

2009

Replacing Slingshots with Swords: Implications of the Antigua-Gambling 22.6 Panel Report for Developing Countries and the World Trading System

Georgia Hamann

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [International Trade Law Commons](#)

Recommended Citation

Georgia Hamann, Replacing Slingshots with Swords: Implications of the Antigua-Gambling 22.6 Panel Report for Developing Countries and the World Trading System, 42 *Vanderbilt Law Review* 993 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol42/iss3/6>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Replacing Slingshots with Swords: Implications of the Antigua-Gambling 22.6 Panel Report for Developing Countries and the World Trading System

ABSTRACT

In December 2007, the WTO awarded Antigua the right to suspend TRIPS obligations at a value of \$21 million. This decision represents the WTO's continuing evolution into a body capable of addressing the concerns of developed countries while balancing the legitimate interests of developed nations. For the second time, the WTO has authorized suspension of intellectual property protection under the TRIPS agreement. Such a remedy, if widely adopted, has the capacity to address concerns surrounding effective retaliation by small economies versus large economies, which traditionally have discouraged developing countries from participating in WTO dispute resolution. Additionally, the remedy seems likely to increase compliance because it constitutes a significant threat to developed nations. Because the recent decision seems to increase both participation and compliance in the dispute resolution system, this Note argues that the decision represents an important and effective step in WTO jurisprudence.

TABLE OF CONTENTS

I.	INTRODUCTION AND STATEMENT OF THE ISSUES	994
II.	HISTORY OF THE ANTIGUA-U.S. DISPUTE	998
A.	<i>Brief Overview of the History of the Dispute</i>	998
B.	<i>Detailed Analysis of the Initial Arguments and Rationale of the WTO Prior to the 22.6 Arbitration</i>	1001
1.	Key Arguments by Both Countries Before the Dispute Resolution Panel	1001
2.	Appellate Body Findings.....	1003

	3. Compliance Issues: 21.5 Compliance Panel and 22.6 Arbitration	1004
	4. Broad Context of the 22.6 Arbitration	1006
III.	ANTIGUA-GAMBLING EXTENDS AND VALIDATES THE INTELLECTUAL PROPERTY VIOLATION REMEDY SET OUT IN ECUADOR BANANAS.....	1011
	A. <i>Brief Overview of the TRIPS Treaty and the Implications of Suspension</i>	1011
	B. <i>Broad Impact of EC-Bananas III and Antigua-Gambling on TRIPS Suspension Remedy</i>	1012
	C. <i>Antigua-Gambling Expands the Flexible Standard of Review and Burden of Proof of EC-Bananas III</i>	1013
	1. “Margin of Appreciation” and “Reasonableness” Guide the Standard of Review for 22.3 Actions.....	1014
	2. “Practical” and “Effective” Provide Flexibility for the Suspending Country	1016
IV.	EXTENSION OF THE TRIPS SUSPENSION REMEDY IS NET POSITIVE FOR THE TRADING SYSTEM.....	1018
	A. <i>TRIPS Suspension Represents a Real Threat to Developed Countries, Yet Has Minimal Effects on Developing Economies</i>	1019
	B. <i>TRIPS Suspension Creates Pressure to Settle</i>	1020
	C. <i>EC-Bananas III Offers Strategies to Minimize Unfettered Piracy</i>	1023
V	CONCLUSION.....	1028

I. INTRODUCTION AND STATEMENT OF THE ISSUES

On December 27, 2007, a special arbitration panel of the World Trade Organization (WTO) announced its decision regarding the amount of damages that the United States owed to Antigua-Barbuda (Antigua) as a result of the U.S.’s failure to comply with a previous Appellate Body decision that ordered the U.S. to cease its disparate treatment of offshore gambling providers.¹ The Arbitrator also

1. Decision by the Arbitrator, *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*, ¶ 6.1, WT/DS285/ARB (Dec. 21, 2007) [hereinafter 22.6 Panel Report]. This Note will refer broadly to the dispute between Antigua and the United States as “Antigua-Gambling.”

decided the question of remedy² and, consequently, addressed the question of meaningful retaliation by a developing country against a fully developed economy.³ Although the burgeoning problem of effective retaliation is far from unique to Antigua,⁴ the *Antigua-Gambling* case presented to the world a uniquely dramatic tableau—a country of minute resources and insignificant economic impact⁵ seeking to punish the world's foremost economic hegemon.⁶

Certainly, Antigua has amplified the drama of the situation, characterizing itself as the “David” pitted against the U.S. as “Goliath,” and encouraging the world to see it as a tiny force of justice and righteousness whose struggle against the bloated behemoth ought to be rewarded with victory.⁷ Of course, the U.S. has offered its own characterization of events, presenting the struggle as one of national morality holding firm against international crime.⁸ Both sides, perhaps as a result of these competing moral narratives, made outrageous demands of the WTO Arbitrators:⁹ Antigua demanded

2. *Id.* ¶¶ 2.3–5.

3. *See id.* ¶ 4.39 (considering Antigua's contention that suspending concessions in the same sectors of trade or under the same treaty as the violation would be neither “practical” nor “effective”). The term “developing country” is a term of art within the WTO itself. *See* PETER-TOBIAS STOLL & FRANK SCHORKOPF, *WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW* 22–23 (2006).

[T]he WTO . . . distinguishes between the group of Developing Countries . . . and a specially defined sub-group, the Least-Developed countries In the absence of an explicit definition of the group of developing countries in the WTO Agreements, the categorization is made on the basis of a declaration by the respective State, which can, however, be contested by other Members.

Id.

4. For example, the EC-Bananas case involved, in one stage of its proceedings, a similar question of retaliation by Ecuador against the European Communities. 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 (Apr. 9, 1999) [hereinafter EC-Bananas III Panel Report].

5. *See* James D. Thayer, *The Trade of Cross-Border Gambling and Betting: The WTO Dispute Between Antigua and the United States*, 2004 DUKE L. & TECH. REV. 13, 14 (2004) (discussing the significance of gambling to Antigua's economy).

6. 22.6 Panel Report, *supra* note 1, ¶ 4.2.

7. Press Release, U.S. Mission to the UN in Geneva, *Statements by United States at WTO Dispute Settlement Body Meeting (July 24, 2007)*, available at <http://www.usmission.ch/Press2007/0724DSB.html> (“There can be no question of responding to a finding of an unintentional commitment on gambling in a way which would undermine the important public policy of preserving public morals. The United States does not believe any other responsible WTO Member would act any differently towards its own citizens.”).

8. *Id.*

9. *See* 22.6 Panel Report, *supra* note 1, ¶ 3.137 (noting that the approaches by the parties are “all or nothing”).

more than \$3 billion,¹⁰ while the U.S. would only concede that its laws had affected Antigua's economy to the tune of \$500,000.¹¹

Despite the two countries' dramatic portrayals of the conflict, the issues presented by the case are vitally important. Developing countries are in a state of flux as they attempt to break into a trading system that, if not intentionally designed to exclude them, has only recently begun to make certain concessions and allowances to help promote their advancement.¹² Currently, countries like Antigua, upon winning victories from the WTO arbitrators, face the problem of enforcement. For such countries, Antigua's travails signal the trading system's readiness to consider the significant challenges faced by developing countries that attempt to enforce judgments against developed economies.¹³ On the other hand, more developed countries have reason to be concerned about asymmetrical remedies.¹⁴ The situation epitomizes the complexity of the WTO's task: balancing the desires of national economies and the best interests of the global economy.¹⁵

10. *Id.* ¶ 2.3.

11. *Id.* ¶ 3.148.

12. For a discussion on the calculations of developing countries evaluating whether to participate in the WTO, see, e.g., Will Martin & L. Alan Winters, *The Uruguay Round: A Milestone for the Developing Countries*, in *THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES* 1, 1 (Will Martin & L. Alan Winters eds., 1996) (discussing the significant benefits available to developing countries as a result of participation in the WTO, as well as the general benefits of global trade).

13. See Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 863 (2005) (discussing the various factors which have discouraged developing countries from bringing suit in the WTO against more powerful trading partners).

14. See *infra* Part IV for a detailed discussion of the effect of the particular TRIPS suspension asymmetrical remedy.

15. The WTO possesses what no other international regime has been able to achieve, and what no regional trade agreement can apparently duplicate with success: a set of largely universal ground rules . . . with a central judicial authority that can interpret these rules in a consistent and impartial manner over time. . . . The ability of the Appellate Body to resolve conflicts in sensitive areas (such as . . . the special and differential treatment of developing countries) has been viewed by some as . . . activism But what may be labelled as "activism" could be more aptly called "effectiveness." While the balance between political and judicial institutions in the WTO has been debated and questioned, a genius of the existing system was the creation of judicial institutions that could be effective even where political change was difficult.

Like the proverbial “mills of God” which “grind slowly, yet . . . exceedingly small,”¹⁶ the WTO, by its very nature, opposes affecting large-scale change through its decisions.¹⁷ As a result of this decision making approach, the *Antigua-Gambling* decision has already created dissatisfaction and seems likely to create more from those who seek a definitive answer to the questions raised by the dispute.¹⁸

The decision is not a decisive win for developing countries; the amount authorized, at \$21 million, is a mere fraction of the amount requested¹⁹ and, by some calculations, a fraction of the amount that Antigua deserves.²⁰ Yet, this Note argues that the decision should be viewed as a significant step towards the availability of fair retaliation by developing countries and a significant step away from the view of the WTO as a “kangaroo court” for powerful developed countries.²¹ For Antigua and similarly situated countries, suspension of obligations under the Trade-Related Aspects of Intellectual Property Rights (TRIPS) should represent a remedy which carries heft and meaning.

While no sudden change ought to be expected, the decision represents a significant step toward full evolution of a remedy developing countries can use to gain leverage sufficient to force developed economies to honor commitments. *Antigua-Gambling* adds significantly to a remedy previously authorized in only one case (and never implemented)—TRIPS suspension.²² Suspension of obligations under TRIPS offers a potential solution to the main problems facing

16. Henry Wadsworth Longfellow, *Retribution*, in HENRY WADSWORTH LONGFELLOW, POEMS 394 (1850).

17. See David Evans & Celso de Tarso Pereira, *DSU Review: A View from the Inside*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 251, 265–66 (Rufus Yerxa & Bruce Wilson eds., 2005) (indicating that because international law has no external means of ensuring compliance, changes wrought via its mechanisms are perceived as excessively slow).

18. See, e.g., Luis Carlos Nino, *WTO Rules in Favour of Antigua & Barbuda in Online Gambling Dispute*, GLOBAL INSIGHT, Dec. 27, 2007 (claiming that the WTO decision treats U.S. non-compliance too lightly). *But see* Phyllis Schlafly, *World Trade Organization Is No Friend to U.S.*, COPLEY NEWS, Jan. 2, 2008 (claiming that the WTO decision intrudes upon U.S. internal legal affairs).

19. 22.6 Panel Report, *supra* note 1, ¶ 2.2 (indicating that Antigua demanded \$3.443 billion dollars).

