The Authorization of Cross-Agreement Retaliation for Ecuador in the Banana Dispute

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Abstract

The formation of the World Trade Organization (WTO) in 1995 was a step forward to a more organized and rule-binding universal trade regime. The WTO is acknowledged as a rule-oriented institution as it implements a detailed and binding dispute settlement mechanism, for which most developing countries are appreciative. Nevertheless, this mechanism does not overcome the age-old question of how developing countries should go about ensuing developed nations comply with the WTO's rulings. The notion of cross-agreement retaliation is discussed in the article as a possible solution to the aforementioned problem. Cross-agreement retaliation, also commonly known as cross retaliation, enables developing countries to suspend concessions in different agreements, especially in relation to the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which provides crucial concessions for developed countries. Using the most well-known WTO dispute, the Banana War, this article examines the crucial role of cross retaliation. In that case, Ecuador, one of the plaintiffs, was granted the right to cross-retaliate under the TRIPS agreement, yet despite the authorization, it did not enforce its right and subsequently the case dragged on for years. This begs the question of why Ecuador refrained from implementing its right. The instrument of cross retaliation may be used as a precedent for future disputes involving developing countries in the WTO. This article analyzes the reason for Ecuador's decision by examining the complexity of cross-retaliation implementation, the true nature of cross-retaliation, and other significant contributing factors to the dispute.

Keywords: Ecuador, banana, cross-retaliation, TRIPS, European Union

A. INTRODUCTION

In an international trade system governed by the WTO, trade-related disputes are perceived as common occurrences. Institutionally, these disputes are resolved using the Dispute Settlement Mechanism (DSM): a litigation process between conflicting parties. This mechanism utilizes sanctions by granting plaintiffs the right to suspend their concessions in the same trade agreement in which a violation has occurred. Sanctioning is rarely used by developing nations as the repercussions tend to be aggravating for small economic countries. Consequently cross-retaliation has emerged as a solution, enabling sanc-

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tions under different agreements, for example under the TRIPS agreement, which is a crucial aspect of trade for developed countries. Many analysts have previously considered the great effectiveness of cross-retaliation for developing countries when facing developed nations in the WTO dispute settlement process (Kunze 2009, p.534; Mitchell & Salonidis 2011, p. 460; Spadano 2008, pp. 531-532).

To date there have been three trade disputes which involve cross-retaliation appeals in the WTO: the Ecuador-European Union Banana Dispute (hereinafter referred to as "the Dispute"); the Antigua & Barbuda-United States of America Online Gambling Dispute; and the Brazil-United States Cotton's Dispute (Abbott 2009, p. 5-9, Whiteman 2010, pp. 195-202). The Banana Dispute, which lasted almost 20 years, involved many Latin American countries (Ecuador, Panama, Guatemala, Colombia, Costa Rica, Nicaragua, Venezuela, etc), some European Union members, and the United States of America. The Banana Dispute started in 1993 with the formation of the Common Market Organization of Bananas (CMOB) which was perceived as a violation of the Most-Favoured-Nation (MFN) principle by granting preferential tariff quotas to African, Caribbean, and Pacific (ACP) countries. Responding to this violation, some Latin American countries complained through the General Agreement on Tariffs and Trade (GATT), which ended in an unsatisfactory result, prompting another complaint under the WTO. In this case, Ecuador was the only country granted the right to cross-retaliate with the total amount of retaliation of US$ 201.6 million each year. Despite the authorization, Ecuador did not enforce its right; nonetheless the European Union (EU) eventually changed course by eliminating quotas for ACP countries and creating gradual decrease in import tariffs. The other two retaliation cases imitate Ecuador's strategy by requesting the right to cross-retaliate in order to coerce the violating countries to comply with the panel's ruling.

The Banana Dispute is considered one of the most important examples of the potency of cross-retaliation for developing countries. This is the first case involving authorization of cross-retaliation and officially resolved with an agreement in November 2012 (WTO 2012c). This article will discuss the reasons why Ecuador did not implement the cross-retaliation and the significance of this authorization for Ecuador in regards to the final resolution.

B. CHARACTERISTICS OF THE WTO AS AN INTERNATIONAL INSTITUTION

In the context of the current international trade regime, the WTO, as a rule-based organization, can be starkly contrasted to its predecessor, the GATT, which commonly perceived as power-oriented institution (Dunne 2002, p. 278). Under the GATT trade disputes were generally resolved by negotiation, with interactions being dominated by developed nations. Developed countries had the most advantage, as they have more resources and capabilities to persuade their adversaries to make greater concessions. Along with the WTO formation in 1995, a dispute settlement mechanism was also founded using a litigious process to resolve trade dispute between members. This marked the evolution of the trade regime from a power-oriented to rule-oriented institution which now has the authority grant binding decision to its members.

