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Cross Retaliation under the TRIPS Agreement: An Analysis of the Policy Options for Brazil

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Cross Retaliation Under the TRIPS Agreement: An Analysis of Policy Options for Brazil

Allison L. Whiteman†

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Part I. Introduction

On August 31, 2009, the World Trade Organization’s Dispute Settlement Body (DSB) issued a ruling that ended a seven-year dispute between Brazil and the United States over U.S. subsidies on upland cotton.1 Brazil had previously won a claim that U.S. subsidies enabled farmers to produce cotton at a lower cost, thereby undercutting the world price and creating a hardship for farmers from Brazil and other major cotton-producing countries.2 The DSB ordered the United States to remove these subsidies in 2005, but the United States failed to comply by the deadline.3 As a result, Brazil asked the DSB to authorize trade sanctions, and the August 2009 ruling was the DSB’s response to Brazil’s request.4

The DSB approved sanctions that were quite dramatic. In most cases, trade sanctions must correspond with the underlying violation. For example, Brazil would normally be required to retaliate against illegal U. S. cotton subsidies by imposing tariffs on U.S. cotton, or at least on other goods.5 In this case, however, the DSB authorized Brazil, under certain conditions, to “cross retaliate:”6 Brazil could issue sanctions against U.S. exports in...
services or intellectual property rights. This Comment will focus on Brazil’s options for suspension of intellectual property rights, which are regulated by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

The DSB has only allowed a country to cross retaliate in two prior cases, illustrating the unique nature of this remedy. The first instance was in 2000, when the DSB ruled that Ecuador could cross retaliate against the European Communities (EC). The EC had failed to implement a DSB judgment that EC trading practices discriminated against Ecuadorian bananas. The remedy was issued a second time in 2007, after Antigua and Barbuda successfully challenged a U.S. law prohibiting the cross-border supply of online gambling services. Neither country opted to exercise this right. Instead, Ecuador used the right as leverage to negotiate greater market access for their banana exports, while Antigua is still in settlement talks with the United States.

The remedy of cross retaliation is very important for Brazil. The cotton case was a breakthrough for developing countries challenging U.S. agricultural policy. Brazil has been advocating for agricultural reform within the WTO’s Doha Round of trade negotiations—which have been ongoing since 2001—but has had

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7 International trade in services is regulated among WTO members by the General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125 (1994) [hereinafter GATS].


9 The European Union is known as the “European Communities” at the World Trade Organization. See Decision by the Arbitrators, European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU, WT/DS27/ARB/ECU (Mar. 24, 2000) [hereinafter EC–Bananas III].

10 See infra Part II.B.i.

11 See infra Part II.B.ii.

little success challenging the strong U.S. farming sector.13 Cross retaliation offers Brazil a new policy tool as it seeks to induce the United States to adopt development-friendly agricultural policies.

The threat of cross retaliation is also very important to the United States. Unlike Ecuador or Antigua, Brazil is one of the ten largest economies, has significant industrial capabilities, and is capable of implementing a cross retaliation plan.14 With the right of cross retaliation, Brazil could pit two politically powerful U.S. sectors against each other. The agricultural sector is well represented in Congress and by special interest groups, and cotton subsidies in the United States are in large part a result of this influence. On the other hand, the United States has a strong economic interest in protecting intellectual property rights, which safeguard valuable patented technologies and copyrighted entertainment products. Thus, the United States may be forced to reform its agricultural policies or lose revenue from intellectual property sources.

Although no country has exercised the right of cross retaliation, the DSB gave some guidance in its decision in the Ecuador case—known as EC–Bananas III—about how to implement such a plan.15 Subsequently, several authors have proposed mechanisms for using cross retaliation under the TRIPS Agreement, taking into account concurrent treaties protecting intellectual property as well as non-legal concerns.16 At least two authors have recommended that cross retaliation take the form of either a government-issued compulsory licensing system for suspension of copyrights with a focus on the entertainment industry,17 or a compulsory licensing system for suspension of

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15 EC–Bananas III, supra note 9, ¶¶ 159-64.


17 See id. at 1395-1409; see also Frederick M. Abbott, Cross-Retaliation in TRIPS: Options for Developing Countries, ICTSD DISPUTE SETTLEMENT AND LEGAL
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patents with a focus on pharmaceutical drugs.\textsuperscript{18} Under such a system, the government would issue revocable licenses to businesses for the right to reproduce otherwise protected materials.\textsuperscript{19}

In light of the DSB’s recent decision to grant Brazil the right of cross retaliation against the United States, this Comment will consider the relative value of three policy options: suspension of copyrights, suspension of patents, and settlement. Specifically, this Comment will evaluate these policy options along three dimensions that are critical for Brazil’s success. First, the remedy must validate Brazil’s rights, either by inducing the United States to comply or providing adequate remuneration for the violation. Second, the remedy must address practical constraints, such as concurrent legal obligations and political viability. Third, the remedy must improve Brazil’s social welfare.

This Comment proposes that Brazil’s best policy option is either to suspend patent obligations or to negotiate a settlement. If Brazil were to suspend patent obligations, it could take advantage of technology, such as pharmaceutical drugs, which has a great potential to improve social welfare. Settlement, on the other hand, may give Brazil leverage to influence and reform U.S. agricultural policies with respect to cotton or other goods, a feat that no developing country has been able to accomplish. In June 2010, the United States and Brazil agreed to begin two years of negotiations toward a settlement.\textsuperscript{20} If these negotiations are successful, the Unites States will incorporate policies favorable to Brazil in its next Farm Bill, an omnibus bill outlining the form and substance of federal assistance to American farmers, which will go into effect in 2012.\textsuperscript{21} If the negotiations fail, Brazil has indicated it will pursue other means of retaliation.\textsuperscript{22}

\textit{ASPECTS OF INTERNATIONAL TRADE}, (Int’l Ctr. For Trade and Sustainable Dev. 2009) Apr. 2009, at 22–25 (explaining the various ways to suspend copyright protection, including suspending the right to broadcast films on television or in public theaters).

\textsuperscript{18} See Slater, supra note 16, at 1389-95; Abbott, supra note 17, at 25-27.

\textsuperscript{19} See Slater, supra note 16, at 1396-9.


\textsuperscript{21} Id.

\textsuperscript{22} Id.
This Comment proceeds in six parts. Part II provides background information on the WTO's dispute settlement process, the economic policies supporting cross retaliation, and the three cases in which the DSB authorized this remedy. Part III identifies issues with suspending intellectual property rights, including concurrent legal obligations, the political environment, and implementation. Part IV provides analysis, exploring the three policy options and measurement criteria in greater detail. Part V identifies factors specific to the case of Brazil, and Part VI concludes with recommendations for Brazil's best policy options.

Part II. Background

A. Dispute Settlement

i. History of the Dispute Settlement Mechanism at the WTO

The WTO was preceded by the General Agreement on Tariffs and Trade (GATT), a treaty signed in 1947 to reduce trade barriers in the post-World War II world.\(^{23}\) The global trade infrastructure encompassed in the GATT 1947 only covered trade in goods.\(^{24}\) Through several rounds of negotiations, culminating in the eighth "Uruguay Round,"—which lasted from 1986 to 1994—the parties to the GATT 1947 expanded the scope of trade regulation by adding the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).\(^{25}\) The GATS regulates international trade in services, including the cross-border supply of workers,\(^{26}\) and the TRIPS agreement provides protection for intellectual property rights (IPRs), including trademarks, copyrights, and patents.\(^{27}\)

During the Uruguay Round, parties also created the WTO, an international organization where countries could conduct future
trade negotiations.\(^2\) One of the WTO's innovations was the DSB, a forum for member states to adjudicate disputes over trade violations.\(^2\) If the DSB determines that a violation has occurred, the violating country must bring its trade policy into compliance with the ruling.\(^2\) The primary goal of the dispute settlement process is to induce compliance with the GATT 1994, GATS, and TRIPS agreements.\(^2\)

\(\text{ii. Rules Allowing Cross Retaliation}\)

The Dispute Settlement Understanding (DSU) is a body of procedural rules for dispute resolution at the DSB and was created during the Uruguay Round of negotiations.\(^3\) Article 22 of the DSU governs the scope of retaliation when a country does not comply with a DSB ruling.\(^3\) Retaliation induces compliance, provides reparations to the complaining country, and helps the countries reach an equilibrium point on their balance of concessions.\(^3\) As a general rule, a complaining country must first try to retaliate in the same sector and under the same agreement that the violation occurred.\(^3\) For example, a country whose cotton industry has been injured must first seek to retaliate against the violating country's cotton industry.

If "it is not practicable or effective to suspend concessions" in the same sector, the country should next seek to retaliate in a different sector under the same agreement.\(^3\) Following the same example, the country whose cotton industry has been injured must then try to retaliate against another goods-producing industry in the violating country, since the GATT 1994 governs cotton.\(^3\)

\(^{28}\) Understanding the WTO, supra note 23, at 10.
\(^{29}\) Id. at 55.
\(^{30}\) Id. at 58.
\(^{32}\) See id.
\(^{33}\) Id. art. 22.2.
\(^{34}\) Slater, supra note 16, at 1371; see also Steve Charnovitz, Rethinking WTO Trade Sanctions, 95 AM. J. INT’L L. 792, 822 (2001).
\(^{35}\) DSU, supra note 31, art. 22.3(a).
\(^{36}\) Id. art. 22.3(b).
\(^{37}\) See GATT 1994, supra note 5.
Finally, a country may suspend obligations under a different agreement "if that party considers that it is not practicable or effective to suspend concessions . . . with respect to other sectors under the same agreement." For example, a country suffering a violation under the GATT 1994 could retaliate under either the GATS or TRIPS agreements. This third option, called "cross retaliation," has only been allowed in three cases to date. Cross retaliation under the TRIPS Agreement would permit a country to suspend certain intellectual property rights of a country that had violated the former country's rights under the GATT 1994.

iii. Economic Policies Supporting Cross Retaliation
Under the TRIPS Agreement

Two economic goals support a policy of cross retaliation under the TRIPS agreement. First, cross retaliation can provide meaningful economic benefits to a small developing country in the context of an imbalance of trade flows. If the two parties to a dispute have economies of vastly different sizes, the smaller of the two may be unable to compel the larger, more developed country to comply. Given this reality, the developing country's efforts to restrict market access of a developed country may not have any appreciable effect. Without providing the smaller economy with a policy instrument—such as cross retaliation—to help level the playing field, the larger economy would face no real consequences for trade practices that violate international law.

