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DRAFT:

COULD SANCTIONING SOUTH AFRICA FOR COPYRIGHT REFORM VIOLATE THE WORLD TRADE ORGANIZATION?

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I. GSP ENABLING CLAUSE 2
A. Non-Reciprocal Criteria *2*
B. Development-Oriented Criteria *3*
II. DISPUTE SETTLEMENT UNDERSTANDING BAN ON UNILATERAL ADJUDICATION 4
CONCLUSION **5**

The United States Trade Representative recently announced that it was opening an investigation of South Africa for passing a Copyright Amendment Bill, not yet signed by the President, that adopts a U.S. style fair use clause and makes other changes to bolster the rights of local creators and users. The USTR investigation is to decide whether the new law would contravene the provisions of the Africa Growth and Opportunity Act (AGOA), which requires "the elimination of barriers to United States trade and investment," including by ensuring "the protection of intellectual property."

This note describes the limitations that the World Trade Organization agreements place on criteria for generalized systems of preference programs, such as those included in AGOA. First, the GSP enabling clause requires that factors be non-reciprocal, general, and oriented toward the recipients' development. These standards may be violated when criteria are not based on a broad based international norm such as in the agreement on Trade Related Aspects of

Intellectual Property Rights (TRIPS). Second, the dispute settlement understanding prohibits unilateral litigation of TRIPS.

I. GSP ENABLING CLAUSE

The trade benefits of AGOA are governed by WTO rules for "generalized system of preferences" or "GSP" programs. These are programs that give extra tariff reductions to developing countries that are not afforded to wealthier countries. GSP programs are regulated by the WTO's GSP Enabling Clause, which exempts GSP programs from the general "most favored nation" ("MFN") requirement of the WTO which would normally prohibit giving some WTO members trade preferences that are not extended to all members.[1] The question for trade law analysis is therefore whether denying South Africa GSP benefits based on the Copyright Amendment Bill would comply with the GSP enabling clause.

A. Non-Reciprocal Criteria

GSP programs are not supposed to involve reciprocal exchanges of concessions. The Enabling Clause requires that GSP program criteria be "non-reciprocal" (Para 2) and "designed . . . to respond positively to the development, financial and trade needs of developing countries." (Para 3). These factors are intended to ensure that GSP programs are *unilateral* grants of privileges to aid development, not bargained for exchanges. Partially for this reason, some trade officials have sought an increase in free trade negotiations with developing

[1] The goal of the MFN rule is to "replace the frictions and distortions of power-based (bilateral) policies with the guarantees of a rules-based framework where trading rights do not depend on the individual participants' economic or political clout." (WTO). It thus requires that any trade benefits given to one country (e.g. a more powerful trading partner) be automatically extended to all WTO members. "This allows everybody to benefit, without additional negotiating effort, from concessions that may have been agreed between large trading partners with much negotiating leverage." (WTO). Strictly applied, MFN would require that trade concessions granted to developing countries be extended as well to rich countries – prohibiting the long standing practice of giving "special and differential treatment" to developing countries. There are two exceptions to the MFN principle in the WTO accords. One is that countries may formally negotiate free trade agreements that contain specific benefits for trade only between those members. The second, relevant here, is that countries may enact special programs that benefit developing countries through so-called "generalized systems of preferences."

countries, including South Africa.[2]

Demanding that South Africa remove its fair use right or make other changes to its policy as a condition for trade concessions in order to benefit U.S. stakeholders could violate the mandates that GSP criteria be "non-reciprocal." To be non-reciprocal, the criteria for GSP programs must be crafted to promote the development interests of the beneficiary countries, not the economic interests of the U.S.

The USTR may argue that the intellectual property requirements of AGOA are meant to benefit South Africa's development. This point can be supported with reference international norms in TRIPS and other treaties linking intellectual property protection with development interests. But the WTO appellate body has held that GSP grantor countries cannot simply define their own development terms so as to promote their own trade interests. Rather, GSP development criteria must be based on international law standards.

B. Development-Oriented Criteria

The WTO appellate body struck down a European GSP program in the case of *EC – Preferential Tariffs*. The matter involved a challenge by India of the EC's program to award additional GSP benefits to countries that participated in a special drug eradication program of interest to the EU. The WTO Appellate Body admonished:

> a 'need' cannot be characterized as one of the specified 'needs of developing countries' . . . based merely on an assertion to that effect by, for instance, a preference-granting country.

