Cross Retaliation Under TRIPS: A Creative Remedy When Power Disparity Exists

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Abstract. The WTO system has largely achieved procedural fairness, yet substantial challenges persist in addressing the equity of legal remedies and enforcement, particularly amid significant disparities in economic power among member states. Such power imbalances necessitate a nuanced consideration in the design of the system to ensure that fairness transcends procedural aspects and reflects in substantive outcomes. In that context, Intellectual Property (IP) retaliation emerges as an innovative and temporary method to address these imbalances, offering a mechanism to level the playing field between developed and developing countries. While IP retaliation has gained traction as a strategic tool to mitigate power disparities, its mechanisms remain inadequately defined and require further empirical validation and refinement in practice. This highlights the need for ongoing reform within the WTO system to enhance both the clarity and effectiveness of IP retaliation, ensuring it serves as a viable and fair recourse in international trade disputes.

Keywords: IP retaliation; power imbalance; WTO system; legal fairness; economic disparity.

1. Introduction

Established in the 1994 Marrakesh Agreement, the World Trade Organization (WTO) is deemed as the significant success for solving trade liberalization, barriers elimination and international settlement. Central to its mandate is the dispute settlement system, renowned for offering remedies to parties that claim harm from violations of WTO agreements [1]. Academic discourse broadly considers the ultimate objectives of remedies following WTO agreement violations to be compliance, compensation, or the minimization of breaches. One prevailing view supports that countermeasures should primarily induce compliance, thereby justifying robust remedies and advocating for an increased reliance on cross-retaliation [2] . Conversely, another perspective emphasizes that remedies should primarily compensate the aggrieved nations for losses incurred due to violations [3].

Among these remedies, cross-retaliation, authorized under Article 22 of the Dispute Settlement Understanding (DSU), allows affected countries to suspend concessions across different WTO agreements, not just the one implicated in the dispute [4]. This method is particularly significant as it extends beyond traditional retaliation methods which are limited to suspensions under the directly violated agreement.

The significance of cross-retaliation is most evident when considering the power imbalances between developing and developed countries within the WTO framework. Developing nations, often lacking substantial economic power and political influence, find their retaliatory capabilities under traditional mechanisms insufficient to effect change or reverse adverse conditions imposed by more powerful countries. Hence, the adoption of cross-retaliation provides these nations with a broader scope of strategic responses, potentially increasing their leverage in disputes. This approach, however, while theoretically empowering, poses practical challenges in terms of enforcement and effective utilization, as highlighted by the seminal Gambling Case, where Antigua and Barbuda confronted the United States over breaches in trade-related intellectual property rights [5].

This paper aims to dissect these mechanisms' effectiveness, with a focus on how they serve the interests of weaker member states against economically stronger adversaries. It will explore the intricacies of the Gambling Case to explore the real-world application of cross-retaliation, discuss the limitations currently faced by less powerful nations, and propose targeted reforms to enhance the

equity and functionality of the WTO's dispute resolution system. By examining these aspects, the research seeks to contribute to the broader discourse on international trade fairness, advocating for changes that ensure all member states can effectively assert and protect their rights within the global trade system.

2. Basic Theory of Cross Retaliation under TRIPS

2.1. Comparative Advantages of IP Retaliation

Proponents of the theory of cross retaliation under TRIPS hold the idea that suspension of intellectual property protection can more effectively achieve both the re-balancing of power and compliance induction compared to traditional retaliation methods. As for developed countries usually attach a great importance to intellectual property protection, the threat of legal piracy can raise concerns to noncompliant countries like the United States about the infringement of their high IP products. Especially when the company that own most valuable intellectual property influence a lot on the governmental decision [6]. In other words, companies supposed to suffer from the IP retaliation in noncompliant countries will exert to discourage their respective government from violating WTO commitment, which pushes the regime of their countries to reverse inconsistent measures and inducing compliance.

From the perspective of re-balancing purpose, the creative countermeasures of IP suspension provide an option for developing countries, which seems to do less harm to domestic economy during the retaliating process than it does through other retaliatory measures. For example, if a smaller country like Antigua were to increase tariffs or enforce other trade barriers against a major trading partner like the United States, the immediate burden would fall on Antiguan consumers through higher prices, potentially exacerbating economic challenges within Antigua itself. Therefore, the retaliation from developing countries through tariff changing is not only too weak to have impact on their powerful opponents, but the enforcement of retaliatory measures will definitely damage domestic industries and consumers first before it influences the noncompliant countries. At this aspect, retaliation under TRIPS is supposed to be an innovation helping to even the playing field between countries with distinct power disparity [7].