Second, a complaining party may suffer economically if it

38 Id. art. 22.3(c).
39 See infra Part II.B.
40 Abbott, supra note 17, at 9; see also Slater, supra note 16, at 1374.
41 This may not always be the case. Some developing countries, such as China, India, or Brazil, may have large enough domestic markets to affect the economy of a developed country. However, the "imbalance in the compliance-enforcement capacity of developed and developing countries" is a common critique of the WTO dispute settlement system. Abbott, supra note 17, at 9.
42 Id.
43 One author suggests an indicator of the power of cross retaliation under the TRIPS agreement to create political pressure on the receiving country is the "hyperbolic language" used when the possibility of TRIPS retaliation is raised. Constituents refer to members threatening suspension as "pirates" and argue that suspension will lead to a reduction in direct foreign investment. The author notes that these threats are not made when a WTO member threatens to suspend concessions on goods. Id. at 9-10.
raises tariffs on goods and services. If the complaining party raises tariffs on goods, those tariffs may be passed along to the consumer as higher prices.\textsuperscript{44} The problem is exacerbated when the complaining country issues tariffs on goods from a large market, such as the United States or European Union (EU), because goods from those markets may represent a significant proportion of the country’s imports.

In the case of services, new restrictions may interrupt beneficial relationships between local citizens and foreign service providers, such as banks. If the complaining party restricts the market access of foreign-service providers, domestic consumers will need to find new providers, incurring lost time and transaction costs.\textsuperscript{45}

On the other hand, a suspension of TRIPS obligations might be economically beneficial for domestic consumers. Suspension of intellectual property rights could give a complaining country’s domestic consumers access to entertainment products and new technologies at a lower price.\textsuperscript{46}

\section*{B. Cases Allowing Cross Retaliation Under the TRIPS Agreement}

\subsection*{i. EC–Bananas III}

The first case authorizing cross retaliation under the TRIPS agreement involved a claim by Ecuador against the EC for its trade policies on bananas.\textsuperscript{47} Ecuador claimed that the EC’s practice of granting preferences to its former colonies (known as the African, Caribbean, and Pacific, or ACP states) was discriminatory and violated international trade law. Ecuador and other parties—the plaintiffs—did not qualify for these preferential trade options and requested consultations with the EC regarding the “importation, sale, and distribution of bananas.”\textsuperscript{48} A DSB

\textsuperscript{44} Slater, \textit{supra} note 16, at 1374-75.

\textsuperscript{45} Id.

\textsuperscript{46} See \textit{id.}; see also Arvind Subramanian \& Jayashree Watal, \textit{Can TRIPS Serve as an Enforcement Device for Developing Countries in the WTO?}, \textit{3 J. INT’L ECON. L.} 403, 405 (2000).

\textsuperscript{47} Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, \textit{EC–Bananas III}, WT/DS27/1 (Feb. 12, 1996).

\textsuperscript{48} Id.
panel, affirmed by the Appellate Body, determined in 1997 that the EC had violated provisions of the GATT 1994.\textsuperscript{49}

However, the EC remained out of compliance following the ruling, and Ecuador subsequently requested that a DSB compliance panel suspend concessions under the TRIPS agreement instead of under the GATT 1994.\textsuperscript{50} The panel determined that the EC was not in compliance with the GATT 1994 and that sanctions were appropriate.\textsuperscript{51}

The case was then brought before a DSB arbitration panel to rule on appropriate trade sanctions. The arbitrators determined that Ecuador had met the necessary criteria under DSU Article 22.3—the provision authorizing cross retaliation—"to suspend concessions or other obligations under another covered agreement."\textsuperscript{52} Since the banana industry was a significant part of Ecuador’s economy, the arbitrators ruled that it had suffered a “serious enough” injury to warrant suspension of rights under the TRIPS agreement.\textsuperscript{53}

The arbitration panel cited development policy concerns to support the decision. The panel noted that the objective of cross retaliation in TRIPS was to induce compliance, and that inducing compliance could be difficult where there is a large trade imbalance between parties.\textsuperscript{54} The arbitrators were persuaded that


\textsuperscript{50} An Article 21.5 panel makes a determination of whether a party is in compliance with a previous ruling. Article 21.5 of the DSU reads, in relevant part: “Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.” DSU, supra note 31, art. 21.5.


\textsuperscript{52} EC–Bananas III, supra note 9, ¶ 44.

\textsuperscript{53} See id. ¶¶ 129, 131 (noting that “Ecuador is the largest exporter of bananas in the world and the largest exporter to the European market”); see also Abbott, supra note 17, at 5-6.

\textsuperscript{54} The arbitrators noted: “in situations where the complaining party is highly dependent on imports from the other party, it may happen that the suspension of certain concessions or certain other obligations entails more harmful effects for the party
inequality between Ecuador and the EC was “serious enough to justify suspension across agreements.”\endnote{55}

Although noting that it had no obligation to direct Ecuador on how to implement cross retaliation, the arbitration panel evaluated Ecuador’s proposal, since this was the first time the remedy had been allowed.\endnote{56} The arbitrators commended Ecuador for proposing to suspend concessions pursuant to a government-issued compulsory licensing system.\endnote{57} Under this system, Ecuador would grant licenses to individuals or organizations to reproduce material that would otherwise be subject to copyright, geographical indication, or industrial design protection.\endnote{58} Ecuador would “limit the suspension of concessions in terms of quantity, value and time,” and reserve the right to revoke the license at any time.\endnote{59} The arbitrators praised this scheme because it addressed many of the panel’s concerns about managing cross retaliation.\endnote{60}

The arbitrators warned that a party should take special caution to suspend only the IPRs of nationals of the WTO member in violation.\endnote{61} Furthermore, the arbitrators noted that a regime of IPR suspension might create problems within the suspending country’s domestic legislation.\endnote{62} If a suspending country had statutes protecting intellectual property rights, suspension of these rights may give rise to an independent cause of action based on domestic law.\endnote{63}

\begin{footnotes}
\item[55] The arbitrators noted: “Ecuador’s share of world merchandise trade is below 0.1 per cent, whereas the EC’s world merchandise trade share is in the area of 20 per cent.” \textit{Id.} \S 125. These statistics convinced the arbitrators that “these differences confirm our considerations above that it may not be practicable or effective for Ecuador to suspend concessions” under the GATT 1994 or GATS. \textit{Id.} \S 126.
\item[56] \textit{Id.} \S 139.
\item[57] \textit{Id.} \S\S 159-64.
\item[58] \textit{Id.}
\item[59] Decision by the Arbitrators, \textit{EC–Bananas III, supra} note 9, \S 161.
\item[60] \textit{Id.} \S 164.
\item[61] \textit{Id.} \S 141.
\item[62] \textit{Id.} \S 158 (“We are aware that the implementation of the suspension of certain TRIPS obligations may give rise to legal difficulties or conflicts within the domestic legal system of the Member so authorized (and perhaps even of the Member(s) affected by such suspension)”).
\item[63] \textit{Id.}
\end{footnotes}
Finally, the arbitrators advised Ecuador that suspension of IPRs in its territory would not affect the intellectual property rights active in other countries. Therefore, Ecuador should "suspend the intellectual property rights in question only for the purposes of supply destined for the domestic market." However, the arbitrators opted not to discuss how a regime suspending IPRs would affect member parties' obligations under the World Intellectual Property Organization (WIPO) agreements—the Berne and Paris Conventions—which provide a separate basis for international protection of copyrights and patents.

Ecuador never exercised its right to suspend intellectual property protection, but instead negotiated a settlement with the EC for improved market access for its bananas. The case was informative because it noted the development policy implications for cross retaliation and provided guidance for a working suspension model, particularly the preference for a government-issued compulsory licensing system. The case also demonstrated the power of cross retaliation as leverage in future trade negotiations.

ii. United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services

The second case to grant the right of cross retaliation involved a dispute between Antigua and the United States. Antigua successfully challenged U.S. laws prohibiting online gambling,

64 Decision by the Arbitrators, EC–Bananas III, supra note 9, ¶ 156 ("An authorization of a suspension requested by Ecuador does of course not entitle other WTO Members to derogate from any of their obligations under the TRIPS Agreement. Consequently, such DSB authorization to Ecuador cannot be construed by other WTO Members to reduce their obligations under Part III of the TRIPS Agreement in regard to imports entering their customs territories").

65 Id.

66 Id. ¶ 152. These agreements are discussed infra at Part III.A.i.


68 The policy implications of such a licensing system are discussed infra at Part IV.B.i.
governed by the GATS.\textsuperscript{69} After reaching the Article 22.6 arbitration phase,\textsuperscript{70} Antigua requested the right to cross retaliate under the TRIPS agreement, arguing that retaliation under the GATS was not feasible because 1) the size of its economy relative to the United States was not large enough to make a noticeable impact, and 2) a suspension in services would cause severe problems for Antiguan workers.\textsuperscript{71}

The arbitrators accepted these arguments, noting that “the extremely unbalanced nature of the trading relations between the parties makes it all the more difficult for Antigua to find a way of ensuring the effectiveness of a suspension of concessions or other obligations against the United States under the same agreement.”\textsuperscript{72} Thus, the arbitrators once again offered the right of cross retaliation as a way to promote the development of a developing country complainant and offer that party a policy tool to help level the playing field.

