United States-Kenya Strategic Trade and Investment Partnership Remarks from Rethink Trade - USTR Listening Session -

By:

Rethink Trade

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Thank you for the opportunity to participate in this listening session on the U.S.-Kenya Strategic Trade and Investment Partnership (STIP). My name is Daniel Rangel, and I am the research director of Rethink Trade.

Rethink Trade is a program of the American Economic Liberties Project (AELP), a nonprofit research and advocacy organization that is a thought leader in the anti-monopoly movement. The Rethink Trade program of AELP was established to intensify analysis and advocacy regarding the myriad ways that today's trade agreements and policies must be altered to undo decades of corporate capture and to deliver on broad public interests.

Rethink Trade submitted written comments on the U.S.-Kenya STIP in September 2022 [1]. In our comments, we focused on the importance of not replicating the failed rules included in previous U.S. free trade agreements, especially those expanding intellectual property rights, granting extraordinary protections to foreign investors, and encroaching on governments' ability to regulate the digital economy. The STIP agenda largely avoids these pitfalls, which we welcome.

The U.S.-Kenya STIP presents an invaluable opportunity to advance the Biden-Harris's goal to advance a worker-centered trade policy, so I will focus my remarks on this subject.

While Kenya is not necessarily a manufacturing powerhouse, its highly educated and English-speaking population has made it an attractive destination for tech companies wanting to locate work related to content moderation, data center management, back-office operations, and more. According to the Business Monitor International, the country's Information, Communications and Technology (ICT) sector grew by an average of 10.8% annually in the last decade, with the digital economy expected to contribute up to 9.2% of the country's GDP by 2025 [2].

However, whether the ICT boom will lead to equitable development and good jobs for Kenyans is an open question. There are concerning signs that indicate tech companies' intent to undercut Kenyan workers and promote a global race to the bottom in the tech sector.

Just last week, the Court of Appeal in Nairobi granted a huge win for Facebook content moderators by allowing a case against their mass firing to proceed in Kenyan courts [3]. Since the case began in early 2023, Meta has refused to argue the merits of the case, instead insisting that Kenyan courts don't have the power to hear it. Eighteen months later, the moderators have confirmation that their case should go to trial.

This ruling came in the context of two lawsuits filed by Kenyan content moderators working for a Meta outsourcing company. The lawsuits claimed that Meta unlawfully exploited workers, damaged their mental health [4], and engaged in union-busting activity to shut down a trade union. 185 former moderators were indeed mass fired and blacklisted due to their efforts to form a union [5].

Instead of accepting responsibility and committing to promote labor rights throughout its supply chain, Meta claimed that Kenyan courts don’t have jurisdiction over the claims since Meta is not registered and does not technically operate in the country. Last week marked an important milestone for Kenyan content moderators, but they still have an uphill battle ahead.

This case is the perfect example of the challenges that digital value chains pose for the enforcement of labor rights and of the difficulties faced by all countries, but especially middle-income nations, to hold tech companies accountable and ensure that the benefits of the digital economy are not solely enjoyed by corporations.

The U.S.-Kenya STIP could be a vehicle to address those challenges and the imbalances of power between middle-income countries like Kenya and multibillion dollar companies like Meta. However, to achieve these goals, the STIP must build on top of the progress made with the U.S.-Mexico-Canada Agreement (USMCA).

In addition to including binding labor standards in connection with the International Labour Organization Declaration on Fundamental Principles and Rights at Work, the USMCA included a novel company-specific rapid response mechanism (RRM) that has been a game changer in terms of promoting corporate accountability through trade enforcement. The RRM allows the U.S. government to investigate and sanction specific facilities where workers’ rights to free association and collective bargaining have been violated.

So far, the Biden-Harris administration has activated the mechanism in nearly 30 cases, many of them delivering real gains to workers who have been empowered to negotiate better wages and working conditions. While the RRM is not perfect, it is a unique tool to promote corporate accountability and empower workers. As such, the USMCA RRM must be the basis for any labor enforcement mechanism in the U.S.-Kenya STIP.

As someone who has advocated for the aggressive use of the USMCA RRM against big multinational corporations, I cannot stress enough the importance of having real company-specific sanctions in an agreement to generate corporate accountability and nudge problematic actors into respecting labor rights. Anything short of that would likely fail to promote labor rights for both U.S. and Kenyan workers.

For those reasons, we urge U.S. and Kenyan negotiators to refrain from pushing through an agreement that does not build up from the standards and enforcement tools established in the USMCA. The U.S.-Kenya STIP could be a critical tool to catalyze a race to the top in the tech sector, but this will only happen if the agreement has the tools required to deal with and sanction corporate abuses.

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[1] 'United States-Kenya Strategic Trade and Investment Partnership,' Written Comments from Rethink Trade," Rethink Trade, last modified September 16, 2022, https://rethinktrade.org/wp-content/uploads/2023/07/Rethink-Trade-US-Kenya-Comments.pdf.

[2] "Kenya – Country Commercial Guide: Information, Communications and Technology (ICT)," International Trade Administration, last modified July 5, 2024, https://www.trade.gov/country-commercial-guides/kenya-information-communications-and-technology-ict.

[3] Evelyne Musambi, "Facebook Loses Jurisdiction Appeal in Kenyan Court Paving the Way for Moderators' Case to Proceed," The Associated Press, September 20, 2024, https://apnews.com/article/kenya-facebook-case-meta-moderators-7a62699c52549355917eda1e5be8f75e.

[4] Niamh Rowe, "'It's Destroyed Me Completely': Kenyan Moderators Decry Toll of Training of AI Models," The Guardian, August 2, 2023, https://www.theguardian.com/technology/2023/aug/02/ai-chatbot-training-human-toll-content-moderator-meta-openai; Evelyne Musambi and Cara Anna, "Facebook Content Moderators in Kenya Call the Work 'Torture.' Their Lawsuit May Ripple Worldwide," The Associated Press, June 29, 2023, https://apnews.com/article/kenya-facebook-content-moderation-lawsuit-8215445b191fce9df4ebe35183d8b322. "

[5] Content Moderators Sue Meta Over Alleged 'Union-Busting' in Kenya," Reuters, March 20, 2023, https://www.reuters.com/technology/content-

moderators-sue-meta-over-alleged-union-busting-kenya-2023-03-20/.

[6] "ILO Declaration on Fundamental Principles and Rights at Work," International Labor Declaration, accessed September 24, 2024, https://www.ilo.org/ilo-declaration-fundamental-principles-and-rights-work. "

[7] USMCA's Rapid Response Mechanism: A Primer on How to Use this New Labor Enforcement Trade Tool to Fight for Workers' Rights," Rethink Trade, last modified September 2022, https://rethinktrade.org/wp-content/uploads/2022/09/RRM-Primer_English_Web_FV.pdf.

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