

# Cross-retaliation through TRIPS in the Cotton Dispute?

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On the first of July, the US should implement several changes to its cotton subsidy policy, but few expect that deadline to be met. It is against this backdrop that a group of Brazilian scholars have proposed to use the TRIPS Agreement as a *sui generis* retaliation instrument for developing countries to force developed countries to comply with their WTO obligations.

In recent years, developing countries have become increasingly successful in using the WTO's dispute settlement system against developed countries. At the same time, however, they have had little effect in forcing the latter to actually implement adverse rulings; their threat of retaliation simply does not have enough weight to induce action. Due to the small size of many developing country markets, tariff increases on exports from the non-implementing country make little difference to the latter.

In this sense the much-criticised Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) can become an interesting and innovative instrument in achieving an effective solution in commercial litigation involving industrialised and developing countries. The proposal centres on the argument that developing countries can disregard their obligations under TRIPS if the losing party fails to bring its measures into compliance with its WTO obligations and if conventional methods of commercial retaliation prove to be of little effect. The great advantage of retaliating through TRIPS is that it is straightforward, effective and legal. Furthermore, it may even lead to 'socially acceptable' (or desirable) consequences. Instead of transferring the burden of the litigation onto society, which would happen if tariffs were doubled for imports from the non-implementing party, the burden is transformed into a social benefit, for example through increasing access to medicines, cultural goods, entertainment products or just information.

## TRIPS as an Instrument of Retaliation

Retaliatory action should satisfy two conditions: (a) it should inflict immediate damage to the losing party, and (b) it should benefit the retaliating country. Conventional commercial retaliation satisfies the first condition, but usually not the second. In general, commercial retaliatory action even harms the country that seeks retaliation through its impact on consumers.

With the inception of the WTO, developing countries have taken on a very strict IPR system that primarily benefits industries in developed countries, particularly in the pharmaceutical, biotechnological, information technology and software sectors, as well as musical producers and the owners of famous trademarks. Indeed, lobby groups from these very sectors were the ones that led to the 'success' of the TRIPS negotiations during the Uruguay Round. Consequently, non-compliance with TRIPS obligations will inflict considerable losses to exactly these sectors. The first condition – focusing on the effectiveness – is thus fulfilled.

As seen above, retaliation via TRIPS is likely to lead to great socio-economic improvements in the retaliating country. Nevertheless, to be legitimate and credible, IPRs may only be suppressed if an alternative supply of the product in question exists. National availability must not be jeopardised.

Retaliating under TRIPS also holds the potential of creating lobbies in the non-compliant country that will push the government to fulfil its WTO obligations. The greater the cost of the retaliation in the IP area, the greater the possibility of lobbying pressure in favour of the retaliating country.

For example, if Brazil threatened to suspend the transfer of royalty payments to Pfizer and other US pharmaceutical industries in retaliation to the country's illegal cotton subsidies; Pfizer and the rest of the industry would end up lobbying the politicians in favour of the current cotton policy to reach a quick and effective solution to the problem. The prompt nature of the retaliation would make a difference in this case, as Brazil could choose the

individual IP title holder that would be the most affected.

## Practical Difficulties

Retaliation in the form of waiving IPRs is not so easy due to the fact that IPRs are private rights that can only be contested in the courts of the country that confers them. Therefore, if IPRs are suspended through government action, the retaliatory measures may end up being taken to local courts and declared illegal or even unconstitutional. On the other hand, when the level of the tariffs is increased, as part of a retaliatory measure, the affected suppliers do not have the right to take the measure to the local courts of the retaliating country. In most countries, a tariff increase is achieved by an order of the executive power. This is not the case when granting or suppressing of IPRs. Moreover, the suppression of IPRs can be interpreted as an expropriation of rights and may thus generate problems vis-à-vis other international agreements.

Another practical complication appears if TRIPS is used as a retaliatory instrument: benefits to the retaliating country can only be achieved if alternative sources of supply of the product are able to satisfy national demand. Furthermore, it is crucial that the retaliatory measure is constructed so that it does not generate uncertainties to the alternative suppliers. This could be the case if, for instance, a patent waiver were suspended abruptly upon the accused country's fulfilling its WTO obligations. The 'alternative' suppliers would then lose their market. The uncertainty associated with this process could potentially generate an unwillingness of the alternative producers to enter in the market during the period of retaliation, in the first place. This would make the defence measure meaningless.

## Cross-retaliation under the WTO

Article 22 of the Dispute Settlement Understanding (DSU) deals with compensa-

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tion and suspension of concessions. It states that if the country that lost the dispute fails to implement the decision of the Dispute Settlement Body (DSB) within a period of reasonable time, the country that won the dispute will be able to seek authorisation of the DSB to suspend certain duties of the WTO system against the losing country in question. The decision on what kind of concessions or obligations are to be suspended lies with the complainant.