The panel decision of the WTO's Dispute Settlement Body (DSB) can be perceived as institutional power; a power or right granted to member country through an institutional decision that should to be obeyed by the losing party (Barnett and Duvall 2005, pp. 15-17).

1. Dispute Settlement Mechanism under the WTO

The formation of the DSM is considered the greatest achievement of the WTO as it enables an easier and more binding litigation process. The most significant change in WTO's dispute resolution is its mechanism of panel report adoption. Previously under the GATT, a panel report could only be adopted by consensus of members, meaning that even the violating member must support the adoption of the report (Dunne 2002, p. 295). It was for this very reason that the outcome of the Banana Dispute was unsatisfactory under the GATT; the European Union blocked the panel report, therefore technically preventing the implementation of the decision. Conversely, under the WTO panel report adoption operates by reverse consensus, which means that adoption of a panel report will only be prevented if all members, including the plaintiff, block the decision.

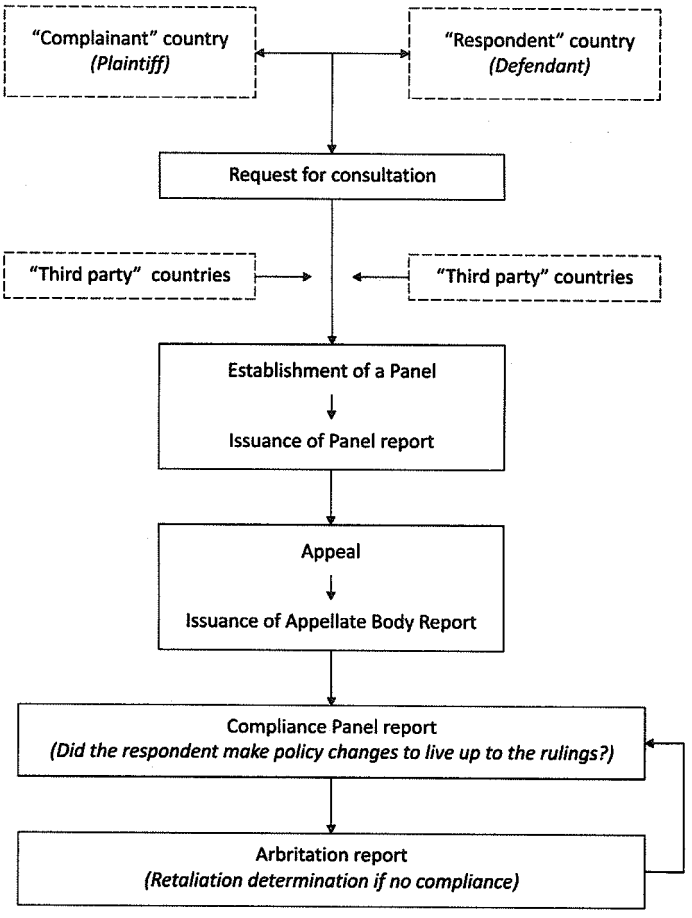

Chart of WTO Dispute Settlement Mechanism Procedure

Source: Bown 2009, p. 47

There are four phases in WTO dispute settlement; consultation, panel procedure, appellate procedure, and implementation of decisions (van den Bossche 2008, p. 269; Zimmermann 2006, pp. 59-69).

When a violation is alleged in international trade, the plaintiff or complainant country can file a formal request to the WTO Dispute Settlement Body to initiate discussion with the defendant. If the consultation fails, the plaintiff can request the formation of a panel to hear from both parties. During this phase, interested countries or entities can request to be joined to the hearing as third parties. If the plaintiff considers the panel's decision unsatisfactory, it can request an appeal to the Appellate Body, the final decision making body. If the DSB find that a violation has occurred the plaintiff may request the formation of a Compliance Panel to ensure the violation ceases. Where offending countries do not automatically terminate the violating practice an Arbitration Panel will decide the amount and form of retaliation for the plaintiff in order to coerce the violating countries to comply with the ruling.

