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TURNING TRIPS ON ITS HEAD: AN “IP CROSS RETALIATION” MODEL

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ABSTRACT

The recent World Trade Organization (WTO) mini ministerial negotiations came a cropper: despite intense negotiations over several weeks, India and the United States could not agree on the extent of tariffs to protect poor farmers against import surges. In the wake of this failure, a number of member states are expected to resort to the WTO dispute settlement mechanism to extract concessions out of scofflaw states. Brazil is one such country that had won a case against the US on illegal cotton subsidies several years ago. However, despite WTO Panel and Appellate Body rulings in Brazil’s favour, the US refused to comply and dangled hopes of further concessions at future WTO talks. Now that the latest round of talks has failed, Brazil is seriously considering “retaliating” against the US in order to secure its compliance.

What is unique about Brazil’s strategy is that it wishes to “cross retaliate” by suspending the intellectual property rights (IPR) of US corporations. Contrast this with “traditional” retaliation that has been thus far followed by member states, under which Brazil would impose tariffs on US goods that are imported into Brazil.

The desire to cross retaliate is easy to understand. Given the highly disparate value of trade between Brazil and the US, and the lower value that the US places on its exports to Brazil, traditional retaliation would not provide a serious enough disincentive to force the US to comply. Besides, given the higher relative value that Brazil places on US goods, such a retaliation may be tantamount to Brazil shooting itself in the foot. Contrast this with an IP suspension strategy, which has a better potential of inducing compliance by defaulting developed countries, since strong IP lobbies in such countries are likely to pressurize their governments into a compliance or settlement.

Although cross retaliation authorizations have been granted in two cases, they have never been implemented in practice. Consequently, there is considerable uncertainty in terms of the kind of IP suspension model that might induce compliance, as also ensure that the value of loss from the suspension of IP is amenable to relatively objective. This uncertainty is likely to be exploited by defaulting developed countries that are pitted against economically

1 Ministry of HRD Professor in Intellectual Property Law, NUJS, Kolkata, India. The author expresses his sincere gratitude to Swaraj Barooah (Nalsar University) for excellent research assistance. He also thanks Ken Shadlen, LSE (for having planted the seed for this paper in the course of a meeting), Steve Charnowitz (GW law school), Petros Mavroidis (Columbia law school), Henrik Horn (Columbia law school), Henning Grose Khan (Max Planck Institute), Bhaven Sampat (Columbia), Thomas Sebastian (ACWL, Geneva), Edson Beas Rodriguez, Bryan Mercurio (Hong Kong University), Srividya Ragavan (Oklahoma law school), Samir Gandhi, RV Anuradha, Aysha Khanna and Nneka Morrison for their inputs and comments at various stages of writing this paper.
weaker developing countries. Unfortunately, there is no scholarly article or other policy paper that recommends any concrete IP suspension model.

This paper seeks to fill the void by proposing a “Tiered IP suspension model”, where certain kinds of IP are targeted first for suspension before others, depending on the ease of objectively ascertaining the value of IP and thereby the harm caused by the unauthorized use of such IP and/or the potential to induce compliance by the defaulting state. Illustratively, copyrights over sound recordings that have established rates for public performance are targeted first. If working with this tier of IP subject matter does not yield desired results, then the complaining state moves on to other IP where it is relatively more difficult to compute the loss caused to the IP owner (such as pharmaceutical patents) but which may be a more powerful tool to induce compliance. To this extent, this paper offers a very concrete “development” oriented international trade law remedy.

This paper will also demonstrate that cross-retaliation also fits conceptually better within the world trading system and what it stands for. To this extent, it needs to be positioned as the primary retaliatory mechanism for developing countries and not just a secondary resort. Since developing countries constitute the majority at the WTO, such a paradigmatic shift will go a long way towards preserving the “fairness” and legitimacy of the WTO.
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I INTRODUCTION

The recent World Trade Organization (WTO) mini ministerial negotiations came a cropper: despite intense negotiations over several weeks, India and the United States could not agree on the extent of tariffs to protect poor farmers against import surges. In the wake of this failure, a number of member states are expected to resort to the WTO dispute settlement mechanism to extract concessions out of scofflaw states. Brazil is one such country that had won a case against the US on illegal cotton subsidies several years ago. However, despite WTO Panel and Appellate Body rulings in Brazil’s favour, the US refused to comply and dangled hopes of further concessions at future WTO talks. Now that the latest round of talks has failed, Brazil is seriously considering “retaliating” against the US in order to secure its compliance.

What is unique about Brazil’s strategy is that it wishes to “cross retaliate” by suspending the intellectual property rights (IPR) of US corporations. Contrast this with “traditional” retaliation that has been thus far followed by member states, under which Brazil would impose tariffs on US goods that are imported into Brazil. The WTO framework contains a number of agreements, and one such agreement, TRIPS (Trade Related Intellectual Property Rights) obliges member states to guarantee a minimum level of intellectual property rights protection. Since Brazil’s proposed retaliation is not under the same agreement which is the subject matter of the dispute (i.e. agreement on subsidies), it is popularly referred to as “cross-retaliation”.

The desire to cross retaliate is easy to understand. Given the highly disparate value of trade between Brazil and the US, and the lower value that the US places on its exports to Brazil, traditional retaliation would not provide a serious enough disincentive to force the US to comply. Besides, given the higher relative value that Brazil places on US goods, such a retaliation may be tantamount to Brazil shooting itself in the foot. The story is the same for a number of developing countries, who find traditional retaliation more a bane than a boon. The Byrd Amendment case is an excellent example. In this case, a group of 11 WTO members jointly filed an action against a US legislation that allegedly contravened the Agreements on Subsidies and Antidumping. While eight of these counties sought and were granted the right to retaliate, most countries that exercised this right by imposing tariffs were developed countries, that is, members of the European Union, Canada and Japan.

Developing countries, with the exception of Mexico, but including India, Brazil and Chile, shied away from exercising their right to retaliate. One can hazard a guess that a part of the reason must have been a lack of confidence in the enforcement machinery, in other words, an awareness of the inefficacy of traditional retaliatory techniques.

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Cross retaliation is advantageous for developing countries on two counts. Firstly, when compared with traditional retaliation (by raising tariffs), it has a better potential of inducing compliance by the defaulting state, since powerful IP lobbies in developed countries such as the US and EU are likely to pressurize their home governments into complying or settling the dispute. Secondly, a number of developing countries see the imposition of minimum standards in intellectual property (hereafter “IP”) through TRIPS as harmful to their national interest and are likely to welcome the opportunity to suspend them, particularly in relation to foreign entities.

Cross retaliation is “legal” under the existing WTO framework, but is often treated as secondary to traditional retaliation. In other words, a complaining member has to first retaliate in relation to the same agreement which is the subject matter of dispute. If this is not likely to secure compliance, it can then retaliate vis-à-vis other WTO Agreements, which have nothing to do with the dispute at hand. This hierarchy, wherein cross-retaliation is conferred a secondary status is mandated by the express wording of the Dispute Settlement Understanding (DSU). It is not granted automatically, but has to be pleaded for in every separate case; it is more the exception than the norm.

Although the Dispute Settlement Body (DSB) sanctioned cross retaliation by suspending TRIPS obligations in two cases (the Ecuador-Bananas Case and the Antigua gambling case), the countries concerned never implemented the authorisation. Consequently, there is considerable uncertainty in terms of the kind of IP suspension model that might induce compliance, as also ensure that the value of loss from the suspension of IP is amenable to relatively objective.

This uncertainty is likely to be exploited by defaulting developed countries that are pitted against economically weaker developing countries. Unfortunately, there is no scholarly article or other policy paper that recommends any concrete IP suspension model.

This paper seeks to fill the void by proposing a “Tiered IP suspension model”, where certain kinds of IP are targeted first for suspension before others, depending on the ease of objectively ascertaining the value of IP and thereby the harm caused by the unauthorized use of such IP and/or the potential to induce compliance by the defaulting state. Illustratively, copyrights over sound recordings that have established rates for public performance are targeted first. If working with this tier of IP subject matter does not yield desired results,

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6 See Art 22.3. The dispute settlement mechanism of the WTO is governed by an agreement known as the Dispute Settlement Understanding (“DSU”). The DSU is an agreement that was authored by WTO members, and includes the procedures for bringing a dispute before the Dispute Settlement Body (“DSB”), as well as the remedies that are available to the prevailing member. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].


then the complaining state moves on to other IP where it is relatively more difficult to compute the loss caused to the IP owner (such as pharmaceutical patents) but which may be a more powerful tool to induce compliance.

This paper will also demonstrate that cross-retaliation also fits conceptually better within the world trading system and what it stands for. To this extent, it needs to be positioned as the primary retaliatory mechanism for developing countries and not just a secondary resort. Since developing countries constitute the majority at the WTO, such a paradigmatic shift will go a long way towards preserving the “fairness” and legitimacy of the WTO.

Before moving on to substantive discussions in the sections that follow, two aspects deserve mention. Firstly, one needs to first be clear on what the term “developing country” means. Members of the WTO are grouped into the categories of developed countries, developing countries, and least developed countries (“LDC”). The WTO does not use any objective criteria to categorise countries as “developing”. Rather members may select themselves as developing countries. To date, all WTO member states with the exception of the United States, the European Union, Canada, Japan, and New Zealand, have at one time or another classified themselves as developing countries for the purposes of the WTO. As for LDC’s, a fairly objective classification is made by the UN based on per capita income.

Secondly, although this paper specifically names the US, EU, Antigua, Brazil and India in its various examples, one could, as easily, substitute the name of any other WTO member. In other words, the models/strategies enunciated in this paper could apply to any WTO member state, though they are more likely to be used by developing country members against developed country members that erect WTO inconsistent market barriers.

II RETALIATION: AN INTRODUCTION

In order to appreciate the concept of “cross-retaliation”, one has to have some sense of the WTO dispute settlement mechanism and an understanding of what traditional “retaliation” entails.

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9 With the addition of Cape Verde on Jul. 08, 2008, the WTO currently has 153 member countries. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Aug. 08, 2008).
10 About two thirds of the WTO’s 153 members are developing countries. See http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm. See also, WTO, Who are the Developing Countries in the WTO, available at http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm. (last visited Aug. 08, 2008).
12 LDC’s are those countries that have a per capita income of less than $900, weak human assets, and high economic vulnerability. See UNCTAD, “UN recognition of the Least Developed Countries, http://www.unctad.org/Templates/Page.asp?intItemID=3618&lang=1 (last visited Aug. 08, 2008). There are currently 50 least-developed countries on the UN list, and 32 of them are WTO members. For a list of all LDC’s, see UNCTAD, UN List of LDC available at http://www.unctad.org/Templates/Page.asp?intItemID=3641&lang=1 (last visited Aug. 08, 2008). For a list of LDCs that are WTO members, see WTO: Least Developed Countries available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Aug. 08, 2008).
13 This is regarded by many observers as the ‘crown jewel’ of the multilateral trade system. See Susan Esserman and Robert Howse, The WTO on Trial, Foreign Affairs, Vol. 82, Num. 1, 2003: 131.
As a first step, a complaining member state (hereafter “complaining state”) secures a judgment from a WTO panel or the Appellate Body that the other party (hereafter “defaulting state”) is maintaining measures inconsistent with a WTO obligation. This panel or Appellate Body report is then adopted by the Dispute Settlement Body (DSB).14

Thereafter, the defaulting state gets a “reasonable period of time” for implementation.15 After expiry of that period, the complaining country may request authorization to suspend concessions or other obligations at a specified level. This suspension is what is commonly referred to as “retaliation”. It is to be noted however, that prior to seeking such authorization, there is provision for “compensation”, a remedy that comes with substantial bottlenecks including the fact that:

i) Compensation is voluntary and the defaulting state has to agree to such compensation.17 Also, parties have only 20 days in which to complete negotiation for compensation.18

ii) There is no provision for the compensating the total value of loss. Rather, the defaulting state need only compensate up to the amount of the harm accrued by the complainant after the dispute was brought before the DSB. In other words, the complaining member cannot recover any amounts for losses prior to the bringing of the dispute.19

For the above reasons, developing countries find it extremely difficult to use compensation as a remedy.20

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14 DSU, supra note 14, art. 22.7. Such adoption of the panel/appellate body report by the DSB is automatic, unless the DSB decides otherwise, by consensus.

15 If there is disagreement over what amounts to “reasonable”, the matter goes to arbitration. This is popularly referred to as “Article 21.5 arbitration”. DSU, supra note 14, art. 21.3.

16 Article 22.2 states that a defaulting state shall, “if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation”. See also Art 22.1 which states that compensation is a temporary measure “available in the event that the recommendations and rulings are not implemented within a reasonable period of time” and Article 3.7 which reiterates that “compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement”.

17 DSU, supra note 14, art. 22.1.

18 See DSU, supra note 14, art. 22.2.

19 See Aysha Khanma, “A Field of Dreams Unfulfilled? Developing Countries and Remedies in the WTO Dispute Settlement Understanding” (paper on file with author). In order to rectify this, developing countries have proposed that the value of the compensation should begin accruing at the time of the adoption of the inconsistent measure, rather than at the time when the decision of the DSB is rendered. See Text for the African Group Proposals on Dispute Settlement Understanding Negotiations, TN/DS/W/42 (Jan. 24, 2003).

20 See Marco Bronckers & Naboth Van den Broek, Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement, JOURNAL OF INTERNATIONAL ECONOMIC LAW (2005) who notes: “…compensation is only possible when the non-complying country offers it and the parties to the dispute agree on its scope and implementation. In reality, this rarely happens.” It is important to note that in the case often cited in the context of compensation (the US – Section 110(5) case involving violation of copyright obligations by the US), the compensation was under the voluntary arbitration under Article 25 of the DSU and not under Article 22. See WTO Article 25 Arbitrators’ Award, United States – Section 110(5), WT/DS160/ARB25/1, circulated on Nov. 9, 2001, ¶ 21–27 (hereafter “US-Copyright”).
Gaining the right to retaliate is not an easy process. For one, the form and proposed level of retaliation is almost always objected to by the defaulting state. This is then arbitrated upon by the panel and can entail complex economic modeling, an aspect that will be dealt with in more detail later in this paper. Following the arbitration, the Dispute Settlement Body (DSB) can, if it is satisfied of the merits, grant authorization to “suspend concessions or other obligations”.

It is to be noted that “retaliation” is not an end in itself. Rather, the WTO framework envisages this only as a temporary measure, till such time as compliance is achieved or the parties reach a settlement. Further, the DSU describes “retaliation” as a possible “last resort”, meaning thereby that it is to be used sparingly.

So far, the traditional mode of retaliation (hereafter referred to as “traditional retaliation”) has been via an imposition of duties on imports from the target country. It bears noting that the WTO framework mandates a hierarchy of remedies, and traditional retaliation sits right at the top, as the primary remedy to be resorted to. However, in many cases involving developing countries, such traditional retaliation may not be effective—in fact, it may be counterproductive. It is here that “cross-retaliation”, a secondary remedy under the WTO becomes important.

For the sake of convenience, when this paper speaks about “developing countries”, it also includes LDC’s. Consequently, this group constitutes about 87% of the WTO’s

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21 However a scholar notes that “the restraints on the form of retaliation have rarely been tested in arbitral proceedings.” See Thomas Sebastian “World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness” 48 HARV. INT’L L.J. 337, 342 (2007).

22 This arbitral panel is known as the DSU Article 22.6 panel. To date there have been seventeen Article 22.6 Arbitration Decisions, almost half of which relate to United States Continued Duty and Subsidy Offset Act of 2000, WT/DS234, 31 August 2004 (US Offset Act (Byrd Amendment); see <http://www.worldtradelaw.net/reports/226awards/index.htm>.

23 The burden of proof is on the violating state to establish that the proposed retaliation is inconsistent with the substantive requirements set out in the WTO Agreements. After the issuance of the 22.6 award, the complaining state places a second request for authorization to retaliate before the DSB. If this second request is consistent with the arbitral award it must be approved by the DSB. Following the grant of authorization by the DSB, the complaining state can proceed to act against the violating state.

24 Article 22.8 provides that “the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed....” See also DSU, supra note 14, art. 22.1.

25 The WTO framework suggests that the settlement of a dispute may be even more important than compliance itself. Article 3.7 of the DSU states, in pertinent part, that “a solution mutually acceptable to the parties [...] is clearly to be preferred,” and then notes that “[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements”.

