OFFICE OF THE U.S. TRADE REPRESENTATIVE

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PUBLIC COUNTRY PRACTICE HEARING
U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP)

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FRIDAY
JANUARY 31, 2020

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The hearing convened at the Office of the U.S. Trade Representative, 1724 F Street NW, Washington, D.C., Rooms 1 and 2, at 10:00 a.m., Laura Buffo, Chair of the GSP Subcommittee, presiding.

GSP SUBCOMMITTEE

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SOUTH AFRICA - INTELLECTUAL PROPERTY RIGHTS

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IRSHAAD KATHRADA, Special Advisor to the Minister of Trade and Industry
EVELYN MASOTJA, Deputy Director General, Consumer and Corporate Regulation Division, Department of Trade, Industry and Competition
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KEVIN M. ROSENBAUM, Counsel, International Intellectual Property Alliance
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SAM RIZZO, Senior Director for Policy, Trade & Tax, Information Technology Industry Council
STEPHEN SIMCHAK, Head of International and Counsel, American Property Casualty Insurance Association (APCIA) and the American Council of Life Insurers (ACLI)
JOSEPH WHITLOCK, Director of Policy, BSA, The Software Alliance

C-O-N-T-E-N-T-S

P-R-O-C-E-E-D-I-N-G-S

10:03 a.m.

CHAIR BUFFO: Good morning everyone, and welcome to USTR for day 2 of our GSP Country Practice public hearing.

Since there are many new faces I'll repeat some but certainly not all of my opening remarks from yesterday, starting with introductions.

My name is Laura Buffo, I am the Deputy Assistant U.S. Trade Representative for Generalized System of Preferences, and I'm also the Chair of this Subcommittee that's before you, the GSP Subcommittee of the Interagency Trade Policy Staff Committee.

I now invite the Subcommittee to please introduce yourselves.

MS. QUIGLEY: I'm Linda Quigley, Senior Director for Innovation and IP at USTR.

MS. COHEN: Good morning, I'm Raquel Cohen, a senior attorney at the U.S. Department of Commerce, the Office of IP Rights.

MR. PAJUSI: Tom Pajusi, I'm with the Department of State, Office of Multilateral Trade Affairs.

MS. SRINIVASAKRISHNAN: Ruchira Srinivasakrishnan. I'm with Treasury covering South Africa.

MS. COHEN: Good morning, I'm Leena Khan, I'm with the U.S. Department of Labor, Office of Trade and Labor Affairs.

CHAIR BUFFO: Thank you.

Today we will be hearing from many witnesses from various perspectives during the hearing. And while the issues certainly vary per country review for all the reviews, we are trying to answer one key question: whether or not the country is meeting the GSP eligibility criteria that Congress established that beneficiary countries must meet if they are to receive GSP benefits.

We will start today with the review of South Africa on the GSP criterion of providing adequate and effective protection of intellectual

property rights.

In the afternoon, we will review Indonesia for the criteria of intellectual property, as well as providing equitable and reasonable access to the beneficiary country's markets.

This hearing is open to the press, and I would like to ask if there are any representatives from the press present if you could please introduce yourselves.

Could you stand up, please. Any press? No? Thank you. Is that it? Thank you very much.

And, also we have a very packed agenda so we kindly ask that each witness stick to the five minutes allotted for your testimony.

If you are not able to address everything you would like to in your testimony or during the question and answer period, you will have a chance to expand on any information or to respond to testimony that is made by other panels that may follow you during your post-hearing brief.

Parties appearing at today's hearing may also receive additional questions from the Subcommittee in about a week or so. We also ask that you include those responses in your post-hearing brief.

So, with that I welcome the representatives from the government of South Africa and turn to Ambassador Carim, Deputy Director General of the International Trade and Economic Development Division for your testimony.

Welcome.

AMBASSADOR CARIM: Well, thank you very much, Chairperson, and good morning to everyone on the committee and everyone in the room today.

Let me start by thanking the Subcommittee for the opportunity to make this brief intervention on behalf of the government of South Africa.

I want to start also by recalling the submission that we sent to the USTR on the 17th of January, 2020, in which we elaborated a set of

policy and legal considerations that the South African government believes is pertinent to this review.

And, today in the brief time allotted, we highlight three core arguments on why we believe South Africa should continue to enjoy full access to the United States Generalized System of Preferences.

The first argument, we're convinced of the importance of preserving the strong economic relationship that exists between South Africa and the United States in which the GSP and AGOA, which are linked, are integral.

In 2018, the combined value of U.S. exports of goods and services to South Africa, together with U.S. income receipts from South Africa, amounted to $12.2 billion USD.

On trade, the U.S. enjoys a surplus in manufactured exports and services. In agriculture our trade tends to be balanced, and in minerals and commodity trade, South Africa runs a surplus unsurprisingly.

According to the U.S. Chamber of Commerce, there are more than 600 U.S. firms invested in South Africa that generate dividends for the U.S. economy.

The U.S. Department of Commerce reports that U.S. exports of goods and services to South Africa supported an estimated 46,000 direct jobs in the U.S. in 2015.

So, our view is that we should be working to strengthen this mutually beneficial and balanced economic relationship, particularly at a time it promises to deliver on a stronger African trade and investment dimension.

Our second argument is that the IIPA petition on which this review appears to be based, is misdirected and mistimed. The petition raises no direct concerns with South Africa's existing copyright law. Rather, it's entirely focused on two proposed amendment bills that are not South African law.

And these, the Copyright Amendment Bill and the Performers' Protection Amendment Bill

still await a decision by our President on their fate.

Under our Constitution, a bill only becomes law if the President is satisfied that it is constitutionally sound. If the President has reservations, the bill will be returned to Parliament for reworking. If constitutional questions persist, the bill can be referred to the Constitutional Court for a final ruling.

When the President deems that the bills have met constitutional muster, their entry into force is not immediate either. For entry into force, the responsible government department must develop subordinate supporting regulations through an open participatory process, and that government department has also put in place the requisite capacity to implement the new legislation.

Our third set of arguments is built on the fundamental point that South African democracy ensures that constitutional principles, due process, and checks and balances govern law-making

in South Africa. All of this is underpinned by a strong and independent judiciary.

Our Constitution contains a property clause that prohibits any arbitrary deprivation of property, and U.S. intellectual property owners should be assured that their IP would continue to be protected in South Africa.

The South African judiciary, including the Constitutional Court, provides avenues to enforce those rights, if needed.

We also draw your attention to the fact that the South African government has strengthened its enforcement capacity and is increasingly acting against infringements of intellectual property protection.

The parliamentary process to develop the bills was thorough and met the constitutional requirement for public involvement in lawmaking. The relevant Committees received more than 250 written submissions and all of them were duly considered, including in the numerous public hearings that were held over three and a half years.

As expected, South African constituencies expressed the diverse views on the bills. The IIPA also made a submission and some of its views resonated with some domestic constituencies.

However, strongly competing views were also raised by other stakeholders in that process and in an annex to our submission we cite the views of U.S. businesses that are supportive of the bills in its current form, including those provisions drawing from best practice in the U.S.

Our parliament sought to work to achieve a balance amongst these competing views in a manner that is appropriate to the South African context, while fully respecting our international treaty obligations.

Having regard to all these facts, we believe South Africa should continue to fulfill, should continue to benefit from the GSP as we fulfill and will continue to fulfill the GSP eligibility criterion, as well as meet our international treaty obligations.

We conclude by reaffirming the South African government's commitment to continue to work with all interested parties in a constructive manner on the unfinished matter of updating South Africa's copyright legislation.

And, that is our brief submission. Thank you for the time.

CHAIR BUFFO: Thank you very much, Ambassador, for your testimony, and to you and your delegation for traveling all the way here from a long distance away.

I will now turn to my U.S. government colleagues to ask you a few questions.

Thank you.

MS. QUIGLEY: Numerous surveys and publications affirm that copyright piracy has been a persistent problem in South Africa, and you mentioned that the South African government has been taking steps to address the piracy problem.

Could you give us more information about specifically what has been done, and whether or not it's been effective.

AMBASSADOR CARIM: Thank you very much for the question. I will ask one of my colleagues to be, to come in and assist on this.

I think the question is a question of enforcement, not necessarily about law. So, it's a question about building the capacity to enforce the legislation, and South Africa has been steadily strengthening its capacity to enforce the law and there are a number of instances that we can, we can, examples we can reference where we've done precisely that.

So, it's an ongoing process of strengthening the enforcement capacity. But the provisions that allow us to do that are embedded in the South African law.

I don't know if my colleague would like to add something.

DR. MASOTJA: Thank you, Ambassador.

Good morning Chair and the panel. I'm Dr. Evelyn Masotja from the South African government.

To answer the question as Ambassador

just started explaining, there are efforts that have been made, and that continue to be made by our government.

The existing Copyright Act of 1978 provides civil remedies in Section 24 that include lawsuits, interdicts, and claims. So, this talks to if there are those contraventions, of piracy and infringements, the legislation does address the issues.

And it also guides in terms of claims on royalties which rights holders can claim directly from for their compensation.

And the existing efforts by government entities on counterfeit goods. In 2019, $2.7 billion in our currency Rands worth of counterfeit goods were destroyed by the South African Revenue Services, one of our entities.

And the authorities act against piracy through a range of actions including the confiscation and destruction of pirated films, the arrest of people trading in counterfeit CDs and DVDs, and raids of facilities suspected of housing

operations for counterfeit products.

We have a Counterfeit Goods Act that provides for criminal offenses for counterfeit copying, dealing, and distributing counterfeit copies for trade, and to the prejudice of right holders.

We also have other legislation that addresses these issues. The Electronic Transactions and Communications Act has measures, including appointment of cyber inspectors and also cyber-crime infringements by the prohibition of circumvention against unauthorized interference with technical protection measures.

And we have a bill currently in Parliament on the cyber-crimes, which is a cyber-crimes bill, and this, the main objective of this bill is to deal with offenses relating to cyber-crime, interference of data, and it criminalizes the theft and interference of data amongst other related protections.

Our current bill, the Copyright Amendment Bill, criminalizes infringement of

circumvention of technological protection measures and certain conduct prohibited on copyright management information.

By so saying, what we are stressing is that U.S. based companies will not be prejudiced and they will be protected because we are of the view that we do have sufficient protection on enforcement on copyright.

MR. PAJUSI: Ambassador, I have a question for you. South Africa signed the WIPO Copyright Treaty and WIPO Phonograms and Performances Treaty but hasn't ratified and acceded to them yet.

Can you explain to us why not, and can you discuss what are your plans to accede to these treaties, and what is the timing?

AMBASSADOR CARIM: Again, thanks very much for the question. Again, I will pass to the colleague that is dealing with this.

DR. MASOTJA: Thank you for the question.

The South African Parliament passed the

WIPO Internet treaties for the previous year, including the Beijing Treaty on Audiovisual Performances. This process is currently underway. We are in the process to deposit them with the WIPO Director General.

So, we are prioritizing this and the processes are under consideration, but the comfort we can give is to indicate that we have moved and went through all the processes, the consultative processes, with our government departments and our Parliament.

So, they are under way, thank you.

MR. PAJUSI: They're underway specifically for these two?

DR. MASOTJA: Yes, the WIPO copyright treaties, and then the Beijing Treaty on Audiovisual Performances. So, there are three treaties that we will be ratifying soon.

MR. PAJUSI: Thank you very much.

MS. SRINIVASAKRISHNAN: South Africa drafted two pending bills, amendments to its Copyright Act and the Performers' Protection Act

in an attempt to modernize your current copyright regime, and so we wanted to ask some questions now about those two bills.

And, so my question is I understand that the two bills are now sitting with the President for review.

Could you give us an idea of what the expected timeline for the President to review the proposed bills is? And, relatedly, is it possible that the proposed bills simply remain on the President's desk unreviewed into perpetuity? Is that a possible outcome?

AMBASSADOR CARIM: Well, I touched on it in the testimony and I think in the, in our written submission which we've spent quite a bit of time setting out in some detail, what the process and procedure is before a bill becomes law.

So, you're right, the process has advanced, it has been passed by Parliament, it is sitting on the President's desk.

The President is required by law to review any bill, including these two, to ensure

that they meet constitutional requirements. He has to do that in a reasonable amount of time. It doesn't specify how long that is. These are obviously important bills. There are complex issues in them, and so the President is giving it due consideration and will make a decision at some point.

So, it's not possible to give a specific time line but what we can say is that it is receiving attention.

Was that, did you have anything else aside from the time line on this? Or, your question was could it sit there indefinitely.

He can't do that. He has to make a decision but the time that he takes to make that decision is not specified.

MS. QUIGLEY: Representatives of creative industries, both local and foreign companies, assert that the legislation that was passed would make it very difficult to continue to do business in the country.

Specific concerns local and foreign

companies have cited include broad and ambiguous exceptions to copyright, new limitations on contractual relations between private parties, and a provision prohibiting the circumvention of technological protection measures that stakeholders assert may not meet international standards, and overly broad exceptions.

What is your response to these assertions?

AMBASSADOR CARIM: Again, I'll ask my colleague to come in just to supplement my answer, but thanks again for the question.

What we try to without getting into the debate and trying to go through the debate that took three and a half years in the South African Parliament and cover all the issues, what we've tried to indicate in our submission, in the written submission and in the testimony today, is that there are a diverse set of views amongst different stakeholders.

So you're referring to the views of some stakeholders and those are clearly important views

that need to be taken into account. But there are a range of other views that have also been expressed in the course of the, of the Parliamentary process of looking into, in developing these bills.

So, all of the claims that have been made, there are counter views on them. I wouldn't want us to try to get in today in the short time that we have into a debate on the merits or demerits of any one of those. That's a long process, we'd probably have to have a lot more time on our hands to get into it.

I'm sure in the course of this morning's engagement, will get a flavor of the diversity of views on that.

What we are able to say is that we know that the Parliament considered this very carefully, all of the views, competing views, applied its mind and made in a judgment of what was most appropriate in the South African context with a very clear view that we needed to meet our international obligations.

So, the judgments were made were not

irrational. They were well considered. In our view, they are balanced and that they would meet the, our international obligations.

Of course, we also know that in our system of checks and balances, the President also has to apply his mind to that. So, that's a further protection for, in the process to safeguard the process to ensure that it is, that whatever passes into law in South Africa is constitutionally sound.

So, I'm not, I don't want to enter into the debate except to say at this point in this hearing, that there's a diversity of views on the matters and we are confident, we're quite sure that the, that our Parliament considered all views in an equitable manner, looked across all of the views.

Evelyn, would you like to add anything?

DR. MASOTJA: Thank you, Ambassador.

I would like to add that there were serious considerations in Parliament regarding all the areas alluded to. We were informed by best practice research and the research stretches back

from 2009, and extensive consultations, and also based on our context in the South African case.

So, regarding the technological protection measures, these are the new innovation or developments in the Copyright Amendment bill in our legislative framework. They will address issues of prohibited conduct and remedies for infringement, and it criminalizes different, the some circumvention activities in the, in the bill.

And, the concerns around the TPMs that there were debates around them. They were properly and thoroughly considered and we are of the view that they are, they meet the requirements and also regulations may be considered to clarify and strengthen areas, if needed.

Thank you.

CHAIR BUFFO: One quick follow up to that. You had mentioned the process of consultations. If you could explain the public consultations that you held that preceded the legislature passing this bill.

Thank you.

AMBASSADOR CARIM: I imagine it's pretty much like it is in the U.S. The bill is prepared, it is submitted to Parliament, a draft. It's prepared by the department based on the consultations that we have in the department, based on studies that were conducted over a five or six year period.

And, then, it's submitted to Parliament and in that process, Parliament itself and through its, through the portfolio Committees, the relevant Committees, look at them, look at the bills in detail.

You have experts participating in that process. You have public hearings, so all interested parties are invited to participate in that process. We receive -- there's a call for submissions, written submissions had indicated that there were 250 written submissions that were submitted into that process from a wide variety of constituencies.

And, those are considered not by Parliament on its own, they're considered through

the public hearings and the debates in, in the Committees in that respect.

I had understood if I'm not mistaken, there were, they counted something like about 32, 34 public hearing events that would last over one or two days. I stand to be corrected on the number but it is really an intensive consultative process, extensive preparations, detailed considerations back and forth.

So, it's a very thorough vetting process and consultative process to develop the bills. So, quite intensive.

I can get you maybe get more precise on the numbers, maybe, in a follow up to you on that.

MS. KHAN: Your submission has asserted that South Africa has adopted a U.S. style fair use. But in fact, the factors as laid out in the South African law actually differ from Section 107 of the U.S. Copyright Act.

Could you please explain how you developed those factors?

AMBASSADOR CARIM: Well, I think again

without getting into the substance of it, I'll ask my colleague to indicate some of the elements in the time that we have.

But it was part of the, part of the preparatory process of developing core elements of where we thought we needed to strengthen the bill and we would look at international best practice.

We would look at how the U.S. legislation is set out and that would be amongst many inputs that go into the process. So, in terms of the process, this would have been informed by looking at U.S. legislation and seeing how best to apply it in the South African context.

So, there are a number of areas where we've looked to other jurisdictions, best practice of other jurisdictions ensuring again that it's within the framework of international, our international obligations, and that's how it would be, it would be considered.

So, it's modeled, the fair use is largely modeled on the U.S. It's not identical but it's modeled on the U.S. legislation, and in some

ways and we've heard some commentators indicated that it's an improvement on that in particular cases.

And, that's because we take on views from a wide variety of stakeholders in trying to get, in trying to optimize the type of provision that we put into place.

But again, I'll ask my colleague to add.

DR. MASOTJA: Our model is considered as a hybrid because it incorporates fair use and then the exceptions and limitations.

The U.S. model is the doctrine of fair use. So, when we say that they are similar, is because the models are similar and also, they do have a test in the model.

So, the wedding may not be exactly 100% the same, but the principles are the same. So, we are of the view that we have followed from best practices and the U.S. is one of those best practices, and other countries that are looking at this model.

And, obviously similarities does not

mean exactly the same but it's, we are talking about the same more or less concept or doctrine.

Thank you.

MS. QUIGLEY: I'm going to ask a follow up. Can you tell us what other models you looked at?

DR. MASOTJA: The other model we looked at was Singapore. We looked at Singapore and we looked at other countries that have a fair use model, like the Israel model.

So, we did look at the countries that have modeled themselves on fair use and just did comparisons. And, where they are, for those countries that maybe have wider, let's say, fair dealing but then they will have wider, they will have exceptions that we could draw from.

So, we used best practice, and research also informed us of where we could look for the examples.

MS. QUIGLEY: And, when you say that you used research, where did your research come from? Did the government have employees that were

doing the research themselves, or did you draw on studies?

DR. MASOTJA: We drew on studies and also we did conduct independent studies with experts who helped us to look at models from other countries, and also showing us why fair use was a good model. And, we also drew from experts who continuously update their work on trends regarding fair use and other models.

MS. COHEN: It appears that the amendments to the Copyright Act and the Performers' Protection Act would override the ability of copyright holders to set their own terms and licensing.

How do parties to a contract have any predictability or certainty if any agreement they reach may be overridden by government intervention or revocation?

DR. MASOTJA: Okay, the South African law provides that when ministers exercise public power that affects, adversely affects rights of parties, they may not act arbitrarily in an

impetuous or irrational manner, and any action must be proportional to the problem it seeks to address.

In the South African context, we have a historical context of unfair bargaining on contracts. So, what the legislation is proposing with the bills is a framework that guides how to apply bargaining between parties.

The misinterpretation or how they have been perceived is that you have a government that oversees, or is involved in contractual dealings between parties. But that is not what these provisions that are in both bills are saying.

What we are trying to do is to empower our creators and our rights holders for their rights to be exercised in a fair and transparent environment. So, it's more of guidelines to assist in how to address contractual relations.

So, government is setting the frame and it will be based on abuses that we are experiencing or observing. So, the minister may not necessarily exercise that right, but it's mainly based on what will be the market failures or market

conducts.

So, we have been experiencing historical context of bargaining powers that were imbalanced. So, this is not to prescribe how contracts should be dealt with, but it's meant to just assist to guide parties to know what to do when, to guide them in terms of how to contract.

So, it's independent but then even when the regulations will be developed, the minister will not develop them alone or in an arbitrary, impulsive manner. The powers are given by Parliament but they will be consultative processes to develop those frameworks.

AMBASSADOR CARIM: Can I just add on that? I think the important way of looking at it is, as my colleague has indicated, is that it's setting a framework and it's setting some standards for contracting.

And, of course governments have that, they have to play that role in that individuals that are party to a particular contract would negotiate it, but they would have to meet certain minimum

standards to try to minimize unfair contracts or abuse in the contracts address the imbalances in bargaining power.

But it's not going to be interventionist in that sense of directing the specifics on that. But it does try to set a minimum, a minimum standard of good practice.

MS. QUIGLEY: But just to clarify, the bill does say that the government can come in and change the rate at which the parties negotiate it, is that correct?

DR. MASOTJA: No, just to -- okay, thank you so much. It's as the ambassador has expressed, it's more about setting the minimum standards but not to intervene directly in contractual relationships.

So, the minimum framework will be set. Say, for example, I want to negotiate a contract and we agree on the royalty payments. The terms for example, you need to know that your contract must have an exit clause if there is a dispute resolution. You need to know that a typical

contract must have a dispute resolution. So, it's just to give those frames.

So, it's minimum set standards but we will not sit with contracting parties and dictate the terms. It's just minimum standards.

MS. QUIGLEY: Okay, I have one other question though. There is automatic revocation at 25 years, correct? So, no matter what the parties decide to do, it's going to be revoked at 25 years? Is that correct?

DR. MASOTJA: The 25 years reversion, how it comes about so maybe to look at it separately from usual contract. The 25 years was informed by a similar model that is in the U.S. under the revisionary clause of 35, which in your case is 35 years.

In the South African context we did a copyright review, a study with a commission, and it did recommend that because of the abuses and the contractual bargaining challenges, the study recommended that we need to consider that we do a reversionary clause in the amendment legislation

because historically, with the bargaining imbalances, our authors and our creators used to sign, assign their rights without proper fair processes in contracting.

So, what will happen, they will assign and then the rights will not, they will not have an opportunity to exploit the economic benefits. So, sometimes those contracts were unfair and so and abusive in their exploitative.

So, the reversionary clause is meant to address that challenge. It was based on a benchmark and a best practice and recommendations from a review of a commission.

So, we are of the view that it is not in contravention of any international laws and also, we have a comfort that is also a model that is pursued in the U.S. So, we think that it's a balanced approach.

AMBASSADOR CARIM: Can I just supplement that.

I think also the way to look at it is you have the 25 years possibility for reversion.

You could also extend it. So, there could be a renegotiation and if the terms are acceptable to both parties, they could continue with the arrangement. But it allows for, it provides in that process a moment for reviewing that particular contract.

MS. QUIGLEY: Okay, I had two follow ups to that. The first, the U.S. model, the author has to request the termination. It doesn't happen automatically.

Did you think about putting that feature in the law; and, why did you choose to make it an automatic termination that all contracts would do that?

DR. MASOTJA: This was based on the recommendations from our best practice research. It was a benchmark looking at what will fit our context as a country, and where we are in our own context.

So, this is a process where there could be negotiations as ambassador has just alluded. There could be negotiations, parties can agree to

continue or set the terms of the new contract. But it was not an arbitrary recommendation. It was based on a thoroughly researched process.

So, we think that in the South African context, this was an approach that fits our context.

AMBASSADOR CARIM: Can I also just add to that. It was not the department's decision. So, it's not us as the department making those calls.

This was the product of a discussion in Parliament on the various options. On time lines, on how you deal with it after 25 years. So, I think it, it was the product of the outcome, it was the product of the discussions in Parliament on the various options on that.

So, it's not too far from the U.S. I take note of the point that you've made that in your case, the author has to request it. But that is, I wouldn't consider that to be a fundamental issue because the authors could again, renegotiate a deal, they could continue the same deal if they're

comfortable with it. But it gives them some leverage to negotiate if they want to.

MS. QUIGLEY: One last quick follow up.

So, sometimes there's multiple parties involved in these agreements. What happens at 25 years when a party can't be found? What recourse would the parties to the contract who are there have if they can't find someone?

DR. MASOTJA: On that one, I think we will revert to you when we do a submission. But we are mindful of the fact that we will be having a, if this process is undertaken further or the President makes a decision that is in favor of the bill, there will be the process of the regulations that will outline the specifics of how the parameters will be undertaken.

And, in instances of practical application of where parties are involved and where to find them, that's a process that will be outlined. But that is subject to the considerations that we have already outlined in terms of the process.

But we are in position to come back with a written submission to supplement what we just said now.

AMBASSADOR CARIM: Can I just add again to that.

I think there, where there are ambiguities and more clarity is needed and it's not necessarily on this point, it could be on a number of different points in the legislation, it's very important that the Committee also takes into account that to implement the legislation, you have to develop subordinate supporting legislation. You have to develop regulations to effectively implement the new legislation.

So, irrespective of what the President's decision is now, at some point when the legislation is, has reached, has been, the President is satisfied that the legislation has met constitutional muster, this would have to be part of an ongoing process of developing, of implementing the, or preparing to implement and operationalize the legislation.

That's also subject to another public process, public participation process. Which means that all interested parties would have an opportunity to say, well look, on this or that aspect, there is some clarity, more clarity that's needed, and I think you've pointed out now some point where maybe that would be one of the points that would need to be taken into account.

That would be, that could be clarified. Many of the, many of those types of questions could be clarified in this further process of, of legislative development.

I think it's quite an important point that the Subcommittee takes into account that the process of updating South Africa's copyright law is as I said, unfinished business. It's an ongoing process.

MS. QUIGLEY: Would you please explain to us what the relationship is in your law between regulations and the law itself? What type of force do the regulations have within the law?

AMBASSADOR CARIM: The regulations are

to implement the law, and sometimes the law is drafted at a level of generality that requires more specificity and guidance for the implementing, in order to implement it effectively.

So, the regulations can't overturn, they can't go against the terms of the law. But they can certainly interpret it and clarify ambiguities that may, may become evident in that process.

