

PIRATES OR PRIVATEERS: EXAMINING THE RISKS OF CONFLICTING INTERNATIONAL REGIMES THROUGH THE LENS OF U.S.-GAMBLING

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I. INTRODUCTION

The Pirate Bay¹ is the world's largest bit-torrent tracker.² The website essentially hosts content uploaded by users to be downloaded by other users. Because much of the exchanged content is protected by national and international copyright law, The Pirate Bay is considered to be in violation of those intellectual property protections.³ This activity has led to the arrest, prosecution, and imprisonment of one of the website's founders.⁴ Though this action against the founders was successful, the website itself still exists and boasts that "[zero] torrents [have] been removed, and [zero] torrents will ever be removed."⁵ Various supporters of The Pirate Bay have come up with many methods and means to get around attempts at shutting down their website, most notably installing servers on unmanned drones⁶ and moving their servers to a cloud network.⁷ But recent international legal developments may make these extraordinary measures unnecessary: the Pirate Bay would not only be able to continue its activities, but would be able to do so legally.

In January of 2013, the twin-island nation of Antigua and Barbuda (Antigua) announced that the World Trade Organization (WTO) had authorized it to suspend certain obligations to the United States in regards to intellectual property.⁸ This declaration came as a result of a decade-long

¹ *The Pirate Bay Bundle*, THE PIRATE BAY, <http://thepiratebay.se> (last visited Nov. 20, 2013).

² *About*, THE PIRATE BAY, <http://thepiratebay.se/about> (last visited Nov. 20, 2013).

³ Nick Bilton, *The Pirate Bay Offers Web Browser to Avoid Censorship*, N.Y. TIMES (May 19, 2015, 2:19 PM), http://bits.blogs.nytimes.com/2013/08/10/the-pirate-bay-offers-piratebrowser-to-avoid-censorship/?_r=0.

⁴ Eric Pfanner, *Four Convicted in Sweden in Internet Piracy Case*, N.Y. TIMES, Apr. 18, 2009, at B2, available at <http://www.nytimes.com/2009/04/18/business/global/18pirate.html>.

⁵ *Legal Threats Against The Pirate Bay*, THE PIRATE BAY, <http://thepiratebay.se/legal> (last visited Nov. 20, 2013).

⁶ "MrSpock," *TPB Loss*, PIRATE BAY BLOG (Mar. 18, 2012), <https://thepiratebay.se/blog/210>; Nick Bilton, *Internet Pirates Will Always Win*, N.Y. TIMES, Aug. 5, 2012, at SR5, available at <http://www.nytimes.com/2012/08/05/sunday-review/internet-pirates-will-always-win.html>.

⁷ Winston Brahma, *The Pirate Cloud*, THE PIRATE BAY (Oct. 17, 2012), <http://thepiratebay.se/blog/224>; *The Pirate Bay Moves to the Cloud to Avoid Shutdown*, BBC (Oct. 17, 2012, 12:01 PM), <http://www.bbc.co.uk/news/technology-19982440>.

⁸ Press Release, PRNewswire, Antigua to Pursue Sanctions Against the United States in Decade-Long Trade (Jan. 28, 2013) [hereinafter Levick Release], available at http://www.antiguawto.com/wto/Levick_Release.pdf.

dispute between the two countries over the accessibility of Antigua-based online gambling websites within the United States.⁹ The dispute settlement system's appellate body ruled that the U.S. practice of blocking access to these websites violated its obligations under the General Agreement on Trade in Services (GATS).¹⁰ According to the United States Trade Representative, Antigua's suspension of U.S. copyright would be unprecedented and amount to government-sponsored piracy.¹¹ And to whom would Antigua grant a letter of marque and reprisal? It seems they will look to none other than The Pirate Bay.¹²

But what do you call a government-sponsored pirate? History occasionally grants such actors the label of "privateers." The determination of titles often depends on who is telling the story. During the American War for Independence, the Colonies enlisted the aid of "merchant mariners" to harass British shipping and support the Colonies' cause.¹³ The United States looks back fondly upon these "privateers."¹⁴ The British, however, certainly have a different recollection of the seamen that pirated their vessels.¹⁵ How will the actions of Antigua and Barbuda be remembered? Like the pirates and privateers of centuries past, this determination will depend on perspective. However, unlike in the past, today's perspectives can develop based on overlapping international legal regimes, not conflicting national security or military interests. For example, a sanction that is legal under the WTO may be illegal under other international regimes, particularly under

⁹ *Id.*

¹⁰ General Agreement on Trade in Services, Apr. 15, 1994, 33 I.L.M. 1167 [hereinafter GATS]; Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (1994); Paul Rothstein, Note, *Moving All-In with the World Trade Organization: Ignoring Adverse Rulings and Gambling with the Future of the WTO*, 37 GA. J. INT'L & COMP. L. 151, 152 (2008).

¹¹ Annie Lowrey, *Caribbean Nation Gets an International Go-Ahead to Break U.S. Copyright Laws*, N.Y. TIMES, Jan. 28, 2013, at B4, available at <http://www.nytimes.com/2013/01/29/business/global/dispute-with-antigua-and-barbuda-threatens-us-copyrights.html>.

¹² David Kravets, *WTO Allows Antigua to Open Piracy Site*, WIRED (Jan. 29, 2013, 12:06 PM), <http://www.wired.com/threatlevel/2013/01/antigua-piracy-site/>; Ernesto, *Pirate Bay and Antigua Explore Launch of Authorized "Pirate Site,"* TORRENTFREAK (May 3, 2013), <http://torrentfreak.com/pirate-bay-and-antigua-explore-launch-of-authorized-pirate-sit-e-130503/>.

¹³ John Frayler, *Stories From The Revolution: Privateers in the American Revolution*, NAT'L PARK SERV., http://www.nps.gov/revwar/about_the_revolution/privateers.html (last visited Nov. 20, 2013).

¹⁴ See, e.g., John Paul Jones, DISCOVERY YORKSHIRE COAST, <http://www.discoveryyorkshirerecoast.com/history-and-info/region/john-paul-jones.aspx> (last visited Nov. 20, 2013).

¹⁵ *Id.*

some of the treaties administered by the World Intellectual Property Organization (WIPO).¹⁶

This Note examines what happens when those kinds of “cross-retaliation” measures are imposed and result in conflicting status under international law. First, this Note will examine in detail the development of the WTO framework, specifically in regards to the WTO “grand bargain” and the rise and development of cross retaliation. Second, this Note will discuss WIPO’s main two treaties, as well as their relation to and interaction with the WTO and its treaties. Third, this Note will contemplate the tensions between TRIPS and the WIPO treaties, as well as other possible conflicts of a similar nature with other regimes, such as the Anti-Counterfeiting Trade Agreement and the North American Free Trade Agreement. Fourth, this Note will look to other international agreements that can serve as models to stem the tide of future conflicts. Finally, this Note will explore the ramifications for international law arising from these conflicts and outline a path forward for developing international regimes in a more unified, streamlined fashion that reduces, if not prevents, future conflicts of this nature.

