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**Comments Regarding U.S. Trade and Investment with Sub-Saharan Africa: Recent
Trends and New Developments
Investigation No. 332-571
Public Citizen
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Post-hearing brief**

Public Citizen submits the following in response to the request by the United States International Trade Commission for comments analyzing U.S. trade and investment in sub-Saharan Africa, including the intellectual property environment. Public Citizen is a nonprofit consumer advocacy organization with 500,000 members and supporters. Our comments draw on our experience providing technical assistance to public agencies, particularly in developing countries, with regard to intellectual property and technology rules.

Public Citizen works with partners across the United States and around the world to make medicines affordable and available for all through tools in policy and law. We also challenge practices that undermine people's digital rights, such as privacy, free expression, and access to knowledge. This submission addresses access to medicines and then digital rights, in two parts.

INTELLECTUAL PROPERTY LANDSCAPE IN SUB-SAHARAN AFRICA

Principles

The United States has had a complicated and, in some cases, shameful role in promoting intellectual property expansion in sub-Saharan Africa at the expense of public health.¹ We urge the U.S. government to learn from the tragic history of the HIV/AIDS crisis when developing its trade policy for sub-Saharan Africa.

In the early 2000s, HIV/AIDS had devastated the African continent. South Africa, in particular, faced a growing epidemic.² In 1990, 160,000 people living in South Africa had HIV. By 2000, 4.2 million people died. That year, more people were dying in their 30s and 40s than in their 60s and 70s. Treatment, however, was unaffordable to all but the wealthiest, at a price of \$10,000 per year.

President Mandela tried to import cheaper medicines from abroad to control the AIDS crisis.³ But the United States government intervened, at the behest of the pharmaceutical industry, to try to block the legislative reforms.⁴ The pharmaceutical industry argued that the measures,

¹ This story has been documented in detail online. SECTION27, Standing up for Our Lives: A History of the Access to Medicines Movement in South Africa, <https://standingupforourlives.section27.org.za/> (interviewing treatment activists and government officials who helped bring HIV treatment to South Africa).

² HIV/AIDS/STD strategic plan for South Africa, 2000-2005 (Feb. 2000), available at http://www.gov.za/sites/www.gov.za/files/aidsplan2000_0.pdf.

³ SECTION27, Standing up for Our Lives: A History of the Access to Medicines Movement in South Africa, Chapter 2, <https://standingupforourlives.section27.org.za/chapter-2/>.

⁴ William Fisher & Cyrill Rigamonti, The South Africa AIDS Controversy: A Case Study in Patent Law and Policy, *The Law and Business of Patents* (2005), available at <https://cyber.harvard.edu/people/tfisher/South%20Africa.pdf>.

such as the parallel importation of patented goods, violated their patent rights.⁵ Industry filed a lawsuit in Pretoria, the United States Ambassador to South Africa wrote a stinging letter urging the government to change course, and the United States Trade Representative withheld trade benefits.⁶ Many people died.

Activists mobilized around the world and, confronted with public pressure, the United States government eventually stepped back.⁷ President Clinton issued an executive order noting that the United States government would not seek “through negotiation or otherwise, the revocation or revision of any intellectual property law or policy of a beneficiary sub-Saharan African country, as determined by the President, that regulates HIV/AIDS pharmaceuticals or medical technologies. . . .”⁸

A few years later, on the heels of activist work, HIV/AIDS medicine prices dropped significantly. Today, South Africa has the largest HIV/AIDS treatment program in the world.⁹ Millions of people in sub-Saharan Africa are alive because generic medicines are available. But too many medicines for other health conditions still remain inaccessible. As we explain below, intellectual property barriers still play a significant role in curbing medicine access.

Moving forward, the U.S. government should not stand in the way of public health. It should not promote rules that block generic competition or condemn countries for pursuing intellectual property policies that safeguard public health. The U.S. government should also not wield its

⁵ Notice of Motion in the High Court of South Africa (Transvaal Provincial Division), Case No. 4183/98 (PMA case), available at <http://www.cptech.org/ip/health/sa/pharmasuit.html>

⁶ Simon Barber, U.S. Withholds Benefits Over Zuma’s Bill, Africa News (July 15, 1998), available at <http://allafrica.com/stories/199807150119.html>.

⁷ NY Times, Clinton Issues Order to Ease Availability of AIDS Drugs in Africa (May 11, 2000), available at <https://www.nytimes.com/2000/05/11/world/clinton-issues-order-to-ease-availability-of-aids-drugs-in-africa.html>.

⁸ See Executive Order 13155, <https://www.federalregister.gov/documents/2000/05/12/00-12177/access-to-hiv-aids-pharmaceuticals-and-medical>

⁹ UNAIDS, The Right to Health, (Nov 2017), p.48, available at http://www.unaids.org/en/resources/documents/2017/20171120_right_to_health.

trade benefits, including those under the African Growth and Opportunity Act, to coerce countries to promote intellectual property. Many lives depend on it.

Intellectual property protection hinders treatment access

The pharmaceutical market is extremely small in Africa. In 2018, the entire African market, including North Africa, was worth a mere \$20 billion—or less than 2 percent of the \$1.2 trillion global pharmaceutical market.¹⁰ Just one product—AbbVie’s Humira—had nearly the same amount of global sales that year as the *entire* African market.¹¹

While the market may be small and the profits negligible, stringent intellectual property rules are prevalent across sub-Saharan Africa, unnecessarily restricting affordable access to medicines. In some cases, this extends to least developed countries (LDCs) that are not even required to provide patent protection on pharmaceuticals until 2033 under the rules of the World Trade Organization.¹² Access to affordable medicines consequently remains a major challenge in sub-Saharan Africa.

Consider the hepatitis C epidemic. At least 10 million people live in Africa with the hepatitis C virus.¹³ But the price of 12-weeks of direct-acting antivirals (DAAs) ranges from \$750 for generic products to \$1200 for originator products.¹⁴ The total cost of generic DAA to achieve universal coverage of all those presently living with hepatitis C ranges from 2% of current total

¹⁰ IQVIA, The Global Use of Medicine in 2019 and Outlook to 2023 (2019). <https://tinyurl.com/yxptt9c9>. IQVIA, Differentiate and win in the African Pharma Market (2019). <https://tinyurl.com/yxmzhqw6>

¹¹ Public Citizen, Pharma 101: A Primer (2019), <https://www.citizen.org/wp-content/uploads/Pharma-101-final-August.pdf>

¹² The least developed countries that are a part of the World Trade Organization are not required to provide patent protection on pharmaceutical products until 2033. The extension is based on Article 66 of the WTO’s Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which provides LDCs more time to comply with the provisions of TRIPS and aims to assist LDCs with TRIPS implementation. TRIPS Council decision, 6 November 2015, IP/C/73.

