UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

September 16, 2022

Re: Comments Regarding the "United States-Kenya Strategic Trade and Investment Partnership," Docket Number USTR-2022-0008

The United States Council for International Business (USCIB) supports the Biden-Harris Administration's decision to launch the "United States-Kenya Strategic Trade and Investment Partnership" (STIP), negotiating an agreement that deepens bilateral relations and achieves durable and resilient economic growth for all – industry, workers, and consumers. USCIB urges the Administration to create a truly ambitious roadmap that advances a comprehensive and substantive agreement with concrete, meaningful outcomes, high standards, and strong rules that are enforceable and binding.

USCIB is a trade association representing primarily U.S.-based global companies and professional services firms with $5 trillion in revenues and 11.5 million employees representing every sector of the economy, with trade relationships around the world. Our companies support American workers and their families through well-playing jobs in manufacturing, services, and innovation, enabling a diversity of communities to flourish in every region of the United States. We promote open markets, competitiveness and innovation, sustainable development, and corporate responsibility, supported by international engagement and regulatory coherence. Not only is this critical to the vitality of our member companies and their workforce, but it is key to the continued prosperity of the U.S. economy and American competitiveness in the global marketplace.

A trade agreement with Kenya can serve as part of a broader strategy to advance U.S. economic and strategic interests in Africa. As Africa grapples with the global disruptions, severe health and economic costs of COVID-19, and a prolonged conflict in Ukraine, a trade agreement with Kenya can help contribute to a stable, inclusive, even, and robust outlook. Of key importance to the prosperity of the continent is the stated goal of STIP to boost intra-African regional integration, complementing the integration efforts of the African Continental Free Trade Area. The proposal goes hand in hand and, if coupled with a strong investment chapter, would further boost the objectives of the U.S. Prosper Africa initiative focused on boosting trade and investment ties especially in the infrastructure, energy, healthcare, environment, and technology sectors.

STIP would be the first substantial trade agreement reached between the United States and a Sub-Saharan African country, contributing to Africa's economic power and opportunity consistent with Biden Administration initiatives such as the newly released U.S. Strategy Toward Sub-Saharan Africa. It would enhance U.S. efforts to create more resilient supply chains, providing alternative sourcing for key inputs and ensuring Kenya remains less vulnerable to threats of economic coercion by non-democratic trading partners. A comprehensive STIP agreement would be a step forward for African trade modernization, reaching high standards and rules that can serve as a

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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 the Africa Growth and Opportunity Act (AGOA), a preference program that faces an uncertain future and is set to expire in 2025.

As such, we welcome the Biden-Harris Administration's determination to pursue STIP and offer the following recommendations to help develop "an ambitious roadmap for enhanced cooperation" to ensure the economic success of this important initiative:

1. General negotiating objectives for the contemplated agreement.

The STIP should be a comprehensive and substantive agreement of high ambition that achieves concrete outcomes, state of the art standards and strong rules that are binding and enforceable. USCIB supports the Administration's goal of advancing key priorities in target areas like digital, customs and trade facilitation, good regulatory practices, and harmonization of standards with an aim toward bolstering resilient and strategically integrated supply chains that help keep essential products readily available for both the public and private sectors. The agreement should provide creative solutions for the new economy, climate and sustainability, socio-economic equality, emerging technologies, and the role of SMEs. It should include new digital governance rules that foster innovation, facilitate digital trade, enable trusted data flows, incorporate digital inclusion for small businesses, and promote digital enablement and skilling in the economies of the United States and Kenya.

As USCIB has asserted in other commentary on Biden-Harris trade initiatives, the United States should remain open-minded, however, on the breadth of substance under the negotiations and ultimate outcomes. We urge the Administration to reconsider unnecessarily limiting U.S. objectives with an initial agenda, particularly with respect to market access, services, intellectual property rights protections (IPR) and investment. We urge the Administration to look to existing free trade agreements to demonstrate consistency in international negotiations with respect to national objectives, harmonized rules, and pursuit of high standards.