20. *Id.* ¶¶ 3.62–73 (detailing the separate opinion of one of the 22.3 arbitrators, who takes issue with the interpretation of the Appellate Body’s conclusions and would interpret those conclusions to mean that the calculations of Antigua’s damages should include all the US gambling provisions, rather than the Interstate Horseracing Act only).

21. See Evans & de Tarso Pereira, *supra* note 17, at 264 (noting the murkiness of the early years of the GATT and the perception that it only existed to serve the interests of developed countries).

22. 22.6 Panel Report, *supra* note 1, ¶¶ 4.117–119 (finding that Antigua is entitled to suspend obligations under the TRIPS Agreement).

developing countries that attempt to retaliate against developed economies. It constitutes a grave threat to developed economies while imposing minimal unpleasant effects on the inflicting country,²³ effectively exerting pressure on developed economies to either honor obligations or pay fair settlement prices.²⁴

This Note recognizes the WTO decision as an important step towards the authorization of a practical remedy for developing nations against violations by developed countries. Part II summarizes the proceedings between Antigua and the U.S. prior to the December 27, 2007 arbitration report. Part III details the specific ways in which the 22.6 Arbitrator's decision extended the TRIPS suspension remedy as an option for developing nations and includes a discussion of the reasons for broadening access of to remedies for developing nations. Part IV focuses on the implications of the TRIPS suspension remedy itself, tackling the arguments against using intellectual property rights as a means of retaliation and affirming the potential efficacy of this kind of asymmetrical remedy in the context of drastically imbalanced economies.

II. HISTORY OF THE ANTIGUA-U.S. DISPUTE

A. *Brief Overview of the History of the Dispute*

Antigua brought a complaint against the U.S. before the WTO in 2003,²⁵ alleging that the laws recently passed by the U.S., which restricted credit card company involvement in payments related to Internet gambling,²⁶ violated U.S. services commitments under the General Agreement in Trade and Services (GATS) Article XIV.²⁷ The U.S. law had significant implications for Antigua's developing economy. Antigua is a tiny nation whose economy depends largely on Internet gambling,²⁸ and U.S. citizens constitute a significant

23. See *infra* Part IV.A.

24. See *infra* Part IV.B.

25. Thayer, *supra* note 5, at 13.

26. Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, intro., WT/DS285/1 (Mar. 27, 2003) [hereinafter *Antigua Request for Consultations*].

27. *Id.*; see also *id.* annex I–II (listing the specific federal and state laws alleged to affect cross-border gambling).

28. In the past ten years, Antigua attempted to diversify its economy yet again, and developed an infrastructure that supported gambling and betting services, operating primarily over the Internet. By 1997, there were over twenty Internet gambling and betting businesses operating in Antigua. By 1999, following a government-licensing program, employment in Antigua's gambling and betting industry reached 3,000. At this time, there were 119 licensed Internet gambling and betting

percentage of those gamblers.²⁹ The U.S. passed a series of laws³⁰ that, according to Antigua, “made the supply of cross-border gambling and betting services from Antigua to the U.S. ‘illegal in all instances under [U.S.] Law.’”³¹ The new laws were allegedly discriminatory in their impact on Antigua’s economy because “the proposed U.S. ban on the use of credit cards and other financial instruments for Internet gambling effectively bans the supply of any offshore gambling and betting services to the [U.S.],” while gambling institutions located within the U.S. remained unaffected.³² Thus, Antigua took the position that the law was “an internal regulation that acts primarily as an external trade barrier, closing off the U.S. gambling and betting services market from foreign providers.”³³

The WTO Dispute Resolution Panel ruled in favor of Antigua.³⁴ In its argument, the U.S. had attempted to justify the laws that explicitly addressed Internet gambling as necessary to protect public morals, indicating that the laws fell within the GATS Article XIV exemptions.³⁵ The Panel rejected this finding, primarily because it found that the U.S. had failed to negotiate with Antigua to find a neutral solution that balanced national interests with trade obligations.³⁶ The Panel also found that other U.S. legislation regulating Internet horse betting was applied in a discriminatory way, by arbitrarily distinguishing between domestic and international gambling organizations.³⁷

operations in Antigua. Also by 1999, the Antiguan government was receiving over \$ 7.4 million dollars annually in licensing fees, accounting for over ten percent of the nation's gross domestic product.

Thayer, *supra* note 5, at 14.

29. See Lorraine Woellert, *A Web Gambling Fight Could Harm Free Trade*, BUSINESS WEEK, Aug. 13, 2007, at 43 (stating that Antigua and other developed countries seeking “big amends” for harm to web-gambling operations).

30. Although Antigua’s complaint cited a long list of offending laws, the Dispute Resolution Panel focused on the three most important regulations of internet gambling: the Federal Wire Wager Act, 18 U.S.C. § 1081–1084 (2008) [hereinafter Wire Act], the Travel Act, 18 U.S.C. § 1952 (2008), and the Illegal Gambling Business Act of 1970, 18 U.S.C. § 1955 (2008) [hereinafter Illegal Gambling Business Act]. Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶¶ 3.72, 3.93, 3.286, 6.543, WT/DS285/R (Nov. 10, 2004) [hereinafter Gambling Panel Report].

31. Thayer, *supra* note 5, at 14.

32. Caroline Bissett, *All Bets Are Off(Line): Antigua’s Trouble in Virtual Paradise*, 35 U. MIAMI INTER-AM. L. REV. 367, 369 (2004).

33. *Id.*

34. Gambling Panel Report, *supra* note 30, ¶ 6.134.

35. Kelly Ann Tran, *The WTO Appellate Body Gambles on the Future of the GATS: Analyzing the Internet Gambling Dispute Between Antigua and the United States Before the World Trade Organization*, 6 APPALACHIAN J.L. 165, 175–76 (2006).

36. See Gambling Panel Report, *supra* note 30, ¶¶ 6.563–.565.

37. *Id.* ¶ 6.608.

The Appellate Body reversed a significant number of the findings of the Panel.³⁸ The Appellate Body rejected the concept of “theoretical better alternatives” for trade found through negotiation, and thus accepted the U.S. argument that public morals justified the series of laws that directly regulated Internet gambling.³⁹ However, the Appellate Body upheld the decision of the Panel as to Internet horse betting, and recommended that the U.S. change their laws accordingly.⁴⁰

The U.S. did not change its laws or take any action to comply with the Panel’s findings.⁴¹ It justified this inaction as “compliance” before a compliance panel convened per Article 21.5, alleging that the original laws were fully consistent with its obligations under GATS.⁴² The 21.5 Panel rejected this argument as an inappropriate attempt to reassert contentions previously rejected by the Appellate Body⁴³ and determined that the U.S. had failed to comply with the Appellate Body’s recommendation.⁴⁴ Antigua requested arbitration under GATS Article 22.6 in order to determine how much the U.S. owed in concessions and the form those concessions would take.⁴⁵ The 22.6 arbitration led to the December 27, 2007 decision to authorize \$21 million in retaliation.⁴⁶

38. Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, ¶ 373 (Apr. 7, 2005) [hereinafter AB Report].

39. *Id.* ¶¶ 317, 321.

40. *Id.* ¶ 373(D)(v)–(vi).

41. See Article 21.5 Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Article 21.5 of the DSU by Antigua and Barbuda*, ¶ 6.8, WT/DS285/RW (Mar. 30, 2007) [hereinafter 21.5 Panel Report] (“The parties do not dispute that the United States has not taken any new measures.”).

42. The United States submits that the “measures taken to comply” in this dispute are the same measures that were at issue in the original proceeding because those measures are consistent with its WTO obligations The United States submits that it has complied with the DSB recommendations and rulings by presenting new evidence and arguments during this compliance proceeding that do meet the burden of showing that the measures at issue satisfy the criteria of the chapeau of Article XIV of the GATS.

Id. ¶ 6.4.

43. *Id.* ¶ 6.57.

44. *Id.* ¶ 7.1 (“[T]he Panel concludes that the United States has failed to comply with the recommendations and rulings of the DSB in this dispute.”).

45. 22.6 Panel Report, *supra* note 1, ¶ 2.2.

46. *Id.* ¶ 6.1.

B. *Detailed Analysis of the Initial Arguments and Rationale of the WTO Prior to the 22.6 Arbitration*

1. Key Arguments by Both Countries Before the Dispute Resolution Panel

Antigua alleged that the U.S. violated its services commitments under GATS Article XIV⁴⁷ by restricting credit card company involvement in payments to Internet gambling.⁴⁸ Antigua's complaint acknowledged that the U.S. commitments to the WTO did not explicitly mention gambling⁴⁹ but argued that such an obligation was implied by a commitment that covered "other recreational services (except sporting)."⁵⁰ Antigua claimed that the "definition of 'other recreational services (except sporting)' is found in a United Nations' document the U.S. used as a template for its commitments, the Central Product Classification,"⁵¹ and thus extrapolated a commitment which would cover cross-border gambling.

In response, the U.S. argued that Antigua failed to assert a specific correlation between Antigua's offshore gambling institutions and U.S. domestic gambling.⁵² In addition to this procedural argument, the U.S. maintained that GATS Article XIV(a) permitted

47. Antigua Request for Consultations, *supra* note 26, intro.

48. Gambling Panel Report, *supra* note 30, ¶¶ 3.72, 3.93, 3.286, 6.543.

49. Thayer, *supra* note 5, at 18.

50. *Id.*; see also General Agreement on Trade in Services, art. XIV, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1167 (1994) [hereinafter GATS].

51. Thayer, *supra* note 5, at 18.

52. [T]he United States argued that Antigua failed to meet . . . procedural burdens of proof. First, that Antigua failed to make a prima facie case that "any specific U.S. measure is inconsistent with WTO obligations." The United States argued that Antigua did not provide any analysis of specific United States laws as they relate to gambling, but it rather asked the Panel to accept its assertion that a list of relevant United States laws represent a "total prohibition" on cross-border gambling The United States alternatively argued that even if Antigua had met its burden of proof, the United States had not violated its obligations under the GATS. According to the United States, Antigua failed to show that the United States adopted any measures specifically prohibited by either the market access or national treatment doctrines of the GATS In addition, the United States argued that, as required for national treatment obligations to apply, Antigua failed to show that its remote gambling services and suppliers are "like" the non-remote gambling services and suppliers of the United States.

the regulation of gambling in countries where it was considered a moral evil.⁵³

The Panel decided in favor of Antigua⁵⁴ because the U.S. “had failed to demonstrate that the federal laws at issue qualify for a GATS Article XIV exception.”⁵⁵ The Panel applied the analysis previously used in an importation dispute to support its conclusion.⁵⁶ The three *Korea Beef* elements that were used are:⁵⁷

- (a) the measure for which justification is claimed must “secure compliance” with other laws or regulations;
- (b) those other “laws or regulations” must not be inconsistent with the WTO Agreement; and
- (c) the measure for which justification is claimed must be “necessary” to secure compliance with those other laws or regulations.⁵⁸

The Panel decided that the first element was met⁵⁹ because the U.S. could convincingly argue that its interests under the Racketeer Influenced and Corrupt Organization (RICO) statute⁶⁰ were affected by offshore gambling.⁶¹ The Panel determined, however, that the second element was not met⁶² because, although RICO protects important government interests, it is nevertheless inconsistent with WTO trade obligations.⁶³ Further, the U.S. could not prove that RICO was the most necessary measure to secure compliance with its other laws and regulations, because it did not seek negotiations with Antigua in order to implement a less restrictive set of laws.⁶⁴

The Panel’s most important determination, which the Appellate Body upheld in part,⁶⁵ was that the U.S. had violated the

53. Tran, *supra* note 35, at 175–76 (“The U.S. justified its restrictions on Internet gambling as an exception from the U.S. GATS commitments based on Article XIV(a), which states that the GATS agreement shall not prevent governments from adopting or enforcing measures deemed ‘necessary’ to protect public morals or maintain public order.”).