¹³ WHO Regional office for Africa, Hepatitis, <https://www.afro.who.int/health-topics/hepatitis>.

¹⁴ Assefa et al., Access to medicines and Hepatitis C in Africa: Can tiered pricing and voluntary licencing assure universal access, health and fairness?, *Globalization and Health* 4-6 (2017) 13:73.

health expenditure in South Africa to 92% of current total health expenditure in Cameroon.¹⁵

To achieve the same outcome with originator DAAs would increase the burden to 3% of total health expenditure in South Africa and 148% of total health expenditure in Cameroon.¹⁶

Cancer prevalence is also growing rapidly. The number of new cancer cases is expected to increase by more than 85% from 2008 to 2030 in sub-Saharan Africa.¹⁷ But treatment access lags behind, in part, due to high prices. A report by the Fix the Patent Laws Coalition and Cancer Alliance in South Africa found that only 7 of 24 cancer drugs were available in the public health system, which serves 80 percent of the population.¹⁸

10 medicines unavailable in the South African public sector – likely due to their cost – were available in India for less than half the price offered to the South African private sector. These different prices reflect differences in patent law. South Africa granted 92 patents on the 24 cancer medicines, 39 of which were rejected or withdrawn in at least one other jurisdiction. These patents extend monopolies and delay affordable generic access.

Lenalidomide, a treatment for multiple myeloma, provides a salient example. A year's worth of treatment costs ZAR 729,000 (\$48,000) in South Africa. It is available in India as a generic for a quarter of the price—at ZAR 28,476 (\$1860).¹⁹ These prices lead to real and preventable suffering.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Morhason-Bello I et al. Challenges and opportunities in cancer control in Africa: a perspective from the African organization for Research and Training in Cancer. *Lancet Oncology*. 2013 Apr; 14: e142-51.

¹⁸ Fix the Patent Laws and Cancer Alliance, *Exploring Patent Barriers to Cancer Treatment Access in South Africa: 24 Medicine Case Studies 4* (2017), available at <https://www.canceralliance.co.za/wp-content/uploads/2018/02/Exploring-Patent-Barriers-to-Cancer-Treatment-Access-in-SA-24-Medicine-Case-Studies-October-2017-update-January-2018.pdf>

¹⁹ Catherine Tomlinson et al., How patent law reform can improve affordability and accessibility of medicines in South Africa: Four medicine case studies, *SOUTH AFRICAN MEDICAL JOURNAL* (2019).

International trade and patent rules have largely been harmful to public health

The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets the rules for intellectual property globally. However, as a report by Dean Baker, Arjun Jayadev and Nobel Laureate Joseph Stiglitz notes,

Ever since the adoption of TRIPS, it has become increasingly clear that the intellectual property provisions of the WTO are not well-aligned with the needs of developing countries and that they serve corporate interests in developed countries disproportionately. These conflicts become more pronounced over time. For example, in the case of extending patent protection to global pharmaceutical companies at the expense of the health of the poor . . . If the knowledge economy and the economy of ideas is to be a key part of the global economy and if static societies are to be transformed into 'learning societies' that are key for growth and development, there is a desperate need to rethink the current regime and to allow for a much less restrictive flow of information and knowledge.²⁰

At the regional level, there are two patent offices in sub-Saharan Africa, which provide a harmonized system of intellectual property protection for 36 member countries. The African Regional Intellectual Property Organization (ARIPO) established in 1976 in Lusaka, Zambia, under the framework of the Lusaka Agreement through the joint efforts of the United Nations Economic Commission for Africa and the World Intellectual Property Organization (WIPO),

²⁰ Dean Baker, Arjun Jayadev and Joseph Stiglitz, *Innovation, Intellectual Property and Development* (2017), <http://cepr.net/images/stories/reports/baker-jayadev-stiglitz-innovation-ip-development-2017-07.pdf>.

and the Organisation Africaine de la Propriété Intellectuelle (OAPI) established in 1977 by the Bangui Agreement.

ARIPO was established by English-speaking sub-Saharan African countries to pool their resources together in industrial property matters²¹ and has 18 Member States.²² Based on the Protocols establishing ARIPO, a single patent application can be filed to cover one or more Member States designated in the application, and the effect of a patent granted by ARIPO is that of a national registration in each designated country. ARIPO grants undeserved pharmaceutical patents at the regional level which become valid in LDC Member States. By failing to recognize and implement the exemption from providing patent protection on pharmaceuticals in LDCs, ARIPO not only undermines regional development strategies, but also “kicks away the ladder” for these countries.²³

OAPI was created by French speaking sub-Saharan African countries²⁴ to implement common administrative procedures deriving from a uniform system for the protection of intellectual property.²⁵ All patents granted by OAPI are automatically valid in all OAPI Member States, including LDCs.

These regional intellectual property organizations have never sought to differentiate standards for granting intellectual property based on countries’ development status. Their patents become valid in the individual member countries, including LDCs. These requirements have resulted

²¹ <https://www.aripo.org/about-us/our-history/>.

²² Namely; Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Sudan, Eswatini, Tanzania, Uganda, Zambia, and Zimbabwe.

²³ Civil Society Organizations in South Africa have called for reforms at ARIPO <https://healthgap.org/press/over-60-health-organisations-demand-aripo-reform-to-increase-access-to-more-affordable-medicines-in-eastern-southern-africa/>.

²⁴ Namely; Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d’Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Union of the Comoros and Togo.

²⁵ Martin Musaluke, A critical analysis of Intellectual Property Rights Protocols administered by the African Intellectual Property Rights Agreement (ARIPO) with particular attention to Zambia, 11-12 2016.

in LDCs granting pharmaceuticals patents, even though they are not required to do so under TRIPS. This practice unnecessarily compromises access to medicines.

Supposed “capacity-building efforts” have also been detrimental in sub-Saharan Africa.²⁶ Both the World Intellectual Property Organization (WIPO) and the United States Patent and Trademark Office (USPTO) have held intellectual property capacity-building workshops in sub-Saharan African countries.²⁷ These trainings tend to be narrowly focused on the interests of the right holders and fail to appropriately highlight the TRIPS safeguards to protect public health. In the case of OAPI, for example, the technical assistance led to stringent IP protection, even when many of these countries were not required to provide patents on pharmaceuticals under the TRIPS transition period.²⁸ As U.S. government officials recognize, these trainings serve as a form of indirect advocacy.²⁹ This is deeply inappropriate and should not be pursued.