2. The Concept of Retaliation

The term retaliation or sanction is never explicitly stated in the WTO Dispute Settlement Understanding. When conflicting parties fail to reach an agreement and violating countries show no initiative to modify their trade practices, the plaintiff can legally request WTO authorization to suspend certain trade concessions in respect of the violating countries. The suspension of concessions referred to as an act of retaliation in international trade (Charnovitz 2001, pp. 603-603; Mitchell and Salonidis, p. 458).

The right to retaliate is automatic; meaning the authorization to retaliate can not be negated, unless all members of the WTO vote against the authorization, including the plaintiff (Pauwelyn 2010, p. 46). According to Pauwelyn (2010, pp. 37-38), generally, there are four interrelated reasons for retaliation: to create trade balance or to save the economic sector which suffers from the trade violation; to encourage compliance or to punish the violator. Legally and normatively, analysts suggest that the main purpose of retaliation is to promote compliance from the violating countries (Charnovitz 2002, pp. 609-610; Sacerdoti 2010, pp. 31-33; Spadano 2008, pp. 520-521). There are a number of important principles that apply to retaliation including, the principle of *equality* which stipulates that the Arbitration Panel will determine the amount of retaliation according to the damage caused, meaning retaliation will not exceed the amount of the actual damage. In spite of this, Pauwelyn (2010, pp. 38-39) argues that if retaliation is intended to promote compliance, then a higher level of retaliation should be applied to coerce compliance from a violating country. Another essential principle of retaliation is that it is temporary; retaliation should be terminated as soon as compliance or agreement is reached.

According to Article 22.3 of the Dispute Settlement Understanding describing retaliation, there are three kinds of retaliation (Spadano 2008, p. 523):

a. Parallel Retaliation: plaintiff retaliates to the violating countries in the same trade sector where the violation occurs.

b. Cross-sector Retaliation: plaintiff can retaliate in a different sector under the same trade agreement, only

if parallel retaliation is proved to be inapplicable and inefficient.

c. Cross-agreement Retaliation: if the circumstances are considered to be pressing and the other two retaliation methods are proven to be inefficient, the plaintiff can retaliate under a different agreement.

Developing countries often find it difficult to pressure developed countries to comply with a WTO ruling. The use of the retaliation mechanism by developing countries can be considered self-harming economically, as those countries often depend on certain imported goods from developed nations (Nottage 2009, pp. 6-8, Zimmermann 2006, p. 157). Cross-agreement retaliation (commonly known as "cross retaliation") is considered a more viable option for developing countries to effectively coerce developed countries to comply. Spadano (2008, p. 532) considered that whilst it is possible to retaliate under the GATS, it is most effective for developing countries to retaliate under the TRIPs agreement.

C. THE BANANA DISPUTE

Bananas are an agricultural commodity that originated in South East Asia and were later brought to Latin America and Africa. India is the largest cultivator of bananas with the majority of produce consumed domestically. Ecuador, Costa Rica, Colombia, the Philippines, Guatemala, Panama, and Honduras were the biggest exporters of bananas in 1999, accounting for 88% of world exports (FAO 1999a). Many nations, especially those in the ACP countries, were heavily dependent on their banana exports, for example in St. Lucia banana exports accounted for 69% of their total trade exports. The ACP countries in 2006 were so reliant on their banana exports that they exceeded the total amount of banana exports in Latin America (UNCTAD 2007). In regards of efficiency however, Latin American countries have benefited from their susceptible growing climate, export distance and relatively stronger economy, resulting in reduced production costs in Ecuador and Costa Rica (Paggi and Spreen 2003, pp. 13-14). As for the EU and the USA, both have high consumption rates of bananas, accounting for 58% of the total world import in 1999 (FAO 1999). Naturally, the European Union is the biggest market for Latin America and the ACP countries, however as a result of the export licensing scheme and implementation of tariff quotas which favoring ACP countries, export from Latin America to the EU has gradually decreasing.

1. The Beginning of the Banana Dispute

It is important to recognize each member in EU implemented different trade policy in regard of banana's import. Many members of the EU originally imported bananas from their former colonies in the ACP including: the Ivory Coast, Cameroon, Madagascar, Windward Island, Jamaica, Belize, and Suriname (Tangermann 2003a, p. 21, p.25). These trade practices were also supported by preferential arrangements from the EU, as stated in Yaounde Convention in 1963 and 1969. The Rome Convention was adopted in 1975 with the gradual enlargement of the EU (Tangermann 2003a, p. 22). Along with the formation of the European Economic Community, the Common External Tariff (CET) of 20% was implemented to all imports except those from the ACP countries. The Panel created under the GATT calculated

that without these preferential practices, Latin American countries would have dominated the European market in 1982-1991. EU's trade practices cost Latin American countries approximately 10.5 metric ton banana export to the EU (Dunne 2002, p. 293).