Besides, for the development of the prevailing countries, the authorization of IP piracy can be taken advantage of to improve their domestic technological strength and innovative ability. The benefits of this measure work especially in the fields of education and technological research. For instance, legal piracy on intellectual property brings about the extension of reasonable limitation on the patent or copyright, which legally allows researchers to get the advanced information with lower price than it should be. Despite the potential failure to fully recoup economic losses caused by violations of the WTO treaty, the benefits of enhanced technological capacity and knowledge acquisition can contribute significantly to a nation's long-term development and competitive positioning.

2.2. Constraints on justification of IP retaliation.

The justification for cross retaliation, particularly through the suspension of TRIPS obligations, necessitates strict adherence to procedural prerequisites. Retaliating nations must demonstrate that traditional forms of retaliation—such as suspending obligations directly related to the violated WTO agreement—are neither practical nor sufficient to redress their losses stemming from the violations [8]. Without such proof, the accused noncompliant countries could challenge the validity of the retaliation. Therefore, the necessity of cross-retaliation must be thoroughly justified across all applicable categories of the WTO Agreement, not just within the confines of the TRIPS Agreement.

Theoretically, retaliation is the last choice for contesting countries. As for the retaliating process will inevitably harm the international trade, this kind of remedy is not favorable under the WTO dispute settlement system. But from the perspective of substantial fairness, sometimes retaliatory measures are necessary when judicial outcomes fail to compel compliance. The primary purpose of

such retaliation, under any applicable WTO agreement, is to provide a viable means for aggrieved nations to attain a sense of equity based on the ruling.

Unlike other retaliatory actions that may involve increasing tariffs or imposing trade barriers, IP retaliation measure suspend the protection commitment through legal piracy of goods with high IP value. Under the trend of trade liberalization, the value attached on IP goods in a large extend relies on cross-border trade to achieve, for which treaty under WTO Agreement of intellectual property has been stressing on transnational protection of IP rights. But cross-retaliation under TRIPS Agreement is definitely harming the international IP protection. For example, in cotton case pharmaceutical products of the US company was authorized by arbitrators for the Brazil to take into production, if the Brazil government, with support from sufficient industrial power, actually had implemented that legal patent piracy, that means the pharmaceutical products of the US company with that high IP value and lower price would spread all over the world. In other words, suspension of intellectual property obligations has the possibility to damage the original value of intellectual property and discourage the incentive of innovation which is contrary to the purpose on including the intellectual property into the WTO Agreement. Thus, even though the unconditional cross retaliation might make sense in some circumstances, the theory does not work as well on IP retaliation.

3. The Effectiveness of IP Retaliation in Practice

3.1. Practical Challenges: The Gambling Case

The effectiveness of traditional retaliation is largely dependent on the economic power of the executing party. It is an uncontroversial fact, proven in practice, that weaker nations face significant hurdles in achieving substantive fairness under the WTO system. This situation substantiates the theory that IP suspension is a feasible solution for weak countries to enforce international judicial decisions against their more powerful counterparts.

The Gambling Case serves as a quintessential example where a smaller nation, Antigua, legally challenged a dominant country, the United States, under the WTO framework. Arbitrators in the Gambling dispute awarded Antigua the right to retaliate against the United States by suspending obligations under the TRIPS. Antigua has periodically announced its intention to suspend U.S. copyrights in the music and film industries. But finally, the Antigua did not really enforce the IP piracy, and the threat of intellectual property suspension in this case did not work on inducing compliance as well. There is such an opinion that the Antigua economy's reliance on tourism from the United States and its fear of political retaliation provides a potential reason [9]. But after the authorization, the Antigua actually made a lot of statement about implementing the copyrights piracy against the US, which shows they did not really worry about the disapproving attitude from the United States. From this perspective, political fear cannot be a persuasive explanation.

