Kimberly B. Buder
11B Appleton Street Unit 6
Boston, MA 02116
860.916.6429

Date of Submission: January 30, 2012
Suffolk University Law School
3L

Introduction:

International Trade Law has several methods for dispute settlement when issues arise between nations.[1] However, when disputes arise between developed and developing countries the developing countries may require enhanced methods in order to have effective dispute settlement. Retaliation, in general, means to suspend trade concessions given to the offending member in a trade agreement within the sector that the country has been injured.[2] Cross-sector retaliation is the method of allowing a country to strategically raise tariffs on specific goods of the injured party's choice regardless of which sector the goods are in. Cross-sector retaliation is an effective method for developing countries to secure compliance with trade laws from developed countries.[3] There have only been a few cases in which cross-sector retaliation has been permitted, but where it has, the developing country was able to bring the developed country into compliance despite the vast difference in bargaining power. The purpose of this paper is to demonstrate that strategic cross sector retaliation is an effective method for Mexico, as a developing country, to secure compliance from the United States with NAFTA requirements.

---

[1] Maria Alejandra Rodriguez Lemmo, *Study of Selected International Dispute Resolution Regimes, With an Analysis of the Decisions of the Court of Justice of the Andean Community.* Arizona Journal of International and Comparative Law Vol. 19, No. 3, 863, 866 (2002). *Available at www.ajicl.org/AJICL2002/vol193/Rodriquez.pdf*

[2] Definition of retaliation *see http://www.businessdictionary.com/definition/retaliation.html*

[3] Cross-sector retaliation makes more economic sense for developing countries because it acts as a "rebalancing" mechanism. It makes little sense for developing countries to use same sector retaliation because it most likely will not work to induce compliance. Further, developing countries are already weak economically and same sector retaliation will make goods more expensive for consumers. In cross-sector retaliation, the government is able to target the offending country's (most profitable) industries. These goods are not necessarily those that consumers in their country need to purchase and therefore cross-sector retaliation offers less of a chance that consumers in the injured, developing country will be harmed. For a full analysis *see* Lucas Eduardo F. A. Spando, *Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?* World Trade Review (2008) at 513. Available at *journals.cambridge.org/article_S1474745608003960*

Recently, Mexico was able to effectively bring the United States into compliance with its trade obligations by resorting to cross-sector retaliation. In the cross-border trucking dispute, Mexico was able to target some of the United States' key industries as well as those industries with the strong lobbying groups by employing cross-sector retaliation.

Principles of International Trade:

Core principles of international trade are Most Favored Nation and National Treatment.[4] The Most Favored Nation Principle is a principle of non-discrimination and states that each member country should treat all members as well as it treats its most favored nation.[5] This means that any trade advantage given by a member party to a product originating in any other country must be immediately and unconditionally given to like products originating in WTO member states.[6] National Treatment is rule of internal non-discrimination and requires that once the product has entered into the country, the foreign nation's goods and services are treated the same as the domestic goods.[7] This concept ensures that trade concessions made at the border are not undermined, by requiring continuous similar treatment.[8] These concepts are crucial for free trade to exist. Without National Treatment and Most Favored Nation requirements, countries would be free to act in a protectionist manner and put foreign competitors at a disadvantage, thus, leaving the domestic industries to flourish. By agreeing to these principles, governments are also

[4] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]
[5] GATT 1994 at Article I
[6] GATT 1994 at Article I, Daniel C.K. Chow & Thomas J. Schoenbaum, International Trade Law 150 (Aspen Publishers 2008).
[7] GATT 1994 at Article III:1
Chow and Schonenbaum , International Trade Law, 160 (Aspen Publishers 2008)
[8] Chow and Schonenbaum , International Trade Law, 159 (Aspen Publishers 2008)
GATT Article III:2; III:4 *see* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm

agreeing to limit their sovereignty because they have agreed to let another entity influence internal economic policy.[9] However, member states agree to this influence in order to promote free trade, predictability, and equality.[10]

Disputes between member countries may arise where one of the countries believes the other is violating their obligations of Most Favored Nation or National Treatment. Under the GATT framework a complaining member state will bring the complaint to the WTO, which uses a system of peer pressure in order to bring an offending member into compliance.[11] The basic elements for a violation are: the imported and domestic product in question are "like products"; the measure in question is a law, requirement, or regulation affecting internal sale; and the imported products are given less favorable treatment than the domestic products.[12] If the entity determines that a violation has taken place, it may allow the injured country to act against the offending member by lifting trade concessions.[13]

NAFTA in General:

[9] Chow and Schonenbaum , International Trade Law, 177 (Aspen Publishers 2008)
[10] Id.
[11] Chow and Schonenbaum , International Trade Law, 152 (Aspen Publishers 2008)
[12] Korea – Measures Affecting Imports of Fresh Chilled and Frozen Beef (2000) Report of the Appellate Body adopted on December 11, 2000 WT/DS161 & 169/AB/R (paragraphs 134, 136) However, this finding also discussed general exceptions under Article XX of the GATT and determined that the measure must be both designed to secure compliance with laws or regulations that themselves are not inconsistent with GATT and the measure must be necessary to secure compliance. Where they further recognized a range of necessity so that even if a measure it not indispensible it may still be considered necessary so long as there is not an alternative measure reasonably avliable. (paragraphs 158 -161).
Other exceptions for National Treatment include government procurement, *see* GATT Article III:8.
For a discussion on "like products" *see* Treatment of Germany of Imports of Sardines Report of the GATT Panel adopted October 31, 1952 GATT B.I.S.D. (1st Supp.) at 53 (1953). Noting, that where products are not considered "like products" there cannot be a violation of Most Favored Nation or National Treatment principles as there is no obligation and differential treatment may be applied.
[13] Chow and Schonenbaum , International Trade Law, 52 (Aspen Publishers 2008)