And, as I said, it's an open participatory process, so any interested party could raise a question to say that they would like to see more clarity and precision on one or another aspect of the law, and that would have to be taken into account in the process of developing the regulations.

So, regulations as everywhere else, is to support the law, it's to help to implement the law. But it is subordinate legislation in that respect.

CHAIR BUFFO: Thank you. In the interest of time, we may send you some follow up

questions in writing as we had mentioned earlier.

I'd like to thank you Ambassador, and distinguished representatives from the government of South Africa, for your testimony and for coming to be here with us today.

We'd like to call up the second panel and invite you to please take a seat in the audience. Thank you. Welcome. So, given that there are several panels, we'll actually ask you each to introduce yourselves and give all of your testimony, and then we'll turn to questions for the panel.

So, starting with IIPA. Thank you.

MR. ROSENBAUM: Great, thank you very much. Excuse me.

My name is Kevin Rosenbaum, with the International Intellectual Property Alliance. I'm very pleased to be here. Thank you for the opportunity to present our views in this review of South Africa's country eligibility under the GSP.

IIPA is a private sector coalition formed in 1984 of the leading trade associations

representing U.S. copyright based industries.

The core copyright industries combined, according to a December 2018 study, contribute over $1.3 trillion to the U.S. economy and provide almost 6 million jobs and nearly 7% of GDP.

Foreign sales and exports totaled over $191 billion in 2017, significantly exceeding foreign sales of other major U.S. industries.

As a recipient of substantial benefits under the GSP program, South Africa must meet certain criteria under U.S. law, including to provide adequate and effective protection of intellectual property rights, and equitable and reasonable access to its markets.

South Africa has failed to meet these minimum standards and two pending bills would make the situation worse. South Africa's current law does not provide the basic protections needed to protect copyrighted materials, and the authors and producers of those materials in the digital environment.

These protections enable digital trade and copyrighted materials underpinning many products and services, including streaming services, that empower consumers to enjoy desired content on a variety of platforms at a time of their choosing.

These legal deficiencies, as well as weak enforcement in the country, have contributed to growing online piracy posing an existential threat to the livelihoods of creators and artists in South Africa, and to investment in future production and distribution of new and existing content undermining the entire economy.

Legal reform is needed for South Africa to make progress towards meeting the GSP criteria. Unfortunately, South Africa's legal reform efforts were diverted from its stated intentions of protecting the livelihood of South African creators.

In the race to enact these bills, South Africa undervalued the voices of producers and artists resulting in legislation that degrades,

rather than safeguards, the right of creators. This is why the introduction of these two fatally flawed bills has drawn outcry and strong opposition from domestic creators and rights holders.

Many stakeholders in this process focus narrowly on their push to export fair use, a defense to infringement. But this looks at copyright through the wrong lens, especially in a country where creators, including indigenous creators and authors, are struggling to earn a living.

Their narrow focus on fair use is misplaced in this proceeding for a number of reasons. As an initial matter, exporting fair use or any other specific exception to copyright protection has never been part of U.S. trade policy. And for good reason.

Requiring specific exceptions in foreign markets in many cases would risk undermining adequate and effective protection, and ensuring adequate and effective protection of intellectual property rights has been at the core of U.S. trade policy ever since the focus brought

into non-tariff barriers.

This bedrock principle enshrined into the GSP criteria in 1984 has been affirmed by Congresses and administrations of both parties ever since.

The problem for U.S. rights holders in foreign market has historically been, and remains, the lack of adequate and effective protection of copyright, not the opposite.

This is especially true in South Africa where the U.S. creative industries are struggling to gain a foothold in the face of rampant piracy.

What these fair use advocates are proposing would be a radical departure from decades of bipartisan U.S. trade policy.

These stakeholders are in effect asking this Subcommittee to turn a blind eye as South Africa with an already weak copyright regime veers further off course from providing adequate and effective protection.

Doing so would fly in the face of well-established principles and U.S. law that have

underpinned economic and cultural growth in this country, contributed to the growth of our trading partners, and been championed by presidents and Congresses across the political spectrum.

Second, it is inaccurate to suggest that South Africa is attempting to import the same fair use doctrine that exists in the U.S.

South Africa's proposal is much broader. It would create a hybrid system that includes a fair use provision with broader language to be interpreted case by case, by courts that do not have the years of experience of U.S. courts, plus the concept of fair dealing, plus numerous broadly written and ill-defined exceptions.

This combination of over broad exceptions is clearly inconsistent with South Africa's international obligations and would, if enacted, create uncertainty and stifle investment by the creative industries in South Africa.

Finally, IIPA's concerns with the bills are much broader and more fundamental than the proposed fair use exception. The two bills suffer

from systemic failings that are not amenable to discrete fixes, and fall far short of reforms needed to bring the country's legal framework into compliance with international agreements, including TRIPS and the WIPO internet treaties.

If enacted, the bills will stagnate South Africa's cultural community and erect barriers that would further deny the U.S. creative industries equitable and reasonable access to the South African marketplace.

The bottom line is South Africa needs a fundamental reset of its copyright reform process to avoid taking a step backward in meeting the GSP criteria.

Thank you and I look forward to your questions.

MS. QUIGLEY: So, you talked about rampant piracy that the creative industry is facing. The South African government mentioned several mechanisms to enforce intellectual property and combat piracy.

Can you discuss, do you have specific

issues with those remedies in South Africa?

MR. ROSENBAUM: Yes, thank you very much.

You know, our experience in the country has been that, you know, piracy on the ground is not improving. And, there are issues with their legal remedies, particularly the lack of statutory damages, which is an important remedy, you know, to ensure rights holders are compensated and to ensure some deterrence for, for infringers.

So, that is kind of our concern. You know, I'm happy, I know they mentioned some specific laws and I'm happy to get, to give you more information on those details as far as shortcomings with their counterfeiting law and things like that.

But the bottom line is our experience in South Africa is piracy is continuing to grow, and these bills would make the problem worse in terms of a lack of adequate criminal penalties for online infringement.

MS. QUIGLEY: My first GSP hearing here and I messed up the order.

(Laughter.)

MS. QUIGLEY: I started questions right away.

MR. ROSENBAUM: I was ready though, but yes.

(Laughter.)

MS. QUIGLEY: I apologize. We're going to go ahead and move on to the rest of testimony first.

MR. YORK: Good morning members of the GSP Subcommittee, my fellow panelists, and those attending here in the room.

My name is George York, and the Recording Industry Association of America welcomes this opportunity to testify at this morning's hearing.

At the outset, it is important to confirm our strong support for the underlying objectives of the government of South Africa's copyright reform agenda. Those objectives were to align South Africa's copyright system with international standards, and to ensure that

creators thrive and that creativity flourishes in that country. These laudable goals have not been realized, however.

Following a process that lacked meaningful and inclusive stakeholder engagement, the legislative product that emerged falls short in critical aspects with respect to coherence and precision.

Instead of achieving international standards, creators face unintended negative consequences. We are here today because South Africa does not satisfy the criteria requiring a GSP beneficiary country to provide adequate and effective protection for copyright protected works and sound recordings.

When assessing the adequacy and effectiveness of the copyright system of South Africa, it is critical to evaluate both the affirmative copyright protections in that system, and the nature and scope of any copyright exceptions.

While some stakeholders ask the GSP

Subcommittee to focus the analysis on proposed copyright exceptions, we respectfully submit that this adequacy and effectiveness analysis proceed from the starting point of where, whether the South African system provides a strong foundation for copyright protection and enforcement.

Any evaluation of proposed copyright exceptions should occur in that context and not in isolation.

Turning to affirmative protections in South Africa, several fundamental protections are either absent or incomplete.

The Copyright Amendment Bill and Performers' Protection Amendment Bill both do not remedy the underlying concerns with the existing system, but would also introduce additional concerns that would further undermine copyright protection. For example, South Africa does not provide adequate protection for technological protection measures.

Likewise, the draft laws do not sufficiently provide basic protection of the

exclusive right of performers. Depriving performers and other creators of these protections harms those this legislation was intended to assist, and likewise falls short of international standards.

Further diminishing copyright protection in South Africa are the numerous contractual limitations contained in the two draft laws.

The proposed limitation on the term of assignment exemplifies the detrimental effect of copyright protection, as well as the unintended negative impact on creators.

Under this provision, vast catalogues of recorded music will fail -- fall out of circulation because it simply will not be possible to move forward with its use without infringing one or more parties' rights, which will in practice, cut the period that sound records can generate revenue for producers and performers in half from 50 to 25 years.

In this context, when copyright

protection and enforcement are already deficient, the proposed copyright exceptions in the draft bills are all the more concerning.

The proposed exceptions are both open-ended and overlapping and would introduce an unclear and untested compound copyright exception to the truncated list of rights that do exist.

These exceptions, which threaten inconsistency with international standards, including South Africa's own obligation under the WTO TRIPS agreement, would further draw South Africa's copyright system below basic levels of adequacy and effectiveness.

Some commentators base their support of South Africa's proposed exception package on the false premise that is consistent with U.S. law. This is not the case.

Fair use, as proposed in South Africa, departs in several critical ways from fair use in the United States, which has been detailed in several sets of written comments and further discussed today.

Other exceptions render the draft legislation all the more distant from U.S. law or adequate and effective, or other adequate and effective copyright systems. For example, the far reaching private copying exception, which is not accompanied by a remuneration system, and which is contrary to international practices, risks further undermining existing licensing norms for creators.

Ultimately, a copyright framework that is missing fundamental minimum standards of protection when combined with over broad copyright exceptions that go beyond international norms, is neither adequate nor effective.

We respectfully ask the U.S. government to work with the government of South Africa to address these systemic concerns with its copyright framework, which we do not believe will be resolved through amendment or regulation.

Thank you very much again for this opportunity to provide comments. I look forward to your questions.

Thank you.

MR. FLYNN: Good morning, my name is Sean Flynn. I'm from American University and our Program on Information Justice and Intellectual Property.

So, listening to the testimony so far and reading the record, if I were to state, you know, the single largest flaw in the complaint, it's a failure to state a rule upon which the relief can be granted.

So, the rule is not that South Africa has to have exactly the fair use clause to the United States, that's not what the statute says. The statute says that they must provide protection of intellectual property.

And, frankly you can look at their corpus of laws and find that every different species of intellectual property is protected in South Africa.

They have trademark rights, they have patent rights, they have copyrights. They do actually have, as Andrew Rens explains, protection already for the circumvention of TPMs. The bill

proposes to add more, not take away, but they already have TPM exceptions.

And, so the inquiry should really stop there. This is a GSP proceeding, this isn't an FTA negotiation, it's not even Special 301.

The general policy prescriptions that certain U.S. stakeholders don't like the Copyright Act is not enough for you to act in this situation.

So, in my written statement I provide some more detail to some of these legal comments and I give you footnotes to the sources. But let me review some of the applicable law here.

So, United States statutes must be interpreted to comply with United States international treaty commitments. And, the most relevant treaty commitment here, the one that is not mentioned in any of the complaints before you, is the World Trade Organization GSP Enabling Clause.

So, the GSP Enabling Clause requires three main criteria of GSP criteria. The first is that they be non-reciprocal. This is not an

opportunity to try to exact concessions for U.S. interests. This is supposed to be a development program.

The second is that the criteria themselves must be generalized. And, this is probably the toughest one for you and, for the complainants to win in this matter. Whatever you apply here, you must apply to all other GSP recipient countries.

So, if you are to rule that a country cannot have fair use, then no GSP country can have fair use. And, you must explain why that is so.

And, finally the GSP criteria must be designed to respond positively to the development and financial and trade needs of developing countries, not of the United States.

And, the WTO appellate body has actually ruled on that and has said the way to figure out if a developing criteria is truly in the interests of the country is that it must be reflected in a general multilateral statute, not merely in the preferences of the USTR or its

stakeholders itself.

Those are the criteria with which you must use to interpret this statute.

So, in articulating that sub-rule, which the complainants have not given you, you need to have a rule that points out what is different from South Africa from the United States, and what is different from South Africa from other fair use countries, and what is different from South Africa from other GSP criteria -- GSP countries, recipients, that is itself, generalized.

So, it's not subjective, it needs to be objective, non-reciprocal and it's based on the development needs of South Africa, not on the trade needs of the United States.

So, looking to the different complaints in the IIPA and other complaints, none of these articulate that standard.

So, the first complaint is that well, South Africa doesn't have 200 years of case law backing up its fair use clause. But neither, of course, do any of the other countries.

There have been 10 or so countries that have adopted fair use in the last 20 years. Korea, Israel, Philippines. Some of them GSP recipients and some of them not.

And, none of those countries of course, had 200 years of case law before they adopted it. It can't be the rule that you can only have fair use if you already had fair use. But actually, South Africa probably would comply with even that criteria.

So, its original Copyright Act was passed in 1919 or so, and it had a fair dealing clause and its case law has interpreted fair dealing to apply the same four-factor test that fair use applies.

It's already been essentially applying fair use so it's not true that they don't have case law, or their courts can't do it because they already have been doing it.

Lack of remedy. So, it's not true, I don't think that the complainants have read or have much knowledge of South Africa law, but if you look

at the Andrew Rens submission, you will find that there are already criminal penalties for TPMs, there are already damages, there are already statutory damages.

There are already criminal penalties, there are already injunctions. There are already provisions that automatically assess attorney costs to the person who loses the case. And, there is even an authority for private parties to bring criminal prosecutions. It's simply just not true that South Africa lacks remedies.

Hybrid exception. So, this is probably the dumbest complaint I've ever heard. So, first of all, it's not true that South Africa has both fair use and fair dealing. You need to read the statute. They actually took out fair dealing and replaced it with fair use.

They do have fair use and specific exceptions, as does the United States, as does every country in the world that has either fair use or fair dealing. Every country that adopts a general exception also has specific exceptions.

Broad exceptions. Lots of countries have broad exceptions. In fact, we submitted a report, you know, in a separate cover in this proceeding that looked at the educational exception, which is perhaps the most controversial one, and found that over 70% of countries in Africa and Latin America have essentially the same rights to use excerpts of materials in educational purposes without compensation.

This is what's generalized. What's generalized is South Africa's exceptions themselves are representative of exceptions you'll find around the world. And again, you can't articulate a norm, a generalized norm that would distinguish South Africa from others on that, on that basis.

And, finally, ambiguity. So, of course every legislation including our own, has ambiguities. But there is a specific process which South Africa defined to cater for those ambiguities and to define them. And, it will be a public process and there will be notice and

comments and the IIPA and USTR may participate that. And, so to the extent that the problems are you seem to have vague and ambiguous requirements, you may continue to work with the South African government to address those ambiguities. So, there's a process for you which you could do that.

I'll just close with two quick points. First benefits the United States. As I said, this isn't supposed to be about benefits of the United States. This is a GSP provision. This is supposed to be about benefits to South Africa.

But the United States does benefit from countries reforming their laws to have broader including fair use-like exceptions and I have footnoted in my testimony some empirical studies that show just that.

So, I think the way forward here is for USTR and IIPA and others if it wishes, to engage in the regulatory process defining the act and its implementation from here. It would be illegal for you to remove GSP benefits based on the complaints as they've been written before you. Thank you.

MS. NOBRE: Thank you. My name is Teresa Nobre. I am the Vice-President of an association based in Brussels called Communia. We have worked on copyright reform in Europe for many years. We also are permanent observers at the WIPO SCCR where we advocate for international standards for users rights, and for the protection of the public domain.

So, we are here because actually at WIPO some of the complaints at WIPO say that these sort of issue should not be solved on an international forum, that countries have the capacity to solve and implement exceptions on a domestic level.

But it seems that when they try to do it, they face this sort of procedures so we thought that it would be important for us to participate and support, to support the claim that indeed, there is no question that the Copyright, or proposed Copyright bill complies with international standards.

So, I will focus my testimony on two issues. It will be maybe detailed. I will try to

make a comparison with what exists in Europe, so I'll focus on the proposed exceptions to copyright that have been suggested to be broad and without limits, and I will also focus a bit on the proposed exceptions to technological protection measures.

So, we believe that there are no grounds on which the USTR could conclude that these exceptions, if enacted into law, would be incompatible with international standards.

But unfortunately, the petition does not specify which international standards are at stake. But from our analysis, we can conclude that in general, the exceptions in the bill are similar or compatible with those contained in various legal instruments, namely the Berne Convention, the EU Copyright Directives, and many national laws including from European member states.

So, for example, the quotation exception in the bill is said to be incompatible with international standards because it does not list the permitted purposes. However, the quotation exception in the Berne Convention

itself, also does not specify for each purposes one can make quotations.

The same approach is followed in the Nordic countries in Europe where the quotation exception is presented as a relatively open rule of reason without the purposes being listed *a priori*.

Another example where we find that indeed, there is really no argumentation possible to say that the exception is not compatible with international standards, is with regards to the education exceptions. So, the petition says that the exception is very few limitations. So, let's look at it.

The exceptions in Section 12d has as many limitations as the educational exceptions, the prototypes, that exist in the Berne Convention, and in the EU InfoSoc Directive, which was, which is still our main copyright directive that lists the types of exceptions that member states in the European Union can have.

So, as the same limitations, one,

allows copies for educational purposes. So, as the limitation of the purpose. It only allows the word to be copied to the extent justified by the purpose. I can do as long -- as much as its allowed or justified by my purpose. That's what is said in the Berne Convention. That's what is said in the EU InfoSoc Directive.

Third, it does not permit copies for commercial purposes. NC limitation, non-commercial limitation is the fundamental limitation in the EU InfoSoc Directive for the educational exception. We don't have any other limitations in the broad and fundamental EU educational exception.

In addition, Section 12b of the proposed bill allows for certain copies to be incorporated in materials to be used in digital learning environments. But when it does so, it introduced further limitations to those that I already mentioned. And, those limitations are exactly the same limitations that we now have in the new EU Copyright Directive, the Digital Single

Market Directive that contains a mandatory educational exception.

So, we limit this new exception in terms of beneficiaries so only educational establishments can benefit from it. That same limitation is in the South Africa proposed exception, and we also include technological limitations.

So, we say that uses must take place in secured networks, accessible only by educators and learners, and that technological limitation, and that limitation in terms of who can access the works in the digital environment is also there in the South Africa bill.

So, furthermore, I think it's important to say that the exception in the South African bill is not subject to conversation but that doesn't make it incompatible with international standards. I can tell you that out of the 27 -- from tomorrow, 27 EU member states -- or today, 18 out of 27 EU member states allow educational uses under exceptions to take place without the payment of any

compensation. So, 18 out of 27 do not subject the educational exceptions to compensation.

Finally, a word about the exceptions to TPMs. When anti-circumventions laws were draft at the international level, they were expected to protect TPMs insofar as they restricted acts not authorized by the right holders or not permitted by the law. They were never intend to restrict those acts that are permitted by the law, namely under copyright exception.

So, these laws never had that, never intended to be blind to the intent of the user. So, of course if the user intends to circumvent the TPMs with the aim to infringe copyright, that's not permitted. But if the user intends to circumvent the TPM with the aim to exert its own rights under exceptions limitations, it of course, he or she can of course, circumvent there is no international standard prohibiting the circumvention of TPMs in all circumstances. In any circumstances.

So, this of course, is easy to explain because otherwise this would lead to an unfair and

costly legal environment for users and society, and that's precisely what's happening in EU. So, the EU decided to give near absolute protection to TPMs and a couple of studies commissioned by the European Parliament and the European Commission concluded that the current EU framework has a deterring effect and is a source of cost.

I can refer to a study that says that technological restrictions were characterized as the most frequently encountered difficulty by more than one-third of educators and learners in Europe, because they couldn't simply access the TPM protected work. So, for that reason, some EU member states already deviated from this rule that prevents circumvention of TPMs.

So, Poland never implemented these rules. My country, Portugal, just revoked them after a long process of hearing users and right holders, and learning that the right holders themselves didn't have any mechanisms, didn't have the means in Portugal to permit users in Portugal to access the, the TPM protected work.

So, the decision was to simply say that TPMs should not be protected if -- because of the omission of the right holder, one cannot access the work. So, circumvention is now possible in EU in at least two EU member states.

Thank you.

MR. BAND: Good morning. My name is Jonathan Band. I represent the Library Copyright Alliance. LCA consists of three major U.S. library associations. U.S. libraries support creators by purchasing more than $4 billion of copyrighted material each year. More importantly, libraries support creators by promoting literacy. You can't write until you know how to read. And, libraries support creators by preserving their works for future generations.

Libraries are part of the critical infrastructure of the creative economy. In a post-hearing brief LCA will provide detailed responses to IIPA's petitions. At this hearing, I will make just a few general points.

First, the Copyright Amendment bill is

intended to update the Apartheid-era Copyright Act of 1978. The Copyright bill seeks to address the lingering effects of Apartheid, notably the lack of bargaining power of Black artists, vis-a-vis white owned publishers. South Africa still experiences a very uneven distribution of income with many impoverished Black students. The copyright bill cannot be evaluated without considering this context.

Second, South Africa and other developing countries confront a frustrating Catch-22 with respect to copyright exceptions; Teresa referenced this. When they seek normative work at WIPO concerning exceptions, the rights holders and developed countries, including the U.S. insist that exceptions should be addressed only at the national level where country conditions can be considered.

But if a country such as South Africa then attempts to adopt exceptions that are mindful of the domestic situation, the rights holders claim that the exceptions are inconsistent with the Berne

three-step test and enlist the U.S. government to intimidate the country into abandoning the exercise.

Third, as a matter of policy, the U.S. should always support other countries' adoption of provisions based on U.S. copyright law. This is true whether the provision expands copyright or limits it. If U.S. law is not adequate and effective, what is?

Fourth, the Copyright bill's provisions that are not based on U.S. law have precedence elsewhere in the world. As you've heard from other witnesses, these amendments do not deviate from global standards.

Fifth, the bill contains many features that significantly benefit copyright owners, including the establishment of the Intellectual Property Tribunal, the prohibition on the removal of copyright management information, and the granting of additional rights of performers.

IIPA minimizes or finds fault with these provisions so as not to detract from its

narrative of the bill's inadequacy. But the bill is not inadequate. To the contrary, it strikes a balance among the interests of individual creators, corporate copyright owners, distributors and the public at large.

Sixth, many of the concerns raised by IIPA, such as those relating to the reversion of rights and royalties, have nothing to do with the adequacy or effectiveness of IP protection. Let me repeat that. Those provisions have nothing to do with the adequacy or effectiveness of IP protection. Rather, they concern the allocation of rights, more importantly, the allocation of money, among different rights holders.

These provisions should be outside the scope of this review. They really have nothing to do with adequacy and effectiveness, it's all a matter of who gets the money between the original creator and the subsequent distributor. In any event, what IIPA calls freedom of contract really means freedom to exploit individual creators.

Seventh, some of the IIPA's attacks are

based on a fundamental misunderstanding of existing South African law. For example, IIPA incorrectly states that injunctive relief is not available in South Africa. Such relief in fact, is currently available under Section 24 of the existing law. Furthermore, the new Intellectual Property Tribunal will have the power to issue injunctions. Evidently, IIPA doesn't understand that the word interdict means injunction. It's just using a different word for the same concept.

Finally, many of the concerns raised by IIPA are highly technical and we've heard this discussion about regulations where legitimate these concerns could easily be addressed by regulations. And here, this is the important point. It must be stressed that regulations, or what is termed in South Africa as secondary legislation, play a much more significant role in South African law than in U.S. law.

South African ministers generally receive broader delegations of authority than in the U.S., and that is certainly the case in the

South African Copyright law. For example, Section 39d of the existing law authorizes the minister to promote regulations quote, as to any matter which he considers necessary or expedient to prescribe in order that the purposes of this act may be achieved, close quote.

IIPA overlooks this fundamental difference between the South African law and the U.S. law and it fails to appreciate the significant role regulations or secondary legislation play in South African law. Thank you for your attention.

CHAIR BUFFO: So, thank you very much to all of our panelists. We will start with some questions. My colleague from the State Department will begin.

MR. PAJUSI: Mr. Rosenbaum, I have a question for you. The IIPA asserted in its submission that South Africa's two proposed copyright bills would violate South Africa's international obligations, including under the Berne Convention for the protection of literary and artistic works, and the WTO TRIPS Agreement.

Could you please explain in what ways you believe the bills would violate these agreements?

MR. ROSENBAUM: Thank you very much.

So, mainly it's the exceptions regime, which is unique in the world. It encompasses a fair use provision that is broader on its face than the fair use provision in U.S. law, certainly, encompassing additional purposes that are not in U.S. law.

In addition, the U.S. law exception for fair use is, arose organically from hundreds of years of case law, which continues to refine and define it today. That will not exist in South Africa when this is, or if this is enacted.

And, so without that defining case law, it's unclear and undefined what exactly the scope of the exception is. And this now sits on top of the fair dealing exceptions that were actually broadened. They remove this standard of fair practice from those exceptions. And then on top of that, there's all kinds of specific exceptions

in the law.

So, this hybrid approach is clearly inconsistent with the three-step test which is the foundation for exceptions and limitations internationally. So, that's kind of the fundamental international obligation that this law would violate.

In addition, it would not meet, and I know they're not members yet, but there are obligations under the Internet treaties in terms of, you know, protection of rights in the digital environment, and protection for technological protection measures. The law would not satisfy those requirements either.

MR. PAJUSI: Thank you very much.

MS. QUIGLEY: Okay, this one is for Mr. York. RIAA asserted in its submission that South Africa's draft laws do not sufficiently provide basic protection of exclusive rights for performers. Would you please explain how the bills fail in that regard? How the current law and then the bills.

MR. YORK: Thank you very much for the question and thanks again for this opportunity. So, I think we have very, very clear concerns with respect to the making available right and the communication to the public right. We also have concerns with respect to rights where they are in international standards provide for exclusive rights, and where that is not the case currently in South African law. Thank you.

MS. SRINIVASAKRISHNAN: This is a question for Mr. Jonathan Band. Would you please explain how the current copyright regime balances copyright needs of right holders and users?

MR. BAND: Are you suggesting the current, under the 1978 law, or the Copyright Amendment bill?

MS. SRINIVASAKRISHNAN: The current existing regime. So, the 1978 law.