The EU's efforts to establish a common market (single market) in 1993 led to the formation of the Common Market Organization of Bananas (CMOB) to standardize banana import practices. The standardization of imports was enforced through Rule 404 which became notorious for discriminating against Latin American countries through a system of quotas, tariffs, and licensing (Smith 2006, p. 262). The basic principle of CMOB is quantitative regulation of exported bananas through the application of Tariff Rate Quota (TRQ). The main ACP countries were given export quotas for which they could export bananas with free tariffs and even if they exceed these quotas, their tariffs are significantly lower than the tariffs being implemented to Latin American countries.

2. Banana Dispute Settlement in GATT and WTO

In 1993 and 1994 respectively, whilst under the GATT, Costa Rica, Guatemala, Nicaragua, Colombia, and Venezuela lodged complaints against each of the EU members and the CMOB import regime (Smith 2006, p. 262). Given that panel reports required adoption by consensus at the time, the EU was able to block the Panel's decision to rule against the import regime. The EU tried to resolve the dispute by proposing the Banana Framework Agreement (BFA), which granted additional quota to and a 70% increase in export licenses to the plaintiffs (Tangermann 2003b, p. 47). All plaintiffs, except Guatemala, agreed to the proposal and to withhold from lodging further complaints against the regime until 2003 (Josling 2003, p. 175).

After the formation of the BFA, it appeared as though the Banana Dispute had been temporarily resolved, the root of the problem however had not been addressed by the EU and as such other Latin American countries complained under the WTO, namely Ecuador, Honduras, Panama, Mexico, Guatemala, and the United States of America. Chiquita International and Dole Foods, one of the US's multinational banana exporters, filed a complaint as it had suffering a loss since the formation of the CMOB. Ecuador, Honduras, Panama, Mexico, Guatemala, and the US requested a consultation with the WTO Panel who concluded that three crucial violations had occurred: tariff implementation, quota allocation, and import licensing scheme (Josling 2003, p. 179). The WTO Panel decision concluded that the EU had violated the non-discrimination distribution of the banana under both the GATT and the GATS (Josling 2003, p. 182; WTO 2012a, p. 14). On appeal, the WTO Appellate Body upheld its judgment prompting the EU to terminate its discriminating import regime in 1999. The EU was given a period of 15 months and 1 week by the Arbitration Panel to amend its regime. As such the EU offered to eliminate additional quota from the BFA and open up licenses for new exporters (Josling 2003, p. 186). The plaintiffs rejected the EU's proposal, and sought the Arbitration Panel's authorization to retaliate. The retaliation right was granted to the US for US$ 191.4 million each year. Ecuador, who did not join with the US in regards to the complaint, opted for more independent approach by requesting the right to cross-retaliate. Ecuador at that

time was deemed inefficient to retaliate to the EU in the same sectors for three reasons (Smith 2006, p. 269). First, Ecuador's imports were too small to actually affect the EU's trade; it accounted for less than US$ 17 million (Josling 2003, p. 190). Second, most imported goods from the EU were capital goods and raw materials that were crucial for Ecuador. Third, the value of the EU's discrimination actually exceeded the value of Ecuador's imported goods from the EU.

Considering the fact that Ecuador was the biggest banana exporter during that period and discrimination had gravely impaired Ecuador's trade (WTO 1999, p. 2-3), the WTO Arbitration Panel granted Ecuador the right to cross-retaliate under the TRIPs agreement for US$ 141.6 million, whilst the total amount of retaliation granted came to US$ 201.6 million (Nzelibe 2005, p. 28). Both the US and the EU were concerned about the precedent of this authorization to intellectual property protection (Smith 2006, p. 271). In an effort to dismiss their concerns regarding intellectual property protection in non-EU countries, Ecuador stated that this retaliation would be implemented domestically and temporarily, it would be lifted once compliance was met. Ecuador also decided that cross-retaliation would be implemented in copyrights, including recording, geographical indication, and industrial design from specific members of the EU: Austria, Belgium, Finland, French, Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Spain, Sweden, and the UK (WTO 1999, p. 3; WTO 2000, p. 1).

