Are Intellectual Property Retaliations Against Violators of WTO Agreements Ineffective?

Author : Pamela Samuelson

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Sarah R. Wasserman Rajec, *The Intellectual Property Hostage in Trade Retaliation*, 76 **Md. L. Rev.** 169 (2016), available at SSRN.

Twenty-some years ago, there was much speculation about how well the World Trade Organization (WTO) dispute resolution process would work, and in particular, whether developed countries would be more likely to comply with their WTO obligations in respect of developing nations because the latter would have the right, subject to approval by the relevant WTO Dispute Settlement Body (DSB), to retaliate against violations of WTO obligations by suspending enforcement of intellectual property rights (IPRs) affecting the violator's industries.

A central premise of creating the right to retaliate against IPRs was that developed countries' interests in ensuring respect for its nationals' IPRs would create a more powerful inducement to treaty compliance than the opportunity to retaliate only against similar types of goods (e.g., bananas or cotton).

So here we are in 2016. After more than two decades of experience with dispute settlements under the WTO agreements, there is a tale to be told about IPR cross-retaliation, and Rajec tells that tale very well. The WTO agreements established a dispute resolution procedure under which nations can formally complain about another nation's claimed violations to a DSB that will then adjudicate the dispute. If the complaint has merit, the DSB will consider what remedial measures the complainant should be able to take against the violator if it does not respond by coming into compliance. Rajec reports that in a substantial majority of cases, nations decide to comply with their treaty obligations once the DSB has ruled that a violation has occurred, although in about nine percent of cases, violators have remained "unabashed[ly]" noncompliant.

In three cases, the DSB has approved a complainant's request to retaliate against a violator by suspending IPR enforcement. Yet in none of these cases has the complainant nation followed through by actually going forward with the IPR suspension. Rajec is curious to understand why and what lessons might be learned by understanding what happened.

One case involved Antigua and the United States over the latter's online gambling ban, which harmed Antigua's industry. The DSB found that the U.S. was in violation of WTO treaty obligations by imposing this ban. The U.S. refused to change its law to comply with the treaty. Recognizing that it was infeasible for Antigua to retaliate effectively in the same sector as that in which the U.S. violation had taken place, the DSB approved cross-retaliation against U.S. film and music industries through a suspension of Antigua's obligation to enforce U.S. copyrights.

Despite the DSB approval of this measure, Antigua has not actually suspended copyright enforcement. Rajec offers some possible explanations for the non-suspension, including some concern that Antigua might have about possible U.S. retaliation against the Antiguan tourism industry. She notes that it would also be costly for Antigua to set up a website to allow users to get access to infringing copies of U.S. films and sound recordings. Another consideration is that the DSB did not permit unlimited

infringements to occur, but only at a level of $21 million annually, which might be difficult for an infringement-enabling site to calibrate. (Quite recently, however, Antigua announced it is planning to suspend copyright enforcement, so the drama continues.)

A second dispute was between Brazil and the United States over U.S. subsidies to its cotton industry. A DSB found the U.S. in violation of its treaty obligations because of these subsidies. It approved a Brazilian proposal to retaliate against the U.S. in part by suspending enforcement of U.S. pharmaceutical patents. Because Brazil has a domestic pharmaceutical industry and a large market for pharmaceutical products, a suspension of these IPRs posed a credible threat to U.S. industry interests. While the U.S. chose to remain noncompliant with its treaty obligations, it offered a financial settlement that, in effect, provided subsidies to Brazilian cotton producers. Rajec points out that this type of resolution is consistent with the theory that DSB remedy rulings should aim to provide compensation for violations rather than only inducing compliance with treaty obligations, as some commentators have assumed.

A third case involved a dispute between Ecuador and the European Union over the latter's tariffs on bananas. DSB arbitrators recommended $201 million annual suspension of EU rights in sound recordings, industrial designs, and geographic indicators as retaliation for violating WTO agreements. Because the EU negotiated a settlement for tariff reductions over time, Ecuador did not go forward with retaliating against EU nationals' IPRs.

The Ecuadorian and the Brazilian cases exemplify IPR cross-retaliation as a useful mechanism for encouraging nations to find a way to settle their differences, even if the settlement does not result in bringing the violator into full compliance with treaty obligations.

Much of Rajec's article is devoted to a theoretical exposition about the purpose(s) of the WTO remedial scheme. Some commentators endorse compliance-inducement as the proper purpose of the remedies scheme, while others think that the WTO regime works as well as it does because nations can opt out of compliance on some occasions when their idiosyncratic national interests make noncompliance a better option than compliance, as long as the nations are willing to provide some compensation when they violate WTO agreements in a manner that harms other nations' industries. Rajec's treatment of these issues is nuanced and well-developed.

As a pragmatist, it struck me that the two purposes Rajec discusses may be more compatible than they might initially seem: The dispute settlement process may aim mainly to encourage compliance with treaty obligations, but it also provides a mechanism for inducing violators to provide some compensation for harms caused to other nations' industries, albeit obliquely, when violators choose to remain noncompliant.

Rajec's main thesis is that the ability to engage in IPR cross-retaliation is not as effective in inducing compliance with WTO treaty obligations as some have posited. This is partly due to inherent structural imbalances among nations. Small developing nations (e.g., Antigua) often lack the bargaining power and infrastructure to make the threat of IPR retaliation seem powerful enough to change a large developed nation's practices and willingness to violate treaty norms.

In addition, IPR retaliation is not as simple to achieve as tariff-based retaliations are. Tariff retaliations are easy because the government must only establish the higher tariff rate and enforce it. However, to retaliate as to IPRs, the complaining nation must motivate other actors (e.g., domestic pharmaceutical manufacturers) to take advantage of an IPR suspension, even though that suspension may not last all that long, so an investment in authorized infringement may be undermined once the authorization to infringe ceases, as the WTO scheme assumes will happen.

Having followed the debate over IPR retaliations in the 1990s and wondered what happened, I was very pleased to have Rajec's report on its conditional success.

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