The Appellate Body explained further that GSP criteria must be based on an "objective" and "[b]road-based recognition of a particular need," such as those "set out in the WTO Agreement or in multilateral instruments adopted by international organizations."

In line with the WTO's ruling in the *EC-Preferential Tariffs* case, USTR must

[2] *See* Inside U.S. Trade, "Froman Signals Interest in 'Reciprocal' Trade Arrangement with South Africa," July 31, 2014.

find not merely that eliminating South Africa's fair use test or other aspects of the Copyright Amendment Bill will benefit the U.S. – or even South Africa. It must allege a violation of broad based international standards, such as that reflected in WTO's Agreement on Trade Related Aspects of Intellectual Property Law, or in other multilateral agreements.

As a threshold question, the USTR cannot find any violation of international intellectual property by the Copyright Amendment Bill because that bill has not been signed. Even when it is signed, the law does not go into effect until after the Minister promulgates regulations adding further definition to its mandates. If and when the Bill is signed and implemented, the question would then arise as to whether the USTR may unilaterally adjudicated TRIPS compliance without first using the Dispute Settlement Understanding.

II. DISPUTE SETTLEMENT UNDERSTANDING BAN ON UNILATERAL ADJUDICATION

As described above, to use an intellectual property issue to deny a country GSP benefits, the issue must be broadly agreed to, such as reflected in TRIPS. But the WTO agreements prohibit the unilateral adjudication of TRIPS disputes.

Unilateral adjudication of TRIPS and other aspects of the WTO accords is prohibited by Article 23 of the Dispute Settlement Understanding. That Article, titled -- "Strengthening of the Multilateral System," states in relevant part:

> 1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
>
> 2. In such cases, Members shall:
>
> > (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.

Article 23 of the Dispute Settlement Understanding was adopted in large part

to halt the practice of the United States unilaterally adjudicating trade disputes and raising tariffs on other countries in the pre-WTO period of "aggressive unilateralism."

One of the first cases to be brought against the U.S. in the WTO was based on its continuation of the so-called "Section 301" program that permitted unilateral trade sanctions. The WTO permitted the program to continue only because of assurances of a U.S. "Statement of Administrative Action" pledging to "base any section 301 determination" of a WTO violation on "panel or Appellate Body findings adopted by the DSB" and only sanction countries with "authority from the DSB to retaliate." The Statement of Administrative Action restricting determinations about WTO compliance to dispute settlement body procedures is still in force. It could violate that policy, and the WTO's Dispute Settlement Understanding, to unilaterally determine that South Africa violates TRIPS without first using the WTO dispute settlement understanding.

Indeed, the WTO panel in the 301 case went further, casting doubt on the WTO compliance of threats of sanctions, even if not carried through. It explained:

> Members faced with a threat of unilateral action, especially when it emanates from an economically powerful Member, may in effect be forced to give in to the demands imposed by the Member exerting the threat… To put it differently, merely carrying a big stick is, in many cases, as effective a means to having one's way as actually using the stick. The threat alone of conduct prohibited by the WTO would enable the Member concerned to exert undue leverage on other Members. It would disrupt the very stability and equilibrium which multilateral dispute resolution was meant to foster and consequently establish, namely equal protection of both large and small, powerful and less powerful Members through the consistent application of a set of rules and procedures.

After the 301 ruling, the USTR has been relatively carefully not to use trade threats for alleged violations of TRIPS. It has largely abandoned, for example, use of the "Priority Foreign Country" designation under the "Special 301" program.

CONCLUSION

Although GSP programs are unilaterally granted, they cannot be unilaterally denied for reasons that benefit the grantor country. GSP programs must be based on "generalized" and "non-reciprocal" criteria that are based on the development

interests of the grantee, not the grantor. The US has not always acted within these guidelines. It revoked GSP benefits from Ukraine for matters including lack of intellectual property enforcement without engaging WTO dispute resolution. And in recent disputes – including with China – it unilaterally raised tariffs and other trade barriers in response to matters not brought to the WTO. These actions were not challenged in the WTO. But they could have been. If the USTR removed AGOA preferences from South Africa based on criteria (such as adopting fair use) that clearly do not violate multilateral standards, South Africa could challenge the action in the WTO under the GSP Enabling Clause. Likewise, if USTR denied benefits based on a unilateral finding of a TRIPS violation, that decision could be challenged under the WTO's Dispute Settlement Understanding.