

Northwestern Journal of International Law & Business

Volume 24
Issue 2 *Winter*

Winter 2004

The Havana Club Saga: Threatening More than Just "Cuba Coke"

Emily Taylor

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>

 Part of the [International Law Commons](#), and the [International Trade Commons](#)

Recommended Citation

Emily Taylor, The Havana Club Saga: Threatening More than Just "Cuba Coke", 24 Nw. J. Int'l L. & Bus. 513 (2003-2004)

This Note is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

NOTE

The Havana Club Saga: Threatening More than Just “Cuba Coke”

*Emily Taylor**

I. INTRODUCTION

The trademark dispute over “Havana Club” rum has aptly been described as “sexier than most.”¹ Most trademark disputes do not result in half a dozen U.S. court decisions,² produce a last-minute U.S. statutory provision³ that ignites an international treaty dispute,⁴ or cause a foreign

* J.D. Candidate, 2004, Northwestern University School of Law; B.A. Duke University, 2001. The author would like to thank Clayton Poppe for his patience, humor, and summaries of the editorials in the Sunday paper.

¹ *Rum, Macaroni and Bad Politics*, CHI. TRIB., Sept. 2, 2002, available at 2002 WL 26770551. Another commentator on the dispute noted that “[i]ruly epic legal fights never die—they just move to another forum.” Jenna Greene, *Rum Wars Test World Trade Organization*, 6 INTELL. PROP. STRATEGIST 5 (2000).

² See *Havana Club Holding, S.A. v. Galleon S.A.*, 961 F. Supp. 498 (S.D.N.Y. 1997) [hereinafter Havana Club I]; *Havana Club Holding, S.A. v. Galleon S.A.*, 974 F. Supp. 302 (S.D.N.Y. 1997) [hereinafter Havana Club II]; *Havana Club Holding, S.A. v. Galleon, S.A.*, 1998 WL 150983 (S.D.N.Y. Mar. 31, 1998) [hereinafter Havana Club III]; *Havana Club Holding, S.A. v. Galleon, S.A.*, 62 F. Supp. 2d 1085 (S.D.N.Y. 1999) [hereinafter Havana Club IV]; *Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116 (2d Cir. 2000) [hereinafter Havana Club V], *cert. denied*, 531 U.S. 918 (2000) [hereinafter Denial of *cert.*].

³ See Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, § 211, Pub. L. No. 105-277, 112 Stat. 2681 (incorporating the Department of Commerce Appropriations Act of 1999) [hereinafter § 211].

⁴ See WTO Panel Report on United States - Section 211 Omnibus Appropriations Act of 1998 (Aug. 6, 2001), http://www.wto.org/english/docs_e/docs_e.htm [hereinafter Panel decision]; WTO Appellate Body Report on United States - Section 211 Omnibus Appropriations Act of 1998 (Jan. 2, 2002), <http://www.wto.org/english/docse/docse.htm>

relations quandary. The fight over “Havana Club” rum however, has done just that.

The saga of the “Havana Club” brand began when the family-owned distillery in Cuba that created “Havana Club” rum was confiscated by the Cuban government during the communist revolution. Years later, a dispute arose as to the rightful owner of the U.S. trademark of the name. In an attempt to settle the matter, a U.S. statutory provision was passed that prevents the registration or protection (in the United States) of trademarks linked to businesses that were confiscated by the Cuban government.⁵ The statutory provision, § 211 of the Omnibus Appropriations Act of 1998 (“§ 211”),⁶ may have been in keeping with the United States’ opposition to Cuba’s communist government and the confiscation of private property, but it was found to violate the United States’ obligations under international treaty law.⁷

The Dispute Settlement Body (“DSB”) of the World Trade Organization (“WTO”) determined,⁸ and the Appellate Body (“AB”) agreed, that § 211 violates⁹ the Agreement on Trade Related Aspects of Intellectual Property¹⁰ (“TRIPS Agreement”).¹¹ The AB requested that the United States “bring its measure . . . into conformity with its obligations” under the treaty.¹²

This comment will examine the options facing the United States in light of the AB’s determination that § 211 violates the TRIPS Agreement. Part I will explore the background of the trademark dispute and the applicable treaty and statutory provisions. Part II will focus on the relevant portions of the AB’s holding. Part III will assess the implications of potential U.S. responses. Finally, Part IV will explain why compliance with the TRIPS Agreement is in the United States’ best interests.

A. Background

“Havana Club” rum was originally produced by José Arechabala, S.A.,

[hereinafter Appellate decision].

⁵ § 211, *supra* note 3.

⁶ *See id.*

⁷ Appellate decision, *supra* note 4.

⁸ Panel decision, *supra* note 4.

⁹ Appellate decision, *supra* note 4.

¹⁰ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

¹¹ Appellate Decision, *supra* note 4.

¹² *Id.* at ¶ 361.

a family-owned distillery in Cuba.¹³ The distillery's rum was distributed internationally, and the "Havana Club" name was protected by trademarks in a number of countries.¹⁴ In 1960, the business was confiscated by the Cuban government.¹⁵ The Arechabala family fled to Spain and the United States where their attempts to restart the business failed.¹⁶ In 1973, the family allowed the U.S. trademark of "Havana Club" to lapse.¹⁷

Meanwhile, in 1972 a Cuban government enterprise, the *Empresa Cubana Exportadora de Alimentos y Productos Varios* ("Cubaexport"), began exporting "Havana Club" rum.¹⁸ Cubaexport registered the "Havana Club" trademark in Cuba in 1974 and registered the lapsed U.S. trademark in 1976.¹⁹

In 1993, the "Havana Club" section of Cubaexport was reorganized into Havana Rum & Liquors, S.A. ("HRL") in order to facilitate a joint venture with the French liquor distributor Pernod Ricard, S.A. ("Pernod").²⁰ In November 1993, Pernod and HRL formed two wholly owned subsidiaries, Havana Club Holding, S.A. ("HCH") and Havana Club International, S.A. ("HCI").²¹ Cubaexport transferred the U.S. "Havana Club" trademark to HRL which later assigned the trademark to HCH.²²

While the Cuban-French venture continued to produce "Havana Club" rum, the Arechabala family sold whatever rights it had to the "Havana Club" name to Bacardi & Co. ("Bacardi")²³ in a deal formalized in April of

¹³ Havana Club V, *supra* note 2, at 119.

