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The WTO and Copyright Piracy

By: Sungjoon Cho and Simon Lester – February 12, 2013

The World Trade Organization (WTO) has recently authorized the tiny Caribbean country of Antigua and Barbuda to retaliate against the U.S., based on a U.S. violation of WTO rules through a discriminatory ban on foreign-owned Internet gambling websites. Antigua's proposed remedy is to set up a "copyright haven" that would intentionally infringe some of U.S. copyrights (and maybe patents as well). While some pundits have declared this a victory of David (Antigua) over Goliath (U.S.), the results are not yet in. There are limits to the power of the WTO, and Antigua's victory is far from assured.

First of all, some background. The Internet revolution has created a number of new online businesses. To no one's great surprise, pornography and gambling were some of the first online success stories. Some countries (like the United Kingdom) legalize online gambling; others criminalize it. The U.S. prohibits it, for reasons ranging from concerns about underage gambling to organized crime. Small countries like Antigua have been able to reap handsome revenues by simply allowing online gambling companies to set up servers in their territories.

Alas, the U.S. government did not clearly write down its concerns in its WTO Services Schedule of Commitments. Since online gambling is one type of "trade in services" under the WTO, and the U.S. committed itself to allow this trade, its discriminatory ban was found to constitute a WTO violation. Antigua successfully sued the U.S. at the WTO, on the basis that the U.S. ban harmed those Antiguan gambling websites. Antigua won the original litigation back in 2005. It has just now requested authorization to retaliate.

Usually, the WTO authorizes retaliation in the same sector where the original dispute arises. In this dispute, Antigua might have been authorized to retaliate in a "service" sector. However, since Antigua does not import many services from the U.S., such retaliation would have been meaningless. To increase the effectiveness of the retaliation, the WTO permitted Antigua to "cross-retaliate," i.e., to retaliate in another sector. Antigua is focusing on the area of copyright, under the Agreement on Trade-Related Intellectual Property Rights (TRIPS).

It is tempting to depict this whole saga as a David-beat-Goliath moment. Yes, justice has finally been done under the WTO! Not so fast. The WTO's authorization of cross-retaliation does arise, in part, from the power disparity between Antigua and the U.S., so there is an element of the small guy triumphing over the big guy. However, it will be extremely challenging to implement and monitor the retaliation to the exact extent which the WTO authorized (\$21 million). Even the WTO acknowledged that this unusual mode of retaliation would be more complicated than the conventional one, i.e., simply imposing extra tariffs. How to actually do this is anybody's guess. One might say that Antigua could provide a website in which any one could download and

watch the "Pirates of the Caribbean" (no pun intended!) free of charge. But how could Antigua make sure that its generosity stops precisely at the point of \$21 million? Clearly, there will be some technical challenges involved.

Moreover, even if Antigua can make this retaliation scheme function, it may be a Pyrrhic victory in the long-term. \$21 million may not be enough to change U.S. policy, and may serve only to anger the U.S. can lead to counter-retaliation (such as the withdrawal of aid programs).

For better or worse, there are inherent limitations to the WTO system in its current form, which, despite the concerns of some trade critics, is nothing like a world government. The WTO ruling in this case cannot force the U.S. to change its laws.

Of course, these caveats should not be taken as a sign of the WTO's irrelevancy. The true value of the WTO lies not just in the actual commercial consequences, but in the "process" itself. Because of the WTO, countries, big and small, have a chance to resolve their trade disputes in a court of law, prevent their tensions from escalating, and build up jurisprudence that could be guidance for future disputes. If the U.S. is concerned with Antigua's "copyright haven" plan (if it ever materializes), it can go back to the WTO to have that issue adjudicated. Indeed, the very WTO tribunal that had accorded Antigua the \$21 million award observed that the U.S. might come back to the WTO if it finds Antigua's retaliation unfair.

In a sense, then, despite all the intrigue about possible copyright violations, this high profile trade dispute is not just between Antigua and the U.S. Instead, it should shine a spotlight on the WTO itself, and how its rules can keep these contentious disputes within appropriate boundaries. Better to have a few authorized pirates than to have trade friction turn into Wild West style shootouts.