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CROSS RETALIATING UNDER THE
TRIPS AGREEMENT

PROBING AN EFFECTIVE STRATEGY

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AUTHORSHIP DECLARATION

I hereby declare and confirm that this thesis is entirely the result of my own work except where otherwise indicated. I have acknowledged below the supervision and guidance I received from my supervisor Mr. Pietro Manzini. This thesis is not used as part of any other examination and has not yet been published.



10th August 2009

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All errors herein are mine alone.

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CROSS RETALIATING UNDER THE TRIPS AGREEMENT PROBING AN EFFECTIVE STRATEGY

INTRODUCTION

The creation of the World Trade Organization (WTO) by the 1994 Marrakesh Agreement is seen as one of the most significant steps in the development of international trade in recent times. The WTO in many crucial respects replaced the provisions of its predecessor, the General Agreement on Tariff and Trade (GATT) and tried to cure the inefficiencies that plagued the former system.¹ Of importance for the purposes of the present paper is the dispute settlement procedure. The system in GATT was based on consensus decision making which required all the participating members of the WTO to concur at every step in the dispute settlement process – right from creation of the panel, appointment of its members, adopting the ruling and authorizing retaliation.² Translated to practice this meant that the State against which a dispute was sought to be initiated had a right to veto any move that the GATT Dispute Settlement process had the authority to undertake.³ More specifically, if in a rare case that a Complainant obtained a ruling from the panel against a Respondent Country, the ruling was but a recommendation to comply with the obligations of the GATT in the future. The implementation of this ruling depended completely on the willingness of the Respondent Country because it had the power to refuse to comply and in the event

¹ W.J. Davey, “WTO Dispute Settlement Practice Relating to GATT 1994” (Federico Ortino and Ernst-Ulrich Petersmann eds., *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, The Hague: 2004) at 191 (hereinafter *Davey*).

² John H. Jackson, *The Jurisprudence of GATT & the WTO* (Cambridge University Press, Cambridge: 2000) at 404 (hereinafter *Jackson*).

³ Warren F. Schwartz and Alan O. Sykes, “The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organisation”, 31(1) *Journal of Legal Studies* S179 (2002) at S179-S182 (hereinafter *Schwartz & Sykes*).

retaliatory processes were used against it, to veto the proposal.⁴ In modern GATT history, the retaliatory provision was invoked on only two occasions – both against the US, and on both occasions, the permission to retaliate was denied.⁵

Despite these obvious shortcomings, the settlement process in the GATT was invoked fairly often. Through its history, 298 cases were filed with the GATT disputes procedure of which 112 ruling were handed down of which 88 were rulings of legal violation.⁶ What is more interesting is that a vast majority of these ruling were adopted and those not adopted produced a satisfactory correction of practice that was under consideration. The first three decades of the GATT saw an almost 100 percent rate of compliance, with it dipping to a still very satisfactory rate of 81 percent in the next couple of decades.⁷

The ‘paradoxical contrast,’ as an author notes⁸ between the voluntary system of compliance and the high success rate leads us to believe that reasons for compliance are not restricted to the enforcement mechanisms and the effectiveness of retaliation. He identifies three reasons why such compliance may have resulted despite the lack of legally binding sanctions – *first*, there may be proponents who believe in the innate benevolence of the provisions of the GATT who therefore believe a correction of the practices of the State in a WTO compliant manner as desirable. *Second*, the recognition of the value of the legal system itself and the belief that the detriment to the system far

⁴ Mitsuo Matsushita et al., *The World Trade Organization* (Oxford University Press, Oxford: 2003) at 19 (hereinafter *Matsushita*).

⁵ *United States: Taxes on Petroleum and Certain Imported Substances*, GATT, BISD, 34th Supp 136 (1988).

⁶ Marc L. Busch & Eric Reinhardt, “Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes”, 24(1-2), *Fordham International Law Journal* 158 (2001) at 163 (hereinafter *Busch & Reinhardt*).

⁷ *Id.*

⁸ Robert E. Hudec, “The Adequacy of the WTO Dispute Settlement Remedies,” (Bernard Hoekman ed., *WTO, Trade and Development*, World Bank, Washington DC: 2000) at 82 (hereinafter *Hudec*).

outweighs the possible benefit the country may derive from noncompliance. *Third*, the possibility of strong condemnation of non-compliance by member states by other member states – all of whom value the need for a well maintained legal system.⁹

The existence of these reasons however did not undermine the need for a more effective framework of Dispute Resolution.¹⁰ Other things being equal, an effective system of Dispute Settlement would only add to the already existing reasons of compliance by adding the force of sanction to the list.

The fear of sanction plays two roles – perceived and real. While on one hand a more objective system of Dispute Settlement send out a positive message to all the member nations about the efficacy of the system, on the other in a case where compliance is actually not forthcoming, it serves as an excellent tool to induce such compliance.¹¹ In addition, adding teeth to the Dispute Settlement process was seen as an attempt to bridge the gap between countries with differing economic powers. The move towards a ‘rule-based’ system which has adequate enforcement machinery was seen as a tool which the developing countries could use against the more developed countries to bring them in compliance with the objectives of the agreement.¹²

⁹ *Ibid* at 82-84.

¹⁰ Even existing systems of Dispute resolution under the WTO framework have been considered inadequate and there have been several proposals made for its improvement. E.U. Petersmann, “The DOHA Development Round Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding 2001-2003: An Overview,”(Federico Ortino and Ernst-Ulrich Petersmann eds., *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, The Hague: 2004) at 7 (hereinafter *Petersmann*).

¹¹ Kyle Bagwell and Robert W. Staiger, *The Economics of the World Trading System* (MIT Press, Cambridge: 2002) at 95 (hereinafter *Bagwell & Staiger*).

¹² “Developing Countries in WTO Dispute Settlement,” Dispute Settlement System Training Module, available at <http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s1p1_e.htm> last visited on 10th August 2009; **See also** M.B. Rao & Majula Guru, *WTO Dispute Settlement and Developing Countries* (Lexis Nexus, New Delhi: 2004) at 10-12 (hereinafter *Rao & Guru*).

It is with this purposes that the WTO ushered in a sea of changes to the Dispute Settlement system. The most important change brought about by the creation of the Dispute Settlement Understanding (DSU) as part of the WTO machinery, was the abolition of the consensus rule in favor of a negative consensus rule – all processes of Dispute Settlement which hitherto depended on the consent of all WTO members prior to adoption, would now automatically be adopted except for a consensus amongst the members against it.¹³ The DSU also strengthens the mechanism by 1) establishing a compliance deadline, or a ‘reasonable period of time,’ that a country would be allowed to come into compliance with a panel decision; 2) establishing ‘compliance review’ procedures to be used when a disagreement arises over whether the losing GATT member had complied with a DSB ruling, and 3) giving the panel greater power in making non-binding suggestions on the implementation of the ruling.¹⁴

Despite these changes which were largely directed at creating an even playing field for all the member countries, the dispute resolution process could not undo the vast economic differences that plagued the world order. The WTO dispute settlement system has been accused of being biased against smaller developing countries in that it favours the leading industrialised countries.¹⁵ The EU and the United States, in particular, are seen as having created and used the DSU to achieve their own objectives by virtue of their international economic and political leverage, greater resources and retaliatory

¹³ The negative consensus rule extends to all aspects of dispute resolution starting from Establishment of the Panels (Article 6 DSU), Adoption of the Panel Report (Article 16(4) DSU), Adoption of the Appellate Body’s Report (Article 17(14) DSU), to Authorizing Suspension of Concessions in the event of Retaliation (Article 22(6) DSU).

¹⁴ Carolyn B. Gleason and Pamela D. Walther, ‘The WTO Dispute Settlement Implementation Procedures: A System In Need Of Reform,’ 31 *Law and Policy in International Business* 709 (2000) at 713 (hereinafter *Gleason & Walther*).

¹⁵ Valentina Delich, “Developing Countries and the WTO Dispute Settlement System,” (Bernard Hoekman ed., *WTO, Trade and Development*, World Bank, Washington DC: 2000) at 72 (hereinafter *Delich*).

power.¹⁶ Even the value neutral, rule based method of enforcement in retaliation was seen as being lop-sided. Retaliation was seen as being more effective when used by the larger countries against smaller ones than the other way round.¹⁷

Empirical evidence mirrors this sentiment. The WTO DSU has hitherto been the domain of the rich and powerful – comprising most of the developed world and large developing countries. Only five developing countries account for 60% of developing country complaints, and thirteen developing countries account for 90% of them. In total, 95 of the WTO’s 120 Non-OECD members had never filed a complaint before the WTO, and 62 had not even participated as a third party. As regards countries from Africa and the Middle East, none has ever been a complainant before the WTO.¹⁸

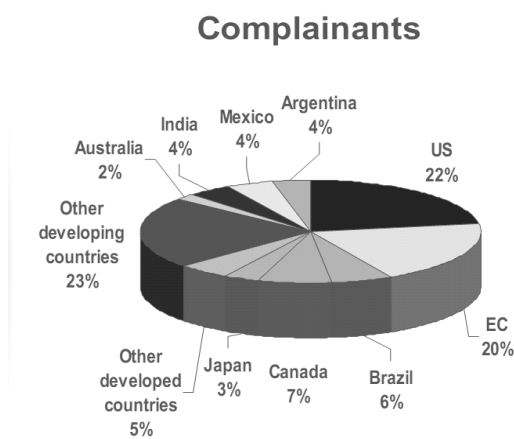


Figure 1¹⁹

¹⁶ Robert Read, “Dispute Settlement, Compensation and Retaliation under the WTO”, available at < <http://www.lancs.ac.uk/staff/ecarar/dispute%20settlement.doc> > last visited on 10th August 2009 (hereinafter *Read*).

¹⁷ Simon Lester, “The WTO Gambling Dispute: Antigua Mulls Retaliation as the U.S. Negotiates Withdrawal of its GATS Commitments,” 12(5) *ASIL Insight International Economic Law Edition* (2008) available at <<http://www.asil.org/insights080408.cfm> > last visited on 10th August 2009 (hereinafter *Lester*).

¹⁸ Asif H. Quereshi, “Participation of Developing Countries in the WTO Dispute Settlement System,” (Federico Ortino and Ernst-Ulrich Petersmann eds., *The WTO Dispute Settlement System 1995-2003*, Kluwer Law International, The Hague: 2004) at 478-479 (hereinafter *Quereshi*); Mary Footer, “Developing Country Practice in the Matter of WTO Dispute Settlement, 35 *Journal of World Trade* 55 (2001) (hereinafter *Footer*); Nottage, H, “Trade and development” (Bethlehem, D.et al eds., *Oxford Handbook of International Trade Law*, Oxford University Press, Oxford: 2008) (hereinafter *Nottage*).

¹⁹ Bruce Wilson, “Remedies In WTO Dispute Settlement: Experience to Date (1995-2006),” Presentation at the WTO Appellate Body Conference Columbia University, 8 April 2006.