¹⁴ *Id.*

¹⁵ Havana Club IV, *supra* note 2, at 1090. For an overview of the Cuban government's confiscation practices, see Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321 (2000).

¹⁶ Misha Gregory Macaw, *The New Rum War: Havana Club as a Threat to the U.S. Interest in International Trademark Harmonization*, 18 B.U. INT'L L.J. 291, 295 (2000).

¹⁷ Ashley C. Adams, *Section 211 of the Omnibus Appropriations Act: The Threat to International Protection of U.S. Trademarks*, 28 N.C. J. INT'L L. & COM. REG. 221-22 (2002).

¹⁸ Havana Club V, *supra* note 2, at 120. "Havana Club" rum "has been exported to over twenty countries since 1973 . . . [T]he principal markets for Havana Club rum are Western Europe, Canada, and Mexico . . ." Havana Club I, *supra* note 2, at 502.

¹⁹ Havana Club V, *supra* note 2, at 120.

²⁰ *Id.* Pernod Ricard is the third largest distributor of wine and sprits, and includes the brands Wild Turkey Bourbon, Seagram's Gin, Chivas Regal, and Bushmills Irish whiskeys. *Congressional Cuba Working Group Releases Cuba Policy Review, Seeks Repeal of Section 211; Pernod Ricard USA Applauds Members' Leadership*, U.S. NEWSWIRE, May 16, 2002, 2002 WL 4577559.

²¹ Havana Club IV, *supra* note 2, at 1088.

²² *Id.* at 1090. This transfer of the United States trademark into the ownership of the Cuban-French company was later an element of the dispute over the trademark's validity. See Havana Club II, *supra* note 2.

²³ The Bacardi family's Cuban distillery was also confiscated by the Castro regime, on

1997.²⁴ Bacardi, claiming to have a right to the “Havana Club” name based on the Arechabala family’s consent, began distributing its own “Havana Club” rum in 1995.²⁵

The dispute between Bacardi and HCH over their respective rights to the “Havana Club” name is recorded in a series of U.S. court cases.²⁶ There, HCH claimed that Bacardi was infringing upon HCH’s registered trademark, while Bacardi questioned the Cuban-Fench venture’s ownership of the trademark.²⁷

B. U.S. Statutory Provision § 211

The battle over the “Havana Club” name did not remain confined to the courtroom, however. Bacardi lobbied U.S. Senator Connie Mack, of Florida, to introduce what became § 211.²⁸ The provision was included the night before the budget bill passed, was never presented on the floor of the Senate, and is not included in any of the bill’s legislative history.²⁹

The text of § 211 states:

(a)

(1) Notwithstanding any other provision of law, no transaction of payment shall be authorized or approved . . . with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

(2) No U.S. Court shall recognize, enforce, or otherwise validate any assertion of rights by a designated national based on common

October 14, 1960. The family fled and restarted their business in the Bahamas. *See Bacardi Heritage*, at <http://www.bacardi.com/learn/Heritage.aspx> (last visited Jan. 25, 2004).

²⁴ Havana Club IV, *supra* note 2, at 1090; the Arechabalas had previously negotiated a similar deal unsuccessfully with HCH and another liquor distributor. *See id.*

²⁵ *Id.*

²⁶ *See* Havana Club I-V and Denial of *cert.*, *supra* note 2; *see also* Daniel Carroll, *Havana Club Holding, S.A. v. Galleon, S.A.: District Court Orders up “One Havana Club Rum and Whatever Congress is Having,”* 8 TUL. J. INT’L & COMP. L. 507 (2000). The cases name Galleon, S.A. as the leading defendant; Bacardi is Galleon’s successor-in-interest.

²⁷ *See id.*

²⁸ Senator Trent Lott added § 211 to the bill at the request of Senator Mack. *See A Special-Interest Cocktail*, WASH. TIMES, Jan. 20, 2002, available at 2002 WL 2903091; *see also* Bruce Rubenstein, *Behind the Scenes with Bacardi’s Lobbyist*, 12 CORP. LEGAL TIMES INT’L 124 (2002) (interview with Bacardi lobbyist).

²⁹ *See id.*

law rights or registration . . . of such a confiscated mark, trade name, or commercial name.

(b) No U.S. Court shall recognize, enforce or otherwise validate any assertion of treaty rights by a designated national or its successor-in-interest . . . for a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of such mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

....

(d)

(1) The term “designated national” has the meaning . . . [“Cuba and any national thereof,”³⁰] and includes a national of any foreign country who is a successor-in-interest to a designated national.³¹

Section 211 has three effects. First, § 211(a)(1) prevents any party from registering or renewing a trademark that is the same as or “substantially similar” to a trademark that was associated with a business confiscated by the Cuban government, unless the original owner of the trademark consents. The provision accomplishes this by preventing anyone from paying the fee that is required to complete a registration or renewal of a trademark unless these qualifications are met.³²

Second, § 211(a)(2) prevents a Cuban entity from gaining U.S. judicial enforcement of statutory or common law rights for a trademark that is the same as or substantially similar to a confiscated trademark.

Finally, § 211(b) prevents a Cuban entity from gaining U.S. judicial enforcement of treaty rights for a trademark that is the same as or “substantially similar” to a trademark that was used by a confiscated business, unless the original owner agrees.

Although the silent, last-minute inclusion of § 211 and the corresponding lack of legislative history preclude an authoritative statement of the purpose of § 211, three objectives are met by the provision. First, § 211 determined the outcome of the ongoing litigation between HCH and Bacardi. After the passage of § 211, the Supreme Court denied certiorari on

³⁰ 31 C.F.R. § 515.305 (2002).

³¹ § 211, *supra* note 3.