54. See Gambling Panel Report, *supra* note 30, ¶ 6.134.

55. Albenia P. Petrova, *The WTO Internet Gambling Dispute as a Case of First Impression: How to Interpret Exceptions Under GATS Article XIV(a) and How to Set the Trend for Implementation and Compliance in WTO Cases Involving “Public Morals” and “Public Order” Concerns?*, 6 RICH. J. GLOBAL L. & BUS. 45, 49 (2006).

56. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter *Korea Beef*].

57. Gambling Panel Report, *supra* note 30, ¶¶ 6.536–537.

58. *Id.* ¶ 6.536.

59. *Id.* ¶ 6.564.

60. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2008).

61. Petrova, *supra* note 55, at 55.

62. Gambling Panel Report, *supra* note 30, ¶ 6.564.

63. Petrova, *supra* note 55, at 55.

64. *Id.*

65. [T]he AB concluded that the U.S. demonstrated that the Wire Act, the Travel Act, and the IGBA are necessary to protect public morals or maintain public order, but that it has not shown, that the prohibitions

introductory section of Article XIV, referred to as “the chapeau.”⁶⁶ “The chapeau requires that the measures in question are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services.”⁶⁷ The Panel found that the U.S. had twice applied its laws in a discriminatory manner.⁶⁸ The primary finding of discrimination related to the Interstate Horseracing Act (IHA):⁶⁹

[T]he IHA permits the remote supply of gambling and betting services for horse races and that the federal laws that prohibit the use of remote communication to supply gambling and betting services do not apply to horse race-betting because the IHA effectively exempts such betting from the application of the relevant federal laws. The text of the IHA does appear, on its face, to permit interstate pari-mutuel wagering over the telephone or via other modes of electronic communication, which presumably would include the Internet, as long as such wagering is legal in both states. Thus, [the] IHA authorizes domestic service suppliers but not foreign service suppliers to offer remote betting services to horse races, and as such constitutes “arbitrary and unjustifiable discrimination between countries where like conditions prevail” and/or a “disguised restriction on trade.”⁷⁰

The Appellate Body would uphold this finding.⁷¹

2. Appellate Body Findings

The Appellate Body reversed significant portions of the Panel’s decision.⁷² The Appellate Body accepted the analysis from the *Korea*

in IHA apply to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, IHA fails to satisfy the requirements of the chapeau.

Id. at 63–64.

66. GATS, *supra* note 50, art. XIV.

67. Petrova, *supra* note 55, at 55.

68. The Panel held that the United States did not consistently apply its prohibition to the remote supply of gambling services domestically and from other WTO Members. The Panel noted that the United States had failed to make a showing that its enforcement actions against large-scale Internet operators in the United States that provide remote supply of gambling and betting services, such as TVG, Capital OTB and Xpressbet.com, are consistent with the requirements of the chapeau.

Id. at 58.

69. See Tran, *supra* note 35, at 188 (“In effect, the IHA allows betting on horse races by phone or computer, but that right is limited only to U.S. states where it is legal to place and accept bets, therefore demonstrating outright discrimination against foreign companies.”).

70. Petrova, *supra* note 55, at 56.

71. *Id.* at 61.

72. AB Report, *supra* note 38, ¶ 373.

Beef case⁷³ but modified the application of the second and third elements of the test:

[T]he results of the comparison should be considered in view of the interests at issue. Thus . . . the Panel should have decided whether the measure is necessary by first weighing and balancing, then comparing the measures, and finally considering the interests at issue. . . . [T]he Panel should have determined whether a measure is necessary or another WTO-consistent measure is reasonably available. . . . [A]n alternative measure is not reasonably available when it is solely theoretical in nature.⁷⁴

The Appellate Body overruled the Panel's finding that consultations with Antigua were a necessary precondition to satisfying the "necessary to secure compliance" prong of the Korean Beef analysis.⁷⁵ The lack of real, as opposed to theoretical, alternative ways of securing U.S. interests⁷⁶ supported the U.S. argument that its restrictions fell within the morals exception.⁷⁷ "[B]ecause the [U.S.] made its prima facie case of necessity, and Antigua failed to identify a reasonably available alternative measure, the Appellate Body concluded that the [U.S.] demonstrated that its three federal statutes are necessary to protect public morals and to maintain public order."⁷⁸

However, as noted above, the Appellate Body decided that the U.S. had not satisfactorily shown "that the prohibitions in [the] IHA apply to both foreign and domestic service suppliers of remote betting services for horse racing and, therefore, [the] IHA fails to satisfy the requirements of the chapeau."⁷⁹

3. Compliance Issues: 21.5 Compliance Panel and 22.6 Arbitration

Following the decision of the Appellate Body, the U.S. announced that it was withdrawing from its commitment to provide offshore gambling,⁸⁰ and, as a result, continued to negotiate the scope of possible concessions with the affected WTO members.⁸¹ Although news releases suggested that the U.S. would consider itself in

73. *Id.* ¶¶ 305–06.

74. Petrova, *supra* note 55, at 59.

75. AB Report, *supra* note 38, ¶¶ 317, 321.

76. *See* Tran, *supra* note 35, at 181–82 (discussing the ways in which the Appellate Body decision ignored previous decisions and modes of analysis; primarily, the Appellate Body shifted the burden of proof away from the United States to justify its measure as the least restrictive).

77. AB Report, *supra* note 38, ¶¶ 326–27.

78. Petrova, *supra* note 55, at 60.

79. *Id.* at 61–62; accord AB Report, *supra* note 38, ¶ 373(D)(vi).

80. Bruce Zagaris, *European Trade Association Brings Complaint Before EU over Selective U.S. Prosecution of Internet Gaming*, CYBERCRIME, Feb. 2008.

81. *Id.*

compliance after the withdrawal was affected,⁸² the U.S. did not raise any arguments related to this announcement in the arbitration related to compliance issues.⁸³

Although the Award of the Arbitrator, under Article 21.3, gave the U.S. until April 2006 to conform its laws and regulations to its GATS obligations,⁸⁴ the U.S. took no action.⁸⁵ Antigua subsequently took steps to establish non-compliance by requesting establishment of a Compliance Panel under Article 21.5.⁸⁶

The Panel scornfully dismissed the U.S. argument as simply an attempt to reassert its original argument.⁸⁷ According to the Panel, the U.S. claimed that its inaction constituted “conformity”⁸⁸ on the grounds that its laws had been in compliance from the beginning of the dispute. Thus, the U.S. sought to challenge the Appellate Body findings and demonstrate to the Panel its laws conformed to its GATS obligations all along.⁸⁹ The Panel rejected this argument, declaring that a demonstrable change in the laws—either a change originating in the U.S. or a change in the legal situation—was necessary to support a finding of compliance.⁹⁰ The U.S. was, in effect, attempting to re-argue the same issues,⁹¹ which conflicted with its commitment to “unconditionally accept” the findings of the Appellate Body.⁹² Thus, the Panel found that the U.S. had not complied within the requisite timeframe.⁹³

Following this finding, Antigua requested authorization to suspend certain GATS privileges and TRIPS concessions.⁹⁴ The subsequent arbitration, convened pursuant to Article 22.6, sought to determine the propriety of the remedy requested and the proper amount for suspension.⁹⁵ The Arbitrator’s decision devoted

82. *Id.*

83. *See generally* 21.5 Panel Report, *supra* note 41; 22.6 Panel Report, *supra* note 1.

84. 22.6 Panel Report, *supra* note 1, ¶ 1.3.

85. 21.5 Panel Report, *supra* note 41, ¶ 6.4.

86. 22.6 Panel Report, *supra* note 1, ¶ 1.4.

87. *See* 21.5 Panel Report, *supra* note 41, ¶ 6.28 (“The novel element on which the United States seeks to rely to demonstrate its compliance are its submissions to this compliance Panel.”).

88. *Id.*

89. *Id.* ¶ 6.4.

90. *See id.* ¶¶ 6.12–14 (defining the terms “conformity” and “inconsistent” in order to conclude that “these two terms, in context, indicate that, in order to bring a measure . . . into ‘conformity with’ . . . some change must come about”).

91. *Id.* ¶¶ 6.55–57.

92. *See id.* ¶ 6.57 (“The United States’ position can be characterized as an acceptance of the original ruling on condition that it retains the right to seek a more favorable conclusion in a future proceeding. That type of acceptance is not unconditional.”).

93. *Id.* ¶ 7.1.

94. 22.6 Panel Report, *supra* note 1, ¶¶ 1.5–6.

95. *Id.* ¶ 2.2.

considerable attention to the development of an appropriate counterfactual that would determine the degree to which Antigua's economy had been affected by the U.S. action.⁹⁶ However, as Antigua had abandoned its arguments regarding the proper remedy under GATS,⁹⁷ the decision addressed only the legality of the requested TRIPS suspensions.⁹⁸

4. Broad Context of the 22.6 Arbitration

Both Antigua and the U.S. claimed the resolution of the arbitration as a victory.⁹⁹ In reality, the decision reached a midpoint between the respective countries' positions, establishing a victory for the evolution of the international trading system itself.

Voluntary compliance with WTO rules and procedures is of the utmost importance to the international trading system.¹⁰⁰ Given the increasingly globalized market, the coming years will see an increase in the importance of the WTO as a cohesive force and arbiter of disputes that likely will become more frequent and injurious.¹⁰¹ The work of the WTO cannot be overstated in a nuclear-armed world, as the body continues to promote respect and even amity among nations with opposing philosophical goals or modes of governance.¹⁰² Demagogues in the United States may decry the rise of China as a geopolitical threat,¹⁰³ and extremists in Russia may play dangerous

96. *Id.* ¶¶ 3.1–188.

97. *Id.* ¶ 4.20.

98. *Id.* ¶ 4.27.

99. “The United States is pleased that the figure arrived at by the arbitrator is over 100 times lower than Antigua's claim,” said Sean Spicer, a spokesman for U.S. Trade Representative . . . Mark Mendel, the lawyer who led the case for Antigua, welcomed the right to cross-retaliate by suspending the intellectual property rights of U.S. business interests.

Jonathan Lynn, *Antigua Triumphs in U.S. Gambling Case*, REUTERS, Dec. 21, 2007, available at <http://www.reuters.com/article/companyNewsAndPR/idUSL2160157420071221>.