26 Art 3.7 of the DSU states: “the last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-a-vis the other Member.”


28 Least Developed Countries (LDCs) have availed of the dispute resolution mechanism very sparingly. From 1995 to 2004, LDC’s complained under the WTO only 8 times, that is, in 0.9% of all bilateral disputes during
membership, driving home the importance of fashioning an enforcement framework that
would be meaningful and effective for them.\textsuperscript{29} Having said this, it bears noting that
developing countries are not one monolithic group, but demonstrate considerable variation
in terms of their invocation of the WTO system and success in deploying it.\textsuperscript{30} Illustratively,
in the first decade since the WTO was established in 1995, India initiated sixteen cases while
Indonesia only initiated three.

III CROSS-RETAI LATION: EXPLORING THE WTO FRAMEWORK

The cross retaliation framework can be best explained through a detailed study of the
Antigua case (see Annexures A and B).

Antigua, a tiny island nation of 80,000 people, relies heavily on “betting” for its economic
well being—in fact, internet gambling is Antigua’s second biggest employer, after tourism.\textsuperscript{31}

It is not surprising then that Antigua brought a case against the US for enacting laws that
restricted Antiguan companies from offering online betting services to US customers.\textsuperscript{32} The
panel/appellate body found that three U.S. federal laws and the provisions of four U.S. state
laws were inconsistent with the specific market access commitments made under GATS.\textsuperscript{33} In
April 2005, the DSB adopted the Appellate Body and Panel findings and recommendations.\textsuperscript{34} Upon the reasonable period of time for U.S. compliance expiring on 3
April 2006, Antigua became entitled to “retaliate” against the US with a view to inducing
them to comply.\textsuperscript{35}

Antigua could not have retaliated in the “traditional” manner (by imposing high tariffs on
US services or blocking such services altogether) without shooting itself in the foot. It

\textsuperscript{29} Of the 153 members, the developing countries number around 100. Along with the 32 LDC’s, they add up to
about 87\% of the members.

\textsuperscript{30} Developing countries such as India and Brazil are among the most active participants in GATT/WTO
adjudication. See Christina L Davis And Sarah Blodgett Bermeo, “Who Files? Developing Country Participation in

\textsuperscript{31} ICTSD, Antigua Awarded Modest Cross Retaliation Rights in Gambling Dispute With US, BRIDGES WEEKLY,

\textsuperscript{32} The main law under challenge forbids paying for Antiguan betting services with US issued credit cards or
checks. The EU and Japan also initiated action against the US on this count, but settled. It is not clear what the
terms of settlement are and a FOIA (Freedom of Information Act) request has been made to uncover this. See
Ed Brayton, Congressman Intervening in FOIA Request available at http://scienceblogs.com/dispatches/2008/03/congressman_intervening_in__foi.php. (last visited Aug. 8, 2008). A recent EU press release suggests that the EU may be considering resuming this action against the US before the WTO. See EU opens investigation into US Internet gambling laws available at http://ec.europa.eu/trade/issues/respectrules/thr/pr100308_en.htm. (last visited 10 March 2008). It notes in particular that: “The complaint and investigation are separate from the compensation package the EU and US agreed upon in December 2007, following the loss of trade opportunities in the US gambling sector as a result of the US intention to withdraw its GATS commitments on gambling”.

\textsuperscript{33} United States – Measures Affecting the Cross-Border Supply of Gambling and betting Services, WT/DS285/AB/R, Apr.
7, 2005.

\textsuperscript{34} See Summary of the Dispute to Date, WTO, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Aug. 08, 2008).

\textsuperscript{35} Id.
therefore sought permission to “cross-retaliate” i.e. suspend its WTO obligations to protect US copyrights, trademarks, industrial designs, patents, and data protection, as well as to suspend liberalization commitments in the communication services sector.

This request was recently granted by the WTO.\textsuperscript{36} However, the amount claimed by Antigua was reduced considerably by the WTO arbitration panel. Whilst Antigua claimed losses approximating USD 3.443 billion annually,\textsuperscript{37} the panel found that the losses amounted only to USD 21 million and therefore Antigua could retaliate only up-to this amount.\textsuperscript{38}

Article 22.3 of the DSU is a good starting point for assessing the cross-retaliatory framework that Antigua intended to deploy. This Article provides a "hierarchy" of remedies that a complaining party must follow in determining in which sectors or under which agreements suspension of concessions or other obligations can be sought:

(i) It must first seek to suspend obligations in the “same sector” in the “same agreement” under which the contravention took place.\textsuperscript{39}

(ii) If the above is not practicable or effective, it must seek to suspend obligations in “other sectors” within the “same agreement”.

(iii) If the above is not practicable or effective and the circumstances are serious enough, it can then seek to suspend obligations under “another agreement”.

For the purpose of this paper, the retaliation envisaged under steps i) and ii) is labeled as “traditional retaliation”. And the retaliation envisaged under iii) is termed “cross-retaliation”.

Article 22.3 (d) states in applying the above principles, the complaining party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation and the importance of such trade to that party;

(ii) the broader economic elements related to the violation and the broader economic consequences of the suspension of concessions or other obligations;

\textsuperscript{36} US Antigua (22.6 Arbitration).

\textsuperscript{37} Antigua’s proposed level of suspension was based on an assessment of the annual amount of trade that it considered it had lost, as a result of the maintenance of the WTO inconsistent measures by the US, beyond the end of the reasonable period of time for implementation. To calculate the level of such lost trade, Antigua relied on a counterfactual scenario intended to reflect what the situation would have been, if the US had complied with the DSB recommendations and rulings. The US challenged this counterfactual and claimed that the losses amounted only to USD 500,000. The panel did not fully agree with either of the parties. See US Antigua (22.6 arbitration), ¶ 3.148. See Bernard O'Connor Remedies in the World Trade Organization Dispute Settlement System – The Bananas and Hormones Cases, 38 J. WORLD TRADE 245, 254–55 (2004) who notes that: “The DSU does not provide any guidance on how to choose between various available counterfactuals and, in practice, arbitrators do not even attempt to justify their choice of counterfactual.”

\textsuperscript{38} The US recently announced that the United States was withdrawing its commitments in the gambling and betting services sector under the WTO’s General Agreement on Trade in Services.

\textsuperscript{39} Article 22.3 of the DSU begins by stating that: “the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or appellate body has found a violation or other nullification or impairment.”

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It bears noting that the term “sector” as used in Article 22.3 (c) has a specific meaning, depending on which WTO Agreement is implicated in the specific dispute at hand. Illustratively, GATS identifies eleven principal service sectors such as “tourism”, “financial”, “transport”, “communication” etc. Thus, if the offending measure is in relation to “communication” services, then retaliation must first be attempted under the same sector i.e. the complaining state has to retaliate by suspending concessions to the defaulting state in relation to “communication” services. If this is not likely to be practicable or effective, then it can seek to retaliate in respect of “tourism” services, which is considered a different “sector”, but under the same “agreement”. If this is also not likely to be effective, then it can retaliate under TRIPS, an altogether different agreement.

The same logic applies for disputes relating to any other WTO Agreement. Illustratively, TRIPS identifies seven sectors classified on the basis of the kind of intellectual property in question i.e. patents, copyrights, trademarks, geographical indications, industrial designs, layout designs and undisclosed information. Therefore, if the dispute involves patents, “retaliation” by the complaining state should first target the patent rights of entities from the defaulting state.

However if the dispute is in relation to a “good” under GATT (most WTO disputes involve a GATT violation), it is important to note that all goods are classified as falling within “same sector”.40 Therefore, in a dispute involving an illegal tariff on “bananas”, the complaining state may retaliate against “steel”, as this good is considered to fall within the “same” sector.41

Let us apply the above framework to the Antigua dispute: Antigua complained that US laws violated GATS commitments by denying Antiguan betting companies unrestricted market access to the US. Antigua argued and the panel agreed that the violation fell within principal sector 10 titled "Recreational, Cultural and Sporting Services", a sector which the US had explicitly included in its Schedule of Specific Commitments under GATS.42 More specifically, it was sub sector 10.D, titled “Sporting and Other Recreational Services” that was violated.43

Antigua could therefore begin by complaining against this very sector i.e. block all recreational, cultural and sporting services offered by US companies in Antigua. It is important to note in this regard that Antigua never committed to opening up sub sector

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40 DSU, supra note 14, art. 22(3)(f).
41 See Morrison, supra note 13.
42 Under GATS, countries have to indicate which sectors they intend to open up. GATS commitments will thereafter apply only in respect of those specific sectors. Article 22.3 (f) of the DSU further defines the term "sector" in the context of GATS as meaning “a principal sector as identified in the current "Services Sectoral Classification List". This list is contained in document MTN.GNS/W/120, which identifies 11 principal sectors. See footnote 14 of the DSU.
43 Sector 10 is titled “Recreational, Cultural and Sporting Services”. The subsections within this are 10.A (Entertainment services (including theatre, live-bands and circus services)); 10.B (News agency services); 10.C (Libraries, archives, museums and other cultural services); 10.D (Sporting and other recreational services) and 10.E (Other). See “Services Sector Classification” MTN.GNS/W/120, July 10, 1991, available at http://www.wto.org/English/tratop_e/serv_e/serv_e.htm)
10.D under GATS. Rather, the only trade within principal Sector 10 in respect to which it made commitments is sub-sector 10.A titled "Entertainment services".

Antigua argues that it has been unable to "locate any statistical sources" on trade in sub-sector 10.A and believes that such trade is negligible in its overall volume. Antigua further considers that suspension of concessions or other obligations in this sector "would most likely impair the already limited entertainment options available to Antiguan citizens while having virtually no impact on the United States at all". The arbitration panel agreed with Antigua and found that Antigua could plausibly arrive at the conclusion that it was not practicable or effective to suspend concessions or other obligations under the GATS in respect of Sector 10.

It is pertinent to note that although Antigua had not committed to opening up any of the other sub sectors under Sector 10, it was still bound by other GATS obligations, in so far as such sub sectors were concerned. Illustratively, it was still bound by the Most Favoured Nation (MFN) obligation, contained in GATS Article II, which obliges Antigua to accord immediately and unconditionally to US services and service suppliers treatment no less favourable than that it accords to like services and service suppliers of any other country. In other words, Antigua could suspend this obligation to grant MFN status to US services falling within the various sub sectors of Sector 10 i.e. 10.B (News agency services); 10.C (Libraries, archives, museums and other cultural services); 10.D (Sporting and other recreational services); and 10.E (Other). Here again, the panel agreed with Antigua that the volume of trade with the US was so negligible that a suspension or any other kind of non-preferential treatment would not hurt the US at all.

We therefore move to the next level of the hierarchy i.e. Antigua could retaliate against other service sectors (under GATS), such as “communications”. However, Antigua claims that this also would not be “practicable or effective”.

Antigua stated that its total imports of services in 2005 amounted to USD 208.11 million, of which the US share was approximately 48.9 percent i.e. USD 101.77 million. The panel therefore concluded that USD 101.77 million represented the maximum value of trade in respect of which Antigua could potentially seek to suspend concessions or other obligations. The panel found that the annual level of nullification or impairment of benefits accruing to Antigua as a result of WTO inconsistent laws was USD 21 million. This meant that it would in principle be possible for Antigua to seek suspension of concessions or other obligations entirely within GATS. However, in the light of certain other considerations, the panel held that such suspension would not be practicable or effective within the meaning of Article 22.3(c).

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44 Id. at 65.
45 Id. at 65-67.
46 Id. at 66-67.
47 See US Antigua (22.6 Arbitration), ¶ 4.82 and ¶ 4.51
48 Nullification and impairment, described in GATT 1994, refers to actions taken by a WTO member that effectively undermine or eliminate the benefit expected under a commitment to liberalize trade. Article 3.8 of the DSU codifies the practice of the GATT panels and explicitly provides that an infringement of WTO obligations “is considered prima facie to constitute a case of nullification or impairment”.
49 See US Antigua (22.6 Arbitration), ¶ 3.189.
In defining the import of “practicable and effective,” the panel endorsed the ruling of the arbitrator in the Bananas case:

i) an examination of the "practicability" of an alternative suspension concerns the question whether such an alternative is available for application in practice, as well as suited for being used in a particular case;

ii) in contrast, the thrust of the "effectiveness" criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO- inconsistent measures into compliance with DSB rulings within a reasonable period of time;

iii) a consideration by the complaining party of the practicability and the effectiveness of an alternative suspension within the same sector or under the same agreement does not need to lead to the conclusion that such an alternative suspension is both not practicable and not effective in order to meet the requirements of Article 22.3.

Antigua successfully demonstrated that a suspension would not be effective, but would rather work to the detriment of Antiguan consumers. Antigua argued that the statements it made in respect of Sector 10 ("Entertainment services") also held true for other sectors of the GATS in which Antigua had made specific commitments in its Schedule. Of the total value of services imported to Antigua in 2005, the main imports were transportation (USD 70.7 million), travel (USD 40.1 million) and insurance services (USD 35.5 million). Antigua argued that if it were to suspend concessions with respect to these services, given the low value of these imports, such suspension would have no real impact on the United States. On the contrary, replacing such services, even if possible, would most likely prove disadvantageous for Antiguan consumers. Illustratively, Antigua explained that it initially envisaged the suspension of concessions or other obligations in telecommunication services, but that, upon more detailed review of the import and use of telecommunications services in Antigua, it had determined not only that the volume of the trade was low (USD 5.03 million) but that disruptions in changing services and suppliers and increased cost to Antiguan consumers would result in a heavier burden on Antiguan citizens as the result of suspending concessions in this area while having no perceptible impact on the United States.

The panel agreed with most of Antigua’s submissions above and found that any suspension of concessions in the form of higher duties, tariffs, fees or other restrictions would have a disproportionate impact on the economy of Antigua and little or no impact on the United States. This logic applies across the board to a number of developing countries. Therefore

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50 In determining practicable or efficacy, the panel is to take into account the following factors:

“(i) the trade in the sector or under the agreement under which the panel or the Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations.”

51 The arbitrators analyzed the meaning of the criteria of "practicability" and "effectiveness" in subparagraphs (b) and (c) of Article 22.3 of the DSU in some detail, as well as the role of the elements referred to in subparagraph (d) of Article 22.3 of the DSU.

52 ¶ 4.94, page 71.

53 Id.

54 ¶ 4.93, page 71

55 ¶ 4.99, page 73.
the case for cross-retaliation is a very strong one in the context of developing country complainants that are pitted against developed countries in WTO disputes.

Apart from the above, there are three other broad requirements/considerations that the panel keeps in mind while authorizing cross-retaliation, as discussed below.

A Serious Circumstances

Article 22.3 (c) requires that while requesting cross-retaliation, a complaining member state has to demonstrate that the "circumstances are serious enough". As noted earlier, Article 22.3 (d) itself provides some guidance in this regard i.e. the complaining state can take into account the trade at issue and its importance, the broader economic elements relating to the nullification or impairment and the broader economic consequences of the proposed suspension on the parties.

Antigua highlighted the following facts to demonstrate the seriousness of the circumstances:

(i) It had extremely limited natural resources and very limited arable land, such that it could not produce sufficient agricultural products to satisfy domestic needs, let alone for export.
(ii) Its economy had become highly dependent on tourism and associated services, including hotels and restaurants, retail trade, construction, real estate and housing and transportation.
(iii) The tourism sector was vulnerable to external factors, such as weather conditions, security threats or economic downturn in source markets. It also tended to employ unskilled workers and generate low-paying jobs.
(iv) In order to diversify its economy, Antigua had tried to develop trade in services, including trade in remote gambling. Antigua suggested that prior to 1998, the United States Government even supported Antigua in its efforts to develop and supervise the remote gaming industry.

Based on all the above factors, the panel concluded that the circumstances were serious enough within the meaning of Article 22.3(c).

Specifically, the panel noted that the extremely unbalanced nature of the trading relations between the parties makes it all the more difficult for Antigua to find a way of ensuring the effectiveness of a suspension of concessions against the United States under the same agreement. It also noted that the heavy reliance of Antigua's economy on the very sectors that would be candidates for retaliation under GATS increased the likelihood that any retaliation would have an adverse impact on Antigua itself, including for low-wage workers.