Such a feeling seriously undermines the role of the WTO while casting doubts on its utility for the lesser developed countries. It is opined that this stark reality is owed to several factors; the ability of the developing countries to use the DSU – being one of the foremost.²⁰

This paper seeks to consider this very aspect of the DSU and tries and find a solution within the WTO framework which could address atleast some of the reasons for the negative attitude towards the DSU. In this attempt the paper will seek to first outline the dispute settlement process and the theoretical foundations of the role of retaliation in the same. The next section will delve into the area of traditional retaliation and identify reasons that undermine its utility for a developing country. The third section will seek to probe into the area of using Cross-Retaliation, more specifically in the area of Intellectual Property Rights, as an option available to developing countries. The fourth section will seek to compare and contrast traditional retaliation as against cross retaliation to see if problems plaguing conventional forms of retaliation play a role in the latter. The next two sections will seek to delve deeper into the aspect of cross-retaliation to ascertain the specific sector that deserves the attention of smaller developing countries while choosing to cross-retaliate. The seventh section analyses the effectiveness of a measure so chosen and identifies possible weaknesses in its implementation. The eighth section will try and draw from the shortcomings that have the effect of undermining such a mode of retaliation and tries and put forth a solution. The paper will conclude by summarising the discussion and charting the significance and limitations of the issues dealt with.

Available at: < <http://www.sipa.columbia.edu/wto/pdfs/RemediesInWTODisputeSettlement.pps>> last visited on 10th August 2009 (hereinafter *Wilson*).

²⁰ Frederick Abbott, “Cross-Retaliation in TRIPS: Options for Developing Countries,” ICTSD Dispute Settlement and Legal Aspects of International Trade Series, Issue Paper 8 at 8. Available at <<http://www.ictsd.net/downloads/2009/06/cross-retaliation-in-trips.pdf>> last visited on 10th August 2009 (hereinafter *Abbott*).

1. RETALIATION AND THE DSU

At the heart of the current Dispute Resolution process under the DSU is the power given to member nations to retaliate against a recalcitrant State for violation of WTO obligations. However, retaliation is authorized by the WTO only as a ‘last-resort action.’²¹ A dispute resolution process as stands today typically has the following steps: As a first step, a complaining government secures a judgment from a WTO panel or the Appellate Body that the other party is maintaining measures inconsistent with a WTO obligation. This panel or Appellate Body report is then adopted by the Dispute Settlement Body (DSB). Thereafter, the Respondent State gets a ‘reasonable period of time’ for implementation. The parties are then required to negotiate in good faith a possibility of the non-compliant State offering compensation in the form of reduction of tariff barriers, together with remedying the non-compliance. Given that compensation is voluntary in nature and the principle of MFN requires States to offer the compensation equally to all the WTO member nations, it is a solution that has never yet been resorted to.²² After this process, 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.’

Article 22.3 of the DSU permits member states to undertake retaliatory measures under certain well-defined conditions. Article 22.4 authorises the panel, while adjudicating on the level of retaliation, to make a suspension “equivalent to the level of the nullification or impairment.” Using this provision, Steve Chanovitz describes the retaliation process in the DSU as a “form of restoring the bilateral balance that existed prior to the breach

²¹ Kym Anderson, “Peculiarities of Dispute Resolution in WTO Dispute Settlement”, 1(2) *World Trade Review* 123 (2002) (hereinafter *Anderson*).

²² Bryan Christopher Mercurio, “Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding,” 8(2) *World Trade Review* 315 (2009) (hereinafter *Mercurio*).

in order to cure a trade injustice - by undoing trade commitments that the complaining Member gave to the responding Member.”²³ A closer reading of the various provisions of the DSU however, conveys a more vital use for retaliation.

Article XVI: 4 of the Agreement Establishing the World Trade Organization (WTO Agreement) requires each Member to “*ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.*”²⁴ Article 3.7 of the DSU states that: “*In 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.*”²⁵ Article 21.1 then explains that “*prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.*” Article 22.8 of the DSU states that suspension actions “*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.*” Article 23.2(c) states that suspension actions are “*in response to the failure of the Member concerned to implement the recommendations and rulings...*”²⁶ The tenor of the DSU therefore seems to suggest the use of retaliation as a means towards achieving compliance rather than an end in itself.

The history of the development of the text and cases decided under the DSU seem to support this view. The GATT under Article XXIII provided for recommendations or

²³ Steve Charnovitz, “The WTO’s Problematic Last resort Against Non-compliance,” available at <<http://www.worldtradelaw.net/articles/charnovitzlastresort.pdf>> last visited on 10th August 2009 (hereinafter *Charnovitz*).

²⁴ WTO, Legal Texts - The Uruguay Round Agreements, Agreement Establishing the World Trade Organisation, available at <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf> last visited on 10th August 2009.

²⁵ WTO, Legal Texts – Dispute Settlement Understanding, available at <http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm> last visited on 10th August 2009.

²⁶ *Id.*

rulings in a dispute but unlike its successor, did not expressly link the issuance, to the implementation of the recommendation.²⁷ The panel in the *EC-Bananas* case, upholding this rationale of the DSU noted that “[the] temporary nature [of countermeasures] indicates that it is the purpose of countermeasures to induce compliance.”²⁸ The panel went on to note that the complaining governments may seek a suspension that is ‘strong’ and ‘powerful’ to induce such compliance from defaulting members to their WTO commitments.²⁹

Even beyond WTO rules, the general regime on countermeasures in public international law explicitly provides that a state injured by a wrongful act may only take countermeasures against the state responsible ‘in order to induce that state to comply with its obligations.’³⁰ This concept of inducing compliance is also in sync with the idea of WTO law as a rule-based system where compliance with agreed rules is a key factor for security and predictability in international trade.³¹

It therefore follows that if there is an obligation to comply and if one of the first objectives of the DSU is to ensure such compliance, the response mechanisms which the DSU offers to the claimant in case of non-compliance should also be understood as compliance-inducing tools.³² However, the compliance inducing attitude cannot derogate the equivalence guaranteed in Article 22.4 of the DSU. Explaining this

²⁷ *Charnovitz* at 794.

²⁸ European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Arbitration By The European Communities Under Article 22.6 of The DSU, WT/DS27/ARB/ECU (hereinafter *EC-Bananas* case).

²⁹ *Id.*

³⁰ Article 49 (1) Responsibility of States for International Wrongful Acts, available at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> last visited on 10th August 2009.

³¹ *Jackson* at 405-6.

³² Henning Grosse Ruse-Khan, “A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations,” 11 *Journal of International Economic Law* 313 (2008) (hereinafter *Grosse Ruse-Khan*).

anomaly and trying to balance the two sides, Reto Malacrida argues that the equivalence paradigm in Article 22.4 of the DSU can function within an overall compliance oriented system. The compliance-inducing retaliation, she suggests, does not lie in adjusting the level of suspension but in the selection, in accordance with Article 22.3 of the DSU, of concessions or other obligations to be suspended.³³ This view therefore seems to vest a greater level of discretion in the hands of the complaining State in the choice of the instrument of retaliation to fulfill the objectives of the DSU. The practical application of the choice however is constrained by the enabling provision of the DSU.

The conditions and procedures for suspending concessions are regulated in Article 22.3-9 of the DSU. Article 22.3 (a) establishes the general principle that the retaliating Member should consider suspending concessions or other obligations deriving from the same sector of the same agreement in which the other party has been found to be in violation of WTO obligations. Under the further conditions in Article 22.3 (b) the retaliating Member can suspend obligations under other sectors within the confines of the same Agreement. Article 22.3(c) authorizes suspension under a distinct WTO Agreement to the one under consideration in a dispute if it is either not practicable or not effective to suspend obligations under the same sector or same Agreement, respectively. Retaliation under Article 22.3(a-b) is conventionally considered traditional retaliation as it involves retaliation under the same Agreement as that of the dispute. Later sections of this paper will contrast such retaliation with the retaliation permitted in clause (c) which is more commonly referred to as cross-retaliation.

³³ Reto Malacrida, "Towards Sounder and Fairer WTO Retaliation", 42(1) *Journal of World Trade* 3 (2008) at 5 (hereinafter *Malacrida*).

2. TRADITIONAL RETALIATION AND DEVELOPING COUNTRIES

Given the pivotal role of retaliation in the DSU, an analysis of its ineffectiveness, as alleged, is probably owed to the misgivings of the retaliation mechanism.³⁴ Since the allegations essentially stem from a historical experience which concerns itself with traditional form of retaliation, let us first consider problems posed by such retaliation.

Traditional form of trade retaliation was in the form of withdrawal of tariff concessions or an imposition of import quotas with the effect of raised tariffs or reduced market space, for specific imports from the non-complying country. The rationale being that a raise in tariffs will inflict economic harm on affected exporters in the non-complying country - even if they can shift trade elsewhere, owing to the loss of sales from the complaining country.³⁵ These exporters are then likely to lobby their government to comply in order to remove the harm. At the same time, raising tariffs or restricting markets can take away an equal amount of trade benefits from the non-complying country and so allow re-balancing of bilateral trade.³⁶

However, this ideal scenario is very much dependant on the size and importance of the domestic market of the retaliating country in relation to the non-complying country. Economically powerful member states are unlikely to be harmed by a suspension of trade concessions by substantially less powerful Members. The trade impact is likely to be too small to induce compliance. Further, the types of suspension that may be used may cause economic harm to the less powerful Members using them. The relevance of

³⁴ *Hudec* at 83-84.

³⁵ *Matsushita* at 98.

³⁶ *Grosse Ruse-Khan* supra.

the size of the economy can be demonstrated by means of the following model borrowed from Paul Krugman³⁷:

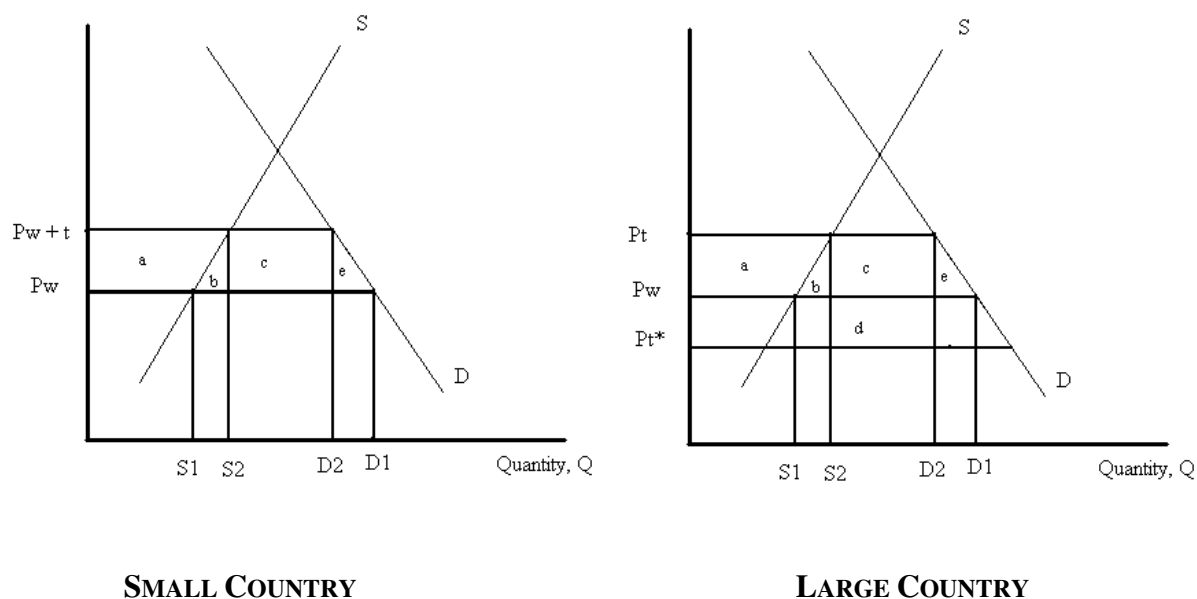


Figure 2

Let us consider two countries – Large and Small, representing respectively a country which has and does not have a significant market share of the good it imports. Let P_w be the world price of the good being imported, D the domestic demand function for the good imported and S the domestic supply function. Let us first consider the case of a Large Country which decides to impose a tariff ‘ t ’ on the imported good. The increased cost of selling the good in the home market of the large country results in a reduction of imports. There is thus a greater amount available for the other countries for consumption which consequently reduces world prices. Let this reduced price be P_{t^*} . The price of the commodity in the home market of the large country is $P_{t^*} + t$. The domestic demand now falls to D_2 and Supply increases to S_2 . There is due to this a net change in welfare of the society. There is net increase to producer welfare and fall in

