforcement capabilities (Section 5 & 6). It governs how consumer data can be collected, processed, shared and stored, and provides robust protection for personal data (Section 26). This law is an important step in a global movement toward data privacy. It raises the bar for protection of personal data and sets the standard for Africa.

However, the 2022 National Trade Estimates (NTE) Report on Foreign Trade Barriers, which catalogs policies in other countries that U.S. commercial interests consider to be trade barriers, describes Kenya's Data Protection Act as "unclear … potentially restrictive … [and] burdensome." U.S. pressure on this issue could be seen as an attempt to undermine the consumer-driven initiative of a country with some of the best data protection laws in the region, to which other countries in Africa and beyond aspire.

Future U.S. trade agreements must recognize that protection of personal data and privacy is fundamental to human dignity and welfare, and essential for building consumer trust online and that protections in one country are rendered ineffective if data is transmitted to a country without such protections. Any terms requiring cross-border transmission of data must be conditioned on every signatory to an agreement establishing and enforcing transparent, strong and meaningful

[5] Larry Liebert, "Tech Liability Shield Has No Place in Trade Deals, Groups Say," Bloomberg Law, May 27, 2021. Available at: https://news.bloombergtax.com/international-trade/tech-liability-shield-has-no-place-in-trade-deals-groups-say

protections and 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.

This will require the United States to improve its domestic policies to be in line with best practices, such as policies limiting data collection, processing, use and sharing; requiring data minimization and deletion, confidentiality and security and providing purpose specification and access and correction rights. It will require enactment of robust minimum standards for cybersecurity for consumers, devices and networks such as strong authentication mechanisms and requiring platforms and services to default to the strongest privacy settings. Plus, consumers must have meaningful redress options, including a private right of action and other means for fair settlement of claims, compensation for misrepresentation, fraudulent and/or deceptive products/services or unsatisfactory products/services.

In sum, future agreements should contain no terms diminishing privacy and data protections afforded by the countries' respective laws, including by establishment of a horizontal and self-standing exception for domestic measures that protect privacy and establish and enforce data protection, with special protections for children and young people. And future agreements must ensure algorithmic transparency and accountability, including prohibition of discrimination against protected classes; remove barriers to due process; ensure accountability prevails over trade secrets; establish mechanisms for human oversight and control; and establish remedies for the adverse impacts of artificial intelligence systems on human rights and social justice, including but not limited to, ensuring effective privacy safeguards for large-scale datasets, collective complaint mechanisms, quality oversight, effective technical protection mechanisms and meaningful algorithmic auditing.

While different governments, individual policymakers and organizations may reasonably disagree on what the best digital governance rules should entail, everyone should oppose locking in deregulatory rules in trade agreements.

3. Labor-Related Matters

U.S. trade agreements since the George W. Bush administration have included labor and environmental standards in their core texts as part of the "May 10" standard. The ostensible goal of these terms was to raise standards in trade partner countries. But these terms have proven ineffective. The absence of effective labor and environmental standards created race-to-the-bottom incentives for U.S. firms to offshore production and slammed U.S. firms and workers with a flood of imports subsidized by environmental and social dumping.

The USMCA, however, included some innovative labor provisions that have led to several historic achievements for labor rights in Mexico. Workers at Mexican plants Tridonex, General Motors, and beyond have secured independent unions and improved contracts thanks in part to the USMCA's innovative Rapid Response Mechanism (RRM). The RRM is a targeted, facility-specific enforcement mechanism unique to the USMCA that is devised to protect workers' right to organize by imposing fines and tariffs on companies found to violate Labor Annex terms, or even denying entry of their goods to the United States. Public Citizen recognizes the efforts of

Ambassador Tai to enforce these terms, as well as her role in the crafting of those provisions in Congress.