A key element to STIP and a broader Africa strategy is supply chain resiliency. This will require strong coordination and collaboration with the business community on policies that promote investment and development such as:

- encouraging investments in supply chain-related infrastructure;
- formulating a predictable, rules-based trade policy;
- reforming permitting processes;
- ensuring reliable access to energy and intermediate inputs;
- strengthening worker training and skills; and
- maintaining a well-run, science-based regulatory system.

Importantly, the Administration should maximize stakeholder consultation and transparency around all negotiating texts.

2. Agriculture-related matters.

The United States leads the world in sustainable and efficient food production and American farmers, ranchers, agribusiness, and their workers stand to gain considerably from enhanced access to growing economies in Africa such as Kenya. USCIB supports a STIP that will increase U.S. agricultural exports, liberalize the trade and investment environment for food products, harmonize standards and regulations, enhance transparency, and advance food safety.

Effective cooperation, collaboration and communication between regulators and industry are critical to ensuring the safety and sufficiency of food supply chains and facilitate food trade. USCIB encourages the Administration to leverage STIP to further opportunities to implement capacity building in Kenya that supports the promotion of food security, and to work to reduce barriers to trade in food and food products.

As an essential element fostering sustainable agriculture and improving livelihood, especially of smallholder farmer, USCIB encourages the Administration to support Kenya with efficient measures, preventing the import, trade, sale and use of counterfeit or otherwise illegal agricultural inputs (pesticides, seeds, and fertilizer).

3. Anti-corruption-related matters.

Corruption continues to be a challenge in Kenya, undermining both Kenyan governance and U.S. businesses seeking to export or invest in Kenya. This can be a particular problem when U.S. businesses in Kenya are competing against third country competitors that wrongly view corruption not as a scourge and crime but merely as a cost of doing business. It is crucial that STIP contain an anti-corruption chapter that sets, as a minimum standard, the provisions of Chapter 27 in the U.S.-Mexico-Canada Agreement (USMCA). We also encourage the United States and Kenya to include an additional provision in this anti-corruption chapter that will encourage enhanced private sector coordination to strengthen ethical business conduct, including the development and implementation of high-standard codes of ethics spanning key sectors of shared interest.

4. Digital economy-related matters.

The United States is a world leader in the development and deployment of digital services and technologies. More so than in any other sector of the economy, these services and technologies empower and enable global engagement by individual entrepreneurs and micro-, small- and medium-sized enterprises (MSMEs), allowing them to access foreign markets with limited resources. The global environment for digital trade is becoming increasingly challenging, however, in no small part due to foreign government efforts to onshore more of the economic benefits of this growing trade, protect their own domestic digital players and growing fragmentation around digital regulation globally which undermines the promise and potential of the digital economy.

USCIB has been a leader in calling for the development of digital trade rules around the globe that benefit U.S. companies and workers by fostering a free and open Internet, enhancing transparency, enabling trusted data flows, increasing the use of electronic transferable records, advancing cooperation on cybersecurity, opening new market opportunities, promoting digital inclusion, upskilling digital workers, and addressing digital trade restrictions that discriminate against U.S. export and service suppliers. Promoting binding trade rules that advance shared democratic values and U.S. economic and national security interests is critical to ensuring that all stakeholders in the United States and our trading partners can take advantage of the benefits of digital trade.

As such, 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. It should draw from the USMCA for important provisions including those related to source code and algorithms, e-signatures, privacy, cybersecurity, data flows and storage. 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. A U.S.-Kenya trade agreement should also include commitments that data can flow unimpeded across borders except for limited and well-defined public policy exceptions. It should prohibit the application of customs duties and/or customs formalities to electronic transmissions and ensure support in the WTO for making the moratorium on customs duties on electronic transmissions permanent, as well as reaffirm the shared principles contained in the Declaration for the Future of the Internet.

5. Digital services tax.

Providing for the removal of Kenya’s Digital Service Tax (DST) should be a key U.S. objective, as the measure discriminates against U.S. companies and undermines ongoing multilateral efforts in the OECD/G20 Inclusive Framework to address tax challenges of the digitalizing global economy. Kenya’s Finance Bill, 2020 first established a 1.5 percent tax on gross transaction value for services sold through a digital marketplace, effective January 1, 2021. While the tax initially applied to resident and nonresident firms and could be offset by corporate income tax payments for companies with permanent establishment, subsequent legislating through Finance Bill, 2021 effectively made the DST more discriminatory against U.S. firms by excluding resident firms from scope and eliminating the ability to offset DST payments against corporate income tax payments. The legislation passed in 2021 also amended the scope to include “business carried out over the internet or an electronic network,” and expanded the definition of “digital marketplace” to “an online platform which enables users to sell or provide services, goods or other property to other users.” Revisions in Finance Bill, 2022 have now excluded income earned by a person with a permanent establishment in Kenya.