³⁷ Paul R. Krugman and Maurice Obstfeld, *International Economics* (6th edn., Pearson Education, New Delhi: 2004) at 186 (hereinafter *Krugman & Obstfeld*).

consumer surplus. The government gains by an amount equivalent to the tariff times the total imports. The net change in welfare as depicted in Figure 2 above is:

Loss of Consumer Surplus: $a + b + c + d$

Gain in Producer Surplus: a

Government Revenue Gain: $c + e$

Net welfare change = Government Gain + Gain in Producer Surplus – Loss of Consumer Surplus

$$= c + e + a - (a + b + c + d) = e - (b + d)$$

If the gains from ‘e’ is greater than the loss from the two triangles ‘b’ and ‘d’, there is a net gain to the society. In contrast, let us now look at a Small Country. Because a Small Country does not have enough of a market share, it is unable to influence world prices of the commodity. Consequently, the entire tariff is passed on to its consumers. As a result, the following welfare changes occur, as depicted in Figure 2 above:

Loss of Consumer Surplus: $a + b + c + e$

Gain in Producer Surplus: a

Government Revenue Gain: c

Net welfare change = Government Gain + Gain in Producer Surplus – Loss of Consumer Surplus

$$= c + a - (a + b + c + e) = - b - e$$

Therefore, irrespective of the level of the tariff, there is always a net loss of welfare in the home market of a small country. It is this very logic that was used to convince small countries to join the WTO framework of free trade in the first place – a small country is always better off with free trade than with any form of protectionist measures. Most

developing countries which fall within this bracket of small countries therefore tend to lose by any form of a tariff barrier – including the type of tariff barrier envisaged in the traditional retaliation.

The results of the theory were explained in a practical setting in the recent case concerning the *US – Gambling Dispute*. In a claim seeking permission to retaliate, Antigua, with its meagre economy had to demonstrate to the tribunal the ineffectiveness of traditional modes of retaliation. The tribunal, upholding the submission made before it, used economic theory to identify the limitations of such retaliation. In the words of the tribunal:

“The natural resources of Antigua and Barbuda are negligible and as a result not only are the country's exports limited (approximately US \$4.4 million annually to the United States) but Antigua and Barbuda is required to import a substantial amount of the goods and services needed and used by the people of the country. On an annual basis, approximately 48.9 per cent of these imported goods and services come from single source providers located in the United States. The imposition of additional import duties on products imported from the United States or restrictions imposed on the provision of services from the United States by Antigua and Barbuda will have a disproportionate adverse impact on Antigua and Barbuda by making these products and services materially more expensive to the citizens of the country. Given the vast difference between the economies of the United States and Antigua and Barbuda, additional duties or restrictions on imports of goods and services from the United States would have a much greater negative impact on Antigua and Barbuda than it would on the United States. In fact, ceasing all trade whatsoever with the United States (approximately US\$180 million annually, or less than 0.02 per cent of all exports from the United States) would have virtually no impact on the

economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.”³⁸

In sum, a retaliatory measure results in a tangible loss to the recalcitrant state through the removal of its preferential access to the market of the complaining state. The complaining state makes some gains from increased tariff revenue. However, its consumers will face higher prices as a result of a restriction on the inflow of the goods. The net effect depends on the relative sizes of the individual components. In the case of a small country within an insignificant share in the world market, the result is that neither side is better off – the smaller state more so, as a result of permitted retaliation.³⁹

Further, quite besides a tariff structure *ipso facto* being economically inefficient for a small developing country, the specific structure of the retaliation permitted under the DSU also seems to favor the larger country so as to skew the welfare losses against the smaller developing countries. The DSU concerns itself primarily with monetary losses caused to member states concerned. Towards this, Article 22.7 of the DSU requires the Arbitrator to determine whether the level of retaliation, monetarily quantified, for which authorization is being sought is ‘equivalent’ to the damage caused by the WTO-inconsistent measure.⁴⁰ Critiquing the sufficiency of such allowance, Kym Anderson

³⁸ Recourse by Antigua and Barbuda to Article 22:2 DSU, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/22 (hereinafter *US-Gambling* case).

³⁹ *Read supra.*

⁴⁰ In the *EC-Bananas* case, The arbitrators under Article 22.6 stated that the term ‘equivalent’ connotes 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. Based on this understanding, the arbitrators calculate the level of nullification or impairment by comparing the trade value in an actual WTO-inconsistent situation with the trade value that would be expected under a WTO-consistent ‘counterfactual’ situation, and then require the level of countermeasures to be identical to the calculated level of nullification or impairment. Thus, to date, the analysis of the equivalence by the arbitrators has been exclusively quantitative. Yuka Fukunaga, “Securing Compliance through the WTO Dispute Settlement System: Implementation of DSB Recommendations”, 9(2) *Journal of International Economic Law* 419 (2006) (hereinafter *Fukunaga*); Shamnad Basheer, “Turning TRIPS On It’s Head:

argues that “ensuring equivalence between the damage and the retaliation in terms of the gross value of trade between the respondent and the complainant does not mean that retaliation has the same economic welfare effect on the respondent as the initial damage [has] on the complainant. The bilateral trade value necessarily exaggerates the negative effect on both parties’ economic welfare, but it does not do so equally (except by coincidence).”⁴¹ To understand this conclusion, let us consider the case of retaliation depicted in Figure 3.

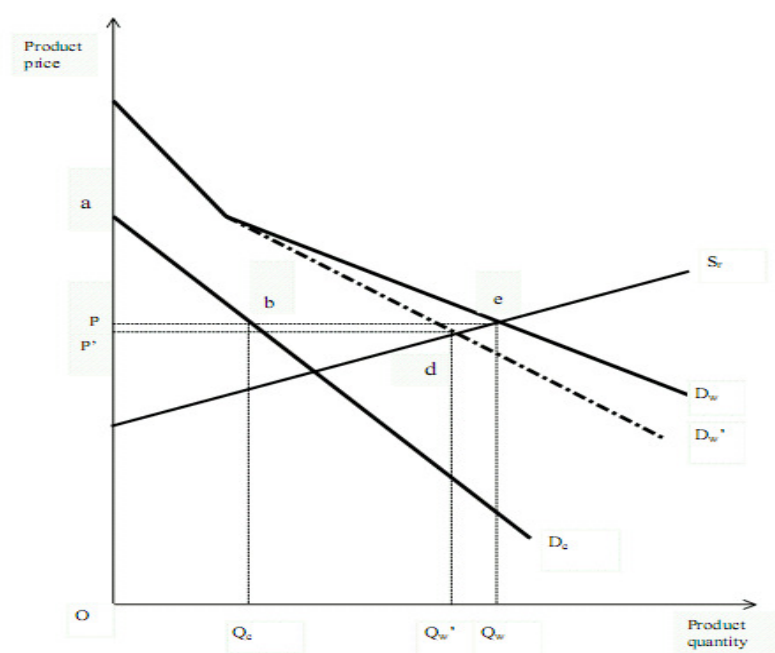


Figure 3

Anderson in his model considers the most commonly considered measure of traditional retaliation as being a tariff structure that involves the complainant listing a range of products it imports from the respondent on which it imposes prohibitively high tariffs until the respondent’s offending measures are brought into conformity.

Cross Retaliation at the WTO,” Available at SSRN: <<http://ssrn.com/abstract=1093284>> last visited on 10th August 2009 (hereinafter *Basheer*).

⁴¹ *Anderson* at 127.

Suppose D_c is State A's import demand curve for a product imported from State B, and D_w is the world's import demand for it. If S_r is State B's excess supply curve for that product, then, assuming perfect competition, the international price of the product will be P and the quantity traded will be Q_w , of which Q_c goes to State A. A prohibitive tariff by State A which reduces Q_c to zero will cause the global demand for State B's exported product to shrink to D_w' . This horizontal shift from D_w to D_w' will be by less than the full extent of D_c because State A now demands more close substitutes in the world market, driving up their price and hence shifting out to some extent the demand curve of the rest of the world for State B's export product. The international price of that product now falls to P' and the volume of the State B's exports will fall from Q_w to Q_w' . The gross value of the imports to be prohibited is the area PbQ_cO , whereas State B's net loss of export earnings from this product is the smaller area $PeQ_wQ_w'dP'$. State B's net economic welfare loss because of that trade prohibition however, is just area $PedP'$, as the area under its export supply curve between points d and e represents costs of production which would not be borne if the export volume was reduced by $Q_w'Q_w$. The economic welfare loss to State B is lesser, the flatter (i.e., the more price elastic) is S_r . Hence the ratio of $PedP'$ to PbQ_cO would vary across products.

Placing the above model in the context of retaliation, if a complainant state obtains authorisation to retaliate against a recalcitrant respondent state, the equivalence clause seeks to equalise the monetary harm caused. However, it fails to recognise that a reduction in the value of imports from the respondent, due to retaliation, although matches the reduction in the value of imports from the complainant, due to the WTO-inconsistent measure being used by the respondent, the welfare loss is not necessarily identical.

The Complainant loses area abP as a result of the retaliation by choosing to forego purchasing those import products from the respondent. That economic welfare cost is smaller the more price elastic (because of the availability of close substitutes) is Dc. The gains from trading with substitute good is necessarily lesser than abP as otherwise, the home country would not have been consuming the imported good in the first place.

The result therefore is that the net welfare consequences depend on the relative elasticities of the respective supply and Demand curves that work in the home country. Let us now consider the case of a small developing country, with very little market share of the imported good. As was demonstrated in the *EU – Bananas* case⁴², given the relative incapacibilities of developing countries to produce certain commodities on their own – either due to lack of technical or financial resources, their ability to produce the good themselves or to produce a substitute good is extremely low. Consequently their demand function is fairly inelastic. Therefore, even if on monetary terms the complainant is able to recover a value equivalent to the loss occasioned to them as a result of the offending measure, they tend to lose out on a huge value of the consumer surplus component in the process thus significantly denting their net welfare. On the other hand, given their meagre share in the world market, a fall in imports from the complaining country hardly affects the world demand curve of the respondent's product. Given also that the quantum of imports are low, larger countries find it relatively easy to divert the goods into other countries with minimal impact on their net welfare. The welfare effects from conventional modes of retaliation are thus skewed against the interests of smaller developing countries.

⁴² *EC-Bananas* case supra. Ecuador demonstrated that it was not feasible for it to retaliate in the same sector as Bananas as absent imports from the EU, they were hard pressed to find substitute suppliers.

Both the above models highlight that a developing country with its limited market share and inability to effectively substitute imports, cannot afford to constrain in any manner the inflow of imports through the imposition of tariffs. It is in this context that the arbitrator in the EU – Bananas case questioned whether the objective of inducing compliance “*may ever be achieved in a situation where a great imbalance in terms of trade volume and economic power exists between the complaining party seeking suspension and the other party which has failed to bring WTO-inconsistent measures into compliance with WTO law.*”⁴³

It is important to note that in both the models outlined above, the cause for the reduction in welfare was a reduction in imports – in the first case, it resulted in a loss of consumer surplus owing to the reduced availability of the imports for consumption. In the latter, the reduction of imports forced the Country to look for substitute good elsewhere which were inevitable more expensive than the goods currently being imported. A viable model must therefore undo this major pitfall of traditional retaliatory measures. If affecting your imports of a product is unfeasible, the logical corollary is to look to retaliate elsewhere. This resulted in countries venturing to use the provisions of the DSU pertaining to Cross Retaliation.