In addition, neither ARIPO nor OAPI has ever encouraged their Members States to utilize flexibilities like parallel importation, compulsory licensing, government use and competition law which are recognized by the TRIPS Agreement and reiterated in the Doha Declaration on TRIPS and Public Health. Even in developing countries like Ghana, Nigeria, South Africa, and

²⁶ See Carolyn Deere (2008) *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford: Oxford University Press (2008). (“The combination of weak national capacity and delegation to the OAPI Secretariat rendered decision-making in the region highly vulnerable to capture by donors, most notably the French IP office, WIPO, UPOV, and the WTO, which used capacity-building to secure rapid and strong implementation of TRIPS”)

²⁷ Commercial Law and Development Program Office of the General Counsel United States Patent and Trademarks Office <http://cldp.doc.gov/category/areas-expertise/intellectual-property?page=15>; see also USPTO and African Regional Intellectual Property Office Sign Historic Workplan for Bilateral Cooperation <https://www.uspto.gov/about-us/news-updates/uspto-and-african-regional-intellectual-property-organization-sign-historic>.

²⁸ See Carolyn Deere (2008) *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford: Oxford University Press (2008).

²⁹ US Working To Block UN High-Level Panel On Access To Medicines Ideas In Geneva And Capitals, <https://www.ip-watch.org/2018/01/22/us-working-block-un-high-level-panel-access-medicines-ideas-geneva-capitals/>. In the context of copyrights, for example, a 2010 analysis of the capacity building program with the Nigerian Copyright Commission revealed that the emerging understanding of intellectual property by the Nigerian public following these workshops was not well-rounded because many topics, including food security, human rights, and health, were not covered in the capacity building programs. Jeremy de Beer, C Oguamanam, *Intellectual Property Training and Education: A Development Perspective*, 23 2010.

Cote d'Ivoire, these flexibilities are necessary for public health reasons as access to medicines remains a challenge.

South Africa provides a salient example. South Africa currently grants virtually all patents as it does not engage in substantive patent examination nor does it apply rigorous patentability criteria. In 2009, South Africa began considering patent law reform. The pharmaceutical industry has tried to undermine the process at every step. In 2014, a leaked document showed industry plans to delay the policy and fund “experts” that would downplay public health concerns.³⁰ In 2015, the American Chamber of Commerce in South Africa sought to tie South Africa’s eligibility for trade benefits to abandoning its proposed patent reforms.³¹ United States pressure then reportedly stalled the process. A new patent law has still not been implemented, although a promising public-health friendly intellectual property policy was recently adopted.

The South African intellectual property policy is an important first step towards increasing medicine access. It includes a number of measures to maximize the use of flexibilities available to protect public health in international law, as permitted by the Doha Declaration (2003) and recommended by the United Nations High-Level Panel on Access to Medicines. These measures, such as setting rigorous patentability criteria, are fully compliant with international law. The U.S. government should not exert pressure on countries in sub-Saharan Africa as they try to enact policies to increase medicine access.

³⁰ Motsoaledi: Big pharma's 'satanic' plot is genocide, Mail & Guardian, 2014, available at <https://mg.co.za/article/2014-01-16-motsoaledi-big-pharmas-satanic-plot-is-genocide>

³¹ TAC, SECTION27, MSF, Joint submission on the out-of-cycle review on South Africa’s eligibility for benefits under AGOA, available at <https://agoa.info/images/documents/5795/submissionoftacs27msfssoregardingsouthafricaagoacr-3.pdf>

Exaggerated claims about innovation and investment

Pharmaceutical Innovation

Using public health safeguards to reduce medicine prices will not meaningfully reduce pharmaceutical innovation.³² Prescription drugs are not expensive because they are costly to produce, or because of R&D investments. As a US Department of Health & Human Services report (2016) notes,

Drug manufacturers often point to high drug development costs as a justification for high drug prices and understanding the R&D costs and time to develop a new drug is important. However, the relationship between R&D costs and drug prices is subject to a number of misconceptions. In reality, the prices charged for drugs are unrelated to their development costs. Drug manufacturers set prices to maximize profits. At the time of marketing, R&D costs have already occurred and do not affect the calculation of a profit-maximizing price.³³

Under the guise of promoting innovation, industry has sought new exclusivities. But analyses have repeatedly shown that these exclusivities are unjustified. For example, the Federal Trade Commission (FTC) concluded that a 12-year monopoly period for biologics was “unnecessary to promote innovation.”³⁴ The FTC maintained that pharmaceutical exclusivities reflect “a public policy trade-off: a restriction on competition is provided in return for a development of a new drug product or new use of an existing product. *A 12- to 14-year exclusivity period,*

³² In addition, public funding also plays a meaningful role in generating knowledge. For example, National Institutes of Health-funded research was associated with every one of the 210 new drugs approved by the Food and Drug Administration (FDA) from 2010–2016. Ekaterina Cleary et al., Contribution of NIH funding to new drug approvals 2010–2016, PNAS: Vol. 115: Iss. 10.

³³ US DEP’T OF HEALTH & HUMAN SERVICES, PRESCRIPTION DRUGS: INNOVATION, SPENDING, AND PATIENT ACCESS (2016), <https://tinyurl.com/y2df5563>

³⁴ FEDERAL TRADE COMMISSION, EMERGING HEALTHCARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION, 45 (2009)

however, departs sharply from this basic trade-off, because it does not spur the creation of a new product or indication. The drug has already been incentivized through patent protection and market-based pricing.”³⁵(emphasis added)In addition, a new study in *Nature Biotechnology*³⁶ found no difference in the amount of time it took to develop a biologic and a small-molecule medicine, undermining another claim proposed by industry to justify extended exclusivities. The U.S. government should not include exclusivities that promote higher prices abroad and entrench monopoly rules at home in any trade agreement.

Above all, arguments that access will harm innovation are especially misleading because of the small size of the pharmaceutical market in Africa. No pharmaceutical inventor or investor is thinking about the small size of expected profits in Africa when developing medicines.

Local Innovation and Development

The innovation process in developing and less developed countries is usually described as imitative, adaptive and incremental in nature.³⁷ A 2006 UNIDO Report found that intellectual property rules impact developed countries positively, while for “catching-up” developing countries this impact was contingent on the level of local R&D and innovation.³⁸ The study found that intellectual property rules showed positive results only for those developing countries which had already achieved a certain degree of local innovation.³⁹

The implementation of the TRIPS Agreement in developing countries has always triggered debates about the implications of intellectual property rules in developing countries,

³⁵ FEDERAL TRADE COMMISSION, EMERGING HEALTHCARE ISSUES: FOLLOW-ON BIOLOGIC DRUG COMPETITION, 45 (2009)

³⁶ Reed Beall et al., Pre-market development times for biologic versus small-molecule drugs, 37 *Nature Biotechnology* (2019).