The authorization of cross-agreement retaliation for Ecuador did not automatically resolved the dispute, as both Ecuador and the US at that time favored different import regimes from the EU. Ecuador initially favored the liberal banana import regime because it enabled Ecuador to export bananas at much lower costs (Paggi and Spreen 2003, p. 108). On the other hand, the US favored specific quotas for Latin American countries as its exporter, Chiquita, was supplied from these countries (Smith 2006, p. 274). With the authorization of cross-agreement retaliation, Ecuador was able to negotiate with both the EU and the US on equal grounds to propose a Mutually Agreed Solution in July 2001. Even though the MAS were reached in 2001, the dispute was formally concluded in 2012 through transitional regime and gradual tariff elimination until 2015 (WTO 2012b).

D. ANALYZING THE IMPORTANCE OF CROSS-AGREEMENT RETALIATION TO ECUADOR

The Banana Dispute is undeniably an important WTO dispute settlement precedent, especially in regards to developing countries. The authorization granted to Ecuador, enabled negotiation with both the US and the EU, and resulted in a more satisfactory outcome, compared to other Latin American countries that chose to use bandwagon tactics with the US. Despite authorization, it remains unclear why Ecuador never actually implemented the cross-agreement retaliation. This paper argues that Ecuador's reason for doing so was that the threat of the authorization was more important than implementation itself.

1. Why did Ecuador choose not implement the cross-agreement retaliation?

There are several arguments why Ecuador decided not to implement the

cross-agreement retaliation (a mechanism which to this date has never been enforced). The first argument, emphasized by the WTO Arbitration Panel, is that actual implementation might prompt another complaint under a different intellectual property protection agreement (Smith 2006, pp. 270-271). There are several international treaties protecting intellectual property rights: Berne Convention of art and literature protection; Paris Convention of industrial property protection; and the World Intellectual Property Organization (WIPO) including, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) for music (Whiteman 2010, pp. 203-204). Ecuador had already ratified the WCT and the WPPT in June 2000 (WIPO 2013), meaning that there will be legal implications, once Ecuador breached the IPR protection in its own country which definitely complicates cross-agreement retaliation in IPR sector.

The second argument relates to political pressure from the TRIPs industry towards Ecuador. The actual implementation of retaliation under the TRIPs agreement may create a negative image of the country for prospective investment in the intellectual property industry. Political pressure may originate from specific industry, which was shown by the European Confederation of Spirits Producers (CEPS) whom lobbied their respective governments to boycott Ecuador's products. The International Chamber of Commerce (ICC) position paper stated that implementation of retaliation under the TRIPs agreement could create economic disturbance and potentially result in a marred reputation (ICC 2012, pp. 5-6). Argument three covers the technical issues regarding the implementation of retaliation. Whiteman (2010, p. 207) argues that effective retaliation faces at least two challenges: (1) the existence of industry that would be benefited from the retaliation; and (2) the ability of governments to oversee the legalized violation of trade concessions. These two issues complicate the implementation of retaliation, especially under TRIPs agreement, as it has never been achieved before.

It appears that Ecuador considered the above arguments when deciding not to implement the retaliation mechanism. Smith (2006, p. 272) stated that there is a possibility that Ecuador had no intention to ever actually implement the retaliation under the TRIPs agreement. The authorization of cross-agreement retaliation can be considered as a threat tactic used by developing countries to coerce compliance or negotiation from developed countries (Pauwelyn 2010, p. 57; Subramanian and Watal 2000, pp. 403-404) using cross-agreement retaliation Ecuador was able to avoid the complexity of implementation of retaliation. This does suggest that Ecuador was unable to actually implement the retaliation, rather that implementation was not on Ecuador's highest list of priorities at the time.

There were two reasons why cross-agreement retaliation was deemed a credible option for Ecuador. First, Ecuador's case was the first authorization granted for cross-agreement retaliation under the TRIPs agreement. The legal complexities of the intellectual property protection created conditions of uncertainty, which according to Nzelibe (2005, p. 3) helped establish a more credible threat, as there has been no authorization of cross-agreement retaliation previously. This uncertainty at that time was not only disturbing for the EU as de-

fendant, but also for the US as plaintiff, as both countries are concerned with heavily protected intellectual property rights. Second, Ecuador endeavored to ensure that the threat was more credible by targeting copyright and creating a system of licenses for violation. This system being referred was a monitoring mechanism of which Ecuador could grant license for domestic industry to legally conduct copyright infringements. This monitoring system was considered capable of overseeing the amount and value of retaliation being sought (Slater 2009, p. 1396-1398).