3. CROSS-RETALIATION UNDER THE DSU

The phrase “cross-retaliation” does not appear in the Dispute Settlement Understanding, but is shorthand to describe a situation where the complaining country retaliates (i.e. suspends concessions or other obligations) under a sector or an agreement which has not been violated by the defending country.⁴⁴ Article 22.3 (c) provides that for cross-

⁴³ *EC-Bananas* case at para 73.

⁴⁴ CANCÚN WTO MINISTERIAL 2003: BRIEFING NOTES, available at <http://www.wto.org/English/thewto_e/minist_e/min03_e/brief_e/brief13_e.htm> last visited on 10th August 2009. This idea of cross-retaliating by using another WTO agreement such as TRIPS first came out of a book by Thomas Cottier. See Thomas Cottier, *Intellectual Property in*

retaliation to be authorized, two conditions need to be satisfied: 1) the traditional modes of retaliation are not ‘practicable and effective,’ and 2) circumstances must be serious enough to warrant such authorization. The circumstances under which cross-retaliation can be authorized are explained in the agreement’s Article 22.3. 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;”⁴⁵

The applicability of Article 22.3 in the context of cross-retaliation was tested for the first time in the case of *EC-Bananas* when Ecuador sought to suspend its TRIPS obligations for a violation of the GATT commitment by the EU in by imposing restriction on the import of Bananas into the EU.⁴⁶ A similar authorisation was sought by Antigua in the *US-Gambling case* against the US.⁴⁷

The panel in the *EC-Bananas case* considered the requirements under Article 22.3 to permit retaliation in an unrelated sector. Article 22.3 provides that such retaliation would only be authorised if a suspension within the same sector or under the same agreement is not practicable and effective. In an interpretation that substantially eased the burden of proof on complainant countries, the panel interpreted the requirements under the article to imply that a permission to cross-retaliate would be given even if either of the requirements of - practicable or ‘not effective’, are met. On the specific

International Trade Law and Policy: The GATT Connection (Aussenwirtschaft: 1992) at 103-05 (hereinafter *Cottier*).

⁴⁵ *Supra* note 25.

⁴⁶ *EC-Bananas case supra*.

⁴⁷ *US-Gambling case supra*.

terms ‘practicable and effective’, the arbitrators explained that an examination of practicality concerns the question whether a suspension option is “*available for application in practice as well as suited for being used in a particular case.*”⁴⁸ On facts Ecuador reasoned that suspending tariff concessions is not practicable since the overwhelming portion of EC imports are primary goods and investment (or capital) goods and a higher tariffs on these goods would increase the cost of domestic production. Since the EC was unable to show that alternative sources of supply are readily available at similar prices and without significant transaction costs, the arbitrators concluded that the EC had not shown that suspension of tariff concessions on primary - and investment goods is practicable.

Speaking affirmatively in favour of cross-retaliation, the panel, using the rationale of the DSU – that of inducing compliance by the Member which fails to bring WTO inconsistent measures into compliance with the DSB ruling within a reasonable period of time, advocated the use by the Complaining party of a suspension which is strong and has the capacity to achieve the required result.⁴⁹ The panel acknowledged that as Ecuador only accounts for a negligible proportion of EC exports, tariff raises on EC imports are unlikely to have such a significant effect.

In similar fashion, in the *US-Gambling* dispute, Antigua sought to suspend TRIPS obligations to retaliate against a US measure which restricted online gambling services being provided in Antigua from operating within the US markets. Antigua maintained in its request that imposing higher import duties or more service restrictions has a disproportionate adverse impact on its citizens by making these products and services more expensive thereby justifying its request for seeking suspensions under TRIPS.

⁴⁸ *EC-Bananas* case at para 70.

⁴⁹ *Ibid* at para 72.

On the second limb of Article 22.3 which requires ‘seriousness sufficient to warrant’ such an authorization, Ecuador’s arguments in the *EC–Bananas* case on the importance of the affected bananas sector for its domestic economy and on a relation between the impaired trade in this sector and the general economic crisis in Ecuador were held sufficient.⁵⁰ Similarly, Antigua relied on the importance of its online gambling services for the national economy and the adverse impact of the measures imposed by the US to prohibit the use of these services in the US to highlight the seriousness of the measure taken by the US. It further pointed to the wider economic elements (such as its extremely limited natural resources, the dependency on a fluctuating industry such as tourism as well as the need to develop service trade to diversify its economy) as relevant to ascertain the gravity of the impact of the US measures.

Thus, a key aspect to determine serious consequences is the impact non-compliance has on the trade and economy of the retaliating country. Relative importance of the affected trade sectors to the domestic economy could prove decisive in an enquiry seeking authorisation to cross retaliate.⁵¹

4. TRADITIONAL RETALIATION VIS-A-VIS CROSS RETALIATION

The question that now arises is whether cross-retaliation can effectively address concerns that traditional modes of retaliation raised.

Cross-retaliation is a permission granted to retaliate in an agreement other than the agreement whose obligations have been violated by the defaulting State. Concessions or Suspension of obligations can be made under any Agreement not pertaining to the sector of the dispute. In deciding which of these Agreements to choose, it is necessary to consider the rationale for permitting use of such Agreements.

⁵⁰ *Ibid* at para 132.

⁵¹ *Grosse Ruse-Khan supra*.

The ruling of the two tribunals seemed to indicate a reluctance to use any tariff or import restricting measure as they will necessarily have the same adverse consequences as were pointed out in the decision. As elaborated, a fundamental shortcoming in traditional modes of retaliation was that it resulted in a restriction of the goods/services in question within the domestic market. Cross-retaliation would be ideal if this aspect could be overcome.

An Agreement such as the TRIPS where a suspension of obligations does not entail a restriction on the availability of these commodities in the domestic market – is an obvious contender. This peculiarity stems from the distinct nature of Intellectual Property (IP) - while there is a need for a significant investment of time, money or labour in its creation, it is easy to imitate or copy. Unlike in the case of conventional goods where each copy requires the exercise of skill in production, the production of replicate copies of a product of intellectual labour requires minimal skill.⁵² The IP regime is designed in a manner to ensure that industries which invest heavily in research and development (R&D) acquire a legal monopoly sufficient to serve as an effective mechanism against misappropriation of their efforts and thereby provide an incentive for further R&D-based innovation.⁵³ In a global trade scenario however, strong IP rights at home are not sufficient: Effective and strong IP protection in all markets around the world is one of the central concerns for industries in order to be able to trade their IP protected products and services globally without the risk of copying or imitation by local competitors.

⁵² Lionel Bently and Brad Sherman, *Intellectual Property Law* (2nd edn., Oxford University Press, Oxford: 2001) at 30-35 (hereinafter *Bently and Sherman*).

⁵³ *Id.* See also Preamble to the TRIPS Agreement, Legal Texts, WTO - Agreement on Trade-Related Aspects of Intellectual Property Rights, available at <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm> last visited on 10th August 2009.

For such protection of IP assets on a global scale, TRIPS is currently the most important multilateral agreement on IP.⁵⁴ A suspension of the obligations under TRIPS would allow a market to freely replicate the products on intellectual labor so as to produce multiple copies without paying the actual worth of the product. Unlike in the case of conventional goods, a suspension of the WTO obligation does not constrain flow of the product but in fact enhances its availability. The positive externality of such suspension can be further enhanced by a well thought out suspension of IP protection.

To illustrate, an authorization could permit production of a fixed amount of a crucial (otherwise patented) medication in order to facilitate access to these drugs by poorer parts of the population. A suspension of the IP rights such as this might, in addition to directly enhancing the availability of this drug in the domestic market, also enable domestic research institutions and industry to access, experiment with, utilize, improve and disseminate hitherto protected technology from the non-complying state and thereby foster technological learning and development as well as domestic innovation through imitation.⁵⁵

The suspension of a TRIPS obligation also makes sense from a trade theory perspective. Unlike in the case of imposition of tariffs, where trade theory clearly makes a case for free trade as being the most economically efficient option, opinion is not as unanimous on the application of TRIPS obligations. This is essentially because an intellectual property right protection is usually a balance that is drawn between the rights of the owner of such property vis-à-vis the rights of the others to use such property. To illustrate, while a patent protection provides for direct economic gain to the inventor which in turn is designed to provide an incentive for innovation, it entails, at least short

⁵⁴ “Intellectual Property: Protection and Enforcement,” Understanding the WTO. Available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> last visited on 10th August 2009.

⁵⁵ *Basheer supra.*

term consumer welfare losses and may discourage diffusion of technology through imitation and adaptation by competitors, which themselves constitutes valuable economic activities. Highlighting this attribute and pointing out that unlike free trade, affording protection to Intellectual Property is not as unequivocal a choice, Trebilcock and Howse argue, “*the level of intellectual property protection each country decides to afford will thus be rationally related to whether its comparative advantage resides more in innovation or imitation and adaptation of innovations made elsewhere, and the relative weight it gives to the interests of consumers, imitators and innovators. A country where innovation is not a major source of economic activity and growth is likely to choose, on balance, a less stringent intellectual property regime than would a country whose economy is highly dependent on innovation. From this perspective, there is nothing suspect or unreasonable with the preference of many developing countries for a relatively lax system of intellectual property rights.*”⁵⁶

The demonstrable advantages of such a suspension in terms of the economic gains that accrue to the suspending party can be easily demonstrated with the model by Krugman we used earlier.⁵⁷ Consider the same case of a Small Country which has little influence on world prices.

⁵⁶ Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (3rd edn, Routledge, London: 2005) 397, 399, 401 (hereinafter *Trebilcock & Howse*). See also, J. Watal, “Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India under the WTO TRIPS Agreement,” 23(5) *The World Economy* 733 (2000) (hereinafter *Watal*).

⁵⁷ *Krugman & Obstfeld supra*.

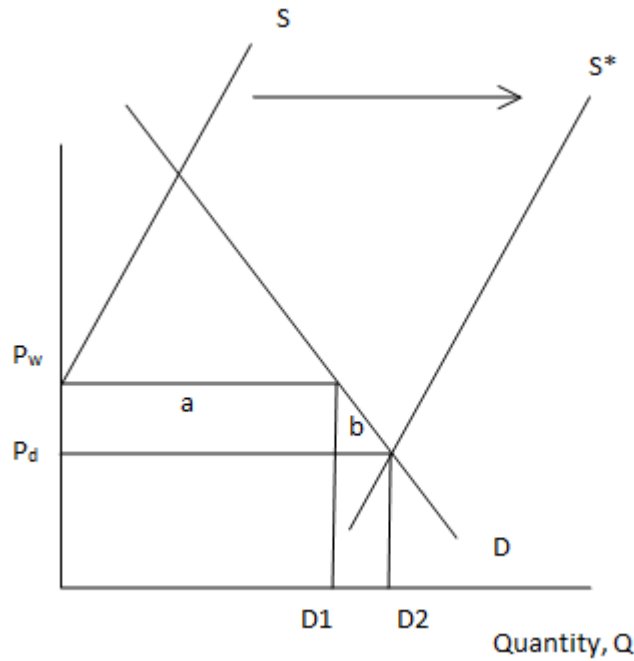


Figure 4

Due to the very high cost of manufacturing the IP right protected product, the domestic supply curve S , is unable to supply any of the demanded quantity $D1$ at the prevailing world prices P_w . With the suspension of the IP regime for that product, the cost function of the domestic suppliers drastically change and the product now can be produced along the new supply curve S^* . Given this shift, the product might now be available even at a price lower than earlier world prices (if the shift is substantial enough i.e. the IP component of the product concerned forms a major part of the cost structure). In this scenario, the product's availability in the market increases from $D1$ to $D2$ and the price falls from P_w to P_d . The net benefit flowing to the economy is now the sum of the area 'a' and 'b' as represented in the graph. In contrast with the earlier scenario of a tariff barrier, there is no visible monetary negative effect from such a trade measure. It is important here to remember a limitation of the graph – it concerns itself solely with monetary benefits and ignores larger concerns such as the benefit of an IP regime to promote innovation. The suspension of an IP regime is bound to result in a

negative impact on innovation. But leading on from Trebilcock and Howse's argument, we are here considering a state which has a comparative advantage in imitation and hence the negative impact a suspension of an IP regime is likely to have on innovation in this country is extremely low. The net effect from such a measure is thus positive.