USTR should insist that Kenya refrain from collecting the DST and instead re-commit to the multilateral project through the Inclusive Framework as a key STIP outcome. This is especially important as Kenya has not lent its support to the OECD/G20 Inclusive Framework’s October 2021 Statement that commits participating governments to provide for the removal of relevant unilateral measures for all companies.

6. Matters of particular relevance to MSMEs.

MSMEs face obstacles to participation in international trade and have been disproportionately challenged by pandemic impacts. We encourage the United States to work with Kenya to adopt the following policies directed at helping MSMEs better achieve the benefits under the United States-Kenya Strategic Trade and Investment Partnership:

- A recognition of direct selling as a legitimate and important MSME-enabling business model, as stated in USMCA Article 15.10.

7. Environment- and climate change-related matters.

International trade and environmental protection must be mutually supportive in considering policies to battle climate change, curtail pollution, and ensure a sustainable future. STIP must include robust industry stakeholder engagement to help achieve carbon neutrality, preserve biodiversity, promote conservation, and enhance resource efficiency and circularity consistent with a rules-based multilateral trading system.

The STIP should seek to build sustainability throughout supply chains, by prioritizing clean/renewable energy, reducing waste, improving recyclability, and encouraging responsible product design. USCIB also supports trade and investment measures that seek to achieve net-zero climate goals and promote a circular economy in compliance with WTO commitments. Used goods, generally, and used technology products, in particular, provide a wealthy source of raw materials that can be recovered and fed back into the production process for new goods. Doing so reduces the need for mining of raw materials, reduces waste, and enhances supply chain resiliency by capitalizing on the supply of critical materials already embedded in ubiquitous consumer products. The United States should address regulatory barriers to resource recovery through STIP.

We are encouraged that many African countries are working to develop national action plans on waste materials, including plastics. Focusing on waste management is critical in creating economic value for waste materials (for example, plastics as feedstock), but also as a way to use environmental solutions to create jobs and sustainable value chains. STIP should be used to promote greater investment in recycling technologies. This would also allow for greater coordination on an enabling policy that support the following, for example:

- development of recycled plastic standards;
- common approaches to Extended Producer Responsibility (EPR) schemes; and
- efficient regulatory procedures to promote recycled content.

USCIB also encourages adoption of measures that facilitate trade in remanufactured and refurbished, depending on the sector, goods with the goal of reducing, and eliminating wherever possible, tariff and non-tariff measures on these products. The underlying issue is that often remanufactured and refurbished goods are viewed as “used” (i.e., end-of-life). When this happens economies often apply used goods restrictions to these goods, thus impeding their trade and limiting the opportunities for industries who remanufacture or refurbish products to grow.

With respect to energy, STIP should promote a regulatory framework that will facilitate U.S. and local companies to reach renewable energy goals. Examples of commitments include:

- Providing open access to energy markets for renewable electricity suppliers, consumers, and corporate buyers;
- Removing regulatory barriers to privately built and operated renewable energy projects and foreign investments in renewable energy;
- Increasing consumer options for sourcing renewable energy beyond the existing grid mix; and
- Promoting common accounting tools to track renewable energy such as renewable energy certificates (REC) or other similar instruments.

We also encourage STIP to facilitate an African strategy to promote the coordination on carbon capture technology and carbon trade policy.

8. Transparency and good regulatory practice matters.

USMCA included the most robust transparency provisions to date and an agreement with Kenya should similarly include strong provisions in this area. These provisions should ensure publishing rules for advance notice and comment, address licensing issues including fees and other areas of the licensing process.