The NAFTA created a free trade area between Canada, the United States and Mexico. The overarching objective of NAFTA is to increase trade between the countries, "specifically through its principles and rules, including national treatment and most-favored-nation treatment."[14] NAFTA allows goods and services to move freely between the member states, but when entering into the area from non-NAFTA countries may be subject to different tariffs, depending on the point of entry.[15] Therefore, only goods that have been deemed to originate from Mexico, the United States, or Canada are eligible for duty-free treatment when exported from one of NAFTA country into another NAFTA member country.[16] Non-NAFTA originating items will be subject to ordinary duty rates, which vary depending on WTO membership.[17]

International Trade Principles and Dispute Settlement Under NAFTA:

Each member-state is specifically required to follow the National Treatment principal in respect to both goods and services.[18] Further, members are required to provide Most Favored

[14] North American Free Trade Agreement ("NAFTA"), art. 102: Objectives, Jan 1, 1994 http://www.sice.oas.org/trade/nafta/chap-01.asp
Note: NAFTA parties are also parties to the GATT and affirm their rights and obligations to the GATT and other agreements the members are party to *see* Article 103: Relation to Other Agreements *available at* http://www.sice.oas.org/trade/nafta/chap-01.asp
[15] Chow and Schonenbaum , International Trade Law, 95 (Aspen Publishers 2008)
[16] Id.
[17] Id.
[18] Goods *see* NAFTA Article 301: National Treatment *available at* http://www.sice.oas.org/Trade/NAFTA/chap-031.asp#A301
Services *see* NAFTA Article 1202: National Treatment requiring members to "accord providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers." http://www.sice.oas.org/Trade/NAFTA/chap-12.asp#A1202
Cross-border services are those that "the provision of a service (a) from the territory of a Party into the territory of another Party, (b) in the territory f a Party by a person of that Party to a person of another Party or (c) by a national of Party in the territory of another Party, but does not include the provision of a service of a party by an investment" *see* Article 1213: Definitions *available at* http://www.sice.oas.org/Trade/NAFTA/chap-12.asp#A1213

Nation Treatment in like services, to all other members.[19] Trade in services, under Chapter Twelve of NAFTA, differs slightly from trade in goods because each party may create reservations as to what they will open up to free trade. Therefore, only those sectors of services that are expressly listed are subject to Chapter Twelve of NAFTA.[20]

Although members of NAFTA are expected to follow both National Treatment and Most Favored Nation principles, they sometimes violate this standard. When a member feels that another member has violated Chapter Twelve (Cross-Border Trade in Services) it may have recourse for dispute settlement under Chapter Twenty of NAFTA, so long as the measure is not subject to an exception.[21] Although complaining parties are allowed to initiate disputes in front of either the WTO or NAFTA, once the complaint has been initiated the party cannot change dispute forums.[22] When disputes are initiated under NAFTA, the Panel will make a decision and present an initial report within 90 days.[23] Disputing members are permitted to make written comments on the report within 14 days.[24] The panel will present a final report to the parties in dispute within 30 days, at which point the violating party is expected to implement changes pursuant to the final report.[25] If the violating party fails take measures that bring them into compliance with their obligations under NAFTA, consistent with the final report, then the

[19] NAFTA Article 1203: Most Favored Nation *available at* http://www.sice.oas.org/Trade/NAFTA/chap-12.asp#A1203
[20] NAFTA Article 1206: Reservations *available at* http://www.sice.oas.org/Trade/NAFTA/chap-12.asp#A1206
[21] NAFTA Annex 2004: Nullification and Impairment *available at* http://www.sice.oas.org/Trade/NAFTA/chap-201.asp#A2004
[22] NAFTA Article 2005: GATT Dispute Settlement *available at* http://www.sice.oas.org/Trade/NAFTA/chap-201.asp#A2005
[23] NAFTA Article 2016: Initial Report *available at* http://www.sice.oas.org/Trade/NAFTA/chap-202.asp#A2016
[24] Id.
[25] NAFTA Articles 2017; 2018 *available at* http://www.sice.oas.org/Trade/NAFTA/chap-202.asp#A2017; http://www.sice.oas.org/Trade/NAFTA/chap-202.asp#A2018

complaining party may "suspend benefits of equivalent effect" until an agreement can be reached.[26]

NAFTA specifically provides for the order in which benefits should be suspended. Before resorting to cross-sector retaliation, the complaining party must suspend benefits accorded in the same sector or sectors affected by the violation.[27] If the complaining Party does not consider suspension of benefits in the same sector to be practicable or effective it may suspend benefits in other sectors.[28] This suspension of benefits in other sectors is referred to as cross sector retaliation. However, few cases have been brought to the level where the NAFTA Panel has authorized cross-sector retaliation, the majority of the time the threat of cross-sector retaliation is sufficient for a country to change its policy.[29]

NAFTA dispute settlement procedures under Articles 2019 and Chapter 20 are designed to mirror Article XXXVIII under the WTO. These rules are designed to limit countermeasures when a violation occurs. Any countermeasures that take place are supposed to be temporary and economically proportionate to the violating behavior. Scholars have suggested that the injured government benefits more from cross-sector retaliation even when same sector retaliation is

[26] NAFTA Article 2019 *available at* http://www.sice.oas.org/Trade/NAFTA/chap-202.asp#A2019

[27] NAFTA Article 2019(2) *available at* http://www.sice.oas.org/Trade/NAFTA/chap-202.asp#A2019
However, should a disputing party feel that the suspended benefits are excessive, then it may bring it to the attention of the Commission who will determine if the benefits are excessive within sixty days *see* Article 2019(3) and (4)

[28] Id.

[29] Alexander, *Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on US Compliance Under NAFTA*, 28 Berkeley J. Int'l L 313, 328 (2010).

plausible.[30] This is because same sector retaliation protects the violating country's most lucrative industries from the targeting that is permitted under cross-sector retaliation.[31] Where injured governments are only allowed to retaliate at the same amount as the violating governments then there is no strong incentive for the violating government to come into compliance with trade law regulations.[32]

In the cross-border trucking dispute between Mexico and the United States, United States measures were inefficient with bringing them into compliance with the obligation under NAFTA. Mexico rightly resorted to cross-sector retaliation in order to obtain effective relief.