II. BACKGROUND

A. WTO

1. Overview and the “Grand Bargain”

The World Trade Organization (WTO) is an institution that “provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development.”¹⁷ The WTO was formed from an

¹⁶ The World Intellectual Property Organization “is the global forum for intellectual property services, policy, information and cooperation.” It is “a self-funding agency of the United Nations, with 188 member states.” Additionally, its mission “is to lead the development of a balanced and effective international intellectual property system . . . that enables innovation and creativity for the benefit of all.” The organization’s “mandate, governing bodies and procedures are set out in the WIPO convention, which established WIPO in 1967.” *Inside WIPO*, WIPO, <http://www.wipo.int/about-wipo/en> (last visited May 19, 2014).

¹⁷ See *About the WTO-A statement by former Director-General Pascal Lamy*, WTO, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Nov. 20, 2013) [hereinafter WTO Mission Statement].

amalgamation of agreements¹⁸ as a place for countries to go to sort out their various trade issues with each other.¹⁹ This collection of agreements represented a “grand bargain” struck between all of the countries involved during the Uruguay Rounds.²⁰ One of these agreements, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),²¹ brought intellectual property (IP) rights into the purview of the WTO.²² TRIPS instituted a global IP regime with specific requirements to safeguard and implement copyrights and other provisions of IP law.²³ The treaty also “provides for minimum standards that bind all WTO members, coupled with a system of international enforcement.”²⁴ Another part of the grand bargain of the Uruguay Round was the General Agreement on Trade in Services (GATS). The GATS is modeled on the earlier General Agreement on Tariffs and Trade (GATT),²⁵ the basis for the WTO,²⁶ “in both name and content.”²⁷ The GATS, as the GATT does for trade in goods, outlines general principles and obligations governing the trade of services.²⁸ These principles are the most-favored-nation (MFN) standard, national treatment (NT), and

¹⁸ *Who We Are*, WTO [hereinafter WTO Who We Are], http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Nov. 20, 2013).

¹⁹ See *Understanding the WTO*, WTO, http://www.wto.org/English/thewto_e/whatis_e/tif_e/tif_e.htm [hereinafter *Understanding the WTO*], available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm (last visited Nov. 20, 2013).

²⁰ See William A. Lovett, *Bargaining Challenges and Conflicting Interests: Implementing the Doha Round*, 17 AM. U. INT’L L. REV. 951, 951–55 (2002) (providing a summary of the “grand bargain” in international trade that occurred in the early to mid-1990s and the economic results in the years that followed); see also Marrakesh Agreement Establishing the World Trade Organization art. II(2), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter *Marrakesh Agreement*] (binding WTO member states to all annexed legal agreements, including TRIPS).

²¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994; Marrakesh Agreement, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter *TRIPS*].

²² Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT’L L. 1, 15–16 (2010).

²³ *Id.* at 16 (citing TRIPS, arts. 9–14 (recognizing copyrights); *id.* at 15–21 (recognizing trademarks); *id.* at 27–34 (recognizing patents)).

²⁴ *Id.* (citing TRIPS, *supra* note 21, arts. 1(1), 3, 8 (describing the scope of obligations and the basic principle of national treatment), arts. 63–64, 68–73 (describing the dispute settlement mechanism)).

²⁵ General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter *GATT*].

²⁶ Kevin C. Kennedy, *The GATT-WTO System at Fifty*, 16 WIS. INT’L L.J. 421, 442–43 (1998).

²⁷ Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?*, 24 U. PA. J. INT’L ECON. L. 77, 104 (2003).

²⁸ *Id.*

transparency.²⁹ Under GATS, MFN requires “that once the host accepts a [specific type of] project from one home country, it will be required to extend the same treatment to similar projects from any other member country.”³⁰ NT under the GATS differs slightly from the GATT in that it is a “specific commitment” made in trade negotiations.³¹ At that point, “the member guarantees it will impose no limits on market access or national treatment in relation to services and service suppliers falling within the scope of those sectors.”³² The transparency principle of GATS requires “that each member clearly and fully reveal any laws or regulations that would affect another entering member’s producers in services.”³³ The MFN, the NT, and transparency, along with various market access commitments,³⁴ supported by the GATS eight annexes of guidelines and deadlines, make up the main obligations created by the GATS.³⁵ The first two principles, MFN and NT, and the market access commitments are the most important components of the GATS in regards to this Note because Antigua alleged that the United States violated these components (as well as multiple other articles that do not fall within the scope of this Note) in the U.S.-Gambling dispute.³⁶ Though the Dispute Settlement Body ultimately only proceeded with the market access commitment claim, which will be discussed more in depth

²⁹ *Id.*

³⁰ Glenn M. Wiser, *The Clean Development Mechanism Versus The World Trade Organization: Can Free-Market Greenhouse Gas Emissions Abatement Survive Free Trade?*, 11 GEO. INT'L ENVTL. L. REV. 531, 594 (1999).

³¹ Nancy J. King & Kishani Kalupahana, *Choosing Between Liberalization and Regulatory Autonomy under GATS: Implications of U.S.-Gambling for Trade in Cross Border E-Services*, 40 VAND. J. TRANSNAT'L L. 1189, 1203 (2007).

³² *Id.* at 1206.

³³ Christopher F. Thornberg & Frances L. Edwards, *Failure of Trade Liberalization: A Study of the GATS Negotiation*, 10 J. INT'L BUS. & L. 325, 326–27 (2011) (citing GATS, *supra* note 10, art. III(1)–(2)).

³⁴ GATS, *supra* note 10, art. XVI (explaining that members of the GATS “shall accord services and service suppliers of any other Member treatment no less favourable [sic] than that provided for under the terms, limitations and conditions agreed and specified in its Schedule”).

³⁵ Kennedy, *supra* note 27, at 104–05.

³⁶ *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Apr. 5, 2014).

later in the Note, it is still important to understand how these elements interact and overlap with other international obligations under WIPO.³⁷

2. *The Dispute Settlement Body and Cross Retaliation*

The Dispute Settlement Body, an organ of the WTO established under the Uruguay Round, resolves all disputes between WTO members regarding their obligations under the treaty and alleged violations.³⁸ The Dispute Settlement Body has the power to grant various remedies to injured member states when another member state breaches its obligations.³⁹ The available remedies include authorizing member states to suspend various concessions established under the WTO.⁴⁰ Ordinarily, the suspension of concessions should correspond with the area of trade where the original breach occurs.⁴¹ However, simply suspending concessions (such as reduced tariffs or MFN status) is not always sufficient to compel the member state in breach to come back into WTO compliance.⁴² This is characteristic of disputes between countries with uneven trade relationships.⁴³ When a developed member-state is in breach and the injured member-state is developing, the typical remedy—raising tariffs against the violating country by an amount equal to the injured country's loss—is not effective.⁴⁴ In such cases, the Dispute Settlement Body has the power to authorize an extraordinary remedy known

³⁷ Decision by the Arbitrator, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 1.2, WT/DS285/ARB (Dec. 21, 2007) [hereinafter Decision by Arbitrator-Gambling].

³⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 1–3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Allison L. Whiteman, Comment, *Cross Retaliation Under the TRIPS Agreement: An Analysis of Policy Options for Brazil*, 36 N.C. J. INT'L L. & COM. REG. 187, 188 (2010).