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56 ¶ 4.110-4.111.
57 The United States disagreed with Antigua on this count. It however did not dispute any of the other factors listed by Antigua. ¶ 4.112.
58 ¶ 4.113.
59 ¶ 4.114, page 75. It is interesting to note that Article 21.8 provides that: "If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned."
B   Equivalence in Retaliation

Art 22.4 of the DSU requires that the level of retaliation be equivalent to the harm caused by the violation. The term “equivalent”, though not defined, has been interpreted by panels to mean that the harm experienced by the defaulting state as a result of the “retaliation” ought to be commensurate with the level of harm experienced by complaining state as a result of the WTO breach.

A scholar argues that Art 22.4 embodies an “equality-of-harm” approach to determining equivalence. However, he rightly notes that there is no guidance about what it is that arbitrators are meant to equalize. Consequently, arbitrators must make their own choices about how to assess proportionality. This means that significant parts of the law relating to WTO remedies must, by necessity, emerge from arbitral rulings rather than negotiated treaty text.

While determining equivalence, the first step is to compute the harm caused by cross-retaliation i.e. the level of nullification or impairment. This is a very complex process, as evidenced by the arbitral panel report in the Antigua case.

Antigua claimed that the losses approximated USD 3.443 billion annually. This amount was based on an assessment of the annual amount of trade that it considered it had lost, as a result of the maintenance of the WTO inconsistent measures by the US, beyond the end of the reasonable period of time for implementation. To calculate the level of such lost trade, Antigua relied on a counterfactual scenario intended to reflect what the situation would have been, if the US had complied with the DSB recommendations and rulings. The US challenged this counterfactual and claimed that the losses amounted only to USD 500,000. The panel disagreed with both parties and found that the losses amounted only to USD 21 million and therefore Antigua could retaliate only up-to this amount. It arrived at this amount by modifying the counterfactual proposed by Antigua. This was a major blow for Antigua—and in this sense, obtaining the permission to retaliate was not an unqualified victory for it.

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60 Article 22.4 of the DSU provides that “the level of the suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of nullification or impairment”. See also Article 22.7, which embodies the same principle.
61 EC- Bananas III (Ecuador)(Article 22.6), supra note 8. Panels have noted that equivalence “connote a ‘correspondence, identity or balance’ between the two levels and that it implies ‘a higher degree of correspondence, identity or stricter balance’ than what was required under the ‘appropriateness’ standard of the GATT 1947…. Thus, to date, the analysis of the equivalence by the arbitrators has been exclusively quantitative.” See Yuka Fukunaga, Securing Compliance through the WTO Dispute Settlement System: Implementation of DSB Recommendations, 9 (2) JOURNAL OF INTERNATIONAL ECONOMIC LAW, 419 – 20 (2006).
63 Id. at 344.
64 However, as Professor Jackson rightly notes: “Clearly the most troublesome concept in Article XXIII is the concept of nullification and impairment. These terms have been variously defined and may be so imprecise as to admit of no satisfactory definition.” See John Jackson, World Trade and the Law of GATT 181 (1969).
65 ¶ 2.3.
66 ¶ 3.2.
67 ¶ 3.146-3.148.
68 ¶ 3.188-3.189.
Now that the amount of harm has been determined, how does one go about ensuring that the retaliation is equivalent to the harm caused?

The US expressed its concern in this regard and requested the Arbitrator to require Antigua to specify how it would ensure that any suspension of concessions or other obligations did not exceed the level of nullification and impairment found by the Arbitrator. In particular, the US argued that Antigua’s request did not place any value on GATS and TRIPS concessions and did not explain what mechanisms Antigua intended to use to ensure that the level of suspension did not exceed the level of nullification and impairment.  

The US feared that without strict supervision by the Government of Antigua, there would be no basis to calculate the level of suspension, or to determine whether the operators were abusing the authorization to suspend TRIPS concessions by offering pirated intellectual property in jurisdictions outside Antigua. It bears noting that Antigua has not yet changed its domestic IP laws to authorize such retaliation.

Antigua countered by relying on Art 22.7 of the DSU, which states in pertinent part that “the arbitrator shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.” Therefore, once the level of harm is determined, the panel cannot go into the “nature” of IP suspensions sought. In other words, the complaining party is not required to specify precisely which "obligations" it intends to suspend once the suspension of concessions or other obligations is authorized by the DSB, nor is it the role of the arbitrators to so determine. The panel agreed with Antigua noting that it would not “question the complaining party’s choice of specific obligations to be suspended”; and that it would only “assess the level of the proposed suspension, rather than its form, against the level of nullification or impairment.” The panel therefore authorized Antigua to suspend the obligations under the TRIPS Agreement at a level not exceeding US$21 million annually.

However, it stressed that the form that is chosen in order to enact the suspension ought to be one that ensures that “equivalence can and will be respected in the application of the suspension, once authorized”. And that “the form should also be transparent, so as to allow an assessment of whether the level of suspension does not exceed the level of nullification.”

The panel also rightly warned that the US could invoke appropriate dispute settlement procedures in the event that it considered that the level of concessions or other obligations suspended by Antigua exceeded the level of nullification or impairment. Therefore it is critical that Antigua build a transparent cross-retaliation mechanism that is likely to ensure
that the level of retaliation does not exceed the level of nullification.  

Prior to concluding the discussion in this section, it is important to note a critical distinction between traditional “tariff” based retaliation and the newer “IP” cross retaliation. When determining “equivalence” in a traditional retaliation context, panel decisions focused substantially on computing the level of nullification or impairment. Once this was determined, it was assumed that computing the losses from retaliation would be relatively easy, since all one had to do was to add up the various tariff amounts sought to be imposed on exports from the defaulting state. And to this extent, panels never really scrutinized the tariffs or related goods/services on which they were sought to be imposed in any significant way. Contrast this approach with an IP retaliation scenario, where one cannot readily assume that the value of IP suspension is easily ascertainable. Of course, in certain contexts such as music and sound recording copyrights, where royalty rates established by collecting societies exist, this may be a relatively easy task. However, in the context of patent or trademark infringement, it may be difficult to value the patent or trademark in question and determine the value of loss by the suspension and consequent “use” of IP in question by a complaining state entity. The Antigua 22.6 panel acknowledges this difficulty by noting that:

“…the suspension of obligations under the TRIPS Agreement may involve more complex means of implementation than, for example, the imposition of higher import duties on goods, and that the exact assessment of the value of the rights affected by the suspension is also likely to be more complex”.  

Therefore, one cannot, as easily, compute the “loss” caused by IP suspension and determine when such loss would equal the value of nullification or impairment. One ought to therefore draw out a transparent, fair and easy to operate framework/model for the computation of losses.

C Burden of Proof

Under DSB rules, it rests on all parties to produce evidence, notwithstanding that the offending member is first required to show why the complainant should not be allowed to cross-retaliate in the manner and amount sought. Should the arguments not produce a clear outcome, the defaulting member state, as the party bearing the original burden of proof, loses. Most of the pre-requisites for a cross-retaliation case are relatively easy for a developing country to establish. The most complex process is in computing the level of harm and not so much in establishing equivalence.

IV CROSS RETALIATION AUTHORISATIONS

Antigua was not the first or the only case in which cross-retaliation (by suspending TRIPS) was requested and/or authorized. There were two other cases, as discussed below.

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75 It may be noted that although both parties are in settlement talks now, the credibility of the IP suspension model that Antigua intends to deploy will no doubt influence the settlement outcome more in favour of Antigua.
76 Antigua case, ¶ 5.10.
77 See Morrison supra note 13.
78 See discussion under earlier chapter dealing with the equivalence framework.
A EC Bananas Case

Cross-retaliation was authorized for the first time in 2001 in this case. A group of countries (Ecuador, Honduras, Mexico and Guatemala) along with the United States complained against the European Communities (EC’s) restrictions on the importation, sale, and distribution of bananas. Both the WTO panel and the appellate body found in favour of the complainants i.e. the EC Banana Regime was discriminatory and violated the Most Favored Nation clause, under GATT and GATS, since it favoured Afro-Caribbean countries at the expense of other banana exporters.

Subsequent to the ruling, the EC made a frail attempt to comply by amending its regulations—however this was seen as inadequate by the DSB arbitrators. Pursuant to this failure, the United States gained authority to suspend tariff concessions of USD 191.4 million—and it did so by imposing tariffs on 100 selected products from various European Union (EU) countries.

Of the complainants impacted by the EC’s discriminatory regime, Ecuador appears to have been the worst hit. Bananas made up about 30% of Ecuador’s exports, making them the world’s largest exporter of this good. Although Ecuador requested suspension of concessions worth, USD 450 million, the DSB authorized Ecuador to suspend only USD 201.6 million. Ecuador convinced the arbitrators that it was entitled to a remedy of “cross-retaliation” by submitting statistics to illustrate the disparity in trade and economic size between itself and the E.C. Unfortunately, despite gaining the right to cross retaliate, Ecuador chose to settle the matter with the EC. It is however likely that Ecuador used the threat of cross-retaliation to buy itself a good bargain with the EC. In particular, a scholar notes:

“This combination of tactics enabled Ecuador to wield surprising influence over the ultimate resolution of the bananas dispute, considering the high profile of the case and the diversity of interests at stake. Although some distance from Ecuador’s ideal point, the outcome was a compromise that incorporated many of Ecuador’s core demands…. Ecuador’s negotiators achieved these results by capitalizing on the bargaining leverage afforded by certain WTO Rules.”

However, for the first time in the history of the WTO dispute settlement, it authorized “cross-retaliation”, a mechanism whereby Ecuador was permitted to suspend its GATS commitments, as also its commitments under TRIPS, till it achieved a level of suspension equivalent to USD 201.6 million.

79 EC-Bananas III (Ecuador) (Article 22.6), supra note 8.
83 EC-Bananas III (Ecuador) (Article 22.6), supra note 8, ¶ 170.
84 See Smith supra note 9.
B The Brazil Case ("U.S.-upland cotton case")

In this case, Brazil alleged that U.S. upland cotton subsidies were in contravention of WTO rules. Since the US failed to comply to bring its laws into compliance within the reasonable time accorded to it, Brazil requested authorization to cross-re retaliate i.e. suspend concessions in the areas of intellectual property and services. Brazil demonstrated that additional import duties would hurt Brazil more than it hurts the US. Illustratively, Brazil imported more than US$11 billion worth of goods from the U.S. in 2004. Increased duties on U.S. imports would increase inflation, increase the cost of inputs and capital goods for Brazilian producers, and thereby harm Brazilian industries.

However, owing to the US allegedly taking some measures to achieve compliance, the request by Brazil to retaliate/cross-re retaliate was suspended. The matter went in for an Article 21.5 arbitration i.e. the arbitrator was to determine whether the US measures were sufficient to comply. The arbitrator ruled that the measures were not entirely sufficient. After the failed Doha talks, Brazil indicated that it would resurrect its request to cross-re retaliate.

V RETALIATION vs. CROSS-RETALIATION

To encapsulate some of the key requirements for making out a case for cross-re retaliate:

1. The circumstances have to be “serious” enough to warrant a “retaliation”. In other words, a complainant has to demonstrate that the violation and its consequences are a grave cause for concern. In a developed:developing country context, where the developed country erects market barriers, this is fairly easy to establish.

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85 Generally, serious prejudice may arise in any case where the effect of the subsidy is to diminish exports from one country, increase the subsidizing member country’s world market share in a relevant product, or otherwise cause depression of prices or significant loss of sales.


87 Communication from Brazil, United States – Subsidies on Upland Cotton – Recourse to Article 7.9 of the SCM Agreement and Article 22.2 of the DSU by Brazil, WT/DS267/21 (July 5, 2005), available at http://www.wto.org/english/docs_e/docs_e.htm (seeking authorization to respond to the grant of prohibited subsidies to goods producers by suspending TRIPS and GATS obligations).

88 United States – Subsidies on Upland Cotton (AB Report)


91 Article 22.3 (c).
2. It has to be shown that the normal or traditional mode of retaliation would not be “practicable” or “effective”. 92 Here again, in a context where the complainant is a developing country, this is relatively easy to establish.

3. The level of retaliation must be equivalent to the harm caused by the violation. 93 Computing the harm caused by the violation is a very complex process, as evidenced by the arbitral panel report in the Antigua case. And this is the toughest part in a cross-retaliation request, at least from the evidentiary point of view. Once this is established, the panel does not go into the “nature” and exact “magnitude” of IP suspensions sought. However, the complaining member state may complain at any time, if the cross-retaliation results in recovering more than the level of nullification or impairment. Therefore, it is recommended that developing countries that intend to use this strategy work out an appropriate IP cross retaliation implementation mechanism. This paper suggests a “tiered IP suspension” model as an optimal model in this regard.

Antigua won mainly because it was able to demonstrate that the value of US exports to Antigua meant much more for Antigua than for the US. Such a concern applies across the board to many developing countries. 94 This may perhaps be one of the reasons why there are so few cases of developing country complainants seeking retaliation. 95 Contrast this with an IP suspension model, where “consumers” in developing countries are likely to benefit from a suspension of foreign IP. Further, given the strong IP lobbies in developed countries, this model has a better chance at securing compliance than the traditional retaliation model. 96 In fact, these very same IP lobbies from the developed countries were instrumental in incorporating minimal intellectual property standards through TRIPS into the WTO framework. 97

Of course, to the extent that the “complaining” developing member state is dependent upon the defaulting “developed” member for foreign aid or preferential tariff benefits, the right to cross-retaliate may never be executed. 98 Apart from this, various other political

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92 Id.
93 Article 22.4 and 22.7.
94 In fact, the world’s largest economies such as the US and the EC have the worst record with regard to the implementation of the DSB recommendations. See Naboth van den Broek, Power Paradoxes in Enforcement and Implementation of World Trade Organization Dispute Settlement Reports: Interdisciplinary Approaches and New Proposals, 37 JOURNAL OF WORLD TRADE 127 145–53. (2003)
95 Settlements between the complaining developing country member and the defaulting developed state may also be one of the main reasons underlying these low numbers of “retaliation” seeking cases. However, even with settlements, it is clear that if the enforcement machinery was stronger (the country can effectively retaliate), then the settlement terms are likely to be slightly more favourable to the complaining developing country. See the Ecuador example in JM Smith supra note 9.
96 See Arvind Subramanian and Jayashree Watal, Can TRIPS serve as an enforcement device for developing countries in the WTO, 3 JOURNAL OF INTERNATIONAL ECONOMIC LAW, 403, 405-406, (2000).
considerations may constrain a developing countries from suspending the IP rights of powerful corporations from the developed world. Nonetheless, it provides a powerful bargaining tool in the hands of developing country member states.

Therefore, in the context of developing countries at least, an IP suspension model will work much better than traditional retaliation and ought to be the preferred mode. This paper considers the Byrd Amendment, a US legislation that was held to contravene WTO norms to illustrate this point better.

A Byrd Amendment Case

The Continued Dumping and Subsidy Offset Act, Oct. 28, 2000 (also known as the Byrd amendment) of the US provides for the distribution of antidumping and anti-subsidies duties to US companies that brought or supported the complaints. It therefore creates an undue incentive for US industries to seek the imposition of duties on imported goods, thereby improving their competitive position.

A group of 11 countries filed a WTO complaint alleging that the provisions of the Byrd Amendment violated the WTO agreements on antidumping and subsidies. Though these agreements permit member states to enact measures designed to counter the dumping or subsidization of imported products, they also specify the means through which states can thwart such unfair trade practices. The panel found that the Byrd Amendment went beyond permissible levels of anti dumping and subsidization measures under the WTO AD/CVD rules and recommended that the amendment be repealed. Subsequently, the appellate body endorsed the ruling of the panel.

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100 Initially, the Request for Consultations was moved by (Australia, Brazil, Chile, the European Union, India, Indonesia, Japan, Korea, and Thailand. See also Request for Consultations by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, United States—Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/1 (Jan. 9, 2001). Later, in June of 2001, Mexico and Canada joined in. See Request for Consultations by Canada and Mexico, United States—Continued Dumping and Subsidy Offset Act of 2000, WT/DS234/1 (June 1, 2001).


102 Panel Report, United States—Continued Dumping and Subsidy Offset Act of 2000, ¶¶ 8.1–8.6, WT/DS217/R, WT/DS234/R (Sept. 16, 2002) (finding “that the CDOSA is inconsistent with AD Articles 5.4, 18.1 and 18.4, SCM Articles 11.4, 32.1 and 32.5, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement.”).