100. See Rufus Yerxa, *The Power of the WTO Dispute Settlement System*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, *supra* note 17, at 3, 3–4 (explaining that the basic dilemma which the WTO attempts to resolve is “to develop an adjudication process that respects national sovereignty yet gives Members a compelling reason to comply with its decisions”).

101. See Renato Ruggiero, *The WTO: Ten Years After its Establishment*, in THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM, *supra* note 15, at 13, 19–22 (discussing the importance of ensuring that the reach of the WTO accounts for the burgeoning markets of fast-growing economies such as China).

102. See *generally id.* (discussing the progress of the WTO in creating a global community).

103. For an example of the ways in which the geopolitical priorities of China and the United States have shifted, see Parag Khanna, *Waving Goodbye to Hegemony*, N.Y.

games of brinksmanship with other great powers, but trade keeps politicians' fingers off "the button."¹⁰⁴ The WTO offers an astounding rate of compliance for an organization with no standing army and no real power to enforce its decisions, suggesting that governments recognize the value of maintaining the international construct of the WTO.¹⁰⁵

In order to promote voluntary compliance, the WTO must maintain a high level of credibility.¹⁰⁶ Nations must perceive the WTO as the most reasonable option for dispute resolution or fear that the WTO wields enough influence to enforce sanctions.¹⁰⁷ The arbitrators charged with performing the substantive work of the WTO by negotiating, compromising, and issuing judgments are keenly aware of the responsibility they have to uphold the organization's credibility.¹⁰⁸

Credibility is lost where a supranational organization appears irredeemably partisan or where nations lack a sense of obligation to give effect to the organization's judgments.¹⁰⁹ GATT, the precursor to

TIMES, Jan. 27, 2008, at Mag.36, available at <http://www.nytimes.com/2008/01/27/magazine/27world-t.html?ref=magazine&pagewanted=all>.

104. For a discussion of the tacit acknowledgement of interconnectedness between the U.S. and Russia, see Dmitri Trenin, *A Less Ideological America*, 31 WASH. Q. 117, 122–123 (Autumn 2008).

105. Judith Goldstein & Richard Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 LAW & CONTEMP. PROBS. 257, 275–76 (2008).

106. See Rufus Yerxa, *supra* note 100, at 4 ("The WTO System works only to the extent Members want it to work, and only if they decide that compliance is in their overall economic interest. It therefore rests on the credibility of the rules, and also on the credibility of the dispute settlement decisions."); see also DEBRA P. STEGER, *PEACE THROUGH TRADE: BUILDING THE WTO* 290–91 (2004) (linking issues of the WTO's "external legitimacy" to the effectiveness of the institutional decision).

107. The goal of the WTO is to prevent unilateral decisions as to the justifiability of trade retaliation, a goal which can only be upheld by global adherence to the WTO and condemnation of unilateral retaliation outside it. See Gabrielle Marceau, *Consultations and the Panel Process in the WTO*, in *KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS*, *supra* note 17, at 29, 30–31; see also Marcelo de Paiva Abreu, *Trade in Manufactures: The Outcome of the Uruguay Round and Developing Country Interests*, in *THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES*, *supra* note 12, at 59, 69 (discussing the importance of "the WTO's capacity to 'create a level playing field among contracting parties of different sizes and heterogeneous bargaining power'").

108. See Peter van den Bossche, *The Makings of the 'World Trade Court,'* in *KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS*, *supra* note 17, at 63, 76–78.

109. See Robert Howse & Susan Esserman, *The Dispute Settlement System and Multilateralism*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM*, *supra* note 15, at 61, 66 ("Consistency, continuity, and coherence are enormously important in maintaining a healthy balance between the political and legal institutions of the WTO. They strongly discourage rumours and accusations that judges are deciding cases on the basis of regional, national or other kinds of 'political' affiliations.").

the WTO, could not approach the level of effectiveness of the WTO due to the system's close ties to the interests of the developed nations.¹¹⁰ Developing nations saw no advantage associated with participation in GATT.¹¹¹ Thus, a secondary organizational goal of the WTO was to create a system to accurately reflect the changing nature of economic development.¹¹²

To some extent, developed economies may feel a sense of responsibility to help developing and less-developed nations who desire material prosperity;¹¹³ however, WTO compliance and participation need not rest on humanitarian considerations alone—the rise of previously imperiled economies such as India demonstrates the continual flux of the global economy and the correlating incentives.¹¹⁴ Although developed nations frequently feel a sense of responsibility to nations whose people live in poverty, developed nations also recognize the advantages of incorporating developing economies into the global trade system and encouraging peaceful trade within and among such economies.¹¹⁵

Accordingly, the interests of developing nations have garnered a considerable amount of attention within the organization¹¹⁶ and the critical literature surrounding the undertakings of the WTO.¹¹⁷ The

110. See Marceau, *supra* note 107, at 45 (indicating that developing countries have begun to use the dispute resolution system with increasing rapidity, more remarkable in context of the past: "Their participation in the WTO dispute settlement system is remarkable when compared with the old GATT, where disputes usually involved only developed countries.").

111. See Evans & de Tarso Pereira, *supra* note 17, at 264 (noting that even today, developing nations' "uncertainty about gains to be obtained by use of the system" serves as a disincentive to "participating actively" in the dispute resolution system).

112. See Ruggiero, *supra* note 101, at 13–14 (indicating that, in contrast to the GATT, the WTO has become "a truly global organization" thanks in part to the changes wrought in 1994).

113. See Enrique Baron Crespo, *From Doha to Hong Kong and Beyond*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM*, *supra* note 15, at 23, 24 ("[C]ivil society and public opinion call for an international trade system that promotes more attention to poverty reduction, the promotion of labour standards, public health, a cleaner environment, education, and so on.").

114. See Ruggiero, *supra* note 101, at 17 (explaining some of the implications of the rise of India and China in context of the global trading system); see also Will Martin & L. Alan Winters, *The Uruguay Round: A Milestone for the Developing Countries*, in *THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES*, *supra* note 12, at 1, 1 (noting the skyrocketing growth of developing countries' economies).

115. Ruggiero, *supra* note 101, at 17 (noting that, absent inclusion in the trading system, rising nations such as India and China will develop preferential trading agreements along potentially questionable lines).

116. See Supachai Panitchpakdi, *The WTO at Ten: Building on Ten Years of Achievements*, in *THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM*, *supra* note 15, at 7, 11 (stating that increasing prosperity in developing countries in the best interest of all countries).

117. See, e.g., Bown & Hoekman, *supra* note 13, at 863 (focusing on the costs of the WTO's litigation process).

participation of developing nations has increased, but not sufficiently.¹¹⁸ The global trading system (both the WTO as an institution and the countries with an economic stake in a smoothly-functioning global economy) must work to encourage these nations to utilize the availability of WTO proceedings as a means of resolving economic disputes.¹¹⁹ The decision in *Antigua-Gambling* has an impact analogous to a marketing campaign—promoting incentives for developing countries to join the WTO.¹²⁰ If Antigua can successfully challenge the U.S. refusal to comply with WTO arbitration,¹²¹ and if there are mechanisms in place to enable Antigua to effect meaningful change in U.S. economic,¹²² then the WTO truly is a forum where each member nation can expect a fair remedy.

However, the WTO cannot compromise fairness and disregard precedent in the interest of sending a signal to developing economies.¹²³ Balancing a multitude of factors and competing interests means that few, if any, WTO decisions can be characterized as a reversal of policy or even a watershed moment.¹²⁴ Instead,

118. See Martin & Winters, *supra* note 114, at 1 (contrasting the participation of developing nations in the Uruguay Round versus their lack of participation in the “seven previous GATT rounds”). For the proposition that the WTO still has significant work to do in order to achieve equal representation of developing countries, see MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 115–16 (2006) (discussing the problems stemming from the development of the current WTO structure as an expansion, without sufficient overhaul, of the GATT’s form as a “multilateral treaty” between dominant developed economies).

119. See Evans & de Tarso Pereira, *supra* note 17, at 264.

Participation of developing countries in disputes has been increasing over time. However this is true for only a limited number of developing countries . . . many developing countries claim that they currently face almost insurmountable obstacles to participating actively in the system. This is usually attributed to a lack of financial and human resources . . . insufficient knowledge of the applicable rules, and uncertainty about gains to be obtained from use of the system.

Id.; see also STOLL & SCHORKOPF, *supra* note 3, at 14–15 (indicating that incorporating developing countries is an institutional goal of the WTO).

120. See Evans & de Tarso Pereira, *supra* note 17, at 264 (indicating that “uncertainty about gains to be obtained from use of the system” is one of the key causes of developing countries’ reluctance to full participation in the WTO).

121. See 22.6 Panel Report, *supra* note 1, ¶ 1.4 (indicating that Antigua pursued 22.6 arbitration subsequent to the decision by the Art. 21.5 compliance panel that the United States had not complied with the DSB’s recommendations).

122. See *id.* ¶ 4.30 (defining the goal of the 22.6 arbitration to be, in part, to help the aggrieved nation find a remedy which will ensure that the non-complying nation feels the need to change its policies).

123. See Howse & Esserman, *supra* note 109, at 65 (noting that “consistency and coherence” are the two significant goals of the WTO).

124. See John Magnus, *Compliance with WTO Dispute Settlement Decisions, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS*, *supra* note 17, at 242, 249 (noting that the decision has to be perceived as a legitimate exercise of WTO

change progresses slowly and incrementally.¹²⁵ The *Antigua-Gambling* decision does not spring from the ether, but builds up on the groundwork laid in the 22.6 arbitration decision in *European Communities—Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III)*.¹²⁶

Why, then, is *Antigua-Gambling* a particularly significant case? It is important because the case cements the *EC-Bananas III* remedy, which authorizes intellectual property violations for nations seeking to retaliate effectively against a more powerful developed economy.¹²⁷ Furthermore, as set out in the 22.6 Arbitrator's decision, the general standards necessary to support retaliation under TRIPS are not difficult for a developing economy to prove.¹²⁸ The decision in *Antigua-Gambling* may indicate that the TRIPS retaliation remedy on course to become the remedy of choice for developing nations seeking to enforce judgments against much larger economies for whom they do not provide particularly important goods or services.¹²⁹

Additional subtleties of the opinion could be interpreted as signals to developing countries that the WTO sympathizes with the difficulty of obtaining a remedy and stands ready to modify the system. The decision includes a dissenting opinion¹³⁰—an unprecedented move by a body that has resolutely maintained an appearance of agreement among the arbitrators.¹³¹ Altogether, the implications of the decision indicate an important transitional step in the evolution of the global trading system. Thus, despite the potentially disappointing pecuniary impact of the decision, developing countries should view the *Antigua-Gambling* decision as encouraging.

Despite the benefits of sending signals in support of developing countries, the decision is not ultimately beneficial to the stability of international trade if the specific remedy it authorizes is misguided and harmful. Thus, the next Part centers on the implications of suspension of TRIPS obligations: To what extent does the decision increase the likelihood that TRIPS suspension will become a standard

power by the nation against whom it is enforced, to prevent significant compliance issues).

125. See Evans & de Tarso Pereira, *supra* note 17, at 266–68 (discussing the WTO's use of gradual "evolution" instead of drastic "revolution").