⁴² *Id.* at 189–90 (explaining the significance of cross-retaliation as a means for leveraging non-compliant member states back into compliance with WTO obligations).

⁴³ *Id.* at 194.

⁴⁴ Gabriel L. Slater, Note, *The Suspension of Intellectual Property Obligations Under TRIPS: A Proposal for Retaliating Against Technology-Exporting Countries in the World Trade Organization*, 97 GEO. L.J. 1365, 1374 (2009); see generally Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter EC-Bananas].

as cross-retaliation.⁴⁵ Cross-retaliation allows the aggrieved member-state to suspend its own WTO concessions to the breaching member-state in an area of trade different from the area in which the breach occurred.⁴⁶ This allows the smaller, injured member-state to have substantially more leverage against the larger, breaching member-state than would otherwise be available.⁴⁷

The Dispute Settlement Body has authorized cross-retaliation only three times since its creation.⁴⁸ While the Dispute Settlement Body has no explicit principle of stare decisis and thus these rulings are not technically binding, there is much evidence that a de facto system of precedent is in place.⁴⁹ Regardless of which view is more accurate, examining and analyzing these decisions is vital to understanding the intricacies of how the cross-retaliation system operates.

3. *EC-Bananas*

The first example are the notorious EC-Bananas⁵⁰ cases that arose as a result of the European Community's unfair trade practices regarding its imports of bananas from developing African, Caribbean, and Pacific (ACP) countries.⁵¹ The United Kingdom, a member of the European Community (EC),⁵² lobbied for preferential treatment for imports from these developing

⁴⁵ DSU, *supra* note 38, art. 22.3; *see also* Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT'L L.J. 337, 341–42 (2007) (explaining that, if necessary, cross retaliation under the WTO can occur between trade in goods, trade in services, and protection of intellectual property rights).

⁴⁶ Whiteman, *supra* note 41, at 188–89 (explaining the option of cross-retaliating in areas of service under the GATS or intellectual property under TRIPS in response to a breach of WTO obligations in the trade of textiles under the GATT).

⁴⁷ *Id.* at 189 (discussing the importance of cross-retaliation for Ecuador in leveraging the European Community into compliance).

⁴⁸ Sebastian, *supra* note 45, at 341; *see also* David J. Townsend, *Stretching the Dispute Settlement Understanding: U.S.—Cotton's Relaxed Interpretation of Cross-Retaliation in the World Trade Organization*, 9 RICH. J. GLOBAL L. & BUS. 135, 136 (2010).

⁴⁹ *See generally* Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT'L L. REV. 845 (1999) (discussing the lack of a formal doctrine of stare decisis for WTO decisions and how the WTO, regardless of this fact, seems to have a practical system of precedent it follows).

⁵⁰ EC-Bananas, *supra* note 44.

⁵¹ *See Development and Cooperation-Europeaid*, EUR. COMMISSION, http://ec.europa.eu/europeaid/where/acp/country-cooperation/index_en.htm (last visited Nov. 20, 2013).

⁵² *See* Decision of the Council of European Communities of 22 January 1972 on the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United

ACP countries and it resulted in the Treaty of Lomé (Lomé).⁵³ Lomé helped shape a uniform banana regime for the European Economic Community.⁵⁴ This new banana regime gave preference to ACP countries with both quotas and tariffs.⁵⁵ After a prolonged dispute brought by Ecuador, Guatemala, Honduras, Mexico, and the United States, a Dispute Settlement Body panel determined that this regime violated various obligations under the WTO and its different agreements.⁵⁶ This led to a series of appeals⁵⁷ between the EC and the aggrieved parties until the Dispute Settlement Body ultimately authorized Ecuador to suspend some of its WTO concessions with the EC by way of cross-retaliation.⁵⁸ Particularly, Ecuador “received authorization to suspend \$201.6 million in concessions and other obligations under the WTO Agreements, including . . . [TRIPS] and the . . . [GATS].”⁵⁹ These approved

Kingdom of Great Britain and Northern Ireland to the European Atomic Energy Community, 1972 O.J. (L 73).

⁵³ ACP-EEC Convention of Lomé, O.J. (L 25), reprinted in 14 I.L.M. 595 (1975); see generally Zsolt K. Besskó, *Going Bananas Over EEC Preferences?: A Look at the Banana Trade War and the WTO's Understanding On Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT'L L. 265 (1996) (stating that pressure from United Kingdom resulted in replacement of Yaounde Conventions with Lomé, which changed relationship between EEC and former colonies from an association to a partnership).

⁵⁴ Council Regulation 404/93, 1993 O.J. (L 47/1) (establishing a uniform banana regime for the EEC “within the framework of the Lomé Convention Agreements”).

⁵⁵ See Besskó, *supra* note 53 (stating ACP countries were allowed to import up to a maximum of 857,700 tons of bananas into the common market duty free); see also Council Regulation 404/93 art. 15 (explaining non-traditional ACP countries and third countries may import up to 2 million tons into the common market at a 100 ECU/ton Tariff); accord Council Regulation 404/93 art. 18 (stating imports over the 2 million ton quota were subject to a 750ECU/ton tariff for ACP country imports and an 850 per ton tariff for third country imports).

⁵⁶ Panel Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas: Complaint by Ecuador*, WT/DS27/R/ECU (May 22, 1997); Panel Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas: Complaint by Guatemala and Honduras*, WT/DS27/R/GTM, WT/DS27/R/HND (May 22, 1997); Panel Report, *United States: European Communities-Regime for the Importation, Sale and Distribution of Bananas: Complaint by the United States*, WT/DS27/R/USA (May 22, 1997) (noting that all complaining parties asserted inconsistencies under Articles 1.2, 1.3, 3.2, and 3.5 of the Agreement on Import Licensing Procedures and Articles 2 and 17 of the General Agreements in Trade Services).

⁵⁷ Appellate Body Report, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, ¶ 3, WT/DS27/AB/R (Sept. 9, 1997); see also Report of the Panel, *European Communities-Regime for the Importation, Sale and Distribution of Bananas—recourse to Article 21.5 by Ecuador—*, 1, 3, WT/DS27/RW/ECU (Apr. 12, 1999).

⁵⁸ See EC-Bananas, *supra* note 50, at 173.

⁵⁹ Matthew S. Dunne III, Note, *Redefining Power Orientation: A Reassessment of Jackson's Paradigm in Light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System*, 34 LAW & POL'Y INT'L BUS. 277, 305 (2002).

actions were reportedly going to be used in a number of ways to leverage the EC's compliance, one of which was to mass-produce Ecuadorean "Champagne" that was indistinguishable in labeling from the legitimate French variety, thus putting pressure on France.⁶⁰ Even though the authorization was granted, the suspensions were never actually implemented.⁶¹ Instead, they were used as a bargaining tool that led to an agreement in October of 2000.⁶² While previous retaliation actions were primarily between major developing powers and developed powers, this marked the first time in the history of the WTO that a low power member-state sought retaliation against a member-state with great influence inside and outside of the Organization.⁶³

4. *U.S.-Cotton*

The second time that cross-retaliation was approved was the U.S.-Cotton dispute between the United States and Brazil.⁶⁴ Brazil claimed the U.S. agricultural subsidies to the American cotton industry violated the principles of the WTO.⁶⁵ The Dispute Settlement Body agreed.⁶⁶ It authorized Brazil to cross-retaliate by suspending its TRIPS obligations to the United States, ultimately resulting in a change of U.S. cotton subsidy policy in multiple

⁶⁰ Gabrielle Marceau, Counsellor, Legal Division, WTO, Lecture in Geneva, CHE (Jul. 16, 2013) (notes on file with author).