Future U.S. trade agreements including STIP should build from the labor improvements in the USMCA, both in the rights that are enumerated and the mechanisms used to ensure those rights are implemented and enforced in an ongoing manner. As has been a consistent demand of the labor movement, U.S. trade agreements must level the playing field by conditioning trade benefits on parties adopting, maintaining and implementing in their domestic laws the policies needed to ensure the four core labor rights enshrined in the eight fundamental Conventions of the International Labour Organization (ILO). This includes Convention 87 on Freedom of Association and Protection of the Right to Organise (1948) and Convention 98 on the Right to Organise and Collective Bargaining (1949); Convention 29 on Forced Labour (1930) and Convention 105 on the Abolition of Forced Labour (1957); Convention 138 on Minimum Age for Entry into Employment (1973) and Convention 182 on the Worst Forms of Child Labour (1999); and Convention 100 on Equal Remuneration (1951) and Convention 111 on Discrimination in Employment and Occupation (1958). And future agreements must ensure, in law and in practice, that all workers, regardless of the workers' citizenship, immigration status or national origin, have the rights and freedoms guaranteed in the eight ILO Core Conventions.

STIP and other new U.S. trade pacts must include provisions that require countries to effectively enforce their labor laws related to core labor standards and acceptable conditions of work with respect to minimum wages, hours of work, wages and benefits owed; worker representation; termination of employment; gender-based violence; and occupational safety and health. Future pacts must also prohibit signatory countries from reducing, waiving or otherwise derogating from their laws and regulations relating to the core labor standards and acceptable conditions of work. This must include derogation by misclassification such that workers are excluded from the required rights by virtue of being classified as a temporary worker, contract worker, or the like, which has proved to be a significant problem under past U.S. pacts.

Any new agreement must establish floor wages to ensure a level playing field such that workers — regardless of sector — have the right to receive wages sufficient for them to afford, in the region of the signatory country where the worker resides, a decent standard of living for the worker and her or his family. (This is not a call for a fixed minimum wage that would apply uniformly in each country, but rather for floor wages to be required that reflect the remuneration needed to support a decent standard of living including to provide food, water, housing, education, health care, transportation, clothing and other essential needs.) Any new pact also must explicitly deem the work of all workers in the economy to be trade-related and therefore subject to the pact's labor obligations given the impact of systemic abuse of worker rights on the ability of all workers in an economy to make fair wages. It also must forbid threats, acts of intimidation or acts of violence against a worker or workers exercising, or attempting to exercise, any of the rights and freedoms protected by the agreement and deem such action to be a violation of the underlying right or freedom. Any new pact must designate a failure to investigate or prosecute any such threat, act of intimidation or act of violence as a failure to enforce the underlying right or freedom.

Labor provisions must likewise remove barriers that could prevent labor enforcement action from being taken, such as those requiring that labor violations must be proven to be "in a manner affecting trade or investment" or that they must be "sustained" or "reoccurring" before enforcement actions can be taken.

To ensure the ongoing implementation of the labor provisions, the United States must assure that all such labor rules are being implemented and respected on the ground in partner nations before allowing any commercial aspects of a STIP agreement to take effect, and include strong, built-in mechanisms to guarantee swift and certain enforcement of labor standards in an ongoing manner.

Any STIP agreement should create independent Labor and Environmental Secretariats, led and staffed by labor and environmental experts, respectively, with the duties of proactively monitoring compliance and rendering decisions on allegations of non-compliance. Any new U.S pact must also provide for the denial of entry for goods and service traded between the parties that fail to meet labor and environmental standards and the imposition of fines on the facility or entity or investor owning and controlling a facility that fail to meet the labor and environmental standards that produces goods and services that compete in the territory of a party with a good or a service of the other party and ensure access is denied to the government procurement market of the parties for a facility or entity or investor owning and controlling a facility that fails to meet the labor and environmental standards and ensure such penalties remain in place until such non-compliance to have ended.

And to ensure a fair playing field for job creation, strong, enforceable disciplines against currency manipulation and currency misalignment are also needed, and must include mechanisms for the automatic triggering of corrective action against currency manipulators, rather than simply reports or dialogue.