2. Supporting Factors for Ecuador Not to Implement The Cross-Agreement Retaliation

The complexity of retaliation and Ecuador's preference for threats were not the only reasons why Ecuador decided not implement the retaliation. There were specific circumstances in the dispute which caused Ecuador to reach this decision, therefore setting this cross-agreement retaliation authorized dispute apart from other similar disputes, namely the Brazil vs. USA and Antigua and Barbuda vs. USA.

First, there were other plaintiffs from Latin American countries that complained long before Ecuador, namely Costa Rica, Colombia, Venezuela, and Nicaragua. Although initially, they allied themselves with the USA in the dispute, their role was essential to coerce compliance from the EU. Since the formation of the WTO in 1995, there have been five complaints from various Latin American countries, including the following: DS16 in 1995, DS27 in 1996, DS105 in 1997, and DS158 in 1999. These Latin American nations, including Ecuador, along with the US, had complained against the EU, all in favor of import regime change.

Second, there were differences of opinion demonstrated by the EU members in regards to the banana import regime. This was shown by Germany, the Netherlands, and Denmark, whom supported the more liberal import regime by equal tariff. This disunity was evident even before the formation of the CMOB in 1993. Generally, the difference of opinion stemmed from France, the UK, Italy, and Spain, all of whom supported a more protective regime of banana import and those who opposed it. France and the UK are examples of the EU members that imported bananas from their former colonies, (including: the Ivory Coast, Cameroon, and Madagascar for the French; and Windward Island, Jamaica, Belize, and Suriname for UK) with free tariff quota. Countries who opposed this practice, for example Germany, did not have former colonies and thus opted for a more liberal trade regime. The disunity amongst members was evident in the CMOB formation voting in 1993, in the Council of Agriculture which had 13 members. All members, except Germany, the Netherlands and Belgium, during the second round voted for the CMOB, and thus began the discriminating regime of banana import in the EU. The disunity was also present when Germany disagreed in the establishment of the BFA and when Germany, Sweden, Austria, and Finland stated that previous EU-US agreements did not accommodate Ecuador's interests (Smith 2006, p. 275). This kind of support from within the EU itself was considered by Bown (2009, p. 52) as beneficial in reforming the import regime.

The final factor contributing to Ecuador's lack of implementation of the retaliation was the US involvement in

the dispute. The US was lobbied by its banana exporters in Latin America to participate in the dispute. For example, Chiquita, a US exporter who owns banana plantations in Guatemala, Honduras, Costa Rica, Nicaragua, and Panama and also employed more 90.000 labors from Latin American countries in 1930s urged the government to take part in the dispute (Brenes and Madrigal 2003, p. 99). Given that other Latin American plaintiffs allied themselves with the US, the US was successfully sought the right to retaliate to the EU for US$ 191.4 million. Unlike Ecuador, the US actually implemented the retaliation in the EU non-agricultural sector, which decreased the value of import from the EU countries, namely the UK and France, exceeding US$ 6.3 and US$ 3.4 million respectively. The three aforementioned reasons played a significant role in ensuing that Ecuador did not implement the retaliation whilst simultaneously coercing compliance from the EU.

E. CONCLUSION

The Banana Dispute is the longest dispute to date to take place under the WTO, and more importantly, it presents intriguing development in the WTO dispute settlement process. The compliance phase is considered the most complex stage in the DSM especially when it comes to developing countries enforcing compliance from developed nations. Ecuador was able to retrieve a satisfactory outcome from the Banana Dispute by requesting authorization of cross-agreement retaliation which was never actually implemented. Whilst it cannot be proven that gaining the authorization to retaliate ensured compliance from the EU, it no doubt provided Ecuador with some bargaining power against both the US and the EU. The important lesson to be learnt from this case is that whilst it might be crucial for developing countries to seek the authorization of cross-agreement retaliation under the DSM, as proven in Ecuador's case, it does not necessarily ensure compliance. It should be recognized that the success Ecuador obtained from gaining authorization for cross-retaliation without actual implementation in the Banana Dispute was due to a multitude of factors. As such it is important to recognize that a similar use of cross-retaliation as a threat could produce a different result where different circumstances are present, including in the Brazil vs. US and Antigua and Barbuda vs. US cases. The Banana Dispute demonstrates a new approach for developing countries in future disputes against developed nations, which evidently strengthens developing countries position during negotiation.

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