Solving EC-Bananas:
The WTO Dispute Settlement Mechanism and Developing Countries

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<th>Description</th>
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<tbody>
<tr>
<td>AB</td>
<td>Appellate Body</td>
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<tr>
<td>ACP</td>
<td>African, Caribbean and Pacific</td>
</tr>
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<td>ACWL</td>
<td>Advisory Centre on World Trade Law</td>
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<td>CMOB</td>
<td>Common Market Organisation for Bananas</td>
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<td>DSB</td>
<td>Dispute Settlement Body</td>
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<td>DSU</td>
<td>Understanding on Rules and Procedures Governing the Settlement of Disputes</td>
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<td>EC</td>
<td>European Communities</td>
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<td>EPA</td>
<td>Economic Partnership Agreement</td>
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<td>EU</td>
<td>European Union</td>
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<td>FAB</td>
<td>Framework Agreement on Bananas</td>
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<td>FDI</td>
<td>Foreign direct investment</td>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IP</td>
<td>Intellectual property</td>
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<td>IPRs</td>
<td>Intellectual property rights</td>
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<tr>
<td>MFN</td>
<td>Most-favoured-nation</td>
</tr>
<tr>
<td>SCO0</td>
<td>Suspension of concessions or other obligations</td>
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<tr>
<td>TRIPS</td>
<td>Agreement on Trade-Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>USA / US</td>
<td>United States of America</td>
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<td>USTR</td>
<td>US Trade Representative</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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A. Introduction

The European Union (EU) grants preferential market access to bananas from certain African, Caribbean and Pacific (ACP) countries in a manner inconsistent with its World Trade Organisation (WTO) commitments. This particularly harms importers from Latin America, which have hence pursued the case EC-Bananas against the EU\(^1\) using the WTO dispute settlement mechanism. 

EC-Bananas III has ongoing for nearly 15 years due to the EU’s failure to implement a WTO-compliant banana import regime. The Latin American plaintiffs, whose economies rely strongly on banana exports, have hence suffered substantial losses from foregone market access and legal costs. The case shows the systemic difficulties developing countries face in achieving their market access goals even when WTO law is on their side and a powerful trading partner such as the USA is backing them.

This thesis will examine the options available to developing countries to enforce WTO obligations of developed countries. It will use the example of EC-Bananas to highlight difficulties developing countries face in the current dispute settlement system and explore specific strategies the main developing country plaintiff, Ecuador, could pursue to reach a rapid WTO-compliant solution. It will then evaluate proposals to reform the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) such that developing countries are better able to induce developed country compliance.

The first section will introduce the background to EC-Bananas by outlining the structure of the world banana market and the WTO’s dispute settlement rules. The thesis will then introduce the case’s history, the current status of the case, the different parties’ interests and the roots of the ongoing dispute. The third section will evaluate DSU’s strengths and weaknesses, focussing particularly on the problems developing countries face in ensuring developed country compliance. The fourth section will discuss strategies to solving the case available to Ecuador within the existing system. Finally, the fifth section presents suggestions for DSU reform to improve developing countries’ leverage in cases such as EC-Bananas. These proposals are

\(^1\) For legal reasons the EU is known officially as the European Communities (EC) in WTO business. This thesis will use the terms EU and EC interchangeably. For a discussion of the EU in international law see Craig and de Burca (2008) pp. 168-182.
evaluated in terms of effectiveness and feasibility. I conclude with a specific proposal for Ecuador’s future strategy.
B. Background

I. Economics: The world banana market

The EU is the world’s largest banana importer. As many Latin American and ACP economies are highly dependent on banana exports, preserving or improving EU market access is very important to them. Most of the main global banana exporters are located in South and Central America (66%), with Ecuador alone providing over 30% of global banana exports in 2006. The large Latin American (‘dollar’) banana exporters depend heavily on banana exports as it is often their largest agricultural export (e.g. in Costa Rica), representing 6-10% of the total value of their exports (Box 1).