⁶¹ Dunne, *supra* note 59, at 307.

⁶² *Id.*

⁶³ *Id.* at 305 (citing Andrew S. Bishop, *The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War with European Union*, 12 INT'L LEGAL PERSP. 1, 2 (2001) (noting that the authorization obtained by Ecuador to retaliate against the EC "represented the first time that the WTO had ever authorized a [low-power state] to impose retaliatory measures on another member"))).

⁶⁴ See Panel Report, *United States—Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004) [hereinafter Panel Report Upland Cotton]; see generally Appellate Body Report, *United States—Subsidies on Upland Cotton*, WT/DS267/AB/R (Mar. 3, 2005).

⁶⁵ *Id.*

⁶⁶ Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS267/ARB/1 (Aug. 31, 2009); see also Decision by the Arbitrator, *United States – Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement*, WT/DS267/ARB/2 (Aug. 31, 2009). (These reports are collectively referred to as U.S.-Cotton in this Note.)

areas⁶⁷ after the two countries came to a settlement before any cross-retaliation measures were implemented.⁶⁸

5. *U.S.-Gambling*

The third and final instance of the Dispute Settlement Body approving cross-retaliation was a result of the U.S.-Gambling dispute.⁶⁹ As discussed previously,⁷⁰ Antigua and Barbuda claimed the United States violated the GATS when it banned the use of online gambling websites, particularly those headquartered in Antigua, but allowed gambling in various locations throughout the United States.⁷¹ The Dispute Settlement Body agreed with Antigua and Barbuda.⁷² After the United States failed to comply with the WTO ruling, the WTO authorized Antigua to cross-retaliate against the United States; now, Antigua could suspend its concessions to the United States under TRIPS and violate U.S. intellectual property law.⁷³ While the general consensus of the international legal community was that Antigua would not retaliate,⁷⁴ the tiny island nation has recently declared that it planned to do just that.⁷⁵

⁶⁷ Townsend, *supra* note 48, at 135–36, 153–55 (examining the policy changes the U.S. implemented in light of *U.S.-Cotton*: removing the program that gave subsidies to buyers of the more expensive American cotton and modifying export credit guarantees to be less protective from the fluctuations of the market).

⁶⁸ Press Release, Office of the U.S. Trade Representative, U.S., Brazil Agree Upon Path Toward Negotiated Solution of Cotton Dispute (Apr. 2010), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2010/april/us-brazil-agree-upon-path-toward-negotiated-solution>.

⁶⁹ Decision by the Arbitrator, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/ARB (Dec. 21, 2007).

⁷⁰ See *supra* Part II.A.1.

⁷¹ Decision by the Arbitrator-Gambling, *supra* note 37.

⁷² Appellate Body Report, *United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 373(c)(ii), WT/DS285/AB/R (Apr. 7, 2005) [hereinafter Appellate Body Report-Gambling].

⁷³ Recourse by Antigua and Barbuda to Article 22.2 of the DSU, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/22 (June 22, 2007).

⁷⁴ Gabriel L. Slater, Note, *The Suspension of Intellectual Property Obligations Under TRIPS: A Proposal for Retaliating Against Technology-Exporting Countries in the World Trade Organization*, 97 GEO. L.J. 1365, 1368, 1378–79 (2009).

⁷⁵ Levick Release, *supra* note 8.

6. *TRIPS' IP Suspension*

To date, the Dispute Settlement Body has authorized the suspension of TRIPS IP obligations in two of these three disputes:⁷⁶ EC-Bananas III⁷⁷ and U.S.-Gambling.⁷⁸ The first of these two disputes came to a close when the European Community agreed to change its unfair trade practices regarding bananas and become compliant with its WTO obligations.⁷⁹ However, the second of the two disputes is still up in the air, with the WTO approving Antigua's proposed suspension of U.S. copyrights and Antigua threatening to act on their proposal.⁸⁰ Antigua's proposal removes its obligations under the TRIPS⁸¹ agreement as retaliation for the United States' refusal to comply with its GATS⁸² obligations in regards to online gambling services.⁸³ Adding even more intrigue to the dispute, there are rumors that Antigua will work in collaboration with the infamous website, The Pirate Bay, to set up a file-sharing website to implement the cross-retaliation.⁸⁴ The website would either give away U.S. copyrighted materials for free and make back the lost \$3.4 billion through ad revenue or sell access to the copyrighted material for a meager amount.⁸⁵

If Antigua goes through with its threat, it will mark the first occurrence such a right has ever been exercised under the WTO.⁸⁶ In terms of obligations, this would arguably represent a fundamental change from what was originally agreed to by the high contracting parties.

⁷⁶ *Id.* at 1368.

⁷⁷ EC-Bananas, *supra* note 50.

⁷⁸ Decision by Arbitrator-Gambling, *supra* note 37.

⁷⁹ See Joe Kirwin, *EU Foreign Ministers Give Qualified Backing to Transitional Banana Tariff-Quota Proposal*, 17 INT'L TRADE REP. (BNA) 1540, 1540 (Oct. 12, 2000).

⁸⁰ Levick Release, *supra* note 8.

⁸¹ TRIPS, *supra* note 21.

⁸² GATS, *supra* note 10.

⁸³ Levick Release, *supra* note 8.

⁸⁴ Ernesto, *supra* note 12.

⁸⁵ *Id.*

⁸⁶ Elizabeth J. Drake, *Antigua and U.S. Dispute Proposed Withdrawal of Intellectual Property Rights Protections as Authorized WTO Retaliation: Implications for the WTO Dispute Settlement System* (2013), available at <http://www.stewartlaw.com/article/ViewArticle/846>.

B. WIPO and the International Copyright Regime

The nations of the world have attempted to deal with the issue of intellectual property on an international scale long before the creation of TRIPS and the WTO.⁸⁷ There are numerous treaties that collectively form the patchwork of international intellectual property law.⁸⁸ The World Intellectual Property Organization (WIPO), an organ of the United Nations, administers a large portion of these treaties.⁸⁹ These WIPO treaties exist in tandem with TRIPS.⁹⁰ WIPO administers twenty-six individual treaties,⁹¹ but two in particular stand out in importance to this discussion: the Berne Convention and the Paris Convention.

1. The Berne Convention

The Berne Convention (Berne)⁹² is the most important of the WIPO treaties for purposes of this discussion. Berne establishes standards for international copyright protection.⁹³ When TRIPS was drafted many years after the creation of the Berne, it borrowed specific language from Berne and directly incorporated those provisions into its own obligations.⁹⁴ There was no requirement for the contracting parties of TRIPS to join Berne if they had not already done so.⁹⁵ What occurred was simply an adoption of a set of standards that was already in place. Most importantly for the discussion at hand, this absorption of Berne's language did *not* absorb the high contracting parties obligations under that convention.⁹⁶ As a result, since there is no

⁸⁷ See *WIPO—A Brief History*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/about-wipo/en/history.html> (last visited Oct. 24, 2013).

