Before the
Office of the United States Trade Representative
Washington, D.C.

Request for Comments on Proposed U.S.-Kenya Strategic Trade and Investment Partnership	Docket No. USTR-2022-0008

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

Pursuant to the request for comments published by the Office of the United States Trade Representative (USTR) in the Federal Register at 87 Fed. Reg. 48,060 (Aug. 5, 2022), the Computer & Communications Industry Association (CCIA) submits the following comments in response to USTR's Request for Comments on the U.S.-Kenya Strategic Trade and Investment Partnership. CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms.[1]

I. Introduction

CCIA supports USTR's pursuit of a trade agreement with Kenya, and welcomes the increased trade engagement with a strategic partner in Sub-Saharan Africa.[2] The United States should use this opportunity to dramatically expand existing market access currently available under the African Growth and Opportunity Act. It is encouraging that the United States has identified the digital economy as a feature of these negotiations, and 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. Increased trade engagement with Kenya also comes at a critical time when non-market economies with authoritarian regimes are investing heavily in the country and the continent more broadly.[3]

[1] For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.ccianet.org.

[2] These comments build upon CCIA's submission to USTR on U.S.-Kenya trade negotiations. *See Comments of the CCIA*, In Re Request for Comments on Negotiating Objectives for a U.S.-Republic of Kenya Trade Agreement, Docket No. USTR-2020-0011 (filed Apr. 28, 2020), https://www.ccianet.org/wp-content/uploads/2020/04/Comments-of-CCIA-U.S.-Kenya-Trade-Negotiating-Objectives-3.pdf.

[3] *See* Yun Sun, *China's 2018 Financial Commitments to Africa: Adjustment and Recalibration*, BROOKINGS (Sept. 5, 2018), https://www.brookings.edu/blog/africa-in-focus/2018/09/05/chinas-2018-financial-commitments-to-africa-adjustment-and-recalibration/ (Traditionally, China had a pattern of doubling or tripling recent FOCAC pledges: from $5 billion in 2006 to $10 billion in 2009, to $20 billion in 2012, and to $60 billion in 2015. "China's financing pledge at the Beijing Summit remains the same as [2015]."); *China's Role at the Heart of*

There is great potential for the future of the U.S.-Kenya trading relationship, and both countries stand to benefit from increased trade and market access for Internet services, and Internet-enabled trade in goods and services. U.S.-based online services have invested heavily in Internet infrastructure to assist in the effort to improve Internet connectivity in Africa, including through subsea cables that go to Kenya or countries on the continent.[4] The digital economy in Kenya is robust, and continues to grow.[5] Estimates show that in 2022, (1) Kenya's telecommunications market is expected to grow from \$2.74 billion to \$3.49 billion, (2) the country's digital services market is expected to increase from \$2.34 billion to \$5.15 billion, and (3) Kenya's cybersecurity market is expected to grow from \$380 million to a projected \$516 million.[6] Kenya's ICT industry and IT-enabled services are soon expected to make up 7% of the country's GDP.[7] Kenya is a leader in expanding access to ICT services with mobile Internet penetration nearly doubling in 2014 and 2019[8] and a concentration of undersea cables give

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Kenya's Election Campaign, FINANCIAL TIMES (Aug. 3, 2022), https://www.ft.com/content/40ea35ea-b9b2-4c92-b595-e5ab191431df; Oscar Otele, *China's Approach to Development in Africa: A Case Study of Kenya's Standard Gauge Railway*, COUNCIL ON FOREIGN RELATIONS (Oct. 13, 2021), https://www.cfr.org/blog/chinas-approach-development-africa-case-study-kenyas-standard-gauge-railway.

[4] Kevin Salvadori, *2Africa Pearls Subsea Cable Connects Africa, Europe, and Asia to Bring Affordable, High-speed Internet to 3 Billion People*, ENGINEERING AT META (Sept. 28, 2021), https://engineering.fb.com/2021/09/28/connectivity/2africa-pearls/; Najam Ahmad & Kevin Salvadori, *Building a Transformative Subsea Cable to Better Connect Africa*, ENGINEERING AT META (May 13, 2020), https://engineering.fb.com/2020/05/13/connectivity/2africa/; Gadjo Sevilla, *Google's \$1B Investment in Africa Includes Funding for Startups and a Massive Subsea Cable for Faster, Cheaper Internet*, TECHCRUNCH (Oct. 7, 2021), https://www.insiderintelligence.com/content/google-s-1b-investment-africa-includes-funding-startups-massive-subsea-cable-faster-cheaper-internet; Andrew Blum & Carey Baraka, *Sea Change: Google and Meta's New Subsea Cables Mark a Tectonic Shift in How the Internet Works, and Who Controls It*, REST OF WORLD (May 10, 2022), https://restofworld.org/2022/google-meta-underwater-cables/; Anthony Kitmo, *Investment in Data Cables Set to Rise*; THE EAST AFRICAN (May 4, 2022), https://www.theeastafrican.co.ke/tea/business/investment-in-data-cables-set-to-rise-3799212; *Submarine Cable Map*, TELEGEOGRAPHY (last accessed Aug. 25, 2022), https://www.submarinecablemap.com/.

[5] INT'L TRADE ADMIN., KENYA - COUNTRY COMMERCIAL GUIDE: INFORMATION, COMMUNICATIONS AND TECHNOLOGY (Aug. 19, 2022) [hereinafter KENYA - COUNTRY COMMERCIAL GUIDE], https://www.trade.gov/country-commercial-guides/kenya-information-communications-and-technology-ict ("Kenya is a regional leader in terms of broadband connectivity, general ICT infrastructure, value added services, mobile money, and mobile banking services. The country's ICT sector is set to account for up to 8% of the country's GDP through IT-enabled services (ITES) and create more than quarter of a million jobs by the end of 2021.").

[6] FROST & SULLIVAN, DIGITAL MARKETS OVERVIEW: KENYA, at 5 (2018) [hereinafter DIGITAL MARKETS OVERVIEW], https://www.frost.com/files/5915/2878/3560/Digital_Market_Overview_FCO_Kenya_25May18.pdf (prepared by Frost & Sullivan for the United Kingdom Foreign and Commonwealth Office).

[7] KENYA - COUNTRY COMMERCIAL GUIDE, *supra* note 5.

[8] Luke Dascoli, *Fact of the Week: Long-Term Digitalisation Policy in Kenya Has Accelerated Economic Growth, and It Brought Digital Payment Services to Over 40 Million People in 2020,* INFO. TECH. & INNOVATION FOUND. (July 26, 2021), https://itif.org/publications/2021/07/26/fact-week-long-term-digitalization-policy-kenya-has-accelerated-economic/ [hereinafter Luke Dascoli, *Fact of the Week*] ("The study finds that digital payments services via M-Pesa surged to over 40 million regional users by 2020. The explosion of digital services, especially

Kenya the best average connection speeds on the African continent (estimated at 12Mbps).[9] The Kenyan government's investment in forward-thinking technology policy initiatives have led to economic growth,[10] and Kenya continues to look ahead for ways to further capitalize on expanded Internet access to deliver economic benefits in frameworks like the "Digital Economy Blueprint" and the "National Broadband Strategy."[11]

With a shared recognition among the United States and Kenya that expanding digital access and services can serve as a positive force in economic growth, countries stand to benefit from strong digital trade rules in the U.S.-Kenya Strategic Trade and Investment Partnership to encourage investment and open up new markets for digitally-enabled commerce.