Antigua stated which TRIPS agreement provisions it would seek to suspend—trademarks, industrial designs, patents, and undisclosed information—but it did not specify how it planned to implement a suspension regime.\textsuperscript{73} The United States argued that Antigua’s failure to describe how it would cross retaliate could “encourage rampant and uncontrolled IPR piracy.”\textsuperscript{74} The arbitrators ruled that it was not necessary for Antigua to draw up a

\textsuperscript{69} Request for Consultations by Antigua and Barbuda, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/1 (Mar. 27, 2003).

\textsuperscript{70} The procedural history of this case is similar, albeit less complicated, than EC – Bananas III, so it is not included here. For a description of the procedural history of this case, see World Trade Org., United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm (last visited Oct. 28, 2010).

\textsuperscript{71} Decision by the Arbitrators, United States – 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, ¶¶ 4.109-4.110, WT/DS285/ARB (Dec. 21, 2007).

\textsuperscript{72} Id. ¶ 4.114 (noting “that the heavy reliance of Antigua’s economy on the very sectors that would be candidates for retaliation under the GATS increases the likelihood that an adverse impact would arise for Antigua itself, including for low-wage workers”).

\textsuperscript{73} See Abbott, supra note 17, at 8.

\textsuperscript{74} Decision by the Arbitrators, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, supra note 71, ¶ 5.3.
specific implementation plan at that time, only noting the importance of devising a suspension plan that was equitable and enforceable.\textsuperscript{75}

As of this writing, Antigua has not requested authorization from the DSB to suspend IPRs, and has not reached a settlement with the United States.\textsuperscript{76}

\textit{iii. United States—Subsidies on Upland Cotton}

In 2002, Brazil requested consultations at the DSB to challenge the United States' subsidies for agricultural production of upland cotton, the most commonly planted cotton species in the United States.\textsuperscript{77} Brazil charged that these subsidies, which included export credit guarantees and marketing loan payments, violated U.S. international trade obligations.\textsuperscript{78} Export credit guarantees provide export credit insurance "for exporters to protect against commercial and political risks" of international sales.\textsuperscript{79} Marketing loan payments provide farmers with subsidies and short-term financing when crop prices are low.\textsuperscript{80} Brazil brought the challenge under provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement),\textsuperscript{81} the Agreement on Agriculture,\textsuperscript{82} and the GATT 1994.\textsuperscript{83}

\textsuperscript{75} Id. ¶ 5.7-5.10.

\textsuperscript{76} See World Trade Org., United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, \textit{supra} note 70.

\textsuperscript{77} Request for Consultations by Brazil, \textit{United States—Subsidies on Upland Cotton}, 1, WT/DS267/1 (Oct. 3, 2002).

\textsuperscript{78} Id.

\textsuperscript{79} \textsc{Dictionary of International Trade} 76 (5th ed. 2002).


\textsuperscript{83} Id.
A DSB panel ruled in favor of Brazil in September 2004. This result was upheld by the Appellate Body, which found that several U.S. subsidy programs—including export credit guarantees and marketing loan payments—violated WTO rules. The Appellate Body ruled that the United States must remove the prohibited subsidies by July 1, 2005. The Appellate Body also noted that other U.S. programs were actionable subsidies—they did not constitute per se violations, but caused “serious prejudice” to Brazil’s cotton industry between 1999 and 2002. The Appellate Body gave the United States until September 21, 2005 to remove the remaining subsidies.

The United States missed the 2005 deadlines to remove the illegal subsidies. In 2006, Congress repealed the “Step 2” marketing loan program, but left the other subsidies, including the export credit guarantees, in place. The United States and Brazil agreed that they would pursue arbitration to suspend trade concessions, but only after 1) a compliance panel ruled against the United States, and 2) Brazil requested the arbitration to resume. Alleging a failure by the United States to implement the DSB’s findings, Brazil requested a compliance panel to determine if it could levy sanctions against the United States.

With a favorable compliance ruling, Brazil requested the arbitration to continue. The arbitration panel issued a ruling on

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84 See Panel Report, United States-Subsidies on Upland Cotton, supra note 2.
86 Id. ¶ 5.
87 Id. ¶¶ 472-73.
88 See World Trade Org., United States—Subsidies on Upland Cotton, supra note 3.
90 DSU, supra note 31, art. 22.6.
August 31, 2009. The ruling allowed Brazil to impose at least $294.7 million in trade sanctions on the United States and possibly suspend intellectual property rights protected by the TRIPS agreement. If sanctions rise above a threshold, then Brazil would be allowed to cross retaliate "with respect to any amount of permissible countermeasures applied in excess of [the threshold]." Otherwise, "Brazil would be entitled to suspend concessions or other obligations only in trade in goods.

The latest estimate suggests that Brazil is interested in settlement but remains poised to set over $800 million in sanctions on U.S. goods and intellectual property rights if negotiations fail. Since Brazil is the biggest and most powerful economy to be awarded the right of cross retaliation, it is more likely than past parties to use the remedy if necessary. As of Summer 2010, officials in Brazil and the United States began a series of negotiations, which if successful, will produce favorable results for Brazil. In the meantime, the United States has agreed to grant Brazil $147 million per year in technical assistance and promises to change its export credit program, which benefits purchasers of U.S. cotton.

Part III. Legal, Political, and Practical Issues with Suspending IPRs

Ecuador, Antigua, and Brazil have opened the door for developing countries to cross retaliate against their trading partners under the TRIPS Agreement. None of these countries have implemented a suspension scheme, but several authors have noted potential barriers to cross retaliation and proposed frameworks for implementation, as discussed in Part C of this section.

93 Recourse to Article 22.6 Arbitration Report, United States–Subsidies on Upland Cotton, supra note 1.
94 Id. ¶ 5.101.
95 Id. ¶ 5.230.
96 Id.
97 Id.
98 BRIDGES WKLY TRADE NEWS DIG., supra note 20.
99 Id.
100 Id.
As the panel in *EC–Bananas III* pointed out, TRIPS is not the final word on cross retaliation. Countries that win the right to cross retaliate under the TRIPS Agreement might face other hurdles from concurrent treaty obligations and domestic law. Countries will also face social challenges, including political pressure from stakeholders, questions of implementation, and dilemmas about how to best improve social welfare. This section will analyze these issues, with a particular focus on the social challenges.

A. Legal Issues

i. Treaties

The TRIPS agreement is not intended to override members' obligations under other treaties. Intellectual property rights are also protected under treaties governed by the WIPO, most notably the Berne Convention on the Protection of Literary and Artistic Works and the Paris Convention on the Protection of Industrial Property. The Berne Convention, which has been in effect for almost 125 years, protects the copyrights of artists internationally, while the Paris Convention, which has been in effect since the 1880s, provides international protection for patent rights. TRIPS incorporates by reference the substantive

101 See Decision by the Arbitrators, *EC – Bananas III*, supra note 9, ¶¶ 159-64.
102 See, e.g., Slater, supra note 16, at 1375.
103 See, e.g., Abbott, supra note 17, at 13.
104 See TRIPS Agreement, supra note 8, art. 2.2 ("Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits").
108 See Paris Convention, supra note 106, art. 1-12, 19.
protection that the Paris and Berne Conventions provide.\textsuperscript{109}

Although no judicial body has ruled on the legal relationship of the incorporated provisions of the Berne and Paris Conventions with the TRIPS Agreement, several scholars have opined that the WIPO conventions will not likely present a barrier to suspending IPRs under the TRIPS agreement.\textsuperscript{110} Furthermore, a party subject to IPR suspension under the TRIPS agreement probably could not bring a separate claim for a violation of the Berne or Paris Convention at the International Court of Justice (ICJ), which is the forum for adjudicating such disputes. This is likely because nearly all signatories to those treaties are also obligated under the WTO’s DSU. The ICJ would be expected to find “that the complaining and responding states had each expressly accepted the suspension regime prescribed by WTO DSU rules” providing for cross retaliation.\textsuperscript{111} Therefore, it is unlikely that the ICJ would find a violation of either treaty.\textsuperscript{112} Instead, the court would probably find that the parties had expressly accepted the WTO obligations upon becoming WTO members.

Two other treaties, the WIPO Copyright Treaty (WCT)\textsuperscript{113} and the WIPO Performances and Phonograms Treaty (WPPT)\textsuperscript{114} also provide international protection for intellectual property rights. These treaties were adopted after TRIPS and thus are not incorporated by reference. However, both treaties allow for

\textsuperscript{109} Articles 1-21 of the Berne Convention and articles 1-12 and 19 of the Paris Convention are incorporated by reference in TRIPS. TRIPS Agreement, supra note 8, art. 2.1, 9.1.

\textsuperscript{110} A former WTO Legal Affairs Officer notes that “[a]ny rights or obligations that WTO members may obtain under Parts V to VII do not necessarily have to give way to WIPO conventions, at least not pursuant to Art. 2.2.” He further explains that, pursuant to the Vienna convention on the law of treaties, “because there is no inherent hierarchy between the sources of international law . . . the latest expression of state intent, in casu, the DSB authorisation [to suspend TRIPS obligations], must prevail.” JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 346 (2003). See also Slater, supra note 16, at 1376-77; Abbott, supra note 17, at 13-14.

\textsuperscript{111} Abbott, supra note 17, at 14.