³⁷ Kilic, Burcu, *The Role of Intellectual Property in technological learning* (pp 3).

³⁸ UNIDO 2006 *The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence*, Pg viii.

³⁹ *Id.*

highlighting the substantial welfare costs such norms would entail. TRIPS-plus rules have created significant complexities and additional costs for developing countries. As most sub-Saharan African countries lack the technological soundness, scientific infrastructure, skilled human capital and market prospects to absorb the technology transfer, TRIPS-plus rules have the potential to inflict heavy welfare costs on these countries.⁴⁰

Historical evidence suggests that the industrialized countries of today such as the United States⁴¹, Switzerland⁴², Germany⁴³ and Japan⁴⁴ did not have strong intellectual property rules in place when they set on the path of industrialization, as they saw intellectual property protection a barrier to their industrial development. Properly calibrated intellectual property systems allowed them to use knowledge and technology freely. This played an essential role in their industrialization.⁴⁵

When the United States was a relatively young and beginning to industrialize, for example, it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development. Developing nations make the same argument today.⁴⁶

⁴⁰ Innovation and Global Intellectual Property Regulatory Regimes: The Tension Between Protection And Access, South Center, https://www.southcentre.int/wp-content/uploads/2016/06/RP67_Innovation-and-Global-IP-Regulatory-Regimes_EN.pdf

⁴¹ For example, between 1790 and 1836 the US imported British technology by restricting the grant of domestic patents. *See*, Poku Adusei, *Patenting of Pharmaceuticals and Development in Sub-Saharan Africa*, Springer-Verlag Berlin Heidelberg, 2013.

⁴² *See*, *Supra* note 40, at 7.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See*, *Supra* note 40, at 7.

⁴⁶ United States. Congress. Office of Technology Assessment. *Intellectual Property Rights in an Age of Electronics and Information*, report, April 1986; [Washington D.C.]. (<https://digital.library.unt.edu/ark:/67531/metadc39611/>; accessed August 13, 2019), University of North Texas Libraries, Digital Library, <https://digital.library.unt.edu>; crediting UNT Libraries Government Documents Department.

A process of learning and capacity building would help create a fertile environment that promotes and fosters technological and scientific development, and this would not be possible with stringent intellectual property protection. The sub-Saharan African countries require a purposeful implementation of Art 66 of TRIPS to “enable them to create a sound and viable technological base.”⁴⁷

Foreign Direct Investment

There is no clear link between foreign investment and stringent intellectual property regimes. For example, China, India and Brazil all receive significant foreign direct investment (FDI), including from the U.S.,⁴⁸ despite the U.S. government’s claims they do not sufficiently respect intellectual property rights.⁴⁹

FDI decisions can range from the selection of type and sector where to invest; whether to invest in an existing company or create a new entity; and what methods of production and technology to apply.⁵⁰ Studies show that an inflow of FDI could trigger economies to adopt innovation policies which would contribute to R&D by foreign firms and labs on domestic soil; knowledge transfers; trigger local competition; and introduce advanced practices in innovation management⁵¹. In this context, the case is often made for stringent intellectual property rules as a mandatory pre-requisite for attracting FDI in developing countries. However, FDI is not

⁴⁷ TRIPS Art 66, https://www.wto.org/english/docs_e/legal_e/27-trips_08_e.htm.

⁴⁸ Foreign Direct Investment (FDI) is defined as a flow of capital, technology and know-how from one country to another. While Brazil (\$ 6,300,000), India (\$2,331,000) and China (\$13,027,000) received the lion’s share of direct investment in chemicals, sub-Saharan Africa attracted no investment from the United States. Bureau of Economic Analysis, https://www.bea.gov/international/di_lusdbal

⁴⁹ See e.g., United States Trade Representative, Special 301 (2018), <https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf>

⁵⁰ Mascus, E Keith (1998), The Role of Intellectual Property Rights In Encouraging Foreign Direct Investment and Technology Transfer (pp 113-114).

⁵¹ Killic, Burcu (2014), Looking at the big picture: national innovation system. In Boosting Pharmaceutical Innovation in the Post-TRIPS Era (pp 117). UK: Edward Elgar.

driven by intellectual property alone. It depends on many other factors which go beyond intellectual property rules.⁵²

One such factor is the absorptive-capacity⁵³ of the host country. FDI carries within itself advanced knowledge which can only be optimally absorbed if a country has the prior established base to absorb and assimilate this knowledge for the intended innovation spillover to take place.⁵⁴ Absorptive capacity is essential to understand and transform external knowledge flows, essential to achieve local innovation and sustainable development. Complementary socio-economic factors such as market size, local capacities and capabilities also play an essential role in determining the inflow of FDI.⁵⁵

Baker, Jaydev and Stiglitz, renowned economists and scholars, established that there is a lack of substantial evidence that a stringent intellectual property regime is an essential requirement for any technology transfer to take place.⁵⁶ Their study demonstrated that factors like market size, infrastructure and better business regulations have a more critical role in determining the inflow of FDI⁵⁷. In a similar vein, Dhar and Joseph observed that the relation between FDI and stringent intellectual property regime is greatly dependent on the market size.⁵⁸ In fact, Professor Keith Maskus, who has been a lead economist at the World Bank, highlighted the importance of the role of market size by arguing that if stringent intellectual property rules had a role to play in the inflow of FDI, then FDI flows to countries like Brazil, China, and India, which represent larger market and have arguably more flexible intellectual property regimes, would not have been as high.⁵⁹ The World Bank data on FDI inflow (as a percentage GDP) for

⁵² See, *Supra* note 37, at 1.

⁵³ See, *Supra* note 37, at 12.

⁵⁴ See, *Supra* note 51, at 118.

⁵⁵ See, *Supra* note 37, at 1-2.

⁵⁶ See, Dean Baker, Arjun Jayadev and Joseph Stiglitz, *Innovation, Intellectual Property and Development* (2017), <http://cepr.net/images/stories/reports/baker-jayadev-stiglitz-innovation-ip-development-2017-07.pdf>.