MR. BAND: Well, it balances them to the extent that it has a regime of rights. It has exclusive rights and then it has exceptions. To some extent, the problem is that the state of the

exceptions reflect 1978, not 2020. And, so that's why the, on the user side having updating of the exceptions makes sense.

But at the same time, the critical point is it's very easy to sort of divide the world into sort of users and rights holders. But the world is much more complicated than that, and particularly with rights holders. And this is a critical point is that you have the original creators, and then you have sort of the distributors.

And, so the much of what the bill is trying to do is redress that inequity between the original creators and then the distributors. The record labels, the publishers, who really, you know, and maybe they create something, maybe they create nothing. They're more on the distribution side, and so that they, but you need to protect the individual rights holder. And, so that's what this bill is trying to do.

And, also the other point about fair use in particular, and exceptions is no work springs

out from someone's head, right? Everything is based on something that went before. So, really a lot of what's, what we're trying to do with exceptions, or what the exceptions in this country and in any country, it's not just between rights holders and users, it's between rights holders and other rights holders. It's between established rights holders and new rights holders.

You can't create anything unless you're able to use what came before in some fashion. And, so that's why maintaining this balance is so critical.

MS. COHEN: So, this question is for Professor Sean Flynn. In your submission, AU's program on information justice and intellectual property compared Section 12D(4)to the Berne Appendix II(6) and found the similar, found them similar nature.

So, the latter, so the Berne Appendix, seems to be a very limited exception to the right of translation that does not appear comparable to the wholesale copying of a textbook that Section

12D(4) appears to allow. Would you please explain how you would compare these two?

MR. FLYNN: Yes, sure, I'm happy to and I would like to, you know, if I could, respond to some of the other things that have gone forth. So, you know, I think it's crucial as you go forward in this process, and I'm sure you'll be meeting with different people as it goes forward, to get specific.

You know, it's not enough to say taken as a whole this clearly violates the three-step test, because it doesn't. You know, it doesn't taken a whole clearly violate the three-step test. So, what specifically about which exceptions actually violate which element of the three-step test? And, I don't see that in any of the written submissions, and I don't see them here today.

On the, you know, my good friend George York, you know, it's also not enough just to say we have concerns about the making available right and the performers' right. These bills put into effect the making available right and performers'

rights. That's what they are trying to do.

So, what are the concerns with it? It looks to me like it would implement rights that are acquired by Beijing, which they want to enter. It would implement the rights required by the WCT, which they want to enter.

This is South Africa trying to do what U.S. policy is encouraging them to do. And, at the same time, modifying and updating, and modernizing their limitations and exceptions. And the primary way they're doing that if you look at the previous Act and the current Act, is to simplify.

So, if you try to read the old Act, it is a real pain because they enact one exception, and then you constantly have to apply it to other rights as they go down. And, so now they're combining them all in one and making each exception apply for all works and all uses, et cetera. It's essentially the same exceptions that existed before but they're making them much easier to read, which will help, not harm, the interpretation of the Act into the future.

So, on the, so I think the most interesting, challenging and progressive right within the South African Act is the proviso in the education provision that says essentially, mainly you can only use excerpts for educational uses, but you may make copies of entire textbooks, so it's a right that only applies to textbooks. If that textbook is not available in the market in South Africa, or is not available on the market on reasonable terms and conditions, reasonable prices if they're excessively priced.

Now, why is that there? That's there because as I stated in my written testimony, South Africa's the most unequal country in the world. And that affects the operations of monopolies in a market.

So, if you have a monopoly in a market with extreme income inequality, then you will earn more money by pricing to the very top segment of that market than you will do at pricing at a price which everyone can afford.

Now, we know this through the history

of AIDS medications in South Africa with which USTR has been intimately involved in, right? Why was it that AIDS drugs were charged in South Africa at three times the GDP per capita in the 1990s, and what was needed to resolve that?

Today, the problem is some textbooks, not all textbooks. Textbooks bought by the government generally are not excessively priced but there are a small number of textbooks usually for niche courses. Niche engineering and science courses in which the prices are as high or higher than they are in the U.S. and other developed countries. We have experiences with textbooks that are charged that are three times as high as students get for their entire annual book purchasing from the government, their bursaries.

So, what the law says is that in those situations either where the book is not there at all, or where the book is excessively priced and relative to other goods that then and only then may a student make a copy. So, it looks to me like that's an individual copy, for a study use. It's

essentially an expansion of the private use doctrine.

Now, why do I reference Berne? The Berne Appendix is not authorizing exactly that but it's one example where, where pricing concerns come in to the international corpus.

There are other examples of laws including in the United States where pricing concerns come into the interpretation of limitations and exceptions. I think South Africa is extending that in perhaps an aggressive direction, essentially having a kind of patent working requirement for copyrights.

But I think it's lawful, I think it passes the three-step test. I think it's actually very narrow in constraint, but most importantly, it is expressly and specifically responding to an acute problem in South Africa's specific market in which for certain goods, the operation of monopoly causes gross social harms. It causes exclusion from access to basic knowledge that students need within their education.

CHAIR BUFFO: I'd like to ask a follow up question actually for Mr. York. Could you respond to Mr. Flynn's claim that the exceptions are the same exceptions that were there before?

MR. YORK: I think I would respond briefly by first welcoming of course, always this opportunity to spend quality time with Professor Flynn, and moreover, to say that I think that that's inaccurate.

We've heard the testimony on the previous panel from the South Africa delegation who I, whose opinion on their legislation I would probably defer in terms of their intent to say that their system is a hybrid between fair use and fair dealing, and that they endeavored through a series of studies to add in a U.S. style fair use system, which would be new to South Africa. That's the testimony I heard from the representatives of the South African government.

So, I would not agree with the assessment of Professor Flynn, however, would love to have a longer conversation about the case law

that he describes. I'm sure that we would be able to find some distinctions between that case law and that that we have here in the U.S.

Moreover, we are playing, unfortunately here we have a bit of some precision around certain issues, particularly exceptions, and then, you know, and then we have a longer discussion with less precision about some rights and how the analysis should be preceded in totality.

And, so I think we just need to return as I think the GSP Subcommittee will do, to an examination of the, of its law in the entirety. And while best efforts were made and as we stated in the beginning of our testimony, we share the underlying intent and the underlying goals of this legislation, unfortunately those were not met. But where one endeavors to achieve a goal but does not attain those goals, unfortunately, that means that the goal was not attained.

And in this case, in several instances to both bring the level of South African law up to

a basic standard, basic international standard, and while yes, some Norwegian countries may have some very discrete exceptions, which may in some general respects may be similar to but also different from very discrete exceptions in South Africa, we can't ignore the remainder of the law of Norway or Finland, or the other countries that have been identified, to show where they have strong levels of affirmative protections, right?

So, again here we would urge a totalistic view of the law at hand in South Africa. Both in terms of existing law, which we believe there is copious evidence to suggest is not adequate and effective, as well as the bills which again, we share their original goals but unfortunately, they were not achieved.

Thank you.

MS. COHEN: My question is for Teresa Nobre. In your submission you noted the provisions on contract adjustment and revocation rights. In your view do parties to a contract have any predictability or certainty if any agreement

that they reach may be overridden by government intervention or revocation?

MS. NOBRE: Thank you. I think, well, I can say something about that, but in the interest of time, I know that other submissions will focus and other hearing testimonies will focus on these issues so probably I don't need to, to deal with it.

But I think it's important to understand because in Europe, we have this type of provisions. They are quite recent. We have it in the new digital single market directive, some provisions and also in other directives.

And the main important issue here is that to understand that these provisions serve to balance the position of the parties when negotiating contracts. And, to rectify situations where that position, where the parties in this case the creators themselves have no power to negotiate better conditions.

So, of course I understand that the U.S. system is a bit different in terms of how it

perceives contractual relationships and private relationships, but in the case of Europe, it was after much, many discussions and assessing that indeed, the parties did not have the same power and it was important to intervene by law to, to rebalance basically their rights.

It doesn't mean many of the things that were said here but again, I know that there's at least one testimony that will focus on all of that so I'll, I'll leave it to that and I can also in my comments, written comments, after this hearing reply further into the question.

Thank you.

CHAIR BUFFO: So, I will ask a final question for IIPA. You mention in your written comments that taken together, the fair use and fair dealings aspect of the proposed legislation is too broad. Do you envision a way to narrow those aspects in a way that you think could still provide for adequate and effective protection of intellectual property rights, and also advance the goals of the reforms?

MR. ROSENBAUM: I guess the short answer to that if when you ask a way, you know, if something that could be tinkered with in the current legislation, the short answer to that is no. I think these bills need to go back and completely, you know, from the bottom up, be looked at and this time I know this morning they talked about there were experts that they worked with in crafting this legislation.

I think it's pretty clear those experts were simply on one side of, you know, one point of view, which I don't think is the mainstream point of view on copyright certainly in this country. So, I think it's important to go back and listen to the views of the full range of stakeholders in crafting this, including local creators, local artists, who as I mentioned when this bill was introduced, you know, were, were, you know, there were protests.

And, so, you know, the answer again is no, I don't think that this hybrid collection of exceptions, you know, can be fixed. I think it

needs to be completely reworked.

CHAIR BUFFO: In the interests of time, thank you all very much for your testimony and I'd like to invite the next panel to come forward. Thank you again. Thank you very much.

We understand that the first panelist is ill and not able to attend. So, with that, we will actually turn to Mr. Peter Jaszi for your testimony. Please begin. Thank you very much and welcome, panelists.

MR. JASZI: I'll start again, my name is Peter Jaszi, and I'm an emeritus faculty member at American University Law School.

For the last 20 years or so, most of my writing and research, and outreach work has been concerned with the fair use doctrine. And, I've been following the copyright reform process in South Africa with interest since as we've heard some, in fact many of the criticisms leveled at the Copyright Reform bill relate, or the Copyright Amendment Bill, I should say more accurately, the CAB, relate to its introduction in Article 13 of

U.S. style fair use.

I'm grateful to USTR for allowing me this opportunity to be heard concerning it and I want to apologize in advance. Having rescheduled once my travel, I have an absolutely hard stop at 12:20, so when I get up and go it will not be because for anything you said but simply because I have a plane to catch.

So, let me start here. To underline a point that Jonathan Band made in the last panel, which is that all new creativity, all new innovation depends on what has gone before. So, today's creators need access to the legacy of culture, technology, and the other subject matter that copyright protects. So, balanced, open copyright exceptions like fair use do in fact, promote the interests of creators. Small creators, and also big creators.

And we know that because no entities in the United States are more frequently to be seen in court asserting their fair use rights than movie companies, recording companies, and publishing

companies, all of whom rely regularly and confidently on fair use.

So, it seems anomalous that the flourishing creative industries of a country where fair use is a venerable, embedded part of the legal landscape should object so strongly to another nation's attempt to promote domestic cultural innovation by following our own doctrinal lead.

And, I want in my remarks to try to explore that anomaly by giving what credence I can to the objections that have been raised, of which I think the most superficially plausible per the IIPA petition is that without the foundation of a well-developed body of case law, South Africa's importation of U.S. fair use doctrine can only result in uncertainty.

So, a bit of background. In the U.S. fair use dates back as you know to the mid-19th century. It was codified in general terms in Section 107 of the 1976 Copyright Act.

The doctrine has been well served over its long history by our federal judiciary, which

thanks to its grounding in the common law, is broadly competent in interpretive jurisprudence, including the kind of interpretive jurisprudence that's required in order to make the general legislation that we're talking about real.

Now happily, all the same conditions apply in South Africa. A well established, well trained judiciary with a common law background, a high functioning supreme court. I could go on but it's hardly necessary.

Another point of correspondence seems interesting to me as well. The recent development of fair use doctrine in the United States has been guided, even shaped by the perception that fair use is important to protect, even to implement rights of freedom of expression guaranteed in our First Amendment. And again I think happily, the protection of speech rights is also an essential feature of the post-Apartheid Constitution of South Africa.

Today, and I can say this having been at the work a long time, fair use is more robust,

more rational, and especially more predictable than at any time in my long career following it in U.S. law. The now settled approach to applying fair use is also highly consistent throughout the federal judicial system.

Courts agree that critical to any consideration of the statutory fair use factors in Section 107 are some core underlying questions whether the use under consideration is a transformative one, whether the amount of material used is appropriate to that transformative purpose, and of course whether the effect of the use is substitutional or non-substitution. Those are considerations that run throughout the fair use jurisprudence of the U.S. for the last 25 years.

Now turning to the CAB, I begin by noting that the language in which it expresses the concept of fair use was designed with some precision to capture the interpretive framework that U.S. law has evolved over decades.

The exemplary non-exhaustive list of potentially eligible use categories in the

proposed new Section 12a encompasses many of the major areas in which U.S. courts have upheld the fair use right, including uses for public administration.

Likewise, the four factors recited in new Section 12b are functionally identical, if not semantically, I should functionally equivalent if not semantically identical, in all respects to those found in Section 107 of the Copyright Act here as it has been interpreted.

Only the addition of Section 12c, which imposes a duty of attribution on fair users is a novelty in comparative law terms, and it's actually a novelty that constrains rather than expands the exercise of fair use in South Africa.

As has been pointed out under the strict logic of IIPA's argument about the potential for uncertainty and the implementation of fair use in South Africa, no country could ever introduce fair use for the first time. And that is not only an absurd result, but it defies the evidence of recent experience in which a number of our trading

partners have done exactly that.

Now, in fact, any uncertainty risk contained in the articulation of fair use in the CAB is offset by the legislative choice in South Africa to invoke specifically, the concept of transformative purpose that's in Section 12b(3)(a)(a), and to specify clearly the relevance of substitution effects in connection with market harm in Section 12b(4).

These are to repeat, legislative clarifications of fair use which build directly on the last 25 years or more of U.S. case law.

These provisions would in fact, give South African jurists a significant head start in applying the doctrine in a balanced and predictable fashion, just as we have managed to do in the United States. They would also have available to them as analogous authority, the same and I quote, nearly two centuries of U.S. case law which the IIPA petitions specifically commends.

Indeed, this practice of relying on analogous authority to introduce the new concept

of fair use into domestic law is exactly the one that has been followed in other countries which have recently adhered to this approach to copyright exceptions and limitations, like Israel and Korea.

Still further clarification and enhanced predictability might be afforded as needed by way of the provisions that you've already heard about, Section 39d of the Copyright Act, which allows the Ministry of Trade and Industry to issue regulations as to any matter necessary or expedient to prescribe the -- to assure that the purposes of the legislation be fulfilled. There may also be a place for in South Africa for the kind of community based practices, or best practices in fair use which have enjoyed some success here in the United States.

I'm nearly done but I want to mention a further related critique of the CAB, which is that the high cost of copyright litigation in South Africa will make it difficult for small rights holders to challenge frivolous assertions of fair use. In fact, where issues of access to justice

for individual creators are concerned, the system envisioned in the CAB is a definite step up from the status quo both there and for that matter, in the United States.

That's thanks to the Copyright Tribunal envisaged in Section 31 of the legislation, which is specifically designed to make it easier for small plaintiffs to pursue their claims effectively and efficiently.

There's also this argument that we've heard about a little bit before that somehow the absence of statutory damages from South African law would mean that the development of fair use in that country wouldn't be constrained in the same that it has been in the United States.

That's a hard argument for me to follow but it is also factually flawed. True, South African law doesn't have statutory damages per se, but as the submission of Andrew Rens indicates, it does have a provision which the U.S. lacks for punitive additional damages in copyright cases. And in addition, South Africa of course follows the

English rule with respect to the award of costs and fees, which would further discourage reckless or time wasting assertions of fair use.

In light of prior comments, there may be no need for me to dwell on another stated criticism, that the CAB combines fair use on the one hand with an array of specific exceptions for particular classes of users, except to point out again to emphasize as emphatically as I can, that such hybrids are entirely typical of countries that have on the one hand, open norms for copyright exceptions like fair use from fair dealing, and on the hand, provide specific exceptions.

Hybrids are almost universal even though the details of each hybrid are different because of course, as is true of this aspect and other aspects of the South African legislation, it is designed to respond to local needs. And I'll stop there and look forward to your questions.

CHAIR BUFFO: Thank you and just to clarify, we did go a little bit out of order and particularly since Mr. Jaszi has to catch an

airplane.

MR. JASZI: Thank you.

CHAIR BUFFO: So, we will now turn back to Ms. Teresa Hackett.

MS. HACKETT: Thank you very much, ladies and gentlemen, Madam Chair. So, my name is Teresa Hackett. I represent Electronic Information for Libraries, an international non-profit organization that works with libraries in more than 50 developing and transition economy countries around the world in Africa, Asia, Europe and Latin America, to support and enable access to knowledge.

And, I manage a program on copyright and libraries supporting libraries in our partner countries that are undergoing reforms and updates of a copyright law, and we also have observer status at WIPO advocating for international standards. So I'd like to thank you very much for the opportunity to testify here to you today, and I will talk about the Copyright Amendment Bill. I make three general points.

First, in the petition from the IIPA it says that the bill will move South Africa further away from international norms. But in fact, reviewing the provisions in the bill, it embraces new developments and global best practices, especially relating to the digital environment. And, I'll give one specific example and that's the contract override provision.

So, Section 39b of the bill safeguards exceptions from override by terms in licenses from digital materials. So in other words, it protects the exception regardless of the format of the material. And, IIPA in their submission characterize this and call it a severe intrusion into contractual freedom. But contract override, the concept of contract override, is already well established in other jurisdictions.

And, it has been part of European law since 1996, the Database Directive. Subsequently, it has come up in three other directives including most recently, the Digital Single Market Directive, adopted by member states

in 2019. Also, Australia and Singapore have recently decided as a matter of public policy to include contract override in their own national copyright law reforms.

And in fact, the language in the South Africa bill mirrors that of the UK copyright Act in amendments adopted in 2014. So, we would say that instead of moving away from international standards with regards to these uses, South Africa is in fact, adopting them.

Second, the IIPA petition asserts that the scope of the exceptions violates South Africa's international obligations. But in fact, the exceptions are carefully crafted as has been mentioned by some of the other witnesses.

Each provision is subject to a clear condition. For example, a proportionality test, an effect on the market test, or is for a strictly non-commercial use. The fair use provision is modeled on U.S. copyright law and the disability provision is modeled on the Marrakesh Treaty.

Now, of course we understand that when

a law undergoes a major overhaul after 42 years, there are going to be many changes, especially reflecting the technological developments. But the exceptions in the South African bill to enable modern activities like format shifting and digitization by libraries, are long overdue.

My third point is that the, I think it's important to take into consideration the context and the background to the enabling of exceptions in copyright law. So, the international copyright system recognizes the importance of exceptions to improve the welfare of society as a whole. And, copyright treaties expressly permit nations to tailor exceptions for their own national situations and circumstances.

And, in South Africa, the national situation is that more than half the population, that's more than 30 million people, live on less than $5.00 a day. And as a legacy of Apartheid, it is according to the World Bank the most economically unequal country in the world.

So, the government is legitimately

availing of the policy space available under international copyright system to address these acute development priorities.

And, the provisions will help to alleviate the chronic shortage of learning materials, promote the preservation of South Africa's rich cultural heritage that will encourage further creativity and innovation, and support the development of a knowledge based economy, which is one of the long-term development objectives of the South African government in the National Development Plan.

So, to conclude my brief remarks, my organization urges the USTR to support South Africa in enhancing access to and use of copyright protected works in a regulated framework for the advancement of education and research, welfare and development. And, this will help to drive economic growth, which is a core objective of the GSP program.

So, with those brief remarks I'd like to thank you for the opportunity to testify. I'll

be glad to take any questions and to follow up with further post-hearing comments. Thank you so much.

MS. KILIC: Thank you. It's hard to go after two copyright groups here so I will be the digital rights advocate on the panel. My name is Burcu Kilic, and I work for Public Citizen, and I direct the digital rights program there. And, this is a very modest stakeholder panel so I am the digital rights advocate.

Public Citizen is a non-profit consumer advocacy organization with 500,000 members and supporters. And we work with partners across the U.S. and around the world to promote access to knowledge, privacy and free expression through truth in policy and law.

Our submission draws on our experience providing technical assistance to public agencies, particularly in developing countries, on copyright and other intellectual property issues. I'm very familiar with the trade policy, U.S. trade policy, and I come here every year like in February and testify for Special 301s.

And, this is my first time testifying for the GSP because we have not been very involved with the GSP process. But it's interesting, you know, when we received the Federal Register notice. We were very, very confused. We were like, what's happening? Why are we here? Because the unusual aspect of the discussion is U.S. right holders is lobbying USTR to pressure a foreign government not to adopt a critical part of U.S. copyright law.

I'm a European trained lawyer. I studied in London, and I did my PhD in intellectual property. And I have to say in Europe, we are not a big fan of U.S. IP law, of intellectual property laws.

But like, one thing we admire that's the fair use. You know, the fair use is the shining part of the U.S. IP rules.

I wrote my PhD on patents and I like, I've been very critical of the patents and with the requirements in U.S. law. But, you know, when it comes to copyright and fair use, we all admire. And this is the case all around the world.

Like, you know, people look at the U.S. and people look at the U.S. copyright law and they admire like, how you guys managed to thanks to professors like Peter Jaszi, and everyone who worked really hard like, at the U.S. courts, how you guys managed to balance the copyright and the exceptions.

So, coming back to the issue. I mean, one might expect that an effort by a foreign government to adopt rather the single most important aspect of U.S. copyright law would be met with praise. Not so.

Let's face it. Let's call the elephant in the room. U.S. right holders have a problem with fair use. And this is not the first time and it will not be the last time for U.S. right holders to criticize a foreign government for adopting a U.S. style exceptions, fair use style exceptions.

Back in 2008, Israel, some of the panelists mentioned Israel. Israel introduced a U.S. style fair use in its copyright legislation, and I'm very familiar with those discussions

because I was writing my PhD about Israeli innovation system. So, I've been to Israel couple of times and people were like discussing the corporate reform in Israel.

At that time, IIPA expressed its concerns that by means of this regulations, potentially opens the door for even broader exceptions to be introduced in Israel. It sounds familiar, right?

And, Israel government point out that even the U.S. own definition of fair use will not match what IIPA are asking Israel to implement. And I'm going to read to you their submission is very short.

The Berne three-step test and Berne Article 9.2 and reaffirm at Article 9 of TRIPS Agreement sets forth a binding international standard that is embodied in the new copyright law.

And in particular, in its fair use section, Section 19 and exceptions sections, neither Berne nor TRIPS requires that the exact language of a treaty general principal be copied

while written into the nation's legislation.

Indeed, if that were the case, then the IIPA would also have to claim that Section 107 fair use of the U.S. Copyright Act is in violation of Berne Article 9.2. Israel's new fair use section follows the Section 107 of the U.S. Act and it is virtually identical therewith.

History has a tendency to repeat itself. South African copyright amendments includes reforms that could help provide educational access to essential books.

The wording of South African provision mimics other wording of the U.S. equivalent. And, the arguments that support the validity of U.S. provision apply to the South African provision as well.

The three-step test incorporated in Article 13 of the TRIPS Agreement shouldn't block adoption of fair use in South Africa any more than it has in the United States.

The U.S. fair use doctrine has been often criticized for violating the three-step

test. I mean, Europeans have discussed this for many, many years and Peter Jaszi can confirm that.

Back in 1996 at the TRIPS council the European Community, Australia and New Zealand, each questioned the United States on the legitimacy of the fair use doctrine under the three-step test.

At that time, USTR, your colleagues argued that it embodied essentially the same goals as Article 13 of TRIPS and it's applied and interpreted in the a way entirely convergent with the standards set forth in that article.

Fair use was never, ever challenged at the WTO Tribunal. And a recent academy literature convincingly demonstrates that fair use complies with the three-step test. The limitations and exceptions in the South Africa's Copyrights bill are well crafted and completely within their rights under international law.

IIPA's claims, and it was very clear from the previous panel the clear reference to either recognize international legal rule. It's not enough to say that this South African

amendments violate international rule. Be the lawyer. Explain it. Which rules are they?

And, applicable legal framework or a sufficient citation to relevant facts in support, all the submissions you received and have citations. There isn't scholarship, academy scholarship, academic articles out there which has been like, written on fair use. And it very shows that fair use complies with Article 13 of the TRIPS Agreement.

Access and knowledge is a crucial building block for South Africa's social development and economic growth. It can help play a role in the breaking enduring chains of inequality based on race in South Africa. And the U.S. trade policy must respect this.

Thank you very much.

MS. STERNBURG: Hi, my name is Ali Sternburg and I am Senior Policy Counsel at the Computer & Communications Industry Association.

Thank you for the opportunity to testify today.

CCIA wishes to respond to arguments made in IIPA's petition that the Republic of South Africa does not provide adequate and effective intellectual property protection by virtue of including a fair use provision in the Copyright Amendment bill.

It is both appropriate and in the economic interests of the United States for other countries to adopt a fair use exception modeled on the provision in Section 107 of the U.S. Copyright Act.

I'd like to make a few high-level points concerning fair use, then will address some of IIPA's specific objections to fair use in the Copyright Amendment bill.

The U.S. government has expressed strong support for fair use in a number of contexts. USTR has previously observed that in the United States, quote, consumers and businesses rely on a range of exceptions and limitations such as fair use in their businesses and daily lives, end quote.

The U.S. Intellectual Property

Enforcement Coordinator has stated that, quote, fair use is a core principle of American copyright law, end quote.

Similarly, the U.S. Copyright Office notes that, quote, fair use is a longstanding and vital aspect of American copyright law, end quote, and the former Register of Copyrights has explained that, quote, fair use is an essential pillar of copyright law, end quote.

Balanced copyright rules such as fair use have been critical to the growth of the U.S. digital economy. A 2017 study illustrated how U.S. firms operating abroad and regimes with balanced copyright law reported higher incomes and increased total sales, encouraging foreign investment.

A CCIA study demonstrated that fair use industries account for 16 percent of the U.S. economy, employ one in eight workers, and contribute $2.8 trillion to GDP. Further, U.S. exports of goods and services related to fair use increased by 21 percent over 4 years to $368

billion.