Linking it back to the discussion on the reasons underlying the DSU scheme of retaliation, suspending TRIPS obligations provides an opportunity to achieve a rebalancing of interests without harming in any manner the domestic market.

The suspension of TRIPS obligations also serve to perform a second, more important function – that of inducing compliance as required under the DSU. Traditional modes of retaliation base their success largely on the monetary harm caused to the state concerned. While this in itself can act as a significant force to induce compliance, the mechanism of TRIPS combines it with a more subtle force which is probably more effective than the tool of direct monetary harm.

IP, has historically been one of the most cherished assets of the more advanced states.⁵⁸ Given this, a withdrawal of obligations under TRIPS can generally be expected to have a significant impact on key industries and thereby provide a strong incentive to industrialized countries to comply with WTO rulings.⁵⁹ Affected industries are likely to lobby their respective (non-complying) governments to do anything necessary to avoid such suspensions in the first place and, if already in place, to act as soon as possible to remove them. Even if compliance in sectors as politically sensitive as agricultural support in the EC or the US is at stake, the respective interest groups may not be able to

⁵⁸ Mariko Kunimi, "TRIPS Agreement, is it Really Successful Achievement in the WTO?- The Difficulty of Balancing between Public and Private Interests," 3 *Oregon Review of International Law* 46 (2001) at 46-47 (hereinafter *Kunimi*).

⁵⁹ *Basheer supra*; *Abbott* at 9-13; Andrew S. Bishop, "The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War with European Union," 12 *International Legal Perspectives* 1 (2002) (hereinafter *Bishop*).

counter the political pressure from IP-dependent industries.⁶⁰ The vigor with which these lobby groups acted to get TRIPS into the general ambit of the WTO despite vehement opposition by Developing Countries, is quite indicative of their political clout.⁶¹

On theory therefore, TRIPS seems to satisfy the requirements posited by the DSU and the WTO on the one hand – in being an effective compliance inducing mechanism; and yet does not have the same adverse effects to Developing Countries as measures such as tariffs do. In practice however, the solution the mechanism of cross-retaliation offers is not as simple. To understand this, let us start with identifying how such a measure could be implemented.

5. TARGET OF RETALIATION

Unlike conventional trade barriers, retaliating through an agreement such as the TRIPS is not as easy a measure to implement. A wide array of intellectual property rights could be the target of a TRIPS suspension and each has its own distinct set of advantages and limitations.⁶² Let us now consider the most-oft used IPRs:

Trademarks and Geographical Indications form a distinct category within the broader ambit IPRs by virtue of their ability to identify commodities. This attribute serves to differentiate different goods/services and thus send across a quality signal to the consumer. In addition to the benefit owners of such rights derive, the benefit to the

⁶⁰ Arvind Subramanian, “Can TRIPS serve as an Enforcement Device for Developing Countries in the WTO”, 3 *Journal of International Economic Law* 403 (2000).

⁶¹ Jide Nzelibe, “The Role and Limit of Legal Regulation of Conflict of Interest (Part I) - The Credibility Imperative: The Political Dynamics Of Retaliation In The World Trade Organization's Dispute Resolution Mechanism”, 6 *Theoretical Inquiries in Law* 215 (2005) at 241 (hereinafter *Nzelibe*); Frederick Abbott, “Toward a New Era of Objective Assessment in the Field of **TRIPS** and Variable Geometry for the Preservation of Multilateralism”, 8 *Journal of International Economic Law* 77 (2005) at 77-79 (hereinafter *Abbott II*).

⁶² For a more thorough analysis see *Abbott supra*.

consumers is unmistakable. Given this, a suspension of such IPRs would only cause greater harm to the consumers with counterfeit goods flooding the market.

Copyrights are the most extensive form of IP which exist in the originator of a work even without a requirement of registration. A suspension of Copyrights could take the form of either a restriction on specific rights under a broader bundle of rights or a restriction on the realization of these rights by withholding of royalty payments. In either case, there is a need for strict monitoring on the extent to which the rights are used to enable valuation. However, the particular nature of copyright poses serious problems - they are uniquely susceptible to digitisation, electronic reproduction and transmission. This raises difficult questions with respect to control over the underlying work in a digital environment: the work is prone to extensive retransmission and reproduction on a worldwide basis.⁶³ The existence of works already protected by Digital Rights Management or such similar protection mechanism does not solve this problem either. The existence of such mechanisms may render it necessary for Members undertaking cross-retaliation to obtain the technology or access codes necessary to use the underlying content. This hits at the very base of the ability of member states to be able to retaliate independently and of their own accord.⁶⁴

Further, the issue of whether products produced under a suspended TRIPS regime can be exported to other countries is still hotly contested in academic circles.⁶⁵ But the law as exists in WTO jurisprudence is as laid down by the tribunal in the *EC-Bananas Case* where the tribunal in no uncertain terms indicated that goods produced under a suspended regime are not capable of being exported. Highlighting the basis for such

⁶³ *Abott* at 23.

⁶⁴ An effective retaliatory measure is one which not only brings the country back into compliance but must also vest the measure completely with the complaining state without having to resort to the non-complying member for compliance. *EC-Bananas* case supra.

⁶⁵ Contrast *Abott* at 36 with the approach of the DSU panel in *EC-Bananas* case at para 150-158.

disallowance, the panel noted: “with respect to phonograms produced in Ecuador without the consent of the right holder, but consistent with an authorization by the DSB under Article 22.7 of the DSU, the obligations of Article 51 of the TRIPS Agreement to apply such procedures would remain in force for all WTO Members.”⁶⁶ Therefore, so long as the importing country is under an existing obligation to honor its TRIPS commitments, it cannot import goods produced under an IP suspension regime such as one authorised in pursuance of Article 22 of the DSU. These goods, despite having been produced legally, have not been produced with the *consent* of the rights holder and thus the legality does legitimise the products where the requirement of consent to legitimise production still exists.

In the context of Copyrights, this poses a serious limitation on the ability of the state to effectively cross-retaliate. If the domestic expense of the state is not sufficient to recoup the damage caused to it by the recalcitrant state’s inconsistent measure, then even if a suspended regime is in place, it is not effective.⁶⁷ Additionally, this geographical limitation might require the state to impose significantly additional and likely expensive safeguards to prevent leaking of domestically produced works outside of the state through the digital environment.⁶⁸ Given that even the most developed protection systems are not fool-proof, it might even lead to situation where if the State is unable to effectively prevent such dispersion, it could be held responsible for violating the scope of its authorization.⁶⁹

⁶⁶ *EC-Bananas* case at para 156.

⁶⁷ Gabriel L. Slater, “The Suspension of Intellectual Property Obligations under TRIPS: A Proposal for Retaliating Against Technology Exporting Countries in the World Trade Organisation,” 97 *Georgetown Law Journal* 1365 (2009) at 1402-1405 (hereinafter *Slater*).

⁶⁸ *Abbott* at 36.

⁶⁹ Mitchell E. Kilby, “The Mouse That Roared: Implications of The WTO Ruling in US – Gambling” 44 *Texas International Law Journal* 233 (2008) at 264 (hereinafter *Kilby*).

Patents⁷⁰ are IPRs granted over specific inventions and as a pre-requisite require identification of the author through registration. Further, the patent holder is required to elaborate the underlying invention sufficiently elaborately so as to enable a suitably qualified person to be able to work it.⁷¹ Patent law affords protection to both the ultimate product and the underlying process if they satisfy the requisite criteria. The utilization of the patent however is an expensive affair. The manufacturing of the product or the utilization of the process generally necessitates an expensive basic infrastructure.⁷² Facilities which are often assumed in larger countries are often lacking in smaller less developed states thus making the process of using a suspension of Patent rights extremely difficult – especially in the short run. This is especially so because, similar to the restriction pointed out in the case of copyrights, domestic expense could limit the ability of the State to recoup investment quickly. This translates into the need for a greater time frame to make the investment viable.

However, if limitations of technical feasibility are overcome, the suspension of a patent has some clearly identifiable welfare effects. A suspension of a Patent for a pharmaceutical product for example, might enable a government to be able to address public health issues by facilitating domestic production of key patented drugs and increasing their availability to consumers.⁷³ The welfare enhancing attribute of the use of such patents is clearly demonstrated through history. Over the years, developing

⁷⁰ For the purposes of this paper, Industrial Designs and Integrated Circuit Layouts can also be considered with the broader ambit of Patents given the commonality they share in terms of authorship, sufficiency of disclosure to work the invention and the underlying infrastructure necessary to enable reproduction.

⁷¹ *Bently and Sherman* at 624.

⁷² See Ministerial Conference, Doha Declaration on the TRIPS Agreement and Public Health (WT/MIN(01)/DEC/2), 20 November 2001, para 6 and the following negotiations leading to the 'paragraph six solution'; see General Council, Decision of 30 August 2003 (WT/L/540 and Corr.1), 1 September 2003 and General Council, Decision of 6 December 2005 (WT/L/641), 8 December 2005.

⁷³ *Grosse Ruse-Khan* at 362-363. See also *Abbott supra*.

countries have on numerous occasions made use of the provisions under the TRIPS framework to provide for compulsory licenses for patents over pharmaceutical products. The authorisation given to countries to issue compulsory licenses even absent national emergencies (without the need for prior negotiation in the event of national emergencies) highlights the key role afforded to such patents in enhancing the welfare of smaller countries.⁷⁴

Further, in addition to ensuring a strong counter to ensure compliance and in the process provide for vital and potentially lifesaving drugs to the citizenry, such measure could be used to build on the local infrastructure of the complaining country. It is difficult to envisage such an unequivocal welfare enhancing effect for any other IPR suspension.

In sum, trademarks and geographical indications are not desirable targets of a TRIPS suspension and neither of Copyrights or Patents are particularly easy to implement. On the positive however, Patents are capable of enormous welfare enhancing use. Given this, it seems prudent for a small developing country – in its attempt to a) effectively retaliate, b) avoid causing harm to itself, and c) maximising possible welfare from the measure of retaliation, to choose the instrument of a Patent regime.

That leaves us with a difficult task of finding a way to overcome the shortcomings in implementing a suspension of Patents. For this, it is necessary to first understand the limitation a suspension of patents poses for the purposes of cross-retaliation.