⁵⁷ *Id.*

⁵⁸ Biswajit Dhar and Reji Joseph, *Foreign Direct Investment, Intellectual Property Rights and Technology Transfer the North-South And The South-South Dimension*, Pg 8, (2012), https://unctad.org/en/PublicationsLibrary/ecidc2012_bp6.pdf

⁵⁹ Keith Maskus, *Intellectual Property Rights and Foreign Direct Investment*, Pg v, 2000.

the year 2017 supports the trend highlighted by Maskus.⁶⁰ For example, the net FDI inflow to China was \$166 billion (1.36% of its GDP), Brazil \$70 billion (2.42% of its GDP) and India \$40 billion (1.5% of its GDP).

Economic development in the world's most-disadvantaged countries — including those in Sub-Saharan Africa — lags behind development in the rest of the world. Investing in expensive legal and institutional infrastructure to augment or enable stringent intellectual property protection raises troubling questions about the allocation of already diminished resources in these countries.⁶¹ A stringent intellectual property regime also implies a transfer of money from resource-strapped countries to developed countries in the form of royalty payments further contributing to potential welfare loss.⁶² For example, in the context of the pharmaceutical industry, the companies designate mostly an insignificant amount of towards research on diseases that affect developing countries because these represent smaller markets, highlighting the extremely limited impact of these countries on global innovation.⁶³

Conclusion

Recent U.S. trade agreements have put pharmaceutical companies' interests before patients' interests. The United States-Mexico-Canada Agreement (USMCA), for example, seeks to strengthen intellectual property protections, which has the potential to raise drug prices. In the past, the U.S. has also tried to introduce provisions in trade agreements to mandate secondary patents, patent term extensions, marketing exclusivity, and patent linkage. All these provisions

⁶⁰ *Ibid.*

⁶¹ Gathii, James Thuo, Strength in Intellectual Property Protection and Foreign Direct Investment Flows in Least Developed Countries (2015) (pp 5).

⁶² See, Dean Baker, Arjun Jayadev and Joseph Stiglitz, Innovation, Intellectual Property and Development (2017), <http://cepr.net/images/stories/reports/baker-jayadev-stiglitz-innovation-ip-development-2017-07.pdf>.

⁶³ *Ibid.*

would be actively harmful for public health and should not be pursued in any future trade agreement with sub-Saharan Africa.

A U.S. trade agreement should also not direct scarce resources in sub-Saharan Africa away from vital public interest needs towards building a stringent intellectual property regime. This regime would further divert resources away from the continent in the form of royalties to rights holders, primarily based in the global north. More helpful would be to promote technology transfer. Under TRIPS, developed country members are required to provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfers to LDC members. However, there is no clarity around how such a transfer can be carried out and if specific WTO measures need to be undertaken to encourage such flows of technology. The lack of implementation of this provision continues to be an outstanding issue for sub-Saharan Africa.

DIGITAL RIGHTS AND DIGITAL TRADE IN SUB-SAHARAN AFRICA

Introduction

Digital trade (e-commerce) relies heavily on the collection, transfer and processing of data. A key aspect of digital trade is trust. Internet ad-clicking business models and smart-connected devices are putting consumers at greater risk of having their personal data compromised and exploited. Robust digital trade is only possible when consumers can trust platforms to keep their data safe and secure from breaches, exploitation, and other mishandling.

Consumers in sub-Saharan Africa have a positive attitude towards digitalization, and they expect technology to not only simplify but also improve their lives. However, technical, economic and regulatory challenges exist to a broadly accessible and sustainable e-commerce experience in sub-Saharan Africa. These challenges include but are not limited to a lack of legal and regulatory protections and digital rights. African consumers need strong privacy and data protection norms that reflect the African reality.⁶⁴

More than two thirds of sub-Saharan Africa's 46 countries have no data protection or privacy laws. The other third has either moderate laws, e.g. South Africa, Nigeria, Ghana and Uganda or limited scope laws, e.g. Ethiopia, Zambia, Kenya, Mozambique, Zimbabwe, and Namibia with no regulators to enforce them.⁶⁵ This privacy and security gap increases the vulnerability of consumers and exacerbates inequality.

⁶⁴ Abdi Latif Dahir, Africa isn't ready to protect its citizens personal data even as EU champions digital privacy. Bridging Loopholes, Quartz Africa, <https://qz.com/africa/1271756/africa-isnt-ready-to-protect-its-citizens-personal-data-even-as-eu-champions-digital-privacy/>.

⁶⁵ For an overview of data protection laws and regulations see: <https://digitalindex.consumersinternational.org/search/category/data-protectionand-privacy/subcategory/personal-data-protection/page/1>; and control regulations: <https://digitalindex.consumersinternational.org/search/category/data-protection-and-privacy/subcategory/personal-datacontrol/page/> See also: <https://www.dlapiperdataprotection.com/>

Today, the global circulation of data is also about the circulation of capital, with enormous consequences for the distribution of wealth, social justice, and fundamental human rights. In recent years the United States has promoted uniform rules to regulate data flows. In the meantime, by redefining privacy and data protection as “trade barriers”, it challenges countries with strong privacy and data protection rules and inhibits others from enacting such policies.

U.S tech companies (Big Tech) argue that the free flow of data is a basic precondition for development everywhere. The rhetoric of opportunities for the excluded – connecting the next billion – is seemingly positive, but we must disconnect it from the current realities of the global economy, in which trade deals contribute to deregulation and lower standards of protection for people’s data and privacy, aggressive copyright enforcement risks the security of devices, and Big Tech takes all the benefits.⁶⁶

Digital Trade Measures Help Big Tech Rule Over the Public Interest

Until recently, Big Tech has enjoyed a vastly unregulated global marketplace. However, a series of recent scandals involving the abuse of personal data has led to a backlash from the public and from national regulators. What could be an important political opportunity for those concerned with the public interest to demand both better protections and regulations and an equitable balance between commercial and consumer rights is also a direct threat to the interests of Big Tech.

Big Tech has doubled down on influencing digital trade agreements as one way to maintain control. Recent U.S. trade agreements like the Trans-Pacific Partnership (TPP), U.S.-Mexico-Canada Agreement and trade discussions at venues such as the World Trade Organization (WTO) have increasingly focused on digital issues.

⁶⁶ Kilic and Avila, A new digital trade agenda: are we giving away the Internet? Open Democracy, <https://www.opendemocracy.net/en/new-digital-trade-agenda-are-we-giving-away-internet/>

For example, the e-commerce chapter of the TPP sets rules that would shape the development of the digital economy for years to come.⁶⁷ These rules have implications for all aspects of the domestic and global economy, even for countries that do not adopt them. The TPP is the first trade agreement to include binding commitments that facilitate cross-border information flows. It prohibits governments from placing any restrictions on the location of computing facilities (or servers)⁶⁸, confusing forced data localization with appropriate measures to protect privacy and data. The text limits governments' ability to regulate the transfer of individuals' personal data.