These U.S. economic benefits are threatened when a foreign country fails to include U.S. style fair use protections in their own copyright laws, impeding market access for U.S. companies looking to export to that market.

Turning to IIPA's specific objections to fair use in the Copyright Amendment bill. First, IIPA claims that South Africa lacks legal precedent on fair use. Under IIPA's reasoning, no country would ever be able to adopt fair use because it would never have the body of precedent necessary to apply it.

Further, South Africa has a ready source of fair use guidance, court decisions on fair use from countries that have already adopted a U.S. style fair use provision including Israel.

Additionally, South Africa will be able to engage in capacity building efforts with the U.S. government, including the U.S. Copyright Office and the USPTO Office of Policy and International Affairs, which is actively engaged

in providing technical assistance and training on copyright related matters for both U.S. and foreign government officials.

Through these efforts, the U.S. government can ensure that South African fair use law is implemented in a manner consistent with U.S. law and precedent.

Second, IIPA objects to the hybrid structure of a specific exceptions and a general fair use provision. However, this is precisely the structure found in the U.S. Copyright Act, a preamble of specific exceptions followed by the fair use factors.

Third, IIPA argues that the language of the Copyright Amendment's bill fair use provision is broader than the U.S. fair use provision. However, Section 107 makes it clear that the four fair use factors are not exclusive and indeed, many U.S. courts have recognized this with some acknowledging a fifth factor, the good faith of the user.

Fourth, IIPA claims that South Africa

lacks statutory and punitive damages that infringe our space in the U.S. but does not explain how this is relevant to the inclusion of a fair use exception. It should be noted that there is no connection between the three-step test and remedies. Moreover, neither Berne nor TRIPS require statutory damages.

In any case, both the Copyright Act of 1978 and the Counterfeit Goods Act allow the imposition of significant punitive fines for copyright infringement in South Africa.

In conclusion, there is nothing inappropriate about the bill's inclusion of a fair use provision that warrants a change in South Africa's eligibility for GSP benefits.

A fair use provision in South Africa modeled closely on U.S. law will protect American innovators and creators that are seeking to export to the South African market, while ensuring that South African copyright law does not diverge from the American legal framework.

Thank you.

CHAIR BUFFO: Thank you so much for all of your testimony. Given that Mr. Jaszi is leaving, we wanted to coordinate the questions to make sure that we will ask our first question of you.

MR. JASZI: Thank you.

MR. PAJUSI: Mr. Jaszi, in addressing one of the problems with fair use noted by petitioners, you argued in your submission that South African courts would have U.S. case law as analogous authority.

Isn't the fair use type provision in the pending bill quite different from Section 107 of the U.S. Copyright Act?

MR. JASZI: As I tried to say earlier, there are semantic differences which reflect the fact that the South African policy process has taken into account not only the literal and very general language of Section 107, but also the interpretive tradition around that language that has developed in the United States.

So, the references in the South African

language difference formative use, or to market substitution, are simply reflects of broadly held Supreme Court sanctioned, undisputed, interpretive traditions in U.S. fair use law.

So, semantically, there are differences. Functionally, there is no daylight between the two provisions save that the South African provision is more restrictive in that it includes in 12c a general requirement of attribution, something that U.S. law does provide.

And, thank you very much for the question. I'm very happy to answer more questions in writing but now I've got to catch a plane.

MR. PAJUSI: Thank you very much.

MR. JASZI: I apologize.

MR. PAJUSI: Thank you for your time, sir.

MR. JASZI: Bye-bye.

MS. QUIGLEY: Okay, this one's for Ms. Sternburg.

CCIA's submission cited to studies that showed the strength of firms that rely on fair use

but did not mention anything about copyright related industries.

But when you're discussing balance, shouldn't we be looking at data that affects both the copyright holders and the users?

MS. STERNBURG: Thank you for the question.

CCIA plans on submitting post-hearing comments that will address these economic studies and can also provide, plans to provide more information on how copyright holders also benefit from fair use economically, and in litigation often, and how fair use is not only critical to the technology industry and many of the services that we provide, but also to copyright holders and to the public interest user community.

I think it's -- fair use, we can explain how fair use is critical to all copyright stakeholders.

MS. QUIGLEY: Ms. Kilic, you talked about fair use and U.S. fair use being adopted in different places. Is it possible that the way a

country would adopt fair use or the wording in a statute, would affect whether or not it complies with the three-step test?

MS. KILIC: It does matter. I mentioned like, South Africa is not the first country which adopted a U.S. style fair use exceptions.

And there are other countries, Japan, Israel, South Korea, and I'm looking for Sean, where is he. Like, they have -- Peter has a very interesting and a very comprehensive study about the use of fair use exceptions in other countries.

And the way that those countries adopted fair use style exceptions differs. Because at the end of the day, there is no one size fits all. And, the local realities play an important factor.

But today all the law professors on this panel confirm that the South African fair use exceptions mimics the U.S. wording. And even then, the South African fair use exceptions comply with the Article 13 of TRIPS Agreement and

three-step test.

MS. SRINIVASAKRISHNAN: My question is for Ali. Thank you for your testimony. I appreciated sort of, as Treasury, the numbers that you included.

And, you know, when we consider GSP for us we're very much considered, we're very much interested in sort of the economic growth benefits that accrue to South Africa and also any benefits that accrue to the U.S.

So, my question for you is whether you could provide an estimate of the value of your members' collective investment in South Africa, and relatedly, if the two proposed bills in question were to enter into force, do you see any sort of major negative financial impact that would occur to the members of your industry?

MS. STERNBURG: Thank you for the question.

As for the first question, collective investment in South Africa, that's something that I would have to look into and can look into

including in our post-hearing comments.

But as for the impact of these, the Copyright Amendment bill on our, on U.S. industry and CCIA members and exporting to the South African market, I think that it would have a strong impact on both U.S. industries operating in South Africa, and encourage South African startups and companies to rely on fair use as well.

We've seen the fair use doctrine, we've seen courts interpreting the fair use doctrine to, since the 1984 Betamax decision to enable so many new technologies that really help contribute to the U.S. economy.

From DVRs, smart phones, MP3 players, search engines, cloud storage, we're seeing fair use as a really important justification for artificial intelligence and machine learning.

So many new types of technology that require copying and so are really reliant on the fair use right.

So, I think that we would see U.S. companies, including CCIA members more likely to

be exporting to the South African market if this is adopted and fair use becomes law in South Africa.

MS. QUIGLEY: For Ms. Hackett, you talked about the exceptions in the pending bills. Are you familiar with the exceptions in the current law and how they operate, and do you have an opinion about that?

MS. HACKETT: Sure, thank you very much for the question.

Yes, we are familiar with the provisions in the existing bill, and librarians in South Africa are very familiar because they are faced with the limitations in the Copyright Bill as regards uses by libraries and archives on a regular basis.

So, for example, I mean, the current Copyright Act dates from 1978 and there have been no substantive updates as regards the uses, the limitations and exceptions by libraries, archives and museums since that time.

So, as you can imagine a bill that predates -- that dates from the pre-Internet era

is not updated for the digital environment.

So, libraries and archives that are seeking to provide modern services using digital technologies are simply prevented from having, from introducing those new services, or maybe are taking a risk in trying to address, use modern technologies to serve the needs of users and students in libraries.

And, we get regular complaints from the library community on, with examples of things that they're trying to do and that they're prevented from in the current law. So, for example, format shifting is not currently permitted under the current law.

So, there are libraries with large collections of VHS video tapes. Some of them quite, you know, quite valuable like, business, business videos that are still very relevant and used by students. And the libraries want to then convert them into a digital format because the equipment is now obsolete.

But when they try to get permission from

the rights holders, either the rights holder doesn't respond or the rights holder may say you have to buy the DVD version.

But they're very expensive and the library simply can't afford to replace an entire collection. So, the collection remains in the, in a basement unused.

There are other examples where libraries for example, wanted to have a project to digitize articles from medical journals and dental journals that were written by academics in their own institutions. And they wanted to digitize, going back to the 1950s, they wanted to digitize them and put them on their institutional repository.

Again, not permitted under the current law and some publishers allowed the library to put them on their institutional repositories, others didn't respond, and others didn't allow it. So, the project basically came to a halt.

So, I think this bill would really assist libraries in unlocking the collections that

they have in their libraries and serving users, and students, and academics to increase access to knowledge.

Thank you.

CHAIR BUFFO: Thank you very much for all of our panelists. And, with that we'd like to invite the next panel to come forward, but let's take a two minute break, two to five minute break so we can stretch our legs before the next panel.

Thank you again.

(Whereupon, the above-entitled matter went off the record at 12:27 p.m. and resumed at 12:39 p.m.)

CHAIR BUFFO: Hello, welcome.

So, we will start our fourth, I believe, and final panel of the morning/afternoon.

So again, given the time and we are falling a little bit behind schedule, we would like to remind all the panelists to please try to keep their testimony to five minutes.

And again, if there's additional information that you would like to provide, you can

do so in the questions and answer period, and you also will have an opportunity to do so in your post-hearing brief.

So with that, I'd like to turn to Mr. Nicholas Gutierrez for your opening statement, please. Thank you.

And I apologize, I did not properly introduce you. Anyway, Mr. Gutierrez is the special representative to the Citrus Growers Association of South Africa. Welcome.

MR. GUTIERREZ: Thanks so much and good afternoon everyone.

As just mentioned, I'm the U.S. representative for the Citrus Growers Association for Southern Africa, or as it's known, the CGA, and speaking on behalf of the President Justin Chadwick.

Just to provide some context, the CGA represents over 2,300 commercial farmers with roughly 191,000 acres currently under production in nine geographical areas scattered throughout the country.

South Africa ranks third worldwide in citrus exports behind only Spain and Turkey.

The African Growth and Opportunity Act has been of huge economic and social benefit to South Africa and the CGA.

AGOA has provided critical trade preferences for quota and duty-free entry where these benefits are greatly expanded beyond the generalized system of preferences program.

AGOA continues to act as a powerful economic and social engine boosting citrus industry growth and expansion. The loss of AGOA benefits would severely cripple a critical industry that provides enormous benefit to a large number of rural and urban workers, including some of the most economically vulnerable citizens in the country.

The CGA has worked tirelessly with the South African government to promote new job creation, racial and gender equality, and improvement in socioeconomic benefits for all involved in the citrus industry.

Although far from perfect, South Africa's relatively new 25-year-old democracy continues to remain a beacon of hope on the African continent as a way forward towards equality for all its citizens.

It is no coincidence that the CGA was organized almost immediately after the new South African democracy was coming into its own in 1994. As a result, the new government and the CGA combined efforts to gain new market access for citrus in the United States in 1998.

The current CGA position is to resist any efforts by USTR to suspend AGOA and our GSP protections that may be threatened by the pending legislation.

The CGA has little subject matter expertise regarding intellectual property rights protection, but recommends that all diplomatic efforts should be pursued as the primary option.

To be proactive and in this case, the CGA would advocate that USTR and other U.S. administration officials continue to raise this

issue directly with the government of South Africa and the newly reelected President of South Africa.

President Ramaphosa has the ultimate authority to influence and/or veto any pending IP legislation through the Parliament.

And, just to provide some context regarding the impact that citrus plays in the basic social and economic fabric of the country, let me provide a few of the following examples.

The citrus industry currently employs well over 100,000 South Africans with large numbers of workers in orchards and in packing houses.

The Department of Agriculture in South Africa estimates that more than a million households depend on the citrus industry and their livelihood.

During the last two years, the industry has added 10,000 new jobs throughout the supply chain including orchards, packing houses, transport and port handling.

The Department of Agriculture of South Africa estimates that for every ten million boxes

of fruit produced, approximately 10,000 new permanent jobs are created.

South African citrus exports are projected to grow by 15 to 20 percent in the next three years. For example, in 2019, South Africa exported a record crop close to 137 million boxes. South African citrus exports to the United States rank third behind Europe and China.

Citrus exports to the United States average around 35,000 metric tons per year, valuated at approximately $60 million. South Africa is a top citrus exporter to the United States along with Mexico, Chile, and Australia.

In support of diversity and gender equality in South Africa, the CGA plays a vital role in supporting its Black farmer constituents by working with the Department of Agriculture, the Department of Rural Development Reform, and the Land Bank to expand opportunities for funding and ownership.

For example, Black and women farmers have steadily increased in the workforce during the

last several years. The CGA provides direct farm management assistance and financial support to over 120 Black farmers who are producing citrus in over 19,000 acres.

The CGA promotes job training and other agricultural related educational opportunities for students in underdeveloped rural areas so that they are adequately prepared to move quickly into the workforce.

And in summary, the CGA plays a critical role in this ability and growth of the South African economy, especially in providing growing employment opportunities for all South Africans. This is especially true in high unemployment, undereducated and impoverished areas throughout the country.

As a result, the CGA respectfully requests that USTR not implement any action that would cripple and/or remove the AGOA or GSP benefits that are so crucial to the country.

Thank you for the opportunity to comment.

CHAIR BUFFO: Thank you very much.

Next we'll have Mr. James Love, Director of Knowledge Ecology International.

Thank you.

MR. LOVE: Thank you very much.

I don't know, I don't recognize a lot of people here. I have some people but I mean, we're a non-profit organization. We have an office in Washington, D.C. We have an office in Geneva, Switzerland.

Over the years I have done a fair amount of work internationally on intellectual property right issues, including beginning in the 1990s with South Africa.

In my experience in working with South African government officials, they've been highly sensitive to global norms about intellectual property and meticulous in the way that they approach legal issues.

It's a highly legalistic environment, probably due perhaps to some of its role in the Commonwealth and British legal traditions.

I'm going to bounce around to a few things based on some of the earlier testimony. I did pass out a handout, which supplemented I think some of my testimony that I gave earlier in my request to testify.

I just wanted to make sure that people were really focused on the inequality and lower incomes in South Africa vis-a-vis the United States.

On the last page of this exhibit here, this essentially for 95 countries, this exhibit gives the name of a country, the population, the gross national income of the country, and then it calculates the per capita of income for every country based on the average for everybody, the top 10 percent, the top 20, the bottom 80 percent, the bottom 20 percent, and the bottom 10 percent.

And if you look at South Africa which has a, in here an average income of $5,751.00. Already that's less than 10 percent of what U.S. GDP per capita was for the same year in 2018.

That's kind of I think important to

recognize. You're dealing with a country that initially has less than 10 percent of our average income.

It also is one of the most unequally income distributions that you can find. And, whereas the top 10 percent have a per capita income of almost $30,000, the bottom 80 percent of the population has a per capita income of around $2,200 per year, less than $200 a month. And, the bottom 20 percent under $2.00 a day.

So, what South Africa's going through in part is centuries of very intense racial inequality. I mean, and even before Apartheid was formally put into effect. And, huge differences between say, Black Africans and white Africans and things like that.

So, some of the policies that they've been trying to do are designed to, have very much a development focus. And, I think a lot of things you see in the copyright law are a chance to really address the issues of education and access. And it should be really perceived in that light.

I don't think this focus on is the South African law the same as the U.S. law is a little misplaced, because South Africa is not the United States.

Their history is different, their economic situation is different, and they deserve to be done differently consistent with the international norms, not bilateral norms imposed by the people, you know, the agencies on this panel.

Now, I'm going to switch to another topic. The IIPA rattled through a bunch of numbers on statistics, which made it look like the copyright industry was holding up the entire U.S. economy. I just wanted to put those numbers into perspective.

The main study people will quote is the 2016 study by the United States Chief Economist to the United States Patent and Trademark Office, and the Department of Commerce.

Their top three IP intensive industries were grocery stores, which had 2.6 million jobs. Why grocery stores? Because they have trademarks

like Corn Flakes is, you know, Kellogg's; computer system design and management consulting.

Just to put it into perspective, copyright which is a much smaller part of the overall IP industry, the top three industries there were computer systems and design related services; next one was other professional and technical services; and, the next one was advertising related services. Those were over half of the jobs assigned to copyright.

The motion picture industry represented 7 percent of what were considered IP intensive jobs in that USPTO study. And, the sound recording industries represented 4/10ths of one percent. It was the smallest sector actually for the copyright industry.

The textbook and journal industry in South Africa are dominated by European publishers, particularly in the education sector where you have publishers like Pearson, you have Bertelsmann, the German publishers. You have most of the journal publishers are Dutch, British, German, French.

So, it's really you're being asked to go to bat on a book publishing side essentially for European publishers.

On the translations issues that was raised earlier, I want to mention that South Africa's Constitution recognizes 11 official languages. Now, prior to the new Constitution, which included Black people and colored people, the official languages were Dutch, English and Afrikaners.

Now, there is a lot of new, I'm not even going to try and pronounce the name of some of the languages because I'm not very good at that, but I don't think that extending translations to these indigenous languages in South Africa is going to have any effect whatsoever on the incomes of American copyright owners.

If you do want to talk about translation, you should mention the most important translation service in the planet, which just basically has nothing to do with the copyright laws because its nobody really bothers to enforce it

there and that's Google Translate.

And I'm sure, and I'm confident that every person on this panel has firsthand experience with Google Translate. I certainly have.

On the issue of reasonable price exceptions, I call attention to 17 USC 108h, the title is Limitation Exclusive Rights Reproduction by Libraries, and there's a section that says that a copy of, a copy or a record of a work can be obtained a reasonable price by a library.

So, we already have in our law, a reasonable pricing statute which bypasses the copyright.

Is that, am I being pinged because it's the end of my time, or is that my?

(Laughter.)

MR. LOVE: On the textbook side, I note that a 2017 article by Applied Education Systems said this, that since 2006 textbook costs in the United States have increased four times faster than inflation. Thirty percent of post-secondary students in the United States use financial aid to

buy textbooks, and community college students are twice more likely to buy textbooks with aid money than four year college students.

And, you look at articles about this in the United States. It's things like or titles like, What's Behind the Soaring Cost of College Textbooks?, or The Rising Cost of Textbooks, on and on, and on. It's a problem in the United States that's creating tension.

It's not surprising in a country that has a very much lower income is concerned about dealing with the cost of journals and education.

And there hasn't been a lot put in the record about it, but it's really a huge problem in the United States, it's a huge problem in South Africa, it's a huge problem everywhere.

I wanted to mention that this week, the WTO published a submission by the South African government on the three-step test. I think, I don't know how many -- if people had the opportunity to review that submission yet, or if you're aware of it. It'll be discussed next week at the TRIPS

council initially.

I think it's in the U.S.'s interest to support this submission which among other things, supports an interpretation that's more consistent with U.S. fair use law, and also closer to the U.S. position in the one WTO case that the U.S. lost to the European Union, which is being revisited by the European Union as we speak.

I'm going to stop here because I think I've taken my time but thank you very much.

CHAIR BUFFO: I will introduce you.

MS. REDA: I can just go ahead.

CHAIR BUFFO: Or you can introduce yourself. Go ahead.

MS. REDA: All right. I'm Julia Reda, I'm currently a research fellow at Harvard University at the Berkman Kline Center for Internet & Society.

And, before that I was a member of the European Parliament for five years, and I was responsible for several legislative reform processes on copyright law during that time.

So, I would like to speak to that, the similarities of the South African proposals to European law.

First of all, I would like to point out that the country practice review deals with whether South Africa provides adequate, effective protection of IP, which must be considered met if it meets its obligations under international treaty.

It does not require meeting the policy preferences of stakeholders from the entertainment industry, of course.

We've heard I think already many testimonies regarding fair use and that it complies with international laws, and I think this is certainly an issue best addressed by U.S. copyright scholars.

Instead, where I think I can bring added value is perhaps to reassure the Subcommittee about some of the concerns that have been voiced regarding the new proposed South African contractual rules, because those seem to be very

much inspired by similar provisions that already exist in European law.

International copyright treaties are silent on how to regulate the contractual relationship between authors and rights holders and indeed, the petitioner could not name a specific international norm that would be violated by those contract adjustment mechanisms.

Therefore, I think any concerns about the contractual provisions in the reform should, as a matter of principle, not be considered as a potential grounds for withdrawing GSP benefits.

Nevertheless, I think it's useful to look at what the EU has already done in that area, and what effects it has had on the content market.

My home country is Germany, a country that can certainly be considered to be having a thriving content market, and a high level of IP protection. And it's quite similar in the respect of contractual rules, as well as France.

In Europe, we don't even talk about copyright, we usually speak about authors' rights,

or the droit d'auteur, and in the European continent legal tradition. And this perspective is that copyright originates from the personality rights of the author.

This perspective is actually enshrined already in the preamble of the Berne Convention, which defines as its goal the desire to protect the rights of authors in their literary and artist works.

And similarly, the Universal Declaration of Human Rights protects the participation and cultural life, freedom of the arts and sciences, and the moral and material interests of authors. Not corporate intermediaries such as publishers.

National laws that protect authors in contractual relations with publishers are those just not just compatible with international law but they also have a long tradition, especially in Europe and in some respects, also the United States.

The new South African rules designed to

improve transparency and fairness of collective management practices seem to be inspired by similar provisions under EU law that exist under the directive and collective management.

EU law also legally guarantees proportionate remuneration similar to the South African provision on royalty sharing.

In this respect, it is worth noting that the legal consensus on the very similar European provisions is that lump sum payments are not categorically ruled out by such royalty sharing provisions, provided that the initial lump sum payment is high enough to be proportionate to the expected commercial exploitation of the work.

The same is likely true for the South African provision, which can be further elaborated by regulation.

The rights reversion provisions exist in different versions both under U.S. and under EU law. And in fact the EU has recently broadened such mechanisms and made them mandatory for all member states because previous national rules

didn't work in practice.

So, for example, in my country Germany there is historical contract renegotiation provisions, which has very similar goals to the U.S. rules on termination of licenses and that it allows an author to renegotiate a contract to obtain fair remuneration.

However, this provision has proved of limited use to authors in practice because when an author would use it, they may get additional remuneration for exceptionally successful works but then they would subsequently be blacklisted by industry, effectively ending their career.

This seems to have happened for example to the German voice actor who gave voice to Captain Jack Sparrow in the *Pirates of the Caribbean* movies.

Such experiences have led the European legislature to strengthen the contract renegotiation mechanisms in its recent directive on copyright in the digital single market by making it subject to collective negotiations. So the

author no longer has to individually request such a renegotiation.

The automatic rights reversion after 25 years as proposed in the South African bill is designed to reach the same goal as the EU provision, which is that it effectively ensures that authors are protected from retaliation simply for exercising their rights.

And finally, since in one of the earlier panels there was a specific question about the effects that government intervention might have in such contractual relations, I would like to point out to a provision under German law, which is paragraph 36a(8) of the German copyright bill, which allows the Ministry of Justice and Consumer Protection by means of regulation, so through secondary legislation, to define appropriate remuneration if the different parties to a dispute cannot to it amongst themselves.

And, this has not led to legal uncertainty among the rights holders and authors involved in such disputes, but rather it has

contributed to an out of court dispute settlement where basically, publishers and other intermediaries have nothing to fear provided that they pay authors fair remuneration for the transfer of their rights.

Thank you very much.

MR. STOUT: I'm Kristian Stout, I'm the Associate Director at the International Center for Law and Economics.

The conditions for GSP eligibility and the history of relevant GSP investigations have already been fully briefed in the IIPA submission. I'm only going to highlight one thing.

Congress was very clear in its direction to USTR that the U.S. should take appropriate action to ensure that countries to whom we unilaterally extend trade benefits do not engage in practices which deny adequate and effective property rights protections to American nationals.

There's a variety of outstanding issues in South Africa's copyright law and I urge USTR to remain engaged with its South African counterparts

to address these.

But the issue driving my interest here today is the proposed amendments to the South African copyright law and the Performers' Protection Act that would place South Africa in conflict with its international treaty obligations, and would otherwise result in a lack of adequate and effective protection as contemplated under GSP.

As the House Ways and Means Committee stated, countries wishing to reap the benefits of preferential duty free access to the U.S. market must fulfill international responsibilities in the intellectual property area.

Although this investigation is taking place within the framework of GSP in which South Africa's eligibility is at risk, this context should not obscure the fact that the underlying issue doesn't actually divide U.S. and South African interests.

Should South Africa determine to proceed with the current amendments, the greatest

immediate victim will certainly be the community of South African creators who have been very vocal in their opposition to proposed amendments and ultimately, the South African public as investment in local cultural production decreases.

In short, withdrawal of GSP benefits is not my objective and will not optimally advance U.S. or South African interests. Instead, I hope to raise greater awareness of the broader risks to South African society should these bills be adopted in their present form.

Ideally, we can avert the withdrawal of trade benefits. What happens next is in South Africa's hands. All we can do is to observe as stated in the IIPA petition that South Africa does not meet GSP eligibility criteria, primarily because its current legal regime fails to provide adequate and effective protection of copyrighted materials, and the two laws on the verge of final enactment would further weaken that legal regime.

The provisions that weaken the copyright regime are based on the idea that South

Africa's economic interests are advanced by favoring access to copyrighted works, as opposed to protection of the production of copyrighted works, thereby reinforcing a false narrative that access and production are disconnected.

But of course, access presupposes the production of materials worth accessing in the first place.

The legal process to initially update South Africa's copyright laws was initiated by a group of performers who understood that South Africa's laws were outdated and causing economic harm to its artists and other creators.

They petitioned the prime minister to examine South Africa's laws and to update them to the digital age to better sustain the local creative community and the ability of artists to earn a living by telling South African stories.

Sometime thereafter, the process was effectively taken over by a small group of committed activists who applied simplistic economic theories based exclusively on existing

cross border capital flows and determined that since South Africa was currently a net importer of copyrighted materials, its interests would best be served by applying minimalist copyright protection in an ongoing fashion.

While choosing the appropriate level of copyright protection in view of South Africa's economic, cultural, and financial interests falls squarely within the South African legislature's purview, there are of course, guide posts based on international treaties and trading obligations that circumscribe that authority including, of course, the obligations under Berne and TRIPS.

And, as evidenced by the instant preceding conditions attached to trading benefits under programs like GSP.

I am aligned with the comments filed by IIPA and by those of the local rights holders in South Africa who have presented the issues in great detail, ranging from over regulation of contracts which would impair the functioning of creative markets, to the use of ambiguous and overlapping

terms, which would introduce even greater uncertainty in South Africa's copyright regime than presently exists.