⁸⁸ Jonathan Franklin, *International Intellectual Property Law*, American Society of International Law Electronic Resource Guide 4 (Feb. 8, 2013), available at http://www.asil.org/sites/default/files/ERG_IP.pdf.

⁸⁹ See *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/> (last visited Oct. 24, 2013).

⁹⁰ Slater, *supra* note 74, at 1375–76.

⁹¹ See *WIPO-Administered Treaties*, *supra* note 89.

⁹² Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, S. Treaty Doc. No. 99-27, 828 U.N.T.S. 221 (as revised at Paris on July 24, 1971 and amended in 1979); see *Summary of the Berne Convention for the Protection of Literary and Artistic Works* (1886), WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Sept. 30, 2013).

⁹³ Slater, *supra* note 74, at 1376–77.

⁹⁴ *Id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

absorption of Berne's treaty obligations, the WTO's suspension of Antigua's TRIPS obligations to the United States would have no effect on Antigua's obligations under the Berne Convention,⁹⁷ a treaty both countries are parties to.⁹⁸

2. *The Paris Convention*

The Paris Convention⁹⁹ (Paris) harmonizes the international patent and trademark fields for the high contracting parties.¹⁰⁰ As with Berne, TRIPS adopts language from Paris but it does not absorb the treaty obligations of Paris.¹⁰¹ Both the United States and Antigua are parties to Paris.¹⁰² This presents the same problem as Berne: obligations are copied, but not absorbed, and when obligations under one treaty are modified, the two treaties requirements imposed may conflict.

C. *The Conflict*

When TRIPS adopted segments of Berne and Paris,¹⁰³ but did not absorb the obligations that those respective treaties created, two pieces of international agreements that once fit together without conflict now exist in tension. The cross-retaliation measures authorized by the Dispute Settlement Body allow for a fundamental shifting of the underlying treaty obligations for the high contracting parties involved. This creates a collision course between the international intellectual property regimes of WIPO-administered treaties and the international trade regime of the WTO and its underlying treaties.

⁹⁷ *See id.*

⁹⁸ *WIPO-Administered Treaties Contracting Parties Berne Convention*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15 (last visited Oct. 24, 2013).

⁹⁹ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305 (as last revised at the Stockholm Revision Conference); *see Summary of the Paris Convention for the Protection of Industrial Property* (1883), WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Sept. 18, 2013).

¹⁰⁰ Slater, *supra* note 74, at 1376.

¹⁰¹ *Id.*

¹⁰² *WIPO Administered Treaties Contracting Parties Paris Convention*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=2 (last visited Oct. 24, 2013).

¹⁰³ *See* TRIPS, *supra* note 21.

III. ANALYSIS

A. Overview

This collision course begs the question: what does this tension mean for international law? Multiple levels of analysis are necessary to answer this question. A great deal of political brinkmanship is at play in this issue. The politics of the U.S.-Antigua relationship and the lobbying efforts of Hollywood (much like the spirits lobby in the EC-Bananas dispute)¹⁰⁴ and any other parties that would be harmed by Antigua's threatened cross-retaliation, will significantly impact the results of this dispute. Trade and investment treaty negotiations, campaign contributions, and other national and international dealings will influence the outcome. However, the main issue this Note examines is the impending legal conflict between Berne and TRIPS, as well as other potential regime clashes, and the ramifications stemming from them.

There are a number of other possible conflicts that could result from the authorized cross-retaliation measures. Conflicts between the North American Free Trade Agreement (NAFTA)¹⁰⁵ and TRIPS or between the Anti-Counterfeiting Trade Agreement (ACTA) and TRIPS. The risk of some potential conflicts, such as between TRIPS and Bilateral Investment Treaties or Free Trade Agreements, has been hedged against by thoughtful treaty drafting. Subsequently, these treaties will be examined for their utility in modeling future treaties and agreements to prevent conflict.

B. Conflicts

There are a number of international regimes that could conflict as a result of Antigua's approved cross-retaliation. Some appear to be facial conflicts, such as Berne-TRIPS and NAFTA-TRIPS while others such as TRIPS-ACTA, are more nuanced. Though ACTA references TRIPS, the national

¹⁰⁴ Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, J. INT'L COM. & ECON. (2009), available at http://www.usitc.gov/publications/332/journals/online_gambling_dispute.pdf (citing JAMES MCCALL SMITH, *Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 257-88 (John S. Odell ed., 2006) (explaining the European Spirits industry's immediate lobbying efforts when their IP rights were threatening by cross-retaliation)).

¹⁰⁵ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

legislation of the contracting parties implementing ACTA may create conflict.¹⁰⁶ These three conflicts are examined in turn.

1. *Berne-TRIPS*

If Antigua and Barbuda acts on its authorization to suspend its IP concessions to the United States, there will be a facial conflict between their obligations under the Berne Convention and their authorization to cross-retaliate by suspending TRIPS concessions to the United States.¹⁰⁷ If the conflict went the other way, a breach of TRIPS hypothetically authorized by Berne, this question might be answered more authoritatively by a ruling from the Dispute Settlement Body. However, because Berne does not authorize a tribunal to enforce its implementation,¹⁰⁸ its obligations might simply go unenforced. Conversely, the Dispute Settlement Body of the WTO has already spoken on this matter, not surprisingly ruling on behalf of itself that its obligations and authorizations are superior.¹⁰⁹

Another wrinkle involved in the possibility of The Pirate Bay's involvement is that the website's founders were prosecuted and convicted in a Swedish court¹¹⁰ for the very same acts that they would be committing by helping Antigua. Because the website would deal with U.S. copyright and it would presumably be operated from Antigua, the very nature of such a website would make it universally accessible. The cross-retaliation between Antigua and Barbuda and the United States could jump across the Atlantic Ocean to Europe with a few clicks of the mouse. Could those involved in this proposed file sharing website be prosecuted elsewhere for their actions? What about the individuals downloading the copyright-suspended material for free or for a fee they paid to Antigua? How much preemption, if any, does an authorization from the Dispute Settlement Body have over other

¹⁰⁶ Anti-Counterfeiting Trade Agreement, art. 6 § 1, Oct. 1, 2011, *available at* http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf [hereinafter ACTA].

¹⁰⁷ Slater, *supra* note 74, at 1375–77.

¹⁰⁸ Berne, *supra* note 92; Slater, *supra* note 74, at 1376–77; Allen Z. Hertz, *Shaping the Trident: Intellectual Property under NAFTA, Investment Protection Agreements and at the World Trade Organization*, 23 CAN.-U.S. L.J. 261, 268–76 (1997).

¹⁰⁹ See JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 346–47 (2003); *see also* EC-Bananas, *supra* note 44; ERICH VRANES, *Cross Retaliation Under GATS and TRIPS — An Optimal Enforcement Device for Developing Countries?*, in THE BANANA DISPUTE: AN ECONOMIC AND LEGAL ANALYSIS 113, 122–27 (Fritz Breuss et al. eds., 2003).