6. SUSPENDING OBLIGATIONS – IDENTIFYING THE DIFFERENCE

Much of the existing regime of dispute settlement is based on the use of conventional modes of retaliation such as imposition of tariff barriers or fixing quotas. An important feature of these conventional tools is that they are effective instantaneously and their

⁷⁴ *Slater* at 1391.

current performance is influenced solely by current processes and current tariffs. The performance of such a measure in the past or the likely performance in the future has very little effect on how effective the measure is currently. Since much of the cost of a retaliatory measure is capable of being passed on to the ultimate consumer, producers have little incentive to modify much of their trade pattern. Thus it would be quite correct to suggest that the performance of a trade barrier is contemporaneous with its implementation and the future state of the barriers does not have a very significant effect on its current performance.

It is important for us to understand this attribute in order to distinguish such modes of retaliation from that of cross retaliation - especially in a TRIPS framework. Unlike conventional modes, the effectiveness of cross-retaliation is largely dependent on future expectations of performance of the measure.

This dependence is best understood in a practical setting. Let us consider a case of suspension of some patent rights. As noted above, utilization of such a suspension requires well developed infrastructure. However, countries which most need the avenue of cross retaliation are smaller poor economies with poorly developed infrastructure.⁷⁵

Therefore, to make use of such concessions, these States must invest in the development of local infrastructure. As with all investments, there exists a time horizon necessary to realize the investment and make it worthwhile. The viability of the investment is a measure of the effectiveness of the retaliatory measure. Since this viability in turn

⁷⁵ It is often argued that this state is owed to the inability of these countries to afford domestic production. As much of the literature which opposed the implementation of a TRIPS regime on these economies suggest, the prohibitively high licensing fees and royalty payments that come attached to the latest innovations, disincentivise domestic production and consequently lead to underdeveloped infrastructure. See Kevin W. McCabe, "The January 1999 Review Of Article 27 Of the TRIPS Agreement: Diverging Views of Developed and Developing Countries Toward the Patentability of Biotechnology," 6 *Journal of Intellectual Property Law* 41 (1998) at 54-55 (hereinafter *McCabe*). The liberal attitude of the TRIPS Agreement towards developing and under developed countries tends to support this conclusion.

depends on the performance of the investment over time, the effectiveness of the retaliatory measure also depends on performance across time.

Therefore, unlike conventional modes of retaliation, there exists a strong inter-temporal dimension to measuring the effectiveness of cross-retaliation. This implies that a simplistic analysis as is performed in the context of conventional modes of retaliation does not suffice. It is necessary to consider the effectiveness of the retaliatory measure across time.

7. A VICIOUS CYCLE

The intertemporal attribute that distinguishes cross-retaliation through a suspension of the obligations of the country under TRIPS has a significant impact on the effectiveness of such a measure. The contours of this difference can be demonstrated by means of a simple game.

Consider a large state L which has certain WTO inconsistent measures in place. A small developing state S finds a significant part of its exports to state L affected by such a measure. State S now has two options - either to bring the dispute in front of the WTO or to remain silent. This decision is in turn influenced by numerous reasons - the cost of bringing such a claim, the possibility of succeeding, the utility of a decision in favor of State S and real politik concerns - to name a few. Relevant for current discussion is the aspect of enforcing an award in its favor to ensure compliance on part of State L. Other things being equal, a more effective implementation mechanism which enhances the utility state S derives (from (a) a reversion to a WTO compliant framework and (b) the benefits it derives from the temporary remedial measures such as retaliation) should increase the probability that state S indeed files a claim with the WTO to bring state B back into the compliance fold.

The aspect of an effective implementation mechanism is more nuanced than appears at first glance. Unlike in the case of a domestic litigation, there do not exist enforcement mechanisms in international litigation. Therefore, an award rendered does not as automatically bear fruit as it does within national boundaries. The focus on the utility of an award hence needs to focus on how effective are the mechanisms to compel the violating country to comply. In the context of the WTO framework, this depends on two crucial factors - firstly, the willingness of the violating country to *suo moto* bring it within the compliance fold after an award is rendered, and secondly, on the ability of the complaining state to use the force of retaliation.

As is clear from GATT history, the violating state has strong reasons why it chooses to comply with a WTO consistent regime of its own accord.⁷⁶ While these reasons act in favor of compliance, the very reasons for the implementation of a WTO inconsistent measure - the protection of the relevant domestic industry or the motive to raise revenues, pull in the opposite direction. Given this, a state undertakes a cost benefit analysis to base its decision. The monetary benefits from increased revenue (in the case of tariffs), and the non-monetary benefit to the concerned industry are weighed against the costs of non-compliance - real politik pressures, the need for a rule based institution etc. Although the non-monetary aspects are difficult to quantify, a rational state routinely undertakes a cost-benefit analysis that requires that these factors be compared.

Putting this into the example at hand, in the event state S files a claim with the WTO against L and pursues it till an award is handed down in its favor, state L has two options available - either to comply and follow the award or to refuse to comply. Let the total benefit the state and its industries receive from the inconsistent measure be **'b'**. Let

⁷⁶ Refer page 2 above.

the cost of non-compliance that compel a state to comply *suo moto*, in terms of the factors pointed out earlier⁷⁷ be ‘c’.⁷⁸

Consequently, if ‘c’ exceeds ‘b’, state L complies with the ruling and the game ends there. The problem however arises when ‘c’ is outweighed by ‘b’.⁷⁹ Given that the aim of WTO is to induce compliance, a state where the costs of non-compliance are outweighed by the benefits is unacceptable. The WTO DSU and the retaliatory provisions thereby step in at this stage to add another variable which seeks to rebalance the variables so as to make the benefits from compliance more attractive. Let ‘r’ denote the value of such a retaliatory measure.

The need for effective retaliation becomes more acute, the lesser is the value of ‘c’ in relation to ‘b’ – a case which occurs often in the context of a small developing country. The reasons for such a skewed balance are obvious. *Firstly*, the probability that the WTO inconsistent measure would ever be discovered is quite low - given the abysmal rate of utilization of the WTO framework by these countries, resulting *inter alia* due to enormous costs and lack of expertise. *Secondly*, even if a violation were discovered, the *real politik* pressure to rectify such a measure against an actor fairly insignificant in the international trade scenario is bound to be very low.

⁷⁷ Refer page 2 above.

⁷⁸ It is important to remember that ‘c’ refers to the factors influencing it *once the award is rendered*, which are in *addition* to those that should have dictated the state to comply with the WTO regime to begin with, before the claim was brought. These additional factors might persuade the state to get into a compliance fold *suo moto* even if prior to the award they were reluctant to do so. This might be due to factors such as the need to appear WTO compliant to the rest of the world – an attribute which is more visible in the face of a clear award identifying a WTO compliant path as opposed to without.

⁷⁹ It is worthwhile at this point to restate a necessary assumption. The concept of an efficient breach does not exist under the WTO framework and so on a systemic level such a cost-benefit analysis does not hold any water. The aim of the system is always geared at achieving compliance by even if the cost-benefit analysis carried out in the respective state suggests a contrary result.

The effectiveness of a retaliation mechanism is influenced largely by – the monetary equivalent of the measure that the complaining state can take, the welfare losses, if any, that can be caused in the recalcitrant state and by the effectiveness of such a measure in inducing compliance.

Of interest for the current discussion is the aspect of cross-retaliation under the TRIPS Agreement. In the example at hand, if state L after an assessment of the costs and benefits decides on non-compliance, state S could seek for permission to retaliate. The implementation of the retaliation within domestic boundaries would mean a refusal by state S to recognize an intellectual property right on a particular commodity till the period of authorization.

At this stage, two options are available to investors in state S - invest the money and make use of the suspensions or to let the opportunity pass. In the event the retaliation is successful and the former case results, the value of retaliation '**r**' is positive. If it is substantially high, then the combined effect of '**r**' and '**c**' tends to make the costs of retaliation to state B larger than the benefit '**b**' it derives. Hence the retaliatory measure proves successful. If the investors do not have enough confidence as to make use of the concessions, there is no retaliation. The value of '**r**' is hence zero. So we revert to the earlier case where the costs = '**c**' + '**r**' is lesser than '**b**' and hence state L does not comply.

Even under the TRIPS agreement, a country could retaliate under one or more of the several heads of Intellectual Property Rights. Leading on from previous discussion, since suspending Patents seems most favorable to small developing economies, let the suspension by state S pertain to a patent over a certain pharmaceutical drug that could significantly increase welfare of its populace. As discussed previously despite being more effective and welfare enhancing, patents are extremely expensive to utilize.

Even under a suspended patent regime, the infrastructural needs for manufacturing say a drug require the making of substantial investment, which, due to their intertemporal nature enable realisation of the fruits with a lag - say 't'. Till time 't' elapses from after the authorisation of suspensions, the value of retaliation 'r' will be in the negative where the cost of the infrastructure is greater than the benefits from a suspended property right.

State L can decide to get back to being WTO compliant any time it so wishes. If this happens, current WTO practice would require an immediate cessation of the suspensions of the TRIPS obligations state S has undertaken and status quo ante is restored. Industries in state S will now be required to pay royalties for the manufacture of the patented product. This seems to fit snugly with the WTO framework which insists on a WTO compliant state of affairs.

However, this creates problems in the specific case where state L decides to comply before the lapse of time 't' from the date of authorisation of suspension. A company which invests money into the making of the particular product, after the suspension of the concerned intellectual property right, usually does so to utilise the lower cost structure it faces for production, absent the payment of royalty rates. If they were to revert back to the regime prior to suspensions, then they are suddenly faced with heightened costs in production - which might make it uneconomical for them to continue production.⁸⁰ That such industries started production only on suspension of the

⁸⁰ The reality of this problem came to fore recently through the *US-Gambling* dispute. After having successfully proved a violation of GATS obligations by the US through its laws that restricted Internet Gambling, Antigua sought suspension of its TRIPS Commitments as retaliation. Soon thereafter, the United States announced that it would comply by withdrawing its gambling service commitments. Antigua requested arbitration on the amount of compensatory adjustment offered by the US, but suspended its arbitration request in the hopes of negotiating a mutually satisfactory solution to all aspects of the dispute. This tricky situation Antigua found itself in, is reflective of the uncertainty that is faced by nation states when they are in the process of deciding on whether to effectuate the authorisation to retaliate. *Slater* at 1379.

rights suggest to the unviability of such production and the investment necessary under normal circumstances. Translated into the example at hand, if state L gets back to being WTO compliant before time ‘t’, investors in state S would make losses.

As was the purpose of using the TRIPS agreement to retaliate, during suspension of the relevant intellectual property rights, state L is under enormous pressure by intellectual property rights industries forcing them to get back into a WTO compliant setup. Given this, state L could get back into a compliant state any time. Investors in state S are thus faced with a situation where the fate of significant investments they are required to make is at the mercy of a completely different state which in a manner of speaking, is on a ticking time bomb. The stronger the belief that the investment could prove to be successful and greater the investment that flows in, the greater is the pressure on state L and the shorter the time available to recoup the investments.

A prudent investor when faced with these pay-offs would decide to refrain from investing in the first place. Since investment into the making of patented goods was how the fruits of retaliation were to be realized, an absence of investment would mean a complete failure of the retaliatory mechanisms. A failure of retaliation would in turn mean that the recalcitrant state can fully ignore the additional costs the DSU was to impose on it and its decision – like in the absence of an effective implementation mechanism, vests solely on its *suo moto* desire to comply. Taking a step back, for smaller countries (who are meant to be beneficiaries of an authorization to cross-retaliate) this situation is very likely. The futility of such authorisation to retaliate is imminent and leads them to include this factor even at the stage of deciding whether to file a suit. As noted just above, the fruitfulness of the dispute settlement mechanism is one of the major factors that such countries consider before filing a suit. If they believe that the influence of the *suo moto* desire to comply is outweighed by the benefits the country

receives from a non-compliant state of affairs, then they do not file a complaint in the first place.

