



Your REF: MOITC/SDT/DET/USA/IP(1)

Our REF: KELINKE/USFTA/001

Date: 16th July, 2020

Amb. Johnson Weru,

Principal Secretary,
Ministry of Industry, Trade and Enterprise Development,
State Department for Trade and Enterprise Development,
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Email: psfortrade@gmail.com



Dear Amb. Johnson Weru,

Re: KELIN Submissions to the Intellectual Property Sub-Working Group on the Proposed US – Kenya Trade Agreement

We make this submission in reference to your invitation letter dated 10th July 2020 (Ref: MOITC/SDT/DET/USA/IP(1)) where you invited the Kenya Legal and Ethical Issues Network (KELIN) to a preparatory meeting of the intellectual property sub-working group meeting.

KELIN is an organization that advocates for a holistic and rights-based system of service delivery in health and for the full enjoyment of the right to health by all, including the vulnerable, marginalized and excluded populations in these five thematic areas.¹

From the onset, we note that access to medicines is a fundamental element of the right to health.

We have taken note of the fact that Kenya and the USA are negotiating a free trade agreement (FTA) that the USA wants to be comprehensive and of high-standard.² We have also noted that the summary of the specific negotiating objectives¹ include an intellectual property chapter with the intention “to promote adequate and effective protection of intellectual property rights.”

We wish to bring to your kind attention the fact that Kenya as a country faces a lot of challenges in the response to diseases, including HIV, TB and malaria, and in building resilient and sustainable systems for health. With 1.5 million people living with HIV in the country, Kenya has the fourth-largest HIV epidemic in the world. At about 78,000, the number of new HIV infections per year remains high. As for TB, the country is one of the 30 high-burden countries that together account for more than 80

¹ https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf

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percent of the world's TB cases. Drug-resistant TB remains a big challenge in the country. Malaria remains a major cause of sickness and death, with more than 70 percent of the population at risk of the disease.ⁱⁱⁱ Further, non-communicable diseases account for 27% of deaths among people between 30 years of age and 70 years of age, most due to causes related to hypertension and diabetes. **To address the burden, patients need to have reliable access to essential medicines to manage their conditions, among other strategies.**^{iv}

We are thus very concerned to see the launch of the Kenya-US free trade agreement (FTA) negotiations on 8 July 2020,^v in the midst of global COVID-19 pandemic. We therefore submit the following two main comments:

A. The FTA between Kenya and US is not an absolute necessity

It is our humble view that the Kenya does not need to negotiate this FTA with the US for at least two reasons:

1. **Kenya does not need the USFTA to maintain AGOA market access:** The USA's African Growth and Opportunity Act (AGOA) currently allows about 71% of Kenya's goods exports to the USA to enter tariff-free.^{vi} Although AGOA is set to expire in September 2025,^{vii} it is expected to be renewed because the US Congress *always renews AGOA with bipartisan support*. There are other countries more reliant on AGOA than Kenya and none of them are worried about AGOA not being renewed. This includes: Nigeria with six times more exports to the US under AGOA than Kenya, South Africa with four times more exports to the US under AGOA than Kenya and Angola with US\$87 million more exports to the US than Kenya^{viii}.
2. **A Kenya-USFTA will not necessarily attract FDI:** we note that the Cabinet Secretary Betty Maina has noted that 'Kenya is also keen to attract Foreign Direct Investment from the United States that will improve vertical and horizontal linkages in the Kenyan economy.'^{ix} We are of the view that if the Kenyan government is hoping that a USFTA will increase US investment in Kenya, this is not proven to occur because the main drivers of foreign direct investment (FDI) are cost, market size (locking market access in via an FTA is not proven to attract FDI^x), levels of human capital and infrastructure development and natural resources.^{xi}

B. An Intellectual Property Chapter should not be part of the agreement

1. **If we proceed with the USFTA, we do not need to have an intellectual property chapter as part of the Agreement.**

We urge the government to restrict the USFTA negotiations on obtaining a goods-only USFTA with no intellectual property (IP) chapter (as seen in the case of US-Japan FTA). The specific negotiating objectives for the Japan-US free trade agreement (FTA)^{xii} are the same as for the Kenya-USFTA^{xiii}. However the Japan-USFTA signed by the Trump Administration^{xiv} meets almost none of the USTR's negotiating objectives because it is only a four page goods agreement to remove/reduce some tariffs and a 19-page ecommerce chapter/digital trade agreement. Therefore even though the USA's negotiating objectives for the Kenya-USFTA

appear to indicate a comprehensive FTA of more than 23 chapters, we urge the government to obtain a FTA like the Japan-US FTA as Kenya has a lower level of development compared to Japan (e.g. Kenya's GNI/capita is US\$1,620 whereas Japan's is US\$41,310^{xv}).