II. General Negotiating Objectives for the Contemplated Agreement.

The United States should be ambitious in its negotiating goals to address as many access barriers to U.S. exports as possible. The U.S. should build off the progress made in the U.S.-Mexico-Canada Agreement (USMCA) to update trade rules for the 21st century and expand on the rules struck in that agreement to address new challenges facing the global market.

In addition to pursuing strong, binding commitments, USTR should also ensure meaningful enforcement mechanisms. As these discussions are conducted, there should be measures taken to ensure transparency. In initiatives such as the Indo-Pacific Economic Framework, the U.S.-Taiwan Trade Initiative, and the Americas Partnership for Economic Prosperity, the Biden Administration has sought multifaceted frameworks that aim to include trade commitments and other market access agreements, as well as other agreements on strategic cooperation among key partners. Given the new multi-structure approach, transparency will be even more important than in traditional trade negotiations. There should be readouts following each negotiation round or key engagements that inform stakeholders on topics being discussed and how countries seek to memorialize commitments or agreements reached. Further, there

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with mobile money, has brought rapid economic development to Kenya, with an average annual GDP growth rate of over 5.3 percent since the country's financial recovery in 2004).

[9] DIGITAL MARKETS OVERVIEW, *supra* note 6, at 8. *See also Submarine Cable Map: Connect to Kenya,* TELEGEOGRAPHY, https://www.submarinecablemap.com/country/kenya (last updated Aug. 16, 2022).

[10] Luke Dascoli, *Fact of the Week*, *supra* note 8 (quoting Fagerberg, et. al, *An Evolutionary Analysis of Transformative Changes in LDCs: the Cases of Kenya and Rwanda* (Univ. of Oslo, Working Paper No. 20210623, June 2011)) ("Policy initiatives such as Kenya's Vision 2030 and the 2013 Science, Technology, and Innovation Act have helped realize Kenya's recurring long-term visions for improved economic growth and parity.").

[11] *See The Digital Economy Blueprint*, COMMC'NS AUTH. OF KENYA (May 15, 2019), https://www.ca.go.ke/the-digital-economy-blueprint/; *see also The National Broadband Strategy: 2018-2023*, MINISTRY OF ICT, INNOVATION & YOUTH AFFAIRS, https://www.ca.go.ke/wp-content/uploads/2020/08/National-Broadband-Strategy-2018-2023.pdf (last accessed Sept. 15, 2022).

should be meaningful opportunities for engagement by all stakeholders to address ongoing discussions as they occur. CCIA welcomes the Administration's commitment to holistic engagement to ensure equitable and inclusive trade, and encourages USTR to conduct trade negotiations pursuant to these principles.

III. Digital Economy-Related Matters.

The U.S. should continue to negotiate binding commitments in free trade agreements that pertain to digital trade and cross-border delivery of Internet services. The Digital Trade chapter of USMCA and the U.S.-Japan Digital Trade Agreement represents the gold standard of digital trade provisions, and any agreement pursued by the United States that includes digital trade priorities should reflect those provisions. The United States should also look to new digital trade rules and standards in other high quality digital agreements around the world, such as the Singapore-Australia Digital Economy Agreement and the UK-Singapore Digital Economy Agreement. 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.[12]

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.[13]

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[12] OFF. OF THE U.S. TRADE REPRESENTATIVE, UNITED STATES-KENYA NEGOTIATIONS: SUMMARY OF SPECIFIC NEGOTIATING OBJECTIVES (May 2020), https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf; MINISTRY OF INDUSTRIALIZATION, TRADE AND ENTER. DEV. OF THE REPUBLIC OF KENYA, PROPOSED KENYA - UNITED STATES OF AMERICA FREE TRADE AREA AGREEMENT: NEGOTIATION PRINCIPLES, OBJECTIVES, AND SCOPE (June 2020), https://www.tralac.org/documents/resources/external-relations/us-agoa/3787-proposed-kenya-us-fta-agreement-negotiating-principles-objectives-and-scope-22-june-2020/file.html.

[13] Judd Devermont & Marielle Harris, *Digital Africa: Leveling Up through Governance and Trade*, CENTER FOR STRATEGIC & INT'L STUDIES (June 9, 2021), https://www.csis.org/analysis/digital-africa-leveling-through-governance-and-trade ("Many of these trade agreements, however, skimp on details when it comes to digital issues like IP protection, digital privacy, and cybersecurity. CSIS reviewed six key trade agreements on the continent—the African Continental Free Trade Area (AfCFTA) Agreement, UK-Ghana Interim Trade Partnership Agreement, UK-Kenya Economic Partnership Agreement, European Union-East African Community (EU-EAC) Economic Partnership Agreement, the Cotonou Agreement, and the U.S.-Kenya Free Trade Agreement (FTA) Negotiation Principles—and found that only half include vague or general provisions around IP protection, while none include clauses on data protection or cybersecurity."); Karishma Banga et al., *Digital Trade Provisions in the AfCFTA: What Can We Learn from South–South Trade Agreements?* (Supporting Economic Transformation, Working Paper Series) (April 2021), https://repository.uneca.org/bitstream/handle/10855/43949/b11990405.pdf?sequence=1&isAllowed=y ("32% of South–South (S–S) PTAs have digital trade provisions, of which 12% have an e-commerce provision only while 20% a have separate e-commerce chapter. The importance of digital trade provisions in S-S trade agreements has

a. Enabling cross-border data flows and trust in digital services.

These negotiations present an opportunity to further enable digital trade and the U.S. should be ambitious in its negotiating objectives with respect to data flows and localization barriers. Cross-border data flows are critical to digital trade, and forced localization mandates make it difficult for U.S. exporters to expand into new markets. 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."[14]

Another study found that the impact of recently proposed or enacted data localization legislation on GDP is "substantial" in seven countries.[15] Recent analysis from the OECD has revealed an increasing level of restrictiveness for digitally-enabled services in part due to restrictions on cross-border movement of data.[16] Cross-border data flows are the lifeblood of global digital trade and by extension the array of industries that increasingly rely on the Internet to compete in the global marketplace. In the U.S., the productivity gains and efficiencies enabled by data flows have boosted the economy by hundreds of billions of dollars.[17]

With an uptick in data-related barriers in recent years, trade discussions and clear rules are critical to ensure that any restrictions on the transfer, storage, and processing of data are targeted in a manner that does unreasonably limit legitimate cross-border trade.[18] Policies that restrict data flows, either directly through explicit data and infrastructure localization

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evolved over time: of 40 S-S trade agreements signed between 2001-2009, only 6 (i.e., 15%) had an e-commerce provision, compared to 13 of 20 (i.e., 65%) S-S PTAs with an e-commerce provision, signed post 2009.").