\textsuperscript{112} Id.

\textsuperscript{113} WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WCT].

\textsuperscript{114} WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 [hereinafter WPPT].
deviations from the protected IPRs under some circumstances.\textsuperscript{115} Therefore, a party could most likely suspend IPRs under the TRIPS agreement and not be in violation of those treaties.

Some bilateral treaties may also provide a framework for the treatment of intellectual property rights between the signatory states. Most notably, the United States has initiated some free trade agreements with developing countries that provide stronger intellectual property protections than are recognized by the TRIPS agreement.\textsuperscript{116} These provisions, known as “TRIPS-plus,” were intended to enhance the scope of intellectual property protections between the parties.\textsuperscript{117} As a result, TRIPS-plus provisions may present barriers for countries that are subject to such agreements.\textsuperscript{118} These provisions may effectively supersede the TRIPS Agreement by providing stronger protections for intellectual property rights or may disallow cross retaliation as a remedy for non-compliance. Therefore, countries that enter into TRIPS-plus agreements with a trading partner may be unable to use cross retaliation as a remedy against that country.

\textit{ii. Domestic Legal Issues}

Treaties are not the only source of legal issues regarding the suspension of TRIPS obligations. Countries may have codified their TRIPS obligations in domestic statutes or have other intellectual property legislation that would prohibit suspending these rights. These countries would need to amend their statutes in order to suspend the TRIPS obligations. The situation is further

\textsuperscript{115} WCT article 10 provides: “Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.” WCT, supra note 113, art. 10.1. WPPT article 16.1 provides the same exceptions. WPPT, supra note 114, art. 16.1.


\textsuperscript{117} Abbott, supra note 17, at 16.

\textsuperscript{118} For an in depth discussion of TRIPS-plus provisions, see id. at 16-18. See also PEDRO ROFFE, BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE CHILE-USA FREE TRADE AGREEMENT (Geoff Tansey, ed., Int’l Ctr. For Trade and Sustainable Dev., 2004).
complicated if the national constitution protects intellectual property rights.\textsuperscript{119} One solution is for a country to amend the statute to allow the government to suspend certain provisions under circumstances where cross retaliation is permitted.\textsuperscript{120} This modification should be feasible because TRIPS and other WTO agreements do not prohibit countries from amending domestic legislation.\textsuperscript{121}

\textbf{B. Political Environment}

Even if a complaining country can overcome the legal challenges of suspending TRIPS obligations, it will likely face an onslaught of political pressure from the affected government and other stakeholders. A stakeholder may characterize the right to suspend intellectual property protection as illegal by using terms like “piracy.”\textsuperscript{122} The legal term “piracy” refers to the “unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.”\textsuperscript{123} It is used colloquially to refer to the stealing of copyrighted music and other media, usually from the Internet.\textsuperscript{124} By equating cross retaliation with piracy, the stakeholder creates a public relations problem for the government that holds the right.

For example, Antigua faced such challenges in 2007 when the WTO authorized the tiny island nation to suspend TRIPS obligations. Immediately following the ruling, the Office of the United States Trade Representative—the top U.S. trade negotiator—issued a statement warning that “it would establish a harmful precedent for a WTO Member to affirmatively authorize what would otherwise be considered acts of piracy, counterfeiting, or other forms of IPR infringement.”\textsuperscript{125}


\textsuperscript{120} See id. at 2.

\textsuperscript{121} Subramanian & Watal, supra note 46, at 415.

\textsuperscript{122} See Abbott, supra note 17, at 1.

\textsuperscript{123} BLACK’S LAW DICTIONARY 1186 (8th ed. 2004).

\textsuperscript{124} See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 943 (11th ed. 2005).

Such political pressure was intended to draw attention to Antigua's use of this remedy. Brendan McGivern, a trade lawyer based in Geneva, described the U.S. tactics: "[e]ven if Antigua goes ahead with an act of piracy or the refusal to allow the registration of a trademark, the question still remains of how much that act is worth . . . [T]he U.S. is going to dog them on every step of the way."¹²⁶ Thus, Antigua can expect the United States to use all political channels to push for a beneficial resolution of the case.

C. Implementation

Even if a country can create a legal context for suspension of TRIPS obligations and surmount the political pressure to not do so, the country may face significant challenges of implementation. These problems are likely to be twofold. First, the country must have infrastructure in place to take advantage of the suspended rights.¹²⁷ Second, the country must be able to monitor the use of material produced under the suspension scheme.¹²⁸

The infrastructure problem will be most pronounced with the reproduction of technology normally subject to patents.¹²⁹ This is particularly true for infrastructure for pharmaceutical production. Although developing countries could see large improvements in social welfare because of greater access to medicines,¹³⁰ these countries will be unable to take advantage of the access to generic drugs if they do not have the capacity to produce them at home.¹³¹

Internet_Gambling.html.


¹²⁸ See Slater, supra note 16, at 1401 (suggesting that a government-issued compulsory licensing system is best because it would help retaliating countries monitor the total value of licenses distributed).

¹²⁹ See Abbott & Reichman, supra note 127, at 927 (arguing that inadequate technology infrastructure contributes to least-developed countries' limited access to medicines).

¹³⁰ See Abbott & Reichman, supra note 127.

¹³¹ However, a growing number of "middle-income" countries, such as Argentina, Brazil, Chile, India, Thailand, Egypt, Indonesia, Taiwan and South Korea, have the
The monitoring problem is most likely to arise in the area of copyrighted material. Since many copyrighted works, including music, are available in a digital format, they are easy to transfer from one person to another. While this quality reduces the need for infrastructure, it means the material easily can be reproduced illegally.

To illustrate the extent of this problem, Antigua has already had difficulties monitoring distribution of copyrighted material subject to its 2007 ruling against the United States, even though Antigua has not yet developed a suspension regime. In Antigua, a company called Zookz launched a website offering unlimited entertainment downloads for a small monthly fee.132 The company’s operators claimed to be working under the 2007 WTO decision.133 The government of Antigua issued a statement clarifying that “[t]he operators of Zookz.com have not played any role in the Antiguan gaming industry or in our country’s case pending before the WTO,” and that “Antigua and Barbuda has not authorized any person or entity to implement sanctions.”134 The Zookz website is no longer operating, suggesting that it has been shut down by the government of Antigua.135 Nevertheless, the case illustrates the problems that governments can face with monitoring the use of copyrighted materials.

Part IV. Measurement Criteria and Policy Options

Following Ecuador’s proposed suspension system, several authors have suggested that the best workable model for suspending TRIPS obligations is for the government to issue compulsory licenses for companies to reproduce material subject to copyrights and patents.136 This section will describe how those

capacity to produce generic medicines at a low cost. Id. at 928.


133 Id.


136 See, e.g., Slater, supra note 16, at 1386; Abbott, supra note 17, at 20-21.
proposed models would operate and adds another option: the possibility that a country will enter into a settlement agreement with the violating country. These descriptions will then be applied to measurement criteria to analyze how countries might proceed to best meet their own goals.

A. Measurements

Any policy option must be analyzed in terms of criteria that can accurately measure the strength of each option. This section proposes a number of measurement criteria. Cross retaliation must 1) validate the complaining country's rights, 2) address practical constraints, and 3) improve social welfare.

First, a viable policy option should validate the complaining country's rights, ultimately inducing the violating country to comply with the DSB ruling. However, if cross retaliation does not bring the violating country into compliance, it should at least ensure that the complaining country is adequately compensated for the loss of its rights. The litigation will be meaningless if it does not improve the position of the complaining country.

Second, a viable policy option should address the practical constraints of suspending trade concessions. The cross retaliation scheme must meet the implementing country's legal obligations, both nationally and internationally. The scheme should also minimize political problems. The violating country is likely to face political pressure from the government of the complaining country as well as from its own stakeholder constituents. Additionally, the complaining country must

137 Inducing compliance is a major policy goal of the WTO dispute settlement process: “Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” DSU, supra note 31, art. 21.1.

138 Compensation is available as a remedy if the DSB’s ruling is not implemented in a “reasonable amount of time” by the violating country. However, “neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.” Id. at 22.1.

139 See Abbott, supra note 17, at 33.

140 See supra Part III. A.

141 See supra Part III. B.

142 See INST. FOR AGRIC. & TRADE POL’Y, supra note 119, at 2 (contending that corporations that benefit from intellectual property protection will pressure violating
implement the cross retaliation scheme to ensure effective control over the material, preserving the ability to end the scheme once the amount authorized for retaliation has been met.\textsuperscript{143}

Third, a viable policy option should improve social welfare. Since this policy option will most often be used by developing countries against developed countries, cross retaliation offers a unique opportunity for developing countries to improve the well-being of their citizens.\textsuperscript{144} Social welfare can be considered in terms of producers or consumers; the benefits of cross retaliation can be measured by increased cash flows to producers or through monetary savings to consumers.

\textit{B. Policy Options}

\textit{i. Copyrights}

Copyright suspension may become the predominant form of cross retaliation because copyrighted materials are available in digital format and are easy to reproduce.\textsuperscript{145} Countries would need little infrastructure to take advantage of this option and would have minimal financial loss if the operation needed to cease once the violating country came into compliance.\textsuperscript{146}

TRIPS provides copyright protection for “expressions,”\textsuperscript{147} and requires all signatories to adhere to articles 1-21 of the Berne Convention.\textsuperscript{148} The Berne Convention establishes minimum substantive rights for copyright holders, including the exclusive right to: 1) reproduce literary and artistic works “in any form or manner;” 2) authorize public performances; and 3) authorize derivative works, such as adaptations.\textsuperscript{149} The Berne Convention requires national treatment, which entitles foreign authors the

countries into compliance).