2. If the Kenya-USFTA must have an intellectual property chapter, it must not have TRIPS plus provisions

We urge the government to oppose any proposal for stronger intellectual property protection (TRIPS+) than is required by the World Trade Organization. Stronger IP protection than the requirements of the TRIPS Agreement ('TRIPS plus') will adversely impact access to affordable medical products in Kenya such as medicines, vaccines, masks, ventilators and other technology needed to deal with the current pandemic and future epidemics, as well as to deal with HIV&AIDS, tuberculosis and other diseases.

3. We further urge the government to cautiously approach any proposed intellectual property chapter bearing the following in mind:

- **The government** should not agree to any open-ended commitments, for instance a proposal to "obtain commitments to ratify or accede to international treaties reflecting best practices in intellectual property protection and enforcement" which creates an open ended obligation.
- The government should have in mind the fact that any proposed technical assistance from the US will be pro-intellectual property and designed to undermine key flexibilities that Kenya may have adopted. Hence negatively impacting on access to affordable medicines.
- That all U.S. consistent measures beyond what Kenya has already adopted will be certain to be TRIPS-plus. Particular measures that the U.S. may seek include: eased standards of patentability that will promote secondary patents and evergreening; eased disclosure standards; patent term extensions for regulatory delays in patenting and registration; data and marketing exclusivity, including longer periods of biologic exclusivity; patent-registration linkage; and enhanced trade secret protections. Further, many of the enforcement measures in U.S. law are TRIPS-plus including, among others: deterrent damages for patent infringement based on market price; provisional measures; mandatory injunctions, intermediary liability; and enhanced and confiscatory border measures.

C. We are also of the considered view that the Kenya-USFTA will undermine Kenya's ability to deal with the pandemic and its economic crises:

The impact of the COVID-19 crisis is expected to continue for the foreseeable future with devastating consequences for society and the economy. Hence at this time, we urge the government to focus on controlling the pandemic and dealing with its economic and social crises. The Director General of the World Health Organization has advised 'that countries must take a whole-of-government, whole-of-society approach,'^{xvi} and to 'refocus the whole of

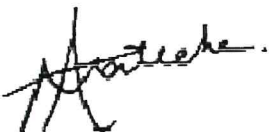
government on suppressing and controlling COVID-19.^{xvii} This is crucial to contain the pandemic. Even the US Trade Representative Lighthizer has 'cautioned against using the coronavirus crisis to "push other agendas" in trade and other areas. Instead, the Group of 20 economies should stay focused on defeating the pandemic. "Let us not make long-term decisions in the midst of a crisis," Lighthizer said.^{xviii} Globally 400 civil society organisations have called for a halt to trade and investment treaty negotiations during the pandemic.^{xix}

As the government negotiates this USFTA we urge our representatives to be cautious of the likelihood that the proposed intellectual property objectives that mind Kenya's ability to deal with the pandemic and its economic crises in a number of ways including:

- Longer patent monopolies, hindering access to affordable medical products such as masks,^{xx} medicines, vaccines, test kits and ventilators^{xxi} for COVID-19 as well as other communicable and non-communicable diseases. The sustainability of Kenya's health system will be adversely impacted.
- Monopolies of 5 years on pharmaceutical products, even when there is no patent, which can keep medicines to treat COVID-19 and its associated problems (as well as medicines for HIV/AIDS etc) at unaffordable prices for longer.
- Extending the monopoly on industrial designs (e.g. on ventilator valves) for an additional 5 years. (When an Italian hospital ran out of ventilator valves which cost \$11,000 each during this pandemic and they 3D printed life-saving replacement valves for \$1 each, this can violate industrial design protection^{xxii}).
- 20-25 year longer copyright monopoly e.g. on the software used in ventilators^{xxiii} and the algorithms and datasets used in artificial intelligence used to deal with this pandemic.
- Law firms have been advising US companies on how to use provisions likely^{xxiv} to be in the FTA's investment chapter to sue the Kenyan government at an international tribunal for unlimited monetary damages for various actions the Kenyan government may take to deal with the pandemic and its social and economic crises, as more than 650 civil society organisations have pointed out.^{xxv}

In conclusion, we remind the government of its constitutional obligation under Articles 10, 21, 43(1)(a) to be guided by national values and principles of governance, and to respect, protect and promote the right to the highest attainable standard of health for all Kenyans. Negotiating trade agreements that may undermine access to affordable medicines will go contrary to this obligation.