With respect Kenya, the U.S. State Department's 2022 Trafficking in Persons Report ranks Kenya as Tier 2, meaning that it does not meet the minimum standards of the Trafficking Victims Protection Act of 2000, but that it is making significant efforts toward compliance. The report also notes that, "traffickers exploit children in forced labor in domestic service, agriculture, fishing, cattle herding, street vending, and forced begging."[6] The State Department's 2021 Country Report on Human Rights Practices describes rampant impunity, corruption and a range of significant human rights violations in Kenya, including:

> unlawful or arbitrary killings, including extrajudicial killings by the government or on behalf of the government and by the terrorist group al-Shabaab; forced disappearances by the government or on behalf of the government and by al-Shabaab; torture and cases of cruel, inhuman, or degrading treatment or punishment by the government; harsh and life-threatening prison conditions; arbitrary arrest and detention; arbitrary interference with privacy; restrictions on free expression and media, including violence or threats of violence against journalists and censorship;

[6] "2022 Trafficking in Persons Report," U.S. Department of State, 2022, Available at: https://www.state.gov/reports/2022-trafficking-in-persons-report/

> substantial interference with the freedom of peaceful assembly and freedom of association, including harassment of nongovernmental organizations and activists; serious government corruption; lack of investigation of and accountability for gender-based violence; and the existence and use of laws criminalizing consensual same-sex sexual conduct between adults.[7]

The AGOA annual review criteria include human rights and labor conditions. To continue such standards going forward if Kenya's AGOA-based access is to be replaced by a U.S. trade agreement, such a pact must include strong human rights provisions in its core text and prohibit waiving or other derogations of laws and regulations relating to the fundamental human rights specified in the United Nations Universal Declaration of Human Rights. Such a pact must provide that failure to meet human rights standards is subject to effective dispute resolution and enforcement mechanisms and penalties that are included in the core text and that are at least as effective as the mechanisms and penalties that apply to the commercial provisions. It also must provide for the establishment of a commission composed of representatives specializing in international and comparative human rights, including representatives of independent human rights organizations in the U.S. and Kenya to receive, investigate, review, and participate in the adjudication of any complaints filed under the human rights provisions, with authority to rule on compliance and obligations by signatory countries to cooperate fully with investigations by the commission.

Any U.S.-Kenya agreement must also include special provisions to address the ongoing issue of child labor within specific Kenyan industries, including a requirement for Kenya to ratify, implement and enforce the United Nations Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. Any U.S.-Kenya trade agreement must also explicitly prohibit all trade in goods made, in whole or in part, by forced labor or the worst forms of child labor (as outlined in ILO Convention 182 on the Worst Forms of Child Labour (1999)), regardless of the source of such goods. The pact must also establish an obligation prohibiting both countries from procuring goods, regardless of the source of such goods, made with forced labor or the worst forms of child labor.

4. Climate and Environment-Related Matters

As environmental groups have previously recommended, and Public Citizen concurs, environmental terms in any U.S. trade agreement must prohibit the signatories from weakening, eliminating, or failing to enforce domestic environmental or other public health or safety standards.[8] Any new U.S. trade agreement including STIP must also require parties to adopt, maintain, and implement laws, regulations, and other measures to fulfill their Nationally Determined Contribution to the Paris Agreement under the United Nations Framework

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[7] "2021 Country Report on Human Rights Practices," U.S. Department of State, 2022. Available at: https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/

[8] "Discussion Paper: A New Climate-Friendly Approach to Trade," Sierra Club, 2016. Available at: https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/climate-friendly-trade-model.pdf

Convention on Climate Change. It must require each country to adopt, maintain, and implement laws, regulations, and other measures to limit the level of priority air, water, and land pollutants to the lowest maximum level found in the laws and regulations of any signatory to an agreement and require each country to adopt, maintain, and implement laws, regulations, and all other measures to prohibit the harvest, take, or trade of wild flora and fauna, including parts and products, in violation of domestic or international conservation obligations, including timber, fish, wildlife, minerals, and other environmentally sensitive goods. As well, any trade agreement must require each country to adopt, maintain, and implement laws, regulations, and other measures to fulfill its obligations under priority Multilateral Environmental Agreements, i.e., those that have been ratified by the U.S. and/or by over 90% of world governments.

Public Citizen encourages USTR to explore innovative ways to expand the RRM and labor provisions that have helped in the USMCA to apply to environmental obligations. Like with labor standards, meeting environmental standards must be a prerequisite to any commercial benefits from the pact, and environmental provisions must also include strong, built-in mechanisms to guarantee their swift and certain enforcement moving forward. Enforcement mechanisms must enable members of the public to initiate claims of environmental violations, and these claims must trigger an independent investigation and, where appropriate, adjudication with binding remedies, regardless of whoever occupies the White House at any given moment.