126. See 22.6 Panel Report, *supra* note 1, ¶¶ 4.106–.107 (indicating that *EC-Bananas III* provides guidance in the interpretive work of the arbitrators).

127. *Id.* ¶ 5.11.

128. See *id.* ¶¶ 4.72–.116 (describing the conditions for seeking retaliation).

129. *Id.* ¶¶ 5.6–.13.

130. See *id.* ¶¶ 3.62–.73 (dissenting from multiple points of the majority arbitrators' conclusions).

131. See van den Bossche, *supra* note 108, at 76 (noting that only two previous reports contained an individual opinion, and concluding that despite the probable existence of dissent on more than two occasions, the Appellate Body has chosen to present a seemingly united front).

remedy? Further, what are the implications for the trading system arising from the availability of such a remedy?

III. ANTIGUA-GAMBLING EXTENDS AND VALIDATES THE INTELLECTUAL PROPERTY VIOLATION REMEDY SET OUT IN ECUADOR BANANAS

A. Brief Overview of the TRIPS Treaty and the Implications of Suspension

TRIPS establishes protections for intellectual property rights, especially for holders of a copyright, patent, trademark, or design.¹³² Signatories to the TRIPS Agreement assume obligations to create and enforce laws to protect rights holders.¹³³ Domestic laws may vary among signatories, but they must comply with certain minimum standards of protection set forth in TRIPS.¹³⁴ When Ecuador requested permission to suspend its TRIPS obligations, it contemplated suspending specific portions of the TRIPS Agreement likely to affect the European Union.¹³⁵ In contrast, Antigua did not specify the nature or extent of its TRIPS suspensions, asserting that such information was irrelevant to the 22.6 Arbitrator's decision.¹³⁶

132. Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.

Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement], available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

133. *Id.* arts. 41, 61. Although the TRIPS Agreement permits both a "transition period" and special treatment of Least-Developed Countries, the goal is to have a cohesive IP protection system in which all signatories equally participate. *Id.* arts. 65–67.

134. *Id.* arts. 41–63.

135. EC-Bananas III Panel Report, *supra* note 4, Part I.A.4 (detailing the sectors in which Ecuador intended to suspend concessions: copyright on sound recordings, geographical indications, and industrial designs).

136. See 22.6 Panel Report, *supra* note 1, ¶ 5.2 ("Antigua's request does not place any value on GATS and TRIPS concessions and does not explain what mechanisms Antigua intends to use to ensure that the level of suspension does not exceed the level of nullification and impairment."); see also *id.* ¶¶ 5.4–5 (declaring that Antigua does not have to specify the scope of concessions in order to have its request for the concession authorized); *id.* ¶ 5.6 (noting that Antigua's only specification was of the broad sectors in which it would suspend obligations: copyright, trademark, industrial designs, patents, protection of undisclosed information).

The Arbitrator in *Antigua-Gambling* did not seek further elaboration from Antigua.¹³⁷ However, the decision did incorporate significant portions of *EC-Bananas III* (a 22.6 Arbitration), referring explicitly to the sections in which the arbitrator addressed proper methods for Ecuador to suspend TRIPS obligations.¹³⁸ Such inclusion was noteworthy because there is little in terms of “precedent” in WTO jurisprudence.¹³⁹

B. Broad Impact of *EC-Bananas III* and *Antigua-Gambling* on TRIPS Suspension Remedy

Although the WTO agreements authorize a nation to seek retaliation under a separate treaty to which both the offending country and suffering country are mutual parties,¹⁴⁰ Ecuador was the first nation to seek WTO authorization to retaliate by suspending provisions of the TRIPS Agreement.¹⁴¹ However, Ecuador never actually implemented TRIPS retaliation because it reached a settlement with the U.S. before taking retaliatory action.¹⁴² Thus, the decision in *EC-Bananas III* left certain questions unanswered: How committed is the WTO to authorizing this remedy? Would discussions of the inherent instability of IP violations as a retaliatory tactic influence the willingness of the WTO to support the remedy? How would the retaliation be calculated, given the disputed valuations of the intellectual property rights at issue? What is the likelihood that retaliation would secure compliance or settlement—that is, can suspension of TRIPS obligations effectively transform the

137. *Id.* ¶ 5.9.

138. *See id.* ¶ 5.11 (including a reference, in footnote 343, to “EC—Bananas III (Ecuador) (Article 22.6—EC), section V (paras. 139 to 165)”).

139. *See id.* (stating that the remarks made by arbitrators were relevant). For the proposition that WTO decisions have little precedential value, see Giorgio Sacerdoti, *The Role of Lawyers in the WTO Dispute Settlement System*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, *supra* note 17, at 125, 127; *see also* MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO 357 (2006) (noting that Panel Reports and AB Reports may “create legitimate expectations” that future decision-makers will take account of those reports under similar factual circumstances, but that “despite creating legitimate expectations, such prior reports are not precedents, because they are not binding on all WTO Member states . . . only between the parties to a particular dispute”).

140. *See* 22.6 Panel Report, *supra* note 1, ¶ 4.1 (“Antigua requested to be authorized to suspend concessions and other obligations under the GATS and the TRIPS Agreement, in accordance with the principles and procedures of Article 22.3 of the DSU.”); *see also* General Agreement on Tariffs and Trade art. 22.3, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 194 [hereinafter GATT] (allowing countries to seek authorization from the WTO to suspend concessions under treaties to which both parties are signatories).

141. *WTO Compliance Panel Awards Antigua \$21 Million in Retaliation*, 26 INSIDE U.S. TRADE, JAN. 4, 2008, at 1, 3.

142. *Id.*

incentives of developed nations such that they find compliance more profitable than allowing violations to continue?¹⁴³

Certainly some of these questions remain unanswered. The WTO has yet to determine how to calculate the value of intellectual property violations.¹⁴⁴ Antigua is delaying such calculations in hopes of entering into a settlement agreement with the United States.¹⁴⁵ The success or failure of settlement negotiations will reveal a great deal about the internal calculations of the U.S. and to what extent U.S. industries feel threatened by the prospect of IP violations.

Nonetheless, the first two questions are answered by the 22.6 Arbitrator's Decision. The WTO will treat the TRIPS agreement as any treaty falling within the domain of 22.3 of the GATS provision on suspension of agreements.¹⁴⁶ The language of the 22.6 arbitration, however, remains carefully neutral by noting only that Antigua has fulfilled the required elements of proof to gain the right to suspend TRIPS obligations under 22.3 of the GSU.¹⁴⁷ The very simplicity of the Antiguan victory in the arbitration suggests that the WTO agrees with Antigua that the somewhat asymmetrical nature of the remedy makes it particularly well-suited for small economies.

C. Antigua-Gambling Expands the Flexible Standard of Review and Burden of Proof of EC-Bananas III

In light of the manner in which the *Antigua-Gambling* 22.6 arbitration interpreted the requirements of Article 22.3, the decision appears to be receptive to the hurdles faced by developing countries. First, the decision applies a permissive "margin of appreciation" standard of review to evaluate Antigua's choice to suspend under TRIPS (instead of suspending under GATS).¹⁴⁸ Second, the decision

143. See Yves Renouf, *A Brief Introduction to Countermeasures in the WTO*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, *supra* note 17, at 110, 118–22 (detailing the process followed by the WTO's arbitrators, who try to induce compliance through countermeasures which are designed to change the economic or political calculations of the non-conforming country).

144. See 22.6 Panel Report, *supra* note 1, ¶¶ 5.7–8 (demonstrating difficulties in valuation).

145. *WTO Compliance Panel Awards Antigua \$21 Million in Retaliation*, *supra* note 141, at 3.

146. 22.6 Panel Report, *supra* note 1, ¶ 5.10

147. See *id.* at ¶ 4.60 ("Antigua could plausibly arrive at the conclusion that it was not practicable or effective for it to suspend concessions or other obligations under the GATS in respect of Sector 10."); *id.* at ¶ 4.64 ("Antigua has taken into account the relevant elements in subparagraph (d) of Article 22.3, in determining that it was not practicable or effective for it to seek suspension in the GATS sector in which the violation was found in accordance with subparagraph (b) of Article 22.3.").

148. *Id.* ¶ 4.16.

adopts a flexible interpretation of the words “practical” and “effective” to govern the application of Article 22.3 suspension.¹⁴⁹

1. “Margin of Appreciation” and “Reasonableness” Guide the Standard of Review for 22.3 Actions

Like the arbitrators in *EC-Bananas III*, the 22.6 arbitration decision in *Antigua-Gambling* broadly construed the terms of Article 22.3.¹⁵⁰ This expansive reading indicates that a country requesting to suspend concessions under other agreements is entitled to a “margin of appreciation.”¹⁵¹ The margin of appreciation allows a relatively lax “reasonableness” standard for the body reviewing whether to grant the country the right to suspend concessions under TRIPS, as guided by the language of Article 22.3:

We agree with the arbitrators in *EC-Bananas III (Ecuador)* that this includes a determination “whether the complaining party in question has considered the necessary facts objectively” and also “whether, on the basis of these facts, it could plausibly arrive at the conclusion that it was not practicable or effective to seek suspension within the same sector under the same agreements, or only under another agreement provided that the circumstances were serious enough.”¹⁵²

Affirming the standard for an Article 22.3 suspension along these lines indicates a significant amount of flexibility for the complaining country. For developing countries seeking an asymmetrical remedy, a flexible “reasonableness” standard represents a significant benefit.

The very idea of a “standard of review” differs somewhat in the international trade context from its usual connotations in the domestic judicial context.¹⁵³ The domestic standard of review usually refers to the manner in which an appellate court reviews the decision of a lower court.¹⁵⁴ In contrast, use of the phrase by WTO bodies usually refers to the level of deference that a WTO panel applies when examining a national determination that certain trade measures were merited.¹⁵⁵

Standard of review arises whenever a panel . . . review[s] compliance of a member’s measure [T]he question arises to what depth and with what intensity the national determination should be reviewed. The standard of review . . . defines the degree to which a panel should

149. *Id.*

150. *Id.* ¶ 4.17.

151. *Id.* ¶ 4.18.

152. *Id.*

153. MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION 7 (2003).

154. *Id.*

155. *Id.* at 13–14.

'second-guess' the measure . . . to determine . . . consisten[cy] with WTO law.¹⁵⁶

Thus, in the context of the *Antigua-Gambling* 22.6 arbitration the standard of review referred to the level of scrutiny that arbitrators would apply to Antigua's determination that it could not suspend concessions to the U.S. under similar provisions of GATS.¹⁵⁷ The level of scrutiny applied to such a crucial determination plays a very significant role in the ultimate authorization of Antigua's (or any country's) trade retaliation measures. Yet, the Dispute Settlement Understanding (DSU) itself does not specify standards of review to be used to examine the determinations of countries' trade measures.¹⁵⁸ Disagreements over proper standards nearly derailed the drafting of the DSU itself, leading to an interesting result: the issue of applicable standards of review was not included in the agreement at all and, instead, was left to the panels to determine over time.¹⁵⁹

While certain norms have developed to address the standard of review relevant to strictly factual determinations by countries,¹⁶⁰ there is no consistent standard of review for "legal interpretations."¹⁶¹ Given this murky history, the decision of the *Antigua-Gambling* arbitrators to use a flexible standard of review is particularly significant.