\textsuperscript{143} \textit{See supra} Part III. C.
\textsuperscript{144} \textit{See, e.g.,} Abbott, \textit{supra} note 17, at 37.
\textsuperscript{145} Slater, \textit{supra} note 16, at 1396.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} TRIPS Agreement, \textit{supra} note 8, art. 9.2. TRIPS does not provide protection for “ideas, procedures, methods of operation or mathematical concepts.” \textit{Id.}
\textsuperscript{148} \textit{Id.} art. 9.1. However, TRIPS does not incorporate article 6bis of the Berne Convention, which is the moral rights provision. \textit{See Id.}
\textsuperscript{149} Berne Convention, \textit{supra} note 105, art. 8, 11, 11bis, 12, 14, 14bis; accord. Slater, \textit{supra} note 16, at 1395.
same treatment as national authors. Under the Berne Convention, copyright attaches to an author's work without the author having to register the work or follow any other formal procedure.

TRIPS protection extends beyond the Berne Convention in a number of ways. TRIPS defines computer source and object codes as "literary works," whereas this protection was not needed when the Berne Convention was first enacted in 1886. TRIPS also provides more remedies for violations of intellectual property rights, allowing for domestic enforcement mechanisms and authorizing parties to bring disputes to the Dispute Settlement Body.

Ecuador proposed a system of government-issued revocable licenses to meet these criteria in EC–Bananas III. Under its plan, Ecuador proposed suspending Article 14 of TRIPS, which protects the "related rights" of copyright holders, including rights of reproduction. Individuals or companies in Ecuador could apply to the government for a permit to suspend Article 14 rights within the country. The license would be limited "in terms of quantity, value and time," and the government could revoke the license at any time. Each reproduction would be assigned a "suspension value" equal to the value of a new "commercially most interesting sound recording" or other media. Since Ecuador demonstrated a low probability that its plan would exceed the suspension level allowed under the ruling, the arbitrators supported the proposal.

A system of government-issued licenses, like the one proposed by Ecuador, might be viable in other countries as well.

A cross retaliation regime suspends copyrights rates favorably under the first two measurement criteria, inducing compliance and

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150 Berne Convention, supra note 105, art. 5.1.
151 Id. art. 5.2.
152 TRIPS Agreement, supra note 8, art. 10.1.
153 Id. art. 41, 64.1. See GATT 1994, supra note 5, art. 22, 23.
154 EC – Bananas III, supra note 9, ¶ 161. Ecuador did not plan to suspend article 9, which incorporates the Berne Convention. See TRIPS Agreement, supra note 8, art. 9.
155 EC – Bananas III, supra note 9, ¶ 161.
156 Id.
157 Id.
158 Id.
providing remuneration. The plan is likely to induce compliance because the violating country will face political pressure to comply with the ruling from its affected constituents.\textsuperscript{159} According to one author, the copyright/entertainment industry was one of the biggest supporters of the TRIPS Agreement and one of the biggest advocates for strong international protection of intellectual property rights.\textsuperscript{160} This author notes that “[i]t is fair to assume that retaliatory measures addressing [the copyright/entertainment or pharmaceutical sector] will generate political pressure within the affected country.”\textsuperscript{161} This point was illustrated in \textit{EC–Bananas III}, where Ecuador’s intent to implement a copyright suspension scheme created enough political pressure for the EC to make its banana trade policy more favorable to Ecuador.\textsuperscript{162} If Ecuador is a representative example, other countries will also likely be able to induce compliance by implementing a copyright suspension scheme.

Depending on the size of the complaining country’s economy, cross retaliation on copyrights is also likely to provide adequate remuneration by allowing the complaining country to avoid paying royalties. Since this suspension system would primarily make entertainment goods (e.g. movies, music, and books) available without copyright restrictions, the success of the program depends on domestic demand for such goods.\textsuperscript{163} Therefore, if domestic demand is limited, this remedy may not produce the level of remuneration that the complaining country had hoped. This may be particularly true in very small countries or in least developed countries (LDCs). As an illustration, this may be the case in Antigua. One author suggested that “[i]t is doubtful that suspending U.S. copyrights could increase domestic retail sales of U.S. copyrighted goods in Antigua by $21 million annually,”

\textsuperscript{159} See Abbott, supra note 17, at 37.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} The EC agreed to treat Ecuadorian bananas the same as it treated bananas from its former colonies, which had previously received preferential trading rights. See Matthew S. Dunne III, Note, Redefining Power Orientation: A Reassessment of Jackson’s Paradigm in Light of Asymmetries of Power, Negotiation, and Compliance in the GATT/WTO Dispute Settlement System, 34 LAW & POL’Y INT’L BUS. 277, 307 (2002).
\textsuperscript{163} Normally, a country will not be able to export the copyright-free material because other countries are still bound by the copyright laws. See Abbott, supra note 17.
which is the amount by which it is allowed to retaliate.\textsuperscript{164} A country like Antigua could combine a copyright suspension plan with another form of cross retaliation, since copyright suspension alone may not provide complete remuneration in a country with a small domestic market.

Second, a country implementing a copyright suspension regime may face practical restraints, in terms of legal requirements, political problems, and control of the materials. While many authors have suggested that a copyright suspension system could be implemented in a way to avoid concurrent legal problems,\textsuperscript{165} no court has directly tested the validity of these assertions.\textsuperscript{166} Nevertheless, various authors argue that the requirements of the Berne Convention and other treaties could be met by an implementing country, suggesting that a copyright suspension scheme could meet all legal requirements.\textsuperscript{167}

On the other hand, a copyright suspension regime is likely to open the complaining country to criticisms of intellectual property theft and "piracy."\textsuperscript{168} Besides verbal attacks, the violating country may use economic pressure to prevent the complaining country from implementing the copyright suspension plan.\textsuperscript{169} For example, many developed countries give tariff preferences to less developed countries under voluntary schemes that can be unilaterally withdrawn.\textsuperscript{170} These benefits, such as the U.S. Generalized

\textsuperscript{164} The author noted "this would require average new expenditures of $300 per person in a country with a GDP [purchasing power parity] per capita of $17,000." Isaac Wohl, The Antigua-United States Online Gambling Dispute, 2 J. INT'L COM. ECON. 127, 139 (2009).

\textsuperscript{165} See supra Part III. A.

\textsuperscript{166} However, the arbitrators in EC – Bananas III indicated their support for a government-issued compulsory licensing system, such as the one proposed by Ecuador: "In our view, the mechanisms envisaged by Ecuador for implementing the suspension of certain sections of the TRIPS Agreement, if authorized by the DSB, would take account of many of our remarks made in the preceding sections." Decision by the Arbitrators, EC–Bananas III, supra note 9, ¶ 164.

\textsuperscript{167} See, e.g., Slater, supra note 16, at 1375-76; Abbott, supra note 17, at 13.

\textsuperscript{168} For example, Antigua faced such criticisms after winning the right to cross retaliate. See supra Part III. B.

\textsuperscript{169} This is particularly true since the violating country is probably facing political pressure and threats of litigation from its copyright/entertainment sector. See Abbott, supra note 17, at 37.

\textsuperscript{170} See, e.g., Off. U.S. Trade Representative, Generalized System of Preferences,
System of Preferences, promote economic growth in developing countries by allowing products to enter the U.S. market duty free.\textsuperscript{71} If the violating country has some flexibility to remove tariff preferences or other economic assistance tools, it may use this as leverage against the complaining country.\textsuperscript{72}

However, it is possible that political pressure from a copyright suspension scheme would benefit the implementing country. If the copyright/entertainment industry in the violating country has a stronger voice than the industry of the original violation (i.e. bananas in the EC or upland cotton in the United States), then the copyright/entertainment industry can likely persuade the government to comply with the WTO ruling. Compliance would necessitate the end of copyright suspension, and the complaining country would receive the benefit of winning its lawsuit.

As another practical consideration, a government-issued compulsory license-based copyright suspension system will not require new infrastructure. Individuals and firms will apply to the government for a permit to reproduce copyrighted material, and the government will issue the permits at its discretion. Since much copyrighted material is already in a digital format, it will be easy to reproduce.\textsuperscript{73}

Despite the benefits of copyright suspension, the system will have problems of implementation and monitoring. To use Brazil as an example, according to research by the International Intellectual Property Alliance, nearly $1 billion U.S. worth of copyrighted materials are traded illegally in Brazil each year.\textsuperscript{74} If copyrights were suspended for a period of time, it might be difficult for Brazil to monitor the levels of reproduction, given the


\textsuperscript{72} Id.

\textsuperscript{73} For example, Brazil receives about $2.5 billion in trade benefits from the United States under the Generalized System of Preferences. The United States has urged Brazil to improve its protection of intellectual property rights in order to retain these benefits. The United States has no legal obligation to continue to offer this support. INST. FOR AGRIC. & TRADE POL’Y, supra note 119, at 2.

\textsuperscript{74} Slater, supra note 16, at 1396.

large domestic market for illegally downloaded material. A compulsory licensing system may help prevent the problem by allowing the government to control which producers have the right to reproduce the materials. At the very least, the compulsory licensing system would shift liability for the illegally reproduced materials from the government to the private sector.

Third, a complaining country should consider the social welfare implications of suspending copyright protections. If a country were to implement a copyright suspension system, most of the economic benefit of this plan would go to producers rather than consumers.\textsuperscript{175} While consumers would probably appreciate the lower price of entertainment goods, these goods are non-essential and widely available for free on the black market.\textsuperscript{176} Consumers, particularly in developing countries, might benefit more from increased access to technology normally subject to patents—especially pharmaceutical drugs and other technologies that can improve the standard of living—rather than to copyrighted material.