³² See Lanham Act § 44, 15 U.S.C. § 1126 (2002) for the details of the fee and license system.

the case,³³ which effectively affirmed the Second Circuit Court of Appeal's dismissal of HCH's claims against Bacardi.³⁴

Second, the provision supports the U.S. policy of non-recognition of foreign government confiscations.³⁵ The international community has agreed that the expropriation of private property without just compensation is illegal. Section 211 prevents recognition of foreign confiscations by preventing the registration, renewal, or enforcement of confiscated trademarks³⁶ without the original owner's consent.³⁷

Finally, § 211 extends the goals of the U.S. embargo of Cuba.³⁸ Enacted in 1963, the embargo was the U.S. response to the establishment of a communist regime in Cuba, Cuba's increased ties with the Soviet Union, and the Cuban government's confiscation of American property.³⁹ Section 211 advances the goals of the embargo by preventing the Cuban government from profiting from confiscated trademarks.⁴⁰

C. TRIPS Agreement

After being denied certiorari by the U.S. Supreme Court, and thus exhausting its U.S. legal remedies, Pernod lobbied the European Communities (E.C.) to bring a suit against the United States in the WTO claiming that § 211 violates the United States' obligations under the TRIPS Agreement.⁴¹

³³ Denial of *cert.*, *supra* note 2.

³⁴ See Joseph Bradica, *Havana Club Rum: One Step Back for U.S. International Trademark Policy*, 16 TEMP. INT'L & COMP. L. J. 147 (2002). "We conclude that the Cuban embargo barred assignment to HCH of the 'Havana Club' trademark registered in the United States, that we are precluded by [§ 211] from enforcing whatever rights HCI might have to trade name protection . . . and that HCI lacks standing to assert its false advertising and unfair competition claims . . ." *Havana Club V*, *supra* note 2, at 119.

³⁵ See Adams, *supra* note 17, at 230.

³⁶ The term "trademark" is used throughout this article to refer generically to intellectual property and is not used as a term of art excluding other forms of protected property.

³⁷ See § 211, *supra* note 3.

³⁸ See Adams, *supra* note 17, at 229-30.

³⁹ See *id.*; see also Bradica, *supra* note 34, at 153-57. The regulations outlining the terms of this embargo are the Cuban Assets Control Regulations ("CACR"). See 31 C.F.R. pt. § 515. The CACR were enacted under § 5(a) of the Trading with the Enemy Act ("TWEA"). See 50 U.S.C. §§ 1-44, as amended by the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-6 (2004). TWEA gives the President "broad authority to impose comprehensive embargoes on foreign countries . . ." *Havana Club I*, *supra* note 2, at 500 (quoting *Regan v. Wald*, 468 U.S. 222, 225-26 (1984)). The President delegated this authority to the Secretary of the Treasury who created the Office of Foreign Assets Control ("OFAC") to oversee the embargo. See *id.* (OFAC also administers embargoes against other countries).

⁴⁰ See Adams, *supra* note 17, at 230.

⁴¹ See generally Panel decision, *supra* note 4. The EU claimed that § 211 violated the registration, enforcement, and National Treatment and Most Favored Nation Treatment

The TRIPS Agreement was created primarily to “preserv[e] the interests of the intellectual property industries that are the mainstay of many Western economies.”⁴² More specifically, the Agreement was created to provide a “coherent, enforceable body of norms, rules and procedural regulations administered by an institutional authority vested with the necessary powers to execute a global intellectual property mandate.”⁴³ The Agreement is the “most comprehensive multilateral agreement on intellectual property ever signed.”⁴⁴

The TRIPS Agreement deals with the “availability, scope and use” as well as the enforcement of intellectual property rights.⁴⁵ In addition to its own requirements, the TRIPS Agreement incorporates certain provisions of an earlier intellectual property treaty,⁴⁶ the Paris Convention of 1967.⁴⁷ This extends certain Paris Convention protections to states party to the TRIPS Agreement.

D. WTO Decision

In the WTO DSB, the Panel held that the U.S. statutory provision, § 211, violated only one provision of the TRIPS Agreement. The Panel found that § 211(a) (2) violated Article 42 of the TRIPS Agreement.⁴⁸ Article 42 of the TRIPS Agreement requires that member states provide “fair and equitable procedures” to “right holders” of other member nations.⁴⁹

The Panel held that because § 211 restricted Cuban and other foreign nationals’ access to U.S. courts to enforce intellectual property rights, it

requirements of the TRIPS Agreement: that § 211(a)(1) violated Articles 2.1 and 15.1 of the TRIPS Agreement and Article 6 *quinquies* (A)(1) of the Paris Convention; that § 211 (a)(2) violated Articles 2.1, 3.1, 4, 16.1, and 42 of the TRIPS Agreement and Articles 2(1), 6*bis*, and 8 of the Paris Convention; and that § 211(b) violated Articles 2.1, 3.1, 4, 16.1, and 42 of the TRIPS Agreement and Articles 2(1), 6*bis*, and 8 of the Paris Convention. See Panel decision, *supra* note 4, ¶¶ 8.6-8.10.

⁴² Ruth Okediji, *TRIPs Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC’Y U.S.A. 585, 608-9 (2001). It is worth noting that the TRIPS Agreement is a “one size fits all” agreement that “bind[s] both developed and developing countries to similar levels of intellectual property protection.” *Id.* at 609.

⁴³ *Id.* at 586.

⁴⁴ Bradica, *supra* note 34, at 147.

⁴⁵ TRIPS Agreement, *supra* note 10, at 83. For discussion of the WTO dispute process, see WORLD TRADE ORG., THE WTO DISPUTE SETTLEMENT PROCEDURES (2d. ed. 2001).

⁴⁶ Paris Convention on the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 24 U.S.T. 2140, 827 U.N.T.S. 305, available at <http://www.wipo.int/clea/docs/en/wo/wo020en.htm> [hereinafter Paris Convention].

⁴⁷ Articles 1-12 and 19 of the Paris Convention are incorporated into Parts II, III, and IV of the TRIPS Agreement. See TRIPS Agreement, *supra* note 10, at 85.

⁴⁸ Panel Decision, *supra* note 4, ¶ 8.102.