The use of "margin of appreciation" is an unusual choice in the trade context¹⁶² because it suggests that "the exact confines of market

156. *Id.* at 13.

157. 22.6 Panel Report, *supra* note 1, ¶¶ 4.17–18.

158. See OESCH, *supra* note 153, at 6–7 (noting negotiators could not agree on generally applicable standards of review); see also Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 199 (1996) ("There are no provisions in the DSU explicitly concerning the 'standard of review' as such . . .").

159. See OESCH, *supra* note 153, at 77–78 (detailing the history of the various proposed standards of review for the DSU, all of which were rejected due to extreme controversy among the drafting nations); see also Croley & Jackson, *supra* note 158, at 199 (discussing the history of the dispute over standards of review).

160. See OESCH, *supra* note 153, at 89–92 (explaining that panels need to accord deference to national authorities' findings); see also Croley & Jackson, *supra* note 158, at 198 (indicating that there are fixed standards of review for factual determinations in anti-dumping cases).

161. The standard of review of legal interpretations addresses the question to what extent panels and the Appellate Body should review legal interpretation of WTO law as submitted and argued by national authorities. While it seems clear that it falls, in principle, within the panels' and the Appellate Body's competence to interpret the existing provisions of the WTO agreements, it is far from settled whether they nonetheless should accord a certain degree of deference towards legal interpretations chosen and presented by a member.

OESCH, *supra* note 153, at 19.

162. *Id.* at 51–54 (discussing the history of the concept of "margin of appreciation," which is a term developed within the jurisprudence of the European

access rights agreed upon in the WTO agreements [differ] in substance and ambit in the various members of the WTO.”¹⁶³ The term—where previously used by the WTO—has usually incorporated “deference . . . to member states in their assessment and evaluation of the factual evidence.”¹⁶⁴ The motive for such a deferential standard of review is usually an institutional determination by WTO arbitrators that countries require sensitivity to their sovereign determinations.¹⁶⁵ Language choices about proper standard of review are far from accidental; they illustrate the balancing mechanism of the WTO dispute resolution bodies, as the “standard of review embodies a carefully drawn balance of jurisdictional and institutional competences between WTO panels and Appellate Body on the one hand and the judged entity . . . on the other hand.”¹⁶⁶

What this means for Antigua, and for other developing countries, is that the WTO has chosen to defer to such countries’ determinations that they cannot effectively retaliate against developed economies using traditional means. Because “standards of review express a *deliberate allocation of power* to decide upon factual and legal issues,”¹⁶⁷ such countries should recognize that the WTO has tacitly acknowledged the problems of retaliation that these countries face and has offered them a mechanism to rectify the situation.

2. “Practical” and “Effective” Provide Flexibility for the Suspending Country

Antigua’s argument that it was “not practicable or effective” for the country to suspend services or goods under GATS was largely rooted in its calculation that the U.S. owed it approximately \$3 billion in damages,¹⁶⁸ an amount that did not signal retaliation by Antigua.¹⁶⁹ Nevertheless, the 22.6 arbitration decision still found authorization for the 22.3 action,¹⁷⁰ even where the amount at issue was reduced to roughly \$20 million.¹⁷¹ Such a finding strengthens

Court of Human Rights and, in that context, refers to the differing cultural understandings of human rights which may create differences in application of such rights).

163. *Id.* at 53.

164. *Id.* at 54.

165. *Id.* at 47.

166. *Id.* at 233.

167. *Id.* (emphasis added).

168. 22.6 Panel Report, *supra* note 1, ¶ 4.4.

169. *See id.* ¶¶ 4.2–.3 (describing the amount requested by Antigua).

170. *See id.* ¶¶ 4.82, 4.90 (acknowledging that Antigua has a dollar value of imports sufficient to support a suspension of concessions, but concluding ultimately that Antigua could reasonably decide that such suspensions would not be perceived by the United States and would have a significant negative effect on Antigua).

171. *See id.* ¶¶ 4.23–24 (indicating that the significantly reduced level of damages, 21 million dollars, would be taken into consideration by the arbitrators).

the conclusion that the suspension of TRIPS could become a frequent recourse for smaller economies.

The arbitration decision's definition of the word "effectiveness" offers the strongest rationale for the decision to suspend obligations under TRIPS. The language of the decision itself tacitly acknowledges that discussions of asymmetrical effectiveness influence the choice by the arbitrators to authorize retaliatory action under Article 22.3:

[T]he thrust of the "effectiveness" criterion empowers the party seeking suspension to ensure that the impact of that suspension is strong and has the desired result, namely to induce compliance by the Member which fails to bring WTO-inconsistent measures into compliance with DSB recommendations and rulings within a reasonable period of time.¹⁷²

On its face, the language here only refers to the "effectiveness" of suspension of obligations under the same sector or treaty in which the violation occurred.¹⁷³ However, the underlying rationale—the reality of the other nation's calculations must be taken into account by the arbitrators—goes a long way towards affirming the use of asymmetrical remedies.¹⁷⁴

The arbitrators, in considering the efficacy of TRIPS suspension, evaluated the potential impact on Antigua if it to suspend concessions under GATS.¹⁷⁵ The prevailing argument for Antigua asserted that the Antiguan economy would suffer if the country was forced to find another supplier for its imports.¹⁷⁶ However, the arbitrators also considered less obvious impacts on Antigua's citizens in their analysis of "practicality."¹⁷⁷ The least tangible negative impact was addressed in the decision's consideration of Antigua's option to stop importing American movies under the entertainment sector agreements of the GATS.¹⁷⁸ In addition to the argument emphasizing the lack of impact on the U.S.,¹⁷⁹ a rationale for rejecting the movie embargo centered on the damaging impact to Antiguans.¹⁸⁰ Though the loss would be

172. *Id.* ¶ 4.84.

173. *Id.*

174. *Id.*

175. *Id.* ¶¶ 4.84–89 (addressing Antigua's arguments as to the relative ineffectiveness of its suspension options under the various sectors of the GATT).

176. *Id.* ¶ 4.87.

177. *Id.* ¶ 4.48.

178. *Id.* ¶ 4.94.

179. [Antigua] states that it has been unable to "locate any statistical sources" on trade in entertainment services and believes that such trade is negligible in its overall volume. Antigua further considers that suspension of concessions or other obligations in this sector "would . . . hav[e] virtually no impact on the United States at all."

Id. ¶ 4.48.

180. *Id.*

intangible, diminished entertainment options on the tiny island nation represented a sufficiently significant side effect of retaliation such that that Antigua could refuse to exercise the option on grounds of impracticality.¹⁸¹

Rather than construe “practical and effective” to mean “possible,” the arbitrators examined the real implications of traditional suspensions on the tiny developing economy, even taking into account intangible external effects, in order to accept Antigua’s determination that straightforward suspension under the GATS sectors could not provide a reasonable solution.¹⁸² In conjunction with a flexible standard of review, construing “practical and effective” to take account of the imbalance between developing economies and developed economies means that developing economies will almost always be able to prove that GATS suspension will not provide an adequate remedy.

Naturally, then, the question must be asked whether the WTO is correct in its movement toward the increased use of the asymmetrical remedy of TRIPS suspension. The answer to this question depends on whether the benefit to developing nations of achieving significant and effective remedies against large economies justifies the possible abuse of the privilege or the impermissible expansion of the legal violations of TRIPS.¹⁸³

IV. EXTENSION OF THE TRIPS SUSPENSION REMEDY IS NET POSITIVE FOR THE TRADING SYSTEM

The benefits of using TRIPS violations as Article 22.3 remedies are twofold. First, the wronged country gains a conspicuous remedy against a powerful economy that ordinarily has little incentive to honor its obligations under an agreement to a developing economy.¹⁸⁴ Second, the TRIPS suspension remedy avoids unintended side effects for the citizens of the retaliating country.¹⁸⁵ The *Antigua-Gambling* decision indicates that such effects bear significantly on the

181. See *id.* (“Antigua further considers that suspension of concessions or other obligations in this sector ‘would most likely impair the already limited entertainment options available to Antiguan citizens’”).

182. *Id.* ¶ 4.105.

183. The United States raises this argument in their argument against allowing Antigua to suspend its obligations under TRIPS. See *id.* ¶ 5.3 (“The United States asserts that an authorization to suspend TRIPS concessions could encourage rampant and uncontrolled IPR piracy, and that such an outcome would serve no legitimate interests of any WTO Member.”).

184. See *id.* ¶ 4.2 (detailing the insignificance of the Antiguan economy and the value of the Antiguan export market as compared to the overall economic dominance of the United States).

185. Mary Kopczynski, *Robin Hood Versus the Bullies: Software Piracy and Developing Countries*, 33 RUTGERS COMPUTER & TECH. L.J. 299, 313 (2007).

calculation of what constitutes an “effective” remedy.¹⁸⁶ Despite worries of rampant, WTO-sanctioned piracy,¹⁸⁷ the protections already in TRIPS itself, or created as a corollary of the suspension remedy, will guard against unfettered reprisal.

*A. TRIPS Suspension Represents a Real Threat to
Developed Countries, Yet Has Minimal Effects
on Developing Economies*

In contrast to straightforward trade remedies, which may impose high costs on developing countries seeking retaliation,¹⁸⁸ intellectual property protections are far more valuable to developed economies than to developing countries. The developing world has significant incentives to violate intellectual property protections illegally.¹⁸⁹

The most likely external effect of TRIPS protection suspension would be a chilling effect on investment in the suspending country as foreign investors fear transferring technology to or establishing a business in a country known to violate intellectual property rights.¹⁹⁰ The U.S. raised this argument in press releases discussing the implications of the 22.6 arbitration decision.¹⁹¹ However, “the magnitude of the impact of weak [IP] protection on FDI decisions is debatable”¹⁹² and appears limited to select industries.¹⁹³

TRIPS suspensions fulfill the central thesis of the retaliation strategy: to harm the offending country while improving the position of the retaliating country,¹⁹⁴ and, at least in the case of Antigua,

186. See *supra* Part III.C.2.

187. The United States has repeatedly invoked the specter of sanctioned piracy in its press releases about the Antigua-Gambling case. See, e.g., Press Release, Office of the U.S. Trade Representative, Statement on Internet Gambling (Dec. 21, 2007), available at http://www.ustr.gov/Document_Library/Press_Releases/2007/December/Statement_on_Internet_Gambling.html [hereinafter Internet Gambling Press Release]. The U.S. also raised this argument formally during the 22.6 Arbitration. See 22.6 Panel Report, *supra* note 1, ¶ 5.3.

188. See 22.6 Panel Report, *supra* note 1, ¶¶ 4.30, 4.84–89 (examining Antigua’s determination that it was neither practical nor effective to suspend concessions under the same sectors of the GATS, because of the negative external effects to Antigua’s economy).

189. See Kocpozynski, *supra* note 185, at 313 (listing six reasons why developing countries choose not to enforce IP laws).