Producers, on the other hand, would benefit because the copyright suspension system would eliminate major production expenses. Producers might otherwise be required to pay royalties to the rights owners that they would now not have to pay.\textsuperscript{177} Therefore, a copyright suspension could help a country develop local businesses. Given the growth potential for producers and the lower social welfare effect for consumers, a government needs to consider its goals—including which parties will benefit—when choosing which suspension system to implement. Nevertheless, copyright suspension might become the principal form of cross retaliation because it requires little initial investment from producers and limited financial cost if the facilities need to be shut

\textsuperscript{175} Cf. Abbott, \textit{supra} note 17, at 37 ("A government may also improve social welfare by making available entertainment-related products at lower cost through copyright suspension. It is not unreasonable to suppose that such ‘making available’ would be well received by people within the country, thus increasing support for government policy").


\textsuperscript{177} In the United States, for example, the current royalty rate per for music is 9.1 cents per song. Slater, \textit{supra} note 16, at 1398.
ii. Patents

TRIPS requires WTO members to provide patents for "any inventions, whether products or processes, in all fields of technology." The patent confers on its holder the right to prevent third parties from "making, using, offering for sale, selling, or importing," a patented product or process. The patent must hold at least a twenty-year term.

TRIPS allows "limited exceptions to the exclusive rights" of rights holders. Countries may adopt legislation "necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development." Countries may also adopt measures "to prevent the abuse of intellectual property rights by right holders," such as engaging in "practices which unreasonably restrain trade or adversely affect the international transfer of technology."

Article 31 of the TRIPS agreement allows countries to use patented technology without the authorization of the right holder "[i]n situations of national emergency or other circumstances of extreme urgency" after satisfying certain requirements. However, the rights holder is entitled to "adequate remuneration."

At least one author suggests that a compulsory

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178 Id. at 1396, n. 183; Subramanian & Watal, supra note 46, at 413.
179 TRIPS Agreement, supra note 8, art. 27.1. This provision is subject to some limitations. Members can exclude from patentability inventions for which commercial exploitation is necessary to protect human, animal, or plant life, or to prevent environmental degradation. Id. art. 27.2. Members can also exclude "diagnostic, therapeutic and surgical methods" and certain plants and animals. Id. art. 27.3. See generally H. Reichman, Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement, 29 INT'L LAW 345, 351-61 (1995) (outlining TRIPS provisions for patents).
180 TRIPS Agreement, supra note 8, art. 28.1(a)-(b).
181 Id. art. 33.
182 Id. art. 30.
183 Id. art. 31(b).
184 Id. art. 31(h).
185 Id. at 31(b).
186 Id. at 31(h).
licensing system, like the one Ecuador proposed for copyrights, would be viable upon suspending the "adequate remuneration of article 31(h)."

Since patent owners have to disclose their patents, countries would often have enough information at their disposal to recreate the technology. However, patents are applied for and granted in only a few countries on a regular basis, which would limit the type of technology available to the country implementing a suspension regime. For example, if a violating country did not produce many patents, the complaining country would have limited ability to use this remedy. Nonetheless, a suspension system for patent rights might be viable for some countries.

Many of the challenges to copyright suspension also apply to patent suspension. However, patent suspension, particularly pharmaceutical patents, could provide large benefits to the complaining country’s citizens by offering important technology at a less prohibitive price. This analysis demonstrates that suspending patent rights may be beneficial to the complaining country if it can overcome some practical constraints.

A patent suspension system would satisfy the first criterion, validating the rights of the complaining country. Such a system is likely to induce compliance. Although no country has yet proposed a patent suspension plan, an analogy can be drawn to copyrights. Like in the copyright context, patent holders—particularly the pharmaceutical industry—have strong political influence. If, for example, a pharmaceutical company was facing patent suspension in a large country like Brazil, it might be able to influence the government to comply with the ruling and avoid losing its intellectual property rights.

A patent suspension system would provide greater benefit to the complaining country than copyright suspension because otherwise patented technologies could be reproduced at a lower cost. As one author notes, "[f]or many developing countries,

187 Slater, supra note 16, at 1391-94.
188 Abbott, supra note 17, at 25.
189 Id. at 26.
190 Id. at 37.
191 See id.
192 Id.
access to patented pharmaceuticals is a top priority. Since many of these countries cannot afford an adequate supply of medicine, suspension of pharmaceutical patents would provide two benefits: first, it would help countries get access to the amount of medicine that they need; and second, it would make the medicine more affordable.

A patent suspension plan will encounter significant problems on the second criterion, practical feasibility. While such a plan can probably overcome the legal barriers to implementation, it will be unlikely to minimize political problems. The implementing country’s ability to ensure control over the material is better than in the copyright context, but will still depend on the capacity of the government in question.

Similar to the copyright context, international treaties like the Paris Convention will not likely prevent a complaining country from suspending patents. However, the threat of suspension may lead violating countries to create new legal barriers to cross retaliation. The United States has already tried to improve international IPR protection through some regional free trade agreements that contain “TRIPS-plus” provisions. Since agreements like the DR-CAFTA deliberately provide for more intellectual property protection than the TRIPS agreement, member countries would likely be precluded from cross retaliation without violating their regional commitments. While stepped-up IPR protections would only apply to parties of a regional agreement like DR-CAFTA, such protections may preclude using the remedy against the United States, a major producer of patented materials. It is possible that in the future, the United States would seek to negotiate provisions of regional treaties that not only include TRIPS-plus provisions, but explicitly prohibit cross retaliation.

A patent suspension plan is unlikely to minimize political problems for the implementing country. While the piracy rhetoric might be less applicable in this setting since that is most often

193 Slater, supra note 16, at 1390.
194 Abbott, supra note 17, at 14.
195 Id. at 17. See, e.g., DR-CAFTA, supra note 116, at ch. 15.
196 For an in-depth discussion of the DR-CAFTA as it relates to cross retaliation, see Abbott, supra note 17, at 16-18.
associated with copyright theft, the complaining country will likely still face criticism that it is stealing another country’s work product. It may also risk losing voluntary benefits it receives from the violating country, such as trade benefits provided under the U.S. Generalized System of Preferences. In terms of rhetoric, however, the complaining country will benefit from the political pressure from the technology sector of the violating government.

The ability to ensure control over the patented materials will vary from country to country. For many countries, the difficult part will be infrastructure. Especially with high-tech patented materials like pharmaceutical drugs, many countries will not have the infrastructure already in place to reproduce the technology. If a country decides to build the necessary infrastructure, it will be left with unusable infrastructure after the suspension period is over. It may be most practical for a country to choose to suspend the patents on products that have only a short time left on their required twenty-year patents. Ideally, the country could suspend the last few years of a patent and then continue to produce the technology once the patent had expired.

While infrastructure might present a challenge, monitoring should be much easier in the patent context than with copyrights. Because specialized infrastructure will be necessary in many cases, fewer producers will be able to take advantage of the suspension. With fewer producers involved, it will be easier for the government to monitor the levels of suspension and ensure that the technology is not reproduced illegally.

The potential for patent suspension to meet the third criterion, improving social welfare, is tremendous. In light of the social benefits of increased access to technology, TRIPS has already established several protections for less developed countries. Article 31 of the TRIPS Agreement provides guidelines for countries that use patented technologies without consent of the rights holder. TRIPS foresees the possibility that a country

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197 See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, supra note 124.


199 See Abbott, supra note 17, at 37.

200 This use, however, must be subject to the laws of the Member state. TRIPS Agreement, supra note 8, art. 31.
would use patented technology under emergency circumstances.\textsuperscript{201} For example, Brazil and Thailand have both used the Article 31 framework to use patented pharmaceutical drugs.\textsuperscript{202} Mozambique, Zambia, and Zimbabwe—which are considered LDCs—have also issued compulsory licenses for HIV/AIDS anti-retroviral medicines and plan to produce the medicines domestically.\textsuperscript{203} Given the attention TRIPS has focused on making patented technologies available to developing countries, such technologies may have a great potential to improve social welfare.

\textit{iii. Settlement}

In some instances, the right to suspend TRIPS obligations will provide a great enough threat that the complaining country will be able to negotiate a settlement with the violating country.\textsuperscript{204} In \textit{EC–Bananas III}, the threat of suspension served two functions, ultimately leading to settlement.\textsuperscript{205} First, in October 2000, Ecuador’s threat of suspension caused the EC to end the discriminatory treatment of Ecuadorian bananas.\textsuperscript{206} Second, the threat empowered Ecuador to oppose a similar settlement

\textsuperscript{201} Article 31, subsection (g) provides that “authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur.” This suggests that under some circumstances, a government could use patented technology to improve public welfare. TRIPS Agreement, supra note 8, art. 31(g).

\textsuperscript{202} See Abbott & Reichman, supra note 127, at 949-53 (describing Brazil’s commitment to ensuring access to medications and Thailand’s commitment to providing treatment for HIV/AIDS). See infra Part V (discussion of Brazil’s campaign for access to medicine).

\textsuperscript{203} Slater, supra note 16, at 1391-92.

\textsuperscript{204} Ecuador entered into a settlement with the EC in 2001. Notification of Mutually Agreed Solution, supra note 67. Antigua has not yet settled with the United States, but it appears that a settlement will be the ultimate resolution. See World Trade Org., United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, supra note 70.

\textsuperscript{205} Dunne, supra note 162, at 307.