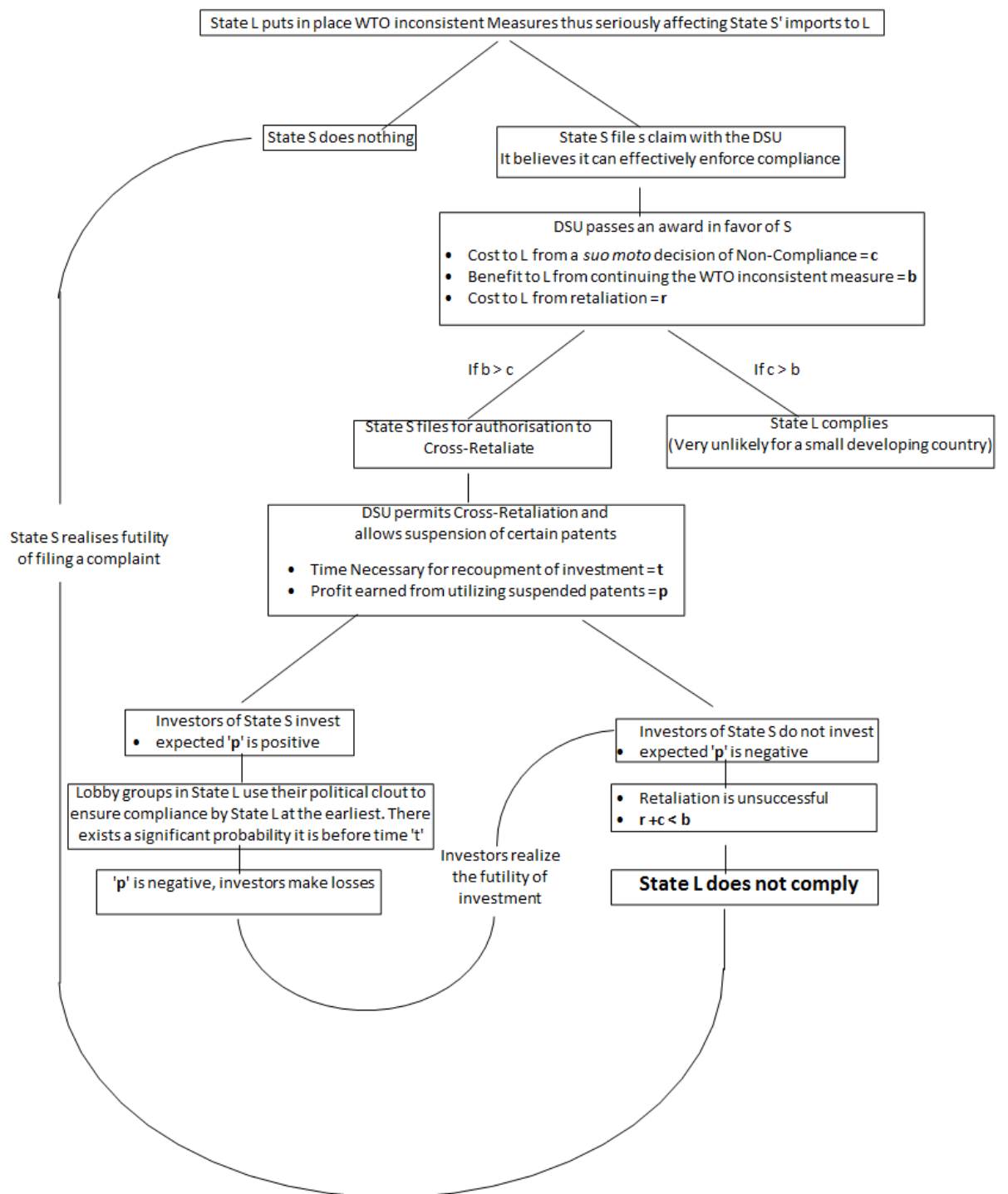


Figure 5

In such a scenario, through the process of backward induction, what results is a state where state L continues to breach its obligations and state S silently suffers. It is

certainly not a scenario the WTO envisaged! The very poor rate of utilization of the WTO DSU by smaller developing countries, even after the ruling in *EC-Bananas* bringing to fore the possibility of cross-retaliation, probably points to this ineffectiveness that plagues the system.

8. PROBING A WAY OUT

Any attempt that seeks to explore possible solutions to the deadlock we are confronted with, must begin with an understanding of the conditions that have lead to the deadlock. As the game brings to fore, the lack of a predictable environment for investors, underlies the ineffectiveness of the retaliatory regime. This unpredictability in turn owes its origins to two requirements of retaliation as under the DSU – that of equivalence of the quantum from retaliation, and the temporary nature of the retaliatory measure. An effective way out must necessarily overcome these limitations.

The aspects of equivalence and ‘temporary remedies,’ are a unique combination of elements specific to the WTO DSU setup. They are an express deviation from the rule generally prevalent in International Law as is reflected in the Draft Articles on State Responsibility. The Draft Articles on State Responsibility as well as public international law in general recognise international dispute resolution as performing two functions: compliance inducing and remedying past harm. The former of the two functions finds reflection in the WTO framework but is restricted by the need for the measure to be equivalent.⁸¹ Hence the concepts of punitive sanctions and compensation – prevalent in

⁸¹ The permissibility of providing for punitive sanctions in the WTO was explored in the *United States Tax Treatment for Foreign Sales Corporations case*. [WTO Arbitrator's Decision on United States Tax Treatment for ‘Foreign Sales Corporations,’ WT/DS108/ARB] The arbitrators in the case affirmed the permissibility of more than equivalent damages by invoking the need for using a punitive instrument to ensure compliance. However, that particular case was under the Subsidies and Counter-veiling Measures Agreement. The extension of the jurisprudence there to the whole of the WTO DSU regime seems impermissible. The arbitrators in that case used the specific wording of the SCM Agreement to note that the countermeasures only need to be ‘proportional.’ Contrasted with the DSU’s requirement of equivalence, the

International Law, cannot be applied to WTO jurisprudence.⁸² As regards the function of ‘remedying past harm’ in International Law, it does not have a concomitant provision in WTO jurisprudence. The need for remedies to be ‘temporary’ and prospective means that past harm is left uncompensated. Further, since retaliation is restricted to present harm, the measure cannot be continued beyond such period of non-compliance even if to recover past harm from such a measure.

Specifically in the context of cross-retaliation, although there exists a need to provide some element of certainty as regards future performance of the investment, the same cannot be granted on grounds of either punitively ensuring compliance or forcing the recalcitrant state to provide compensation. Neither can the objective be achieved by using the DSU by itself to provide for retaliation till the harm caused is realised. So it seems unlikely that the aim of remedying cross-retaliation can be achieved by using the suspended TRIPS regime. This leaves us to explore the permissibility of an authorisation which solves the aforementioned problems while yet remains TRIPS compliant.

8.1 The Award

The vicious cycle identified could be solved if the investors are assured of predictability in their investments. This would necessitate an assurance that for the time frame necessary to recoup investment, the benefits they derived from a suspended TRIPS

former provision provides the panel with much greater flexibility. Additionally, while interpreting the phrase ‘equivalence’ under the text of the DSU, the arbitrators in the *EC-Bananas case* specifically disallowed use of punitive measures. [*EC-Bananas case* at 34.]

⁸² The Draft Articles on State Responsibility specifically provide for an exception to their applicability in the event of a specific rule of International law or ‘*lex specialis*’ governing that area. The DSU interpreted under Article 55 of the DSR is a special rule that forbids the applicability of DSR to the extent of counter measures. Henrik Horn, Petros C. Mavroidis, *The American Law Institute Reporters' Studies on WTO Case Law* (Cambridge University Press, Cambridge: 2007) at 349.

regime i.e. absence of royalty payments, would persist. Let us consider an award which is tailor made to achieve this result.

The tribunal could authorise a ‘temporary’ suspension of the patent over a particular drug and allow a scheme whereby - the government provides for a reasonable period of time for the recalcitrant member state to comply failing which, they provide a suitable time-frame bound license to identified private actors to allow utilisation of the patent suspension. The allowance would grant these licensees permission to produce the product without the need for royalty payments for a pre-estimated time period considered absolutely essential to make the investment viable. The license would permit production of the product till the expiry of the pre-estimated time frame, or the reversion of the recalcitrant state into compliance fold – whichever is later.

8.2 Ascertaining Legality

It is obvious that the award of the form just presented inevitable leads to a curtailment of the rights vested in a patent holder. The curtailment is justifiable during the legitimate course of a suspension under an authorisation by the panel setup under the DSU. The more complicated question however, is whether the award continues to remain legally valid even after cessation of the TRIPS suspension. Validity of this part of the award must necessarily flow from an exception envisaged in the TRIPS agreement itself. As pertains to Patents, Article 30 of the TRIPS Agreement provides for limited grounds within which such exceptions could be made.

Article 30 allows Member States to provide exceptions to the exclusive rights conferred by the patent provided that they satisfy the following requirement: a) the exception is limited in nature, b) does not *unreasonably* conflict with the normal exploitation of the patent, and c) does not *unreasonably* prejudice the legitimate interest of the patent owner. The above factors must be applied, taking into account ‘legitimate interests of

third parties.’⁸³ Therefore, the Article, rather than providing for a recognised set of exceptions, allows for a case by case determination of the ambit of the exception that may be granted.

The term ‘limited’ serves to do little to curtail the ambit of application of the exception and connotes a restriction that is restricted either in scope, extent, amount or person etc.⁸⁴ In the form of the award under discussion, the right to continue production till economically viable vests with an identifiable set of private actors and the relaxation provided to them is with a purpose. Hence the requirement of ‘limited’ seems satisfied.

The other two conditions required under the Article – conflict with normal exploitation of the patent and prejudice to the legitimate interest of the patent owner, are both qualified by the test of unreasonableness. It is obvious that the current form of the award indeed curtails normal exploitation of the patent and prejudices the owner, as it restricts his ability to control the use of his patent and his right to ‘make, use or commercialize the invention without third party competition.’⁸⁵ The question that remains is whether such restrictions are unreasonable.

The Article provides little guidance to the interpretation of the term ‘unreasonable.’ Therefore, absent a normative test for reasonableness, the principle of proportionality as

⁸³ Legal Texts, WTO - Agreement on Trade-Related Aspects of Intellectual Property Rights, available at <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm> last visited on 10th August 2009.

⁸⁴ Carlos M. Correa, *Trade Related Aspects of Intellectual Property Rights* (Oxford University Press, Oxford: 2007) at 306-7 (hereinafter *Correa*). The author substantiates this conclusion by critiquing the much narrower approach adopted by the panel in the *EC-Canada case* [Canada-Patent Protection for Pharmaceutical Products, WT/DS114/R], where the term ‘limited’ was interpreted to refer to the extent to which rights are restricted rather than to the extent of economic effect, as not reflecting WTO practice. He suggests that even a complete curtailment of certain rights, otherwise limited either in purpose, outcome, persons or its duration has been held a valid ‘limitation’ for the purposes of the WTO.

⁸⁵ *Correa* at 308.

used in EC Law may be used as a guiding yardstick.⁸⁶ The principle requires that means used to achieve an end bear a reasonable relation with the end achieved.⁸⁷ Therefore the means used – here the form of the award under consideration, must bear a reasonable relation with the end – which here is a balance drawn between: the achieving of the purpose of the TRIPS obligations and protecting the legitimate interests of the investors for whose benefit the present clause is drafted.