¹¹⁰ Pfanner, *supra* note 4.

international or even national legal regimes? These questions threaten dangerous international ramifications from Antigua's proposed action that will be discussed more fully later in this Note.

2. ACTA-TRIPS

While the main issues of conflicting international regimes would certainly arise from treaties and organizations that both the United States and Antigua are parties to, there remains the possibility of issues arising from treaties those countries have not ratified. Other multilateral treaties, such as ACTA, impose obligations on their members to have enforcement measures in place for the protection of the intellectual property rights of other member states.¹¹¹ This obligation creates a very real possibility that a third-party nation to the U.S.-Antigua dispute would become involved if one of its citizens partook in the "Freedom Bay." The treaty is non-self-executing,¹¹² which essentially obligates the high contracting parties to implement the provisions of the law with their own national legislation.¹¹³ So, while ACTA states, "[n]othing in this Agreement shall derogate from any obligation of a Party with respect to any other Party under existing agreements, including the TRIPS Agreement"¹¹⁴ it is still an independent treaty from TRIPS. Additionally, the laws passed by each high contracting party are also independent from TRIPS:

Each Party shall ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in

¹¹¹ ACTA, *supra* note 106, art. 6, § 1.

¹¹² Monika Ermert, *Last Parliament Standing: Europe Final Stronghold of ACTA Critics*, INTELL. PROP. WATCH (Dec. 21, 2011, 7:39 PM), <http://www.ip-watch.org/2011/12/21/last-parliament-standing-europe-final-stronghold-of-acta-critics/>.

¹¹³ *Foster v. Neilson*, 27 U.S. (1 Pet.) 253, 314 (1829); *see also* *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (explaining that self-executing treaties require no implementing legislation to make them operative).

¹¹⁴ ACTA, *supra* note 106, art. 1.

such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.¹¹⁵

There is also conflict in regard to interpreting how ACTA and TRIPS interact. For example, some commentators view TRIPS as not merely a benchmark for the bare minimum of intellectual property protections required by member-states, but also as the maximum allowable for a state to establish.¹¹⁶ If this interpretation were correct, any "TRIPS-plus" protections such as ACTA would violate TRIPS¹¹⁷ and possibly lead to a WTO dispute. Such a conflict could be avoided if the WTO better defined whether TRIPS acts merely as a floor or both as a minimum and maximum limit to enforcement. Additionally, the WTO could rewrite ACTA's national enforcement obligation provision to specify exactly how the provisions should interact with TRIPS obligations rather than merely saying that the national legislation should "avoid the creation of barriers to legitimate trade."¹¹⁸ Better regard for the interactions between international agreements of a similar subject matter would be incredibly beneficial for preventing future conflicts of this sort.

3. NAFTA-TRIPS

Another regime that TRIPS could possibly conflict with is NAFTA.¹¹⁹ While the WTO has derogation exceptions for regional trade unions under Article XXIV, these exceptions only apply to preferential treatment of goods and other concessions.¹²⁰ Article XXIV does *not* apply to interpretations, judgments, or determinations of the tribunals of such regional trade unions.¹²¹ NAFTA has such tribunals.¹²² With both trade unions having their own independent tribunals, there is always a possibility that the bodies

¹¹⁵ *Id.* art. 6 § 1.

¹¹⁶ Henning Grosse Ruse-Khan, *A Trade Agreement Creating Barriers to International Trade?: ACTA Border Measures and Goods in Transit*, 26 AM. U. INT'L L. REV. 645, 654–55 (2011).

¹¹⁷ *Id.* at 655.

¹¹⁸ ACTA, *supra* note 106, art. 6 § 1.

¹¹⁹ See NAFTA, *supra* note 105.

¹²⁰ GATT, *supra* note 25, art. XXIV § 5.

¹²¹ *Id.*

¹²² NAFTA, *supra* note 105, art. 20.3; Anthony DePalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html?pagewanted=all&src=pm> (last visited Dec. 5, 2013).

will hand down conflicting rulings or interpretations. This will very likely come to a head in the recent Zeroing cases that came before both tribunals.¹²³ Zeroing is a practice related to what is known as “dumping” in the trade world that has become rather contentious in recent years.¹²⁴

This problem is more nuanced than the ACTA-TRIPS relationship because both bodies have tribunals that can very rule differently on the same subject matter including when the parties involved are subject to both rulings. To stymie such a situation, one body would likely need to defer to the other. Whether such deference would be given is unclear.

C. Models to Prevent Future Conflict

A handful of treaties and agreements that have occurred post-Berne have had the foresight to outline how they will interact with other existing treaties. This practice insulates the contracting parties against any future conflicts of treaty obligations. In the realm of IP law, such provisions seem to be exclusively contained in bilateral investment treaties and free trade agreements as opposed to larger multilateral agreements (though some of the free trade agreements are multilateral). This Note will examine these treaties and agreements as models for future treaty drafting to prevent nations from entering into agreements that are initially not conflicting but gradually become so by modified obligations through adjudicative measures (such as cross-retaliation).

1. BITs

Unlike international trade, which is mainly regulated by multilateral agreements like the WTO and NAFTA,¹²⁵ investment is mostly dealt with in

¹²³ Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement, USA-MEX-2007-1904-01; *see generally* Sungjoon Cho, *The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations*, ASIL INSIGHTS (May 4, 2006), <http://www.asil.org/insights/volume/10/issue/10/wto-appellate-body-strikes-down-us-zeroing-methodology-used-antidumping> (providing background on zeroing and the Appellate Body’s reaction to zeroing).

¹²⁴ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 2005, 1868 U.N.T.S. 201; *Anti-dumping*, OFF. OF THE U.S. TRADE REPRESENTATIVE, <http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/wto-issues/trade-remedies/anti-dumping> (last visited Oct. 24, 2013) (explaining the significance of dumping, anti-dumping regulation, and the role of the WTO in the matter).

¹²⁵ Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT’L L. 697, 700 (1999).

separate, bilateral treaties¹²⁶ that collectively resembles a “spaghetti bowl” of investment.¹²⁷

Many of these treaties commonly incorporate intellectual property provisions.¹²⁸ Some BITs explicitly discuss their interaction with TRIPS, such as the U.S. Model BIT.¹²⁹ However, others that are like the Model German BIT¹³⁰ do not mention the GATS explicitly, though they do discuss interactions with other international obligations.¹³¹ While there is a possibility of conflict, these provisions seem to make such conflict highly unlikely by specifying the limits of the BIT in areas that it would interact with TRIPS or by stating that the provisions are in line with TRIPS and should be interpreted as such. Subsequently, such a provision is a good model for how to draft a treaty or agreement in a way that avoids clashing treaty regimes or obligations.

2. Free Trade Agreements

Another possible overlap arises from free trade agreements. As previously mentioned, Article XXIV of the GATT allows for regional trade agreements and creates an exception for them in regards to other obligations under that treaty.¹³² These free trade agreements (FTAs), like BITs, often include provisions dealing with intellectual property.¹³³ Most FTAs lay out

¹²⁶ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 67 (2005).

¹²⁷ U.N. CONFERENCE ON TRADE AND DEV., INVESTMENT PROVISIONS IN ECONOMIC INTEGRATION AGREEMENTS, at 10, UNCTAD/ITE/IIT/2005/10 (2006), available at http://unctad.org/en/Docs/iteiit200510ch1_en.pdf.