The principles and procedures to be respected in this context are foreseen in Article 22.3:

- First, the plaintiff must suspend its concessions in the same commercial sector that was involved in the dispute (for instance, if the dispute involved the GATT Agreement, the retaliation should target the same industrial sector that started the controversy).
- If this turns out to be *impossible* or *ineffective*, the country wishing to retaliate may seek the DSB's authorisation to suspend its concessions in other industrial sectors covered by the same agreement (the GATT, the GATS or TRIPS);
- If this measure, too, is considered of little or no effect, the country will be able to request the suspension of its obligations covered by another agreement. This is referred to as cross-retaliation, i.e. retaliation in a dispute that involved the GATT would consist of commercial restrictions under the TRIPS or GATS Agreements. The DSB may only reject the request of cross-retaliation by consensus.
- If the country wants to obtain the right to cross-retaliate in the field of IPRs, it will have to make the case that retaliation within the same sector is inefficient due to the differences in the size and profile of the national economies involved in the dispute. Furthermore, it must show that conventional retaliation (i.e. punitive import tariffs) would lead to damages within the retaliating country itself. These arguments were successfully used by Ecuador in the banana dispute against the EU (Bridges Year 4 No.4, page 3).

### Conflict with Pre-existing International Agreements

Would the implementation of cross-retaliation using TRIPS cause conflicts with other international agreements? For example, if

the retaliation were to be based on waiving certain patent obligations, would this break the Paris Convention of Industrial Property (1883)? Would retaliation in the field of copyrights violate the Bern Convention (1886)?

Two observations are relevant here. First, TRIPS Article 2.2, which requires WTO Members to honour prior obligations under other IPR treaties, does not apply to the DSU (paragraphs 148-150 of the report WT/DS27/ARB/ECU). Second, if the DSB permits cross-retaliation, according to the 1969 Vienna Convention on the Right of Treaties, the conflict must be interpreted in favour of TRIPS, which is the more recent and specialised agreement.

### The Retaliation Framework

The difficulties described above can be overcome with a well-structured plan of retaliation. IPRs are private rights and thus their suspension must be accomplished through local legislation. Let's say country A seeks to retaliate against country B that fails to comply with its WTO obligations in a way that affects country A. Country A must therefore provide its executive authorities with the right to revoke or suspend certain IPRs belonging to nationals of Country B. To avoid international conflicts, country A's national legislation must therefore re-written to preserve the legitimate character of the retaliatory measure against country B.

The following options could support the implementation:

- First, the retaliatory measure could suspend the rights of those patent holders that belong to companies or nationals of the country that is subject to retaliation. This would still allow the company to register the patent in another country that is not involved in the dispute but experiences losses in the market that is seeking retaliation.
- Second, the retaliatory measure could take the form of a compulsory license. National IP legislation could clearly specify that if a commercial competitor ignores its obligations under the WTO in a way that harms the domestic market, a compulsory license may be granted by the government. The advantage of this legal strategy is that it allows the government to have precise control over the nature of the retaliation and can specify its exact conditions and timing. The government would also retain the power to revoke the license at any time.
- The nature of the retaliation must, of course, remain limited to the domestic market and national demand. The product in question may not be exported to other countries where its sale would infringe national IPRs.
- Third, to facilitate the process, the government could choose to prioritise products whose patents are about to expire, thus allowing competitors to enter the market and start commercialising the generic products slightly ahead of their official entry. This is unlikely to generate much uncertainty for the supplier as the patent life would most likely expire during the period in which the solution between the disputing parties is being negotiated.
- Trademarks and copyrights could also be used in retaliation, simply because reproducing them is so straightforward. The initial investment for products subject to trademark and copyright protection tends to be lower than that of patents, which also reduces the risk of alternative producers. Most commercial products today are subject to trademark protection, which opens a large window of opportunities. In the banana dispute between Ecuador and the EU, Ecuador chose to retaliate through goods that were subject to copyright protection, industrial designs and geographic indications.
- Another option lies in the temporary prohibition of local production and importation of certain products that are patented or protected by trademarks belonging to nationals of the country to be retaliated against. Such a prohibition, however, would be traditional commercial retaliation rather than cross-retaliation under the TRIPS Agreement. Furthermore, if it failed to promote alternative production at the national level, it would result in a negative impact on local consumers and thus defeat its purpose.
- Last, but not least, the plaintiff could freeze the transfer of royalty fees to nationals of the non-compliant country. So far, this possibility has not been put forward at the international level. It could, however, be very effective as it would allow for the perfect calculation of the amount aimed for in the retaliation.

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