Of course, I am particularly troubled by the introduction of provisions designed to reflect the American fair use doctrine but which fail to properly contextualize and limit their application as it is in the United States.

To be clear, I do not oppose fair use. I think it functions fairly well in the United States but it functions within a context that has developed over the course of two centuries and is bound by other provisions in our copyright law.

It's an important principle and can provide useful breathing space while safeguarding the integrity of the original work, but fair use principles do not exist in a vacuum and do not lend themselves to being easily transposed into an environment that is already challenging for copyright protection, and in which authors' precarity is a core feature of their landscape.

In conclusion, South Africa is poised

to adopt legislation which would conflict with its international treaty obligations, fail to provide adequate and effective protection as contemplated under GSP, and more distressingly, represent a poison pill for its creative community.

I join the domestic and international calls for South Africa to reject the bill. It has been heavily influenced by advocates who are interested in the expansion of fair use per se, and fails to reflect the real economic and cultural interests of South Africa.

It is indeed unfortunate that we find ourselves in a moment in which the U.S. might have to remove trading benefits from South Africa when our underlying interests are actually wholly aligned.

However, Congress has repeatedly highlighted the importance that it attaches to the adequate and effective protection of intellectual property and directed the administration to use all available tools to ensure effective global protection.

It would make little sense for the U.S. to unilaterally provide trading benefits to a nation that has chosen to deny effective protection. Should the proposed legislation come into effect, I believe the USTR needs to respond accordingly, consistent with Congressional intent.

Thank you.

CHAIR BUFFO: Thank you to all the panelists for your testimony. We'll turn to your questions now.

Thank you.

MS. COHEN: Thank you.

So, this question is for Julia Reda. Your submission discussed ways in which European law safeguards authors and contractual provisions and asserted that provisions in the South African bills do the same.

In your opinion, how do parties to a contract have a predictability or certainty, if any agreement they reach may be overridden by government intervention, or a revocation?

MS. REDA: So, I can draw from the specific experience of Germany where we have such a possibility for government to intervene by means of passing secondary legislation that sets the exact remuneration for the different parties. As a general rule, this is only the last resort.

So, first of all, the author as a right to appropriate remuneration under European law, and also for a long time has had this right under German law. And it is evaluated based on the market rates and quite often trade associations and collecting societies also set model remunerations for particularly users.

If there is a dispute between the rights holders and the authors, in such cases the first step would be to try to mediate and to settle these disputes under out of court mechanisms. And only as a last resort would the ministry actually intervene and set a specific solution, or a specific remuneration.

So, effectively, this possibility for the ministry to intervene highly encourages the

parties to find amicable solutions and I think as a general principle, any kind of possibility of future contract renegotiation or a contract termination if a contract is not advantageous to both parties encourages the parties to find fair solutions at the outset.

I think it's also important to highlight in this context that the vast majority of commercially exploited copyrighted works is out of commerce after 25 years.

So, only in the cases of particularly successful and commercially viable works would the work still be in commerce after 25 years when the contract termination happens.

And it's precisely in those cases where authors have received a disproportionately low remuneration considering how successful the work ended up being, which of course, the parties could not know at the outset.

So, in that respect, rights holders would only have to renegotiate and pay additional remuneration for works that have been unusually

successful and that have given them unusually high revenues in the first place.

So, I don't think that the application of such rules would unreasonably prejudice the commercial interests of those right holders or publishers.

MR. PAJUSI: Mr. Love, a question for you.

So, you've highlighted here some income inequality statistics in South Africa and I'm just wondering, is it your contention that income inequality and economic development in general, or that income inequality specifically, could be reduced as a result of IP laws and fair use provisions in South Africa, or have you seen this happen in any other countries?

MR. LOVE: You mentioned IP. One of the cases I worked on in South Africa was I was consultant with a Competition Commission on patents on HIV drugs. And when the case started there was about 20,000 people being treated in South Africa. And that number had radically

changed after the government granted a compulsory license on patents on HIV drugs.

So, in that case, it was a life, you know, a life or death matter that had a huge effect.

Now, in the case of education textbooks, things like that, I think that economic development really depends a lot on having an educated population. So, I think that's important.

I think a lot of the publishers that are lobbying against the South Africa changes and let me just say, you know, you have the people from the entertainment industry, and then you have the textbook people and they kind of have different agendas and different interests in the things.

On the education side, it is primarily European publishers that are involved in that and I think that the South African government is correct in thinking that it's in their interest from an economic development thing, to have as much access as they can to educational materials.

On the entertainment side, I'm

actually, you know, in terms of the contractual provisions that are mentioned and things like that, for works that have multiple contributors and films, as I said in my comments, I'm somewhat sympathetic to the idea that it's possible that South Africa got it wrong in that area.

I'm not, you know, I don't really want to sort of defend the exact outcome they had. I just don't think it's up to this body here, or the U.S. Congress to sort that out. I think that should be sorted out in South Africa.

I think the performers there have, are an important group. They're trying to, I think, they have an interest in incomes as much as anybody does. They're concerned about the challenges in copyright enforcement.

I mean, one of the weird things about this is that South Africa has probably one of the best records in terms of copyright enforcement of the continent.

And you sort of single out this country, you know, and leave out all the other countries,

I think it's because it's the most important economy in the area and I think the new law is perceived to be a precedent that other countries would follow. So, that's why they're being kind of hung out in this preceding.

But you can't objectively say that their standards of enforcement are low relative to other countries. It's the opposite. They're higher than they are among the, you know, countries in the region for sure.

So, I think for the creative people, effective enforcement of copyright law is a positive thing. I think overall, you know, you don't want to wipe out copyright protection. Getting the balance just right.

When you have a country with very low incomes and you have very high copyright exceptions like most of the WIPO studies have shown, what you have is people just ignore the copyright law.

And, so if you want enforcement, I think you have to have a law that's consistent with enforcement. A law that a teacher will want to

enforce. Or a student will want to abide by.

If you have laws that are just out of whack with things on the ground, you'll have like the law you want but you won't have the enforcement you want. And I think you have to kind of, you know, get those things together.

So, the complicated thing in copyright it's always the balance, you know, that you're trying to reach. It's -- you're not trying to be at extreme. No, you know, no copyright or you know, sort of the maximalist position.

What's it like for South Africa? I don't think it's what the recording industry or the motion picture industry have in mind, but I just don't think this is a good case for a GSP benefit case.

And, I think even some of the people that represent the artists there would agree that this should not result in a tariff, increased tariffs in South Africa.

CHAIR BUFFO: I have a question for Mr. Stout. I'll ask the same question I had actually

asked earlier to IIPA.

MR. STOUT: Sure.

CHAIR BUFFO: Are there reforms that could be undertaken to the proposed legislation that would still meet the objectives of the legislation and also address your concerns around intellectual property?

MR. STOUT: I thinks of course possible they could go back and look at their legislation. A few of the areas that stand out, well one in particular on the fair use side is that the way it is structured as I read their current law and I read the proposed amendments, the fair dealing, the existing fair dealing exception is extremely broad for personal and private use, for instance.

And, then what the amendments do is they add on a new exception for education. So, that just broadens an already existing very broad exception.

So, on its own, that's disturbing to me, but it's disturbing going forward in the sense that we're importing the generalized American embrace

of fair use into an environment in which we don't have the backstop of other types of laws.

So when I think about enforcement of copyright in South Africa, I am very sympathetic to people like the person representing the libraries when we're thinking about getting textbooks into the hands of kids.

But the areas I'm more thinking about is the fact that fair use in that kind of environment, where you don't have any kind of criminal enforcement for rings of notorious copyright infringement, you don't have principles like secondary liability that we have in the United States, you don't have case law like Grokster, which can come in and can cabin the uses of the way these doctrines function.

You created this open-ended big question mark that I think potentially could very well endanger American industry.

And, I want to repeat, I don't relish the thought of withdrawing GSP benefits from South Africa. I think that it would be an unfortunate

outcome. I think the people of South Africa deserve to have their intellectual property protected. But we have to worry about the mandate that USTR has from Congress in this respect.

And I think that unless these sorts of reforms are undertaken to the existing legislation, it would be dangerous for American interests.

MS. KHAN: My question is for Mr. Gutierrez.

In your testimony, you spoke about the critical benefits of the GSP and the AGOA programs in the citrus industry, as well as beyond that industry.

And, I'm wondering if you could please explain how would your customers' strategies, sourcing strategies, change if South Africa's GSP preferences were revoked?

MR. GUTIERREZ: That's a really good question and before coming in to provide testimony I had spoken with a number of South Africa growers again, just to get their feeling, their

understanding on how exports to the United States would change.

And again, without having any solid statistics or information to back up the statements that they made, they thought that, you know, lack of AGOA, lack of GSP, would probably affect South African citrus exports to the United States by 20, 25 percent, you know, where they would have to look for alternative markets in other areas around the world.

CHAIR BUFFO: Thank you very much to all of our panelists on this panel, as well as all the panels that preceded. This has been a long, I think, but very useful exchange of information and ideas.

Again, I'll reiterate if there's any additional information that you would like to add, or respond to other testimony that you heard today, you will have that opportunity to do so in a post-hearing brief.

If anyone is sticking around for the Indonesia country practice review, we still are

planning to start on time at 2:00 o'clock.

With that, I know we are running a little bit behind so we appreciate everyone's patience and thank you so much.

(Whereupon, the above-entitled matter went off the record at 1:19 p.m. and resumed at 2:05 p.m.)

CHAIR BUFFO: Thank you and welcome. So I'll go over a few logistical details that many of you have heard me say a few times, those of you that participated in the earlier panels. So we will have two different panels for this next review, which is on Indonesia intellectual property rights.

Just wanted to remind the panelists, in the interest of time, to try to keep your testimony to around five minutes. You will have an opportunity to add additional information during the question and answer period. And if there's any additional information that you feel that you would like to still provide, you will also have that opportunity to do so in the post-hearing brief.

We also, as a panel, may submit some additional questions to you in writing, and would also ask that you provide answers to those in the post-hearing brief. So with that, I think we'll do a very brief round of introductions since there are new folks in the room. My name is Laura Buffo, and I am the Deputy Assistant U.S. Trade Representative for the Generalized System of Preferences Program, and also the Chair of this GSP Subcommittee. I'll turn to my colleagues for their introductions.

MR. CHANG: Hi. Good afternoon. My name is Sung Chang. I'm a Director of Innovation and Intellectual Property at USTR.

MS. COHEN: Good afternoon. My name is Raquel Cohen. I am a senior attorney at the IP Office at the U.S. Department of Commerce.

MR. PAJUSI: Hi. I'm Tom Pajusi. I'm with the Department of State in the Office of Multilateral Trade Affairs.

MS. MITCH: Hi. I'm Sage Mitch with the Treasury Department in the Office of Trade and

Investment Policy.

MS. KHAN: Good afternoon. I'm Leena Khan. I'm with the U.S. Department of Labor, Office of Trade and Labor Affairs.

CHAIR BUFFO: Thank you. And with that, we will turn to the distinguished panel from the Government of Indonesia, Mr. Hari, Chargé d'Affaires of the Embassy of Indonesia. Thank you.

MR. SUSTANO: Thank you, Mrs. Chairperson. Ladies and gentlemen, good afternoon. I'll be giving testimony on behalf of the Indonesian Government for the GSP public hearing today. And today I am accompanied by my Attaché for Trade, Mr. Wijayanto, and my colleague from the Economic Division, Mr. Ronald.

Ladies and gentlemen, please allow me to extend our appreciation for the opportunity to work with USTR on the review of Indonesia's country practices regarding our compliance with Generalized System of Preferences eligibility focusing on intellectual property rights.

We deeply regret that International Intellectual Property Alliance, or IIPA, doesn't join us into this session, although IIPA sent a petition about us. We believe that IIPA's petition does not properly address the reform efforts which Indonesia has aggressively made in the past few years.

Furthermore, we noted that IIPA's petition is not substantially the same as last year with a different conclusion this time. Last year, IIPA recommended USTR to terminate the GSP review and to remove Indonesia's position from priority watch list to watch list.

For the reason being said, the Government of Indonesia would like to seek your considerations in closing the review. Please allow us to share our reform efforts as well, which are as follows:

(1) Indonesia has demonstrated positive improvement on intellectual property rights enforcement, which are as follows: Indonesia has proactively blocked over 1,000

illegal streaming sites in the past few years. In 2019 alone, for example, we had closed 237 illegal streaming sites. Number two, Indonesia established an online system to launch complaints of IP violation. The system allows complainant to register and monitor their complaints. During 2014 to 2019, Indonesia had proposed 230 complaints of IP violation. This includes trademark, patent, industrial design, and copyrights complaints.

(2) Indonesia continues to strengthen customs enforcement, which includes the adoption of the Government Regulation Number 20 year 2017, the Minister of Finance Regulation Number 40 year 2018, and the Supreme Court Regulation Number 6 year 2019. These all regulations integrated our enforcement message between our customs and IP agency, which provides early notification of counterfeit goods at the border.

(3) Indonesia maintains the World Trade Organization moratorium on customs duties on electronic transmissions, and will not impose customs to this on software and other digital

products transmitted electronically before the next WTO ministerial meeting.

(4) The issuance of our Government Regulation Number 71 year 2019. The regulation allows for the offshore processing, transfer and storage of commercial data outside of Indonesia.

(5) The issuance of the Minister of Law and Human Rights Regulations Number 30 year 2019. This regulation provides our governments consistency with the WTO Trade-Related Intellectual Property Rights, or TRIPs Agreement, on the procedures for compulsory licensing. Several features of the regulations are, among others: (a) grounds for compulsory licensing, (b) procedures to issue compulsory license, (c) grievance mechanism against issuance of compulsory license, (d) procedures to delay local working requirement. Going forward, the Director of Intellectual Property Rights will meet with your team for furthering engagement under the Special 301 process.

(6) The issuance of the Minister of Law

and Human Rights Regulations Number 12 year 2019. The new regulation ensures the protection of prior trademark rights in relation to subsequent geographical indications. It also improves the position and cancellation procedures, including by having grounds with respect to prior trademarks and generic terms or common names.

(7) Indonesia has begun the process of revising its 2016 Patent Law with a goal of issuing an amendment to this law. Indonesia believes that such an amendment will improve the existing provisions related to patentability criteria, local manufacturing and use requirement, as well as compulsory licensing.

(8) Indonesia has also begun the process of drafting an omnibus law to address the overlappings amongst the existing regulations and to simplify business process in Indonesia. The law will replace and revoke several substantive provisions in the existing law, in which it will include trade investment, taxation, labor, and environment. As the next step after the

conclusion of the GSP review, Indonesia is committed -- is strongly committed to pursuing efforts to increase trade volume with the U.S. and establishing more enhanced trade and investment relationship with the U.S., which is one of our most important trading partners in the world.

Indonesia believes that this forum, along with enhanced trade and investment relationship with the U.S., will ultimately increase the volume of our trade and investment, with a goal towards doubling our two-way trade volume in the next five years. Our officials from the U.S. and Indonesia have discussed about this goal in many occasions, which I'm sure that it will be able to provide and give a lot of benefits for the two countries and peoples.

Therefore, in short, the positive conclusion of the GSP review is an important step in this undertaking. It is in Indonesia's interest to create a welcoming environment for trade and investment, including the improvement of market access and stronger enforcement of

intellectual property rights protections.

The conclusion would also provide great opportunities for the two largest democracies in the world to achieve the economic trade investment in full potentials. I thank you for your consideration.

CHAIR BUFFO: Thank you very much for your testimony. We would like to now turn to my U.S. Government colleagues to begin a few questions. Thank you very much again.

MR. CHANG: Thank you, Mr. Chargé, for your testimony. And thank you also for sharing information regarding Indonesia's enforcement against illegal streaming sites. And as your written submission notes, the United States and Indonesia agreed on a work plan on IPR in May 2019, besides issuing Regulation Number 30 of 2019 and enforcing against illegal streaming sites. And in addition to that, you in your oral testimony provided some updates on other activities that the Government of Indonesia has undertaken recently.

But as you know, our bilateral IP Work

Plan is broader than that. It encompasses areas of IP, including copyright, trademarks, and other types of IP enforcement beyond streaming websites. So in that context, what progress has Indonesia made to address the concerns that the U.S. Government has raised regarding intellectual property, and what further steps are underway or planned?

MR. EBERHARD: Thank you for the question. On behalf of the Government of Indonesia, I would like to further provide explanations on several points that you have raised regarding our testimony.

Well on the IP Action Plan, I think we have provided further details on the efforts that we took in the past months in terms of enforcement, as noted and also stated by our testimony, that we've established a system at the border, which basically provides an enforcement rule for our customs agency to seize and confiscate counterfeited goods.

This has just started this year. And

on January 1st, I mean on January 2020, the customs has started to confiscate goods, which the value exceeds 1 billion rupiah. We can -- I can provide the exact comparison to U.S. dollar later.

But the implementation of the IP Work Plan has been done in a way that it's just not issuing -- just not by issuing new regulations, but also put enforcement actions on the ground. We could provide more details like how the customs agency did this. And I think it's already on the news as well. In January 2020, there was a big case that involves counterfeited goods. And it's a proven action that the customs agency and the Government of Indonesia as a whole in terms of fulfilling our commitment to the IP Action Plan.

And we also just recently established an online system to monitor IP violations. And this online system allows complainants to lodge, register their complaints, which includes trademark, patent, industrial design, and copyrights complaints. And up until now we have processed 230 complaints, and some of them are

already processed at the court. Some of them is still in the phase of collecting evidence. But in terms of the significance of this online system, it provides more transparency for all the stakeholders to really monitor and closely look at how their complaints are being processed by the Government and also in the end by the court.

And the IP Work Plan was also implemented in a sense that we have begun the process of revising the 2016 Patent Law. Just this year, the Minister of Law and Human Rights in January met with several stakeholders, including foreign governments, foreign ambassadors, the European Union, to gather inputs and to provide a mechanism -- a dialogue mechanism in order for us to complete the revision of the patent law.

And this is very clear in the IP Action Plan that this is something that we have to undertake in order for us to improve the priority watch list position where we are now. And we also addressed the issues of geographical indication by issuing last year in 2019 the Minister of Law and

Human Rights Regulation Number 12 year 2019, which provides, or which addressed the concerns over the coexistence between geographical indications and the trademark.

We provide a flexibility on which an existing trademark lasts which has been registered more than five years, could not be invalidated solely on the ground there is a new geographical indication. And I guess as has been mentioned previously, the omnibus law will also address bigger aspects of IP policy as a whole, including the patent law and also the other aspects of intellectual property.

And the big -- another big steps that we took as a part of implementing the IP Action Plan was issuing the Minister of Law and Human Rights Regulation on compulsory licensing, which basically provides consistency with the TRIPs, in specific Article 31 of the TRIPs Agreement, which provides a strong and clear grounds of how and when compulsory license could be issued.

And also there is a provision which

gives flexibility for patent holders to delay the working requirement as described in the patent law. We will address the bigger issue of the local working requirement in the revision of the 2016 Patent Law. But for the time being, it will provide a certainty -- a legal certainty on how a patent holder in Indonesia could effectively sell or distribute their products.

And on the issue of pirated device, piracy apps, it's also being included in our improvement of the enforcement measures, as the online system that we've mentioned previously will enable complainants to register their concerns or complaints regarding applications or devices that are being used for piracy.

So those are the main efforts that we took in the past year, specifically in 2019, to implement the IP Work Plan as a whole.

MS. COHEN: Great. Thank you. So following up on the amendments to the patent law, I had a couple more specific questions for you. What is the process and timeline for these amendments

to pass? And how will Indonesia take stakeholder and foreign government views into account? Is there a public comment period? And if you can go into detail, that would be great. Thank you.

MR. EBERHARD: All right. Thank you. On the patent law revision, the Government right now is drafting the academic paper as we call it. It's a paper that we need to provide reasoning why we start the amendment. And on that process, we include a wide array, range of stakeholders, including the private sectors, the universities, think tank, and researchers.

And in terms of clarity of how the public consultation is being, is, how we carry out the public consultation, we have established a dialogue directly with the stakeholders, including the one that we are going to have next month when we are having a visit by the IP Office in Washington to meet with several stakeholders, including USTR, the U.S. industry, chambers, PhRMA, and IIPA.

So this is something that we've already put down as one of our agenda in order to further

implement the IP Action Plan, including helping us in revising the patent law. So I sent direct communications between us and the stakeholders.

I know there is no data comparison with the consultation mechanism that's being done here in the U.S., as we have our own mechanism to do that. But rest assured, we've already in communications with the stakeholders, including the U.S.

MR. CHANG: Thank you. I had a quick follow-up question on that. So you mentioned that the internal academic paper drafting process is currently underway. So with that in mind, could you give us a better sense of the timeline we could expect in terms of when the actual drafting of the amendments will begin, at what point in the process will industry and foreign governments be able to comment during the process? And when, to the best of your ability, do you expect that your legislative body will be able to consider the amendments?

MR. EBERHARD: I think the way it works in Indonesia, as you might know, a law can be

proposed by either the Government or the Parliament. And this law, this revision is being proposed by the Government. And at this point, as far as we know, there is no exact timeline of like when we are going to propose this draft revision to the Parliament, because we are ensuring that we would have -- that we are accommodating inputs from the stakeholders.

So before we submit to the Parliament, it is our interest, it is our agenda as well, to gather inputs, including the one that we are going to have next month here in Washington. So we can't provide exact timeline when the academic papers -- how long it will take to draft it and how long it will, furthermore, to bring it to the Parliament and how long the Parliament will consider it and put it in force.

So it's something that we are working on. We can't provide an exact timeline on it. But rest assured, next month we'll be having a meeting within the IP Office and the stakeholders.

MR. PAJUSI: Good afternoon. Could

you tell us the status of Indonesia's national IP task force? We understand it was undergoing revitalization. Has this been completed? And are there any results of this revitalization?

MR. EBERHARD: Thank you for your question. On the national IP task force that is -- that was established a few years ago, so we have been undergoing several restructuring as well in the line ministries.

So I believe that previously the Economic Creative Agency have a role in the team, but it is now the role of the Ministry of Tourism and the Creative Economy. But the responsibility, the objective of such team is still inherent under the line ministries. So the main line of coordination is between the Ministry of Law and Human Rights, the Ministry of Finance, the enforcement agencies like the National Police, and also the Ministry of Tourism and Creative Economy is still being maintained as it is as previously.

MR. CHANG: Thank you. I have a quick follow-up question on that. So it's good to hear

that there is this continued restructuring of the line ministries, but I think the crux of the question is: could you provide us a better sense of when that restructuring may be completed so the IP task force, when up and running, could be a boost to working on some of the issues that we've highlighted in our Bilateral IP Work Plan, including enforcement?

MR. EBERHARD: Thank you for your question. I think in terms of procedural, we can't provide the exact timeline, how we can readjust the new ministries with the current structure in the national IP team. But I believe that the coordination between the line ministries substantively has been done, including one that we mentioned earlier, when we gave an enforcement role for the customs agency at the border to directly confiscate. This is something that two years ago, three years ago, five years ago hasn't been done. So this is an example without the structure we can do reforms quite effectively.

MS. KHAN: One of the issues raised by

the International Intellectual Property Alliance was the need for additional steps to combat piracy, devices and apps that enable the dissemination of unauthorized motion pictures and television content. And you alluded previously to the work that's being done around those piracy devices. And I was wondering if you could please describe in some more detail, give us some -- expand upon what steps Indonesia is taking regarding combating those devices and apps.

MR. EBERHARD: Thank you for your question. As we mentioned earlier in the testimony, we've -- one of the features, new features last year that we've established is the online system to register the complaints.

So the main difference between how we address this issue with what we just did recently is we established a more inclusive process on which everyone can register complaints when they see one. When they see there are pirated apps or apps that are being used for piracy, they could report it directly with the IP Office. And there are

guidelines on the website on how to lodge the complaint, on how the complaints are being handled, and which are the person responsible for handling the complaint.

I believe we could provide you with more statistics, like how many complaints that we are being processed and how many are already in court and how many already are still in the initial process of collecting evidence. So at the time being, the new steps that we took was to ensure transparency in handling pirated apps or apps used for piracy.

MR. CHANG: Thank you. I think in your post-hearing brief, it would be helpful if you could provide additional statistics that, you know, in terms of using this transparent mechanism, how many complaints were received, how many were resolved or are still in court pending any type of enforcement. Concrete statistics that you could provide in your brief would be very helpful.

MR. EBERHARD: Yes, we can do that actually without waiting for a post-hearing brief.

It is something that is publicly available, and we can share that later with you.

MR. CHANG: Thank you.

MS. MITCH: Thank you very much. On the legislative side, one of the things IIPA identifies in their submission is a recommendation for the elimination of certain provisions from the film law that serve as barriers to market access, specifically local screen quotas and the prohibition on the dubbing of imported films. Could you comment on that proposal at all?

MR. EBERHARD: On the issue of market access for the film law, I think this is something that the Government is also considering in the omnibus law. It is -- film law is one of the laws that are being considered to be further simplified.

So we couldn't really provide clarity on how the restrictions or limitations will be adjusted. But at the time being, it is one of the laws that is being addressed when we are drafting the omnibus law.

CHAIR BUFFO: Thank you very much for

your testimony and for traveling from a very long way away to be here with us today. We know we will see you a little bit later this afternoon as well. We would now like to invite the next panel to please come forward. Thank you again.

Thank you very much. Welcome. So, I think you've all heard, the -- the logistical elements. But I will remind all the panelists, in the interest of time, to please keep the testimony to five minutes. So we will start with Mr. Daniel Anthony, Vice President of the Trade Partnership.

MR. ANTHONY: Good afternoon. Once again, my name is Dan Anthony and I am testifying on behalf of the GSP Action Committee, this time in regards to GSP benefit for Indonesia. I will continue to focus on why GSP benefits for Indonesia are critical for American companies while trying to avoid repeating myself too much from yesterday. In my personal pursuit of constant learning, I have also trimmed down a page off my prepared remarks to try to stay on script in the five minutes.