Furthermore, the STIP would be an appropriate forum for the U.S. and Kenya to commit to a "climate peace clause," which would be a legally binding commitment by the parties that they will not use or permit the use of trade or investment rules in any of their international agreements, including STIP and the WTO to challenge each other's climate policies. The global community is running out of time to address the climate crisis, and governments need every policy tool in the toolbox to reduce emissions and ramp up renewable energy without fear of trade challenge. Such a "climate peace clause" should protect any measure a country takes to implement its climate commitments, including its Nationally Determined Contribution to the Paris Agreement. This could include, for example: policies to reduce use of and reliance on fossil fuels (e.g., rejecting fossil fuel permits, bans on fossil fuel extraction, and removal of fossil fuel subsidies) and policies to ramp up the production and distribution of renewable energy and clean energy goods like electric vehicles, heat pumps, and wind turbines (e.g., subsidies, procurement policies, and domestic content preferences).

5. Transparency and Good Regulatory Practice Issues

Public Citizen urges STIP negotiators to not include provisions from the so-called "Good Regulatory Practice" chapter found in the USMCA and recent pacts. Co-opting important values of transparency and stakeholder participation, these provisions award large corporations specific roles in virtually every step of the regulatory policymaking process and grant corporations new avenues for attacking regulations they do not like — not only after regulations take effect, but before they are even crafted.

Per language in the USMCA, Good Regulatory Practice chapters cover all government practices "relating to the planning, design, issuance, implementation, and review of the Parties' respective regulation." There are requirements on everything from the creation of "Expert Advisory Groups" and "Regulatory Impact Assessments" to the use of "sound statistical methodologies" and "Retrospective Review." Such provisions serve to slow, weaken and/or prevent public interest regulations in the areas of climate, food safety, financial regulations, consumer privacy, labor rights and more, and they must not be included in STIP or any other pact.

6. Other Provisions That Should Not Be in STIP

a) No Limits on Procurement Policy

As the Biden administration has taken admirable steps to reshore jobs and support domestic manufacturing, it would be counterproductive to include in STIP the usual waiver of "Buy American" procurement preferences or to undermine any efforts by Kenya to use procurement policies to benefit their local economies. Past U.S. FTAs contain terms undermining the Buy American preferences that have been in place since the Franklin D. Roosevelt administration to ensure that American-made goods are purchased when the government spends our tax dollars on infrastructure projects or purchases vehicles, computers and other products.[9] These previous trade-pact terms also forbid the U.S. government from requiring that firms operating government call centers or providing other government services employ U.S. workers. These rules offshore our tax dollars rather than investing them to create jobs and innovation at home. They also limit conditions for procurement contracts, like requiring workers on infrastructure and construction contracts be paid 'prevailing wages' or requiring recycled content in goods or renewable energy. If the U.S. government – or a state – does not conform its policies to these constraints, then the other countries that are part of the agreement can challenge our policies in foreign tribunals that can impose trade sanctions against the United States until the laws are eliminated or changed. The exclusion of procurement terms from STIP or any future U.S. trade pact should not be controversial. For many years, domestic manufacturers and many members of Congress have noted that given the much greater value of U.S. government procurement relative to almost every other trading partner, providing some U.S. firms with opportunities to bid on a smaller amount of government contracting in other countries did not seem like a sound trade-off for providing preferential access for foreign goods and firms to our larger pool of government contracts.

b) No Investor-State Dispute Settlement (ISDS)

After decades of raising awareness around the controversial trade policies that empower corporations to attack public interest laws, Public Citizen was pleased to hear President Biden say:

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[9] "How Overreaching 'Trade' Pact Rules Can Undermine Buy American and Other Domestic Preference Procurement Policies," Public Citizen, July 2021. Available at: https://www.citizen.org/wp-content/uploads/BAA-Backgrounder-updated-July-2021.pdf

> I don't believe that corporations should get special tribunals that are not available to other organizations. I oppose the ability of private corporations to attack labor, health, and environmental policies through the Investor-State Dispute Settlement (ISDS) process and I oppose the inclusion of such provisions in future trade agreements.[10]

As such, we look forward to any STIP excluding ISDS, and hope to see USTR work to remove ISDS from our existing agreements.