Purpose of Retaliation:

The remedial enforcement power of retaliation is intended to prevent trade wars from occurring. A trade war is defined as, "a battle between countries to increase their trading positions, usually taking form of import restrictions against foreign countries and increased subsidies for their home industries."[33] Trade wars are a form of protectionist practices, all of which go against the purpose and theory behind NAFTA whose purpose is to promote free trade in general. Motivated by self-interest and reciprocity, retaliation should compel private industries that are negatively affected by retaliatory measures to persuade their government to cease the policies causing the retaliation.[34] The higher, retaliatory tariffs will negatively affect specific industries due to their increased cost of exporting. Due to increased costs, consumers in

[30] Richard Chisik and Harun Onder, *Limiting Cross-Retaliation when Punishment is Limited: How DSU Article 22.3 Complements GATT Article XXVII*, Ryerson Economics, (Mar. 25, 2011). *Available at* http://www.economics.ryerson.ca/workingpapers/wp025.pdf
[31] Id. at 3.
[32] Id. at 14.
[33] Definition *available at* http://www.economics-dictionary.com/definition/trade-war.html
[34] Klint W. Alexander and Bryan J. Soukup, *Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on US Compliance Under NAFTA*, 28 Berkeley J. Int'l L 313, 326 (2010).

the importing country will not buy higher-cost goods affected by retaliatory tariffs. As a result, there is strong incentive for private industries to influence with trade policy in order to avoid the burdens of retaliatory tariffs.

However, the effectiveness of cross-sector retaliation is influenced by several factors. These factors include the amount of harm caused by the offense, discrepancies in economic strength and bargaining power between the parties in dispute, and the degree of influence private industries have over their respective governments.[35] In the event that the injured industry has a strong political influence over the offending government, cross-sector retaliation will be most effective. This is especially true for industry groups with large voting populations in important political states. If trade policies negatively affect these industry groups, voters will be influenced to take a stance against the political party promoting the trade policy. Governments are sensitive to industry groups in these important political states because if their voting influence is large enough they may be able to "swing" an election to the other political party.[36]

Cross-sector retaliation is an important tool for developing countries because it offers a strategic plan for the injured government, where even though the injured government is limited to the amount it may use for the countermeasure to the amount that it has been injured; the violating government is hurt much more and therefore is more likely to be brought into compliance with trade regulations.[37] Even the threat of cross-sector retaliation considerably increases a developing country's negotiating power because the country may choose which

[35] Id. at 327.
[36] Industries with a presence in swing states are more likely to be protected than those with small representation in pivotal states. The size is also important for trade policy chose; however, both the size and location are important for complete protection of an industry from a trade policy prospective. *See* Mirabelle Muulus and Dimitria Petropoulou *Oranges and Steel – A Swing-State Theory of Trade Protection in the Electoral College* London School of Economics at 20 (August 2005). *Available at www.etsg.org/ETSG2005/papers/petropoulou.pdf*
[37] Id. at 22.

sectors to target.[38] Allowing for cross-sector retaliation also helps limit incentives to violate the trade agreement because countries are aware that the punishment will be much more severe and it has the potential of harming its most important industries.[39]

Cross-Sector Retaliation Demonstrated:

While cross-sector retaliation is now an effective tool for developing countries, originally, developed countries pushed for cross-sector retaliation with the intention of having additional protection for intellectual property rights.[40] However, the only cases that have resulted in cross-sector retaliation under the WTO framework have involved developing countries bringing suit against developed countries.[41] There have only been three cases under the WTO where the injured government was allowed to cross-retaliate: the European Community-Banana III Case (in which Ecuador was allowed to retaliate under GATS and TRIPS); the United States – Cotton Case in which Brazil was allowed to retaliate under GATS and TRIPS); and

---

[38] Lucas Eduardo F. A. Spando, *Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?* World Trade Review (2008) at 513. Available at *journals.cambridge.org/article_S1474745608003960*

[39] Richard Chisik and Harun Onder, Limiting Cross-Retaliation when Punishment is Limited: How DSU Article 22.3 Complements GATT Article XXVII, Ryerson Economics, Mar. 25, 2011 at 30-31.

[40] Spando, *Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?* World Trade Review (2008) at 513

[41] The WTO does not define developed or developing countries. Members decide for themselves if they were developed or developing, although other members can challenge members who define themselves as "developing." Developing countries have certain rights under the WTO, such as having longer transition periods for implementation of agreements. *See* http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm
The WTO benefits developing countries because it provides them with principles and rules of trade that all members must follow; giving the developing countries leverage because once they are members all other members must treat them in a particular way. *See* http://www.inquit.com/iqebooks/WTODC/Webversion/wto/three.htm
Developing country is a term used to describe a nation with a low level of material well-being. Measures include statistical indexes such as income per capita, life expectancy, rate of literacy, etc. There also may not be a significant degree of industrialization as well as a low standard of living. *See* Sullivan, Arthur & Steven M. Sheffrin, *Economics: Principles in Action*. 471 (Pearson Prentice Hall, 2003)

United States- Internet Gambling Case (in which Antigua and Barbuda were allowed to retaliate under TRIPS). These cases all demonstrate that cross-sector retaliation is effective under the WTO framework because the developed country was brought into compliance with their WTO obligations following the use of cross-sector retaliation.[42] As already stated, the NAFTA retaliation regulations are almost identical to the WTO regulations and therefore, the cross-sector retaliation would be just as effective under the NAFTA framework.