The failure by the US to bring its law into compliance prompted eight of the complainants including India to request authorization from the WTO to retaliate i.e. impose additional import duties on US products.

Pursuant to arbitration under Article 22.6 and 22.7, the DSJ authorised the retaliation. In particular, the arbitrator determined that that the level of retaliation to be applied by countries was 72% of the amount disbursed to US companies from duties collected on products from the complaining member state.

Of the 8 complainants that sought retaliation, only a few countries i.e. EU, Canada, Japan and Mexico exercised this right. Apart from Mexico, none of the developing countries (Brazil, Chile and India) did so. One possible reason, and a strong one at that, could be that traditional retaliation might have hurt these countries. Apart from this, the decision to not retaliate may have been a political one as well.

From the above, it is clear that cross-retaliation is a more effective remedy for developing countries than traditional retaliation. Therefore, this ought to be made the main mode of retaliation, without countries having to go through the farce of demonstrating each time why they cannot retaliate in a traditional manner. Given that the decks are stacked against developing countries in WTO dispute resolution, making it easier to avail of effective remedies such as cross-retaliation will go a long way towards ensuring the creditability and legitimacy of the WTO.

Illustratively, in a data set covering 856 WTO disputes from 1995 to 2004, it was found that developing countries (including LDCs) initiated 280 bilateral disputes, or 32.7%, whereas the developed countries initiated almost 576 disputes or 67.3%. This only goes to demonstrate that members with greater retaliatory power to restrict imports from the...
defendant in a dispute are more likely to initiate a dispute and gain larger trade liberalization outcomes. Given that developing countries constitute two thirds of the WTO membership, they ought to be initiating more disputes in a bid to gaining more trade liberalization outcomes within the current WTO framework.

Paradoxically, at the stage of adoption of the Dunkel draft (which was the first document to provide for cross-retaliation), a cross-retaliatory mechanism was perceived as furthering developed country interests. Developing countries were concerned about obligations under TRIPS and the prospects of retaliation by developed countries. Since traditional retaliation for breach of intellectual property commitments would not have made sense (developing countries own very little intellectual property in developed countries), it was thought that developed countries would resort to cross-retaliation by suspending obligations in areas that mattered to developing countries such as agriculture, subsidies etc. Consequently, developing countries thought it beneficial to restrict the efficacy of cross-retaliation techniques. This might have accounted for the relegation of cross-retaliatory techniques to the status of a mere secondary remedy. As also for the watered down version of Article 22.7 which restricts the scope of examination of retaliation to a mere finding of “equivalence” and forbids them from venturing into the nature and form of such retaliation.

VI TRIPS: A MISFIT WITHIN THE WTO?

Some scholars have expressed their discomfiture with the present “retaliatory” framework within the WTO. They argue that such imposition of trade restrictive measures reinforces the very sin that the free trade mechanism as envisaged by the WTO is meant to eviscerate. Illustratively, Professor Jackson notes that “the entire notion of trade retaliation to a large extent undermines some of the fundamental principles of the liberal trading system.”

Subramanian and Watal note that “[u]nder most circumstances, the implementation of trade retaliation leads to a decline in economic welfare of the retaliating country. The fact that it continues to be the measure of first recourse is of course sad testimony to the disproportionate weight accorded to producer interests in pluralist systems. In the normal political calculus, the hurt to consumers is often overridden by the benefits to domestic producers.”

Paradoxically, these scholars are likely to favour cross-retaliation over traditional retaliation. Vigorous liberalisation proponents such as Professor Bhagwati would readily agree that

111 See Sebastian, supra note 25, 345.
112 See Subramanian & Watal, supra note 101, 410.
113 See Jackson, supra note 68, 194.
114 See Subramanian & Watal, supra note 103, 406. Based on economic simulations, Fritz Bruess concludes that in three out of four EC-U.S. disputes, retaliation resulted in welfare losses on both sides. The exception is the U.S.-FSC (Article 22.6) case, where Bruess concludes that the EC gained from retaliation. See Fritz Bruess, WTO Dispute Settlement: An Economic Analysis of Four EU-U.S. Mini Trade Wars – A Survey, 4 J. OF INDUS., COMPETITION AND TRADE 275, 300–01 (2004).
115 He was economic policy advisor to the Director-General of GATT and is the author of “In Defence of Globalization”. See also B. K. Zutshi, Bringing Trips Into The Multilateral Trading System, In The Uruguay Round And Beyond 37, 47 (Jagdish Bhagwati & Mathias Hirsch eds., 1998); UNCTAD-ICTSD, RESOURCE BOOK ON TRIPS AND DEVELOPMENT 4 (2005).
intellectual property standards sit uneasily within the WTO framework. By limiting the flexibility of countries to regulate knowledge production and technology adaptation through appropriate rules, TRIPS is far from optimal for developing countries. Illustratively, Professor Bhagwati notes:\(^{116}\)

"Intellectual Property does not belong in the WTO, since protecting it is simply a matter of royalty collection. But the matter was forced onto the WTO agenda during the Uruguay round by the pharmaceutical and software industries, even though this risked turning the WTO into a glorified collection agency."

Further, Watal and Subramaniam note that “cross-retaliation” by suspending TRIPS can be genuinely welfare enhancing in a way that conventional retaliation is not. They support this proposition from the many analyses that show that under most circumstances, higher intellectual property protection accorded by individual countries makes them worse off.\(^{117}\) Conversely, withdrawing TRIPS commitments, or reducing the strength of IP protection, must make such countries better off.

It is well known that in the Uruguay Round, developing countries accepted TRIPS and GATS obligations in exchange for market access to developed country markets for textiles and clothing.\(^{118}\) Given the structure of this bargain, cross-retaliation by suspending TRIPS obligations seems a fair way of achieving the balance that developing countries bargained for.

The evolution of technologically proficient developing countries such as India, Brazil and China may cause one to question the absolute nature of the above statement.\(^{119}\) However, given the context of cross-retaliation, this statement is likely to hold true. Even assuming that technologically proficient developing countries may wish to acquire patent protection in areas of technology that they are strong in, there is no reason why a suspension of foreign rights would affect their incentives in any way. Further, even assuming that such suspension is likely to impact foreign investment (an argument that is yet to be empirically borne out), countries can always opt to suspend in only those sectors, where the perceived impact on potential foreign direct investment (FDI) is less. Subramaniam and Watal rightly note that:

> It should be noted that in the context of retaliation which will be isolated instances of, rather than systematic, dilution of IP protection, the question of the dynamic effects - of innovation and R＆D generation - will not arise. Reducing IP protection will therefore confer the static benefits without leading to any dynamic efficiency


\(^{119}\) See Basheer and Primi, The WIPO Development Agenda: Factoring in the “Technologically Proficient” Developing Countries, WIPO Development Agenda Workshop, Hong Kong. It is also pertinent to note that technologically proficient developing countries may be in a better position to cross retaliate by suspending patents than other developing countries that lack a sound technology base.
VII INDUCING COMPLIANCE

Any discussion on the WTO enforcement framework and retaliation would not be complete without a discussion on the rationale underlying the WTO “retaliatory framework.” Some argue that the purpose is to induce compliance. Others argue that the primary purpose of the WTO dispute settlement system is to provide “expectation damages” i.e. the complaining state ought to be placed in the position in which it would have been if the defaulting state had complied with WTO law.

Yet another paper argues that there is no single or sole purpose underlying the WTO enforcement framework. The DSU embodies a contradictory mixture of enforcement-encouraging devices (automatic dispute settlement and retaliation, the bar on arbitrators policing the nature of the retaliatory response under Article 22.7 of the DSU) and enforcement-discouraging devices (the strict equivalence standard for assessing permissible intensity, the limits on the form of retaliation, the absence of retrospective remedies and collective retaliation).

This paper does not aim to revisit these scholarly debates on the theoretical underpinnings of the “retaliatory” framework. Rather, its aim is a more modest one i.e. to examine the present retaliatory framework with a view to strategically exploiting its flexibilities to suit the ends of a developing country that wishes to cross-retaliate. As highlighted earlier, given political and economic pressures, the decks are stacked against developing countries in this regard. Given this limited task, how does one go about structuring a model that will induce compliance or amount to a strong enough threat to spur settlement talks? This paper


Illustratively, see Jide Nzelibe, The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization’s Dispute Resolution Mechanism, 6 THEORETICAL ENQUIRIES IN L. 215, 245 (2005) (“In the end, the objective of retaliation is not to compensate protectionist interest groups, but to induce compliance by defaulting states.”). This view is critiqued by some who argue that were compliance the function, the right to retaliate under the present framework would have been an unrestrained one. The fact that there are constraints in terms of intensity and form casts some doubt on the view that the framework is only geared towards inducing compliance. See Sebastian, supra note 25, 365-367.

Warren F. Schwartz & Alan O. Sykes, The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization, 31 J. LEGAL STUD. S179 (2002) S181-83. However, given the nature of the obligations that can be suspended under the WTO Agreements, some argue that it is extremely unlikely that retaliation will have the effect of compensating the complaining state in any real sense. See Sebastian, supra note 25, 367-370.

See Sebastian, supra note 25 who notes that members may have were unclear as to what the rationale ought to have been and the resulting mixture of enforcement measures tainted with some level of inbuilt contradiction may have come about as a result of this diplomatic compromise.
recommends a tiered IP suspension model as one that is likely to work well, given that IP lobbies in countries such as the US and the EU are considerably strong and are likely to pressure their home governments to comply or settle on favourable terms. Specifically, in the Antigua case, one can hazard a guess that if the present settlement talks fructify, the final terms are likely to favour Antigua, as the US may not want to set in motion any precedent for the suspension of its intellectual property rights.

VIII A TIERED SUSPENSION MODEL FOR IP “CROSS-RETAIATION”

Despite authorization for cross-retaliations being granted in favour of Antigua and Ecuador, they have neither exercised this right nor specified as to how they would effectuate such retaliation.

Illustratively, Antigua merely requested that TRIPS obligations (copyrights, trademarks etc) be suspended in relation to US entities/nationals, without specifying as to what would happen thereafter. Could any domestic entity then use such intellectual property? If it does, then how will Antigua compute the losses accruing to the US as a result of such usage, that might otherwise have been an infringement?

No doubt, once the panel determines the level of impairment (e.g. USD 21 million in the case of Antigua), it cannot then question Antigua on the precise nature of IP rights proposed to be suspended and whether such suspension will result in an equivalent “loss” to the US. However, such evaluation to determine “equivalence” may become important, if the defaulting state complains that the retaliation has exceeded the level of nullification or impairment.\footnote{The arbitrators in EC - Bananas III stressed that the modalities of Ecuador’s proposed licensing mechanism (to operate upon the suspension of EU intellectual property rights) is a necessary element to ensure equivalence under Article 22:4 DSU; see EC - Bananas III (Article 22:6 - Ecuador), above n 11, at paras 160-64.}

Unless a complaining state (RS) works out a credible and transparent model in this regard, the resulting uncertainty may be exploited by the defaulting state (SS). A comment from an expert\footnote{Statement of Brendan McGivern, a trade lawyer with White and Case in Geneva, as reported in “WTO gives Antigua right to violate US Copyrights in Gambling Dispute”, International Herald Tribune, December 21, 2007 available at http://www.iht.com/articles/2007/12/21/business/wto.php.} in the light of the arbitral panel decision permitting Antigua to suspend its TRIPS obligations is illustrative:

“Even if Antigua goes ahead with an act of piracy or the refusal to allow the registration of a trademark, the question still remains of how much that act is worth. The Antiguans could say that’s worth USD 50,000, and then the US might say, that’s worth USD 5 million—and I can tell you that the US is going to dog them on every step of the way.”

A model that might work reasonably well and entails a somewhat objective evaluation is considered below. For ease of reference, the section below uses the specific context of India and discusses Indian laws/regulations.

TRIPS provides for the following kinds of intellectual property rights:
Depending on the kind of industries that are prevalent in the defaulting and the complaining states, one or more of the above categories could be suspended. The aim is to ensure that the targeted retaliation proves an effective threat and induces compliance or an amicable settlement within the shortest possible time.

Noteably, in the Antigua case, Antigua requested that the following categories be suspended in relation to US entities/nationals: copyrights, trademarks, designs, patents and undisclosed information.

Contrast this with the Ecuador banana case, where Ecuador asked that the following be suspended: copyright and related rights; Geographical indications and Industrial designs.

The inclusion of geographical indications should come as no surprise, given the relatively high importance of GIs to the EU. The fact that patents have been excluded might be an indication of Ecuador’s low technological base that might not have permitted it to effectively exploit suspended patent rights.

This paper recommends that while requesting the right to retaliate, the complaining state include all categories of IP, since an initially excluded category might turn out to be important later on. Besides, given that complaining states are relieved of any requirement to precisely demonstrate the nature and kind of suspensions to an Article 22.6 panel, member states can opt for an all-pervasive inclusion of IP categories in their retaliatory basket.

However, at the time of actual retaliation, this paper proposes a “tiered suspension” model, whereby certain kinds of IP goods/services are suspended before the others, so as to aid i) a relatively more objective determination of the harm that ensues from the retaliation; and ii) a more effective compliance inducing mechanism.

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127 This TRIPS obligations to protect pharmaceuticals and agro-chemicals from unfair commercial use (commonly referred to as “regulatory data protection”) is one of the most contentious obligations, the exact nature of which is still far from certain. See Shamnad Basheer, Regulatory Data Protection under Article 39.3 of TRIPS: Towards a Compensatory Liability Standard, India Paper No 108, Intellectual Property Institute (IPI), London available at http://www.ip-institute.org.uk/pub.html

128 EC- Bananas III (Ecuador) (Article 22.6), supra note 8.


130 The term “suspended” is used more in a “relative” sense than an “absolute” one i.e. the IP right in question is suspended to the limited extent, that third parties who register with a government authority can use this right without making any payments to the IP rights holder. In short, the IP right in question is only “suspended” qua RS entities that wish to operate/work the rights in question and register their interest with the government.
Preference would be given to those copyrighted works/patented inventions, in respect of which there already exists a “licensing” rate. These could be statutorily established rates (in the context of compulsory licences), or rates carved out by collecting societies (such as rates for public performance of sound recordings), patent pools and the like or rates that are present in existing individual voluntary licensing arrangements. If working with this kind of IP does not yield any results within 3 months of the suspension, then the government permits the suspension of other works/inventions, for which there are no established royalty rates. Lastly, if the working of the second tier also for another 3 months (6 months in total) does not yield the desired results, then the government permits the suspension of trademarks and geographical indications.

This model is explained in detail below:

1. The first kind of IP to be suspended would be copyrighted works/patented inventions, in respect of which there already exists some licensing rate. These would include:

   a. Statutory royalty rates: The laws of many countries provide for the compulsory licensing of certain kinds of copyrighted works. Illustratively, the Indian copyright regime permits the making of “cover versions” of musical works that have already been recorded once, upon the payment of statutory royalties. Such royalties were set by the Indian Copyright Board at 5% of the ordinary retail selling price of the record in 1959 and continue to this day.

   In an IP suspension context, defaulting state (RS) entities can make cover recordings without paying any royalties. The harm occasioned to the IP owner as a result of the suspension is easily ascertainable by computing the royalties that might have been paid to the copyright owner under normal circumstances.

   There are several other provisions in the Indian copyright act that provide for compulsory licensing of copyrighted works. Section 31 provides for two kinds of compulsory licenses in respect of Indian works that have already been published or performed in public once:

   i) where the owner has refused to republish or allow the republication of the work or has refused to allow the performance in public of the work, and by reason of such refusal the work is withheld from the public; or

   ii) where the owner has refused to allow communication to the public by broadcast of such work or in the case of a sound recording, the

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131 Section 52(1)(j) of the Indian Copyright Act, 1957.
work recorded in such sound recording on terms which the complainant considers reasonable.\textsuperscript{133}

Royalty rates in respect of the above two categories were adjudicated upon and set in two cases,\textsuperscript{134} though one case was appealed all the way to the Supreme Court, which remanded the case to the Copyright Board and \textit{inter alia} ruled that they set rates based on more objective criteria and after hearing all necessary stakeholders.\textsuperscript{135}

However, since section 31 is limited to “Indian” works, it will not be of help in an IP cross retaliation context.