[14] LEVIATHAN SECURITY GROUP, QUANTIFYING THE COST OF FORCED LOCALIZATION (2014), https://static1.squarespace.com/static/556340ece4b0869396f21099/t/559dad76e4b0899d97726a8b/1436396918881/Quantifying+the+Cost+of+Forced+Localization.pdf.

[15] MATTHIAS BAUER ET AL., EUROPEAN CENTRE FOR INTERNATIONAL POLITICAL ECONOMY, THE COSTS OF DATA LOCALISATION: A FRIENDLY FIRE ON ECONOMIC RECOVERY (May 2014), http://www.ecipe.org/wp-content/uploads/2014/12/OCC32014__1.pdf (finding that the GDP was reduced in the following countries with data localization policies: Brazil (-0.2%), China (-1.1%), EU (-0.4%), India (-0.1%), Indonesia (-0.5%), Korea (-0.4%), and Vietnam (-1.7%)).

[16] OECD TRADE AND AGRICULTURE DIRECTORATE, OECD SERVICES TRADE RESTRICTIVENESS INDEX: POLICY TRENDS UP TO 2020 (Jan. 2020), https://issuu.com/oecd.publishing/docs/oecd-stri-policy-trends-up-to-2020?fr=sNmVlNzYxOTI3Mw.

[17] Joshua Meltzer, *Data and the Transformation of International Trade*, BROOKINGS (Mar. 6, 2020), https://www.brookings.edu/blog/up-front/2020/03/06/data-and-the-transformation-of-international-trade/.

[18] For examples of these barriers, *see Comments of the CCIA Regarding Foreign Trade Barriers to U.S. Exports for 2022 Reporting*, In re Request for Comments to Compile the National Trade Estimate Report on Foreign Trade Barriers, Docket No. USTR-2021-0016 (Oct. 26, 2021) [hereinafter CCIA Comments for 2022 NTE Report], https://www.ccianet.org/wp-content/uploads/2021/10/CCIA-Comments-2022-National-Trade-Estimate-Reporting.pdf.

requirements, or indirectly for national security or other purposes, negate the productivity gains and efficiencies enabled by Internet platforms and cloud computing.

The United States should continue to pursue rules that prohibit governments from interfering with data flows or the exchange of information online, and prohibit regulations or standards that condition market access, procurement, or qualification for widely-used certifications based on nationality of ownership, location of corporate headquarters, or size of company. 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. This should extend to financial services.[19] To the extent possible, these prohibitions should apply to both explicit and indirect measures such as ill-fitting privacy and cybersecurity measures, industrial policy, and censorship disguised as national security protections to keep data in a particular country.[20] Articles 19.11 and 19.12 of the USMCA Digital Trade chapter represent the strongest rules in trade agreements in force pertaining to cross-border data flows and localization prohibitions. USTR should aim to secure text in the U.S.-Kenya Strategic Trade and Investment Partnership that reflects these commitments.

Trust is fundamental to the growth and cross-border delivery of these services. Without adequate privacy protections and security in digital communications, governments may continue to enact restrictions on cross-border services citing perceived risks. Privacy and consumer protections and trade rules should work in tandem to further the goals of initiatives promoting trustworthy data flows. To that end, trade agreements, including this proposed agreement with

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[19] Specifically, Parties should not require the use of or locate financial service computing facilities in that Party's territory as a condition for conducting business in that territory or subject to cumbersome pre-approval requirements, so long as the Party's financial regulatory authorities have ongoing access to information processed. Additionally with respect to financial services, Parties should commit to remove unnecessarily different treatments to domestic and foreign financial institutions as regards the standards on the use of outsourcing and third-party services.

[20] *See* Nigel Cory & Luke Dascoli, *How Barriers to Cross-Border Data Flows Are Spreading Globally, What They Cost, and How to Address Them*, INFO. TECH. & INNOVATION FOUND. (July 19, 2021), https://itif.org/publications/2021/07/19/how-barriers-cross-border-data-flows-are-spreading-globally-what-they-cost/ ("More policymakers (such as in France, India, and South Korea) are being creative in using arbitrary and opaque licensing, certification, and other regulatory restrictions to indirectly require data localization (and exclude foreign firms and products). These policymakers seek to avoid scrutiny from trading partners by pushing restrictions deeper into technical and administrative regulations… Policymakers often take a "dual-use" approach with an official and seemingly legitimate objective, such as data privacy or cybersecurity, when their primary (hidden) motivation is protectionism, national security, greater control over the Internet, or some combination of these. In some cases, such as India, they use all of them.").

Kenya, should encourage the development of national privacy legislation that sets clear rules on the use of personal data domestically, promote the adoption of bilateral and multilateral agreements on government access to data such as those being pursued by the OECD,[21] and commit to codify protections for valid basis for transfer of personal data such as the APEC Cross-Border Privacy Rules into domestic law.[22]

Securing commitments and protocols for the free flow of data transfers between the United States and Kenya is particularly crucial given Kenya's existing data protection laws, which present an obstacle for firms operating in the country.[23] Since 2019, when the Data Protection Act was enacted, Kenya has imposed restrictions on data transfers. These limitations to data protections include: requiring all data to be processed in data centers in Kenya prior to transfer abroad; providing a Data Commissioner with widespread power to block data transfers or prove sufficient data protection in the destination country; and broad requirements to enable data transfers such as necessity of sending the data abroad and adequacy promises from a foreign regulator.[24] In 2021, these data protection measures were expanded upon when the new Office of the Data Commissioner issued draft regulations proposing that data processed for "actualising a public good" shall be processed in a server and data center based in Kenya. This would include, but not be limited to, data related to civic registration and national identification systems; primary and secondary education; elections; health; electronic payments and public revenue administration. Such data localization mandates are a barrier to cross-border digital trade, and the forced local equity ownership requirement limits market access opportunities for U.S. companies operating in Kenya.

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[21] *See Government Access to Personal Data Held by the Private Sector: Statement by the OECD Committee on Digital Economy Policy*, OECD (Dec. 2020), https://www.oecd.org/digital/trusted-governmentaccesspersonal-data-private-sector.htm.

[22] Kenya enacted the Data Protection Act in November 2019 which is closely modeled after the European Union's General Data Protection Regulation.

[23] RUTENDO TAVENGERWEI ET AL., U.N. ECON. COMM'N FOR AFRICA, WHAT TO CONSIDER AHEAD OF THE AFCFTA PHASE II NEGOTIATIONS: FOCUS ON DIGITAL TRADE POLICY ISSUES IN FOUR SUB-SAHARAN AFRICAN COUNTRIES, at 19 (Jan. 2022), https://www.bsg.ox.ac.uk/sites/default/files/2022-03/Digital%20trade%20policy%20AfCFTA_EN.pdf.

[24] KENYA LAW, THE DATA PROTECTION ACT, PART VI – TRANSFER OF PERSONAL DATA OUTSIDE KENYA (2019), http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019#part_VI; DELOITTE, KENYA DATA PROTECTION ACT: QUICK GUIDE, at 3 (2021), https://www2.deloitte.com/content/dam/Deloitte/ke/Documents/risk/Kenya%20Data%20Protection%20Act%20-%20Quick%20Guide%202021.pdf.

b. Prohibition on customs duties for electronic commerce.