The *EC-Bananas* Case was the first case in which cross-sector retaliation was permitted.[43] Ecuador had been injured under GATS, as it was receiving unfair treatment in relation to bananas exports. [44] Ecuador was allowed to use cross-sector retaliation by suspending its TRIPS obligations because it argued that same sector trade retaliation was not practicable or

[42] Spando, *Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?* World Trade Review (2008) at 513

[43] Ecuador, as a small developing country, brought a claim against the European Community. The European Community indentified three different types of bananas that could be imported into the EU: bananas from within the EC had free movement within the EU; "traditional bananas" from the ACP countries (African, Caribbean, and Pacific) who traditionally supplied the EC with bananas had duty-free entry; "non-traditional" bananas from other counties. Non-traditional bananas had a quota and other specific qualifications; thus non-traditional bananas received worse treatment than traditional bananas and those grown within the EC. Under the WTO framework, it was found that there was a violation of Article XIII of the GATT, which requires non-discriminatory application of qualitative restrictions because only some bananas had quotas. The worse treatment was also a violation of National Treatment because it was clear that the banana policy favored EC banana suppliers. Ecuador was granted authorization to use cross-sector retaliation against the EC because it would have been ineffective to use simple retaliation – Ecuador does not import many agricultural goods from the EC and therefore it would not have been effective to place additional tariffs on agricultural goods from the EU. For a full discussion *see* Stefan Griller and Erich Vranes *EC-Bananas Case*. Max Planck Encyclopedia of Public International Law (January 2009) *available at* http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1689&recno=8&

[44] The TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement covers intellectual property (copyrights, trademarks, patents, and undisclosed information) protection. There are minimum standards that each member must follow to protect intellectual property, although members may provide more extensive protection if they wish, and specific domestic procedures for enforcement. Any disputes may be brought to the WTO for dispute settlement procedures. *See* http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm

effective" as it would not inflict any meaningful injury on the developed country.[45] The dispute settlement board ("DSB") agreed with Ecuador's argument, allowed the cross-sector retaliation, and the EC was brought into compliance with its obligations.[46] Intellectual property rights are highly valued by developed countries and therefore the ability to threaten suspension of the TRIPS agreement significantly increases a developing country's negotiating power.[47] Cross-sector retaliation threats are a powerful mechanism for developing countries to place pressure on "large players."[48]

Further evidence that cross-sector retaliation is an effective enforcement tool for developing countries can be found in the *United States – Cotton Case*.[49] The DSB found for Brazil and who requested authorization to suspend trade concessions to the United States under the TRIPS agreement in November 2009.[50] The threat of cross-sector retaliation alone was enough; by April 2010 Brazil decided to postpone countermeasures because the United States

[45] Stefan Griller and Erich Vranes *EC-Bananas Case*. Max Planck Encyclopedia of Public International Law (January 2009)
[46] Spando, *Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?* World Trade Review (2008) at 513
[47] Hudec, R.E, *The Adequacy of WTO Dispute Procedures: A Developing Country Prospective*, The World Trade Organization at 83. *Avaliable at www.ppl.nl/bibliographies/**wto**/files/289.pdf*
[48] Id. at 88.
[49] Brazil brought a claim to the WTO against the United States for subsidizing its cotton industry. The DSB found for Brazil, stating that the subsidy program were prohibited under the WTO export subsidy disciplines and were not protected in the Peace Clause. Further, the United States' programs would result in prejudice to Brazil's interests through price suppression in the world market. *See* United States – Subsidies on Upland Cotton DS267 *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds267_e.htm
[50] Id. and WTO gives Brazil the green light to retaliate against US cotton subsidies, Global Subsidies Initiative (September 2009) *available at* http://www.globalsubsidies.org/en/subsidy-watch/news/wto-gives-brazil-green-light-retaliate-against-us-cotton-subsidies
Brazil explored its options under cross-retaliation to determine which possibility would induce the United States to come into compliance, it believed that by targeting Intellectual property the United States would come into compliance the quickest. *For a complete discussion see* Poder, *How is the Threat of Retaliation Affecting US-Brazil Ties?* The Inter-American Dialogues (March 2, 2010). *Available at* http://www.poder360.com/article_detail.php?id_article=3778

had engaged in a "dialogue" to find a mutually satisfactory solution for the subsidies.[51] In August 2010 the countries concluded a "Framework for a Mutually Agreed Solution to the Cotton Dispute in the World Trade Organization" in which the countries agreed to a solution on the issue and Brazil agreed to not impose the countermeasures authorized by the DSB so long as the framework remained in effect.[52] Scholars have suggested that the threat of cross-sector retaliation, involving the TRIPS agreement and thus targeting one of the United States' most important industries, played a role in the United States coming to an agreement so quickly with Brazil.[53]

Finally, in *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* Antigua brought a claim against the United States alleging non-compliance with its GATS obligations.[54] The WTO Panel authorized Antigua's cross-sector retaliation under TRIPS because the WTO Panel agreed that Antigua would not have an effective remedy if it was required to retaliate under the GATS agreement, as it did not export services to the United

[51] Id.
[52] Id.
[53] Spando, *Cross-agreement retaliation in the WTO dispute settlement system: an important enforcement mechanism for developing countries?* World Trade Review (2008) at 513
[54] Antigua claimed that the United States was violating its most favored nation and national treatment obligations under the WTO framework. The United States claimed that it was able to limit and regulate the gambling and betting services as it was excluded from its GATS schedule. The GATS employs a positive list framework where countries determine which services they want to open up to foreign nations. Countries expressly list which services are to open to other countries and then are held to national treatment, most favored nation, and all other obligations. The United States further claimed that regardless if the sector was excluded, it was able to restrict gambling/betting services as a measure necessary to protect its public morals and order. The Court found that in following the Vienna Convention on the Law of Treaties, treaties should be interpret in good faith in accordance with their ordinary meaning and when the United States had included gambling and betting services because it had including the "sporting" sector on its GATS schedule. Further, the court held that the United States did not demonstrate necessity their defense of protecting public morals and order because they failed to pursue a good faith course of action under reasonably available alternatives. *See* United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285 (2005). *Available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

States.[55] Antigua purposely chose TRIPS because the United States is a leading producer of pharmaceuticals, movies, music, and software technology.[56] Antigua was allowed to impose $21,000,000 USD in sanctions; it was allowed to do away with patent protection rules and sell legally pirated copies of software and movies.[57] The United States reacted by completely removing its commitments on gambling services.[58] The fact that the United States responded at all demonstrates that cross-sector retaliation is effective. If Antigua had been limited to retaliating under the GATS the likelihood that the United States would have responded at all is unlikely because there would not have been any negative effects felt. Antigua was able to specifically target the industries that were most important to the United States economy and then use that to their advantage when trying to force compliance with WTO agreements. A developing country was able to have a large effect on one of the largest economies in the world; this is the major benefit of employing cross-sector retaliation.