8.2.1 Achieving the purpose of the TRIPS Obligations

Article 31 of the Vienna Convention on the Law of Treaties requires that a treaty “*be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of the object and purpose.*” Hence it is necessary, while interpreting the terms of Article 30 of the TRIPS Agreement, to refer to Article 7 of the Agreement which defines the objectives envisaged. Article 7 of the TRIPS Agreement under the marginal heading ‘Objectives’ states that “*The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*” Hence it provides that protection and enforcement of intellectual property rights do not exist in vacuum but exist within the confines of a broader need to benefit society. Private interests must therefore co-exist with objectives of health policies, promotion of technological innovation, transfer and dissemination of technology, social and economic

⁸⁶ Daniel Gervais, *The TRIPS Agreement – Drafting History and Analysis* (3rd Ed., Sweet and Maxwell, London: 2008) at para 2.271-2.278 (hereinafter *Gervais*).

⁸⁷ *Id.*

welfare etc.⁸⁸ Reasonableness of an exception under Article 30 must be considered in light of the purposes envisaged under the Agreement.⁸⁹

8.2.2 Protecting the legitimate interest of investors

Article 30 of the TRIPS Agreement requires that reasonableness of an exception be ascertained while considering the legitimate interest of third parties. It is pertinent to note that this aspect of the TRIPS Agreement is an addition to the text of Article 9(2) of the Berne Convention, from where the rest of the text is borrowed. Such a specific deviation from an existing text necessitates special consideration of such addition.⁹⁰

The term ‘legitimate interest’ as used refers to a concept much wider than ‘legal interest.’ As was noted by the panel in the *EC-Canada* case, “*the term must be defined in the way that is often used in legal discourse – as a normative claim calling for protection of interests that are ‘justifiable’ in the sense that they are supported by relevant public policies or other social norms.*”⁹¹ ‘Legitimate’ thus needs to be understood as requiring a connotation of legitimacy from a more normative perspective.⁹² Thus, interests to be taken into account include, *inter alia*, those of follow-on innovators, competitors, end users and of the society at large in addressing health concerns or ensuring advancement of science and technology.⁹³

⁸⁸ Submission by the African Group Barbados, Bolivia, Brazil, Cuba, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Phillipines, Peru, Sri Lanka, Thailand and Venezuela [IP/C/W/296] at para 18.

⁸⁹ UNCTAD-ICTSD, *Resource Book on TRIPS and Development*, (Cambridge University Press, Cambridge: 2005) at 128-135 (hereinafter *UNCTAD-ICTSD*).

⁹⁰ *EC-Canada* case at paras 7.68-71.

⁹¹ *Ibid* at para 7.69.

⁹² *US Copyright* case [United States-Section 110(5) of the US Copyright Act, WT/DS160/R] at para 6.224.

⁹³ *Correa* at 311.

8.2.3 Ascertaining reasonableness

The form of the award under consideration was necessitated to achieve a specific result. The DSU, given its requirements of equivalence and temporality, lead to a vicious cycle where smaller developing countries found themselves unable to fully utilise the DSU. The specific category of member states which end up with this deadlock are those whose infrastructural capabilities are so limited that they find themselves unable to exploit the suspension.

The purpose of exploring the avenue of cross-retaliation, more specifically the avenue of cross-retaliation through a suspension of patent rights under the TRIPS regime was to achieve the dual purpose of inducing compliance and contemporaneously to enhance the social welfare of the state under question. The proposed form of the award, while providing a measure of certainty in terms of utilising an award, has the corresponding effect of 1) providing for greater dissemination of vital patented products, and 2) improvement of infrastructure which besides sustaining current production needs, provides the structural framework for future scientific advancement – falls squarely within the objectives envisaged under the TRIPS Agreement.

Further, such a measure is necessary to protect the interest of the investors whose investment decisions into a venture which enhances social welfare, is contingent on the provision of a measure of predictability in their investment. Investors, who are legitimately vested with a right to utilise a suspension find themselves at the mercy of the recalcitrant member state as to the future performance of their investment. Since one of the key aspects of an effective retaliation mechanism is the ability of a state to be able to effectively retaliate without the consent of the recalcitrant state, public policy concerns necessitate a measure which distances such reliance. Additionally, the ambit of the phrase ‘legitimate’ as used in Article 30 of the TRIPS Agreement is wide enough to

include within its ambit such interests, legitimately formed, which *have the effect* of furthering the objectives as laid down in the Agreement.

The final question now is whether such a measure while achieving the aforesaid objectives, is reasonable in its extent. The proposed form of the award seeks to meet this requirement of proportionality through two measures: firstly, the time period given to the member state to comply before the commencing of suspension should afford the rights holder sufficient time to coax its national government to get back into compliance fold. Secondly, the allowance to utilise the patent without royalties is strictly restricted in time to the pre-estimated period deemed necessary to recoup investment and make it viable. While the first of such measures has the effect of affording the investor an opportunity to protect his commercial interests, the second ensures that any limitation that might come to be imposed has a strict relation to the objectives sought to be achieved.

8.3 Analysis

As the discussion above reveals, the TRIPS Agreement with its widely drafted provisions and a set of objectives which tend to further the cause of smaller developing countries, seems capable of providing a solution to address the deficiencies of the aspect of TRIPS retaliation considered. The use of the exception to achieve the purposes of a different agreement together with achieving the objectives as envisaged within itself, is unprecedented and necessitates some degree of judicial creativity. The result is however still capable of being justified within the bounds laid down in the Agreement.

The avenue of cross-retaliation thus still remains a viable option.

CONCLUSION

The WTO with the introduction of the DSU ushered in a sea of changes to the existing GATT regime. The WTO, primarily aimed at bringing countries with significantly different economic powers under a rule based system, felt the need to strengthen enforcement mechanisms therein to overcome limitations the previous system under the GATT posed. The changed regime in addition to adding significant bite to the enforcement machinery, vested guided discretion in the hands of the panel established under the DSU, to choose an instrument that could act as a vehicle which carried the impact enshrined in the changed regime.

It is in furtherance of such discretion vested in the panel that they probed hitherto unexplored territories of retaliation. The various dimensions of traditional modes of retaliation that served to undercut its utility were probed and an instrument that could overcome its limitations was sought. The avenue of cross-retaliation through the TRIPS Agreement was one such instrument that the language of the DSU together with some judicial innovation, readily offered. Envisaged with the intention of nullifying the limitations of traditional modes of retaliation, such cross-retaliation was seen as a bastion in the hands of underdeveloped economies that could enable them to compete on par with their more developed brethren. In theory, it was capable of undoing most of the limitations that traditional modes of retaliation encountered and also significant welfare enhancing possibilities. But a result of judicial innovation as it was, the text did not fully support a realisation of its capabilities.

The DSU framework, despite its modifications from the GATT regime, was still grounded in a framework of familiar modes of retaliation such as tariffs and quotas. Cross-retaliation as a measure had attributes which were in essential aspects different from their more traditional counterparts. Of significance, the inter-temporal attribute of

cross-retaliation did not have a corresponding corollary in traditional modes of retaliation. Consequently, being a mode of retaliation fundamentally different – both in terms of effect and nature, it could not fit it snugly in a framework not originally meant to house it. The friction that ensued served to hit at the effectiveness of such a measure. As the paper outlines, this difference lead to a long causal chain that ultimately resulted in cross-retaliation, like conventional modes of retaliation, as being financially unviable for smaller economies.

To render it more feasible, there is need for further judicial creativity. As was with the creation of this instrument of retaliation, the future of the measure and its effective use depends largely on the willingness of the DSU panel. It is important that they realise the critical need of such an instrument for small developing countries, and exploit the language of openly worded instruments such as the TRIPS Agreement and the provision for an Exception contained therein, to effectuate the remedy.

Such an interpretation would be a significant step in assuring smaller countries of their equality on the WTO platform, despite vast economic differences that separate them from the rest. An effective remedy on a finding of violation is quintessential for the perception of the dispute settlement mechanism as a machinery worth utilising. It could in its own small way take us one step forward in enabling smaller countries to use the WTO mechanism without the hesitation that seemed to have plagued them all these years.

Having said this, it is important to realise that it is but only a small step. There are other problems – some specific to cross-retaliation, and others more generally linked to the aspect of retaliation, that act as impediments in the realisation of the fruits of such a measure.

Specific to cross-retaliation, there are two problems that persist to exist even after the hurdle of investor hesitation has been crossed: problems with valuation and with the interplay of the TRIPS with other treaty obligations.

Problems with Valuation: When determining “equivalence” in a traditional retaliation context involving the raising of tariffs, 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 tariff amounts and this would give some sense of the loss of trade to the country concerned. However, when such retaliation involves the suspension of IP rights, the value of suspension is not easily ascertainable: particularly since there is, as yet, no universally accepted objective methodology for valuing IP.⁹⁴ This is bound to create problems as any measure which values intellectual property is bound to be contested and this is only going to result in more rounds of litigation – meaning thereby, additional costs for the Complaining State.

Interplay of other Treaty Obligations: Article 2.2 of the TRIPS Agreement clearly states that nothing in the agreement “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.” If a Complaining State is a signatory to one of these several conventions, then a suspension of its obligations under TRIPS does not necessarily mean a suspension of its obligations under other Conventions. In such a situation, upholding say the Berne or Paris Conventions, despite a WTO authorization to cross retaliate will render redundant a key aspect of the WTO retaliatory framework.⁹⁵

⁹⁴ *Supra* note 30.

⁹⁵ *Grosse Ruse-Khan supra*.

There is much debate on whether this argument holds much ground.⁹⁶ But in the existence of a multitude of Bilateral and Multilateral Commitments between member states on the aspect of IP protection, the continued uncertainty over this issue would create significant roadblocks, preventing a smoother implementation of a TRIPS cross-retaliation measure.

Quite distinct from the specificities of cross-retaliation and quite significant in its impact, there exists a much larger issue that could seriously undermine the utility of the retaliation machinery. Irrespective of how sound an economic sense within the framework of the WTO a suspension might make, there inevitably are external factors which might resist a Complaining State from going ahead with implementing retaliation. It is irrefutable that in the current world scenario, countries have a complex set of interwoven linkages – some of reciprocity and some of dependence, which hinge on a smooth conduct of international affairs. Any measure of retaliation would inevitably have an impact on such bilateral and multilateral relations.

Of significance to smaller developing economies is the aspect of their dependence on larger wealthier nations. Given the current world order, most developing countries are dependant on the wealthier counterparts for unilateral benefits such as foreign aid or preferential tariff benefits. They would rather not irk their benevolent counterparts lest they be denied such benefits.

It is clear from everything above that using the force of retaliation and more specifically that of cross-retaliation will be a monumental effort. There is need for much legal refinement over issues that are inevitably bound to arise and for strong political will to

⁹⁶ Those refuting its applicability resort to rules of Treaty Interpretation which render applicable provisions of an earlier treaty only to the extent that its provisions are compatible with those of the later treaty. Since the WTO, the DSU and the TRIPS Agreements are more recent than most of the relevant multilateral treaty obligations, they are argued to have overriding effect. *Abbott* at 14.

take some hard decisions. But atleast there is an avenue that can be used. As an author rightly notes, “WTO Members contemplating cross-retaliation in TRIPS should be aware that this will be no easy task.”⁹⁷

Word Count: 16,179

⁹⁷ *Abbott* at 38.

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