TPP Exception

Both TPP provisions on cross-border data transfers⁶⁹ and restrictions on the location of computing facilities⁷⁰ include an exception for measures which are inconsistent with the requirements of the provisions (e.g. privacy legislation). The exception appears to be difficult to use and insufficient to protect the policies, laws and regulations that Parties have or may have in the future to safeguard privacy and data protection. The exception has many layers of qualifications, which are similar to the general exceptions adopted in Article XIV of the General Agreement on Trade in Services (GATS).

There are three thresholds that must be met for the government's defense to succeed. First, the measure must achieve a "legitimate public policy objective". "Legitimate public policy

⁶⁷ Burcu Kilic and Tamir Israel, 'The Highlights of the trans-Pacific Partnership E. Type: Webpage; Web address: <http://www.citizen.org/documents/tpp-e-commerce>.

⁶⁸ Provisions on this issue prohibit requirements that servers be located (or data stored) locally, implying that these requirements are protectionist trade barriers. The location of data may impact choice of law questions on how data is stored and processed. The majority of American ICT companies store data in the U.S., which makes U.S. rules more likely to apply to the storage, processing and transfer of data in the conduct of their worldwide business.

⁶⁹ See, TPP Article 14.11

⁷⁰ See, TPP Article 14.13

objective” is not self-defining and the Party would have to justify the policy objective if it is challenged in a dispute. There are two further elements, both of which must be satisfied.

The application of the measure (or the measure itself, if it is discriminatory) must not “constitute a means of arbitrary or unjustifiable discrimination” (the same term used in the GATS general exception), which requires a rational connection to the objective.. The application of the measure must not be a disguised restriction on trade, so if there is some benefit to domestic interests, even if not the goal or intended consequence of the measure, it could fail to meet the requirement.

Finally, the measure must be the least burdensome, and it must not impose any restrictions on transfers of information. If there is arguably another way to achieve the stated policy objective that is less onerous, then the government must adopt that one. In other words, if there is another option that is less burdensome to cross-border transfers of data online, but that option has an undesirable impact (not necessarily related to the policy objective) and the government therefore wants to avoid it, it cannot choose to do so.

Once dragged into the trade narrative, privacy and data protection rights become a form of protectionism, posited as “non-tariff trade barriers”. For governments to protect their citizens’ privacy online, the measures they establish (whether they are legal, administrative and otherwise) would need to satisfy this very narrowly defined exception, which is clearly not broad enough to protect citizens’ privacy and data protection rights.

The digital trade chapter of the revised North American Free Trade Agreement (also known as the U.S.-Mexico-Canada Agreement or USMCA) builds on concepts included in the TPP.⁷¹

⁷¹ Like the TPP, the USMCA does not establish a mandatory minimum of data protections and even goes beyond the TPP and extends the prohibition to algorithm disclosure; extends the bar on data localization to financial services; and adds liability exemptions (modeled after the Digital Millennium Copyright Act’s Section 512 and Communications Decency Act’s Section 230).

The USMCA's text closely mimics the language and structure of the TPP but also includes several novel provisions. For example, the USMCA extends the TPP's restrictions on source code disclosure to algorithms, omits the exception for the ban on local computing facilities, includes exemptions for Internet service providers from copyright liability (omits the TPP's balanced copyright language) and introduces Internet immunity provisions similar to Section 230.

Developmental benefits of digital trade rules are overstated

One-size-fits-all digital trade rules fail to address the developmental interests of sub-Saharan Africa. According to Dan Ciuriak:

For these small, open economies, the question is whether any of these [the EU, U.S. or Chinese] models are in their interests. Given this, flexibility to regulate in the national interest, without incurring penalties that would tend to generate inaction due to “regulatory chill” effects, seems to be a paramount consideration when making commitments in such agreements.⁷²

To promote sustainable growth, such economies require ad-hoc measures that account for their unique national circumstances, reflect their digitalization capabilities and needs, and favor the development of a local digital economy. Digital trade rules “kick away the ladder” by restricting countries’ regulatory space and preventing them from adopting pro-development policies. African countries have continuously raised concerns that⁷³ such impending international legal architecture would not provide an even field for digitalization in developing

⁷² Dan Ciuriak, *The Economics of Data: Implications for the Data-driven Economy*, Data Governance in the Digital Age, available at www.cigionline.org/articles/economics-data-implications-data-driven-economy.

⁷³ WTO, *Statement By The African Group*, section 3.1, (October 20, 2017)

countries, would prevent them to have a fair chance at developing their own markets, and decrease their already-remote chances at competing *vis-à-vis* the dominant Big Tech.⁷⁴

Despite these concerns, a group of countries⁷⁵ announced a new plurilateral WTO initiative on electronic commerce in January 2019. The plurilateral initiative on e-commerce goes beyond the structure or institutional arrangement of the WTO's Work Programme on Electronic Commerce. The WTO's work on e-commerce is conducted under the Work Programme, which was established in September 1998 to "examine all trade-related issues relating to global electronic commerce, taking into account the economic, financial, and development needs of developing countries."⁷⁶ For those seeking to develop new WTO rules on these issues to succeed, WTO member countries had to first unanimously approve a new mandate calling for such negotiations. The African Group opposes the WTO process and insists on a continuation of the work conducted under the Work Programme "based on the existing mandate and guidelines."⁷⁷

Nonetheless, the plurilateral negotiations are taking place absent the participation of half of the WTO members and a majority of sub-Saharan African countries (with the exception of Nigeria).⁷⁸ Given the lack of institutional capacity and means to govern data, these negotiations (and enforceable rules that are being negotiated) are premature for most (if not all) of the sub-

⁷⁴ See Burcu Kilic & Renata Avila, Data Is the New Oil, so Big Tech Is Pushing for a Digital Free Trade Deal, BuzzFeed News, (December 13, 2017), available at <https://www.buzzfeednews.com/article/burcukilic/big-tech-is-pushing-for-a-new-kind-of-free-trade>. (noting that "[d]ominant platforms can lock in their [market] position by creating barriers for competitors. They acquire start-up challengers, buy up innovations and hire the industry's top talent. Add to this the competitive advantage that their user data gives them, and we can expect the next 20 years to be far less innovative than the last.") (quoting Tim Berners-Lee, The Web Can Be Weaponised—and We Can't Count on Big Tech to Stop It, The Guardian, (March 12, 2018).