⁴⁹ TRIPS Agreement, *supra* note 10, at 100.

deprived member states of “fair and equitable procedures.”⁵⁰ The Panel recommended that because of this “nullification or impairment of the benefits accruing to the [E.C.] under the TRIPS Agreement,”⁵¹ the DSB should “request the United States bring its measures into conformity with its obligations under the TRIPS Agreement.”⁵²

II. APPELLATE BODY DECISION

The United States and the European Community appealed the DSB decision. The United States appealed the Panel’s decision regarding “fair and equitable procedures” and the European Union appealed all other issues.⁵³ The AB⁵⁴ issued its report on January 2, 2002, finding that § 211 violated two provisions of the TRIPS Agreement: national treatment and most favored nation treatment.⁵⁵

A. National Treatment

Both the TRIPS Agreement and the Paris Convention, as incorporated into the TRIPS Agreement, require that member states treat their citizens and the citizens of other member states equally with regard to access and protection of intellectual property rights.⁵⁶ This national treatment requirement has “long been a cornerstone of the Paris Convention and other intellectual property conventions . . . [as well as] the world trading system that is served by the WTO.”⁵⁷

The TRIPS Agreement’s national treatment provision, article 3.1, states that “[e]ach Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property . . .”⁵⁸ “Protection” is defined to include “matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights . . .”⁵⁹ Article

⁵⁰ See Panel decision, *supra* note 4, ¶¶ 4.91-96.

⁵¹ *Id.* ¶ 9.2.

⁵² *Id.* ¶ 9.3.

⁵³ Claims were filed in October 2001. See Appellate decision, *supra* note 4, ¶ 12.

⁵⁴ Panel was comprised of Claus-Dieter Ehlermann (Presiding Member), James Bacchus, and Julio Lacarte-Muró. See *id.* ¶ 363.

⁵⁵ The additional claims brought by the European Union were that § 211 violated the Paris Convention and TRIPS Agreement requirements for the registration of trademarks, enforcement of trademarks, exclusive use of trademarks, and protection afforded to trade names; that § 211 violated article 6 *quinquies* (A)(1) of the Paris Convention, and articles 1.2, 15.1, 16.1, and 42 of the TRIPS Agreement.

⁵⁶ See TRIPS Agreement, *supra* note 10, at art. 3.1; see also Paris Convention, *supra* note 47, at art. 2(1).

⁵⁷ Appellate decision, *supra* note 4, ¶ 241.

⁵⁸ TRIPS Agreement, *supra* note 10, at art. 3.1.

⁵⁹ *Id.* at n. 3.

2(1) of the Paris Convention states that “[n]ationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all countries of the Union the advantages that their respective laws now grant”⁶⁰

These provisions require the United States to provide citizens of other member countries the same access to registration and protection of intellectual property rights that is afforded U.S. citizens. The European Community claimed that the United States failed to provide such national treatment to either original owners or bona fide successors in interest of confiscated trademarks.⁶¹ First, the European Community claimed that § 211 discriminates against Cubans who are original owners of U.S. trademarks that are the same as or substantially similar to confiscated Cuban trademarks.⁶² The European Community claimed that § 211 was discriminatory because it forced Cuban nationals to undergo a § 211(a)(2) hearing before granting them access to U.S. courts to enforce their trademark rights, while U.S. nationals were not required to undergo this hearing.⁶³

To illustrate its point, the European Community presented a hypothetical situation in which two original owners of U.S. trademarks that are the same as confiscated Cuban trademarks seek to enforce their U.S. trademarks.⁶⁴ One of the parties is a U.S. national, the other is Cuban; this is the only difference between them.⁶⁵ In this situation, the Cuban national would be required to undergo a § 211(a)(2) hearing while the U.S. national would not.⁶⁶ Therefore, the European Community claimed that this represents less favorable treatment for foreign nationals.⁶⁷

The United States argued that the apparent discrimination in § 211 did not exist in reality. First, the United States claimed that the Cuban entity in the hypothetical would always be permitted to enforce its trademark rights because “original owners are always in a position to consent expressly to their own assertion of rights.”⁶⁸ This argument assumes, however, that the original owner of the U.S. trademark is also the original owner of the confiscated Cuban trademark; this is not always the case.⁶⁹

⁶⁰ Paris Convention, *supra* note 47, at art. 2(1).

⁶¹ See generally Appellate decision, *supra* note 4, ¶¶ 233-296.

⁶² *Id.* ¶ 275.

⁶³ See *id.*

⁶⁴ *Id.* ¶¶ 275-77.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* ¶ 275.

⁶⁸ *Id.* ¶ 282.

⁶⁹ *Id.* The United States made additional arguments in rebuttal which were rejected by the Appellate Body. See *id.* ¶¶ 283-195.

The United States also argued that this hypothetical situation would never occur because the Cuban entity would have registered its trademark before the restrictions included in § 211(a)(2) were put in place.⁷⁰ This argument also failed, however, because it would only be true for statutory registration rights.⁷¹ Section 211(a)(2) applies not only to these rights, but also to common law rights, which the Cuban entity could have claimed after the regulation was in effect.⁷²

Finally, the United States claimed the Cuban entity in the hypothetical could be considered an “unblocked” entity under certain provisions of the Cuban embargo, meaning that it would be treated the same as a U.S. entity and that § 211(a)(2) would not apply.⁷³ The AB stated that in order to “fulfill the national treatment obligation, less favorable treatment must be offset, and thereby eliminated, in every individual situation that exists under a measure.”⁷⁴ Because the AB found that in certain instances a Cuban national would not qualify for “unblocked” status, it rejected this argument.⁷⁵

Therefore, the AB held that the United States violated the national treatment provisions of the TRIPS Agreement and the Paris Convention by providing less favorable treatment to Cubans who are the original owners of U.S. trademarks that are the same or substantially similar to confiscated Cuban trademarks.⁷⁶

In its second claim regarding national treatment, the European Community claimed that the United States violated the national treatment requirements of the treaties as they pertained to non-U.S. successors-in-interest to trademarks that are the same as or substantially similar to confiscated Cuban trademarks.⁷⁷

The European Community claimed that § 211 is discriminatory because it forces “designated nationals,” which includes Cubans and any “national of any foreign country who is a successor in interest to a designated national,”⁷⁸ to meet the requirements of § 211 in addition to successfully completing an OFAC hearing.⁷⁹ U.S. nationals, in contrast, are not required to meet the requirements of § 211, but are only required to

⁷⁰ *Id.* ¶ 283.