In this panel I will focus on how

American companies and workers are the primary beneficiaries of the GSP eligibility for Indonesia while expanding on my comments from yesterday about how the potential loss of GSP is very small compared to ongoing shocks in the global supply chains in the next panel. Let's start with American benefits from GSP Eligibility for Indonesia.

In the first 11 months of 2019, American companies saved an estimated $137 million in tariffs on imports from Indonesia. That's up from about $110 million in all of 2018 and $80 million in 2017. To put it in perspective, the lowest single months of savings last year, $9.1 million in February, was higher than the highest single month in all of 2017. Basically, American companies are looking at GSP savings nearly doubling on imports from Indonesia in just two years.

Who is saving that money? The Coalition for GSP has a supporter list that companies can join by providing basic details about themselves and their use of GSP. It's demographic

info about locations and employment, import info about supplier countries, products and tariff savings, and even questions about things like whether they export. During the 2017, 2018 congressional renewal cycle, over 400 companies signed up, including over 100 that indicated importing from Indonesia. The typical company importing from Indonesia has just 17 employees and saves $100,000 annually because of GSP. They're not just importers. About 37 percent report exporting GSP-eligible products either directly or as part of a derivative product. That includes about 33 percent of the small businesses, so about six to seven times the SBA's estimate for the share of small business exporters.

But even small companies can have big GSP savings. Primetac Corporation is a family-owned business in New Jersey that imports industrial tape from Indonesia. It paid $1.5 million when GSP expired from mid-2013 to mid-2015. A lot has changed since then, but it's -- since it's the closest comparison that we have to when -- when

trying to determine what happens when GSP benefits go away, without clarity on when those tariffs might go -- come back. The company raised prices to compensate for the new tariffs and the resulting sales drop caused it to freeze hiring, slash benefits and put investments on hold. Once GSP benefits for Indonesia were back in place, it hired two new workers and instituted a new, employee profit-sharing program. It bought a forklift manufactured in Ohio and hired a local contractor to upgrade its warehouse lighting. In 2017 a 2018 it hired two more sales people and opened a warehouse in Houston. Plans for growth and sales in internal operations to support them would be at risk if GSP benefits for the packaging materials and imports from Indonesia were lost.

While my group focuses on U.S. benefits, it should not be lost the benefits help improve welfare for everyday workers in Indonesia. Several years back, USTR produced a report on preference programs impact in alleviating poverty. We reached out to companies, asking if they can

provide any useful information for that report, and Primetac Supplier emailed back, including pictures, about how business spurred by GSP benefits allowed it to build a medical clinic with an on-site doctor to provide free treatment and general medicines to workers. And it also reported opening the clinic to the public occasionally for free check-ups to increase health awareness in the surrounding community.

None of these things -- a new forklift here, a sales manager there, and free employee clinic way over there -- may make the news, but they are critical to the economic growth at home and abroad -- and an example of why maintaining GSP benefits is so critical. Primetac is a really good example, but far from alone. Here are what some other companies told us last year about potential impacts of termination. A small jewelry importer that hired two workers in 2018 and increased salaries by 25 percent over three years, quote, we would curtail all new employees and most likely reduce our current staff to remain viable. The

chemical supplier to U.S. manufacturers, quote, our group devotes a large percentage of profits into an employee profit-share program. Suspension of GSP from India, Turkey, Indonesia, and Thailand would have definite negative impact on our profitability, resulting in significantly lower profit share for all of our employees. India and Turkey have obviously lots benefits, and so those have already taken a hit. And as we talk about, Thailand and Indonesia, again -- you've got that risk of even more.

A food importer -- we might have to freeze -- quote -- we might have to freeze hiring new sales people if our business volume decreases, or if we have to buy the same products at a higher cost. Customers do not accept price increases within the contract period. That's usually a full year. End quote.

The unfortunate history of temporary GSP lapses in retroactive reauthorization means companies know all too well how lost GSP benefits will affect their business. It's not just

benefits for Indonesia. It's American jobs and the quality of American jobs in terms of wages and bonuses and benefits that are put at risk when we talk about revoking GSP as part of these reviews. Thank you again for the opportunity to testify. Happy to answer any questions.

MR. HERMAN: Thank you again for the opportunity to testify today on this important matter. My name is Nate Herman. I am the Senior Vice President for Policy at the American Apparel and Footwear Association. AAFA is a trusted public policy and political voice of the apparel and footwear industry, and our 4 million American workers. Please note that the Travel Goods Association, the national association of the travel goods industry, fully supports this testimony.

Together our members span the industry of U.S. companies that make, market and sell travel goods. Again, as I discussed yesterday, travel goods are luggage, backpacks, handbags, wallets and related accessories. Together, our member --

excuse me -- we recognize the underlying IPR and market access concerns with Indonesia. In fact, we have had numerous discussions with the government of Indonesia to urge them to address these important issues. And you heard that in the last panel.

But today, we want to talk about the negative impact withdrawal of GSP benefits for Indonesia would have on us, American companies, American workers and American consumers. Dan talked a lot about that in general, but I am going to talk specifically about travel goods.

Over 99 percent of all travel goods sold in the United States today are imported. The United States has not manufactured travel goods in a very long time. Yet, through the power of global value chains, the travel goods industry directly employs around 100,000 American workers. Workers who do design, compliance, marketing, I.T. and retail. Until July 2017, when President Trump made travel goods eligible for GSP benefits, China's share of the U.S. market was 85 percent.

Why was it so high? Because China has most of the global industrial capacity for travel goods. Not just for final assembly, but also for the materials and components that go into the final product. China also has the specialized skill sets -- especially for the more complex or high end or technical aims.

Finally, our industry's relatively small size compared to larger industries like clothes and shoes, or toys and electronics, makes it difficult for us to justify the creation of a new industry in another country when we have to compete with these larger industries for capacity. Also, our members pay high tariffs on travel goods imports. With most duties ranging between 17.6 percent and 20 percent. In September 2018, that duty burden got a lot worse. For the last 17 months, our members have had to pay a huge additional punitive tariff on our imports from China. A 25-percent punitive tariff. And those punitive tariffs will remain in place for the foreseeable future. That means that, for most of

our product, we went from paying a 17.6-percent tariff, to a 42.6-percent tariff overnight.

These tariffs are not paid by other countries. Tariffs, instead, are a tax on Americans -- on American consumers who have to pay higher prices, and on American workers who face lower wages and fewer jobs. Duty-free access for travel goods under GSP for countries like Indonesia gave the industry our first real opportunity to diversify away from China. GSP has given us the opportunity to get out from under our crushing duty burden -- a burden that is paid by American businesses, American workers and American consumers alike.

And we have seized that opportunity, spending the last 2.5 years building factory capacity and skills in Indonesia and other GSP countries. And the results? Since July 2017, China's share of the U.S. travel goods market has dropped from 85 percent to around 68 percent, and it's still dropping. Meanwhile, the percentage of U.S. imports and travel goods from GSP countries

has grown significantly -- from around 5 percent before GSP, to almost 14 percent today, and growing. And American consumers and American workers have benefitted.

We are in a very price-sensitive industry, where higher prices directly translate into lower sales -- even for high-end and technical products. Thanks to GSP, companies have been able to temper those price increases, enabling them to continue to employ -- And in some cases even expand -- their American workforces. And Indonesia plays a key role, thanks to its unique expertise with technical and high-end products.

Let me -- excuse me. Today, Indonesia is the sixth-largest supplier of travel goods. Growing 77.6 percent in 2019 alone. That means Americans bought over 27 million travel goods items from Indonesia in 2019. As a result, the loss of GSP for Indonesia would hurt U.S. travels goods firms, their American workers, and their American consumers. Again, these are technical and high-end travel goods that require skill sets

available nowhere else besides Indonesia and China. That means our members will be forced to source fewer travel goods, which will obviously lead to lower sales, which impacts our workers -- American workers. Or, our members will be forced to source from China and charge higher prices -- 44.6-percent higher prices. Which again, will lead to lower sales. Which again, impact our workers -- American workers. For these reasons, we urge that GSP for travel goods be left intact for Indonesia. Thank you again for the opportunity to testify, and I would be happy to answer any questions.

CHAIR BUFFO: So -- thank you so much, Mr. Herman, for your testimony. We will now turn to Mr. Love, Director of Knowledge Ecology International. Thank you.

MR. LOVE: Thank you very much. And I -- I guess there's a couple new members in this panel, so I will just repeat a little bit about who we are. We are a non-profit organization that -- we have an office up in Dupont Circle. We have an

office in Geneva, Switzerland. We work a lot on intellectual property issues. And have -- have been doing that for some time. And I -- over the years I spent some -- some time in Indonesia and have some familiarity with some of the issues there. I am responding to the Federal Register notice, and I've tried to review the comments by some of the very stakeholders.

I think in our initial comments, I mentioned the localization issues in the copyright, and I would like to start with that. And that is, there's a history of USTR trying to knock down, quote is -- for example from local content or localization requirements, usually on behalf of U.S. companies. And I understand why, and you know, I -- I am not saying that the U.S. doesn't have an interest in that. But just -- our -- our own organization is that measures the governments take to protect their cultural industries should be cut some slack. I think that the world is better off by having healthy cultural industries that are different from Hollywood, or,

you now, different from the U.S./European music industry. And to the extent that things like screen quotas in Korea or localization requirements that are described in the IIPA's missions and things like that for Indonesia in the copyright sector promote cultural industries in those areas. I think that's a good thing that Americans value.

Also, when it comes to enforcement of intellectual property rights, particularly in the copyright sector, to the extent that you have a thriving or more robust domestic sector, you're going to have stronger advocates for enforcement. You heard that in the previous panels, talking about South Africa, where there was a lot of citations to how local performers and local artists of South Africa were pressing for higher degrees of, for example, enforcement in the digital area. Well that's -- that's because they have a -- they have an important music industry in South Africa -- and important film industry and important motion picture -- television industry. So I think that,

in some ways, if you just try and push down the localization or the local thing, in a way you undermine different goals you have in the enforcement area.

On the -- on the drug side, some of the same issues come up. I know that in the pharmacy submission in docket that we were referred to -- had concerns about the localization in that area. And it is the case that in the Obama -- in the Trump Administration, there's really a big focus in the United States and in promoting local manufacturing. There was a hearing even in the Congress as well -- there was a hearing last Wednesday that there was a bill that was considered -- HR-4866, National Centers of Excellence and Continuous Pharmaceutical Manufacturing Action of 2019 -- and in that, which is discussed in here quite a bit -- was quite a bit of anxiety in the United States about having to rely upon China or India as the source of active pharmaceutical ingredients. And there's been other bills in Congress that are concerned about the lack of

access to technology, for example, the CREATES Act which has recently passed in Congress, is a mandatory technology transfer act in the United States. We have -- an area -- one of the areas we are working on are the local manufacturing requirements in the Bayh-Dole Act. One of the concerns we have about the failure of companies to report government funds from the NIH and patent advances the United States is those companies can escape the local manufacturing requirement in there. And in the area of biologic drugs, which is a big problem in terms of pricing and access and lacks the competition, the -- the -- things that -- things that push for a more direct technology transfer in the long run are positives in terms of developing more competition in the biosimilar market.

The last thing I wanted to say is that the local working requirement in the TRIPS Agreement is controversial. There was a period when the United States was going to bring a WTO case against Argentina based on a local working

provision in -- in a local working manufacturing working provision. And this has come up also with India, which has a provision like that in its patent law. The reason the U.S. didn't pursue -- I should say, the case was going to be brought against Brazil, not Argentina. The reason that the U.S. finally dropped the case against Argentina in local manufacturing, is when they looked at the pre -- the briefs that were submitted by the parties, a lot of it revolves around Article II of the TRIPS Agreement. Article II of the TRIPS Agreement makes reference to other treaties, including the Paris Convention. The Paris Convention has very specific provisions on local manufacturing, which are roughly consistent with the law that you have in Indonesia in terms of the provisions.

So the U.S. dropped the case because I didn't think they wanted to run it up for -- you know, and then lose the case and then establish unambiguously that local working was a condition. But the -- but the failure of the U.S. to pursue cases against Brazil and India on this issue, I

think, is pretty good evidence that the opinion within USTR is they would lose the case if they litigated in the WTO. So that sort of gets to the issue of, is -- is Indonesia acting outside of international norms on something that the U.S. is afraid to bring to the WTO as a WTO case on local manufacturing? And finally, I think you just have to look at all the actions the U.S. is trying to take in the area of pandemics and vaccines, APIs and things like that to -- to sort of come up with some way to redress the lack of manufacturing capacity the United States has in the area of active pharmaceutical and biologics. And it's somewhat hypocritical that we would then take another country with a similar-sized population -- that should have a robust domestic manufacturing -- and lean all over them on this issue. Thank you.

CHAIR BUFFO: Thank you very much for your testimony. We will now turn to our representative from Public Citizen.

MR. MAYBARDUK: Hello, my name is Peter Maybarduk. Public Citizen is a consumer group

with -- I suppose we're now at half a million members and supporters nationwide. You heard from my colleague, Burcu Kilic earlier today on the matter of South Africa and access to textbooks. I direct our access to medicines program, and here to talk about the Indonesia patent law and recent amendments -- and hope to make three quick points.

First to the changing needs in politics of this issue in our own country. Second, the TRIPS compliance of the regulations, and thirdly the point of health security and the utility of laws like this. We've been coming to you for a long time to comment on matters like this, and recognize that there is some legacy -- institutional, cultural legacy about the mandate of the U.S. Government in this area and how we view intellectual property. My father was a foreign service officer. I have some personal understanding of how it goes.

But this is not -- we are not the same country that we were 10, 15, 20 years ago discussing somebody's issues. There have been, of course, many changes -- but including specifically in the

area of pharmaceutical policy -- medicines, intellectual property that, I think, should change our calculation a little bit. Treatment rationing in the United States today is tremendously serious. The stats, depending on which you believe, are somewhere between 1 in 4 and 1 in 3 are self-rationing their own access to medicines due to their cost. This includes, if you extrapolate from the studies, hundreds of thousands of people even living with cancer who ration their own access to care because prices are so astronomical.

This of course has produced very significant political change in this area. If you ask Americans what is their number one request of Congress, as often as not over the past two years, that answer has been please lower prescription drug prices. Which of course, implicates intellectual property. If you look at treatment of patents in recent political discussions, it has changed a great deal. Three of the four leading contenders for the Democratic presidential nomination expressly support compulsory licensing of patents

to improve access to medicines in their healthcare plans -- meaning, depending on again which polls you believe, there's maybe a 30-percent -- maybe a 1 in 3-percent -- or 1 in 3 chance that all of us here next year will be serving at the pleasure of a president that supports compulsory licensing. And so we should have a -- have a think on what rules we are laying down for other countries meanwhile -- and I am happy to send you the references.

These -- this -- a policy of local working and manufacturing pharmaceuticals locally, as Jamie was saying, can help us with some pretty serious health problems as well -- including obtaining access to naloxone, which we need to help people survive opioid overdoses. In order to get people access to affordable insulin, just this sort of rule can be helpful.

Now really briefly -- we address it in our submission -- but on the TRIPS' compliance of Indonesia's regulations in this area, as the Emissaries from Indonesia pointed out, Article 31

gives members -- of the TRIPS' agreement gives members the right to pursue compulsory licensing on grounds of their choosing. There's no requirement to list the grounds. And if countries are so free, then certainly it is permissible to grant compulsory licenses in much more specific, limited circumstances -- following protocols as Indonesia does, and is increasingly narrowing toward doing -- especially if you have the extra safeguard of a five-year delay giving patent holders the chance to litigate the matter, frankly, a little more permissive than we would probably prefer for those patent holders. But certainly Indonesia is well within the international norms. Also, we must recall that there's a payment of royalties to patent holders. So there is compensation available. And I believe it's also the case that about 71 countries worldwide have some reference to working failures and their loss. Indonesia is hardly alone.

If you want further evidence on that point, look to the -- the Paris Accord, as Jamie

was saying. He mentioned it, so I will go past it. But also, the drafting history of TRIPS and the Anell and Brussels early drafts of the TRIPS Agreement, there were efforts to specifically exclude local working -- those failed. It's not in the final draft. That's part of how you know that it is okay.

There is an Article 27 argument I can address if you want, but in the interest of time -- I know we've got to keep moving -- I'll skip it. So why does this matter? There are real values of health sovereignty and health security at stake. As Jamie also noted, we are concerned in the United States right now about sole-source manufacturing of pharmaceuticals and drug manufacturers taking advantage. And it's unfortunate that HHS is not here. I know they're part of the Special 301 process. They may have something to say. But we all remember pharma bro Martin Shkreli, that's an incident of sole-source manufacturing causing an extreme hold-up game. The State of California has just proposed its own generic drug manufacturing

plan to serve the state's needs -- state production of pharmaceuticals. Again, analogous to local working.

Finally, I'd just like to have us imagine a scenario with the news ran -- and the United States has just ordered a withdrawal of its personnel, I believe, from China in the case of the coronavirus. So what if -- what if we can get a vaccine? And what if that vaccine is not produced in the United States? What if -- what if it's produced in Europe? What if it's produced in China? Or future threats of that nature. Things are tense with some such countries. Don't we want the ability to have a failsafe and to manufacture our own pharmaceuticals, despite the interference of something as minor as a patent? Again, we can always compensate the right holder for their investment in R&D.

So it's not easy to get any compulsory license in Indonesia, but the country reserves the right. And so should we. Thank you.

CHAIR BUFFO: Thank you very much for

your testimony. We'll turn to my colleagues for questions. Thank you.

MR. CHANG: This question is for Mr. Love. Thank you for your testimony. In your written submission you state that members of the Motion Picture Association of America, quote, should not be able to use U.S. tariff policies to force their policies on the Indonesian public, end quote. Could you explain this statement further, keeping in mind that market access and IP protection and enforcement are criteria that must be met to maintain GSP benefits? Thank you.

MR. LOVE: My comments in the statement were also in the context of localization and issues that were raised in the IIPA submission. But in general, we're not comfortable with the -- with the Special 301 process, or the GSP thing linked to ISP policies and the way that they've been implemented. One of the concerns that we have is there's this revolving door between the people that set on this panel this week and the people next week will be on my side of the thing arguing for the -- the

benefits.

Some of the people testifying today -- or will testify today used to be on that side of the room, and now they're on this side of the room. So there's some question about the legitimacy of the process where some people look at -- look at the submissions that are done by people on this panel as almost like a job interview for when they leave the agency and take a higher paid job outside the agency.

The other thing is that -- you know it's the -- the -- the industries have narrow interest. The U.S. has broader interest. So if you take, for example, pharmaceuticals -- an issue that Peter talked about -- if you want to force Indonesia to raise the prices of cancer drugs, for example, on its people -- given all the pressure and military issues and a million other things that are at stake in the U.S. policy, it's possible you can -- you can pull that off. The question is what do you have to -- what do you -- you know, what does it cost you to get them to do something that they don't want

to do? It's not free. Nothing's free.

So if you asked them to -- to turn back on their culture industries, or to raise the price of cancer drugs, you're going to have to give them something in return. And we are -- it's our opinion that the U.S. is giving up too much in the IP area for areas where there just isn't that much at stake. I don't think that the localization of the copyright thing is a big problem for U.S. industry. There may be other issues that are out there. Indonesia -- I don't even know, like, what the -- what the impact is, for example, in the recording industry of America. I doubt if it's -- I doubt if it's very -- you know, I have no idea how important it is. But what we don't know is what are we sort of giving up in the other areas? So, I think in the copyright sector, every country I go to has a strong lobby domestically on the copyright. Not true in the pharma, but in the copyright side, it's always the case. They always have their local actors. They always have their local singers. They always have the local

authors. And they love them in every country.

And most people are pretty strong advocates for copyright things. I don't think you need to have USTR bringing the hammer down on countries on those issues. Now, you can make a different argue in the pharma, but that raises completely different issues because unequal access to pharmaceuticals is considered different than unequal access to computer games or motion pictures. Sorry about the long-winded answer.

MS. COHEN: This question is for Mr. Peter Maybarduk, all right. In your written submission you state that, quote, the drafting history of the TRIPS Agreement demonstrates that country delegations explicitly excluded limitations on the ability of member states to address local working requirements and their patent laws from the final agreement -- end quote. Could you please explain this statement further, keeping in mind that the IP and Protection and Enforcement is a criterion that must be met to maintain GSP benefits?

MR. MAYBARDUK: Happily, and I think we have a bit more in writing on that than is in our submission. So we will -- we will provide it in post-hearing comments. My recollection is that two prior drafts of the TRIPS Agreement included efforts, I imagine by the United States, to specifically exclude local working from the rights enjoyed by member states. The Anell Draft and the Brussels Draft -- it does not appear in the final agreement because the countries could not arrive at an agreement on that point. Rather, as Jamie said, the Paris Accord was incorporated by reference. That reference to -- what is it, Article 5A, the Paris Accord -- if you follow it -- specifically cites working failure, perhaps local working specifically. So there is -- there is sort of ample reason to look at the history and look at the content of the agreement and say this -- you know, this was a point that opponents of local working could not win as -- as Jamie suggested, that also, the litigation history at WTO suggests the same.

MR. CHANG: Next question is for Mr. Herman. How would you member sourcing strategies change if GSP benefits were revoked for Indonesia?

MR. HERMAN: That's a good question, thank you. The -- the problem is that there's -- you -- there's not many choices. As -- and I can discuss what a member told me, but the -- China's not an -- not an option anymore. And again, Indonesia specializes in the higher-end and technical product --- a lot of the outdoor product, backpacks and other things. And there's just not the alternatives there. Vietnam is a saturated market. Again, we're a very small industry competing with furniture, electronics, apparel and footwear are rushing into Vietnam right now because of the China tariffs. And India has been taking out of GSP, so that's not as much of an option anymore. And they are not able to do the technical product.

And so -- so the limit -- options are very limited. And just -- just to talk about it, from a member who wrote me, and said, Indonesia is

becoming very important to us. In The past year we've gone from no production to around 5 percent production, which for us means nearly 3 million units of handbags And accessories alone. We've made a lot of investments and in the ground to support that business. And it not only provides a great alternative to China, but also to Vietnam, which is not GSP but is becoming highly saturated.

As you can see, the situation with China has gotten much worse. We anticipate that 50 percent of the workers will not return after Chinese New Year. The loss of India GSP has also contributed to the capacity constraints. Thus with China, Vietnam and India out of the picture, Indonesia is becoming a much more important player in the supply chain, despite the fact that costs are a little higher in Indonesia.

CHAIR BUFFO: In the interest of time, that will conclude this panel. We appreciate your participation. Thank you very much. And we will take about a 5-minute break before we call up the next panel, thank you.

(Whereupon, the above-entitled matter went off the record at 3:12 p.m. and resumed at 3:23 p.m.)

CHAIR BUFFO: Welcome back, Chargé d'Affaires Iwan, and welcome to distinguished colleagues from the Embassy of Indonesia. So -- it's been a long day, so I am now realizing that you traveled from not that far, but with traffic in D.C. --

(Laughter.)

CHAIR BUFFO: -- I will still retain my gratitude for traveling all this way. Thank you very much. Please proceed with your testimony.

MR. SUSANTO: Thank you, Mrs. Chairwoman. Before I give you testimony, let me introduce one of my colleagues who just arrived. He is our Attach**C** for Agriculture, Mr. Hari. Ladies and gentleman, good afternoon. Please allow me to extend our position, for the opportunity again to work with USTR on the review of Indonesia's country practices regarding our compliance with Generalized System of Preferences,

eligibility focusing on market access.

We believe that there is substantial room for expanding our increasingly intertwined trade relationship, considering the fact that the U.S. is now being the largest economy in the world, while at the same time Indonesia possesses one of the largest domestic markets in Asia. Indonesia also becomes the hub for the Southeast Asia and East Asian region. And we've been enjoying our economical rates over 5 percent in the past 11 years. This is something that is -- we really -- we cherish. The full potential of trade between the U.S. and Indonesia, in our opinion, haven't been met. Knowing the fact that we are considered as a top economy in the world.

Our two way trade total is approaching $30 billion U.S. Dollars, while at the same time the U.S. trade deficit has consistently reduced. This happened -- this because of Indonesia's continuous efforts to send buying missions to the U.S. to purchase additional agricultural products, energy and technology to promote free, fair and

reciprocal trade traditions with the U.S. On the efforts related to the GSP review, The Government of Indonesia has undertaken many positive yet far-reaching reform efforts on the following subjects. First, the issuance of the Ministry of Law in Human Rights' Regulation 30 in 2019. The regulation provides consistency with the WTO trade-related intellectual property rights TRIPS Agreement on the procedures of foreign policy re-licensing.

Several features of the regulations are among others, the grounds for compulsory licensing, the procedures that is through compulsory licensing, to seek grievance mechanism against issuance of compulsory licensing, and procedures to delay local working requirement. Going forward the duty for intellectual property rights will meet with your team for furthering engagement under the Special 301 process. Number two, on parallel review, Indonesia has met and demonstrated so many positive improvements on intellectual property rights enforcement, like

what I said beforehand. Upon the agreement of work planned on IPR in May 2018 in an assessment progressing towards an improved state of IP protection, apart from the management of compulsory licensing regulation. Indonesia has proactively blocked over a thousand illegal streaming sites. In addition, Indonesia has began the process of revising our 2016 patent law with the goal of issuing an amendment of this law. Indonesia believes that such an event will fundamentally will improve the existing proficiency related to patentability criteria, local manufacturing and the use, requirement and compulsory licensing.

Number three, the issuance of the Government Regulation of 71, year 2019 in which this new regulation allows for the offshore processing, transfer and storage of commercial data. Number four, the issuance of the Government Regulations number three year to 2020. The regulation exempts foreign-owned insurance companies from 80-percent equity cap on additional

capital injections. This provides for some grandfathering clause. Number fifth, on re-insurance Indonesia is preparing to phase out mandatory domestic sessions requirements as stipulated in OJK, or Financial Services Authority Regulation number 14 of 2015 and OJK, or Financial Services Authority Circular Letter number 31 of 2015. The phasing-out process will be done gradually in three years.