¹²⁸ Model US Bilateral Investment Treaty (2012) [hereinafter Model U.S. BIT], available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; Model German Bilateral Investment Treaty (2008) [hereinafter Model German BIT], available at <http://www.italaw.com/sites/default/files/archive/ita1025.pdf>; Model French Bilateral Investment Treaty (2006) http://www.italaw.com/documents/ModelTreaty_France2006.pdf; Model Indian Bilateral Investment Treaty (2003), <http://www.italaw.com/sites/default/files/archive/ita1026.pdf>.

¹²⁹ Model U.S. BIT, *supra* note 128.

¹³⁰ Model German BIT, *supra* note 128.

¹³¹ *Id.* art. 7 § 1.

¹³² See *supra* note 25 and accompanying text.

¹³³ U.S.-Australia Free Trade Agreement, U.S.-Aust., art. 17.1, Mar. 3, 2004, 43 I.L.M. 1248 [hereinafter U.S.-Australia FTA], available at http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file148_5168.pdf; U.S.-Israel Free Trade Agreement, U.S.-Isr., art. 14, Apr. 22, 1985, 24 I.L.M. 657 [hereinafter U.S.-Israel FTA], available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp;

specific treaty obligations already in force and discuss the interaction between all of them, like the U.S.-Australia FTA¹³⁴ and the E.U.-Korea FTA.¹³⁵ However, some simply reaffirm existing IP treaty obligations in general without discussing specific treaties or provisions, like the U.S.-Israel FTA.¹³⁶ Both styles seem to contemplate conflicts with the other treaties and subsequently hedge against any future clash by discussing the interactions between all the relevant treaties. Possible conflict is also avoided by requiring both parties to ratify or accede to certain existing treaties, as seen in the U.S.-Australia FTA.¹³⁷ Like the previously discussed BITs, FTAs of this type provide an excellent model for treaty drafting that would prevent future conflict of international regimes by specifically outlining where one treaty ends and the other begins, as well as where the treaties agree or do not overlap. In regards to the different styles, it is not immediately clear which format would provide superior protection against such an outcome, but either route is more desirable than the status quo.

D. Lessons Learned

1. Risks of the Status Quo

There are a number of lessons to be gleaned from this discussion of international regimes. First, the amorphous nature of these numerous treaties and international bodies that come as a result of cross-retaliation measures creates the risk of conflict. The use of linkage to achieve the aforementioned “grand bargain”¹³⁸ by way of linking various issues such as trade and intellectual property together creates overlap between regimes. The U.S.-Antigua dispute represents a possible Pandora’s Box in this world of overlapping regimes.

While there is certainly a possibility of the two nations settling before Antigua goes through with its threats,¹³⁹ this situation represents a very real

NAFTRA, *supra* note 105, art. 1701; E.U.-Korea Free Trade Agreement, E.U.-Kor., ch. 10, Oct. 15, 2009, 2011 O.J. (L 127), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:127:FULL:EN:PDF>.

¹³⁴ U.S.-Australia FTA, *supra* note 133.

¹³⁵ E.U.-Korea FTA, *supra* note 133.

¹³⁶ U.S.-Israel FTA, *supra* note 133.

¹³⁷ U.S.-Australia FTA, *supra* note 133, art. 17.1 §§ 2, 4.

¹³⁸ Lovett, *supra* note 20, at 952.

¹³⁹ See Hartley Henderson, *Antigua offers a new proposal to end Internet gambling dispute with U.S.*, OFF SHORE GAMING ASSOC., *available at* http://www.osga.com/online_gaming_arti

conflict that can arise in the future despite the outcome of this specific dispute. If not gambling, perhaps another issue of trade will arise between WTO member-states and spark a similar clash of regimes. To avoid such a clash, the current state of overlapping systems of international regulation must be thoroughly reexamined and restructured into a uniform agreement or complimentary agreements.

2. Building on Past Success

To explain the success of the WTO in further opening international trade and connecting markets,¹⁴⁰ many point to the structure of the Dispute Settlement Body.¹⁴¹ The author of this Note posits that the success of the WTO is in part based upon the absorption of various existing treaties and their subsequent unification under the WTO, resulting in a more uniform system. This success should be built upon by further streamlining the associated international regimes through merging treaties and simplifying obligations. International IP regulation, as well as other international regimes with overlapping agreements, should undergo a unification effort to streamline the various agreements and multilateral treaties. Such unification would create uniformity in the global market, make the resolution of international intellectual property issues and disputes more predictable, provide more stable and cognizable protection for intellectual property right holders, and, most importantly, eliminate the possibility of facing liability from one regime when following the authorized action or obligations of another regime.

3. Linkage Is a Double-Edged Sword

Linkage can be a fantastic tool at the negotiating table. However, if it is used haphazardly and continually without any unification of regimes along the way there will always be a possibility of conflicting regimes when there is an overlap. Different rules, standards, and interpretations all present problematic encounters for such regimes and could very easily put nations in the awkward legal position of violating one regime to comply with another.

cles.php?Antigua-offers-a-new-proposal-to-end-Internet-gambling-dispute-with-U.S.-14330#.VVud0NNViko (last visited May 19, 2014).

¹⁴⁰ See MARC L. BUSCH & ERIC REINHARDT, TRADE BRIEF ON THE WTO DISPUTE SETTLEMENT 1 (2004), available at <http://faculty.georgetown.edu/mlb66/SIDA.pdf>.

¹⁴¹ DSU, *supra* note 38, art. 1.

This possibility is even more likely with measures like cross-retaliation¹⁴² being used that essentially modify the initial agreement and its obligations. A country could sign on to two different multilateral treaties that are not initially in conflict but eventually conflict when a cross-retaliation measure, or some other modifying action, is approved. It could certainly be argued that such modifications are reasonably foreseeable and thus should be contemplated at the time of drafting or at least at the time of signing or ratification. However, returning to the other WTO disputes mentioned, particularly the U.S.-Antigua dispute, the outcome was not expected.¹⁴³ At the very least, it does not seem that the United States would have pushed so hard for the inclusion of cross-retaliation measures¹⁴⁴ if it foresaw it being used in such a fashion against itself. The more these measures are embraced, the more likely this collision of laws will occur. When treaties do conflict, what will result is unclear.

4. *A Realistic Approach*

There are various approaches that might clarify this issue. From a simply realistic viewpoint, it would seem that whichever international regime was the most robust in terms of enforcement would win. In the U.S.-Antigua dispute, it seems the WTO would come out on top over the WIPO administered treaties, such as Berne. The WTO has the Dispute Settlement Body but Berne has no real means of enforcement in the United States as a non-self-executing treaty.¹⁴⁵ In a situation where both regimes do have tribunals, like a hypothetical clash between NAFTA and the WTO, the result would be far more difficult to predict. If two tribunals were to hand down conflicting rulings on the same issue, a member-state bound to both tribunals would be placed in an impossible legal situation. Additionally, such a situation could open up a massive amount of liability for a country and its industries.