⁷⁵ Joint Statement on Electronic Commerce, 25 January 2019, http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf

⁷⁶ "Electronic Commerce," World Trade Organization, https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

⁷⁷ As clearly articulated in its proposal. See https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=240318&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

⁷⁸ Only 76 of the 164 WTO members and none of the Sub-Saharan Africa countries (apart from Nigeria) joined. World Trade Organization (2019), Joint Statement on Electronic Commerce, (January 25, 2019), available at: http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf.

Saharan African countries.⁷⁹ Absent their participation, it is likely that any rules resulting from these negotiations would fail to reflect the development needs of developing countries.⁸⁰

The Digital Divide in sub-Saharan Africa

Sub-Saharan Africa lags behind the rest of the world in the dissemination of digital technologies. Lack of access to electricity⁸¹, let alone affordable access to the Internet, constitutes a major challenge for the adoption of digital technologies in sub-Saharan Africa. Even though more households in sub-Saharan Africa today own a mobile phone than have access to electricity, the Internet remains out of reach for most Africans.

The Internet penetration rate in sub-Saharan African stands at 39% and lags the rest of the world.⁸² African consumers face the high prices and slow connections. Compared to other developing regions, Africa has the slowest broadband speeds and Africans experience the highest delays in processing network data.⁸³ The broadband connectivity is priced well above the means of majority of sub-Saharan Africans.⁸⁴

⁷⁹ WTO, Statement By The African Group, section 3.1, (October 20, 2017), (“we will not agree to go beyond the current structure or institutional arrangement of the Work Programme.”)

⁸⁰ In addition, there are increasing concerns about influence from developed countries-based tech giants that want the norms that serve their business models. James Fontanella-Khan, Brussels: Astroturfing Takes Root, Financial Times, (June 26, 2013), available at <https://www.ft.com/content/74271926-dd9f-11e2-a756-00144feab7de>; Nancy Marshall-Genzer, Why US Tech Lobbyists Have Descended on Brussels, Marketplace, (August 11, 2014), available at: <https://www.marketplace.org/2014/08/11/world/why-us-tech-lobbyists-have-descended-brussels>.

⁸¹ Only 43% of the Sub-Saharan Africa population has access to electricity. This is less than the 87% global access rate and well below any other developing region. More than 600 million people in Africa live without electricity, and only two countries in Sub-Saharan Africa (Mauritius and Seychelles) have near universal electricity coverage. With an average electrification rate of 16% in urban areas and 5% in rural areas, the current number of people without electricity is predicted to increase with Africa’s population boom. World Bank, Electricity Access In Sub-Saharan Africa, 2019, Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/31333/9781464813610.pdf?sequence=6&isAllowed=y>

⁸² Compared to 85-90% Internet penetration in United States and Europe, the Internet penetration stands around 47% for Cameroon, Côte d’Ivoire, Ethiopia, Kenya, Nigeria, and South Africa, sub-Saharan Africa’s largest economies. World Bank Data, <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=ST-KM>.

⁸³ Cisco Cloud Readiness Tool (2017), available at: <https://www.cisco.com/c/en/us/solutions/service-provider/cloud-readiness-tool/index.html>.

⁸⁴ Even in Sub-Saharan Africa’s largest economies, such as Cameroon, Côte d’Ivoire, Ethiopia, the cost of 1 GB averages around 10% of the monthly income per capita, and is substantially more in countries like Zimbabwe,

Affordable internet access is a prerequisite for the development of digital economy in sub-Saharan Africa. Big Tech and its allies, as well as Chinese companies, are racing to connect the disconnected in sub-Saharan Africa and provide critical infrastructure for economically disadvantaged populations. While few would argue that connectivity is not an admirable aim, technology companies pursue it with the goal of both opening up new markets of online consumers and garnering these consumers' data. The companies offer affordable devices, free applications and services, and, in some cases, even free access to parts of the internet, but use these as a lure to open markets that operate under their control, with no data protection.⁸⁵

Studies⁸⁶ suggest that as the economy becomes more digital, the impact of technological progress on productivity increases, however, this effect is substantially lower in sub-Saharan Africa. Digital transformation so far also worsens inequalities between countries, with a notably strong impact on sub-Saharan economies that are not well-positioned to govern data in a manner conducive to development. Therefore, the already existing “digital divide” is expected to widen in upcoming years.

MSMEs would not benefit equally from digital trade rules

It is widely argued that digital trade rules could be a game-changer for micro, small & medium enterprises (MSMEs).⁸⁷ These claims lack empirical support and tend to be subjective. In fact, studies have shown that despite the widespread dissemination of digital technologies, there

where 1 GB costs around 30% of the monthly income per capita. (compared to 1.5% in Asia or 3.5% in Latin America).: <https://a4ai.org/mobile-broadband-pricing-data/>.

⁸⁵ See Burcu Kilic & Renata Avila, Data Is the New Oil, so Big Tech Is Pushing for a Digital Free Trade Deal, BuzzFeed News, (December 13, 2017), available at <https://www.buzzfeednews.com/article/burcukilic/big-tech-is-pushing-for-a-new-kind-of-free-trade>.

⁸⁶ Banga, Karishma, The digital industrial revolution: will African countries sink or swim? (2018), available at <https://www.makingitmagazine.net/?p=10611>.

⁸⁷ “For micro, small and medium enterprises (MSMEs), e-commerce presents an opportunity for expansion beyond their own backyards and lowers the high costs usually associated with penetrating foreign markets.”, Non-paper from Colombia; Costa Rica; Hong Kong, China; Israel; Malaysia; Mexico; Nigeria; Pakistan; Panama; Qatar; Seychelles; Singapore and Turkey, JOB/GC/101/Rev.1

have not been significant positive externalities for local economies and these technologies have not yet altered the growth trajectory in the developing world.⁸⁸

Many African nations still lack effective policies that address critical infrastructure, connectivity, competitiveness, and keep citizens safe on e-commerce platforms. This puts much of Africa at a steep disadvantage when it comes to developing its e-commerce sector.

Indeed, e-commerce involves strong network effects that can lead to anti-competitive practices and market concentration. Large e-commerce platforms such as Amazon or Alibaba collect vast amounts of data on their customers, which can be used to out-compete African MSMEs that lack access to such data. This may lead to high market concentration, which would be a significant concern for MSMEs. They have limited capacity and resources, and often rely on external suppliers for critical services for their cross-border operations to be able to effectively compete with multinational corporations.