Number six, on national payment gateway, or NPG. Indonesia has engaged a foreign electronic payment supplier and has concluded a partnership agreement related to participation in the National Payment Gateway for processing of domestic retail electronic debit transactions. Indonesia has also indicated that it will not expand NPG requirements to the processing of domestic retail electronic credit payment transactions. Number seven, Indonesia maintains the World Trade Organization moratorium on customs duties on electronic transmissions, and will not impose customs duties on software and other digital

products transmitted electronically before the next WTO Ministerial in 2020.

Number eight, Indonesia continues to improve the issuance -- the issuance of import licenses for horticultural and dairy products as follows -- a, the management of the Ministry of Agricultural regulation number 39, year 2019. That provides fast-track opportunities for countries that have already recognition of its safety, monitoring system of fresh fruit or plant origin, including the United States, to ship horticultural products including apples, grapes and oranges, to Indonesia. This track doesn't require importers to submit good agricultural practices, good handling practices and protection capacity information, to obtain import recommendation. B -- Ministry of Agriculture Regulation number 39, year 2019 also creates a sense of provision which allows the validity of import recommendations and approvals to be extended into January and February of the upcoming year.

C -- The -- with the issuance of The Ministry of Agriculture Regulation number 30 And 33, year 2018, Indonesia has released the requirement for dairy importers, dairy traders and food processors to partner with domestic producers, or submit partnership agreements. And this has shown its strong commitment to open up Indonesian market access to imported dairy products.

Number nine, Indonesia has begun the process of drafting an omnibus law to address the overlapping amongst the existing regulations and to simplify business processes in Indonesia. The law will replace and refocus several substantive provisions of The existing laws, which include trade investment, taxation, labor and environment. As the next step after the completion of the GSP review, Indonesia is strongly committed to pursuing efforts to increase our two-way trade volume and of course, as the blessing, enhanced trade and investment relations with the U.S.

Indonesia believes that this reform,

along with enhanced trade and investment relationship, will surely increase the volume of trade and investment with a goal towards doubling two-way trade volume in the next five years. The positive conclusion of the GSP review is an important step in this undertaking. Therefore, it is Indonesia's interest to create a welcoming environment for trade investment, including the improvement of market access and stronger enforcement of IP audit protection. It will also provide the two largest presidential democracies in the world with huge opportunities to achieve the economic trade investment in full potentials.

The conclusion of GSP for Indonesia will benefit the U.S. consumers, companies, workers and their families. We need each other, and of course the conclusion of GSP is win-win solution for the U.S. and Indonesia. I thank you for your consideration.

MR. THANHAUSER: Thank you Chargé d'Affaires Iwan. First question, we welcome Indonesia's stated commitment to undertake

domestic reforms that will improve its trade and investment environment. In addition to the reforms mentioned in the comments submitted by your government, are there any other reforms Indonesia is considering? And how will they improve U.S. market access? Thank you.

MR. EBERHARD: Thank you for your questions. As described earlier, the latest point that we've submitted was the start of the drafting of the omnibus law, which is an overarching regulation which you understood will address huge amount -- a quite substantial amount of issues regarding market access, trade, investment, labor, environment and taxation in general. So I believe that this is a -- momentum domestically to reform our economic policy. And apart from what we have submitted publically, we've also put -- published online the relevant regulations that we mentioned. As previously stated on the horticulture import, The Ministry of Agriculture -- The number two, year 2020, the Minister of Finance -- the government regulation amendment to the GR-14, as well as the

upcoming re-insurance phasing-out plan. That will be it, thank you.

MR. WIJAYANTO: Thank you for your question. I would like to also address some of The issues regarding how Indonesia will -- are improving the investment and American access to The overseas, specifically to the U.S. And with this, regards also Ministry of Trade also having -- have been -- met some of the progress on improving the regulation, and -- as well as the information system related to the procedure of import license. And this is -- will be good process for the importers to get their document within days and then it's like a -- reducing also the -- the process of the -- exchanging the document that's -- as a whole, it's like a true online-based system. So this is a part of our effort that's being made. And also, according by The Ministry of Finance as well -- as part of the monitoring system also, and also surveillance to -- ensuring all of the processors to get the document running well. That would be -- that's the information the latest one, thank

you.

MR. PAJUSI: Mr. Iwan, in the comments submitted by your government, Indonesia states that it has amended Government Regulation 14-2018 on foreign ownership and insurance companies. Can you describe for us the amendment? And specifically the treatment of grandfathered companies and Sharia spin-off units under this amendment?

MR. EBERHARD: We thank you for your questions. As people find out in our statement that we issued the Government Regulation number to year 2020, and this regulation exempts existing foreign-owned companies from 80-percent equity cap on additional capital injections. What we meant by this is, the existing foreign-owned insurance companies would be able to add capital as long as it doesn't exceeds their current capital level. For example, if a company already have 85 percent of foreign ownership, it will be able in the future capital injections to retain that level and not subject to the 80-percent equity cap. And the --

it is also applicable for Sharia unit. And the regulation has provided pretty clear a very specific proficient stipulated to guarantee Sharia unit will be treated the same as conventional insurance companies.

And the additional capital injections for foreign -- for foreign-owned insurance companies will need to be done through initial public offering in the capital market. That's it.

MR. PAJUSI: Thank you -- thank you very much.

MS. CACKOSKI: Mr. Iwan, in the comments submitted by your government, Indonesia states that it continues to improve the issuance of import licenses for dairy products, yet we note that the Ministry of Agriculture has put a hold on approving new U.S. dairy facilities, and that several U.S. dairy facilities have not received final authorization to ship product to Indonesia despite passing the ministry's final review. Have you engaged that ministry on this issue? And if so, have they indicated when they will grant final

authorization to these U.S. dairy facilities?

MR. SOEKIRNO: Thank you very much for your question. The Ministry of Agriculture, or we call it MOA, really also concerned about this. And we already met some position to follow up this issue. We already check that the proposal already submitted to the MOA -- especially to the Director General of Livestock. And based on the record, we have planned to come to do the on-site inspection last December. But we have already receive the letter based on the email from the USDA. But it should be -- because probably -- is -- if I am not wrong, it will be happen -- or, it will be happen on the second week of December last season -- last year. So it -- we have received. It should be done for the next year. But we haven't received it yet. When the USDA allow us or invite us to -- to do the inspection -- on-site inspection. In general, usually we -- to get the approval, we do three steps. Just -- I think USDA also have the same regulation. First, the proposal should be

pass the discreet view in the DG of Livestock. And the second step, we have to do the on-site inspection. And the last step would be the final assessment. So if all of this step can be done, I think -- I believe the MOA will issue the proposal that you ask. Thank you very much.

MR. WIJAYANTO: Maybe I would like to add some update regarding the question. We are from Ministry of Trade regarding with issuance of the import licensing for the dairy product from USA, particularly for the companies that has been doing business before with Indonesia, and the exporter from U.S. that already granted to -- to get the certificate of the plan. The process itself is still ongoing. I mean, the process is already there. I mean, there's no limitation or delay on that because we -- we have been issued some of the import licenses for the importers from U.S., particularly for the existing plan from the exporter -- I think from Midwest areas. And we -- we right now, together with Ministry of Agriculture, carry out some of the -- overseeing

the process to -- ensuring that all of the -- the new facility that ongoing -- ongoing to get the -- certificate will be take care and expedite as they get the import recommendation from Ministry of Agriculture.

So I think in a near future, or within next -- within weeks, probably the process itself will be resolved. And I am sure that, together with Ministry of Trade, Agriculture as well, we are going to address all of the issues and report with the -- both USTR and also from USDA. So -- thank you.

MS. CACKOSKI: Thank you.

MR. SOEKIRNO: Can I give additional information? Thank you. The DG of Livestock, MOA, also info -- that we have -- we have already received the proposal sent by the U.S. regarding these dairy -- new facility to be registered. And they -- the Duty of Livestock already asked for some documents that should be fulfilled immediately. And until today we haven't received those documents. So -- that's what -- additional

information, thank you.

MS. MITCH: Thank you very much. So we understand that Indonesia's Financial Services Authority, Regulation 14 of 2015 and The OJK Circular Letter 31-2015, require all reinsurance business for simple risks and up to 50-percent of non-simple risks be seeded to Indonesian reinsurers. You mentioned in your testimony today that there is a planned phase-out of these requirements over the next three years. Could you just elaborate briefly on what the process of this phase-out will look like?

MR. EBERHARD: Thank you for your question. We are discussing internally, and also with our stakeholders, on the phasing out of the mandatory domestic session.

What we can ensure, what we can assure today is that the phasing out will be done gradually. It will -- it won't be done all at the same time. It will require three years, as what we had indicated.

What we are doing currently is trying

to consult internally with the stakeholders, and also externally with our stakeholders in Indonesia, and also abroad, when we can start the amendment process of the relevant two regulations. That's it. Thank you.

MR. THANHAUSER: Great. Thank you. In the comments submitted by your government, Indonesia states that it, quote, continues to improve the issuance of import licenses for horticultural products.

Can you describe how Indonesia is improving import licensing issuance for horticultural products?

Furthermore, we note that the Ministry of Agriculture did not begin issuing 2020 import licenses for U.S. horticultural products until late June. How does Indonesia intend to ensure that such delays do not occur in the future?

MR. SOEKIRNO: Thank you very much. MOA right now already made a decision also regarding this. They are still trying to adjust the application for the recommendation -- for the

horticultural recommendation.

So, this application should be adjust to be forfeit for the important needs. Before, in the previous time, this application only can be submit for one application, for one -- just for one importers. And the importers can submit for many countries.

Let's say one importer submit the import recommendation for three countries, like say, China, U.S., and Malaysia. So, for those country who have the country application for the horticultural except the food, except the product -- I mean, the food. There will be no problems.

But then, once they submit, and one of those country, let's say China, they don't have any country recognition issued by us. So, it will be not challenged because cannot issue the import recommendation; if one of those country applied, it's not passed.

So, right now the Ministry still trying to adapt this application that can be -- for importers to be -- that can be submit, or they allow

to submit the import recommendation proposed by country. So then, the -- each company can submit multi proposal.

And they're still trying to adjust this application. Once it's done, so I'm pretty sure it will be happen the same case for the next. Thank you.

MR. WIJAYANTO: Okay. One more. Excuse me. From MOT sites, actually the progress of updating the system itself will be improving a lot of procedure of the import licensing on issuing of the import document itself.

Recently by inception of Indonesian National Single Window, the data center for, of the system of each ministries will be in the central system.

So, it might be ones of the resolving of the problem itself. Because since there are many of ministry has their own system, it will be taken by the Indonesian National Single Window.

And some of the issues, like the procedures to get the document from Ministry of

Agriculture to Ministry of Trade, promising the simplified and also more transparent, I mean, in term of how to get the data itself from importer requests.

And also, how the updating of the process itself, until they got the import license. It will be monitored by the system, through the -- even by the mobile, from each of the importers.

So, I think this is one of the progress that -- effort by both Ministries. And the offer come will be part of the how we opening our market access as well, as part of this import procedure.

CHAIR BUFFO: Thank you very much. We appreciate all of your testimony today, and your participation in the panel. We may have some follow-up questions for you. And if we do, we'll send them in approximately a week or so.

And again, you can feel free to provide, expand on any additional information in your post hearing brief. Thank you again. Safe travels back to the embassy.

MR. SUSANTO: Thank you so much, Mrs.

Chairperson. Once again, on behalf of the Indonesian government and the embassy, I would like to express our gratitude, because of getting the opportunity to share our views.

The business as well, especially on so many reforms that we have made in themselves, how to try to find the best solution for us, in terms of concluding the GSP review for Indonesia. Thank you so much. And I will definitely be traveling far away. Thank you so much.

CHAIR BUFFO: So, I would like to invite the next panelists up. Thank you.

Thank you very much, and welcome, panelists. We will start with Mr. Anthony. Welcome again.

MR. ANTHONY: Switched up the sides. Thank you again for allowing me to testify on behalf of the GSP Action Committee. My name is Dan Anthony. And I work with U.S. companies and associations that import under the GSP program, including many that import from Indonesia.

In this panel I plan to expand on my

comments from yesterday about how the potential loss of GSP is very small compared to ongoing shocks to global supply chains, thereby reducing the effectiveness of using GSP suspension or revocation as a stick for inducing changes in review countries.

Just in case my panel wants time estimates, we're still too optimistic. These comments are two and a half pages. Worst case scenario, everyone gets out a little earlier.

So, in thinking about leverage the carrot is as important as the stick. And in Indonesia's case, again with GSP the carrot is pretty small.

Only about one in eight dollars of Indonesia's goods exports to the United States gets GSP. And only about ten percent of Indonesia's total goods exports to the world go to the United States.

So, GSP changes for better or worse only affect about one dollar out of every $80 dollars of Indonesia's goods exported to the world.

Furthermore, if the benefits go away costs are paid by the American companies, as I pointed out in the last panel. And while loss of benefits may stunt demand, imports don't collapse.

Even in the two year expiration they declined a bit, and then stagnated, as shown in this sort of chart here. And I'm going to submit this in the post hearing comments.

But these little shaded sections, you can see, the imports, they just sort of flatten out. But it's not like companies stopped buying from Indonesia, or any other GSP country, just because they're paying tariffs at the border.

I think that those basic facts justify some skepticism about the extent to which GSP provides a sufficient carrot to induce change, even in a normal trading environment. But the current environment is anything but normal.

For the Asian countries in particular everything comes back to China. Yesterday I cited how GSP savings growth trends for imports from Thailand corresponded very closely with whether

those products face new Section 301 tariffs when imported from China.

To reiterate, savings on Thai imports facing 25 percent Section 301 tariffs when imported from China are up 17 percent. Those facing 15 percent tariffs are only up 8 percent. And those facing no new tariffs are down by 20 percent.

For Indonesia there have been across the board increases. But the differences between the aggregate product groupings are just as clear.

Savings on Indonesian imports facing 25 percent tariffs when imported from China are up 46 percent in 2019. Those facing 15 percent tariffs are up 23 percent. And those facing no new tariffs on China are up just 5 percent.

In fact, most Asian countries see similar GSP savings growth patterns. So, it's not just Thailand and Indonesia. It's also Cambodia and Philippines, and India and Turkey who have lost GSP, which is perhaps the strongest indication that it's not about GSP at all, but global supply chain shifts.

In further support of the idea that it's mostly regional shifts away from China, we see no similar patterns on imports and savings trends from the Western Hemisphere countries under GSP.

In fact, they're flipped. GSP savings have increased most for Western Hemisphere products on no Section 301 list. While those for products on Lists 1 to 3 have declined.

There are some wonky explanations for why that is. But the basic explanation is that the Western Hemisphere countries generally aren't substitutes for Asian supply chains. And so, the advantages provided by GSP, or potential disadvantages stemming from lost GSP, do not change any of these facts.

The simple reality is that GSP termination would be lose-lose for Americans. Companies and workers that depend on duty free imports obviously lose, including maybe their jobs, due to new tariffs.

But termination means that exporters or other interested parties did not get the outcomes

they desired. So, they are no better off either.

The third group, the foreign companies and governments who petitioners hope to pressure enough to induce change, are generally just fine. Demand for their products may even boom, like in India or Turkey, as American companies bang down the factory doors asking if they can replace current Chinese suppliers.

I recognize the challenge this presents for the GSP Subcommittee and all the agencies involved in negotiations. And I recognize the frustration it caused both for petitioner industries who want to see change, and importers like my members, who just want some certainty.

But, you know, it's clear that there's no one who actually benefits that we can point to from termination of any country under GSP. And we ask that you keep all of these issues in mind as you move ahead with reviews and future recommendations. I'd be happy to answer any questions.

MR. DEMPSEY: Thank you. Good

afternoon. My name is Kevin Dempsey. And I'm the Senior Vice President for Public Policy and General Counsel at the American Iron and Steel Institute.

I appreciate this opportunity to testify here today on behalf of our U.S. producer members on the question of whether Indonesia is meeting the GSP eligibility criteria requiring that it provide equitable and reasonable access to its basic commodity resources.

For our members, especially those producing stainless steel, the answer to this question today is clearly no. This is because the government of Indonesia has recently reimposed a full ban on the export of nickel ore, which is a key component in the production of stainless steel. And has taken other steps affecting the global nickel and stainless steel markets, to the detriment of U.S. steel producers.

So, our view is, therefore, that Indonesia no longer meets this key criterion for beneficiary status under the GSP.

Let me explain a little bit why American

steel producers are so interested in this question of nickel. Indonesia is today the world's largest producer -- mine producer of nickel, and holds the largest nickel ore reserves in the world.

Nickel is a key alloying element in the production of stainless steel -- in many grades of stainless steel. The most common grade of stainless steel, 304, requires about 8 percent nickel. And in fact, about 70 percent of all the nickel produced in the world today is consumed globally in the production of stainless steel.

As a part of a national plan to develop certain downstream industries, including in particular stainless steel, Indonesia in 2014 imposed a ban on the export of nickel ore. This ban was then partially relaxed in 2017 to allow the exportation of low grade nickel ore, subject to an export tax.

At that time the government indicated that it would seek to reimpose the full ban a number of years later, in 2022. But this past September the government announced that it was moving up the

ban to January 1 of this year.

The major beneficiary of this export restriction system on nickel in Indonesia has been a Chinese stainless steel producer, Tsingshan Holdings Group.

In August of 2017 this Chinese company opened a major three to three-and-a-half million metric ton stainless steel mill in Indonesia, with the primary purpose of exporting its production to markets around the world.

This mill was heavily promoted and sponsored by the Indonesian government, and financed by the Chinese government through its Going Global, and then Belt and Road initiatives.

And importantly, when you take together the three million metric ton capacity, Tsingshan has in Indonesia, with its existing seven million metric ton capacity in China, that means this one company will now have production capacity equaling nearly 20 percent of global stainless steel demand.

So, these government imposed export restrictions on nickel effectively subsidize

stainless steel -- Chinese stainless steel production in Indonesia, by giving these producers access to nickel at prices that are well below the world market price that is normally set on the London Metal Exchange.

By contrast, the U.S. producers, European producers, other global producers outside of China and Indonesia, they're only recourse is to get their nickel at prices that pegged to this LME price, so at a world market price.

So, you have this very large artificial and unfair pricing differential, which frankly has now been further exacerbated over the last year as a result of a series of closely timed actions by Tsingshan on the one hand, and the government of Indonesia, that have further driven up the world price for nickel.

This happened over the course of the summer as Tsingshan started reportedly buying large quantities of nickel on the London Metal Exchange. And they were closely timed with the consideration, and then announcement, by the

government of Indonesia of its plans to move up the reimposition of the full export ban on nickel ore to the beginning of this year.

The result of that was, as I -- we show in our written comments, a very significant spike in the price of nickel on the world markets that affected the costs for stainless steel producers in the U.S. and in much of the rest of the world.

But these market distorting policies have also fueled the rise of increased Indonesian stainless steel exports to world markets since 2017, including importantly to the U.S.

Imports of semi-finished stainless steel from Indonesia to Tsingshan's joint venture partner, ATI, here in the U.S. have increased dramatically over the last three years, even as imports from other countries around the world have declined significantly.

This is largely due, we believe, to the fact that the average unit values for the imports coming from Indonesia into the U.S. are fully $1000 a metric ton below the average price of imports

coming in from the rest of the world.

And these imports, if left unchecked, are going to put further pressure on the U.S. industry in the U.S., its prices, its profitability, and could affect our ability to maintain current investment and production levels.

And so, if unaddressed, this situation could ultimately force the shutdown of critical domestic stainless steel making operations in the U.S., leaving us reliant on foreign sources of these critical steel products.

And that's why we're here today, to ask that as you review the eligibility for GS -- Indonesia for GSP, you take into account how these government policies and actions in Indonesia to limit access to its nickel ore are impacting world nickel prices and fueling the low price exports of stainless steel to the U.S. Thank you.

MS. MORRIS: Thank you for the opportunity to testify today on behalf of America's dairy farmers, farmer owned dairy cooperatives, dairy processors, ingredient suppliers, and export

trading companies.

I'm here representing the National Milk Producers Federation and the U.S. Dairy Export Council. Indonesia is a top ten export market for our industry, and a valuable partner.

National Milk and USDEC had hoped to be able to wholeheartedly recommend that USTR maintain Indonesia's GSP benefits, following its swift and positive response to concerns that we raised during the 2018 GSP review process.

In the prior instance we had noted concerns regarding a law that was designed to mandate local sourcing and partnering by Indonesian dairy buyers in ways that threatened to impair U.S. access to the market.

Indonesia took decisive action in 2018 to remedy that situation, and we greatly appreciated those actions.

Regrettably, more recently Indonesia has raised new roadblocks that impair the ability of our exporters to fully access the Indonesian dairy market, and thereby hinder the smooth flow

of dairy products.

In light of those new barriers we unfortunately must request that USTR continue its review of Indonesia's commitments to -- adherence to its GSP commitments.

In September of last year Indonesia's Ministry of Agriculture and USDA commenced discussions on a review of the U.S. dairy system to respond to Indonesia's requirement that a protocol be negotiated for dairy trade to continue.

The U.S. government has been working with Indonesia to resolve this issue, and document a consistent and excellent safety record in animal health oversight system in our industry. And it's our understanding that that work continues.

Despite that ongoing process to address Indonesia's concerns and provide the necessary assurances regarding our products, the Ministry of Agriculture has for many months now maintained a hold on the approval of any new dairy facilities that were not already registered as authorized to ship to Indonesia.

Some of these facilities have been waiting for approval since the summer of last year.

This long standing hold on the ability of U.S. companies to gain access to ship to Indonesia, or of existing shippers to expand the scope of products they can supply to the market by registering additional facilities, is impairing the growth opportunities for our industry in this market.

Five U.S. dairy facilities have submitted facility registration materials, and are in or have completed the Ministry of Agriculture's desk review of those documents. Yet none have received final authorization to ship.

In addition, at least ten more U.S. dairy facilities have filed all of their paperwork, but still are awaiting a desk review by Indonesia. Four of those had submitted all of their paperwork, in our understanding, over three months ago.

Additional facilities remain in the process of completing their facility registration materials. Yet, will face the same roadblock at

the next stage, if Indonesia does not change course and resume allowing U.S. facilities to be approved to export.

Indonesia has demonstrated a track record of being responsive to U.S. concerns, and is showing a strong desire to be a good faith trading partner with the U.S.

We greatly value our relationship with them, and have appreciated the steps taken by its government to further encourage trade with the U.S.

It's our hope that a constructive solution regarding this hold on facility approvals can be found quickly with Indonesia, in order to restore the smooth flow and expansion ability of our exports.

Until that time we regrettably must recommend the continued review of Indonesia's compliance under GSP.

Regarding the audit visit mentioned earlier, our recommendation -- we certainly support and recognize Indonesia's right to come and conduct a system audit of the U.S. to effectively

spot check the way in which our regulators ensure high standards here in this country.

But we certainly cannot support insisting on this as a precursor to the registration of specific facilities, or 100 percent inspections of facilities across the board.

We stand ready to work with the U.S. government to foster a mutually beneficial solution that respects Indonesia's right to food being provided -- safe food being provided to its consumers, while upholding fair principles and expectations laid out by Congress in GSP. Thank you.

CHAIR BUFFO: Thank you very much for your testimony. I will now turn to my colleague from the Department of Commerce for the first question.

MR. McGEE: Mr. Dempsey, your comments note that since peaking at $18,620 dollars per metric ton last September, nickel prices have settled at around $14,000 dollars per metric ton.

What developments account for this decrease in nickel prices? And how does Indonesia's nickel export ban factor into these developments?

MR. DEMPSEY: Thank you. Yes, I think as we noted, you know, there, it's a very dynamic market and there was certainly a drop off in demand in the second part of last year for steel in general, and including -- and for stainless steel in particular.

And so, that perhaps coupled with -- perhaps there was a little over-buying on the London Metal Exchange, that then led to a swing back. There's been -- there's some reduction in those prices from those very high peak levels.

We're still seeing, you know, world market prices, though, much elevated. And, importantly, the differential between the price that Tsingshan, or any other producer that would be operating in Indonesia would be able to purchase nickel for, and the price that our companies would be able to obtain on the world market is going to

be still very substantial, which is what drives that very large difference in the AUV on imports of goods coming -- of stainless steel coming in from other parts of the world, compared to Indonesia.

I think that -- so it's not just a problem frankly in the U.S. It's a problem very much in Europe and in other parts of the world, that they're tied to world market prices.

MR. McGEE: Thank you.

MS. MITCH: Thank you very much. My question is for Ms. Morris. In your submission you express a hope that a constructive solution can swiftly be found to some of the market access issues you've described.

Can you give examples of the kind of constructive solutions your organization specifically has in mind? And have you proposed these to Indonesian officials in any of your engagements?

MS. MORRIS: Thank you for the question. We leave the matter of the negotiations related to the protocol between USDA and the

Ministry of Agriculture in Indonesia, to them to sort out.

It is our understanding that those appear to be resolvable issues. But they're not within our place to propose what the specific recommendations for that protocol should be. Rather, our focus is specifically simply on the facilities that seem to be held hostage to that process.

In our view, our recommendation that's been provided to the Indonesian government, and as we laid out in our testimony, is to lift that hold on facilities.

There has been no indication that any of the numerous companies shipping to Indonesia are posing a food safety problem, nor other concerns that have been identified. And the companies that would like to gain the ability, or expand their ability, to ship to the market are operating under the exact same set of regulations here in the U.S.

There therefore is no reason to have this hold in place, simply because they were newer

entrants or applicants to the market.

MR. THANHAUSER: This question is for Mr. Dempsey. What actions would Indonesia need to take to resolve the market access concerns described in your submission?

MR. DEMPSEY: Well, what we'd like to see Indonesia do is remove the trade distorting policies that are in effect, the ban on the export of nickel, the preferential measures that basically require those purchasing the nickel to process it in-country.

You have a number of, frankly, WTO violations on -- in terms of Article 11, in terms of, you know, the export ban. And then what amount to subsidies for, or preferential purchasing of goods; they're conditioned on use of domestic goods or domestic processing.