Economic constraints appear to be a more significant factor influencing Antigua's decision to cease cross retaliation under the IP suspension. Implementing IP piracy requires a robust local industry capable of producing and marketing the pirated goods profitably. For developing or least-developed countries lacking substantial industrial power and market size, it is challenging to offset their losses through such intellectual property countermeasures. Besides, in order to implement the IP retaliation, the Antigua government needs help from private actors actively willing to invest in the production of authorized IP goods. And certainly these 'private actors' must have background of running relevant business. As for the IP retaliation is such an innovative remedy method, which makes the effectiveness of the policy under this retaliation unstable, investment for the relevant business has the possibility to fail for political reasons. If a company decides to sell pirated music, when noncompliant countries change their violating actions into compliance, the effort put on IP piracy would amounted to nothing. Therefore, even without explicit political pressure from the United States, the inherent power disparity and the volatility of enforcement policies may dissuade capable Antiguan entrepreneurs from backing the piracy industry. This is particularly problematic in smaller economies where there is a scarcity of corporations capable of aiding in the enforcement of such retaliation.

3.2. Comparative Cases: EC Banana and Upland Cotton

Apart from the gambling case, which IP retaliation did not work neither as a retaliatory measure or a threat to induce compliance, other typical cases that IP retaliation involved has proven the functional effectiveness of IP retaliation on dispute settlement under the WTO system. One of them is EC banana III, where the first time TRIPS suspension was threatened. In this case, the complaining country Ecuador, with the support from the United States, did not retaliate through IP suspension despite the authorization from the Appellate body. Instead, EU and Ecuador had reached an agreement on tariff reduction for banana importation to EC as final settlement. Although Ecuador did not really enforce the authorized IP retaliation, the threat of piracy sanction did help for reaching settlement in which the EU made concessions, as for the intellectual property rights has always been the significant part of the WTO Agreement that the EU care about. There is a view that as for the United States line up with the Latin American countries in the banana case, any retaliatory countermeasures approved in this case were likely to present real threats, regardless of whether they were tariff- or TRIPS-related. That makes sense for the real effectiveness is the key reason that made the EU promise to change their noncompliant measure, but the importance of the US support does not mean that IP threat means nothing in the negotiating process. Although Ecuador could threaten the EU by other retaliatory measures mainly based on tariff, the negative results for the EU was being superficial, for example, price changing on fruits, which might bother the EU to find an alternative but not constitute a significant threat. In this circumstance, the political or economic support from other countries might promote this process but cannot make any difference. However, the effectiveness with IP retaliation makes difference, while might fail with other retaliatory measures, in threaten the EU to change violating policy. Because the most special feature of IP retaliation making noncompliant countries worried is the damage made to the original value of high IP products, which would impact on the roots of many European companies. This explains the significant function IP retaliation has on inducing compliance when the retaliating countries really have the possibility (economic power or support from others) to enforce IP piracy.

In contrast, the Upland Cotton case between Brazil and the US showcases a scenario where the retaliating country had both the capacity and the intent to utilize IP suspension effectively. With that industrial power and market size, same as Ecuador, Brazil also has the possibility to turn the IP suspension into a real threat. Authorized to enforce IP retaliation, Brazil, with mature pharmaceutical industry and technological know-how, can totally form the pharmaceutical regime about pirating valuable patented meditations from the US companies. Nevertheless, the case concluded with a private settlement where the United States agreed to compensate Brazilian farmers for their losses, demonstrating that even a credible threat of IP retaliation can lead to substantial settlements without actual enforcement. This outcome illustrates that the potential for IP enforcement can be a powerful lever in negotiations, prompting concessions from non-compliant countries when they face a credible threat to their intellectual property.

Actually the example of EC banana case didn't offer a clear narrative about developing countries through their own strength prevailing in the face of resistance from developed countries. The difference between the gambling case and this one is Ecuador gained the support from the US, which made their retaliation a real threat. But the result of failure in using IP suspension in the two case is exactly the same. The similar outcome also came up in the Upland cotton case, which shows Brazil's preference to get compensation settlement compared to the benefits made through IP piracy.