These three cases are a clear demonstration of the benefits of being a member of the WTO. As members, these countries were entitled to basic principles of most favored nation and national treatment and access to effective dispute settlement mechanisms. It is arguable that without WTO membership and in turn access to the WTO's dispute settlement mechanisms, the larger, developed countries would not have reason to respond to developing countries concerns. Further, through the use of cross-sector retaliation, developing countries had enough leverage to make two of the world's largest economies respond to legitimate trade disputes quickly. As

[55] United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285 (2005). *Available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm

[56] Antigua awarded modest cross-retaliation rights in gambling dispute with US, International Center for Trade and Sustainable Development, Vol. 12 No 1 (January 16, 2008). *Available at* http://ictsd.org/i/news/bridgesweekly/7651/

[57] Id.

[58] Id.

evidenced by the above three cases, cross-sector retaliation provides an effective means of establishing a level playing field for developing countries.

Cross-border Trucking Dispute:

The cross-border trucking dispute is a recent case, which exemplifies the notion that developing countries will have a similar advantage under NAFTA dispute settlement procedures as that evidenced under the WTO. Prior to NAFTA, the United States and Mexico both had policies that prohibited access for cross border commercial trucking.[59] Although NAFTA was intended to deregulate the commercial trucking industry it has failed to do so, in light of the United States' restrictive policy. Those drivers and commercial trucks entering the United States are required to follow the United States Federal Motor Carrier Safety Regulations. These regulations place burdensome requirements on Mexican trucks and include daily vehicle inspections reports, compliance with *all* local and state laws, compliance with air pollution limits, weight and size restrictions, vehicle licensing, etc.[60] Mexican drivers are also subject to United States regulations such as minimum driving age, driver hours of service regulations, knowledge of interest and an understanding of highway traffic signs and signals.[61] Many of these regulations came after intense lobbying efforts by the International Brotherhood of Teamsters who claimed that opening the border to Mexican trucks would increase risks of public safety, endanger the environment and result in illegal drug transportation.[62]

---

[59] The United States prohibited Mexican commercial drivers to the United States through the Bus Regulatory Reform Act, passed in 1982. Ralph H. Folsom, Michael Wallace Gordon & David A Gantz, NAFTA and the Free Trade in the Americas: A problem-Oriented Casebook, 237(Thomson-West 2d ed. 2000).

[60] Ralph H. Folsom, Michael Wallace Gordon & David A Gantz, NAFTA and the Free Trade in the Americas: A problem-Oriented Coursebook, 238(Thomson-West 2d ed 2000).

[61] Id.

[62] Cazamias, *The U.S.-Mexican Trucking Dispute: A Product of Politicized Trade Agreement*. 33 Texas Int'l L.J. 349 (1998).

Basic Obligations for Trucking Under NAFTA:

Most Favored Nation and National Treatment principles apply to cross-border services under Chapter Twelve of NAFTA. Therefore, any increased regulations placed on Mexican truckers must also be placed on Canadian truckers so that the Most Favored Nation principle is not violated. The United States does not place any kind of restrictions on Canada's cross-border trucking service, however, it does not allow Mexican carriers to enter the border, and therefore the United States treats Mexico less favorably than it does Canada in this sector. The United States using a complete ban on cross-border trucking services is a violation of is a violation of NAFTA Article 904(3).[63] The United States ban on cross-border trucking does not fall under any of the allowed exceptions NAFTA provides for in Article 2101: protection of human, animal, or plant life or health or the environment or consumer protection concerns.[64] Further, if a NAFTA country is not claiming a national defense, public health and safety is not a catchall exception. Lastly, "like circumstances" may still exist in different regulatory environments and when there are like circumstances, the government is required to follow its obligations under NAFTA.

Mexico's Compliant:

Mexico brought a complaint against the United States contending that the United States was in violation of its NAFTA obligations to eliminate barriers for trade in services.[65] Further, Mexico claimed that the United States' conduct could not be defended because it did not fall

---

The International Brotherhood of Teamsters is a labor union in the United States and Canada *see* http://www.teamster.org/

[63] NAFTA, Art 904(3) *available at* http://www.sice.oas.org/trade/nafta/chap-091.asp

[64] NAFTA, Art 2101 *available at http://www.sice.oas.org/trade/nafta/chap-21.asp*

[65] In the Matter of Cross-Border Trucking Services (Secretariat File No. USA-MEX-98-2008-01) ¶ 4.

under any of the acceptable NAFTA exceptions.[66] The United States' claimed there were no "like-circumstances" in the trucking operations industry and therefore, it was not obligated to follow national treatment and most-favored-nation principles.[67] Additionally, the United States cited to health, safety and consumer protection concerns, which are acceptable defenses under NAFTA Article 2101.[68] The Panel unanimously found for Mexico, stating that the United States did not provide a sufficient legal basis for its "blanket ban" on Mexican trucks.[69] The Panel recommended that the United States take steps to bring its trucking practices in line with its obligations under NAFTA.[70] While the United States could not be required to allow all Mexican trucks into its territory, it could not continue with a blanket ban of all Mexican trucks without violating its NAFTA obligations.[71]

United States' Response and Mexico's Cross-Sector Retaliation:

As a response to the Panel's finding, the Bush administration reversed the Clinton administration blanket ban on Mexican trucks. The legislation acted as a compromise to the United States safety concerns regarding its highways and the United States obligations under NAFTA.[72] Mexican nationals were required to follow United States hours of service rules, maintain logs, have a specialized driver's license, and undergo safety audits.[73] Each application