So, dismantling those measures to allow market forces to operate, and to allow all parties access to nickel from Indonesia on equivalent terms, would be critical we think to resolving that situation.

MR. THANHAUSER: Thank you. Ms. Morris, in your submission you note that Indonesia is a top ten market for U.S. exports of dairy products, with 2014 exports totaling $140 million dollars. Can you speak to how U.S. dairy exports to Indonesia have fared in 2019?

MS. MORRIS: Thank you. Product -- we have trade data through November of 2019. The total for that, according to USDA data is $218 million dollars.

I note that there has been a recovery in global dairy prices between 2018 versus 2019. So the value basis has been aided by the fact that the same volume of products is trading at a higher value.

I think what's fair to say is that those companies that have the ability to ship to the market now, our understanding is they're having a very positive experience, unless they're one of the ones that have additional facilities that are pending approval. That they can't source those products from, that they may make at the other

facilities that are still awaiting approval to be able to enter the market.

The other set of our members that are not able to enjoy the positive market there, and expand opportunities, are of course those that lack any plants on the list. And so, are still stuck there as well.

I think our hope is that everyone can enjoy in the growth in that market, and work together to help foster greater trade with Indonesia moving forward.

CHAIR BUFFO: All right. Maybe one more, maybe two more. So, this is a question for Mr. Dempsey. Your comments note that this is not the first time that Indonesia has banned nickel ore exports, and you speak a bit about the previous bans in 2014.

Indonesia also banned nickel exports, and only partially relaxed this export prohibition in 2017. You talked a bit about how the 2014 ban affected your member companies. Is this recent ban different from the 2014? If you could, expand

a little bit on that.

MR. DEMPSEY: Well, I think what is different this time around is that the additional actions, you now have a major Chinese producer operating in Indonesia. That was not the case back in 2014.

So, there is a major stainless steel producer available there to take advantage of that subsidized nickel price, and is dramatically increasing exports on world markets.

You also have a difference -- the coordinated activity between that Chinese producer and the government of Indonesia, which I think further exacerbated the impact on the world market.

So, it was not only that they were getting -- the Chinese company was getting a below market price source of nickel, but then the world nickel price that everyone else was -- has to purchase at was being driven up artificially because of the interaction between the government policies and the action by the Chinese company that's in -- the partner in Indonesia.

MS. MITCH: Okay. And just a final question for Ms. Morris. Does the National Milk Producers Federation have any experience with, or has your organization heard of, other country's facility registration being withheld pending a Ministry of Agriculture assigning of the protocol? Or is it just U.S.?

MS. MORRIS: I don't know that off-hand. I'd be happy to look into it and get back to the panel.

CHAIR BUFFO: So, for Mr. Anthony, this is not as much a question as a request. You had a lot of very interesting survey data that you have spoken about, and the results of such data.

We were just wondering if the methodology, the survey sample size, some of the -- and the additional analysis that you have done, if that's something that's posted publicly, or something that you could provide subsequently?

MR. ANTHONY: Happy to. And if I could just make a quick comment? Sorry, you opened the door once the microphone's on.

I mean, I think from our perspective, I don't think any of the importers that use the program want to undermine the sort of legitimate challenges that any of the companies who have petitioned face. That's not our intent.

But it is a challenge on some of these very niche issues. For example, if the nickel ban violates multiple WTO rules, why GSP review should be the form that U.S. government uses to try to essentially affect change of a single company's practices. I mean, you would have countervailable subsidies that you could pursue if these are unfair pricing. If it's a WTO violation though, why aren't we taking them to the WTO?

Same thing on sort of, when you get back to some of the Thailand and the ractopamine. I mean, this is a very specific issue. But when I think about what should GSP eligibility criteria be, it should be very country-specific in terms of what that company or country is doing.

And so, on something like ractopamine, if 100 companies ban it, and a bunch of U.S.

companies have figured out how to sell ractopamine-free products to China and others, this isn't, you know, it's not a Thailand specific thing.

E-commerce is similar, data localization. These are big cross cutting issues that we have with 100-plus countries. And so, the idea of singling them out, and taking away GSP benefits for one, on what is not really an actionable issue on a single country level, or if it is, there may be other channels, like a WTO challenge to an individual country's practices that are clear violations.

The idea that our members should pay higher tariffs instead of using these other channels is I think part of the frustration there. It's sort of the, you know, being the sacrificial lamb, so that folks don't have to go through other -- you know, it's an available tool, even if it's not the best tool. And so, it gets chosen. So, I think that's just again where a lot of this stems from. So, thank you.

CHAIR BUFFO: Thank you for your comment.

MR. ANTHONY: And I'm happy to provide that survey data.

CHAIR BUFFO: Okay.

MR. THANHAUSER: Thank you. I just want to note for the record that we are not discussing a ractopamine ban in the context of this hearing or this review. I know that was an example for Thailand. But just for clarification purposes, wanted to note that.

CHAIR BUFFO: And with that, in the interest of time we thank you for your testimony, and for your questions and answers. And we'll invite the next panel to please step forward. Thank you very much.

Welcome to our last panel of this two-day hearing. So, with that, please, Mr. Sam Rizzo, you're welcome to begin your testimony.

MR. RIZZO: Good afternoon. And thank you for the opportunity to testify today on this final Friday afternoon panel. I very much

appreciate your time and attention.

My name is Sam Rizzo, and I'm Senior Director of Policy for Tax and Trade at the Information Technology Industry Council, or ITI.

ITI represents the world's leading information and communications technology, ICT, companies. We're the global voice of the tech sector, and the premier advocate and thought leader around the world for the ICT industry.

Indonesia is a fast developing market for the global tech sector, with many opportunities for U.S. ICT and tech-enabled firms.

In recent years a combination of foreign investment and nascent startup culture and widespread mobile and digital connectivity have created a wealth of potential for Indonesia's continued development.

However, despite certain limited improvements, since USTR's 2018 review of Indonesia's GSP eligibility, the ICT sector has faced continued and emerging market access barriers that limit the entrance and operation of

U.S. companies in the Indonesian market.

In my testimony today I'll provide select examples of these kinds of market access barriers. These issues are discussed in greater detail in ITI's public written submission to USTR. And we're happy to provide additional written details in follow-up to this hearing.

We appreciate USTR's and the Indonesian government's efforts to confront these issues, and hope for the prompt conclusion of the GSP review in a manner that meaningfully addresses market access concerns, and allows for the continued collaboration and productive engagement between the two governments.

Our companies regularly confront barriers to digital trade in the Indonesian market. These barriers vary in terms of their form, though they often entail localization requirements that favor local companies at the expense of foreign competitors.

Government Regulation 82-2012, otherwise known as GR82, has been at the center of

these concerns. And the Indonesian government's action to revoke GR82, replacing it with GR71, has shown clear positive intent.

However, the revised GR71 still appears to include potentially problematic elements, on which we would welcome clarification. These include data localization requirements for all public sector related entities, and source code disclosure requirements for companies seeking to do business with public sector entities.

A separate longstanding concern is Ministry of Finance Regulation number 17 from 2018, which amended Indonesia's harmonized tariff schedule to add software and other digital products transmitted electronically.

This addition skirts Indonesia's commitment under the WTO moratorium on customs duties on electronic transmissions, a commitment that Indonesia reaffirmed as recently as December 2019.

Even while tariff rates remain at zero, Indonesia's actions have established a dangerous

precedent, with a range of negative repercussions for the ICT sector and beyond. We therefore continue to urge the Indonesian government to rescind Regulation 17.

Finally, various elements of Indonesia's draft cybersecurity law, its recently enacted Government Regulation Number 80 on E-commerce, as well as localization requirements placed on providers of over-the-top services, as part of Indonesia's draft regulation regarding the provision and application, and/or content services through the Internet continue to generate market access concerns for the ICT sector.

Another grouping of barriers U.S. industry regularly faces in the Indonesian market are country-unique local content requirements and product regulation.

In our written submission we provide reference to five specific measures where industry faces such requirements, which are burdensome and in some cases not clearly articulated in final measures.

In a similar vein, ITI has long raised concerns around technical barriers to trade faced by the ICT industry when seeking to place ICT goods on the Indonesian market.

As a general matter, industry regularly experiences challenges with a lack of notification and compliance timeframes, as well as localized testing requirements for certain products.

As a recent example of the former, Regulation Number 9 on wavelength division multiplexing, which also contains opaque local content requirements, was issued with an effective date that occurred prior to the date of release.

This type of retroactive applicability of regulations makes compliance difficult and costly.

Beyond the categories discussed so far, ITI members also face certain tariff, investment, taxation, and technology-specific measures that limit market access.

Examples include a systemic lack of resolution for tax overpayments made by foreign

companies, and the potential for targeted market access barriers as Indonesia transitions from analog to digital broadcasts.

ITI is grateful for the efforts of both USTR and the Indonesian government to work toward addressing these and other key barriers faced by the U.S. ICT sector.

We encourage prioritization of work on these issues as a central component of continued bilateral engagement. Thank you, and I look forward to answering any questions you have.

MR. WHITLOCK: Thank you very much to the GSP Subcommittee for the opportunity to testify at today's hearing, as to whether Indonesia is meeting the generalized system of preferences eligibility criterion, requiring a GSP beneficiary company to provide equitable and reasonable access to its markets.

My name is Joe Whitlock and I handle digital trade issues at BSA, The Software Alliance. BSA is an association that advocates for the global software industry before governments around the

world.

BSA members are enterprise software companies and cloud computing service providers that provide services to manufacturers and companies in all sectors.

Our members offer productivity enhancing solutions that help companies create jobs and value, build their competitiveness, and export products around the world.

Our written submission before the Subcommittee addresses four issues, Regulation 17 regarding the imposition of customs requirements on electronic transmissions, Government Regulation 71 on the operation of electronic systems and transactions, Government Regulation 80 on E-commerce and Indonesia's over-the-top regulation.

I will focus my oral comments today on Regulation 17. BSA submits that Indonesia's continued maintenance of Regulation 17, which is a completely unprecedented imposition of customs requirements on electronic transmissions of data

over computer networks, is of great significance.

We submit that this measure would deny equitable and reasonable access to the Indonesian market for U.S. digital exports in contravention of the terms of the GSP statute.

BSA urges USTR not to renew GSP status for Indonesia unless Indonesia repeals Regulation 17. Regulation 17 directly impacts U.S. digital market access in Indonesia.

In the United States software contributed more than $1.6 trillion of U.S. value added GDP in 2018. And the industry supports 14.4 million U.S. jobs in all sectors. Many of these jobs depend upon access to foreign markets, including the very significant Indonesian market.

Thus, BSA was concerned when Indonesia began to impose customs requirements on a wide range of U.S. digital exports, potentially including downloaded subscription and/or streaming services for music, films, publications, and software, cloud and other remote software services, app updates or other software security

patches, data use in manufacturing plants, and a broad catch-all category of all other digital exports.

Additionally, Indonesia's continued maintenance of Regulation 17 is intentioned with its commitments and its position in negotiating for -- or, around the world.

It is not correct to suggest that the imposition of an omnibus customs regulation on electronic transmissions is fully consistent with the WTO moratorium.

Indonesia is the first country anywhere in the world to attempt to impose the full range of customs legal obligations on electronic transmissions, including merchandise classification, determinations of origin, and valuation.

Indonesia's actions will have a chilling effect on U.S. digital exporters seeking access to that market.

The imposition of customs compliance obligations, leading to potential liability with

respect to a measure that is unworkable, is a challenge for U.S. exporters.

For example, no guidance is provided as to how importers would make a determination of custom origin with respect to an electronic transmission consisting of electronic data packets dynamically assembled from servers all over the world.

To create legal obligations and impose liability in such a situation results in significant deterrent risk for U.S. digital exporters.

Indonesia's actions also raise questions regarding the coherence with ongoing negotiations at the World Trade Organization, and in other fora.

Indonesia's a participant in the WTO Joint Statement Initiative on digital negotiations. A major plank of those negotiations is to achieve a prominent moratorium on customs, duties, and requirements relating to electronic transmissions.

Yet, at the same time as Indonesia is engaged in those negotiations, it maintains a regulation that appears to be fundamentally at odds with such an outcome.

Likewise, any effort to advance the imposition of customs requirements at the World Customs Organization during the pendency of Indonesia's participation in the WTO JSI negotiations is at odds with the core outcome of those negotiations.

Third, Regulation 17 is a highly discriminatory measure that targets U.S. and foreign digital exporters, while exempting Indonesian providers of like products and services.

The incidence of the measure falls exclusively on imported products and services. Indonesia has available to it other neutral and nondiscriminatory, and less onerous, measures to collect revenue.

Indeed, Indonesia is one of over 135 countries participating in the OECD's inclusive

framework relating to taxation reform in the international context.

In adopting Regulation 17 it has taken an unprecedented step adopted by no other member of those negotiations. In this way Indonesia has chosen a measure that departs drastically from accepted international economic regulatory practices.

Finally, we wish to highlight that Regulation 17 would impose the highest costs of all on Indonesian business and the Indonesian economy by raising its own industry's cost of accessing critical technologies and data, including productivity enhancing software solutions, scientific research and other publications, and manufacturing data.

Regulation 17 threatens to hobble Indonesia's own international competitiveness, and its ability to export products and services that can compete in global markets.

Additionally, Regulation 17 undermines Indonesia's attractiveness as a destination for

investment in R&D.

In closing, we submit that Regulation 17 impairs U.S. digital market access into Indonesia, and provides grounds for consideration -- reconsideration of its GSP benefits. Thank you.

MR. SIMCHAK: Well, thank you very much to the Members of the Committee for the opportunity to appear at this important hearing today. And thank you for saving the best for last. And I mean dead last.

I had some flashbacks to, like, my third grade class when we were picking people for a pickup basketball game. You know, that's sort of -- I was always last.

Anyway, my name is Steven Simchak. And I am the Head of International with the American Property Casualty Insurance Association, the APCIA. And I'm honored to present this testimony today on behalf of both the APCIA and our counterparts at the American Council Of Life Insurers.

Indonesia currently is not meeting the Generalized System of Preferences -- GSP eligibility criterion requiring a GSP beneficiary country to provide equitable and reasonable access to its markets.

Indonesia's barriers to U.S. insurance and reinsurance trade include restricting cross-border reinsurance, limiting foreign investment in insurance companies, and forcing the localization of data.

At the same time, Indonesia's economy is woefully under insured, which harms Indonesian citizens, economic stability, and resilience in the face of increasing weather-related catastrophes.

For example, according to the Organization for Economic Cooperation and Development, the OECD, Indonesia in 2017 had an insurance penetration rate, which is the total premiums as a percentage of GDP, of 1.9 percent.

Now, compare that with the OECD average of 8.9 percent and 11.2 percent that we have here

in the United States.

That low level of insurance penetration in Indonesia could be addressed in part by greater participation of U.S. insurers and reinsurers. But unfortunately, the barriers that Indonesia has erected prevent them from doing so.

This process however appears to have made it clear that Indonesia needs to address its trade restrictive measures in order to enjoy GSP benefits.

Encouragingly, recent statements from the government of Indonesia, including those we heard today, and including those in their January 13, 2020 submission for this hearing, would positively address many of our concerns, particularly on the forced localization of reinsurance, depending on additional details of the commitments.

We hope to learn more details about those commitments, and how those commitments will be implemented permanently, and enforced.

So, though the problem -- the problems

that in our opinion make Indonesia currently ineligible for GSP remain unresolved as of today, we hope that they will be resolved in the near future.

Our organizations APCIA and ACLI, working in cooperation with U.S.-based ASEAN business associations, USTR, the Treasury, Commerce, and State departments, have attempted to resolve our concerns with the Indonesian financial regulator, OJK, and other Indonesian government agencies over the last two years.

We believe that a successful GSP review process would lead to the definitive resolution of those concerns. And while the government of Indonesia's submission for this hearing suggests we are well on our way to doing so, we're not there yet.

Turning to the details of the barriers that U.S. insurers and reinsurers face, Indonesia maintains severe barriers to U.S. reinsurance trade through the forced domestic reinsurance sessions for most reinsurance lines, and mandatory

preferential offers to domestic reinsurers, even where cross-border reinsurance is permitted.

In restricting cross border reinsurance in a way that favors its own domestic reinsurers, including a state owned reinsurer, without credible prudential justification, Indonesia is out of compliance with its World Trade Organization, WTO, commitments to the United States, as our written submission will demonstrate.

Indonesia committed to accord national treatment to foreign reinsurers offering reinsurance services on a cross-border basis, which it currently fails to do in providing legal and regulatory treatment that is less favorable to U.S. reinsurers that offer services that are like those offered by Indonesian reinsurers. None of the potential exceptions in GATS is available to these measures.

Putting aside momentarily the very real harm that these measures currently inflict on U.S. insurers and reinsurers, I think that as a matter

of principle we believe that GSP benefits should be applied only to those countries that are currently in compliance with our international trade commitments to the United States, since doing otherwise would set a very negative precedent.

I think that's a very fair principle, and one that all of us should be able to agree to.

Encouragingly, as alluded to earlier, we note that in its submission for this hearing the Indonesian government has committed itself over three years to phasing out the mandatory domestic reinsurance sessions.

Assuming that the phasing out of the mandatory local session occurs, and also removes the mandatory domestic preferential offer, that move may address these reinsurance concerns.

We look forward to learning more details about Indonesia's plans to remove permanently the reinsurance barriers, including a timeline for their removal, and the procedures that will be put in place to ensure compliance with such a commitment.

With regard to the investment restrictions, while Indonesia has grandfathered those foreign insurers that already owned above 80 percent of an Indonesian insurer, which we appreciate, it continues to maintain the 80 percent foreign investment cap for all other companies, including Greenfield Investment.

We note that the Indonesian government has committed itself to further improvements to the investment rules, and appreciate the progress that has been made so far.

Likewise, we note that the government of Indonesia has stated that the issuance of Government Regulation Number 71, GR71, will resolve the forced data localization requirements.

As of this time, however, no official revision or suspension of the financial regulator, OJK, requirements has been released.

In conclusion, we believe that the GSP eligibility criterion requiring a GSP beneficiary country to provide equitable and reasonable access to its markets is of paramount importance.

That GSP requirement not only ensures that U.S. companies are treated fairly in those countries that the U.S. aids through GSP, but also helps the GSP beneficiary countries develop through engagement in international trade.

We appreciate deeply all of the very hard work that the negotiators on both sides have put into the GSP review process, and the impressive progress that has been made so far.

And with our government colleagues we hope that -- and with our U.S. government colleagues we hope that Indonesia will put into practice soon the promises it has made as part of this GSP review process. And I'd be please to answer any questions you may have. Thank you.

CHAIR BUFFO: Thank you very much to all of you for your testimony. And we will have, certainly, questions. For the first question I'll turn to my colleague from the Department of Commerce.

MR. McGEE: Mr. Rizzo, your testimony today and your comments beforehand highlight some

transparency concerns with Indonesia's issuance of measures without notification, and the opportunity for public comment.

How does this affect the ability of your members to access the Indonesian market? And how could Indonesia address these concerns?

MR. RIZZO: So, thank you for that question. I think, broadly, with respect to transparency concerns this is something that cuts across the various types of barriers that we have pointed to. So, it's not just with respect to digital trade. In fact, most recently, where we have had direct engagement with the Indonesian government, it has had more to do with forced localization requirements and technical barriers to trade, with regulations issued by SDPPI.

And so, the direct impact on our membership can vary. If it's a question of not notifying to the WTO, we lose that direct channel for engagement, as well as the comment period that is typically provided through notification through a WTO inquiry point.

In the most severe of examples, as was the case with Regulation Number 9, which I alluded to in my testimony, that measure entered into force in fact before it was released to the public. That creates serious compliance burdens which can have a direct impact on market access in the instances where there is, particularly with respect to that measure where there were local content requirements that are also somewhat opaque in their description within the measure. That can stop products from being sent. It can, at a minimum, create uncertainty with respect to how, in this case, physical goods are to be placed on the Indonesian market in a manner that's compliant with the applicable requirements.

I think from our perspective what we would encourage are good regulatory practices, in line with those proscribed in the WTO TBT agreement, at a minimum.

But ideally we would like to see application of further reaching good regulatory practices, including through early appropriate

publication of the measures, consultation with stakeholders, and of course notification to the WTO. Thank you.

MR. McGEE: Thank you.

MR. PAJUSI: Mr. Simchak, in your comments you noted that in Indonesia's submission for this hearing would positively address many of your concerns depending on additional details of the commitments.

Could you elaborate on some of these additional details? And do you feel you received some of these details here at this hearing?

MR. RIZZO: Thank you for the question. I wouldn't say that we received additional details, other than what's already in the submission.

Well, with one exception. The representative of the government of Indonesia said that they're going through a stakeholder consultation process, both interior and exterior stakeholders, which is true, and which we greatly appreciate.

But what -- I think that the details

that we would like to see, particularly with regard to the reinsurance section of Indonesia's submission for this hearing, would be to understand the timeline better, and would be to understand the exact process for removing the cross-border restrictions.

We'd like a guarantee that that also includes removal of the mandatory preference, which was included in the two regulations here. But I note that the, technically the submissions says mandatory domestic session, as opposed to mandatory domestic session and mandatory domestic preference.

And then, you know, I think that it would be good to hear that information from the financial regulator, OJK. As you know, in Indonesia there's a separation of financial regulators from the central government, as we have here in the U.S. And so, sometimes it's good to hear commitments from different stakeholders within the government.

MR. PAJUSI: Thanks very much.

MS. CACKOSKI: Mr. Whitlock, your comments note that the customs requirements on electronic transmissions would put at risk Indonesia's international competitiveness, and undermine its attractiveness as a destination for investment. Can you elaborate on that?

MR. WHITLOCK: Sure. So, this is an issue that's near and dear to BSA's interest. We provide a range of productivity-enhancing solutions that are all dependent upon the ability to transmit data across borders.

Those data transmissions can occur either through access to an offsite server that might be located in the United States or another county, through streaming services, or through downloads.

However, the services that our members provide have a multiplier effect for service providers and manufacturers in-country, and allow them to compete on a level playing field with other manufacturers in other countries.

Their ability to gain access to these

types of services, secure and efficiency enhancing, is critical to their ability to compete with like-minded countries of similar products and exporters of similar products and services around the world.

So, we see it as -- the proposed imposition of customs duties and customs requirements on software and enterprise software is very self-defeating in that regard.

I'd also call your attention to a study published by the European Center for International Political Economy, ECIPE. That study examines the potential revenue and welfare impacts of customs duties, if those were imposed by a number of countries. And the study specifically examines India, South Africa, China and Indonesia, as well as a basket grouping of other developing countries.

The potential detrimental impacts to the Indonesian economy outstripped other economies studies, although the detrimental impacts were large for all.

In the case of Indonesia the gross

domestic product losses were estimated to exceed the value of customs duties collected by 160 times for Indonesia, when the risk of retaliatory or corresponding duties imposed by other countries, to which Indonesia would be exporting, was taken into account.

So, those are a couple of examples. But happy to elaborate further if you'd like.

MS. CACKOSKI: Thank you.

MR. THANHAUSER: This question is for Mr. Rizzo. In your comments that were submitted you highlight the need for Indonesia to, quote, clarify implementation of Regulation 71.

Can you elaborate on this? And have you met with the Indonesian government to discuss how they should clarify Regulation 71?

MR. RIZZO: Thanks very much for the question. I'll say at the outset I'm happy to follow-up following the hearing, either in greater detail or in writing.

But as a general matter I would reiterate the fact that we notionally saw GR71 as

a significant improvement, and acknowledge the revocation of GR82, and it's replacement with GR71.

Where we continue to have a fair amount of uncertainty stems from, largely, how the term public would be defined in this context, since much of the measure has to do with private sector interaction with public entities, which, for the purposes of the regulation, could mean state-owned enterprises, however defined. Or it could be something as broad as any public entity providing a service to the Indonesian public.

That has significant implications with respect to the scope of the regulation. That's just one example.

To your question about our direct engagement with the government of Indonesia, ITI will be traveling to Indonesia in February. In fact, next month for these direct engagements with their government.

That being said, I would need to follow-up with respect to more recent direct engagement that we have had on the scope and

definitions within GR71. Thanks.

MS. MITCH: Thank you. This is a question for Mr. Simchak. So, you alluded to this earlier, but what is your assessment of Indonesia's amendment to Government Regulation 14 of 2018 on foreign ownership in insurance companies?

How do you think the provisions of this amendment address the market access concerns your members have raised?

MR. SIMCHAK: Thank you very much for the question. I would say that this is a significant positive development with regard to addressing our members' concerns.

Essentially what it means is that, if you owned above 80 percent, you're grandfathered. So, you can continue to own above 80 percent. And as the Indonesian government mentioned in their submission they've further changed the regulations so that you can continue to invest, as long as you stay at the original percentage at which you were before the grandfathering occurred.

That said, we hope -- our hope for all

markets is that they will allow 100 percent foreign ownership of insurance companies. That's not only a benefit to the U.S. insurance and reinsurance industry, but it's also a benefit to the domestic market as well, because you get the full expertise, and you get the full capital infusion that would benefit those markets.

So, that's the long answer. The short answer is it's a positive development. And we hope that Indonesia in time will also allow 100 percent. Thank you.

CHAIR BUFFO: So, this concludes our questions for today. I'd like to thank all of you. We've heard many different perspectives over the past two days, and heard -- and had, I think, a very productive exchange of detailed and robust information.

As I mentioned earlier a transcript of the hearing will be available within approximately two weeks on regulations.gov.

And as you've heard me say many times, but I will reiterate, again, you all have -- all

witnesses have the opportunity to expand on anything you've heard today, any additional information that you would like to add, or in response to any questions that we may provide.

The deadline for the post hearing submission is February 28th at 11:59. And that is, for those of you who know the regulations.gov system, a very firm deadline.

Again, we would like to thank all of you for your participation, and hope that you all have a wonderful weekend. And with that, this very long two-day public hearing is adjourned.

(Whereupon, the above-entitled matter went off the record at 4:53 p.m.)

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Public Country Practice Hearing
US Generalized System of Preferences

Before: USTR

Date: 01-31-20

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

Court Reporter