190. Carlos A. Primo Braga, *Trade-Related Intellectual Property Issues, in THE URUGUAY ROUND AND THE DEVELOPING COUNTRIES*, *supra* note 12, at 341, 362–63.

191. See Internet Gambling Press Release, *supra* note 187 (“[T]o do so [suspend IP protections] would undermine Antigua’s claimed intentions of becoming a leader in legitimate electronic commerce, and would severely discourage foreign investment in the Antigua economy.”).

192. Braga, *supra* note 190, at 362.

193. See *id.* at 362–63.

194. See Brendan McGivern, *Implementation of Panel and Appellate Body Rulings: An Overview, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS*, *supra* note 17, at 98, 99 (quoting and explaining the DSU’s statement that

represent the only obligations that can be suspended without significant economic backlash.

However, the rationale for upholding TRIPS is well-reasoned and vital to developed countries' continued participation in the trading system.¹⁹⁵ "Western nations . . . consider enforcement of intellectual property rights to be a non-negotiable issue in WTO agreements" for their importance to their citizens and economies.¹⁹⁶ Without the assurance that WTO commitments include protection of intellectual property rights, and without the hope to recoup costs, industries, especially the software industry, cannot afford research and development.¹⁹⁷ Ultimately, though, the value of TRIPS suspensions as a highly effective remedy justifies the costs imposed in terms of the preservation of rights under TRIPS.

B. TRIPS Suspension Creates Pressure to Settle

Discussion of TRIPS suspension must also include consideration of pressure to settle through private negotiation. A foreseeable effect of TRIPS suspension as a remedy will inevitably be a marked increase in developed countries' incentives to enter settlement negotiations with developing countries.¹⁹⁸

The pressure to settle necessarily implicates the legitimacy of the remedy. While settlement may reduce some of the practical difficulties of TRIPS retaliation to hypotheticals, pressure to settle also means that blackmail and coercion could potentially undermine the legitimacy of the remedy. While TRIPS suspension is intentionally asymmetrical because it empowers weaker economies through direct means, the trading system cannot overcompensate for developing countries by granting a license to steal.

The pressure to settle must fulfill the underlying goals of the WTO in order to be a legitimate goal of WTO dispute resolution. In many ways, increased pressure to settle does fulfill those goals. As a result, the actual number of TRIPS violations could be relatively

compensation and concession are only means to an end, that end being full compliance with the WTO); see also Yerxa, *supra* note 100, at 4 (noting that members must find compliance "in their overall economic interest" for the system to work properly).

195. See Kocczynski, *supra* note 185, at 309.

196. *Id.*

197. *Id.*

198. In contrast to the stakes for developed countries, developing countries have strong incentives not to enforce TRIPS. See *id.* at 313.

[S]ix reasons why developing countries choose not to enforce IP laws: 1) a lack of resources, 2) a lack of cost-benefit tradeoffs, 3) a need for economic growth and protection of domestic industry, 4) a different cultural value, 5) "a 'Robin Hood' mentality of justifiably robbing the rich to help the needy," and, finally, 6) suspicion of Western intentions.

small, potentially balancing some of the arguments against permitting TRIPS to be suspended. Just as the actual number of trade retaliations has been small relative to the number of cases brought to the WTO,¹⁹⁹ the number of actual TRIPS suspensions could be minute.

As with any trade system, the WTO prefers that countries avoid the violation of rights in the first place. However, international economic law faces the serious challenge of securing compliance from economies too large to feel much pain from noncompliance.²⁰⁰ If the WTO credibly endorses a damaging, asymmetrical remedy for small countries, the mere presence of that remedy could have a balancing effect as the conduct and policies of large nations transform to avoid confrontation with smaller economies.

Although compliance must be an important consideration for WTO arbitrators balancing the interests of developed and developing countries, it cannot be the sole justification for a trade remedy.²⁰¹ If the pressure to settle is insurmountable and the damage of the TRIPS suspension far outweighs the value of the offending domestic law, then the arbitrators should reconsider or abandon the TRIPS suspension remedy. "Inducing compliance," severed from notions of comity and discussions of the original violation, is a dangerous rationale for a trade remedy.²⁰²

Authorizing a remedy that guarantees, rather than encourages, settlement is a troubling example of severing proportionality considerations from discussions of remedy.²⁰³ The WTO documents do not contemplate that remedies be structured with the goal of inducing compliance; instead, the language addressing suspensions of concessions is focused on proportionality and equality of the

199. See Bruce Wilson, *The WTO Dispute Settlement System and Its Operation*, in KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS, *supra* note 17, at 15, 23 (noting that in the first ten years of its operation, the Dispute Settlement Body only heard sixteen requests for retaliation, and only granted seven of those requests through arbitration).

200. Decisions which authorize countermeasures begin with an analysis of the best way to induce compliance. See *id.* at 346–52 (discussing the development of the idea that the primary goal of countermeasures is to induce compliance); Renouf, *supra* note 143, at 120 (discussing the rhetoric and methods which arbitrators have used in attempting to secure compliance, and noting that although "inducing effective compliance" is not a term found in actual WTO documents, the concept is a cornerstone of decisions authorizing countermeasures).

201. See DAVID PALMETER, *THE WTO AS A LEGAL SYSTEM: ESSAYS ON INTERNATIONAL TRADE LAW AND POLICY* 352 (2003) ("Inducing compliance is the first, but not the only, requirement of international law that needs to be fulfilled before reprisals are found permissible. A countermeasure will not be 'appropriate,' even if it effectively induces compliance, if it is disproportionate.").

202. See *id.* at 351–52 (discussing the implications of the notion of "inducing compliance" upon the "delicately negotiated balance" between sovereignty and WTO obligations).

203. *Id.* at 358–59.

remedy.²⁰⁴ In theory, the offending country should be empowered to accept the cost of non-compliance and continue to the violation (analogous to the rationale underlying “efficient breach” in contract theory).²⁰⁵ Invoking the rationale of “induced compliance” could potentially increase demands for ever-expanding penalties and upset the balance that exists between WTO institutional legitimacy and the national sovereignty of its members.²⁰⁶ A country’s ability to “efficiently breach” WTO obligations when domestic economic considerations demand such action is a key aspect of sovereignty.²⁰⁷ If the WTO begins to place its own institutional demands above the interests of its member nations, it risks a severe backlash and eventually its own destruction.²⁰⁸

In light of these potential issues, the WTO arbitrators should focus on issues of equivalence and proportionality to avoid the perception that the WTO has resorted to “stiffer penalties.”²⁰⁹ If Antigua retaliates under TRIPS, the WTO must be attentive to calls for increased monitoring of the retaliatory conduct and must aggressively ensure that the retaliation does not exceed the authorized \$21 million. While many factors outlined below suggest that pressure to settle will remain at an ideal level rather than crossing into coercive territory, awareness of the potential problems associated with retaliation help ensure that the remedy will be applied carefully and with sensitivity to implications for the trading system as a whole.

The problem of increased pressure to settle is that parties may remain on unequal footing. The specter of blackmail, authorized by a system dedicated to fairness, is no light matter. This tension will accompany any discussion of TRIPS suspension as asymmetrical empowerment—at least until a system for imposing the requisite award develops. The 22.6 arbitration decision acknowledges the challenge that the WTO will face in calculating the value of individual TRIPS violations:

204. *Id.* at 347–48.

205. Joel P. Trachtman, *The WTO Cathedral*, 43 STAN. J. INT’L L. 127, 152 (2007). For a contrary argument that inducing compliance is a legitimate, independent rationale because WTO obligations carry independent legal force, see STEGER, *supra* note 106, at 245–49.

206. PALMETER, *supra* note 201, at 357–59.

207. See Trachtman, *supra* note 205, at 152. Trachtman further notes that efficient breach is “normatively” a good function which the trading system should allow: “[N]ormatively speaking, the goal should be to induce compliance when compliance is efficient, and breach when it is not.” *Id.*

208. PALMETER, *supra* note 201, at 358–59.

209. See *id.* at 358 (“If arbitrators keep asserting that the purpose of countermeasures is to induce compliance, further calls for ‘stiffer penalties’ are a virtual certainty.”).

We . . . note that the suspension of obligations under the TRIPS Agreement may involve more complex means of implementation than, for example, the imposition of higher import duties on goods, and that the exact assessment of the value of the rights affected by the suspension is also likely to be more complex.²¹⁰

No answer to this conundrum has emerged that satisfies all criticism, although the beginnings of an answer may exist. Though the *Antigua-Gambling* decision may illustrate the acceptance and extension of the remedy of the suspension of the TRIPS agreement, it falls short of an announcement that the WTO will authorize this remedy in any situation. The WTO already views retaliatory measures as a “last resort”²¹¹ and a poor substitute for compliance,²¹² and there is no sign that *Antigua-Gambling* overturns this institutional reluctance.²¹³ Antigua’s damages were severely limited,²¹⁴ and the arbitrators required specific proof of factual circumstances that recourse to suspensions under another treaty would produce the most effective remedy.²¹⁵ Recourse to another treaty for suspensions is a rare remedy,²¹⁶ and the *Antigua-Gambling* decision does not expand the frequency of the remedy in all instances, but clarifies the appropriate context for such a remedy.²¹⁷ This may not fully answer the charge that the remedy’s coercive pressure amounts to blackmail. However, it does suggest that developed countries ought not assume that the WTO will rush to endorse TRIPS suspension, and can thus rely on the chances of success in winning the argument to bar application of the remedy.

C. *EC-Bananas III Offers Strategies to Minimize Unfettered Piracy*

Although the 22.6 arbitration decision does not address problems of implementation,²¹⁸ the arbitrators refer in a footnote to the extensive analysis set out by the arbitrators in *EC-Bananas III* to answer certain questions about the mechanics of the TRIPS suspension remedy.²¹⁹ Because the *EC-Bananas III* panel considered

210. 22.6 Panel Report, *supra* note 1, ¶ 5.10.

211. McGivern, *supra* note 194, at 106.

212. See Renouf, *supra* note 143, at 112 (“Countermeasures are not a legally acceptable substitute for compliance under the DSU . . .”).

213. 22.6 Panel Report, *supra* note 1, ¶¶ 4.22, 4.92.

214. See *id.* ¶ 4.22 (noting, in the context of the decision to authorize TRIPS suspension, that Antigua’s damages had been recalculated to \$21 million).

215. See *id.* ¶ 4.92 (“Antigua has not limited itself to general assertions as to the size of its economy, in itself or relative to the US economy.”).

216. See Renouf, *supra* note 143, at 115 (identifying only three cases where “requesting parties have sought authorization to suspend ‘other obligations’ than tariff concessions . . .”).

217. 22.6 Panel Report, *supra* note 1, ¶¶ 5.7–10.

218. *Id.* ¶¶ 5.9–10.