[66] Id. at ¶ 7.
[67] Id. at ¶ 7-8.
[68] Id. at ¶ 9.
[69] Id. at ¶ 296.
[70] Id. at ¶ 299.
[71] Id. at ¶ 299-300.
[72] US transportation Department Implements NAFTA Provisions for Mexican Trucks, Buses (Federal Motor Carrier Safety Administration New Release Dot 107-02 Nov. 27, 2002) *specifically* "…establishing a strong safety program…opened to long-haul Mexican truck traffic. This objective has been met by having in place a sufficient number o inspectors, adequate facilities and space for inspectors, measures to ensure that licenses are valid and that motor carrier firms pass safety and compliance reviews."
[73] Id.

for a Mexican commercial trucking driver would be individually reviewed to ensure compliance.[74] As a result of the legislation, Mexico would also be obligated to expand access to United States trucks entering Mexico.[75]

However, in 2009 the Obama administration stopped funding for the cross-border trucking program.[76] This led to Mexico[77] using cross-sector retaliation against the United States. Mexico imposed high tariffs in hopes that the United States would fulfill their NAFTA obligations and open the United States borders to Mexican trucks.[78] Mexico employed NAFTA Article 2019(2)(b)[79] and specifically targeted goods produced in politically important states, including: strawberries from California; wine from California[80]; Christmas Trees from Oregon[81];

---

[74] Id.
[75] Id.
[76] Ioan Grillo, *Obama's Trade War: No Truck with Mexico*, TIME, (Mar. 25, 2009). *Available at* http://www.time.com/time/world/article/0,8599,1887494,00.html
[77] Mexico is still viewed as a developing country according to the International Monetary Fund. The International Monetary Fund uses a flexible classification system that considers: per capita income level, export diversification (the more diversification the better) and degree of integration into the global financial system *See* http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/groups.htm#oem

[78] Id.
[79] NAFTA Article 2019 allows for retaliation where a country is not following the implementation recommendations given by the Panel; (2)(b) allows for cross-sector retaliation
[80] Within California, grape exporters have seen a forty-five (45) percent tariff hike, which is one of the highest tariffs Mexico has done. To further the point, Senators Diane Feinstein and Barbara Boxer as well as Nancy Pelosi are all in California and helped to push through the measure which cut funding for the cross-border trucking program. Further, all the California Democrats and some of the California Republicans voted in favor for h measure that resulted in cutting the cross-border trucking program. Clearly, the tariffs were aimed to cause damage to the California's wine producers because California wine producers must compete directly against Chilean wine producers whose product is duty-free. Consumers will not pay for the more expensive Californian wine and therefore the tariffs have caused California producers to lose a great deal of money. For a full analysis *see* Klint W. Alexander and Bryan J. Soukup, *Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on US Compliance Under NAFTA*, 28 Berkeley J. Int'l L 313, 337 (2010).
[81] Although the tariffs on Christmas trees have only been hit with a twenty percent tariff, it is

and dairy products from the Midwest.[82] In 2010, the Mexican government added even more goods to the list, affecting products produced in 43 states.[83] The new tariffs had a value of $2.6 billion of the United States' economy.[84] Mexico reiterated that it would be willing to remove the tariffs as long as the United States would re-implement the trucking program.[85] Mexico strategically targeted industries in specific states, so that the industries would apply political pressure on Obama.[86] Further, the cross-sector retaliation took place in the year before an election year, which would help Mexico reach its goal of encouraging the United States to come

---

interesting to note that the majority of the senators from Oregon voted in favor of the bill that cut funding for the cross-border trucking program. One Congressman stated that, "Mexico's cross-retaliation was illegal and nothing more than political gamesmenship." Even though Oregon has not been considered a politically important swing state, Mexico's choice to target goods from Oregon is interesting because of the political retaliation it had – where the politicians were against trade policies that favored Mexico, Mexico hit their state hard with tariffs. For further discussion *see DeFazio Examines Cross-Border Trucking in Hearing Today*, Press Release, U.S. Representative Peter DeFazio, Mar. 13, 2007, *available at* http://www.defazio.house.gov/index.php?option=content&task=view&id=274.
See also Klint W. Alexander and Bryan J. Soukup, *Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on US Compliance Under NAFTA*, 28 Berkeley J. Int'l L 313, 338 (2010).

[82] Mico Rosenberg, *Mexico Tariffs Hit a Diverse List of U.S. Goods*, Reuters, (Mar. 18, 2009). *Available at* http://www.reuters.com/article/2009/03/18/us-mexico-usa-trade-idUSTRE52H1BQ20090318. For a complete list of all goods that were given increased tariffs (ranging from 10 – 20% increases) *see* dof.gob.mx/PDF/180309-MAT.pdf (pages 50-51).

[83] Dustin Ensinger, Mexico Levies More Retaliatory Tariffs on American Products, (Aug. 17, 2010). *Available at* http://www.economyincrisis.org/content/mexico-levies-more-retaliatory-tariffs-american-products

[84] M. Angeles, Villarreal, United States- Mexico Economic Relations: Trends, Issues, and Implications, (Feb 24, 2011). *Available at* fpc.state.gov/documents/organization/158528.pdf

[85] Dustin Ensinger, *Mexico Levies More Retaliatory Tariffs on American Products*. Economyincrisis.org (August 17, 2010). *Available at* http://economyincrisis.org/content/mexico-levies-more-retaliatory-tariffs-american-products

[86] Mirabelle Muulus and Dimitria Petropoulou *Oranges and Steel – A Swing-State Theory of Trade Protection in the Electoral College* London School of Economics at 20 (August 2005).

in line with its NAFTA obligations, because Obama would be looking for political support during this time period.[87]