Good regulatory practices (GRP) based on WTO principles and international norms are equally important to inclusive growth and the participation of MSMEs in global commerce. As such, the STIP should include clear procedures for adopting, reviewing, and repealing regulations. Processes should be transparent and allow adequate time for engagement and public comment by affected parties before regulatory action is taken. Decisions should be based on science and evidence and regularly undergo risk and regulatory impact assessments. There should be clear provisions defining what information and studies may be used to develop domestic regulations.

The U.S. Treasury Department should seek opportunities to work more closely with Kenya's financial regulatory community to promote GRP and exchange information.

9. Worker rights and protections-related matters.

Trade is a key tool in achieving global economic growth and stability, higher paying jobs, increased living standards, upward mobility, consumer choice and lower priced goods and services for American families. USCIB supports a trade policy that advances effective enforcement of labor laws and decent work for all. Through our membership affiliation with the International Organization of Employers (IOE), USCIB holds a formal role as the U.S. employer representative authorized to engage and negotiate international labor standards within the International Labor Organization (ILO), and USCIB members have joined every U.S. government delegation to the ILO's International Labor Conference (ILC) since our founding. At the ILO, USCIB has sought to promote core labor standards, bolster human rights, and eradicate child labor and forced labor in global supply chains. An especially important example of USCIB's contributions to international labor rights governance, it was USCIB that first proposed and successfully advanced the proposal that culminated in the adoption of the ILO's 1998 Declaration of Fundamental Principles and Rights at Work. Engaging all stakeholders throughout the STIP negotiating process is the best way to develop effective and longstanding solutions to critical human rights and labor concerns in Kenya.

STIP should promote principles of corporate social responsibility (CSR) and responsible business conduct. The application of CSR principles in business operations can bolster the positive impacts of trade and investment flows bilaterally and serve as a model for regional partners. USCIB urges the United States to advocate through STIP that Kenya adopts and effectively enforce labor laws that meet international standards.

USCIB members recognize the importance of education, skills training, and life-long learning to support the development of worker potential, align with the evolving needs of employers, and support the goal of human capital development as promoting the well-being of all people and achieving sustainable and inclusive economic growth. Investment in skills training is key to providing workers with the preparation necessary to overcome the challenges and harness opportunities in the new digital age. USCIB strongly supports efforts through STIP to establish public-private partnerships that help close digital and other skills gaps.

STIP can foster collaboration on digital skills development, by committing to:

- Establish centers within domestic economic development agencies and public universities that will partner with the private sector on programs to upskill students and workers, including those in under-represented communities in tech like women and girls, and to train artisans and small businesses on how to be e-commerce sellers; and
- Work with the World Bank or the African Development Bank to establish global financing programs in conjunction with the private sector that will allow countries to obtain funds to help small businesses and entrepreneurs develop technical skills, navigate business registration, use digital technologies to transform their business, and connect with local expansion partners.

10. Standards collaboration.

USTR should address all non-tariff barriers (technical regulations, conformity assessment practices, standards-based measures) that impede trade. Such measures are a major challenge for U.S. companies operating in foreign markets, they are growing in prevalence, and they are particularly difficult for MSMEs to navigate and overcome. The United States and Kenya should work to build stream-lined, open, and transparent standard-setting procedures that provide for robust industry consultation and engagement. Standards should be flexible and non-discriminatory and promote sustainable, resource efficient technologies. At a very minimum, STIP should include the provisions contained in the technical barriers to trade (TBT) chapters of recent U.S. trade agreements.

Moreover, the types of TBT-related challenges that frustrate goods trade are also increasingly a barrier to digital trade and trade in services. The basic principles of the WTO TBT Agreement and TBT chapters of U.S. trade agreements lend themselves equally well to the development of standards, regulations, and conformity assessment procedures for services in Kenya.

STIP should also support ongoing efforts to increase capacity and harmonization of regulatory processes to remove barriers to access to medicines. It should improve regulations for the prescribing and distribution of pharmaceuticals to ensure quality and compliance. USTR should seek standards for pharmaceuticals and medical devices that ensure that government regulatory reimbursement regimes are transparent, provide procedural fairness, are nondiscriminatory, and provide full market access for U.S. products. Any agreement should also promote value-based reimbursement systems and decisions with the objective of transforming these structures to ensure improved health systems sustainability and improved patient access to evidence-based medicines. It should also implement a pricing framework that includes mark-up caps.