Similarly, Section 31A provides for ‘compulsory licence in unpublished Indian works’ and Section 32 provides for ‘licence to produce and publish translations’.

Some of the above provisions do not appear to have invoked till date, with the result that we are devoid of any royalty rates in this context. This paper recommends that till such time as such rates are fixed, such IP works ought not to form part of the IP cross retaliation basket at the first instance.\textsuperscript{136} However, such works could be included if:

i) There is major demand for such works (evident from the declarations of intent to use suspended IP filed by complaining state entities). In such cases, the complaining state ought to ensure that the relevant statutory authorities determine these rates in accordance with existing statutory provisions.

ii) such works are subject to a statutory license in the defaulting state (eg. US) and the rates have been fixed in this state.

iii) Such works have been licensed under the statutory/compulsory licensing provisions in any other country that has a comparable GDP to that of the complaining state.

Compulsory licensing provisions are not exclusive to the copyright regime. Section 11A of the Indian Patents Act provides that generic manufacturers that manufactured copies of drugs prior to the grant of patents (in respect of mailbox applications) can continue producing such drugs upon payment of reasonable royalty.\textsuperscript{137} Unfortunately, till date, this provision has never been invoked and no royalty rates have been fixed.\textsuperscript{138} This paper recommends that till such time as royalty rates are established in respect of this section, a complaining state ought not to permit a retaliation in respect of such IP subject matter at the

\textsuperscript{133} See Pune Video Theatres Association v. Cinemaster, (2002) 24 PTC 242 (in respect of a case under Section 31 (1) (a)) and Music Broadcast Pvt. Ltd. & Ors v. Phonographic Performance Ltd., 2003 (26) PTC 70 (CB) (in respect of a case under Section 31 (1) (b)).

\textsuperscript{134} M/s Entertainment Network (India) Ltd. Vs M/s Super Cassette Industries Ltd (Civil Appeal NO. 5114 of 2005, May 16, 2008).

\textsuperscript{135} It could however be included at a later stage along with other works, for which there are no set/established royalty rates.


\textsuperscript{137} Other grounds for compulsory licensing can be found in section 84 of the Indian Patents act, 1970, which \textit{inter alia} provides for licenses when the patent is not worked in India or when the price of the patented product is excessive.
first instance. However, this category could be subject to retaliation at a later stage, along with other patented inventions, for which there exist no royalty rates, whether voluntary or otherwise.

b. Rates set by collective management organizations (CMO’s) and patent pools: A number of copyright regimes provide for the establishment of CMO’s or collecting societies, which are not-for-profit organisations that license or administer certain uses of copyright material on behalf of their members (who are copyright owners). The licence fees collected are distributed to members.\textsuperscript{139} India has two music related CMO’s that have been constituted under the Copyright Act:\textsuperscript{140} Indian Performing Rights Society (IPRS), which represents music publishers and authors/composers and the Phonographic Performances Limited (PPL), which represents the record industry.\textsuperscript{141} These bodies contain a repertoire of most Indian music and license them out routinely to commercial establishments such as bars and retail outlets that wish to publicly perform such music on set royalty rates. They also have reciprocal relationships with collecting societies overseas. This means that they are generally able to license the works of copyright owners who are members of, or affiliated with, overseas collecting societies with which it has agreements.\textsuperscript{142}

In much the same way that CMO’s administer copyrights on behalf of copyright owners, some patent owners collectively license their inventions through what are commonly termed as patent pools. The license rates are public information in some cases and it is therefore easy to compute the royalties that might have been payable, had the IP rights in question not been suspended.\textsuperscript{143}

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\textsuperscript{139} See Australian Copyright Council, “Copyright Collecting Societies” Information Sheet G36 February 2006.
\textsuperscript{140} Section 33 (3) of the Copyright Act, 1957 provides that the government may permit the establishment of “copyright societies” to administer copyrights in relation to a class of works.
\textsuperscript{141} PPL administers the rights on behalf of about 137 recording companies including HMV (Saregama India), Tips, Universal, Venus, Sony Music, Magnusound, BMG Crescendo, Virgin and others. It categorises its licenses into the following broad categories: Television Licences (for television shows which involve usage of sound recordings); Telecom Related Licences (for ring tones, music messaging, IVRS and other telecom value added services involving the usage of music), Radio Licenses (for the broadcast of music by radio stations); Internet Licences (granted to websites for streaming of music); Events License (granted to organiser of events where performers perform on stage on recorded sound recordings) and Public Performance Licences (for any public performance of sound recordings including the playing of music in cinema halls, hotels, restaurants etc). See their website at \texttt{http://www.pplindia.org/}. IPRS administers similar licenses as above on behalf of music publishers and authors/composers. For IPRS tariff, see \texttt{http://www.iprs.org/tarifflist.asp}
\textsuperscript{142} In so far as US copyrighted sound recordings are concerned, one could argue that Indian establishments do not need to pay any license fees for publicly performing sound recordings to PPL (which has reciprocal arrangements with US copyright societies that represent the interests of US sound recordings companies), since the US does not recognise public performance rights in sound recordings. See Nikhil Krishnamurthy “Sound Advice – Or What You Always Wanted to Know About Phonographic Performance but were Afraid to Ask”, Manupatra Intellectual Property Reports, June 2007. Therefore retaliating against this class of works may be meaningless.
\textsuperscript{143} Although IPRS and patent pools are voluntary licenses, we treat them separately for the reason that there is a conceptual distinction between collective licensing that is more or less open and non discriminatory and voluntary licensing, which may be relatively more closed and discriminatory.
\end{flushright}
c. Voluntary licenses: IP owners regularly enter into voluntary licenses to enable use of the IP subject matter in question. Illustratively, Moser Baer, an Indian disc manufacturer has revolutionized the home entertainment market in India by entering into licenses with a wide range of content producers to manufacture and sell CD's and DVD's of music and movies at a fraction of their normal cost.\footnote{In 2007, Moser Baer entered into various license agreements with content producers and launched Hindi movies on CD's and DVDs at about one tenth of their prevailing market rates i.e. Rs 38 (DVD) and Rs 24 (CD). Although foreign titles are considerably more expensive (Akira Kurosawa & Bergman titles at around Rs.399), they are still considerably cheaper than the normal market rates. According to research, India has over 26 million DVD/ VCD users, growing at a healthy clip of over 25%, and comprising about a fourth of all TV ownership in the country. Despite the huge potential market, home video accounts for a mere 7% of the total film revenues of Rs. 7,900 crore. The US home video market is almost the same revenue size as that of the theatrical market. See company website at <http://www.moserbaer.com/mediaroom.asp?id=27>. Also see <www.moserbaerhomevideo.com>, which offers the entire range of home videos released by Moser Baer till now online.}

Needless to state, some of the rates at which Moser Baer licenses such works from foreign content owners may not be known. In fact the key difference between category (b) and category (c) is that while in (b), the rates are almost always known (though some patent pools are still secretive), in (c), the rates are normally never known. The complaining state ought to have the power to demand such rates from the owners/licenses, once the existence of such a license is brought to their notice. Given that many IP owners consider such licensing rates to be confidential information, a threat of IP cross retaliation could act as an additional compliance inducing factor i.e. it is likely that IP owners in the defaulting state would lobby their government to force a change in its WTO inconsistent law that brought about the retaliation in the first place.\footnote{Sometimes, the very existence of the license itself is treated as a trade secret or as confidential information. Illustratively, see Karen F. Greif and Jon F. Merz, Current Controversies in the Biological Sciences. Case Studies of Policy Challenges from the New Technologies, The MIT Press, Cambridge, 2007, pp 72.}

The other kind of copyrighted work that is often voluntarily licensed for use is computer software. Unlike most other copyrighted goods, any use of the software itself entails a potential infringement since copies are made on the computer, and therefore a software is not typically “sold” but is “licensed” for use.\footnote{Illustratively, the licensing rates for Microsoft products (both normal off the shelf software and the more high end customized software) is found on this reseller website < http://www.buyoriginalms.com/>.}

Voluntary licenses are not limited to copyrights, but extend to other kinds of intellectual property such as patents, designs, plant varieties etc. In this case, the existing licensing rates are taken to compute the “harm” to the IP owner from the unauthorized use of the IP by entities from the retaliating state.
Under the model proposed in this paper, only Tier 1 IP subject matter would be suspended first. Illustratively, any complaining state entity could copy music or movies (in any medium), and the harm would be computed in accordance with the royalty rates normally applicable for which there exist voluntary licensing rates. The highest of existing royalty rates prevailing for that genre and for that medium is then taken to be the harm accruing to the IP owner from an unauthorised use of such work. If there exist no licensing rates in the complaining state, then the rates for very similar IP works in the defaulting state or any country with a gross domestic product (GDP) similar to that of the complaining state shall be taken into account.

2. If Tier I suspension does not yield any significant result even after 3 months of being operational (either in terms of the revenues that adds up or in terms of the fact that the defaulting state does not take any steps at all to change its laws or to settle), then we move to Tier II. At this stage, what is targeted are intellectual property goods (copyrighted works, patented inventions), for which no licensing rates exist. Here the rule would be that the harm that ensues to an IP owner are the total profits that are made by the entity/entities using the suspended IP in question. We assume for the purpose of this model that the complaining state entity would not have made any such profit, but for the use of the suspended IP in question. Therefore irrespective of the value of the IP vis a vis the value of the total product made by the complaining state entity and irrespective of whether or not the markets captured by the complaining state entity would ever have been captured by the IP owner, we assume that all profits would inure to the benefit of the IP owner. We refer to this as the “profits” rule. However, if this amount (say “X”) is less than the difference between the amounts made by the IP owner before and after the retaliation (say “Y”), then the said difference (Y) is preferred over X, in computing harm to the IP owner. Let us assume that:

i) An IP owner makes USD 1000 in the year preceding the retaliation
ii) It makes only USD 500 in the year immediately following the retaliation
iii) The amount of lost profits made by entity (lets say USD 400).

In such a case, USD 500 is to be preferred as the amount of harm to the IP owner by the entry of a complaining entity that uses the IP in question and not USD 400 which represents “lost profits”.

The advantage of Tier II, is that in some cases, it has more of a compliance inducing effect than Tier I, where the IP good in question is anyway licensed at fixed rates. Additional users of Tier I IP goods may not cause any harm to the IP owner, barring the royalties that might have been paid, had the IP in question been in force. Contrast this with Tier II goods such as pharmaceutical patents, a category of invention that is relatively less licensed than most other inventions and which IP rights holder either exploits directly or through an exclusive license.¹⁴⁷

¹⁴⁷ cite
iv) Trademarks and Geographical Indications: As discussed earlier, this ought to be resorted to, only if all of the above categories fail to make any impact on the defaulting state who continues to unabashedly retain a WTO inconsistent law. As discussed, the key problem with suspending trademark rights and permitting any complaining state entity to use the said trademark is the harm that might ensue from customer confusion.

The above tiers need not be strictly adhered to, but could be deviated from by a complaining state if circumstances so warrant. In the Antigua case, the panel held the loss to Antigua by the US’s inconsistent law to be a mere 21 million dollars. Let us now assume that were Antigua to work with Tier 1, it might recover the entire amount relatively quickly. In such case, Antigua might want to think of suspending patents (Tier 2 retaliation), particularly since the threat of suspension of this category might have a greater compliance inducing effect.

Needless to state, there are a number of concerns with the operationalising the above model, which are dealt with below:

A Problems with Valuing IP

The key challenge in any IP cross retaliation model is the uncertainty inherent in valuing intellectual property and determining an optimal royalty rate that represents the true value of loss to the IP owner. As we noted above, the loss occasioned to an IP owner by suspending Tier 1 IP goods (sound recordings collectively licensed by CMO’s) are relatively easy to ascertain. However, in the cases of other IP goods such as patented pharmaceuticals, where no voluntary licenses exist, one cannot be absolutely certain that lost profits accurately represent the true loss to the IP owner.

For one, it may fail to account for the harm that could result from price erosion i.e. a lower priced generic product in the market could force the patentee to also lower prices for its drug. However, price erosion and losses occasioned as a result of such erosion cannot be taken to be a given in every case, and depends on the facts of each case. Illustratively, a lowering of prices by the originator company may not necessarily result in losses—but could help increase its consumer base to capture more customers.

Secondly, under-compensation from price erosion might be offset by overcompensation from other countervailing factors. Consider for example, a situation where, lower prices or more extensive distribution networks cause an Indian generic manufacturer to capture markets that the US intellectual property owner may never have captured in the first place.

Owing to the fact that determining the precise boundaries of such “additional” markets are very complex, we assume, for the purposes of our model, that revenues from these additional markets would have also accrued to the benefit of the IP owner. This

148 See the US –EU case
149 US case law stipulates that “...claims of price erosion must be discounted to the extent that the higher prices a patentee could have charged absent competition would have driven away some consumers.” See Mark Lemley, Distinguishing Lost Profits From Reasonable Royalties, Research Paper No. 1133173, Stanford Public Law and Legal Theory Working Papers.
overcompensation of the IP owner could theoretically offset any under compensation resulting from price erosion.

What if the IP right used is but a small component of the entire product? Would we still attribute the entire value of the product to the IP used? For the sake of convenience and ease of computation, this paper assumes this to be the case. Such a “valuation” approach comes close to that adopted by some US cases where courts typically judge the value of an IP good based on the entire market value of the good/service in question. In other words, the “entire market value” approach stipulates that irrespective of the relative contribution of the “IP” in question to the total value of the product, the entire market value of good/service in question is used to compute the damages that a patent owner is entitled to. However, whilst in the US cases, in order to be entitled to such market value, the plaintiff has to prove that the patented feature is what caused the sale, so that the defendant’s infringement garnered a sale that would otherwise have gone to the patentee, our model assumes this to be the case in every situation where a patented feature is part of the product/service of an RS entity.

Like the “additional markets” matrix discussed above, the “entire market value” approach also results in overcompensating the IP owner. And to this extent, it offsets any potential losses results from price erosion, that may occur in the context of other IP goods that form part of the cross retaliation basket.

It bears reiteration that the current WTO framework on cross retaliation does not mandate a technically accurate estimation of losses, particularly since such an estimation is next to impossible in the context of intellectual property. Rather a broad estimation that is not wholly arbitrary would suffice.

It is interesting to note that the Article 25 panel in the US-EU copyright dispute admits of imperfections in any attempt to accurately value the loss from an unauthorized IP use:

150 See Lemley, note 153.

153 Since the amount of harm computed through such a model may tend to be on the higher side, owing to assumptions in relation to “additional markets” and “entire market” value, the cause for complaint by the defaulting state is likely to be minimal.
... in the absence of some important data, we have had to make ourselves a number of estimations and, in some cases, make certain assumptions based on what we perceived to be the most reasonable estimate in the light of the arguments of the parties. In doing so, we have attempted to arrive at a number that is in the right order of magnitude, but we recognize that it may not be entirely accurate.¹⁵⁴

This demonstrates that a broad estimate would suffice and one does not need to be technically precise.¹⁵⁵

Importantly, the burden of proving that the complaining state has recovered more than what was due to it through the suspension of IP rights is on the defaulting state. So long as the model implemented by the complaining state is not wholly arbitrary, it is very difficult for the defaulting state to discharge the above mentioned burden.

Given the above reality, the modest aim of this paper is to merely throw up one credible model for IP suspension and then leave it to countries to fine-tune it as time goes by. After all, it is well nigh impossible to begin with a perfect model from day one.

B International Sales

A key limitation of any IP Cross Retaliation model is that the retaliator cannot sell its goods in international markets. In the specific US-Antigua example, Antigua would have to ensure that the IP suspension does not extend beyond its borders i.e. DVD’s containing US copyrighted content manufactured by Antiguans do not reach the shores of another country. Most intellectual property categories (patents, copyrights etc) confer on their owners the exclusive right to manufacture, sell, import and export. DVD’s that find their way from Antigua to New Delhi violate the exclusive right to “import” in New Delhi. India is still bound by its TRIPS obligations and the patent or copyright owner can prevent such imports into India. This was one of the concerns expressed by the US in the Antigua case.¹⁵⁶

In the Ecuador 22.6 case, the panel rightly noted:

“An authorization of a suspension requested by Ecuador does of course not entitle other WTO members to derogate from any of their obligations under the TRIPS Agreement. Consequently such DSB authorization to Ecuador cannot be construed by other WTO members to reduce their obligations under Part III of the TRIPS Agreement in regard to imports entering their customs territories.”¹⁵⁷


¹⁵⁵ See Sebastian, supra note 25, 379 who notes that “...the vast majority of arbitral awards concerning the permissible intensity of retaliation will be arbitrary to a certain degree.”