Imposing customs requirements on purely digital transactions creates significant and unnecessary compliance burdens on nearly all enterprises, including small and medium-sized enterprises (SMEs).[25] The moratorium on imposing customs duties for electronic transmissions[26] has been key to the development of global digital trade and shows the international consensus with respect to the digital economy. The moratorium was most recently renewed at the 12th WTO Ministerial Conference in June 2022,[27] and the commitment not to impose duties on electronic transmissions is reflected in the number of commitments made in free trade agreements among multiple leading digital economies. Permanent bans on the imposition of customs duties on electronic transmissions are a frequent item in trade agreements around the world. This includes, but is not limited to, Article 14.3 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[28] Article 19.3 of the U.S.-Mexico-Canada Agreement (USMCA),[29] and Article 8.72 of the EU-Japan Economic Partnership Agreement.[30]

The United States should continue to embed in trade agreements, including the U.S.-Kenya Strategic Trade and Investment Partnership, commitments resulting in a permanent ban on the imposition of customs duties on electronic transmissions in the trade agreements. Enshrining the moratorium in agreements such as that between the U.S. and Kenya would enhance bilateral trade while also continuing to discourage other countries from including electronic transmission in their domestic tariff codes.

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[25] There would need to be several requirements created that would accompany such an approach, many of which would be extremely difficult to comply with. For instance, data points required for compliance include the description of underlying electronic transfer, end destination of the transmission, value of transmission, and the country of origin of the transmission — all of which do not exist for most electronic transmissions, especially in the cloud services market.

[26] The 2nd Ministerial Conference of the World Trade Organization in 1998 produced the Declaration of Global Electronic Commerce which called for (1) the establishment of a work program on e-commerce and (2) a moratorium on customs duties on electronic transmission.

[27] *See WTO Members Secure Unprecedented Package of Trade Outcomes at MC12*, WORLD TRADE ORG. (June 17, 2022), https://www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm.

[28] Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018 (entered into force Dec. 30, 2018), https://www.mfat.govt.nz/assets/Trade-agreements/TPP/Text-ENGLISH/14.-Electronic-Commerce-Chapter.pdf.

[29] OFF. OF THE U.S. TRADE REP., Agreement Between the United States of America, the United Mexican States, and Canada (entered into force July 1, 2020) [hereinafter USMCA], https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[30] Agreement Between the European Union and Japan for an Economic Partnership Agreement, July 17, 2018 (entered into force Feb. 1, 2019), http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157228.pdf#page=185.

c. Prohibition on unilateral and discriminatory taxation rules.

International trade requires a consistent and predictable international tax system, and tax measures play a significant role in the global competitiveness of U.S. companies. Any country that the United States seeks a trade agreement with should not impose digital taxation measures that are discriminatory in nature and contravene long-standing principles of international taxation. At the time of filing, Kenya has not endorsed the OECD-led Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalization of the Economy detailing an international framework for global corporate tax reform,[31] and imposed a 1.5 percent digital services tax (DST) in 2021. Kenya even considered doubling the rate of its digital services tax to 3 percent as part of the Finance Bill in 2022, but ultimately kept the rate at 1.5 percent.[32]

In the U.S.-Kenya Strategic Trade and Partnership, USTR should seek to include commitments not to pursue unilateral and discriminatory digital taxation measures and for Kenya to phase out its existing DST.

d. Online content regulations and addressing state-censorship practices.

Censorship and denial of market access for foreign Internet services has long been the case in restrictive markets like China, but it is becoming increasingly common in emerging digital markets, including those of major trading partners, and even in some larger developed markets and is accomplished through different tools and methods.[33] The U.S. International Trade Commission released a report documenting the costs of foreign censorship policies to U.S. businesses[34] in January 2022 and detailed how extensive these practices have become, noting that:

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[31] OECD G20/BASE EROSION AND PROFIT SHIFTING PROJECT, STATEMENT ON A TWO-PILLAR SOLUTION TO ADDRESS TO THE TAX CHALLENGES ARISING FROM THE DIGITALISATION OF THE ECONOMY (Oct. 8, 2021), https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-thedigitalisation-of-the-economy-october-2021.pdf (stating "The Multilateral Convention (MLC) will require all parties to remove all Digital Services Taxes and other relevant similar measures with respect to all companies, and to commit not to introduce such measures in the future. No newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023 or the coming into force of the MLC. The modality for the removal of existing Digital Services Taxes and other relevant similar measures will be appropriately coordinated.").

[32] *Kenya Enacts Finance Act, 2022*, ERNST & YOUNG (June 30, 2022), https://www.ey.com/en_gl/tax-alerts/kenya-enacts-finance-act--2022; David Herbling, *OECD Urges Kenya to Drop Plan to Double Digital - Services Tax*, BLOOMBERG (Apr. 14, 2022), https://www.bloomberg.com/news/articles/2022-04-14/oecd-urges-kenya-to-drop-plan-to-double-digital-services-tax.

[33] CCIA Comments for 2022 NTE Report, *supra* note 18.

[34] U.S. INT'L TRADE COMM'N, FOREIGN CENSORSHIP, PART 1: TRADE AND ECONOMIC EFFECTS ON U.S. BUSINESSES, Pub. No. 5334 (July 2022), https://www.usitc.gov/publications/332/pub5334.pdf. *See also U.S. ITC Finds American Media Companies Lose Billions Due to Chinese Government Censorship*, U.S. SENATE COMM. ON

> The consequences of censorship-related policies and practices can be significant for U.S. firms, especially U.S.-based content producers and digital services firms, as they may restrict trade, impede market access, increase operational costs and reputational risks, or discourage foreign direct investment.[35]

The United States and Kenya have an opportunity to work together to address rising digital authoritarianism and state-censorship practices that pose threats to the open Internet and freedom of expression around the world. It is encouraging that Kenya joined the Declaration on the Future of the Internet in April 2022 to commit to work with like-minded countries to promote fundamental freedoms online and combat actions by authoritarian governments.[36]

The United States should look to embed similar commitments in trade disciplines as well. Because the business community has a limited technical capacity to assess and respond to interference with cross-border flow of services, products, and information by nation-states, allied governments have a critical role to play in partnering with technology companies and leading in the defense of Internet freedom and open digital trade principles.

Government-imposed restrictions on digital services and online content can take multiple forms, and the risks associated with each method or regulatory framework providing for censorship methods can vary greatly. For example, some types of content restrictions may be reasonable and legally permissible in certain contexts, but may result in overbroad removals of user speech if attached to filtering or monitoring requirements, or can be a backdoor channel for governments to gain access to private data. Such requirements, particularly where they incur liability for a supplier, may be simply unfeasible to implement given the volume of content that Internet-enabled suppliers process and transmit, and thus often result in companies being incentivized to curtail more speech than is necessary, or simply withdrawing from specific markets.

