

Cross-Retaliation in TRIPS: New Solutions or Problems?

Presentation Outline

Susy Frankel, Professor of Law, Victoria University of Wellington, Co-Director
New Zealand Centre of International Economic Law.

I Introduction

Since the formation of the World Trade Organization (WTO), non-compliance with recommendations of the dispute settlement body (DSB), has raised many issues of interpretation of the dispute settlement understanding (DSU), particularly with regard to article 22, which provides for compensation and suspension of concessions. Part of that article allows cross-retaliation in certain circumstances. In three different disputes about compliance with DSB recommendations, the arbitrator has allowed the successful complaining party to cross retaliate under the TRIPS Agreement. The first two of these disputes never resulted in that cross- retaliation taking place. The third looks more likely to result in actual cross-retaliation. The successful party in that dispute, Brazil, is authorized to retaliate against the United States for breaches of the Agreement on Subsidies and Countervailing Measures. The WTO authorization to retaliate includes the suspension of TRIPS protection, including some patent and copyright interests. This paper assesses the risks and benefits of that what that sort of cross-retaliation may entail.

II Suspending Intellectual Property Obligations Generally

A Suspension under domestic law

1. National emergencies (TRIPS , article 31 and 31bis)
2. Havana Club dispute (*United States- Section 211 Omnibus Appropriations Act 1988* WT/DS176/AB/R Jan 2, 2002)

B Inducing compliance with recommendations following a TRIPS dispute

III The Rules Relating to Cross Retaliation

A Cross retaliation as the third option-Article 22, DSU

In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

- (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
- (b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;
- (c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

B Factors to consider- Article 22

- (d) in applying the above principles, that 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 or other nullification or impairment, and the importance of such trade to that party;
 - (ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;

IV The Arbitrations that have Allowed Cross-Retaliatio

- A *EC-Regime for the Importation, Sale and Distribution of Bananas- Recourse to Arbitration by the EC under article 22.6 of the DSU (WT/DS27/ARB/ECU, Mar 24 2000).*
- B *United State- Measures Affecting the Cross-Border Supply of Gambling and Betting Services- Recourse to Arbitration by the United States under article 22.6 of the DSU (WT/DS285/ARB, Dec 21, 2007).*
- C *United States- Subsidies on Upland Cotton Recourse to Arbitration by the United States under article 22.6 of the DSU (WT/DS267/ARB/1 and 2, Aug 31 2009).*

V The Parameters of TRIPS Retaliation

- A Avoiding violating other international intellectual property agreements
- B Expropriation
 - 1. under Bi-Lateral Investment Treaties
 - 2. under domestic law
- C The level of suspension to address the loss
- D Exporting the products of suspension

VI How Retaliation of Patent Protection Might Work

- A New markets in the short term?
- B Suspending patents in a particular field
- C Suspending some rights such as exclusive importation
- D Suspending TRIPS enforcement obligations

VII Concluding Thoughts