¹⁴² See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹⁴³ Gary Rivlin, *Online Gambling Pits Antigua against U.S. and Challenges WTO*, N.Y. TIMES, Aug. 22, 2007, http://www.nytimes.com/2007/08/22/business/worldbusiness/22iht-gamble.4.7214682.html?pagewanted=all.&_r=0.

¹⁴⁴ Lowrey, *supra* note 11.

¹⁴⁵ Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 CARDOZO L. REV. 373, 403–06 (1995) (explaining how the United States Congress interpreted the Berne Convention in such a way that it was non-self-executing).

5. *An Interpretive Approach*

From an interpretive view of international law, the “winning” regime might be determined by which treaty came later. Under the Vienna Convention on the Law of Treaties (Vienna Convention),¹⁴⁶ the “latest expression of state intent, *in casu*, the [Dispute Settlement Body] authorisation [sic] [to suspend TRIPS obligations], must prevail.”¹⁴⁷ In other words, whichever agreement came later would be the agreement that is binding in case of a conflict. It would not be a stretch to apply such an interpretation to a conflict between an international organization, such as the Dispute Settlement Body, and a treaty, like Berne. This would seemingly result in the WTO winning out over Berne in the U.S.–Antigua dispute. However, there is a multitude of potential problems involved in such an interpretation.

First, the Vienna Convention seems to be contemplating one treaty being replaced with or superseded by a later-in-time treaty. The drafters of the Vienna Convention likely did not contemplate treaties with an amorphous shape, such as the WTO treaties after the authorization of cross-retaliation,¹⁴⁸ because such treaties did not exist when the Vienna Convention was signed in 1969. As previously mentioned, TRIPS did not absorb the obligations of Berne nor did it expressly supersede Berne.¹⁴⁹ It adopted much of the language of Berne,¹⁵⁰ which seems to indicate the two treaties were intended to work together instead of the latter replacing the former. That being said, the Vienna Convention does outline the analytical process for when you have successive treaties on the same subject.¹⁵¹ This analysis would point to

¹⁴⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. It should be noted that the United States has not ratified the Vienna Convention. However, the Vienna Convention is largely a codification of the binding customary international law governing the relations between nations so it is still applicable. See, e.g., Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 433–34 (2004).

¹⁴⁷ Slater, *supra* note 74, at 1377 (explaining that the method of interpreting overlapping treaties and international organizations is based on the latest expression of state intent) (citing Pauwelyn, *supra* note 109).

¹⁴⁸ DSU, *supra* note 38, arts. 1–30.

¹⁴⁹ Slater, *supra* note 74, at 1376–77.

¹⁵⁰ *Id.*

¹⁵¹ Vienna Convention, *supra* note 146, art. 30(4)(a) (stating that as between States party to both successive treaties relating to the same subject matter where the earlier treaty is not terminated or suspended in operation under article 59 of the Vienna Treaty, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty).

Berne only applying to the degree that it did not conflict with the WTO treaties, subsequently allowing for the cross-retaliation of Antigua against the United States under both the WTO treaties and Berne.

Second, claiming that “the latest expression of state intent”¹⁵² is what determines which agreement trumps the other is obviously focusing the analysis on the intent of the state. But if the United States never imagined the cross-retaliation provision being used to suspend IP rights as a result of its national legislation regarding online gambling, can it really be said that there was state intent? The United States maintains that it never intended for online gambling to be included in the United States’ GATS obligations.¹⁵³ Those protests aside, the Appellate Body found that online gambling was within the scope of the United States’ GATS obligations,¹⁵⁴ though they acknowledged that it was possible that online gambling entered into the scope by mistake.¹⁵⁵ If it is the case that this obligation came by mistake, was “the latest expression of state intent” really to make the United States subject to suspensions of its IP rights? While this is a seemingly valid concern of intent, it likely does not matter. Whether or not the United States intended to subject itself to such suspensions of obligations by Antigua, *expressed* intent is what is key.¹⁵⁶ The actual intentions of the United States do not affect what the Appellate Body found to be expressed by the United States in its GATS obligations. Subsequently, this possible wrinkle would likely be overcome for the previously stated reasons.

A third issue that could arise from an interpretation that the WTO treaties supplant Berne is the possibility of an Article 53 invalidation. Article 53 of The Vienna Convention invalidates agreements that violate preemptory norms of international law at the time of signing.¹⁵⁷ The United States could claim that the protection of IP rights is so fundamental to modern society that it is such a preemptory norm (or *jus cogens*) of international law that no derogation is allowed. However, this would almost certainly fail as well. There are two major flaws in such an argument. First, the very existence of the WTO and its 159 members¹⁵⁸ would indicate that international custom

¹⁵² Slater, *supra* note 74, at 1376–77.

¹⁵³ Rothstein, *supra* note 10, at 174.

¹⁵⁴ Appellate Body Report-Gambling, *supra* note 72.

¹⁵⁵ Panel Report, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.136, WT/D238/R (Nov. 10, 2004).

¹⁵⁶ Slater, *supra* note 74, at 1377.

¹⁵⁷ Vienna Convention, *supra* note 146, art. 53.

¹⁵⁸ *Understanding the WTO: Members and Observers*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 20, 2013).

does allow for derogation from IP rights since the WTO implements cross-retaliation. While the Vienna Convention does specify that it looks at the custom at the time of the signing,¹⁵⁹ not after, there still would likely not be a strong consensus on IP rights and their protection.¹⁶⁰ Second, and likely the most practical problem, the United States is simply not going to claim the whole WTO regime is invalidated merely so it can avoid losing a dispute. In 2010, the United States exported \$518 billion in commercial services alone,¹⁶¹ making the \$3.4 billion¹⁶² Antigua is claiming look like a mere pittance. It would be completely irrational to jeopardize the whole system of trade, not just in services but goods as well, that the United States relies on for such a sum that is meager in comparison.

IV. CONCLUSION

International law needs to become more unified and streamlined. The U.S.-Antigua dispute is a warning of things to come, whether or not Antigua actually acts on its threat of cross-retaliation. Sooner or later, international regimes and treaties will conflict in a grand fashion with disastrous results for both the member-states and the organizations themselves. Such an outcome can be stymied—or even prevented entirely—by acting in two specific ways. First, current multilateral agreements should be merged into a more streamlined organization, such the WTO, where it is appropriate and feasible. Second, future treaties should be drafted in a way that contemplates interaction with other international obligations and regimes so the member states that are parties to both are not left guessing which obligation they should risk violating. As technology advances and globalization connects the world more and more, new laws will be created and new forms of regulation will be drafted to keep up with the times. These new laws and regulations must be formed with an eye on this issue to prevent a recrudescence of conflicting regimes. Otherwise, the question of pirate or privateer will never be answered.

¹⁵⁹ Vienna Convention, *supra* note 146, art. 53.

¹⁶⁰ Numerous countries implement practices that violate IP rights for various reasons. One of the more notable examples is the advent of compulsory licenses. The legal basis of this practice comes from Berne, *supra* note 92, art. 13(1), the very treaty that the United States would be relying on.

¹⁶¹ U.S. Int'l Trade Comm'n, Recent Trends in U.S. Services Trade: 2012 Annual Report, at xiii (2012).

¹⁶² Kravets, *supra* note 12.