

OPINION: WTO Should Not Authorize Theft Of Personal Property

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Law360, New York (December 5, 2016, 2:27 PM EST) --Imagine the World Trade Organization authorizing the theft of privately held physical property (crops, widgets) in order to enforce a trade dispute having nothing to do with the parties or the goods at issue. Such an action would strike most as unjust and preposterous. Yet, the WTO has authorized a similar act of thievery directed at owners of intellectual property.

More than a decade ago, Antigua prevailed in a WTO case against the United States regarding U.S. laws against interstate gaming. Because the United States has not complied with the WTO ruling, Antigua is entitled to retaliate by withdrawing WTO commitments otherwise owed to the United States. In a typical trade dispute, this would allow Antigua to significantly increase tariffs on U.S. goods entering Antigua.

Given the limited amount of U.S. exports to Antigua, however, several years ago the WTO indicated that it would allow Antigua also to disregard WTO obligations regarding intellectual property rights. When Ecuador and Brazil were given the same option in other cases, both declined to retaliate against intellectual property. But recently, Antigua informed the United States that it may indeed take this step. If it does, the WTO will have authorized Antigua's theft of U.S. movies, books, songs and software.

Allowing Antigua to steal intellectual property could cause tremendous economic harm to U.S. intellectual property owners. Moreover, there is a fundamental principle at stake here regarding the respect and protections to which private property is entitled. When the WTO permits a country to raise tariffs in order to enforce a WTO ruling, innocent parties might be impacted, but none risk having their property taken. What is so pernicious about the relief Antigua is seeking in this case is that it puts an international rules-based organization (WTO) in the position of authorizing the theft of privately held property.

The only explanation for why WTO authorization of property theft has not caused more of an uproar is that, despite the rhetoric, intellectual property is not seen by some as warranting the same level of protections as physical property. This is the most alarming implication of Antigua's request.

A global economy relies on a comprehensive system of national and international rules. None is more essential than those establishing the protection of private property. When widgets are exported to a



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foreign country, they enjoy protection under the laws of that country from theft or destruction. If a country fails to enforce its property law, exporters to that country can take mitigating steps, including the suspension of all future exports.

Unlike basic property laws commonplace in virtually every country, strong intellectual property protections have been spotty in many countries. In the 1990s, WTO members sought to address this problem through the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), which requires countries to establish appropriate protections for intellectual property.

One of the overarching goals of TRIPS was to raise awareness that intellectual property is “real” and deserves property protections enjoyed by other forms of property. Given the growing importance of intellectual property for the U.S. and global economy, the need for strong global protections is greater than ever.

It is unfathomable that the WTO would license the theft of privately held physical goods to enforce a government-to-government trade dispute. By authorizing the theft of intellectual goods for such purposes, the WTO demonstrates that it lacks the courage of its conviction that intellectual property should not be treated as second-class.

Antigua is entitled to have its favorable WTO ruling enforced. But the WTO should not authorize the theft of intellectual property. If Antigua proceeds to permit the theft of U.S. intellectual property, it will establish a terrible and unjust precedent that could become very costly if pursued by other larger countries.

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