\textsuperscript{206} The EC ended its preferential treatment of bananas from the African, Caribbean, and Pacific (ACP) group of states, which provided better trade terms for former European colonies, which did not include Ecuador. See id; see also Joe Kirwin, EU Foreign Ministers Give Qualified Backing to Transitional Banana Tariff-Quota Proposal, 17 INT’L TRADE REP. (BNA) 1540, 1540 (Oct. 12, 2000).
agreement the EC made with the United States in April 2001.\footnote{Dunne, supra note 162, at 30; see also Joe Kirwin et al., \textit{U.S. and EU End Decade-long Dispute over EU's Banana Import Regime}, 18 INT'L TRADE REP. (BNA) 564, 566 (Apr. 12, 2001).}

A settlement will have a mixed result for the first criterion, upholding the country’s rights. It may not induce compliance, but it is likely to provide remuneration for the complaining country. The likelihood of inducing compliance will depend on how the complaining country uses cross retaliation as leverage. Some small countries, such as Antigua, may seek settlement because they do not have the capacity to cross retaliate. In other cases, the violating country may seek settlement because it is unable or unwilling to comply. As demonstrated by the Ecuador case, cross retaliation may also be used as a tool to reach a better settlement.\footnote{MCCALL SMITH, supra note 12, at 257.}

One study of the Ecuadorian case describes the benefit of cross retaliation as a bargaining chip: “Ecuador’s innovative request to cross-retaliate focused on the intellectual property rights . . . in several sensitive sectors.”\footnote{Id. at 259.} The author explains that “[b]y obtaining this authority, Ecuador signaled its commitment to press for full compliance . . . enhancing its leverage in subsequent negotiations.”\footnote{Id. at 273.} This author concluded that Ecuador’s ability to cross retaliate “appeared to enhance its leverage beyond what WTO remedies would normally provide a small developing country.”\footnote{Id. at 277.} Ecuador not only settled, but also improved its own market access to the EC. Ecuador’s share of the EC banana market was 14.7 percent in 1998, but it jumped to 17.8 percent after settlement, and to 20.3 percent by 2002.\footnote{Id. at 277.} Ecuador and other banana exporters finally concluded all negotiations with the EC.\footnote{These improvements occurred under the EC’s transitional regime. Ecuador’s bananas were expected to perform even better after the EC came into full compliance in 2006. Id. at 278.}
about bananas in December 2009.\textsuperscript{213}

A settlement stemming from the right of cross retaliation is also likely to provide remuneration to the complaining country. In \textit{EC–Banana's III}, Ecuador won the right to retaliate up to $201.6 million per year.\textsuperscript{214} In exchange for Ecuador giving up its right of retaliation, the EC agreed to an import regime for Ecuador that would be more favorable than the amount of the allowed retaliation.\textsuperscript{215} In future cases, a complaining party could negotiate a cash settlement or other preferential trading options, which would improve its position in the violating country against its competitors.

However, it is possible that a more powerful violating country could induce a less powerful complaining country to take a settlement worth less than the original award.

Since a settlement could help a complaining country avoid the practical constraints under the second criterion, it may be the only feasible option for some countries. A settlement would avoid the legal problems associated with suspending intellectual property rights. It would also avoid a discussion of the rights under international treaties like the Berne and Paris Conventions. Finally, a settlement may be the only feasible option for countries that have signed TRIPS-plus agreements, since they have already agreed to stronger intellectual property protections than those provided under TRIPS.

A settlement may or may not help the complaining country avoid political problems. The country would still face political pressure from abroad, but it would be in a better position to negotiate. The case of Ecuador illustrates this point. Aware of the pressure it would face from the ACP countries that staunchly defended their preferential trading relationship with the EC, Ecuador opted to request the right of cross retaliation to provide a better bargaining position.\textsuperscript{216} In the end, the benefits of its negotiation went to the same domestic sector that suffered the original injury, thus avoiding the criticism that Ecuador was not supporting its banana sector.

\textsuperscript{213} Ennis, \textit{supra} note 67.
\textsuperscript{214} \textit{Notification of Mutually Agreed Solution}, \textit{supra} note 67.
\textsuperscript{215} \textit{Id}.
\textsuperscript{216} \textit{McCALL SMITH}, \textit{supra} note 12, at 268.
Finally, settlement avoids issues of control and infrastructure. The complaining country would not have to devise a monitoring mechanism to make sure that the material is being distributed legally. Likewise, the complaining country would not have to invest in infrastructure to take advantage of the suspension, and would not have to worry about the valuation concerns, such as the level of suspension that the country has reached.

A settlement is also likely to satisfy the third criterion, improving social welfare. This option has the possibility to improve the welfare for both producers and consumers. Ecuador provides a good example of a settlement that improves the welfare of producers. Since Ecuador was ultimately able to compel the EC to change their bananas regime, the Ecuadorian banana farmers eventually gained better market access to EC member states.  

Under different circumstances, a settlement could also benefit consumers because it would bring additional revenue into the country.

Although settlement may at first appear to be the “weakest” option, and perhaps the only alternative available for the least developed countries, Ecuador illustrates that this is not the case. When viewed as one facet of a larger trade-negotiating framework, settlement can help a country create the type of leverage it needs to negotiate compliance with a much larger and more powerful violating country.

Part V. Analysis: The Special Case of Brazil

Brazil has moved swiftly to take advantage of the ruling following the August 2009 decision. In November 2009, the government of Brazil issued a list of American goods for which it was considering imposing tariffs in relation to the upland cotton dispute. The list, which contained 222 goods representing about eleven percent of Brazil’s imports from the United States, included food stuffs, acetaminophen, alkaline batteries, paint, and bar code readers. The list, which did not target intellectual property, was

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217 Id. at 273.


219 Id.
submitted to the U.S. Trade Representative’s office for review.

In March 2010, Brazil followed up by issuing a list of 102 goods on which it intended to impose tariffs—totaling $591 million—within thirty days. Brazil also indicated its plans to publish a list of intellectual property slated for cross retaliation, following a period of public comment. These announcements caught the attention of U.S. officials. In April, the United States agreed to three concessions: 1) $147 million per year in “technical assistance;” 2) changes to the export credit program that supports purchasers of U.S. cotton; and 3) efforts to open the U.S. market to imports of Brazilian meat. These concessions were offered as part of preliminary negotiations for a settlement agreement, and the United States and Brazil agreed to reach a further agreement by June 2010.

Over the next two months, the United States and Brazil made progress, but did not resolve the cotton dispute. In June, the parties reached a “placeholder” agreement, which sets forth a timeline for future negotiations until 2012, when the current U.S. Farm Bill is set to expire. Over the next two years, U.S. and Brazilian officials will negotiate a settlement as the United States revises its current Farm Bill, an omnibus bill that governs the form and substance of federal assistance to American farmers. If the negotiations are successful, the next Farm Bill will be more favorable toward Brazil and reduce U.S. cotton subsidies. According to Robert Azevedo, Brazil’s ambassador to the WTO, “this is not a final solution, but it lays out elements that will allow for consultations and reforms to the Farm Bill that will take place by the end of 2012.”

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221 Id.


223 Id.

224 BRIDGES WKLY TRADE NEWS DIG., supra note 20.

225 Id.

226 See id.

227 Alan Beattie, Brazil to suspend action in US cotton dispute, FIN. TIMES (June 18,
cross retaliation open as a possibility if the negotiations fail.\textsuperscript{228} Azevedo further stated: "Brazil doesn’t rule out taking countermeasures at any moment."\textsuperscript{229}

Nevertheless, these developments indicate that Brazil does not plan to cross retaliate—at least not yet. Brazil occupies a special place among developing countries: it advocates on behalf of development issues, such as access to medicine, but it also has very strong industrial capacity.\textsuperscript{230} Since the DSB issued Brazil the right to cross retaliate after reaching a threshold level of violations,\textsuperscript{231} their right of cross retaliation in any particular year is not a given. Even if the threshold is reached, Brazil may opt not to use it.\textsuperscript{232} In light of Brazil’s unique position and this constraint, this section will look at special factors that will influence Brazil’s decision about how to best use its right of cross retaliation.

\textit{A. Copyrights}

Although Brazil loses a lot of revenue from copyrighted material through piracy,\textsuperscript{233} it remains a large market for the legal trade of copyrighted materials, particularly over the Internet.\textsuperscript{234} Brazil is home to 64.9 million Internet users, representing thirty-three percent of Brazil's population.\textsuperscript{235} The government of Brazil has worked with the private sector to help reduce the amount of

\begin{footnotesize}
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\item \textsuperscript{228} Id.
\item \textsuperscript{229} Id.
\item \textsuperscript{230} Abbott & Reichman, \textit{supra} note 127, at 950-51.
\item \textsuperscript{231} Recourse to Article 22.6 Arbitration Report, \textit{United States – Upland Cotton, supra} note 1, ¶ 5.201.
\item \textsuperscript{232} The arbitration panel used 2007 as its base year, but the $409.7 million estimated threshold level for cross retaliation would not have been met then. Theodore R. Posner, \textit{The Brazil-U.S. Cotton Dispute: Brazil Should Think Twice About Intellectual Property-Focused Retaliation}, (Oct. 30, 2009), http://www.martindale.com/intellectual-property-law/article_Crowell-Moring-LLP_828242.htm. As of this writing, it is unknown whether Brazil will meet this threshold level in 2009, although one source estimated that Brazil is entitled to between $800 and $900 million in sanctions in 2009, including up to $450 million in cross retaliation. Sullivan, \textit{supra} note 218.
\item \textsuperscript{233} Int’l Intell. Prop. Alliance, \textit{supra} note 174, at 156.
\item \textsuperscript{234} See id.
\item \textsuperscript{235} See Brazil, CIA \textit{WORLD FACTBOOK} (Oct. 8, 2010), https://www.cia.gov/library/publications/the-world-factbook/geos/br.html.
\end{itemize}
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piracy. Such a large market may make this option feasible for suspension in cross retaliation.