FINANCE (July 8, 2022), https://www.finance.senate.gov/chairmans-news/us-itc-finds-american-media-companies-lose-billions-due-to-chinese-government-censorship (Senate Finance Chairman Ron Wyden welcoming conclusions in report noting "Governments in China, Russia and elsewhere are making tech and media companies choose between enforcing authoritarian restraints on speech or losing out on billions in revenue. This growing government censorship is a threat to American values and to American jobs. . . . The United States has to start fighting back against this malign trend, or the Chinese government's twisted model for online and offline speech will win out.").

[35] U.S. INT'L TRADE COMM'N, FOREIGN CENSORSHIP, PART 1: POLICIES AND PRACTICES AFFECTING U.S. BUSINESSES, Pub. No. 5244, at 21 (Feb. 2022), https://www.usitc.gov/publications/332/pub5244.pdf.

[36] THE WHITE HOUSE, A Declaration for the Future of the Internet, Apr. 28, 2022, https://www.whitehouse.gov/wp-content/uploads/2022/04/Declaration-for-the-Future-for-the-Internet_Launch-Event-Signing-Version_FINAL.pdf.

Other trade concerns arise where content policies are not applied equally to both domestic and foreign websites. Furthermore, an increasing number of content restrictions do not comply with principles of transparency, necessity, minimal restrictiveness, and due process to affected parties.

Recent reports show Kenya's government oversight of content online fluctuates between more openness and restrictiveness with several instances of individuals being penalized for online content[37] and recent domestic legislation has been subject to legal challenges due to free expression concerns.[38]

The U.S.-Kenya Strategic Trade and Investment Partnership should include strong commitments to promote free expression and combat content takedowns in the digital and content-creating spaces. Countries should affirm commitments under Article 19 of the International Covenant on Civil and Political Rights as they apply to defending free expression online.[39] Parties should pursue commitments to refrain from blocking or restricting access to lawful online content, digital services, and infrastructure underlying Internet delivery.

e. Securing digital communications and devices.

Providers of digital devices and services continue to improve the security of their platforms through the deployment of technologies that safeguard the communications and commercial transactions that they enable. Strong encryption has been increasingly enabled on

[37] *Freedom on the Net 2021: Kenya*, FREEDOM HOUSE (Sept. 2021), https://freedomhouse.org/country/kenya/freedom-net/2021#footnote2_6rc97d0.

[38] The 2018 Computer Misuse and Cybercrimes Act punished any person who "knowingly publishes information that is false in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens of the Republic, or which is likely to discredit the reputation of a person" with a fine of up to five million shillings or a ten-year prison sentence. The law has been challenged, had 25 provisions suspended due to a judge's finding that they "contravened constitutional provisions on freedom of opinion, expression, the media, security of the person, the right to privacy, the right to property and the right to a fair hearing," subsequently reinstated, and is currently pending another legal challenge. KENYA LAW, The Computer Misuse and Cybercrimes Act (2018), http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ComputerMisuseandCybercrimesActNo5of2018.pdf; Tony Roberts, *Digital Rights in Closing Civic Space: Lessons from Ten African Countries*, INST. OF DEV. STUDIES, at 168-169 (Feb. 2021), https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/15964/Digital_Rights_in_Closing_Civic_Space_Lessons_from_Ten_African_Countries.pdf?sequence=4&isAllowed=y.

[39] These commitments are also reflected in principle by United Nations Human Rights Council Resolution 47, which the United States has signed. *See* G.A. Res. 47/16, ¶ 11, U.N. Doc. A/HRC/RES/47/16 (July 13, 2021) ("*Condemns unequivocally* measures in violation of international human rights law that prevent or disrupt an individual's ability to seek, receive or impart information online, including Internet shutdowns and online censorship, calls upon all States to refrain from and to cease such measures, and also calls upon States to ensure that all domestic laws, policies and practices are consistent with their international human rights obligations with regard to freedom of opinion and expression, and of association and peaceful assembly, online.").

now-ubiquitous smartphones and deployed end-to-end on consumer-grade communications services and browsers. Encrypted devices and connections protect users' sensitive personal and financial information from bad actors who might attempt to exploit that information. It is encouraging that Kenya's domestic privacy law recognizes the privacy benefits of encryption.[40]

Many countries, at the behest of their respective national security and law enforcement authorities, have passed laws that mandate access to encrypted communications.[41] Often the relevant provisions are not explicit, but mandated facilitated access, technical assistance, or compliance with otherwise infeasible judicial orders. Other versions require access to or transfer of source code as a condition of allowing technology imports. Such exceptional access regimes run contrary to the consensus assessments of security technologists because they are technically and economically infeasible to develop and implement.[42] Companies already operating in countries that have or are considering anti-encryption or source code access laws will be required to alter global platforms or design region-specific devices, or face fines and shutdowns for noncompliance. Companies that might have otherwise expanded to these markets will likely find the anti-encryption or facilitated access requirements to be barriers to entry.

The United States should continue efforts to promote regulatory cooperation and international standards and best practices for securing products and services.[43] The U.S.-Kenya Strategic Trade and Investment Partnership should contain commitments to promote encrypted devices and connections, and adherence to frameworks such as the NIST-developed Cybersecurity Framework. Specifically, the agreement should prevent countries from compelling manufacturers or suppliers to use a particular cryptographic algorithm or to provide access to a technology, private key, algorithm specification, or other cryptographic design details. Similarly, the agreement should prohibit governments from conditioning market access, with appropriate exceptions, on their ability to demand access to cryptographic keys or source code. Additionally, the agreement should include commitments for partners to pursue risk-based

[40] The Data Protection Act, art. 41, 43 (entered into force Nov. 25, 2019).

[41] *See World Map of Encryption Laws and Policies*, GLOBAL PARTNERS DIGITAL (last visited Sept. 14, 2022), https://www.gp-digital.org/world-map-of-encryption/.

[42] HAROLD ABELSON ET AL., MIT COMPUT. SCI. AND A.I. LAB'Y, KEYS UNDER DOORMATS: MANDATING INSECURITY BY REQUIRING GOVERNMENT ACCESS TO ALL DATA AND COMMUNICATIONS, REP. NO. MIT-CSAIL-TR-2015-026 (July 2015), http://dspace.mit.edu/bitstream/handle/1721.1/97690/MIT-CSAIL-TR-2015-026.pdf.

[43] These include commitments to adhere to internationally-recognized standards, such as the ISO 2700 family of information security management standards as well as the SOC 2 service organizations standard published by the American Institute of Certified Public Accountants (AICPA), in cloud services certification procedures, to support privacy and security and encourage interoperability across markets.

cybersecurity measures, and utilization of open, consensus-based international standards as they are the more effective approach in comparison to prescriptive regulation. The United States and Kenya should pursue cooperative approaches to cybersecurity and incident responses, including sharing of information and best practices.

f. Fostering innovation in emerging technologies.