⁷¹ *Id.* ¶ 284.

⁷² *Id.* ¶ 283.

⁷³ *Id.* ¶ 286.

⁷⁴ *Id.*

⁷⁵ *Id.* ¶¶ 289-90.

⁷⁶ *See id.* ¶ 290.

⁷⁷ *Id.* ¶ 246.

⁷⁸ § 211, *supra* note 3, § 211(d)(1).

⁷⁹ *Id.* ¶ 246.

undergo an OFAC hearing.⁸⁰ The European Community claimed that meeting the requirements of § 211 amounted to an “extra hurdle” for foreign nationals that were not required of U.S. nationals.⁸¹

The United States attempted to rebut this argument by claiming that this apparent inequality would never exist in reality. This, the United States claimed, was because under other provisions of the Cuban embargo,⁸² a U.S. citizen would never become a successor-in-interest to a trademark that was the same as or substantially similar to a trademark confiscated by the Cuban government.⁸³ Therefore, the fact that U.S. citizens were not included in the requirements of § 211(a)(2) would not matter since they could never be in the situation where § 211(a)(2) would apply.⁸⁴

Furthermore, the United States argued that under its “longstanding doctrine of non-recognition of foreign confiscations,” no U.S. court would recognize claims brought on a confiscated trademark.⁸⁵ Therefore, the United States argued this doctrine would serve the same purpose and have the same effect as § 211, and applied to U.S. nationals as well as foreign nationals.⁸⁶

Nonetheless, the AB held that these arguments were insufficient to solve the discriminatory nature of the provision. The AB held that since non-U.S. successors-in-interest would still be forced to surpass an “extra hurdle” that was not required of U.S. nationals, the provision provided less favorable treatment.⁸⁷ Therefore, the AB held that § 211 violated the national treatment provisions of the TRIPS Agreement and the Paris Convention.⁸⁸

B. Most Favored Nation Treatment

In addition to requiring member states to provide national treatment, the TRIPS Agreement also compels member states to provide most favored nation treatment. This means that any benefits a member country bestows

⁸⁰ *Id.*

⁸¹ *Id.* ¶ 256.

⁸² *See id.* ¶ 249.

⁸³ *See id.*

⁸⁴ *See id.* The United States also claimed that it did not matter that U.S. citizens were excluded from § 211 requirements because no U.S. court would enforce a U.S. national’s assertion of claims to a confiscated trademark because of the U.S. doctrine of non-recognition of foreign confiscations. The AB held that this doctrine would apply to all parties, U.S. or foreign, and that this failed to remove the “extra hurdle” placed on foreign nationals. *See id.* ¶¶ 266-67.

⁸⁵ *Id.* ¶ 266.

⁸⁶ *Id.*

⁸⁷ *Id.* ¶¶ 265, 268.

⁸⁸ *Id.*

upon its own nationals it must also afford to nationals of other member countries. Article 4 of the TRIPS Agreement states that “[w]ith regard to the protection of intellectual property, any advantage, favor, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”⁸⁹

The debate regarding § 211’s possible violation of the TRIPS Agreement’s most-favored-nation treatment provisions paralleled that of the national treatment dispute.⁹⁰ The European Community claimed that § 211 violated the TRIPS Agreement by favoring U.S. successors-in-interest to trademarks the same or substantially similar to confiscated trademarks by exempting them from the additional requirements imposed on Cuban and other foreign successors-in-interest.

The United States’ rebuttal arguments mirrored those made in its discussion of the national treatment provisions. The United States claimed that 1) Cuban national original owners of confiscated Cuban trademarks could consent to use of the U.S. trademark; 2) that the statute was not in effect when Cuban nationals registered their trademarks;⁹¹ that 3) Cuban nationals could be “unblocked” and treated as U.S. nationals;⁹² and 4) that U.S. citizens were not eligible to be in the situation where the additional requirements would apply.⁹³

The AB also followed the same reasoning that it had with regard to national treatment and determined that § 211 violated the most favored nation treatment provision of the TRIPS Agreement.⁹⁴

III. IMPLICATIONS

As a result of its finding that § 211 violated the national treatment and most favored nation obligations of the United States under the TRIPS Agreement, the AB “recommend[ed] that the DSB request the United States to bring its measure . . . into conformity with its obligations”⁹⁵ under the TRIPS Agreement.

⁸⁹ TRIPS Agreement, *supra* note 10, at art. 4.

⁹⁰ With the exception of the fact that the provision was only disputed with regard to Cuban confiscations and only to the level of successors-in-interest. *See* Appellate decision, *supra* note 4, ¶¶ 303-04.

⁹¹ *Id.* ¶ 311.

⁹² *Id.* ¶ 311.

⁹³ *Id.* ¶ 310.

⁹⁴ *Id.*

⁹⁵ *See id.* ¶ 361. For further commentary on the effects of § 211 and the AB decision on international intellectual property rights and the Cuban embargo, *see* Robert Dufresne, *Assessing Clashes and Interplays of Regimes from a Distributive Perspective: IP Rights Under the Strengthening Embargo against Cuba and the Agreement on TRIPS*, 24 MICH. J. INT’L L. 767 (2003).

Under the rules of the DSB, the United States was granted an initial period in which to comply with the ruling; on March 28, 2002, the parties agreed that the United States would comply by January 3, 2003.⁹⁶ Since that time, the United States has negotiated with the European Commission for an extension until December 31, 2004.⁹⁷

A. Treaty Compliance

In order to comply with the national treatment and most favored nation status provisions of the TRIPS Agreement, the United States must remove the discriminatory provisions of § 211. The United States could do so by altering the provision so that all original owners or successors-in-interest to trademarks that are the same as or substantially similar to confiscated Cuban trademarks are required to undergo a § 211 hearing to determine the consent of the original owner of the Cuban trademark.⁹⁸ The AB noted that its finding did not comment on the right of a member state to refuse to recognize foreign confiscation of private property without just compensation;⁹⁹ it was only the discriminatory nature in which the United States completed this objective that the AB found to violate the TRIPS Agreement.¹⁰⁰

The advantage to preserving § 211 by extending its requirements is that the United States would be able to continue to prevent the Cuban government from profiting from confiscated trademarks. The disadvantage, however, is that this would increase the administrative costs of registering, renewing, and enforcing trademarks by forcing all parties wishing to complete such a transaction for a trademark that is the same as or substantially similar to a confiscated Cuban trademark to undergo an additional hearing.