219. *Id.* ¶ 5.10 n.342.

the TRIPS suspension remedy as a question of first impression, basic questions had to be answered in order to advise the countries involved and to legitimately authorize the remedy.²²⁰

The *EC-Bananas III* panel, addressing the question of scope, asserted that the suspension remedy could only apply to the work of a national of the target country.²²¹ The arbitrators suggested that the TRIPS privileges be suspended only for property wholly owned by persons of the relevant nationality to avoid infringing the rights of non-affected TRIPS signatories.²²² The decision pointed to treaties associated with the TRIPS agreement, particularly those setting out the definitions of "scope," as relevant to determining whose nationality mattered in the context of retaliation.²²³

The strongest argument against TRIPS suspension is that violations sanctioned in one country will spread widely with the dissemination of the unauthorized copies of the "objects of piracy" (that is, the copyrighted or patented material).²²⁴ Antigua makes such veiled threats with language that at least implies that Antigua seeks to capitalize on American producers' fear of widespread piracy.²²⁵ However, the *EC-Bananas III* arbitrators attempted to address this argument by pointing out that the duties of all the other parties to TRIPS are not suspended²²⁶ and that one of those duties is to prevent circulation of materials copied without proper permission.²²⁷ The arbitrators further indicated that TRIPS suspension authorized through the WTO is not an acceptable substitute for proper permission to copy obtained through TRIPS-approved means:

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

220. *EC-Bananas III* Panel Report, *supra* note 4, ¶ 139.

221. *Id.* ¶ 141.

222. *Id.* ¶ 140. The report cites art. 1.3 of the TRIPS Agreement as to the persons protected by TRIPS:

In respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all Members of the WTO members of those conventions.

Id.

223. *Id.* ¶ 144.

224. The United States particularly levels this criticism in its press releases which discuss the case. See Internet Gambling Press Release, *supra* note 187.

225. See, e.g., *WTO Compliance Panel Awards Antigua \$21 Million in Retaliation*, *supra* note 141, at 3-4; *Antigua Triumphs in U.S. Gambling Case*, *supra* note 99.

226. *EC-Bananas III* Panel Report, *supra* note 4, ¶ 153.

227. *Id.* ¶ 154.

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.²²⁸

Accordingly, the *EC-Bananas III* decision indicated that the suspension would only be authorized within Ecuador's domestic market.²²⁹ This safeguard certainly does not give U.S. rights holders can treat suspension lightly. Yet, countries theoretically would be able to keep "distortions in third-country markets"²³⁰ in check if TRIPS signatories were diligent in satisfying their TRIPS obligations with regard to goods coming from Antigua. If Antigua was required to keep very close track of each of its copyright violations,²³¹ the monitoring system that the country used to identify their "legitimate piracy" could make it easier to track those same copyrighted goods and make sure they stayed within domestic borders.

Monitoring and enforcement systems are, unfortunately, untested territory because Ecuador settled instead of suspending TRIPS.²³² However, Ecuador's proposed mechanism is an indication that viable options exist.²³³ In *EC-Bananas III*, the decision noted "with approval"²³⁴ that Ecuador had proposed to implement a coherent and likely effective structure for monitoring and calculating the value of continued violations, in addition to the "actual impact" of initial violations.²³⁵ If it were to suspend TRIPS, Ecuador intended to establish a licensing system whereby companies or individuals who wanted to produce materials with an EC copyright would instead apply for a license from the Ecuadorian government.²³⁶ The licensing system would "[limit] the suspension of concessions in terms of quantity, value, and time."²³⁷ The government would use a specified "related right value" of a new . . . sound recording," with the value

228. *Id.* ¶ 156.

229. *Id.*

230. *Id.*

231. It would seem to be in Antigua's best interests to check such violations, as it seems highly likely that the United States would be quite quick to declare that Antigua's violations exceeded twenty-one million. See 22.6 Panel Report, *supra* note 1, ¶ 5.12 ("[W]e also note that the United States may have recourse to the appropriate dispute settlement procedures in the event that it considers that the level of concessions or other obligations suspended by Antigua exceeds the level of nullification or impairment we have determined for purposes of the award.")

232. Henning Grosse Ruse-Khan, *Suspending IP Obligations Under TRIPS: A Viable Alternative to Enforce Prevailing WTO Rulings?*, CIEL, Apr. 2008, at 2, available at http://www.ciel.org/Publications/TRIPS_IP_7May08.pdf.

233. *EC-Bananas III* Panel Report, *supra* note 4, ¶ 160.

234. *Id.*

235. *Id.*

236. *Id.* ¶ 161.

237. *Id.*

calculated by an international institution.²³⁸ The *EC-Bananas III* decision further explained,

The Ecuadorian government would reserve its right to revoke these licen[s]es at any time. . . . A certain proportion of this value would represent the performer's share and another, larger part would represent the producer's share. If the level of suspension thus calculated were to risk reaching (together with authorized suspension in other sectors and/or under other agreements, if any) the level of nullification and impairment suffered by Ecuador, the authorization scheme would be stopped. Ecuador believes that the chances that this would happen are very close to nil.²³⁹

Although Antigua proposed no such structure and merely sought the right to suspend TRIPS,²⁴⁰ the specific reference²⁴¹ to the *EC-Bananas III* arbitration by the *Antigua-Gambling* arbitrators²⁴² hints that the WTO would require a similar system for developing countries in subsequent arbitration that actually implements the TRIPS suspension remedy.

Forcing developing countries seeking retaliation under TRIPS to demonstrate effective monitoring and enforcement of the authorized IP suspensions could also lead to more effective monitoring and enforcement of regular TRIPS protections. Weak TRIPS enforcement in developing countries is primarily attributed to "institutional weaknesses and the lack of resources," as well as a lack of "the political will to curb 'piracy.'"²⁴³

Whereas the incentives to develop systems to enforce TRIPS protections are currently relatively low,²⁴⁴ authorization of the TRIPS suspension remedy increases those incentives. The U.S., or any similarly situated developed country, would watch for signs that the retaliating country lost control of the remedy. The developing country would have an incentive to avoid expensive and exhausting disputes over the scope of retaliation and attempts by the developing economy to maximize the value of suspensions—that is, the

238. See *id.* (specifying that the value for European sound recordings would be calculated "as estimated by the International Federation of the Phonographic Agency (IFPI)").

239. *Id.*

240. Antigua has declined to provide any explanation on how it proposes to apply such suspension and how it will ensure that the level of the proposed suspension does not exceed the level to be authorized by the DSB. We regret that Antigua did not find it useful to provide such explanations.

22.6 Panel Report, *supra* note 1, ¶ 5.8.

241. As noted *supra* in Part III.A, there is little adherence to precedent in WTO jurisprudence.

242. 22.6 Panel Report, *supra* note 1, ¶ 5.11.

243. Braga, *supra* note 190, at 365.

244. *Id.* at 367.

developing country would develop “the political will to curb ‘piracy.’”²⁴⁵ In addition to this newfound will, the developing country would also correct “institutional weaknesses” by developing effective means of monitoring pirates and protecting information.²⁴⁶

Other developed countries, though not directly entangled in the dispute, would nevertheless have an interest in ensuring that the suspensions did not affect their protected material.²⁴⁷ Increased interest in maintaining protection would increase the pressure on the developing state to increase TRIPS enforcement across the board and perhaps would lead to assistance in creating enforcement regimes. Such assistance would go far to increase TRIPS compliance.²⁴⁸

In the event that developed countries harbor fear that the monitoring system outlined by Ecuador would never work in practice, such countries should take heart in the oft-expressed mandate of the WTO to keep remedies strictly equal to the original violation.²⁴⁹ Previous decisions on retaliation have emphasized “equivalence” and “compensation,” explicitly repudiating remedies that go outside the bounds of strict fairness.²⁵⁰ Not only does this suggest that the arbitrators knew what they were agreeing to do when they endorsed Antigua’s (and Ecuador’s) use of TRIPS suspension, but also it suggests that developed countries that can demonstrate that retaliation has spiraled out of control will receive WTO support in response to demand for stronger levels of monitoring.

The aforementioned existing safeguards within the TRIPS agreement should also help to hedge against the asymmetry of the remedy and provide some assurance the WTO is not overtly encouraging unrestrained piracy.²⁵¹ Settlement pressure, while still

245. *Id.* at 365.

246. *Id.* at 365, 367.

247. The EC-Bananas III arbitrators hint at such an interest when they emphasize the need for each sanctioned breach of TRIPS to be one in which every right holder is of the nationality of the affected country (for example, if the suspension applies to a sound recording of a song, all of the people who have rights in that song must be from the European Communities for Ecuador to be entitled to suspend TRIPS protections with regard to that song). See EC-Bananas III Panel Report, *supra* note 4, at 144. While the arbitrators do not explicitly mention third party interest in preserving rights in the event of an accidental breach, it seems very plausible that, to use the above example, the United States might show an interest in ensuring the protection of songs which have mixed nationality of right holders, with some of those right holders being from the United States and some being from the European Communities.

248. See Braga, *supra* note 190, at 365, 367.

249. See, e.g., STEGER, *supra* note 106, at 249 (“Suspension of concessions or retaliation is a blunt and clumsy instrument, but the WTO rule that the suspension must be ‘equivalent’ to the level of nullification or impairment prevents it from being used as a purely punitive device.”).

250. Trachtman, *supra* note 205, at 138.

251. See, e.g., Nicholas Wapshott, *U.S. May Suffer After WTO Rules Against Internet Gambling Ban*, N.Y. SUN, Dec. 27, 2007, available at <http://www.nysun.com/foreign/us-may-suffer-after-wto-rules-against-internet/68620> (“American companies

high because of software companies have a great deal to lose should the safeguards be ignored,²⁵² may be less skewed as further applications of the TRIPS safeguards are extrapolated and tested.

V. CONCLUSION

The WTO has taken a significant step toward addressing an important problem: the impracticality of existing trade retaliation measures for smaller developing economies against noncompliant developed economies. When the WTO decided to extend the availability of TRIPS suspension as a retaliation option, it gave developing nations a powerful weapon. The trading system has reason to be apprehensive about the full implications of possible retaliation under the untested TRIPS suspension system. Nevertheless, the decision made in *Antigua-Gambling* represents a positive step in the evolution of the international trading system—a move towards a system that can better accommodate the needs of all its members.

Ultimately, the availability of TRIPS suspension as a remedy for developing countries seems to be beneficial to the international trading system. While the difficulty of calculation and the possibility of unfair expansion of the retaliatory effects should be considerations for the WTO as it contemplates the mechanics of the remedy,²⁵³ the ultimate effect of having TRIPS suspension on the table is more consistent with WTO goals than any plausible alternative.

Regardless of the credibility—or lack thereof—of its calculation of losses, Antigua ultimately offers a persuasive argument that demonstrates the impossibility of effective punishment using straightforward suspension in similar sectors.²⁵⁴ For Antigua and other developing economies, TRIPS suspension represents a remedy that carries weight and meaning.

*Georgia Hamann**

may suffer from the legal piracy of movies, music, computer programs, and other intellectual property after the international regulator of free trade, the World Trade Organization, ruled that a ban on Internet gambling services provided by companies abroad is unlawful.”)

252. *Id.*

253. 22.6 Panel Report, *supra* note 1, ¶ 5.10.

254. *Id.* ¶¶ 4.89–100.

* J.D. Candidate, Vanderbilt University Law School, May 2009. Thank you to Adam Romney for the initial impetus for this Note.