¹⁵⁶ The United States feared that without strict supervision by the Government of Antigua, there would be no basis to determine whether the operators were abusing the authorization to suspend TRIPS concessions by offering pirated intellectual property in jurisdictions outside Antigua. US Antigua (22.6 Arbitration), ¶ 5.3.

¹⁵⁷ EC- Bananas III (Ecuador)(Article 22.6), supra note 8, 156. See Article 51 of TRIPS which provides that “members shall adopt procedures to enable a right holder who had valid grounds for suspecting that the importation of counterfeit trade or pirated copyright goods may take place” to request customs authorities to suspend release into free circulation of such goods.
However, Antigua is free to export to a non-WTO member or to a country where the IP right does not exist for whatever reason (most likely in the case of patented goods). It is interesting to note a parallel import provision in India’s patent regime which would seem to make legal any exports from Antigua (exercising its rights of cross retaliation) to India. Section 107(A) (b) of India’s patent regime mandates that in order for an import to be legal, the exporter of the patented product must be ‘duly authorised under the law to produce and sell or distribute the product’. Thus, given the cross retaliation authorization to Antigua and the suspension of IP in Antigua, an Antiguan exporter would presumably be ‘duly authorised’ under the laws of Antigua to ‘sell or distribute the product’, including to India.

At a policy level, an “international sales” model could be justified on the basis that all signatories to a treaty have a joint interest in seeing it implemented. Therefore, some form of “collective retaliation” ought to be permitted. However, such a philosophy is antithetical to the current WTO norms, given that IP rights are territorial and suspension in one territory need not entail suspension in another. Illustratively, see the Byrd decision where it was held that the relevant trade damage for establishing retaliation rights is not the total global trade effects of the illegal measure, but rather the more limited impact on the trade of the requesting party. In other words, countries are only entitled to retaliate in amounts equal to the trade effects of the illegal measure on their own exports regardless of the global effects of the illegal measure. Specifically, the arbitrator rejected the complainants’ claims that they should be allowed to consider not only the trade damage suffered by their own exporters, but should additionally be allowed to allocate among themselves the trade damage suffered by countries that did not participate in the case.

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158 See Shamnad Basheer and Mrinalini Kochupillai: Exhausting Patent Rights in India”, JIPR, 2008. However, it may argued that such a provision may contravene TRIPS.

159 Illustratively, see Khanna (n ). However, see Jide Nzelibe, “The Case Against Reforming the WTO’s Enforcement Mechanism” who argues that “collective or third party sanctions are likely to increase the global level of protectionism without any offsetting compliance benefits”. The only form of collective retaliation now permissible is for member states to file complaints and then seek retaliatory measures (for non compliance) in their individual capacity. They could then trade in any IP goods (produced by their own domestic entities using suspended IP of defaulting states) between themselves, by having the relevant parallel import provisions etc.

160 The complaining members requested the right to take measures that would conjunctively inflict on the United States detrimental effects equivalent to the detrimental effects the United States had inflicted on the entire WTO Membership. The United States responded that what was relevant to the task of the Arbitrator was the detrimental effect on the particular Member seeking retaliation. According to the United States, a WTO Member cannot retaliate for detrimental effects experienced by third countries. The Arbitral Panel accepted the United States’ position. This ruling requires panels to segregate and allocate detrimental effects to individual WTO Members. The panel ruled that “a Requesting Party may only request suspension of concessions or other obligations with respect to the trade effect caused by disbursements under the [Continued Dumping and Subsidy Act of 2000] relating to its own exports.” U.S.-Byrd Amendment (Article 22.6), supra note 20, ¶ 4.16 R (emphasis added). However, a slightly different logic is followed in the context of subsidy norm violation complaints. The amount-of-subsidy approach has been used in every prohibited subsidy case decided pursuant to the special “appropriateness” standard in Article 4.10 of the SCM Agreement. It differs markedly from the equality-of-harm approach, as the detrimental effects experienced by the complaining state are completely irrelevant to the calculation of its corresponding right to retaliate. Moreover, it appears to allow one WTO Member to retaliate for consequences inflicted on the entire WTO Membership. However, there are concerns that this approach is not anchored in any plausible legal interpretation of the term “appropriate.” See Thomas Sebastian:

In the absence of a WTO amendment that permits some form of collective retaliation, international sales (exports) from the complaining state are illegal, unless the law of the “importing” country permits this, as appears to be the case with the Indian parallel import provision discussed above.

And in such cases, we make the same assumption that we did during our discussion of the other models i.e. any profits made out of the sales by Antiguan manufacturers (both domestically and internationally) would be used to compute the “losses” to the US, regardless of whether the US IP owner would have captured all these markets. And regardless of the exact value of IP to the overall value of the good/service in question that uses such suspended IP.

Antigua cannot be expected to micro-monitor the situation and track each possible instance of export to determine whether or not such exports are legal. It must therefore place the onus of legal compliance on the Antiguan entities that wish to use the suspended IP belonging to the defaulting state. If at all there is a transgression in this regard, then the IP owner has a claim against the concerned operator and/or against the importer who brings such goods/service to another country and not against Antigua.

C  Sunk Costs

Upon IP cross retaliation taking effect, complaining state entities may invest considerable sums of money into the manufacture/use of IP goods belonging to defaulting state entities (hereafter referred to as “suspended IP goods”). They may even invest in new infrastructure for this purpose. Were the WTO inconsistent laws by the defaulting state to be removed at some uncertain time in future, such entities would have to stop availing of the suspended IP. This would cause them considerable losses, particularly as the time frame for such settlement or removal cannot be known in advance. And this uncertainty may disincentivise them from availing of suspended IP goods in the first place.

As Subramaniam and Watal note162:

“...if the retaliatory action has to be reversed because partner countries come back into compliance, then WTO rules would require the restoration of IP rights. This would mean that alternative suppliers will have to cease production. This may cause such uncertainty that alternative suppliers might not enter the market in the first place.”

The way out of this quandary is to enable complaining state entities to continue using defaulting state IP goods even after the cross retaliation terminates by virtue of a statutory compulsory license. This is easy in the case of Tier 1 (a) goods, since these are subject to statutory licenses in any case. The only difference in a post retaliation environment would be

162 Subramanian, A., and J. Watal, 1999, “TRIPs as an Enforcement Device for Developing Countries in the WTO,” 409. Also see Ecuador case, where the arbitrators note that “Given this temporary nature of the suspension of concessions or other obligations, economic actors in Ecuador should be fully aware of the temporary nature of the suspension of certain TRIPS obligations so as to minimise the risk of them entering into investments and activities which might not prove viable in the longer term.
that the complaining state entity begins paying royalty rates under the relevant statute. As for Tier I (b) goods, a similar situation is likely to prevail, as complaining state entities are not likely to be prevented by the IP owner from paying the requisite royalties and using the IP in question.

It is in the context of Tier II IP goods that one faces problems.

If such goods are copyrighted works, it is relatively easy for a complaining state entity to desist from continued exploitation, since it is unlikely that any substantial investment would have been incurred by the entity in question i.e. the cost of replicating discs carrying copyrighted content such as music, movies or software is minimal. However, in the context of patented goods, complaining state entities may have invested substantial sums in infrastructure to produce and manufacture such goods. In such cases, the law ought to provide that all complaining state entities that had made substantial investments in order to work the suspended IP rights would be conferred an automatic compulsory licence to continue using such IP. The only requirement is that they pay a “reasonable” royalty to the IP owner.

Such provision would ensure that complaining state entities are not disincentivised from operating a suspended IP, in the fear that they would have to stop at an undefined date and that their investments in manufacture etc would come to naught. However, what ought the royalty rates to be in such a case?

In order to make it administratively easier to operate, one could stipulate the following:

1. Where the IP in question or a comparable technology/good/service has already been licensed (whether “voluntary” or “non voluntary”), the “fair” royalty ought to be the highest royalty rate or other amount prevailing in any part of the world. And parties that wish to work the suspended intellectual property shall submit statements of such existing royalty rates. If none exist, parties shall make a best estimate of such royalties. Where actual royalties or rates exist for the use of intellectual property, the complaining state authority shall declare these royalties/rates as the “notional” license fee that might have been paid. Where none exist, it shall examine the rates submitted by parties, study rates prevailing for similar IP goods, whether in Antigua or countries that share similar economies, and then determine the royalty rate. It shall, as far as possible, strive to set flat rates and may pick the highest royalty rate prevailing in any one sector of technology/content and deem this to be the notional royalty for all sectors.

2. If there is no existing license or other rates as above mentioned anywhere in the world,

163 It is pertinent to note that only technologically proficient developing countries such as India and Brazil may be in any position to cross retaliate by suspending patents: to this extent the problem of sunk costs may be one that is specific to them.
then one assumes that a flat royalty rate of 5% is an appropriate one. In the context of pharmaceutical patents at least (widely acknowledged as the poster boy for the proposition that patents are necessary to incentivise innovation), a UNDP Human Development Report appears to recommend a base royalty rate of 4% of the price of the generic product.\textsuperscript{165} If 4% is considered reasonable for a technology sector which involves considerable R&D and is often the poster child for the proposition that strong IP rights are necessary for innovation, a 5% would appear more than reasonable for other technology sectors.

The question now is: would the operation of a compulsory license post the termination of the offending measure (when a determination that the complaining state has recovered an amount equivalent to the amount of nullification in that year) as per the above model be compliant with TRIPS? TRIPS leaves considerable flexibility in the hands of member states to determine the grounds on which it can issue compulsory licenses.\textsuperscript{166} In fact, the Doha Declaration goes to the extent of clarifying that members are free to determine the grounds for compulsory licence. Therefore, a member is free to stipulate that a compulsory licensing shall be granted to entities that wish to operate suspended IP and incur enormous infrastructure and other costs whilst doing so. The prospect of a compulsory licence at the end of the retaliation period offers a sufficient incentive to such entities to make investments in the first place.

However, Article 31 of TRIPS states that authorization for compulsory licensing shall be considered on “individual merits”. Could an argument therefore be made that any ground which categorically subjects a class of inventions to a compulsory license violates Article 31 (a), as the determination of the need for a compulsory licence is not made on individual merits?

The import of the term “on its individual merits” is not fully clear. A member state might argue that when faced with an application for a compulsory licence in this regard, it would (whether through its judiciary or administrative authority) still make a determination on individual merits. In other words, in our example above, only those Antiguan entities that have made substantial investments in operating the suspended IP would be entitled to a compulsory license. The expenditures incurred in infrastructure etc ought to be taken into account by the authority whilst deciding on the compulsory licensing application in this regard. In some ways, this provision is similar to one in the Indian patents act that stipulates that generic manufacturers that have made significant investments in manufacturing drugs

\textsuperscript{165} This base royalty rate has been derived from Canadian guidelines on this point. The UNDP report recommends that this can be increased or decreased by 2% for developing countries, depending upon such factors as the degree to which a medicine is particularly innovative, or the role of governments in paying for R&D. See Human Development Report, 2001, page 107-108 available at http://hdr.undp.org/en/media/completenew1.pdf (last visited Aug. 8, 2008). The benefits of this approach include its simplicity, predictability, ease of administration and ability to incorporate certain factors particular to a licensed product (e.g. degree to which it is innovative). See James Love, Remuneration Guidelines for Non-Voluntary Use of a Patent on Medical Technologies, Paper published by the World Health Organization. HEALTH ECONOMICS AND DRUGS, TCM SERIES No. 18 (2005).

\textsuperscript{166} Article 31 of TRIPS
that turn out to be protected by patents at a later point in time could continue producing such drugs upon the payment of a reasonable royalty.\textsuperscript{167}

Article 31 also requires that if a compulsory license for a patent issues, then certain other conditions need to be met i.e. the patentee has to be paid a reasonable royalty, the parties have to first voluntarily negotiate etc.\textsuperscript{168} Here again, the complaining state law permitting RS entities to continue using IP belonging to SS entities ought to clearly comply with all these conditions.

The overarching assumption underlying the cross retaliation model espoused in this paper is this: if the retaliation model poses a credible threat and induces lobbying by the IP producers in the defaulting state, it would not need to be operationalized at all. And even if operationalised, it is not likely to continue beyond a year. Therefore, one is not likely to reach this stage of having to invoke a compulsory licensing mechanism to enable RS entities that invested considerably sums to continue using suspended IP. Therefore, worrying about TRIPS implications of this compulsory licensing provision may be more academic than real.

D Lack of Technology Base

The fourth problem with the model emerges when one considers IP covering technology intensive goods such as pharmaceutical drugs and countries such as Antigua that may not be technologically proficient. Assume that Pfizer has an Antiguan patent covering Lipitor, an anti-diabetic pill. Now, even if the patent can be suspended and made free for use by the Antiguans, how many Antiguan entities can produce generics versions of this drug?\textsuperscript{169} Virtually none, as they do not have the necessary technical expertise or other capacity necessary to produce such drugs. Without some basic local capacity, it is impossible for foreign manufacturers (such as Indian generics) also to fill this vacuum. Let us assume that this is the case not just with respect to pharmaceuticals, but with respect to all kinds of technology i.e. in other words, the science and technology base of Antigua is so poor that its local industry cannot work any of the patents belonging to US entities, be they pharmaceutical, electrical or mechanical.\textsuperscript{170} To this extent, one needs to strike a distinction between developing countries and “technology proficient” developing countries.\textsuperscript{171}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{167}section 11A (cite)
\item \textsuperscript{168}Article 31 (k) of TRIPS
\item \textsuperscript{169}as Watal notes: “A practical complication arises when retaliating in TRIPS: benefits will accrue to the retaliating country only if alternative sources of supply quickly substitute for the product whose intellectual property right has been withdrawn. Thus the retaliation must be such as to ensure quick alternative supplies to the market that will dilute or eliminate the legal monopoly granted.”
\item \textsuperscript{170}As discussed earlier, this could be one of the reasons underlying Ecuador’s decision to not ask for a suspension of patent rights, but only of copyrights, trademarks and geographical indications.
\item \textsuperscript{171}The term “technologically proficient” developing country appears to have been first used by Professor John Barton. \textit{See John Barton “Catch-up Strategies for Technologically Proficient Developing Nations”, Simposio Nacional de Pesquisa de Administracao em Ciencia e Tecnologia, Rio de Janeiro (1991). For more on the implications of this distinction for intellectual property policy, see S Basheer and A Primi. The WIPO Development Agenda: Factoring in the “Technologically Proficient” Developing Countries, Implementing WIPO’s Development Agenda” (Waterloo, ON: Wilfred Laurier University Press/Centre for International Governance Innovation/International Development Research Centre, 2009); draft available at}
\end{enumerate}
\end{footnotesize}
cross-retaliation tool may prove a stronger one in the hands of technologically proficient developing countries.

In such a case, Antigua may have to rely mainly on suspending US copyrights i.e. mainly Tier 1 goods. Assuming the domestic market in Antigua is a small one (even with the rapid IP tourism that is likely to emerge from its reputation as a destination for perfectly legitimate low cost movies, music and software), Antigua may not be able to recover sums that are equivalent to the loss caused to it by nullification/impairment by the US. Of course, Antigua might try and create an international market in such goods and thereby increase revenues. However, the current WTO and TRIPS framework does not permit Antigua to sell to any other WTO jurisdiction where the IP right is in force, a point that was discussed earlier. 172

If the copyright suspension strategy discussed above does not yield the required dividends (since the market is too small), Antigua could also resort to a suspension of trademark rights belonging to US entities—however, as noted earlier, this is problematic owing to the customer confusion rationale implicit in the protection of trademarks in most jurisdictions worldwide. It should therefore be resorted to only as a last resort.

E Violating Other International Treaties

The last, but perhaps most significant concern with the above model is that it runs the risk of implicating other international treaties dealing with intellectual property. However, as will be demonstrated below, in so far as the Berne and Paris Conventions are concerned, this fear is largely unfounded.