Emerging technologies such as artificial intelligence (AI) and machine learning, as well as quantum computing, increasingly impact cross-border trade, and trade rules will govern the development and growth of these technologies. The United States should ensure regulatory practices and technical standards are in alignment to foster open lines of cooperation. To continue to use and export AI and other emerging technologies, businesses and users need a trade framework that allows them to move data and infrastructure safely across borders while ensuring that other countries will not misuse legal systems to impede the growth of new technologies. This will enable use of emerging technologies in addressing global challenges such as public health, humanitarian assistance, and disaster response. It is promising that the International Trade Commission in the U.S. Department of Commerce recently launched a public consultation on "AI Export Competitiveness," and CCIA encourages the U.S. Administration to use this new data in trade negotiations to understand how best to encourage cross-border trade in AI-enabled technologies and services.[44] Work on promoting AI alignment and export competitiveness, including through this agreement with Kenya, should not clash or otherwise undermine existing efforts such as the ongoing National Institute of Standards and Technology (NIST) AI Risk Management Framework process aimed at implementing a risk-based and flexible AI regulatory landscape.[45]

Further, Kenya has shown promise and commitment to developing the field of AI technology,[46] and the United States should seek to support and build off that effort through this agreement. Kenya ranked third among countries in Sub-Saharan Africa in Oxford Insight's

[44] Artificial Intelligence Export Competitiveness, 87 Fed. Reg. 50,288 (Int'l Trade Admin. Aug. 16, 2022) (Request for Comments), https://www.federalregister.gov/documents/2022/08/16/2022-17576/request-for-comments-on-artificial-intelligence-export-competitiveness.

[45] *See* NIST INFORMATION TECHNOLOGY LABORATORY, AI RISK MANAGEMENT FRAMEWORK (2022), https://www.nist.gov/itl/ai-risk-management-framework; NIST, AI RISK MANAGEMENT FRAMEWORK: SECOND DRAFT (2022), https://www.nist.gov/system/files/documents/2022/08/18/AI_RMF_2nd_draft.pdf.

[46] MARC ROTENBERG ET AL., CENTER FOR AI AND DIGITAL POLICY, ARTIFICIAL INTELLIGENCE AND DEMOCRATIC VALUES, at 271 (Feb. 2022), https://www.caidp.org/reports/aidv-2021/.

Government AI Readiness Index, and 78th out of 160 countries analyzed.[47] In a recent analysis, Kenya ranked fourth among 20 African countries surveyed in the number of companies specializing in AI housed in the country, with 204 companies identified.[48] Kenya has demonstrated great ability to attract companies building the next-generations of technology such as AI.[49]

The United Nations Conference on Trade and Development (UNCTAD)'s latest Technology and Innovation Report detailed the extent of Kenya's ability to host flourishing technological innovation—it found that the country received the largest amount of equity funding for startups in Africa in 2018 with $348 million flowing to the country to support growing firms.[50] One example is a Kenyan-founded AI firm specializing in agriculture and food security, Gro Intelligence, which announced in 2021 that it had raised $85 million. Tthis company reflects the potential of Kenya's AI landscape, as it was established in Nairobi and has since grown both in funding and in reach, with offices in New York and Singapore as well.[51] Kenya has signaled intent to lay the foundation to host emerging technologies through its 2019 report on emerging technologies such as AI and blockchain, and sought to put forward a 15-year plan for fostering the growth of such technologies.[52] Additionally, the previously-cited UNCTAD report highlights how Kenya's strong performance and development could lay the groundwork for a thriving partnership with the United States in emerging technologies such as AI, as it found that Kenya was one of 20 countries out of 158 assessed that were deemed to be the most "over-performing."[53] With these promising developments, the United States should

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[47] PABLO FUENTES NETTEL ET AL., OXFORD INSIGHTS, GOVERNMENT AI READINESS INDEX 2021, at 44, 68 (Jan. 2022), https://static1.squarespace.com/static/58b2e92c1e5b6c828058484e/t/61ead0752e7529590e98d35f/1642778757117/Government_AI_Readiness_21.pdf.

[48] Faustine Ngila, *Africa is Joining the Global AI Revolution*, QUARTZ AFRICA (June 23, 2022), https://qz.com/africa/2180864/africa-does-not-want-to-be-left-behind-in-the-ai-revolution/.

[49] Wagdy Sawahel, *Artificial Intelligence Centre Could Expand Economy*, UNIVERSITY WORLD NEWS: AFRICA EDITION (Mar. 4, 2021), https://www.universityworldnews.com/post.php?story=20210301092515749.

[50] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, TECHNOLOGY AND INNOVATION REPORT 2021, at 58 (Feb. 2021), https://unctad.org/system/files/official-document/tir2020_en.pdf [hereinafter TECHNOLOGY AND INNOVATION REPORT] ("Nine countries received more than $10 million: Kenya, Nigeria, South Africa, Tanzania, Egypt, Malawi, Senegal, Rwanda and Ethiopia… Some of the largest recipients promote financial inclusion, such as Tala from Kenya which offers loans via a mobile app using non-traditional loan scoring.").

[51] *Gro Intelligence Raises $85 Million in Series B Funding*, GRO INTEL. BLOG (Jan. 8, 2021), https://gro-intelligence.com/blog/gro-intelligence-raises-usd85-million-in-series-b-funding; *Contact Us*, GRO INTEL. (last visited Aug. 25, 2022), https://gro-intelligence.com/contact.

[52] MINISTRY OF INFORMATION, COMMUNICATIONS AND TECHNOLOGY, EMERGING DIGITAL TECHNOLOGIES FOR KENYA: EXPLORATIONS & ANALYSIS (July 2019), https://www.ict.go.ke/blockchain.pdf.

[53] TECHNOLOGY AND INNOVATION REPORT, *supra* note 50, at 27.

seek to streamline efforts in burgeoning technologies, and ensure that progress is made in standardization and that establishment of best practices are executed in tandem.

Trade rules that can facilitate the responsible cross-border growth of AI technologies include those that enable cross-border data flows and removing localization requirements; encourage governmental investment in and release of open data; identify and share best practices for the responsible use of AI; engage in cooperation and public-private collaboration on AI; and adopt innovation-oriented copyright rules that enable machine analysis of data. In addition, to ensure substantive convergence and avoid the potential for discriminatory outcomes, the U.S. and its trading partners should agree to avoid adopting any measures that discriminate against U.S. suppliers who excel in this area by providing less favorable treatment to AI products or applications than they give to like products or applications without an AI component.

As a matter of good regulatory practice, the development and implementation of AI regulations should include: adopting a risk-based approach, including transparent processes for assessing, managing, and mitigating risks associated with specific AI applications; assessing whether potential risks can be mitigated or addressed using existing instruments and regulatory frameworks; considering whether any new or proposed regulation is proportionate in balancing potential harms with economic and social benefits; employing risk management best practices, including considering the risk-substitution impact of a specific AI application against a scenario where that application has not been deployed but baseline risks remain in place; and promoting the development of voluntary consensus standards to manage risks associated with AI applications in a manner that is adaptable to the demands of dynamic and evolving technologies.

In addition to trade rules, countries should work together to facilitate research and development of new applications of AI to address shared challenges; facilitate dialogues among all stakeholders including governments, civil society, academia, and the private sector on best regulatory practices; and pursue joint discussions on the responsible and ethical use of AI.

g. Following global practices on Internet access and interconnection policies.

