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August 11, 2015

Alan Treat
Director, Office of African Affairs
Office of the U.S. Trade Representative
600 17th Street Northwest
Washington, DC 20508

RE: USTR-2015-0009 South Africa AGOA Eligibility

Dear Mr. Treat:

Public Citizen appreciates the opportunity to provide post-hearing comments in response to the out-of-cycle eligibility review for South Africa to receive benefits under the African Growth and Opportunity Act (AGOA).

Public Citizen is a national nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. We have 400,000 members and supporters. Public Citizen's Global Access to Medicines Program works with partners worldwide to improve health outcomes through use of pharmaceutical cost-lowering measures, including generic competition.

In the 1990s, millions of people in low- and middle-income countries died for lack of access to existing HIV/AIDS treatments. Companies charged thousands of dollars for life-saving medicines in sub-Saharan Africa, a region where people lived on a few dollars per day or less. The U.S. government, shamefully and to great international criticism, sided with pharmaceutical companies and their monopoly power.

On May 10, 2000, in recognition of the catastrophic toll of HIV/AIDS and in an effort to mitigate the harms of U.S. government policy in South Africa that provoked many protests, including by Health GAP, President Clinton signed Executive Order 13155. The order established that "the United States shall not seek...the revocation or revision of an intellectual property law or policy of a beneficiary sub-Saharan African country... that regulates HIV/AIDS pharmaceuticals or medical technologies," so long as "the law or policy of the country...provides adequate and effective intellectual property protection consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)."

Even today, UNAIDS estimates that 6.8 million people are infected with HIV in South Africa, more than any other country in the world. About 140,000 people died of AIDS in South Africa in 2014 alone.

In 2011, the government of the Republic of South Africa initiated efforts to reform intellectual property protections in the country, motivated largely by the need to expand access to HIV treatment and prevent rightholder abuse of South Africa's very permissive patent system. The patent reform efforts propose to implement a search and examination system, clarify standards of patentability and patentable subject matter (an exclusion for diagnostic, surgical and therapeutic methods, as permitted by TRIPS Article 27), adopt a pre- and post-grant opposition system (contemplated by TRIPS Article 62.4) and allow for flexibilities such as compulsory licenses and parallel importation. The proposed reforms are TRIPS-compliant and could save many lives.

The American Chamber of Commerce in South Africa (AmCham) recently issued a press release expressing its intent to "use the AGOA 30 day Review as leverage for action and changes in terms of policy issues that the South African Government is pursuing." AmCham lists "IP Patent Protection Dilution" and the proposed reforms as one of its primary concerns. Yet AmCham makes no assertion that any of the proposed reforms fail to comply with TRIPS, or even raise a compliance question. AmCham ignores the humanitarian purpose and benefits of the reform package. Worse, and grossly offensive, AmCham fails to recognize the history of AIDS and pharmaceutical industry bullying in South Africa.

It would be unconscionable for the U.S. government to use its influence against another country's lawful efforts to protect its people's health. Nevertheless, we have received reports that representatives of the U.S. government in South Africa have inappropriately linked the question of whether or not South Africa's AGOA benefits will be renewed¹ to U.S. government concerns about the proposed IP law reform. We note that any such pressure, inducement or persuasion undermines longstanding U.S. policy and, if successful, would lead to preventable suffering and death.

Absent any claim of current, clear TRIPS non-compliance, the out-of-cycle AGOA eligibility review should not contemplate South Africa's intellectual property policies, regulations or reform proposals.

Public Citizen appreciates this opportunity to comment. The following organizations have requested that their names be added in support of this submission:

Health GAP (contact: Brook Baker b.baker@neu.edu)

Oxfam America (contact: Stephanie Burgos sburgos@oxfamamerica.org)

Should questions arise regarding the aforementioned comments, please do not hesitate to contact me at pmaybarduk@citizen.org or (202) 588-1000.

Sincerely,



Peter Maybarduk
Director, Global Access to Medicines Program

¹ The statutory provisions governing AGOA eligibility for sub-Saharan African countries are set forth in section 104 of AGOA (19 U.S.C. 3703) and section 502 of the 1974 Trade Act (19 U.S.C. 2462). Both statutes reference intellectual property as a factor. Section 104 of AGOA requires "the elimination of barriers to United States trade and investment including by...the protection of intellectual property." Section 502 of the 1974 Trade Act states "the President shall take into account...the extent to which a country is providing adequate and effective protection of intellectual property rights."