From a public international law standpoint cross-sector retaliation is an effective practice. Countries generally are not willing to give up any more sovereignty than they must and agreeing to free trade agreements requires countries to give up some of their sovereignty as it is.[88] Although enforcement mechanisms for international disputes have certainly improved, the WTO's enforcement is limited to giving recommendations and authorizing retaliations.[89] Further, the hope is that other countries will "shame" or place pressure on the offending country until it comes in line with its obligations. Therefore, under a public international law standpoint

---

[87] Mirabelle Muulus and Dimitria Petropoulou *Oranges and Steel – A Swing-State Theory of Trade Protection in the Electoral College* London School of Economics at 20 (August 2005). *Concluding* that industries with strong lobbies located in swing states are the most protected industries by the United States government.
Note: swing states are defined as those states that do not have overwhelming support for a single candidate or party and therefore are targets of both parties in presidential elections in order to gain support. *See* http://www.oxfordadvancedlearnersdictionary.com/dictionary/swing-state Further, some are already commenting on the big swing states for the 2012 election, and are expected to include Florida, Wisconsin, and Ohio. All states that were greatly effected in Mexico's cross-sector retaliation targets. *See* David Paul Kuhn, *The Critical 2012 Swing States* Real Clear Politics (March 4, 2011). *Available at* http://www.realclearpolitics.com/articles/2011/03/04/critical_big_five_swing_states_electoral_map_obama_ohio_florida_virginia__wisconsin_colorado_109116.html

[88] Claude E. Barfield, *Free Trade Sovereignty, Democracy. The Future of the World Trade Organization*. The American Enterprise Institute at 11 (2001). *Available at www.tulane.edu/~dnelson/PEReformConf/Barfield.pdf*

[89] Officials have stated that while retaliation is counterproductive to those countries involved and perhaps even insufficient to bring a country in line, it is currently the only legally justified instrument to promote conformity with international trade rules. The issue in retaliation is whether the other country will comply; not whether the injured party will exercise its rights to retaliation. In regards to the *US – Cotton Subsidies* case Brazil recognized the importance of the United States as a trading partner but noted that Brazilian goods only made up two percent for the United States' trade flow where the United States market was eight times more important to Brazil's foreign trade. Thus this case demonstrated the importance and effectiveness of cross-sector retaliation where a developing country was up against a developed country. *See* Poder, *How is the Threat of Retaliation Affecting US-Brazil Ties?* The Inter-American Dialogues (March 2, 2010). *Available at* http://www.poder360.com/article_detail.php?id_article=3778

cross-sector retaliation is effective because it places enough pressure on an offending country to make it follow its obligations. However, from a private industry standpoint cross-sector retaliation affects those industries that are likely in compliance with their obligations to their national government. This hardly seems fair to those obliging industries. Further, cross-sector retaliation almost seems to encourage protectionist behavior because injured countries are allowed to pick and chose which industries they would like to have affected in the offending country and at the same time the injured country's industries are allowed to receive some protection. This is the very behavior that international trade law hopes to eradicate.

New Legislation:

In January 2011, the Obama administration proposed a new program that would resolve the trucking issue.[90] The proposed program contains three elements: preoperative, operation, and transparency.[91] The preoperative element includes an application process for Mexican carriers as well as various documentation proving licensing, safety, and financial capabilities.[92] The operative element includes monitoring procedures and compliance reviews, which will also include drug and alcohol testing requirements.[93] Finally, the transparency element includes periodic reporting to United States federal groups, making information publically available on a website and establishing a committee that will relay information to the United States Federal government.[94] This program also requires reciprocity with Mexico, so that the Mexican government must grant permits to United States trucks entering Mexico comparable to those the

[90] M. Angeles, Villarreal, *United States- Mexico Economic Relations: Trends, Issues, and Implications* (2010)
[91] U.S. Department of Transportation, *Concept Document: Phased U.S.-Mexico Cross-Border Long Haul Trucking Proposal,* January 6, 2011, available at http://www.fmcsa.dot.gov and http://www.fmcsa.dot.gov/rules-regulations/topics/nafta/nafta.htm
[92] Id.
[93] Id.
[94] Id.

United States grants to Mexican trucks.[95]

However, the proposal itself does not really speak to any of the so-called concerns that the United States originally had. The concern that security would be jeopardized is not dealt with because in the proposed legislations, as soon as the truckers complete the eighteen-month accreditation process they are essentially given carte blanche and are not required to be checked again. This goes against the safety issues that the United States had been claiming as a reason for not allowing Mexican trucks into the United States. The proposal is much tougher than those requirements established under NAFTA trucking regulations and it is unclear if Canadian trucks will be subject to the same accreditation process. If Canada is not subject to the accreditation process then United States will still be in violation of most favored nation and national treatment obligations, because it will still be conferring worse treatment on one of the member states. Therefore, the proposed legislation has not really brought the United States in compliance with its NAFTA obligations.

As previously discussed, industries are affected differently by this legislation. The teamsters and other independent truckers are against this proposed legislation because it will affect their stronghold on the trucking market. Yet, if the teamsters, or any other powerful lobbying group for a private industry, have more power than a government then the point is proven that cross-sector retaliation is a necessary tool for developing countries. Developing countries need to have a powerful tool to ensure that their needs are heard on the international trade level and cross-sector retaliation provides that for them because it creates a way to combat with powerful private industries in developed countries.