The United States could also comply with the AB ruling by repealing § 211. A number of parties have supported this option, including the Congressional Working Group, a bipartisan group comprised of 40

⁹⁶ Mark P. Sullivan and Maureen Taft-Morales, *Congressional Research Service — Cuba: Issues for Congress*, at CRS-17 (2003).

⁹⁷ United States - Section 211 Omnibus Appropriations Act of 1998 - Modification of the Agreement under Article 21.3(b) of the DSU, Dec. 24, 2003, WT/DS176/14, available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members4_e.htm (last visited Mar. 3, 2004).

⁹⁸ This paper assumes that if the United States were to alter § 211, it would do so in order to fully comply with the mandate of the AB. It is worth noting, however, that there have been other instances in which the United States has been accused of “less than full compliance.” See Okediji, *supra* note 42, at 605-06.

⁹⁹ Appellate decision, *supra* note 4, ¶ 362 (“The validity of the expropriation of intellectual or any other property rights without compensation by a WTO member is not before us.”).

¹⁰⁰ *Id.* ¶ 363.

members of the U.S. House of Representatives.¹⁰¹ The Congressional Working Group characterized § 211 as an “improper intervention in a private trademark matter in favor of a foreign interest.”¹⁰²

In addition, USA*Engage, a “coalition of over 650 United States businesses engaged in trade and investment abroad,” supports the repeal of § 211.¹⁰³ The organization favors the repeal of § 211 over its alteration in order to achieve treaty compliance because of potential “retaliation by foreign countries” which would remove the protections of U.S. trademarks abroad found in “bilateral and multilateral agreements outside of TRIPS.”¹⁰⁴

B. Non-Compliance

If the United States refuses to comply with the AB’s decision, it may result in the assignment of compensation and the suspension of concessions by other member states.¹⁰⁵ The WTO considers these to be temporary measures and less desirable than full compliance,¹⁰⁶ yet as long as a country remains non-compliant, such measures may be imposed.¹⁰⁷

In order to suspend concessions, the prevailing party in the dispute must request authorization from the DSU to suspend concessions or other treaty obligations.¹⁰⁸ The concessions suspended should relate to the same sectors in which the DSB or AB found a “violation or other nullification or impairment.”¹⁰⁹ There should also be proportionality between the “nullification or other impairment” and the concessions requested.¹¹⁰

The DSU is required to adopt the requested concessions unless there is a consensus agreement within the DSB to deny the request.¹¹¹ This presumption of adoption prevents parties from being able to block the implementation of concessions.¹¹²

In addition to retaliatory measures under TRIPS, countries may retaliate on the basis of the Vienna Convention on the Law of Treaties.¹¹³

¹⁰¹ Congressional Working Group, *A Review of U.S. Policy Toward Cuba*, May 15, 2002. There have also been repeated, though unsuccessful, attempts in Congress to repeal § 211.

¹⁰² *Id.* at Part V.

¹⁰³ USA*Engage, *Letter to Chairman Max Baucus*, (July 18, 2002) (on file with author).

¹⁰⁴ *Id.*

¹⁰⁵ See Okediji, *supra* note 42, at 623.

¹⁰⁶ See *id.*

¹⁰⁷ World Trade Org., *THE WTO DISPUTE SETTLEMENT PROCEDURES: A COLLECTION OF THE RELEVANT LEGAL TEXTS* (Cambridge University Press, 2d. ed. 2001).

¹⁰⁸ Jose Felgueroso, *TRIPS and the Dispute Settlement Understanding: The First Six Years*, 30 *AIPLA Q. J.* 165, 178 (2002).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 180.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Adams, *supra* note 17, at 239.

This is exactly what Cuban President Fidel Castro has threatened.¹¹⁴ Castro argues that, under the Vienna Convention, he is permitted to retaliate against U.S. non-recognition of Cuban trademarks by refusing to recognize U.S. trademarks.¹¹⁵ He has stated:

[The United States] should not complain if we start using any North American brand to produce and commercialize products. We are not going to remain, of course, with our arms crossed . . . Maybe there are some who say, Caramba! Let's taste Cuban Coca-Cola. Or brand-name perfumes, or other goods sold in duty-free shops.¹¹⁶

The Congressional Working Group fears exactly this response. The Group states that § 211 “frees Cuba of its legal obligation to honor the more than 5,000 U.S.-owned trademarks registered in Cuba. Section 211 places American product trademarks at risk, violates our international obligations, and undermines U.S. credibility in defending intellectual property rights.”¹¹⁷

C. Effects Immediately within Cuba

Allowing Cuba to stop recognizing U.S. trademarks could have negative repercussions for American business as well as for consumers in Cuba and possibly elsewhere. First, American companies doing business in Cuba could be economically harmed by the inability to enforce their exclusive rights to trademarked materials. Companies using well-known brand names such as “Coca-Cola®, Aunt Jemima®, Huggies®, Weight Watchers®, Kool-Aid®, Reebok®, Nike®, and United Airlines®” all operate in Cuba and rely upon trademarked materials.¹¹⁸ If Cuba fails to recognize these trademarks, counterfeit products could be manufactured and marketed in Cuba free from litigation.¹¹⁹

In addition, the removal of trademark protections could result in harm to consumers.¹²⁰ Counterfeit products of sub-standard quality, including

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ Juan O. Tomayo, *Fidel threat: We'll make our own Coke; Cubans angry at Bacardi's use of 'Havana Club,'* MIAMI HERALD, May 11, 1999, at 1C (quoting Cuban President Fidel Castro).