11. Customs and trade facilitation matters.

It is important that any U.S.-Kenya agreement include strong provisions on customs and trade facilitation. We encourage consideration of past USCIB detailed customs and trade facilitation submissions linked to USCMA. The following points should be included:

- Accelerate the full and expedited implementation of all provisions of the WTO Trade Facilitation Agreement (TFA), including but not limited to implementation of the best practices that underpin the articles of the agreement. We applaud Kenya for its efforts to acceded to the WCO Revised Kyoto Convention in 2010; however, at the USCIB level, we believe TFA is the priority for implementation, noting its bound nature. Linked to TFA commitments, Kenya should:
    - Provide for meaningful industry consultation and support the best practice of publishing draft regulations, opening comment before finalizing by all interested stakeholders, affording adequate timeframe for review and comment – no less than 30 days with the opportunity for extension based on complexity, and providing necessary transition period; and
    - Separate the physical release of goods from the duty and tax collection process.
- Leverage the experience of the pandemic and accelerate digitization of customs forms, move to e-signature acceptance (not limited to customs), secure online payment of duties and taxes, and enable electronic filing. USCIB supports digitization. However, as digitization occurs, there must be processes to ensure the protection of confidential commercial information (i.e., confidential business information or CBI) as well as consideration of who owns the data in question, what data is appropriate to share, with whom, and under what legal arrangements;
- Ensure inclusion of streamlined duty drawback provisions;
- Kenya should re-affirm its commitment to the WTO Customs Valuation Agreement (CVA), which prohibits the use of reference price databases. We encourage Kenya to abandon the use of foreign government or commercially available pricing databases as sources for determining the import value of goods;

- Create a single window to allow the trade community to provide the necessary information to satisfy all government agency requirements with a single data transmission. We strongly encourage domestic development of a Single Window (SW). In the event a third party is used, the system once complete should be handed back to the government for overall ownership and management. Moreover, if a third party is engaged in the SW, then there must be strong governance as well as adequate and clearly documented protections of confidential business information;
- Evaluate the possibility of aligning the Parties' Authorized Economic Operator (AEO) programs more closely with a view toward laying the basis for eventual mutual recognition;
- AEO participants should be able to calculate and pay duties and taxes after the physical release of the goods and allow periodic payments of these fees as opposed to doing so on a transaction-by-transaction basis;
- Engage with customs officials to promote efficient and secure processing of necessary imports and exports with Africa including:
    - Promoting investment in technology platforms for customs administration;
    - Support capacity building on Trusted Trader security programs; and
    - Engage in efforts to promote harmonized or consistent interpretation of customs rules.
- Establish a meaningful *de minimis* level for customs duties and taxes, and allow simplified and expedited clearance of these shipments without a Harmonized Tariff Schedule number and on a most-favored nation (MFN) basis;
- Provide for the immediate release of express shipments upon arrival, provided that all required documentation and data have been submitted;
- Develop a robust informal entry process that is above the *de minimis* level, but below the formal entry level, which would necessitate less documentation than is required in a formal entry and would aim to reduce the time, cost, and complexity in trade. For example, the informal entry amount in the U.S. is currently at $2,500;
- Simplify the process for returning goods of domestic origin. Returned shipments should be released without a formal declaration required, provided that the reference to the preceding outbound shipment and goods declaration can be provided so that both shipments can be reconciled. Clear guidance should be provided to ensure that duties are not collected on returned goods that have not been improved to avoid the cumbersome procedure of the trade having to request refunds of such duties;
- Improve capacity within Kenya Revenue Authority (KRA) to eliminate delays related to pre-import inspection for pharmaceuticals;
    - Enforce and adhere to government parallel trade guidelines and revise existing guidelines to require that a company has a marketing authorization to import the product;
- Rules of origin (RoO): Support efficient rules of origin to encourage more cross border trade.
    - Ensure efficiency of RoO by harmonizing with existing American free trade agreements (e.g., U.S.-Australia, U.S.-Korea, and U.S.-Chile) which are less burdensome to qualify for originating status. For Harmonized System (HS) Chapters 28 to 39, ensure maximum flexibility in order to qualify substantial