[95] NAFTA-Long-Haul-Trucking Provisions, available at http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/rule-programs/rule_making_details.aspx?ruleid=335

United States producers of products that have been dealing with the negative effects of the retaliatory tariffs have been lobbying for proposed legislation to be put into law.[96] Mexico has agreed to lower the tariffs by fifty percent once the proposal is signed and remove the remainder of the tariffs as soon as the program has started.[97] Cross-sector retaliation has a heavy toll on the industries that it targets in the offending country. In the case of the United States – Mexico cross-border trucking dispute, the affected industry was limited to the trucking industry. However, once Mexico was authorized to retaliate, many other industries were involved and affected negatively. For example, fruits, dairy, pork, and even Christmas trees were specifically targeted because they were in states with significant political pull or the industry had enough members to make a large difference in the political involvement. While this is effective and serves the purpose of cross-sector retaliation, which is to avoid trade wars by placing political pressure on the government through affected industries within the offending country; it harms private industries that were not involved in the initial conflict.[98] This is concerning because it demonstrates that uninvolved industries become at the mercy of other countries' trade policies and technically the affected industries' government may do little or nothing to change their initial trade policy. Does this mean that industries need to ensure they have a certain amount of political power in order to be protected? What would happen if an industry did not have a large enough political voice for the government to care? The likelihood of an injured government

[96] M. Angeles, Villarreal, *United States- Mexico Economic Relations: Trends, Issues, and Implications*. (2010) *Available at www.fas.org/sgp/crs/row/RL32934.pdf*
[97] Editorial, *Nafta's Unfinished Business*, NEW YORK TIMES, (Mar 11, 2011). *Available at* http://www.nytimes.com/2011/03/12/opinion/12sat4.html?_r=1&ref=northamericanfreetradeagreement
David Hendricks, *U.S. makes proposal on Mexican trucks*, Chron, (Apr 8, 2011). *Available at* http://www.chron.com/disp/story.mpl/business/7514075.html
[98] Dustin Ensinger, *Mexico Levies More Retaliatory Tariffs on American Products*. (August 17, 2010)

choosing an industry that does not have a political voice is small because the goal of cross-sector retaliation is to bring the offending country in line with their obligations through the affected industries' lobbying. However, this demonstrates the fragility for industries in this kind of retaliatory scheme.

The American Trucking Association has noted that while they like the proposal requirements because it will require Mexican truckers to follow the same regulations as United States Truckers, they are against the United States government paying for electronic monitoring/recording systems in those Mexican trucks that will be participating in the program.[99] Further, there is no evidence that Mexican truckers will even take advantage of an open border. Journalists have commented that the requirements the United States has placed on the Mexican truckers are so high that the majority of the trucking community will not be able to partake in the program.[100] The cost of insurance for coming into the United States is almost prohibitively high for many of the Mexican truckers. The requirements are so burdensome that it almost seems as though the United States is still trying to keep the majority of Mexican truckers out of the United States, and thus is still acting in a protectionist manner.

Mexico, as a developing country, was able to employ cross-sector retaliation in a very effective way against the United States, a developed country.[101] The specific targeting of a determined set of goods influenced the affected industries to lobby to the United States

[99] Trucker News Services, ATA's Graves notes progress in NAFTA trucking dispute, The Trucker, Apr 11, 2011, *available at* http://www.thetrucker.com/News/Stories/2011/4/11/ATAsGravesnotesprogressinNAFTAtruckingdispute.aspx

[100] Mark B. Solomon, *Much Ado About Nada*? DV Velocity (April 4, 2011) *Available at* http://www.dcvelocity.com/articles/20110405mexican_truckers/

[101] As of April 2010, Mexico was still listed as a developing country on the International Monetary Fund's List of developing and emerging economies *see* http://www.imf.org/external/pubs/ft/weo/2010/01/weodata/groups.htm#oem

government to change its trade policy in regards to the cross-border trucking dispute. It can be argued that the lobbying resulted in the United States proposing new legislation that would open the United States border to Mexican trucks; bringing the United States in line with its NAFTA obligations of most favored nation and national treatment. Therefore, cross-sector retaliation is an effective means for a developing country to bring a developed country into compliance with its obligations under NAFTA.

Conclusion:

If it is found that that the offending member has committed a violation and then refuses to implement a measure that would bring compliance then the injured member might be permitted to retaliate against the offending member.[102] Countermeasures must first take place in the same sector in which the violation occurs.[103] If obligations are still unmet, retaliation may take place in a different sector covered by the same agreement.[104] Finally, if obligations are still unmet, retaliations may take place in a different sector covered by another agreement or "cross-retaliation".[105] Cross retaliation is only permitted where the countermeasures in the same sector are not practicable or effective.[106] However, cross-sector retaliation is more effective where the

[102] Id. at 354.
[103] DSU Article 22.3
[104] Id.
[105] Id.
Cross-sector retaliation is defined as retaliation exercised in a sector other than the sector specifically affected by the measure in dispute. *See* http://www.sice.oas.org/dictionary/DS_e.asp
[106] Chow and Schonenbaum , International Trade Law, 57 (Aspen Publishers 2008)
For a discussion on cross-sector retaliation *see* European Communities – Regime for the Importation Sale and Distrpution of Bananas, WT/DS27/ARB/ECU (2000); where Ecuador was permitted to use cross-sector retaliation because of the European Communities restrictions on Ecaudor's banana imports and if Ecuador had been required to restrict imports on bananas from the European Union than it would not have had a true remedy.

states do not have totally equal grounds in development or bargaining power.[107] This is because the developing country is able to inflict injury on the developed country in the most direct and effective way; targeting their most important industries so that the offending country will be compelled to come into compliance with their obligations under NAFTA.[108] Targeting specific industries will allow for a quicker response from the offending government than if same-sector retaliation was required.

Developing countries should take advantage of cross-sector retaliation because it is an effective means of bringing a developed country into compliance with a trade agreement. This will ensure that developed countries cannot skirt their obligations under NAFTA due to a limited capability of developing countries to retaliate sufficiently. Mexico's use of cross-sector retaliation exemplifies that a developing country can ensure effective compliance from a developed country, such as the United States, to follow basic obligations required by an international trade agreement.

[107] Benjamin L Brimeryer, *Bananas, Beef, and Compliance in the World Trade Organization: The inability of the WTO Dispute Settlement process to Achieve Compliance from Superpower Nations*, 10 Minn. J. Global Trade 133, 135 (2001).
[108] Alexander and Bryan J. Soukup, *Obama's First Trade War: The US-Mexico Cross-Border Trucking Dispute and the Implications of Strategic Cross-Sector Retaliation on US Compliance Under NAFTA*, 28 Berkeley J. Int'l L 313, 330 (2010).