B. Patents

It may be easier for Brazil than most countries to implement a patent suspension plan. Brazil has plants capable of producing medicine and has already used the TRIPS Article 31 framework once before to issue a compulsory license for a pharmaceutical drug. After the TRIPS Agreement came into effect in 1995, the Brazilian drug manufacturing industry suffered major losses because the country had not previously recognized pharmaceutical patents. At the same time, however, Brazil was a leader in establishing universal access to anti-retroviral (ARV) drugs for HIV/AIDS patients. Brazil used public facilities to manufacture ARVs that were not subject to patent protection.

When these drugs eventually came under patent, Brazil used the threat of issuing compulsory licenses under TRIPS Article 31 as leverage to convince drug manufacturers to provide the drugs to Brazil at a low price. In April 2007, Brazil issued a compulsory license for the ARV drug Efavirenz produced by Merck.

Given that Brazil has already used the TRIPS Article 31 exceptions for a compulsory license of pharmaceutical products, it is possible that it would take it one step further. Brazil could use its cross retaliation right to suspend Article 31(h), which requires providing adequate remuneration to the patent holder.

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237 Abbott & Reichman, supra note 127, at 951.
238 Id.
239 Id.
240 Id.
241 Id.
242 Abbott & Reichman, supra note 127, at 951. Brazil and Thailand are the only two countries to ever issue a compulsory license under TRIPS Article 31 for a pharmaceutical drug. Id.
243 This does not necessarily have to happen against the Merck's drug subject to a compulsory license, but could happen for any drug.
244 TRIPS Agreement, supra note 8, art. 31(h). See also Slater, supra note 16, at 1392 (proposing that retaliating countries able to produce pharmaceuticals domestically should use their DSB authorization to suspend the obligation to pay adequate remuneration under Article 31(h)).
Such a move would not only be available as sanctions, but would help Brazil continue its goal of providing drugs to its people at a low cost.

C. Settlement

The DSB’s threshold requirement—which prevents Brazil from using cross retaliation against the United States until a certain level of sanctions is reached—provides a disincentive to use the remedy since its use may only be available in certain years. However, there are other reasons why Brazil might choose to use the right as leverage but not implement cross retaliation outright.

First, Brazil has an incentive to see the TRIPS Agreement enforced because it seeks to protect its own sources of intellectual property.245 Brazil is making an effort to develop its oil and biofuels sectors, which hold patents for deep sea drilling in many countries.246 The Brazilian federal government is the majority owner of Petrobras, the country’s largest oil company, and is considering developing a new state-owned company for drilling in the “pre-salt” area, which houses the largest oil discovery in the Americas in the past thirty years.247 The new company “most likely will develop and apply Brazilian technologies.”248 Given Brazil’s emergence as a significant producer of intellectual property, one author suggests that “Brazil has a major stake in adherence to and vigorous enforcement of the TRIPS Agreement... [which] should make Brazil loath to take action that would be seen as undermining that treaty’s effectiveness.”249

Second, Brazil is aware of the importance of protecting intellectual property in light of its recent winning bid to host the 2016 Summer Olympics.250 The day after Brazil won the bid, it enacted a law251 to protect the intellectual property related to the

245 Posner, supra note 232.
246 Id.
248 Posner, supra note 232.
249 Id.
250 Id.
Olympics, including the symbols, trademarks, mascot, and song.\textsuperscript{252} According to one author, "[t]his experience reinforces an appreciation within the [Brazilian] legal community of the importance of intellectual property protection."\textsuperscript{253}

Third, Brazil may prefer to seek sanctions that will ultimately support its domestic cotton industry. Brazil is the fifth largest producer of cotton, with the United States third.\textsuperscript{254} In the 2008-2009 crop year, Brazil produced an estimated 5.7 million bales of cotton.\textsuperscript{255} However, during this crop year, the area used for cotton crops decreased by more than twenty percent, in part due to a lack of adequate financing.\textsuperscript{256} In light of the financial difficulties facing the Brazilian cotton industry, the government may decide that it would like the benefits derived from the sanctions to go directly to this industry as opposed to other industries. Given Brazil's recent agreement to begin negotiating a settlement with the United States, it seems likely that Brazil sees this route as its best option.

**Part VI. Conclusion**

Brazil's institutional capacities and prominence as an economic power, make it one of the developing countries most capable of successfully implementing cross retaliation. As the world's tenth largest economy and with a population of almost 200 million,\textsuperscript{257} Brazil is increasingly a powerful spokesperson for developing country interests. Brazil's use of cross retaliation as a policy instrument will likely inform how developing countries use the remedy in the future. In terms of how to implement cross retaliation, Brazil's interests are best served either through patent

\textsuperscript{252} Posner, *supra* note 232.

\textsuperscript{253} *Id.*


\textsuperscript{256} *Id.* at 3. The contraction primarily occurred in the state of Mato Grosso, where credit was particularly difficult to receive and transportation costs increased. *Id.* at 3-4.

\textsuperscript{257} CIA WORLD FACTBOOK, *supra* note 235.
suspension or through settlement, rather than copyright suspension.

Patent suspension—particularly in the pharmaceutical context—would lend itself well to Brazil’s strengths. Brazil has already built the infrastructure necessary to reproduce pharmaceutical drugs and has already used the TRIPS Agreement Article 31 framework to reproduce ARV drugs for HIV/AIDS without the consent of patent holders. From this perspective, it would be relatively easy for Brazil to suspend TRIPS Article 31(h), which currently requires Brazil to provide “adequate remuneration” to the drug manufacturer.\(^{258}\) Furthermore, Brazil has already subjected itself to political criticism by invoking the Article 31 mechanism for anti-retroviral drugs, and has developed strategies for handling such political pressure. Since patent suspension would be the next step in reproducing drugs and would not be a completely new course of action for Brazil, patent suspension is a more viable option in Brazil than in other countries.

Patent suspension is also likely to provide many benefits to Brazil. Such a regime would affirm Brazil’s rights, either by inducing the United States to comply with the WTO ruling or by providing remuneration to Brazil for the harmful cotton subsidies. In this way, Brazil should realize significant social welfare benefits. Brazil can continue its goal to provide universal access to HIV/AIDS medication and possibly provide other health services as well. By improving public health, Brazil will likely improve its economy and reduce domestic income inequality.

Settlement would also be a viable option for Brazil. As Ecuador illustrated in \textit{EC – Bananas III}, settlement can be used in a very calculated manner to help the complaining country induce compliance from the violating country. Just as Ecuador ultimately negotiated with the EC to change their trading preferences for bananas, Brazil may be able to use cross retaliation as leverage to surmount the strong U.S. agricultural interests and negotiate reform. Brazil could also use the right of cross retaliation as leverage for negotiating with the United States on the Doha Development Agenda. The Doha Round is the WTO’s latest round of trade negotiations, ongoing since 2001, where members

\[^{258}\text{TRIPS Agreement, supra note 8, art. 31(h).}\]
are negotiating a global free trade agreement.\textsuperscript{259} In either case, the right of cross retaliation should provide considerable negotiating space for Brazil with the United States.

Settlement may be the most practical option for Brazil given its limited right of cross retaliation. Since Brazil is only allowed to cross retaliate once a certain threshold of sanctions has been met—a threshold which may not be met in any particular year—it may be too expensive for Brazil to cross retaliate without knowing for certain whether the policy option would be available in the next year. In this context, it might be more prudent for Brazil to seek a settlement or to choose only to retaliate in goods. Settlement would also avoid the extra political costs of cross retaliation as well as any problems with monitoring or compliance.

Settlement has a good chance of improving social welfare. If Brazil can negotiate a settlement that is better for Brazilian farmers, this will be a major accomplishment. Brazil and many developing countries have been pushing for U.S. agricultural reform for years, and were hoping that the Doha Round of trade negotiations would produce an agreement that was better for their farmers.\textsuperscript{260} With no resolution to Doha on the horizon, Brazil is looking for a private remedy to improve international trade for its cotton farmers.\textsuperscript{261}

Copyright suspension, on the other hand, would fail to take advantage of some of the attainable benefits under other strategies. While Brazil has a large market for copyrighted entertainment goods, the government may have a very difficult time monitoring the use of copyright suspended material. Considering that one source estimates that Brazil already sees nearly fifty percent of its potential revenue from copyrighted material lost to illegal downloads,\textsuperscript{262} this remedy might not be as effective as Brazil had hoped. Copyright suspension may lead to increased scrutiny from the United States and other countries, as well as present a challenge of determining the correct suspension value.

\textsuperscript{259} For more information on the Doha Round, see World Trade Org., Doha Development Agenda: Negotiations, implementation and development, http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Oct. 28, 2010).

\textsuperscript{260} See, e.g., Ewing & Riveras, supra note 13.

\textsuperscript{261} Id.

\textsuperscript{262} Int’l Intel. Prop. Alliance, supra note 174, at 2.
Copyright suspension would not provide the same social welfare benefits as patent suspension or settlement, as most of the benefit would go to the companies that procured the government licenses. While the copyrighted material may provide entertainment and some educational value, it may not be nearly as meaningful as the public health benefits derived from patent suspension or the agricultural or other benefits derived from settlement.

Cross retaliation provides WTO members with a unique policy tool to hold parties accountable for continuing trade violations. Previous research has identified some possible mechanisms for implementing cross retaliation: suspension of copyrights (with a focus on the entertainment industry), suspension of patents (with a focus on the pharmaceutical industry), and settlement. From a public policy perspective, there are benefits and pitfalls to each approach. When these models are applied to the most recent case on point, the dispute between Brazil and the United States over U.S. subsidies on upland cotton, Brazil is likely to exercise its option to cross retaliate through patent suspension or settlement. Ultimately, Brazil’s case will provide more guidance on how a developing country can creatively use the cross retaliation policy instrument in the future.