The United States should work to protect the interoperable and interconnected nature of the global Internet architecture that enables cross-border data flows, support principles of non-discrimination and market access to telecommunications networks, and enable stakeholders to negotiate the nature of services to be delivered across the network on a voluntary market-driven basis, based on reasonable business practices agreed upon by both sides.

Globally, the business practice on Internet interconnection is for content providers and ISPs to enter into agreements through autonomous negotiations. An OECD paper found that 99.5 percent of interconnections are made without written contracts, and "the Internet model of traffic exchange has produced low prices, promoted efficiency and innovation, and attracted the investment necessary to keep pace with demand."[54] To protect the Internet ecosystem, the growth of the tech industry in Kenya, and ensure these investments can continue to flourish and support digital trade, the United States should seek to include assurances that Internet-based telecommunications service providers seeking the exchange of traffic with content and application providers, and vice versa, are able to negotiate with the other party on a voluntary, market-driven basis in this agreement. Further, access to domestic telecommunications networks should be facilitated on reasonable and non-discriminatory terms.

h. Addressing technical barriers to trade.

U.S. technology exporters face a growing number of non-tariff measures such as technical regulations, conformity assessment practices, and standards-based measures. Adoption of global standards is critical to ensuring regulatory coherence and avoiding country-specific standards that deter market entry. Some U.S. cloud service providers (CSPs) have been unable to serve the public sector due to onerous security certification requirements that deviate from internationally accepted standards and make it impossible for CSPs to comply without creating a market-unique product, including physically segregating facilities for exclusive use for government-owned customers and onshoring of data. The adoption of country-specific standards creates de facto trade barriers for U.S. companies and raises the costs of cutting-edge technologies for consumers and enterprises.

Additionally, Kenya is one of a number of African countries that have local ownership requirements for telecommunications providers. Flexibility on local ownership requirements would better facilitate market access. Industry also reports that equipment delivery can be delayed due to different types of approval regimes, and that mutual recognition for approval processes could better facilitate operations.

In the U.S.-Kenya Strategic Trade and Investment Partnership, the United States should (1) pursue commitments like those outlined in USMCA Chapter 11 on addressing technical

[54] DENNIS WELLER & BILL WOODCOCK, OECD DIGITAL ECONOMY PAPERS, INTERNET TRAFFIC EXCHANGE: MARKET DEVELOPMENTS AND POLICY CHALLENGES (2013), https://www.oecd-ilibrary.org/science-and-technology/internet-traffic-exchange_5k918gpt130q-en.

barriers to trade; and (2) pursue commitments to follow good regulatory practices as detailed in Section V of these comments in the development of standards, regulations, and conformity assessment procedures for services.

i. Provisions to enable trade in electronic services.

Electronic payment (e-payment) systems which are interoperable across borders are critical in enabling the growth of cross-border digital trade. Trade policy can help drive the development of cross-border e-payment systems through commitments on the free flow of data including financial services data, promoting interoperability through international standards, and encouraging open innovation and competition through the adoption of open e-payment models such as real-time payments (RTP) systems and encouraging open application programming interfaces (APIs) to allow all e-payment service providers to compete.

Additionally, the United States should use the U.S.-Kenya Strategic Trade and Investment Partnership to pursue provisions on electronic signature, electronic authentication, paperless trading, and other best practices often included in trade agreements.

j. Copyright rules for emerging technologies and digital services.

To the extent copyright considerations are included in the U.S.-Kenya Strategic Trade and Investment Partnership, the United States should secure commitments that reflect U.S. law on limitations and exceptions, and that will foster innovation in emerging technologies.

A flexible copyright regime is necessary for the continued growth of the digital economy. Principles such as fair use are a cornerstone of U.S. copyright law, as laid out in 17 U.S.C. § 107, and industries that rely on this right are a significant contributor to the U.S. economy and exports. CCIA released a report in 2017 on the economic contribution of fair use industries which found that these industries account for 16 percent of the U.S. economy and generate $5.6 trillion in annual revenue. Fair use is also critical to activities central to new areas of innovation and cutting-edge technology such as artificial intelligence and text and data mining.[55] It is encouraging that Kenya has a "fair dealing" provision within its Copyright Act.[56]

A balanced copyright regime with appropriate limitations and exceptions is also what Congress intended when it granted the prior Trade Promotion Authority (TPA) in 2015. TPA

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[55] EUROPEAN ALLIANCE FOR RESEARCH EXCELLENCE, THE GLOBAL AI RACE (June 2018), http://eare.eu/assets/uploads/2018/06/Global-AI-Race.pdf.

[56] *See* Cynthia Nzuki, *Can I Get Away with This? Fair Use and Fair Dealing of Copyrighted Work*, CIPIT (Nov. 27, 2019), https://cipit.strathmore.edu/can-i-get-away-with-this-fair-use-and-fair-dealing-of-copyrighted-work/. For the text of the law, *see* http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20130.

provides that the principal negotiating objectives of the United States should include promoting intellectual property in a way that facilitates legitimate digital trade.[57] Committee reports from Congress contained identical language elaborating on this mandate, specifically recognizing that trade agreements should "foster an appropriate balance in copyright systems, inter alia by means of limitations and exceptions consistent with the internationally recognized 3-step test."[58] USTR has also noted that the United States "seeks . . . the commitment of our free trade agreement partners to continuously seek to achieve an appropriate balance in their copyright systems, including through copyright exceptions and limitations."[59] USTR should include text that reflects shared commitments of the United States and Kenya to promote a balanced copyright regime, such as Article 18.66 of the Trans-Pacific Partnership negotiated by the United States.

Additionally, mandated technological protection measures (TPMs) are a frequent inclusion in U.S. trade agreements. Corresponding statutory exceptions to these anticircumvention measures are a critical component of these provisions. Consistent with USMCA, any TPM provision should include exceptions to anti-circumvention that are consistent with 17 U.S.C. § 1201, including § 1201(f) on reverse engineering and interoperability, in providing limitations and exceptions to TPMs.[60]

Intermediary liability protections for Internet service providers, such as the framework in 17 U.S.C. § 512 in the United States, have been critical to growing the U.S. digital economy by providing business certainty to U.S. investors and innovators.[61] Kenya amended its Copyright Act in 2020, including provisions that mirror § 512.[62] U.S. trade policy has long reflected domestic copyright principles by including necessary intermediary protections for online services in trade agreements dating back to 2003.[63] USMCA continues this tradition, drawing directly

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[57] The Bipartisan Congressional Trade Priorities and Accountability Act of 2015, Pub. L. No. 114-26, § 102(b)(5)(A)(ii).

[58] S. REP. NO. 114-42, at 17 (2015), https://www.congress.gov/114/crpt/srpt42/CRPT-114srpt42.pdf.

[59] OFF. OF THE U.S. TRADE REP., THE DIGITAL 2 DOZEN (2017), https://ustr.gov/sites/default/files/Digital-2-Dozen-Updated.pdf.

[60] USMCA, *supra* note 29, at art. 20.H.11.