The fast pace of digitization and mobile revolution present a mix of challenges and opportunities for Africa. With the right policies in place, digital transformation may present an opportunity to drive growth and prosperity for the African MSMEs. In the meantime, there is a threat that it may serve only a few. Certain conditions should be met in order to ensure that the African digital revolution serves all, creating greater opportunities for African MSMEs including but not limited to access to ICT infrastructure and services, competitiveness and a level playing field, tailor-made industrial policies and institutional frameworks, government

⁸⁸ For example, studies show that there's no positive spillover from technology. Foreign direct investment (FDI) in Jordan's ICT sector did not lead to growth spillovers among domestic firms interacting with the foreign tech companies. Neither domestic firms supplying goods or services to foreign tech companies (backward linkages) nor domestic firms consuming their services (forward linkages) grew as results of such linkages. Furthermore, foreign firms like Microsoft or Oracle might use Jordan primarily as a hub to support regional activities involving few linkages to the domestic economy. Michael Lamla & Marc Schiffbauer, Spillovers from FDI in ICT in Jordan, Background paper for the World Development Report 2016, World Bank, Washington, DC.

driven SMEs development, access to finance, legal and regulatory framework, technology transfer and capacity building, privacy by design and secure e-payment solutions.

Consumers in sub-Saharan Africa are highly vulnerable

The consumer drive for privacy and security makes data protection and privacy regulations essential for the growth and long-term success of e-commerce platforms. There is no international consensus in terms of optimal design of privacy rules that relate to the collection, maintenance, use, disclosure, and processing of personal information. The lack of privacy protection and the absence of any accountability structure undermine consumer trust online.

Sub-Saharan Africans are over exposed to data exploitation. Some of the information collected in Africa includes: land, birth, death, immigration (including I.D./ Passport numbers, refugee/ IDP data), residence, email addresses, marriage, elections, education, tax, SIM card registration, driver's license, education history, National Social Security Fund (NSSF) register, National Hospital Insurance Fund (NHIF) register, National Bureau of Statistics (NBS), policing/ intelligence, telephone records, consumer habits, finger prints, bank details, business and health records etc.

African consumers need their governments to align and press a demand that companies take proactive steps and pledge to grant the high standards of digital protection to all users and consumers regardless of jurisdiction. Increasingly the Big Tech response to instances of governments creating rules about how data travels across their borders is to attack such policies as “digital protectionism”—a label that is easy to assert, hard to define, and deeply polarized.

Nothing in digital trade rules reassures citizens that the rules-based system is transparent, accountable and open to citizen input. Given recent scandals involving the abuse of personal data and the backlash from the public and national regulators, coercing sub-Saharan African countries into adopting this model is reckless at a minimum.

Excessive copyright protection harms access to knowledge

Overzealous copyright rules can compromise access to educational materials, such as textbooks or online resources. The United States and copyright holders have long been advocating for the adoption of stronger copyright protections and standards going beyond TRIPS in Sub-Saharan Africa. In a similar vein, international capacity building efforts in sub-Saharan Africa tend to focus on protection of copyright but not so much on flexibilities or copyright limitations and exceptions, which are fundamental for access to knowledge and thus for human and social development in sub-Saharan Africa.

For instance, both the WIPO and USPTO provided capacity building and technical assistance to the Nigerian Copyright Commission (NCC). A 2010 study revealed that the emerging understanding of intellectual property by the Nigerian public following capacity building workshops did not extend to limitations and exceptions and access to knowledge.⁸⁹ The NCC's approach to intellectual property is based on the conventional claim that stronger intellectual property protection inevitably promotes innovation, creativity and development. This uncritical and context-neutral approach towards copyright fails to seek a balance between right holders and users and promote access to knowledge for creation of accurate and engaging resources addressing history, culture, and literature.

A study conducted by the African Copyright and Access to Knowledge (ACA2K) project in eight African countries⁹⁰ (six of them are in Sub-Saharan Africa), on how copyright impacts access to knowledge revealed that all the African countries comply with international copyright standards and in many cases provide greater protection than is required by the international

⁸⁹ Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda

⁹⁰ Ghana, Kenya, Mozambique, Senegal, South Africa and Uganda

norms. Yet these laws failed to generate the anticipated result of economic development or inflow of foreign investment.

The empirical evidence in the ACA2K study suggests that there is a disconnect between the copyright law and its application, directly impacting access to knowledge and education in Africa. The study recommends that what Africa needs is a balanced copyright system reflecting local realities. A less restrictive but more realistic copyright system would not only provide more effective protection and increase access to knowledge but also would enable compliance with entire segments of the population operating outside the copyright system.⁹¹

One example of the tension between the interests of countries in sub-Saharan Africa and the U.S. approach is South Africa's recently introduced Copyright Amendment Bill. The bill has been praised for its clearly defined exceptions, including a pro-user fair use section that strikes an exemplary balance between rights owners' interests and the interests of the users, third parties and the general public, tailored to local needs. However, the bill was flagged in USTR's 2019 National Trade Estimate report as containing provisions "that some stakeholders argue will weaken the adequacy and effectiveness of the protection of copyright" including "broad and ambiguous exceptions to copyright."⁹² The exceptions are neither broad nor ambiguous. Instead, they will enhance access to knowledge, spur creativity, and safeguard the public interest.

Conclusion

⁹¹ Schonwetter, Tobias and de Beer, Jeremy and Kawooya, Dick and Prabhala, Achal, Copyright and Education: Lessons on African Copyright and Access to Knowledge (2009). J. de Beer, T. Schonwetter, D. Kawooya & A. Prabhala, "Copyright and Education: Lessons on African Copyright and Access to Knowledge" (2009-2010) 10 The African Journal of Information and Communications 37-52.. Available at SSRN: <https://ssrn.com/abstract=2333864>

⁹² See USTR's 2019 NTE report available at: https://ustr.gov/sites/default/files/2019_National_Trade_Estimate_Report.pdf.

Digital trade rules will provide Big Tech an opportunity to influence unregulated digital markets worldwide. This could shape the development of the digital economy for years to come. Recent digital trade rules have been designed not to safeguard the public interest, but to maximize the profits of a few technology companies and others able to sway trade negotiations. The enforceable rules they envision are of unprecedented scope, extend well beyond traditional commerce, and could constrain the ability of sub-Saharan African countries to regulate a rapidly changing digital environment in the areas of development, privacy and other human rights, anti-competitive practices; future of work; government data, cybersecurity, and national security, among others.

These economic and social as well as political concerns need to be considered before imposing binding and enforceable “winner-takes-all” digital trade rules on sub-Saharan Africa. The United States has several options for addressing the socio-economic issues raised by digital technologies. If the United States wishes to address the informational and technological needs of sub-Saharan Africa, the United States might consider implementing new programs to assist sub-Saharan Africa to develop digital infrastructure, broadband networks, skill and literacy, data governance systems and digital rights.

We urge the United States government to refrain from promoting its digital trade model in sub-Saharan Africa.