The Berne Convention173 and the Paris Convention174 are amongst the earliest international intellectual property instruments and are in many respects, predecessors to TRIPS.

It is important to note that some of the operative provisions of the Berne Convention and the Paris Convention have been incorporated into TRIPS. 175 Notably, the Berne Convention introduces the notion of “national treatment”, wherein each Member State ought to accord to nationals of other member States the same level of copyright protection provided to its

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172 The current retaliation framework also does not permit any system of collective retaliation (unless members ger together and file complaints in their individual capacity and request retaliation also in their individual capacities) or auctioning of the right to retaliate. The scope of this paper is limited to considering only those remedies that are permissible under the existing WTO framework.

173 The Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"), signed on September 9, 1886 and effective on December 5, 1887, was the first multilateral copyright treaty. The Berne Convention strives to provide protection for literary, scientific, and artistic works. The Berne Convention has 164 signatories, as of Aug 8, 2008. See http://www.wipo.int/treaties/en/ip/berne/.

174 The Paris Convention for the Protection of Industrial Property ("Paris Convention"), signed on March 20, 1883, is one of the oldest international agreements on the protection of intellectual property rights. Signatories to the Paris Convention include over 100 other countries. The objective of the Paris Convention is to provide "protection of industrial property". The term "industrial property" includes patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition." See http://www.wipo.int/treaties/en/ip/paris/.

175 Article 9.1 of TRIPS states that "Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto." Similarly, Article 2.1 of TRIPS states that “…Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention..”
own citizens.\textsuperscript{176} Under this principle, a work of a United States national that is first generated in United States will receive the same protection in other Berne Union countries (such as Antigua), as those countries accord their own citizens (nationals). In other words, unless Antigua suspends copyrights to its own citizens, it commits a breach when it does not guarantee the same right to US citizens.

The Berne Convention also imposes substantive copyright standards by insisting that all literary and artistic works are to be protected, through certain exclusive rights granted for a minimum duration of time.\textsuperscript{177} And these substantive obligations have been carried over into the TRIPS regime.\textsuperscript{178}

Like the Berne Convention, the Paris Convention also provides for the principle of national treatment. However, unlike the Berne Convention, members of the Paris Convention are not required to abide by any substantive standards of patent protection. As a result, Antigua has the individual choice to provide as little or as much intellectual property protection as it decides, so long as it treats both domestic and foreign claimants similarly under its national intellectual property law. Here again, unless it suspends the patent rights of Antiguan nationals, a cross-retaliation strategy involving the suspension of rights of US owners alone will lead to a breach of the Paris Convention.

Antigua and every other WTO member (including those that never signed on to Berne or Paris) are bound by the above-mentioned “incorporated provisions”. And in respect of such provisions, they are obligated to comply (and susceptible to a WTO challenge at the DSB if they do not), in much the same way as any other provision under TRIPS.

TRIPS does not repeal the Berne convention or the Paris convention. On the contrary, Article 2.2 clearly states that nothing in TRIPS “shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.”

In other words, countries that are members of the Berne Convention (or Paris Convention) and the WTO continue to be bound by each of these instruments separately. Antigua is a party to both the Berne and Paris Conventions.\textsuperscript{179} If it cross retaliates in respect of the “incorporated” provisions, the defaulting state could argue that Antigua has violated its obligations under the Berne or Paris Conventions. The “national treatment” obligation alone

\begin{itemize}
\item \textsuperscript{176} See Berne Convention Art. V which states that "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."
\item \textsuperscript{177} Berne defines a non-exhaustive list of protected works: books and other writings; dramatic or dramatico-musical works; choreographic works; musical compositions with or without words; cinematographic works and works expressed by a process analogous to cinematography; works of drawing, painting, architecture, and sculpture; photographic works; and derivative works (translations, adaptations, arrangements of music). It also provides that duration of copyright shall be for the life of the author plus 50 years.
\item \textsuperscript{178} One of the key exceptions in this regard is “moral rights” under Article 6bis of the Berne Convention—Article 9.1 of TRIPS states that members shall not have rights or obligations in respect of the rights conferred under Article 6bis of the Berne Convention.
\item \textsuperscript{179} Both these Conventions, entered into force, with respect to Antigua and Barbuda, on March 17, 2000. See http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_214.html. See also http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2.
\end{itemize}
under both Berne and Paris is enough to ensure that Antigua’s actions of suspending the IP of US entities tantamount to a breach of the Berne or Paris Conventions. Unless Antigua decides to suspend the IP rights of its own citizens—something that is not feasible; or it decides to retaliate in IP sectors that do not find mention in either the Paris or Berne Conventions i.e. plant varieties, semiconductors. Here again, since the trade with the US is minimal, suspending IP rights will not help secure compliance. The real areas where Antigua can hit hard are in suspending US copyrights (movies/songs/software) and trademarks. Any retaliation in these areas is likely to attract the Berne or Paris Convention provisions.

Under both the conventions, disputes between member nations are to be settled by the International Court of Justice ("ICJ"). However, members may, by declarations to this effect, oust the jurisdiction of the ICJ. Unfortunately, Antigua, like many other members, has not made any such declaration. Under Section 33 (2), such a declaration ought to be made at the time of signing of the Act or depositing the instrument of ratification of accession. Therefore, even if it wishes to do so, Antigua cannot make such a declaration now.

From the above, it is clear that there is a theoretical possibility that the US could drag Antigua before the ICJ for a technical breach of the Berne/Paris Conventions. If the ICJ rules against Antigua, the US could also move to enforce the ruling via the Security Council. However, there are exceptional countervailing circumstances that militate against such an interpretation.

Upholding the Berne or Paris Conventions, despite a WTO authorization to cross-retaliate will render redundant a key aspect of the WTO retaliatory framework. In other words, there is a direct conflict between WTO provisions on cross-retaliation on the one hand and of the Berne/Paris provisions on the other.

Article 30 of the Vienna Convention of the Law of Treaties (VCLT) provides that in such circumstances, the earlier treaty (Berne/Paris) applies only to the extent that its provisions are compatible with those of the later treaty (WTO/TRIPS). Article 30 (3) reads as below:

“When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”

Unfortunately, not all Berne and Paris members are party to the WTO and therefore Article 30(3) does not apply in its entirety. One has to therefore resort to Article 30(4) which goes on to state:

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180 Article 28(1) of the Paris Convention and Article 33 (1) of the Berne Convention.
181 Article 28(2) of the Paris Convention and Article 33(2) of the Berne Convention.
182 Article 33 (2) states that “each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph 1.” Turkey made an Article 33 (2) declaration ten years after it had deposited its instrument of accession. For this reason, it was challenged by Germany. See “Berne Notification No. 230” available at http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_230.html See also Germany’s challenge available at http://www.wipo.int/edocs/notdocs/en/berne/treaty_berne_242.html.
When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States Parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

In the case at hand, both Antigua and the US are signatories of both Berne and Paris on the one hand, and of the WTO/TRIPS on the other. Therefore, in so far as these two countries are concerned, it could be argued that Article 30 (3) applies. Therefore, the WTO/TRIPS will trump any “incompatible” provisions under Berne/Paris, as explained below.

There is a direct conflict between the right to cross-retaliate by suspending IP under TRIPS/WTO and some of the provisions under Berne and Paris which have been incorporated into TRIPS such as “national treatment”. It is the US that has blatantly disregarded a WTO commitment and has, despite panel and appellate body rulings to this effect, failed to comply. A WTO arbitrator has found that the only meaningful way for Antigua to secure compliance is by complaining in respect of TRIPS i.e. by suspending IP obligations. No other retaliation is likely to have any effect on the US.

However, if such retaliation were to be construed as amounting to a Berne or Paris violation, it virtually renders the enforcement provisions under the WTO meaningless. As discussed earlier, there is no effective way for Antigua to narrowly retaliate by suspending IP obligations that fall outside the purview of the Paris and Berne Conventions. Therefore, under Article 30 (3) and (4) of the VCLT, the right to retaliate by suspending TRIPS obligations, a right guaranteed under the DSU of the WTO ought to prevail.183 In other words, the Berne and Paris provisions that are in such conflict ought to be considered as “incompatible”, as per Article 30 (3).

The question arises as to whether TRIPS/WTO can be considered as a successive treaty to Berne/Paris, particularly since Article 30 makes it clear that the provision can only apply to “successive” treaties relating to the same “subject matter”.184

The fact that the operative provisions of both Berne and Paris have been incorporated verbatim into TRIPS/WTO would suggest some level of “succession”. In fact, the key reason for such incorporation was to avail of the strong enforcement framework under the WTO. This is more than borne out by the fact that despite the existence of dispute resolution provisions under both Berne and the Paris Conventions discussed above, no country has so far invoked them, owing to a perception that they were ineffective.185 As a Government Accountability Office (GAO) report points out:

183 See Subramaniam & Watal, supra note 106, who make this point and go on to note that “this argument also applies to bilateral investment treaties, as they are always subordinate to more specific international treaties to which the countries are party.”

184 Art 30 (1) states in pertinent part that “…the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs”.

“Knowledgeable government officials agree that [existing multilateral intellectual property agreements] do not contain effective provisions for challenging countries that do not meet their obligations.”

The above interpretation may be questioned in the light of Article 2.2 of TRIPS. As discussed earlier, this Article states that nothing in TRIPS shall derogate from obligations of members states under either Paris or Berne. In other words, obligations under Paris and Berne are to subsist independently even after the advent of TRIPS.

So how does one reconcile Article 2.2 with our interpretation of Article 30 of the Vienna Convention, by virtue of which TRIPS would trump “incompatible” provisions under the Berne and Paris Conventions. The key word here is “incompatible”.

Article 6bis of the Berne Convention guaranteeing “moral rights” has not been incorporated into TRIPS. Therefore, an order of cross retaliation cannot permit Antigua to suspend the moral rights of US authors. Contrast this with provisions such as national treatment under Berne and Paris which are trumped by TRIPS during a cross-retaliation authorization, as being “incompatible” provisions.

Apart from the above, one could also argue that Article 2.2 of the TRIPS Agreement only refers to Articles I through IV, whereas the dispute settlement mechanism is under Article V. Therefore Article V which incorporates the dispute settlement mechanism including the cross-retaliatory mechanism under Article 22 is not subject to the saving clause in Article 2.2.. The problem with this argument however is that the logic can be extended to argue that Antigua could even cross-retaliate by suspending its moral rights obligations to US nationals under Berne. And this reading may be difficult to square with the spirit underlying Article 2.2, which is to ensure that some provisions of Berne and Paris would continue to operate independently, even after the advent of TRIPS.

In the worst case scenario, assuming that none of the above arguments that favour Antigua hold good, Antigua could ignore the threat of any potential sanction for breaching either Berne or Paris. It bears reiteration that it is the US that has contravened a key WTO commitment and thereby seriously prejudiced a much poorer trading partner, Antigua. Antigua’s only realistic way of securing compliance is by suspending IP rights. If this remedy were to be watered down owing to a legal technicality flowing from a reading of TRIPS and the Berne/Paris Conventions, it would result in an inequitable situation.

With the moral high ground in favour of Antigua, it is difficult to see how a technical breach

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187 supra note 138. See also EC- Bananas III (Ecuador) (Article 22.6), supra note 8, 149 which stresses this point.
188 EC- Bananas III (Ecuador)(Article 22.6), supra note 8, 34.
189 Ibid 150.
190 The panel in the EC Bananas case appears to hint at such a possibility. However, they do not elaborate on this aspect. Rather they are careful to note that: “It is not within our jurisdiction as Arbitrators, acting pursuant to Article 22.6 of the DSU to pass judgment on whether Ecuador, by suspending, once authorized by the DSU, certain TRIPS obligations, would act inconsistently with its international obligations arising from treaties other than the agreements covered by the WTO (e.g. the Paris, Berne and Rome Conventions which Ecuador has ratified).” Ibid 152.
of either the Berne or Paris Conventions will attract the ire of the Security Council. It seems highly unlikely that the Security Council will waste its time on Intellectual Property violations, particularly when such violations have been authorized by the WTO.\footnote{191}{A commentator notes: “Even if an ICJ intellectual property judgment were obtained, it would never be enforced…. The Security Council would almost certainly not act to enforce a judgment regarding intellectual property.”} Given the track record of the US in complying with ICJ rulings,\footnote{192}{The US has shown scant regard for ICJ rulings, since the 1986 Nicaragua decision, which was highly critical of the US means to change the political landscape in Central America and led the US to terminate its acceptance of the Court's jurisdiction under the optional clause. In recent years, the US has defied the Court by disregarding provisional measures in the Breard and LaGrand cases; and, despite some cautious steps towards responding to the equally adverse Avena judgment, it has eventually withdrawn from the jurisdiction of the Court under the Consular Convention. See \textit{Nico Krisch, International law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order}, E.J.I.L. 391-392, (2005).} it will be paradoxical for the US to insist upon compliance in this case, particularly when it has blatantly breached a WTO commitment and comes to the Security Council with unclean hands.\footnote{193}{This proposition stems from the larger doctrine of "unclean hands" in international law: A State which is guilty of illegal conduct may be deprived of the necessary locus standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality--in short were provoked by it. \textit{See Gerald Fitzmaurice, The General Principles of International Law}, 92 \textsc{Recueil Des Cours} 119 (1957-II). \textit{See also David J. Bederman, Contributory Fault and State Responsibility}, 30 \textsc{Va. J. Int'l L.} 335 (1990); cf. Case of Seth Driggs (U.S. v. Venez.), excerpted in \textit{Opinions Delivered by the Commissioners in the Principal Cases} 403, 403-04 (U.S.-Venez. Comm'n 1890).} If not for anything else, China, which has been at the receiving end of WTO actions by the US for allegedly failing to comply with TRIPS, is likely to oppose any such move.\footnote{194}{\textit{See China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights: Panel Report} available at, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm}

Despite our inability to accurately predict the outcome at the Security Council, should the above situation present itself, it is reasonable to assume that the Council is unlikely to take Antigua to task for doing that which is equitable in the circumstances. In fact, it might even be argued that based on the equitable considerations outlined above, the ICJ may not even find that the complaining state has breached international law.

Notwithstanding the concerns raised above, it ought to be borne in mind that the model is put in place only to operate as a credible threat and induce compliance or an agreeable settlement by the US. The paper assumes that if the threat is credible enough, given the strength of IP lobbies in the developed world, violating states belonging to the developed world would readily comply or settle and the model would not need to be operated at all. Therefore technical accuracy in valuation etc may not be that much of a hindrance in evolving and implementing such a model.

\section{F Violating Bilateral Treaties}

Apart from multilateral conventions such as Berne and Paris, regional and bilateral trade agreements also pose challenges for an IP cross retaliation model. In particular, the US is known to have signed up a number of free trade agreements (FTA’s) containing a number of TRIPS plus provisions with several developing countries. A number of these FTA’s include “investment” protection provisions that provide enforceable rights to private investors. Apart from this, separate bilateral investment protection treaties (BIT) have been signed
between a number of countries. Thus far, there does not appear to have been any case that has tested the enforceability or otherwise of investor protection clauses that pertain to a perceived violation of IP rights.

For the purposes of this paper, one is not clear as to whether an IP suspension model would be compatible with obligations under such free trade and investment protection agreements outlined above. In such a context, it may be helpful to distinguish between IP obligations in such agreements that are consistent with TRIPS and IP obligations that are TRIPS plus or outside the purview of TRIPS.

It would appear that in so far as TRIPS obligations have been inducted into FTA’s or BIT’s, those obligations could be suspended without attracting penalties under the FTA or BIT in question.

However, in so far as the TRIPS plus provisions are concerned, they would continue to be enforceable independently. In such cases, since TRIPS obligations are not involved at all, they cannot be suspended, without the complaining state being liable for an independent breach of the FTA or BIT in question.