¹¹⁷ Congressional Working Group, *supra* note 101.

¹¹⁸ Adams, *supra* note 17, at 240-41; see also Anthony Boadle, *Cuba, Denied Rum Brand, Could Make "Coke"*, REUTERS, June 7, 2001 (“Moving either to protect their brand names or position themselves for the day when the embargo is lifted, an increasing number of American firms are registering trademarks in Cuba.”) (quoted by Global Exchange, at <http://www.globalexchange.org/campaigns/cuba/US-Cuba/reuters060701.html>).

¹¹⁹ Adams, *supra* note 17, at 241.

¹²⁰ *Id.* at 239-40.

“drugs . . . alcohol, construction materials, and components for cars, airplanes, and even space shuttles,” could pose substantial risks to consumers.¹²¹

Finally, freeing Cuban companies to take advantage of U.S. trademarked materials could provide an economic benefit to the Cuban government.¹²² This would not only be contrary to the goals of the Cuban embargo with regard to economic isolation of Cuba, but would also be a political victory for Castro, contrary to the embargo’s goal of destabilizing his totalitarian regime.¹²³

D. Future Effects in Cuba

In addition to these immediate effects, allowing a trademark standoff with Cuba to proceed into a war of retaliation could be detrimental to American interests in the future of Cuba. Although the international community has agreed with the United States on the need for a democratic government in Cuba and has condemned the human rights violations of the current regime, many countries continue to develop trade relations with Cuba.¹²⁴

These countries have adopted a policy of engagement instead of isolation in dealing with Cuba.¹²⁵ The United States “remains the only developed country that prohibits its corporations from investing in Cuba.”¹²⁶ The fact that foreign investors are already establishing themselves in Cuba, combined with the refusal to respect American trademarks could make it difficult for American corporations to invest in a post-embargo Cuba.¹²⁷

¹²¹ *Id.* at 240.

¹²² *Id.* at 242-43.

¹²³ For information regarding the goals of the Cuban embargo, see *supra* note 39. Of course, allowing Cuba to ignore U.S. trademarks would also be antithetical to the purpose of § 211, which created this situation in the first place.

¹²⁴ Kathleen S. Adams, *Subchapter III of the Helms-Burton Act: A Reasonable Assertion of United States Extraterritorial Jurisdiction?*, 21 *HAMLIN L. REV.* 147, 148 (1997); see also Bernadette Atuahene, *The Effectiveness of International Legislative Responses to the Helms-Burton Act*, 69 *REV. JUR. U.P.R.* 809, 829 (2000). Canada, for example, is Cuba’s largest trading and investment partner.

¹²⁵ John J. Coughlin, *Cuban Foreign Investment Act: Opportunities for United States Corporations in a Post-Embargo Era*, 23 *SUFFOLK TRANSNAT’L L. REV.* 299, 303 (1999); see *id.* at 299 (Cuba opened to such foreign investment with the passage of the Cuban Foreign Investment Act in 1995); see generally Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 *YALE HUM. RTS. & DEV. L. J.* (2002) for a discussion on the ethical and policy implications of U.S. policy instead of engagement.

¹²⁶ Coughlin, *supra* note 125, at 299.

¹²⁷ There are other obstacles which will have to be considered as American companies begin investing in Cuba, including developing a system for restitution for past confiscations. See, e.g., Ortiz, *supra* note 15; see also Bradley T. Gilmore, *U.S.-Cuba Compensation*

E. International Effects

These future interests in Cuba implicate other countries as well. If a Cuban company with foreign interests is using a confiscated trademark, § 211 would reduce its ability to expand to the United States if the embargo is lifted. This insecurity regarding confiscated materials is compounded by another U.S. regulation which allows U.S. entities to bring claims against foreign companies that are trafficking in confiscated U.S. property. This provision, the Cuban Liberty and Democratic Solidarity (“LIBERTAD”) Act of 1996 is commonly known as the Helms-Burton Act.¹²⁸

The Helms-Burton Act fights the use of confiscated property in three ways. First, it provides a private right of action to U.S. nationals against foreign entities that are profiting from the use of confiscated property.¹²⁹ Second, it allows the U.S. to exclude from any U.S. territory any “corporate officers, directors, or controlling shareholders, including their spouses and minor children, of companies which derive any economic benefit from the use of confiscated Cuban property.”¹³⁰ Finally, the Act imposes civil and criminal liability against lending institutions that loan capital to entities benefiting from confiscated property.¹³¹

The international response to the Helms-Burton act has been “virtually unanimous” and anything but positive.¹³² Opposition to the Act has taken three forms. First, many countries have requested that the United States repeal the measure.¹³³ The United Nations General Assembly, for example, has passed multiple resolutions objecting to the Act.¹³⁴ In addition, a declaration has also been signed by leaders from 48 nations denouncing the Act.¹³⁵ Second, many countries have passed blocking or counter legislation which prevents the U.S. law from being effective in other countries.¹³⁶

Policy, 8 TEX. HISP. J. L. & POL’Y 79, (2002).

¹²⁸ 22 U.S.C. §§ 6021-91 (2002) [hereinafter Helms-Burton Act]; see also S. Kern Alexander, *Trafficking in Confiscated and Cuban Property: Lender Liability under the Helms-Burton Act and Customary International Law*, 16 DICK. J. INT’L L. 523, 525-26 (1998). Although proposed prior to the incident, the Helms-Burton Act was passed in its current stringent form after two civilian planes were shot down by Cuban fighter jets in the Florida straits.

¹²⁹ Alexander, *supra* note 128, at 523.

¹³⁰ *Id.* at 523-34.

¹³¹ *Id.* at 524.

¹³² Jorge F. Perez-Lopez and Matias F. Travieso-Diaz, *The Helms-Burton Law and its Antidotes: A Classic Standoff?*, 7 SW. J. L. & TRADE AM. 95 (2000) [hereinafter Antidotes].