[61] MATTHEW LE MERLE ET AL., FIFTH ERA, THE IMPACT OF INTERNET REGULATION ON EARLY STAGE INVESTMENT (2014), http://www.fifthera.com/s/Fifth-Era-report-lr.pdf.

[62] KENYA LAW, THE COPYRIGHT ACT AMENDMENTS, §§ 25C-35A (2001), http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20130.

[63] *See* United States-Australia Free Trade Agreement, art. 17.11, para. 29, May 18, 2004, 43 I.L.M. 1248; United States-Bahrain Free Trade Agreement, art. 14.10, para. 29, Dec. 7, 2005, 44 I.L.M. 544; United States-Chile Free Trade Agreement, art. 17.11, para. 23, June 6, 2003, 42 I.L.M. 1026; United States-Colombia Free Trade Agreement, art. 16.11, para. 29, Nov. 22, 2006; United States-Korea Free Trade Agreement, art. 18.10, para. 30, June. 30, 2007; United States-Morocco Free Trade Agreement, art. 15.11, para. 28, June 15, 2004; United States-

upon Title 17 of the U.S. Code.[64] Ensuring these protections are included in trade agreements is also consistent with Congressional intent under prior TPA.[65]

IV. Competition-Related Matters.

To the extent that competition issues are raised in the context of the U.S.-Kenya Strategic Trade and Investment Partnership, the Parties should promote and strengthen a common understanding of the importance of maintaining competitive markets that deliver long-run consumer welfare benefits. These provisions should also foster convergence on substantive principles and procedural norms that increase legal certainty for businesses and consumers across multiple jurisdictions. To increase convergence, the Parties should agree to avoid targeted rules or thresholds for specific sectors or groups of companies, including in the digital context, which create the potential for discretionary or discriminatory implementation of competition rules. As countries around the world, including Kenya and others in the region, look to review existing competition rules in light of the digitalized global economy, the United States and Kenya should work to ensure that any new approaches follow recognized good regulatory practices and avoid discriminatory measures that target one country's exporters.

V. Transparency and Good Regulatory Practice Matters.

International regulatory cooperation is an important tool for improving regulatory quality, reducing the likelihood of creating trade barriers or unnecessary regulatory differences, aligning regulation with shared principles and values, avoiding unintended consequences or conflicts with broader foreign policy objectives, building trust and expertise among regulators, and deepening understanding of trends in regulatory governance to inform current and future approaches to policymaking. This is critical as countries move fast to introduce new regulatory frameworks on data governance, and seek to craft rules on the development of emerging technologies. Across digital governance frameworks, regulations should be non-discriminatory and principles-based,

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Oman Free Trade Agreement, art. 15.10, para. 29, Jan. 19, 2006; United States-Panama Trade Promotion Agreement, art. 15.11, para. 27, June 28, 2007; United States-Singapore Free Trade Agreement, art. 16.9, para. 22, May 6, 2003, 42 I.L.M. 1026.

[64] USMCA, *supra* note 29, at art. 20.J.10-11.

[65] H.R. REP. NO. 114-100, at 46 (2015) ("Strong intellectual property rights protection should be accompanied by provisions on liability that are consistent with U.S. law, including the Digital Millennium Copyright Act, and that provide limitations on the scope of remedies available against service providers for copyright infringements they do not control, initiate, or direct, and that take place through systems or networks, controlled or operated by them or on their behalf. Such limitations also must create legal incentives for service providers to cooperate with copyright owners in deterring the unauthorized storage, and transmission of copyrighted materials.").

made pursuant to a transparent regulatory process, ensure due process to those affected, and include adequate safeguards to reduce the impact of any unintended consequences.

The United States should pursue binding commitments on good regulatory procedures that promote transparency and accountability in the development and implementation of regulations. This includes provisions, like those secured in Chapter 28 of USMCA on transparent development of regulations (Art. 28.9), through timely publication of draft regulatory measures and public consultations, regulatory impact assessment requirements (Art. 28.11), and retrospective review of regulations (Art. 28.13). The U.S.-Kenya Strategic Trade and Investment Partnership further presents an opportunity to build off these provisions to include additional practices relevant for the regulation of the digital economy including through the promotion of international standards to enhance regulatory coherence and interoperability, and ensure that technical requirements are no more restrictive to trade than necessary to fulfill a legitimate government objective. The discussions should also include services-specific "good governance" provisions that supplement the general good regulatory practice obligations detailed above. In USMCA, Article 15.8 of the Cross-Border Trade in Services chapter describing the "development and administration of measures" addresses matters such as fair administration of licensing procedures, and transparency and timeliness in regulatory processes. There are also provisions in Chapter 15 of USMCA that prevent active discriminatory measures on foreign services, placing clear obligations on governments to allow foreign suppliers to enter the market and provide digital services to business and consumers in their country. This includes provisions on "national treatment" (Art. 15.3), "most-favored-nation" treatment (Art. 15.4), the prohibition against quantitative supplier limitations (Art. 15.5), "local presence" (Art. 15.6), and "payments and transfers" (Art. 15.12).

VI. Matters of Particular Relevance to Small and Medium-Sized Enterprises.

Digital services enabled businesses of all sizes and across different industries to continue operations throughout the COVID-19 pandemic, and access to digital tools can help SMEs overcome export challenges. The United States and Kenya should pursue work streams focused on helping SMEs throughout the country and the continent continue to grow and reach new markets, working to establish dialogue among interested stakeholders to identify ways and share best practices on how the digital economy can facilitate SMEs. Additionally, the Parties should commit to rules that ensure that licensing and registration procedures for exporters are simple, fair, and transparent. SMEs would also benefit from a prohibition of local presence requirements.

VII. Matters Related to Supporting the Participation of Women, Youth and Others in Trade.

These talks present an opportunity for like-minded partners to work together to develop a workforce that has the necessary digital skills for the 21st century. There is a growing need for countries to build out job-training programs that reflect the needs of the modern workforce. Possible avenues to explore with Kenya include: creating programs within economic development agencies and public universities to partner with the private sector to upskill students and workers including those in under-represented communities; working with institutions like the World Bank to establish global financing programs in collaboration with the private sector that create funds for small business and entrepreneurs; and establishing joint scholarships for digital and STEM education courses throughout the country.

VIII. Customs and Trade Facilitation Matters.

As part of a comprehensive approach to digital trade, the United States should pursue commitments with Kenya that pertain to customs and trade facilitation like those secured in the USMCA. This includes setting eligibility for *de minimis* shipments in a manner that facilitates e-commerce including potential green lanes for shipments that arrive with greater advance data; avoiding unnecessary trade import licenses for important of digital hardware and software; requirements on information sharing between government and private sector entities on seizures; strengthening informal entry language; and providing unified entry process through Single Window from all partner government agencies.

IX. Conclusion

CCIA supports the Administration's efforts to pursue a comprehensive strategy for engagement with Kenya. Industry appreciates the opportunity to share its views on how increased trade engagement can lead to continued economic growth and U.S. competitiveness in the region through enhanced cooperation with key partners.

September 16, 2022

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