exports including the chemical reaction rule as well as the active ingredient being considered in the origination instead of just Net Cost or Regional Value Content.
  - Maintain 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. In addition, in recognition of the regional distance between the United States and Kenya we urge additional peripheral origin requirements on inputs used to produce apparel (such as sewing thread, pocketing fabrics, elastomeric, etc.) be avoided as is the case with all non-Western Hemisphere free trade agreements;
- Strengthen capacity and regulatory/legislation frameworks to prevent illicit trade by:
  - Increasing and strengthening interagency cooperation across the Kenyan government;
  - Developing an educational campaign to increase awareness;
  - Implementing a process to proactively detect illicit medicines; and
  - Creating a surveillance network.
- Align domestic infrastructure projects with trade priorities, especially removing bottlenecks to access and competition such as upgrading rail, port and transport infrastructure;
- Modernize transport security requirements to allow for same drivers or single transport across the border; and
- Temporary admissions: In 2019, Kenya expressed joining the ATA Carnet System. USCIB, as the National Guaranteeing and Issuing Association (NGA and IA, respectively) for ATA Carnet in the United States, has a particular interest in Kenya joining and implementing the ATA Carnet System (ACS). The ACS, a five-decade plus old partnership between governments and business organizations, facilitates trade by allowing goods to enter the customs jurisdiction of economies party to the ATA System duty and tax-free for a period of one-year. As Kenya looks to achieve robust implementation of the WTO TFA, necessary steps must be taken to implement the ATA System, which is the global gold standard for Temporary Admissions (WTO TFA Article 10, specific measure 10.9). USCIB encourages measurable commitments towards joining the ACS and the taking of all necessary steps to become an active participant in or to implement the ACS by becoming a contracting party to either the WCO's ATA Convention or the preferred and more robust Istanbul Convention with the fullest scope of coverage possible. ATA Carnets are vital tools of trade facilitation that will play an important role in post-COVID economic recovery globally.

12. Other measures or practices that undermine fair market opportunities for U.S. workers, farmers, ranchers, and businesses.

Although not envisioned as part of the Administration's STIP proposal, USCIB urges consideration of the following provisions as important to a meaningful agreement with Kenya.

Intellectual Property

An agreement with Kenya should include a comprehensive intellectual property (IP) chapter, an outcome critical to about 40 percent of the U.S. economy, 30 percent of all U.S. employment, and over half of all U.S. exports. The agreement should prioritize world-class IP protection and enforcement mechanisms that protect the proprietary knowledge of U.S. companies operating abroad as well as support the growth of Kenya's innovative output. It should also include a strong base term and scope of protection for patents, copyrights, trademarks, designs, undisclosed test or other data; provide a high-standard data protection term for both biologics and small molecule drugs; establish a statutory commitment to protect trade secrets; exclusive rights for all forms of IP regardless of the technology; transparent, predictable, and carefully defined rules for limited exceptions, as appropriate, to rights across all forms of IP.

Finally, the agreement should help increase capacity, build infrastructure, and create frameworks to prevent trade in counterfeits.

Financial Services

USCIB urges inclusion of a high-standard financial services chapter in STIP, building largely on progress made in the USMCA financial services chapter, although some areas should not be the model for negotiations with Kenya and improvements are needed.

- ***Non-discriminatory treatment:*** Any agreement should ensure non-discriminatory treatment to level the playing field with state-owned entities, and domestic and foreign competitors. In this respect, STIP should maintain the same commitment to national treatment found in the USMCA for sectors such as electronic payments services (EPS).
- ***Market access:*** Like USMCA, STIP should ensure that financial services firms may choose the legal structure and establish an absolute right to enter the market and expand geographically throughout the market. The United States should negotiate market access commitments using a "negative list" and "ratchet" to ensure a high standard of market openness and lock in further liberalization expanding and creating new business opportunities.
- ***Cross Border Market Access:*** USMCA expanded and improved coverage of cross-border commitments and these improvements should be included in the financial services chapter with Kenya. USMCA expanded commitments in areas such as EPS, portfolio management, and investment advice services.
- ***Transfer of Data and Prohibition of Data Localization:*** 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.
- ***Digital Technology:*** USTR should seek to include language in the chapter that promotes the shared understanding of the use of cloud technologies by financial institutions. It should promote cooperation regarding data connectivity developments, including digital innovation, supporting development and growth.