¹³³ See Atuahene, *supra* note 124, at 852.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*, see also Perez-Lopez and Travieso-Diaz, *supra* note 132, at 96 (“Countermeasures have been put in place by Canada (October 1996), Mexico (October 1996), the European Union (November 1996), and Argentina (September 1997). Cuba also enacted antidote legislation in December 1996 and February 1999.”).

Finally, the validity of the Act has been challenged by the European Union in the WTO as violating customary international law and treaty obligations.¹³⁷ The E.U. agreed to drop this claim in the WTO in response to negotiations with the United States over the issue. However, the issue remains unresolved and the E.U. has warned that it “retain[s] the option of using formal dispute settlement procedures against the United States in ... light of its continued recourse to barriers on trade and inward investment.”¹³⁸

Another international effect of U.S. non-compliance is the detriment it will have on efforts to harmonize intellectual property protections worldwide.¹³⁹ The United States has traditionally been a “staunch supporter” of harmonizing intellectual property protections,¹⁴⁰ especially in light of the volume of globalized marketing and trading that affects the U.S. economy.¹⁴¹ Through harmonization of the processes and protections of intellectual property, businesses can more easily engage in such transnational transactions.

Refusal to comply with its obligations under the TRIPS Agreement would represent a break in U.S. policy of working toward harmonization; the resulting retaliation could discard the progress achieved through the TRIPS Agreement.

Finally, the U.S.’s willingness to renege on its obligations under the TRIPS Agreement sends a mixed message to developing countries which often have little incentive to apply the protections to intellectual property mandated by developed countries.¹⁴² If the rules of the agreement are not followed by one of its strongest supporters, less enthusiastic countries may decide that they are not bound by the agreement either.

IV. RECOMMENDATIONS

The AB decision that § 211 violates the TRIPS Agreement presents a difficult challenge to the United States. Not only will the U.S. response trigger domestic disputes over the future of the Cuban embargo and the responsibility of the United States to adhere to its treaty obligations, but

¹³⁷ John W. Boscariol, *An Anatomy of a Cuban Pyjama Crisis: Reconsidering Blocking Legislation in Response to Extraterritorial Trade Measures of the United States*, 30 L. & POL’Y INT’L BUS. 439, 486 (1999); see Atuahene, *supra* note 124, at 810. There may also be a claim that the Helms-Burton Act violates NAFTA.

¹³⁸ *EU Criticizes Continued US Barriers to Trade and FDI Inflows*, MARKET NEWS INT’L, Nov. 20, 2002, available at 2002 WL 103469148 (citing European Commission annual report).

¹³⁹ See Macaw, *supra* note 16, at 322.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 322-23. The United States loses “billions of dollars a year in exports because of the inadequate protection of intellectual property rights in foreign countries.” *Id.* at 323.

¹⁴² *Id.* at 323-34.

may also implicate far-reaching international disputes.

First, with regard to the domestic response to the AB's ruling, it is important to note the current controversy over the Cuban embargo. Increasingly, there are calls for lifting the embargo.¹⁴³ The Cuban embargo has failed to remove Castro from power and has exacerbated the suffering within Cuba.¹⁴⁴ In addition, it has denied U.S. businesses the ability to invest in what could be a close and growing market.

Meanwhile, there remain the "feverishly anti-Castro Cuban-American voters in Florida . . . [who] won't tolerate even a semblance of trade normalization with Cuba."¹⁴⁵ This powerful lobby group¹⁴⁶ may present an obstacle to those who would support the repeal of § 211. On the other hand, many American business interests support the repeal of § 211 in order to prevent Cuban retaliation and the non-recognition of American trademarks. Furthermore, the response of the international community to § 211 and the Helms-Burton Act show that the United States' isolationist approach to Cuba may have larger implications for American businesses abroad.

Certainly, the potential for future U.S. investment in Cuba is threatened by acts such as § 211 and the Helms-Burton Act. Additionally, however, the United States may find itself facing current opposition from other countries in other trade areas in response to the U.S.'s actions regarding Cuba. It is these larger implications that show the true extent of damages resulting from non-compliance with the AB decision. If the United States refuses to comply with its obligations under the TRIPS Agreement, the consequences that it faces could extend beyond simply Cuba.

For these reasons, the United States should comply with the TRIPS Agreement by repealing § 211. Although the United States might be able to

¹⁴³ See USA*Engage, *supra* note 103.

¹⁴⁴ See Havana Club I, *supra* note 2, at 510; see also Arthur Schlesinger, Jr., *Letter to the Editor*, N.Y. TIMES, Feb. 21, 1997, at A22 (quoted in Havana Club I, *supra* note 2, at 502). Arthur Schlesinger, Jr., former special advisor to President Kennedy has stated:

As one involved in the Kennedy Administration's Cuban policy, may I note that the United States embargo was laid down at a time when Cuba was a Soviet base and when it was organizing attempts to overthrow other Latin American governments. Neither condition obtains today. . . . A better policy [than preserving the embargo] would be to repeal Helms-Burton, lift the embargo and drown the regime in American tourists, investments, and consumer goods.

¹⁴⁵ *Rum, Macaroni, and Bad Politics*, *supra* note 1.

¹⁴⁶ One commentator stated that the political organization, the Cuban American National Foundation, is "something to behold . . . so powerful that when in full effect it can paralyze Congress and even influence national trade policies." Rolando J. Santiago, *Y2K, The Millennium for a Revised U.S.-Cuba Trade Policy: Grounds for Removing the Embargo*, 6 NAFTA: L. & BUS. REV. AM. 169, 176 (2000).

comply with the TRIPS Agreement and the AB mandate by altering § 211 to extend to U.S. nationals as well as Cuban and other foreign nationals, there is still a risk that the United States would face repercussions of its actions in other arenas.¹⁴⁷

Therefore, the United States should repeal § 211 in order to fully comply with its obligations under the TRIPS Agreement and under the WTO Dispute Settlement system.

¹⁴⁷ See USA*Engage, *supra* note 103 (“[W]hile universal application of 201 might satisfy TRIPS compliance standards, this “solution” endangers countless U.S. trademarks around the world that are preserved by bilateral and multilateral agreements outside TRIPS, resulting in costly and unnecessary litigation and retaliation by foreign countries.”).