So this condition raises a question about why did these complaining countries have little interest in carrying through IP suspension. For small economies like Antigua, their weak domestic market and poor power of consumption attributes a lot to the weak impact of their IP threat, not to mention the potential chill in diplomatic relations or the potential for decreased aid they met for IP retaliation. And for other countries like Ecuador or Brazil, it is relatively easier to reach other settlement than it is to impose IP retaliatory measures. For the extra effort made for IP retaliation, it is reasonable that complaining countries prefer the monetary compensation or negotiated settlement other than retaliatory measures [10]. Besides, making IP rights suspension is less flexible than tariff-based

retaliation in diplomatic negotiations. That may explain why IP suspension has been the last choice for these countries.

3.3. Optimization Paths for Enhancing IP Retaliation

To enhance the efficacy of IP retaliation within the WTO framework, a comprehensive approach focusing on clarity, support, and capacity building is essential. Firstly, the WTO could enhance transparency and establish explicit guidelines detailing the justification, expected outcomes, and procedural nuances of IP retaliation. This clarity would help all member states, particularly developing countries, to understand and potentially leverage IP retaliation more effectively. Furthermore, establishing support mechanisms such as legal and technical assistance would empower these countries to navigate the complexities of IP law and retaliation procedures, thereby leveling the playing field in global trade disputes.

In addition to procedural enhancements, promoting multilateral negotiations and integrating alternative dispute resolution (ADR) methods like mediation and arbitration could prevent disputes from escalating to the point of retaliation. These platforms and methods would encourage dialogue and provide less confrontational, more efficient resolution pathways, reducing economic and political costs associated with punitive measures. Such preventive measures, coupled with efforts to build domestic legal and industrial capacities in developing countries, would enable them to utilize IP retaliation not only as a strategic threat but as a viable, practical tool.

Lastly, the WTO should consider implementing a dynamic review system for the regulations governing IP retaliation, allowing for periodic adjustments based on global trade dynamics and technological advancements. Alongside regulatory adjustments, creating positive incentives for compliance with WTO rulings—such as enhanced trade opportunities or access to development funds—could encourage adherence to rules without resorting to retaliation. Together, these strategies would foster a more equitable and cooperative environment within the international trade system, promoting fairness and effective conflict resolution.

4. Conclusion

Generally, as an alternative to traditional retaliation, the method of authorized piracy whose effectiveness mainly depends on the value of the intellectual property is more likely to solve the problem of power difference. Besides, the damage results from the cross-retaliation through TRIPS suspension can be a threat to prominent domestic industries of the developed countries, which contributes to induce compliance with the WTO rulings. Therefore. theoretically IP retaliation constitutes a brand new way of evening the playing field between developed and developing countries on international conflicts. Besides, if implemented wisely, suspending TRIPS obligations can facilitate technological development and domestic innovation through imitation and technological learning.

While the future of IP retaliation is bright, the problem of this measure is obvious as well. The flexibility of IP rights suspension is less than that of tariff-based retaliation in diplomatic negotiations, often resulting in higher implementation costs. This is evident from the experiences of countries like Ecuador and Brazil, where the preparatory work involving government and private sectors in activating IP goods has proven costly. These high costs contribute to the hesitation among nations to enforce IP piracy actively. Besides, effectiveness of the threat of intellectual property suspension has been proved uncertainly when the huge power disparity exists, no matter as a push to induce compliance or getting counter compensation from violating parties. For example, the Antigua, for their own strength is so limited that they need economic help to realize the piracy profits. But on condition that IP suspension in some way contradicts the international purpose of intellectual property protection, it’s hard to say whether other large economies with host of their own IP goods would offer help.

Addressing the high costs, the strategic value of IP retaliation lies in its ability to compel concessions during negotiations due to the potential damage to high-value IP assets of noncompliant countries. Although not all authorized nations proceed with enforcing IP piracy, the mere option significantly influences the diplomatic landscape. IP retaliation is justifiable mainly when other remedies are inadequate, positioning it as a last resort under the WTO dispute resolution framework. Therefore, while it may be seen as a less preferred option due to its complexity and cost, its role in facilitating favorable agreements and compelling compliance should not be underestimated. Enhancing transparency, providing support mechanisms for developing countries, and integrating alternative dispute resolution methods could mitigate these costs and complexities. These measures, along with a periodic review of WTO policies on retaliatory measures, are essential to ensure they remain effective and equitable. The evolving landscape of global trade and the ongoing challenges for developing countries in implementing IP suspension underscore the necessity for continued international support and cooperative mechanisms to bolster their capacities, adapting to modern trade dispute challenges.

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