Yours faithfully,



Allan Maleche

cc:

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- ⁱⁱ <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/president-trump-announces-intent-negotiate-trade-agreement-kenya>
- ⁱⁱⁱ <https://globalfundkcm.or.ke/home/hiv-aids/>
- ^{iv} [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(18\)30563-1/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(18)30563-1/fulltext)
- ^v <http://www.industrialization.go.ke/index.php/kenya-usa-free-trade-area-agreement/580-joint-statement-between-the-united-states-and-kenya-on-the-launch-of-negotiations-towards-a-free-trade-agreement>
- ^{vi} <https://www.citizen.org/wp-content/uploads/Public-Citizen-Comments-on-Proposed-U.S.-Kenya-Trade-Agreement-April-28-2020.pdf>
- ^{vii} <https://www.cbp.gov/trade/priority-issues/trade-agreements/special-trade-legislation/african-growth-and-opportunity-act>
- ^{viii} <https://ustr.gov/sites/default/files/assets/agoa/USTR-Biennial-Report-to-Congress-on-AGOA-062320.pdf>
- ^{ix} <http://www.industrialization.go.ke/index.php/kenya-usa-free-trade-area-agreement/580-joint-statement-between-the-united-states-and-kenya-on-the-launch-of-negotiations-towards-a-free-trade-agreement>
- ^x E.g. see S/C/W/27/Add.1 from https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S001.aspx and UNCTAD (2000) A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations. Geneva, United Nations Conference on Trade and Development
- ^{xi} 'Intellectual Property Rights and Foreign Direct Investment', United Nations, New York, 1993 and Paulo Eliche Tembe & Kangning Xu (2012) « Attracting Foreign Direct Investment in Developing Countries: Determinants and Policies-A Comparative Study between Mozambique and China ». See also: U.S. Agency for International Development (2005) Foreign Direct Investment: Putting It to Work in Developing Countries. Washington, DC: USAID.
- ^{xii} https://ustr.gov/sites/default/files/2018.12.21_Summary_of_U.S.-Japan_Negotiating_Objectives.pdf
- ^{xiii} https://ustr.gov/sites/default/files/Summary_of_U.S.-Kenya_Negotiating_Objectives.pdf
- ^{xiv} <https://ustr.gov/countries-regions/japan-korea-apec/japan/us-japan-trade-agreement-negotiations/us-japan-trade-agreement-text>
- ^{xv} <https://data.worldbank.org/indicator/NY.GNP.PCAP.CD>
- ^{xvi} <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>
- ^{xvii} <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---25-march-2020>
- ^{xviii} <https://www.reuters.com/article/us-health-coronavirus-trade-usmca-idUSKBN21I01J>
- ^{xix} <https://www.citizen.org/news/open-letter-stop-all-trade-and-investment-treaty-negotiations-during-the-covid-19-outbreak/>
- ^{xx} E.g. there are hundreds of patents on things related to the N95 masks most needed to protect healthcare workers, <https://www.bloomberg.com/news/articles/2020-03-20/world-war-ii-style-production-may-carry-legal-risks-for-patriots> and the Kentucky Governor asked 3M to licence its patent on N95 masks because it was so problematic, <https://eu.courier-journal.com/story/news/2020/04/03/beshear-calls-3-m-release-patent-n-95-respirator-amidpandemic/5112729002/>
- ^{xxi} 18 <https://www.shoosmiths.co.uk/insights/articles/COVID-19-can-the-manufacturing-giants-play-a-part-in-saving-lives>
- ^{xxii} <https://metro.co.uk/2020/03/16/firm-refuses-give-blueprint-coronavirus-equipment-save-lives-12403815/> and <https://www.techtimes.com/articles/248121/20200317/maker-ventilator-valves-threatens-sue-volunteers-using-3d-printedcoronavirus.htm>
- ^{xxiii} <https://www.shoosmiths.co.uk/insights/articles/covid-19-can-the-manufacturing-giants-play-a-part-in-saving-lives> and <https://www.wipo.int/copyright/en/activities/software.html>
- ^{xxiv} Based on the USMCA text (which seems to be the basis for the US proposals in the Kenya-USFTA).
- ^{xxv} <http://s2bnetwork.org/sign-the-pen-letter-to-governments-on-isds-and-covid-19/>