IX IP TAX MODEL

Apart from the above model, one might also consider an IP tax model as a potentially effective sling that Antigua could build into its domestic law and use against the US. As a first step, Antigua imposes a tax on all IP goods from the US, which are likely to include the following:

i) goods with patent protection (electronics, pharmaceuticals, etc)
ii) goods that are protected by copyright (music, movies, software etc)
iii) goods protected by registered designs
iv) goods/services with trademarks

Let us assume for the sake of argument that such a tax would be in the range of 10-20%. Over time, Antigua’s tax collection may equal USD 21 million—the loss caused to Antigua by the US. The clear advantage with this model is its ease of operability and ability to make an almost accurate estimation monetary gain/loss by Antigua and US respectively. Some of the other advantages are as below:

1. A tax model operates in many ways like the traditional tariff model—the key remedy in most WTO retaliations. As such, it would be relatively easier and less problematic to compute losses to IP owners. Any challenge on “equivalence” grounds is therefore bound to be minimal.
2. A tax on IP goods may seem a lesser evil than suspending IP rights altogether to the US and other IP rich countries, who may for this reason, find it more acceptable.
3. Such taxes can be removed as soon as the defaulting state removes the offending measures or agrees for a settlement. In other words, an abrupt removal of the tax will not hurt anyone. Contrast this with the earlier IP suspension model, where a
termination of the right to use the suspended IP may cause some losses to Antiguan entities that operate such rights.

4. Yet another advantage is that the taxes are collected directly by the government, unlike in earlier models, where the moneys using suspended IP are made by private entities. Perhaps such taxes could be distributed amongst Internet betting operators in Antigua that suffer losses as a result of denial of access to the US market.

Notwithstanding the above, the tax model suffers from the below overwhelming problems:

1. The IP owner will most likely pass on the extra ‘tax’ cost to the consumer. And this is a result that Antigua may not wish for its consumers.\textsuperscript{195}

2. The IP owner may withdraw goods from the market if it finds that it cannot make a decent profit margin in the market.\textsuperscript{196} The tax model may not hurt IP rich countries as much as the earlier statutory license model. And to this extent, its efficacy in inducing compliance and bringing out a mutually beneficial settlement may be limited. As the panel in the Ecuador dispute acknowledges:

   “However, the interference with private property rights of individuals or companies may be perceived as more far-reaching under the TRIPS Agreement, given the potentially unlimited possibility to copy phonograms or use other intellectual property rights. In contrast, producers of goods and service suppliers which are affected by the suspension of concessions or other obligations under the GATT or the GATS may stop exporting to the Member imposing such suspension.”

3. Very few IP goods/services are actually sold in Antigua and taxing the goods in question may not help recover the amounts due, even if such tax is imposed for a great number of years.

4. Lastly, but perhaps most significantly, a tax model potentially implicates Art. III.2 read with Art. I.1 of the GATT, because a discriminatory internal tax is applied. It may also implicate Art. III.4 read with Art. I.1, because the price control regulation is applied only to imposed goods.

Therefore, on balance, a tiered suspension model, as fleshed out below, is likely to be more “legal” and effective.

\section{Elements of the Tiered Suspension Model}

In order to give effect to the proposed tiered suspension model, it needs to be domestically legislated upon.\textsuperscript{197} Indeed, Brazil is considering amending its law to provide for a cross-

\textsuperscript{195} Illustratively, the Tanzanian government was planning on impose a tax on imported medicines—and it was expected that this would affect the poor the most. See http://www.ippmedia.com/ipp/guardian/2007/07/26/95148.html.

\textsuperscript{196} Indeed, this is a problem inherent in the traditional retaliation model as well. “

\textsuperscript{197} Unlike retaliatory tariffs, which can be initiated through a simple act of the executive, suspending intellectual property rights may need to be effected in most cases through implementing legislation. See Watal and Subramaniam. See also Ecuador case, where the panel notes that suspending IP could create problems within the domestic legal regime and the difficulties would depend upon the precise nature of suspension sought. See
retaliatory mechanism.\(^{198}\) This will help reduce uncertainties and delays associated with using cross-retaliatory techniques.

Also, it will help countries immediately deploy such strategies, after they have secured an order to this effect from the WTO.\(^{199}\)

This paper proposes that a complaining state, such as Antigua introduces a domestic legislation titled “The TRIPS Suspension Act” containing the following broad provisions (see Annexure B):

1. In the event of a WTO ruling permitting Antigua to cross-retaliate by suspending TRIPS obligations against a defaulting state such as the US, a designated Antiguan governmental authority may issue a decision to suspend any of the IP obligations owed to US entities under TRIPS (patents, copyrights, designs, semiconductor chip designs, regulatory data protection, undisclosed information, plant varieties).

2. Provided that the cross-retaliation authorization is a final one i.e. it comes after the Article 22.6 arbitration, if any, and the placing of a second request to cross-retaliate based upon the Art 22.6 determination. Provided further that any such suspension shall be subject to the terms of the cross retaliation authorization, including limiting of the categories of intellectual property that could be suspended.

3. The designated authority shall issue a list of the categories of IP that can be suspended and the order in which they can be so suspended. It shall have the power to add more categories to the list at any time. The authority shall ordinarily follow the below suspension hierarchy (tiers).

   a. Under Tier I, preference would be given to those copyrighted works/patented inventions, in respect of which there already exists a “licensing” rate. These could be statutorily established rates (in the context of compulsory licences), or rates carved out by collecting societies (such as rates for public performance of sound recordings), patent pools and the like or rates that are present in existing individual voluntary licensing arrangements.

   Parties that wish to work the suspended intellectual property under Tier I shall submit statements of existing royalty rates, whether statutory or otherwise. Such rates shall be rates either prevailing in the complaining state or in the defaulting state or in any other country with a similar GDP and in connection with a good/service that is very closely related with the IP good/service in question. Parties may also draw the attention of the authority to the fact that although such licenses exist, their rates are not known. In


\(^{199}\) Although Antigua has secured an order to cross-retaliate, nothing in its domestic regime permits it to do so at this moment. This will no doubt delay its deployment of cross-retaliation.
such cases, the authority shall have the power to demand licensing royalty rates from the licensor or licensee.

b. If working with this kind of IP does not yield any results within 3 months of the suspension, then the government moves to Tier II IP goods, for which there are no established royalty rates. It permits the suspension of such goods. The computation of harm would be based on the “profits” rule outlined in an earlier chapter: the harm that ensues to an IP owner are the total profits that are made by the entity/entities using the suspended IP in question.

However, if the above amount (say “X”) is less than the difference between the amounts made by the IP owner before and after the retaliation (say “Y”), then the said difference (Y) shall be taken to be the amount of harm to the IP owner.

c. Lastly, if the working of the second tier also for another 3 months (6 months in total) does not yield the desired results, then the government permits the suspension of trademarks and geographical indications. Here again, the rates shall be determined in accordance with either a) or b) depending upon whether or not there already exist voluntary licenses between the IP owner and a third party.

Provided however that the above hierarchy could be deviated from in circumstances, where the complaining state wishes to achieve quick compliance. In such circumstances, it could target those sectors that have greater lobbying power in the defaulting state right at the start.

4. Any new rights that are subsequently registered within the suspended IP categories stand suspended from the date of commencement till the date of removal of the inconsistent laws or till the time that the parties settle. Such determination of dates shall be made exclusively by a designated government office/person. Owing to issues of consumer confusion, trademarks and geographical indications are not included within the initial category of “suspended IP rights”.

5. Provided however that any Antiguan entity shall ensure that it does not sell the product/service using the suspended IP rights to a WTO member state where the concerned IP right is in active force. Any transgression in this regard shall entail a cause of action only against such violator and not against the complaining state government.

6. Provided also that any rights under any of the other international conventions (e.g. Berne Convention, Paris Convention) that are not incorporated into TRIPS or any bilateral trade or investment treaty\(^\text{*}\) that are still in force and for whose breach

\(^*\) The number of “TRIPS plus” bilaterals that are being signed by developing countries are increasing each year. See <http://www.grain.org/briefings/?id=6>. And to the extent that such bilaterals make TRIPS
independent causes of action can be maintained by the defaulting state, shall not stand suspended. Any breach of such other conventions/treaties shall entitle the IP rights owner of the defaulting state to take action against the RS entity that uses its IP right in contravention of such other international convention.

7. Subsequent to a WTO ruling granting Antigua the right to cross-retaliate, any domestic or foreign entity or individual can register with a designated government authority such as the patent office and declare its intention of working the suspended IP rights. Such entities would then have to file statements each month or quarter of how they have used the “suspended” IP and the amount of sales/profits of goods/services using the “suspended” IP, notwithstanding the fact that such IP may only constitute a small part of the overall product/service. Provided however that if the entity using the suspended IP is a foreign entity, then only a designated portion of the profits shall be repatriable to the home country of the said foreign country. The designated authority shall be entitled to audit accounts etc of the said entities to ensure that their filings are accurate.

8. The designated authority shall issue a notification when the complaining state reaches an agreement with the member state or if the defaulting state withdraws the offending measures. A determination in this regard shall be the sole prerogative of such authority.

9. Upon such notification, any complaining state entity that has invested considerable sums in infrastructure etc to use the suspended IP shall be entitled to a compulsory licence to work the suspended IP in question for the remainder of the term of the IP i.e. till the IP right would have naturally terminated under Antigua's domestic IP laws. The royalty rates for such use and other terms of use shall be determined by mutual agreement between the IP owner and the entity seeking to use the IP in question. If no agreement is reached within a month of the commencement of negotiation talks, then the rate shall be fixed by the designated authority, as per the below:

   a. Where the IP in question or a comparable technology/good/service has already been licensed (whether “voluntary” or “non voluntary”), the “fair” royalty is the highest royalty rate or other amount prevailing in any part of the world. And parties that wish to work the suspended intellectual property shall submit statements of such existing royalty rates.

   b. If there is no existing license or other rates as above mentioned anywhere in the world, a flat royalty rate of 5% of sales shall be fixed.

10. The designated authority shall also issue a notification when the value of “harm” to the defaulting state by the use of suspended IP (computed in accordance with the royalty rates and/or the profits rule in point 5 above) matches up to the level of nullification. Upon such notification, a compulsory license shall be issued to all RS entities that has invested considerable sums in infrastructure etc to use the redundant, cross retaliation by suspending TRIPS obligations will not mean much. This is a serious source for concern.
suspended IP. The framework for determining royalties under point 9 above shall apply here as well. If the year (one year of cross-retaliation) comes to an end and the defaulting state has still not withdrawn the offending measures or reached a settlement with the complaining state (to be determined at the sole discretion of the complaining state), the compulsory license terminates and the RS entity in question is entitled to use the IP for free i.e. the position reverts to the pre-compulsory licensing days.

11. The law ought to clearly state that the ownership of any “suspended IP right” cannot be transferred. If cross-retaliation becomes a credible threat, an IP owner from the defaulting state (such as the US) may have the IP transferred in the name of one of its subsidiaries in another country. Therefore, any transfers of IP ownership ought to be prohibited, starting from the date when the member state obtains a favourable order from the WTO stating that the defaulting state is in breach of a WTO commitment. 201

12. Each of the Antiguan entities that operate suspended IP and make profits shall pay 2% of their profits to the government of the complaining state. These moneys shall be used interalia for expenses incurred in administering the cross retaliatory mechanism.

13. The above provisions shall operate, notwithstanding the guaranteed protection of rights under the various IP legislations in the complaining state. If there is a conflict between this “TRIPS suspension Act” and any of the existing IP legislations, this Act shall prevail.

XI CONCLUSION

The Antigua case, which has pitted one of the WTO’s tiniest economies against its biggest, is seen as a test of whether the global trade body's dispute settlement system is equitable and fair. Such “fairness” will depend in some part, on how successful Antigua is with its deployment of the “IP suspension” string.

Whilst the notion of IP “cross-retaliation” has been doing the rounds for a while, there is considerable uncertainty regarding how this concept will be operationalised and implemented. Developing countries urgently need to work out an optimal model that helps assess losses to the foreign IP owner in a reasonably objective way and implement this domestically—this way there is no time lost between the procuring of a favourable order from the WTO sanctioning cross-retaliation and the actual cross-retaliation itself.

This paper seeks to fill this lacuna by proposing a tiered suspension mechanism as a viable option. That the model lacks technical precision in terms of computing losses to IP owners accurately is not fatal since the aim is to evolve a model that will help in securing compliance

201 The Ecuador decision cautions that any TRIPS suspension must only be targeted at “nationals” (a term used in Article 1.3 of TRIPS) of the defaulting member state and not of any other member state. See 140-144.
or a settlement. Given that the IP lobbies in countries such as the US and EU are powerful, the likelihood of a settlement or compliance is very strong. Particularly, since the model advocates an automatic compulsory license right even after the offending measures have been removed. In other words, the likelihood of a country having to actually operationalise the IP suspension model is very remote. Any infirmities in the model ought to be evaluated, bearing this over-arching assumption in the model. Further, the current WTO framework does not require such accurate estimation of losses. But equivalence ought to be achieved, very broadly.

Lastly, this paper highlights a paradox, albeit an obvious one. Cross-retaliation is often positioned as an exception to the standard retaliation through imposition of tariffs. In most cases concerning developing countries, cross-retaliation is a more effective remedy than traditional retaliation. Not least because a credible cross-retaliatory model is likely to place the right kind of pressures on developed countries to comply, as the IP lobbies in these countries are quite strong. Also, at a conceptual level, prominent free trade scholars are not entirely happy with the imposition of minimum standards through TRIPS and the linkage between TRIPS and the WTO. To these free trade scholars who view traditional retaliatory techniques are somewhat antithetical to the very purpose of the free trade agreements, cross-retaliation by suspending TRIPS obligations sits much better—and in fact, may be desirable to offset the negative impact of TRIPS! As noted earlier, the bargain between the developed and the developing countries could in some way be seen as a give and take—where the developed countries offered to open their markets to developing country goods such as textiles and agriculture and the developing countries promised to implement minimum standards in IP so that developed country entities could extract rents from these countries.  

Given the framework of this bargain, it is only fair that TRIPS obligations be suspended by developing countries, when developed countries fail to live up to their commitment to open up their markets.

This paper therefore prescribes that cross-retaliation ought to be conferred with the status of a mainstream retaliatory technique, as opposed to a secondary one. Such a paradigmatic shift will go a long way towards making the WTO framework more meaningful to a large number of developing countries that continue to see it as representing an inequitable bargain.

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202 “TRIPs was negotiated by a handful of people, perhaps 45 … Developing countries essentially signed away their rights in exchange for a couple of concessions in the agriculture and textiles industry, with very few actually understanding the implications on their markets, people and culture”. See J. Stiglitz, “Making Globalization work”, 139/67 South Bulletin Feb 15 2007.

203 This is not to suggest that a rebalancing of the bargain rationale is one that correctly and comprehensively explicates the entire WTO enforcement framework. Rather it is one of the many one of the many potential reasons influencing the enforcement framework.

204 See BL Das, How the WTO Rules and System are Inequitable Against the South, THIRD WORLD NETWORK, Aug-Sept 1999. See also Jawara and Kwa, Behind the Scenes at the WTO, who argue that the trade-negotiation process makes it possible for a few rich countries to dominate the trade agenda at the expense of all other countries. They go on to demonstrate that trade negotiations have developed into “a game for high stakes, between unequally matched teams, where much of the game is played with few rules and no referee” (p. 50).
ANNEXURE A: THE WTO ENFORCEMENT MECHANISM

WTO Dispute (Antigua vs. US)

WTO Panel + AB (Antigua wins)

US Complies With WTO Ruling

Parties Enter Into Settlement

No Compliance Within “Reasonable” Time

No Settlement (and no Agreement on Damages under Article 22.2)

End of Dispute

Arbitration to Determine Quantum of Loss (Art 22.5)

Retaliation Request

Retaliation Request Granted

Traditional Retaliation

Cross Retaliation

Compliance

Settlement

Continued Breach

End of Dispute
ANNEXURE B: “TIERED IP” CROSS RETALIATION MODEL

WTO: Antigua VS US
Antigua Authorised to Cross Retaliate Against US “IP”

Antiguan Govt Issues “Cross Retaliation” Order

Antiguan Entities To Declare Intent To Use Suspended IP

TIER 1 IP GOODS
(First Preference)
Example: IP for which there are existing licensing rates (Compulsory Licences AND Voluntary licenses)

TIER 2 IP GOODS
(Second Preference)
Example: IP, for which there are no existing licence rates, but TM and GI excluded

TIER 3 IP GOODS
(Last Resort)
Example: TM and GI (where IP usage by third party has potential for customer confusion)

Suspended IP is “Used”

Compliance OR Settlement

Retaliation Stops:
But “Used” IP that involves investment is subjected to compulsory licensing

No Compliance

Retaliation continues