c) No Rules Undermining Access to Medicines

No future U.S. trade agreement should include an intellectual property (IP) chapter that serves as a forum for powerful lobbies to continue pushing for maximalist IP standards that fail to account for the interests of patients in the U.S. and partner countries. Given the recent failure of the United States and WTO to achieve a meaningful waiver of IP rules inhibiting greater production of COVID-19 vaccines, tests, and treatments, the only IP provisions in the STIP should be safeguards to trigger automatic waivers in the event of public health, climate and other emergencies.

d) No TRIPS-Plus Copyright Terms

Copyright terms in any new U.S. trade agreement should not extend beyond the terms in the WTO TRIPS text, which requires protection for 50 years after the death of the author. The terms of the USMCA should not be replicated in new agreements, meaning neither extended copyright terms nor vague limitations and exceptions should be locked in via a new U.S. trade agreement. Many elements of the copyright rules in the USMCA were derived from controversial provisions in the TPP that were strongly opposed by those in the education and library fields. By requiring a copyright term of "life of the author plus 70 years," the USMCA copyright terms dramatically lengthened Canada's copyright term by 20 years. Including such terms in the USMCA also locks the United States into long copyright terms that keep classic literary and artistic works of cultural importance under the monopoly control of Hollywood and recording and publishing giants. Any STIP or future U.S. trade agreement must break from past pacts' tendency to shift the balance of interests towards more protection of and less access to copyright protected works. In particular, developing countries need a balanced copyright system that reflects local realities and promotes access to knowledge and education. Thus, for instance, to the extent any U.S. trade pact includes copyright terms, it also must include terms that provide the flexibilities afforded by the U.S. fair use principle. As well, any such terms in STIP must include explicit exceptions for educational uses, libraries and archives. Future U.S. trade agreements must also exclude provisions requiring the protection of "trade secrets" with respect to products that pose threats to public health, safety or the environment.

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[10] "Candidate Questionnaire," United Steelworkers Political Action Fund, May 17, 2020. Available at: https://www.uswvoices.org/endorsed-candidates/joe-biden

e) No Terms Undermining Food Security

The STIP must exclude any terms undermining efforts to achieve food security and alleviate hunger. U.S. negotiators must respect the ability of governments to implement programs that ensure farmers and other food workers receive fair compensation, and that consumers have access to safe and affordable foods and the right to know where and under what conditions their food is produced. Likewise, nations must be able to protect themselves from dumping, land grabs and other unfair trade practices that force farmers off their land. The STIP's agriculture terms must be designed with the goal of achieving balanced trade that supports fair and sustainable rural economies and food supplies. Nations must have the right to democratically establish domestic farm policies that ensure that farmers are paid fairly for their crops and livestock, and other farm and food policies that protect farmers and consumers such as inventory management, strategic food reserves and import surge protections, and other mechanisms to protect the right of each country to prevent dumping of agricultural commodities at below the cost of production.

Conclusion

It is Public Citizen's view that negotiating a traditional U.S. FTA with Kenya is an idea with catastrophic policy and political repercussions. We have been encouraged by Ambassador Tai's comments that this STIP is not intended to replicate the past model, and that the full range of stakeholders – not just large corporations – will be consulted in developing U.S. positions. We hope to see these promises realized soon with IPEF, STIP and beyond.

These comments describe the limited-scope pact that has the best chance of promoting President Biden's worker-centered approach to trade that will complement the administration's efforts to build a more resilient economy. Public Citizen and partner organizations in Kenya will closely monitor the negotiations and outcomes. We will ensure the public is apprised of how terms of a potential STIP will affect peoples' jobs, health and safety and the environment in the United States and in Kenya. We will fight fiercely to sustain the improvements for which we have long advocated that were included in the USMCA and to promote the critical improvements that remain to be made so that any new U.S. trade agreement actually benefits most people, rather than replicating past failed trade-pact models that have benefited large commercial interests to the detriment of most.

Simply put, for a prospective U.S.-Kenya trade initiative to succeed in terms of policy or politics, it cannot merely mirror past U.S. FTAs. If there is to be a new trade model that can enjoy broad support, it must build from the floor set by the final, approved USMCA and meet the additional criteria described in these comments.