

The Intellectual Property Hostage in Trade Retaliation

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The World Trade Organization agreements (WTO) prohibit barriers to free trade, whether they be tariffs, differing industrial and product safety standards, or differing levels of intellectual property rights protection. When a country is found to violate the WTO, its Dispute Settlement Body may authorize retaliatory trade measures, such as suspending concessions to the non-compliant country. Debate over the ideal amount and form of these remedies turns on whether the goal of trade remedies is compensatory and seeks to rebalance trade or whether it is compliance-inducing and seeks to impose the greatest punishment. These arguments are familiar from other areas of law, however they are complicated by the lack of provision for financial damages and by the separation between those who receive the benefits of noncompliant laws and those who are harmed by retaliatory measures. The different approaches are in starkest opposition when it comes to cross-retaliation—a practice under which unfair tariff treatment may be countered by retaliatory measures against intellectual property rights. Cross-retaliation runs counter to the arguments for stability and certainty that precipitated the inclusion of intellectual property rights in the WTO Agreement. Nevertheless, intellectual property rights suspension has increasingly been seen as a desirable retaliatory measure for small and developing countries facing violations by more powerful countries. For example, as a result of WTO violations resulting from its cotton subsidies and online gambling laws, the United States has faced threats of intellectual property rights suspension from Brazil and Antigua and Barbuda, respectively.

This Article explores the theory behind cross-retaliation as well as its role in recent cases. The case studies show that cross-retaliation does not induce greater compliance. Instead, the threat of cross-retaliation may lead to financial settlements. This path to financial damages comes with some problems from both the compensatory and compliance views of remedies. On the one hand, the ability to negotiate for financial settlements remains dependent on the size and political power of the complaining country, a problem for those who believe the intellectual property threat will keep larger countries in line. On the other hand, compensatory damages—and the potential for efficient breach—require a link to the harm done to a complaining country rather than the value of the rights that are threatened. Moreover, certain characteristics of intellectual property rights make it particularly difficult to contain the harms associated with their abrogation. It is time to release the intellectual property hostage in trade negotiations and seriously consider financial damages.

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