- ***Senior Management:*** The STIP should ensure that financial services firms may engage the top managerial personnel and Board members of their choice, without regulatory approval and regardless of nationality.
- ***Investment Provisions:*** The financial services chapter should incorporate investment provisions including expropriation (direct and indirect), the minimum standard of treatment, free transfers, performance requirements, denial of benefits, and special formalities.
- ***Government Procurement:*** In prior agreements the financial services chapter ensured non-discriminatory treatment for government procurement in the financial sector. Unfortunately, in USMCA government procurement was excluded from the financial services chapter. The agreement with Kenya offers an opportunity to ensure that U.S. financial services firms receive non-discriminatory fair treatment in the procurement of services by the Kenyan government.
- ***Subsidies:*** The financial services chapter, consistent with past practice, should discipline subsidies to financial services firms.

Government Procurement

U.S. businesses have historically faced numerous barriers preventing them from competing fairly for Kenyan government procurement. STIP should ensure open, transparent, and reciprocal access to U.S. and Kenyan procurement markets, with strong commitments on fair procurement practices consistent with those contained in the USMCA government procurement chapter and comprehensive market access commitments by Kenya on procurement by government ministries and government corporations. Increasing transparency and competition in Kenyan government procurement will benefit U.S. exporters and generate greater value and more effective governance for Kenya, and also ensure that U.S. exporters can compete fairly with exporters from third countries. Kenya should either eliminate or allow U.S. products to count as "domestic" for purposes of: any domestic content requirements for government procurement; any domestic set-asides in government procurement; and any price preferences for locally manufactured goods (including the 15 percent price preference in tenders for locally manufactured medicines). Commitments on government procurement procedures should (a) permit and encourage use of best-value/lifecycle-cost procurement evaluation criteria and (b) require commercial entities to submit and demonstrate adherence to a high-standard code of ethics as a prerequisite to participation.

Investment

USCIB also urges the Biden Administration to include foreign direct investment (FDI) in the STIP and be both ambitious and creative in looking for win-win provisions. Two-way flows of FDI can contribute significantly to technology transfer and partnerships, climate goals, expanded trade, job creation, and improved U.S. competitiveness. Restrictions on FDI should be eliminated except in narrowly negotiated areas.

Strong rule of law provisions and protections for investors, including robust investor-state dispute settlement (ISDS), must be included in any final trade agreement. The investment chapter must include national treatment, MFN treatment, minimum standard of treatment, guarantees for compensation in case of expropriation, free transfers, prohibition of performance requirements, and ISDS. ISDS depoliticizes important investment rules by putting them in the realm of neutral and legal arbitration. Although ISDS has been the subject of some recent criticism, it remains necessary to adequately ensure the fair treatment of foreign investors. It does not undermine any individual nation's sovereignty. Simply, it ensures that states follow World Trade Organization (WTO) and other basic obligations in making regulation non-discriminatory.

STIP investment protections must comprehensively cover all sectors without any limitations on the claims that investors can make on specific investment protections. There should also not be any requirements of exhaustion of remedies in Kenya's domestic courts. Certain types of legislation cannot be adjudicated by domestic laws and all governments have the capacity to be discriminatory. A U.S.-Kenya agreement should include protection from performance requirements to purchase or use a particular technology for all sectors, including financial institutions. It is also critical that an agreement reached with Kenya include rules prohibiting the parties from requiring companies to transfer their technology, production process, or other proprietary information to persons in their respective territories as a condition of market access.

Conclusion

USCIB remains committed to working with the Biden-Harris Administration across all aspects of the U.S.-Kenya Strategic Trade and Investment Partnership to achieve meaningful results. We hope the Administration will establish an ongoing and substantive consultative mechanism for the private sector to share feedback on the priorities for each sector and to maximize benefits and outcomes. The business community stands ready to partner with the Administration, Congress, and our trading partners to build the depth, scope, credibility, and momentum necessary for this initiative to succeed.