Box 1: Dependency rates of banana exporting countries in 2006

<table>
<thead>
<tr>
<th>Latin America</th>
<th>ACP</th>
</tr>
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<tbody>
<tr>
<td>Panama: 10%</td>
<td>Saint Vincent and the Grenadines: 22.3%</td>
</tr>
<tr>
<td>Ecuador: 9.3%</td>
<td>Saint Lucia: 19.7%</td>
</tr>
<tr>
<td>Costa Rica: 7.7%</td>
<td>Dominica: 18.1%</td>
</tr>
<tr>
<td>Honduras: 6.8%</td>
<td></td>
</tr>
<tr>
<td>Dominican Republic: 6.8%</td>
<td></td>
</tr>
<tr>
<td>Guatemala: 5.9%</td>
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</tbody>
</table>

Many ACP countries and overseas European banana producers such as the Canary Islands, Martinique and Guadeloupe are also highly dependent upon banana exports (Box 1). However, they are at a competitive disadvantage in banana production (Figure 1) because land constraints limit their ability to make use of the economies of scale that characterise banana growth and shipping. Large plantations in Central and South America, by contrast, benefit from favourable climatic conditions such as deep fertile soils and lower vulnerability to climatic disasters.

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2 Unctad.org, *Banana Market*  
3 Arias et al (2003) chapter 2  
4 Unctad.org, *Banana Market*  
5 Vanzetti et al (2005) pp. 5 and 9  

The share of Caribbean region banana exports thus fell from ca. 8% in the 1970s to less than 2% in the 2000s. Source: Unctad.org, *Banana Market*
Between 2002 and 2006, the EU was the largest importer of bananas, followed by the USA and Japan. Both the USA and Japan draw their imports almost exclusively from Latin America and the Philippines. Due to its discriminatory import regime, the EU is thus the near-exclusive importer of ACP bananas. Absent this regime, much cheaper dollar bananas would likely supplant most ACP bananas. The size of the EU banana market together with the dependence of Latin American countries on banana exports hence makes better access to the EU market significant for dollar producers’ economies. The dependence of ACP countries on banana exports makes them equally determined to retain preferential trade arrangements.

II. Law: The WTO dispute settlement mechanism

The dispute settlement mechanism of the General Agreement on Tariffs and Trade (GATT), prior to the establishment of the WTO, was weak in enforcing controversial judgments due to its emphasis on political consensus rather than legal adjudication. Consensus in the GATT Council was necessary to refer a dispute to a panel, to adopt a panel report and to authorize

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7 Vanzetti et al (2005) p. 5
8 Unctad.org, *Banana Market*
10 Laurent (2006) p. 428
countermeasures. Hence, a respondent could effectively veto a dispute and its solution. In most technical cases, respondents refrained from blocking decisions. However, the system was unable to resolve more complex and controversial cases such as *Bananas*.

With the establishment of the WTO in 1995, DSU came into force. Given the WTO’s expanded scope to services and intellectual property rights (IPRs) and its greater legitimacy as an international institution, a stronger dispute settlement system was warranted to enforce the new agreements. The most important innovations in DSU were requiring a negative rather than positive consensus of Members for the adoption of panel and Appellate Body (AB) decisions, tight time-frames for each stage of dispute settlement, establishing the Appellate Body, and formal surveillance of implementation measures. Dispute settlement has thus been more effective under the WTO than the GATT system, such that to date all panel and AB reports have been accepted and most cases are settled swiftly.

A typical case proceeds as follows: Following a complaint, the parties will engage in consultations to reach a mutually acceptable solution. If no agreement is found within two months, a panel to adjudicate the case is established. It will usually make a decision within half a year, which it issues to the parties of the dispute and then to the public. The Dispute Settlement Body (DSB) adopts the report, unless a party decides to appeal the decision. Upon appeal, the AB convenes and decides on the case within another three months. When DSB adopts the final report, an average of one year and three months will have passed.\(^{12}\)

If a party found in violation of a WTO agreement fails to implement a WTO ruling, the defendant may offer the prevailing party compensation. If it does not do so, the prevailing Member can request authorisation to ‘retaliate’ by suspending concessions or other obligations (SCOO) vis-à-vis the non-compliant Member. Whilst DSU has usually allowed disputes to be resolved rapidly, *EC-Bananas* is an exception to this experience. The EU has prolonged the dispute by repeatedly reforming its banana regime without making it fully WTO compliant, thus provoking renewed consultations and litigation after each reform.

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\(^{11}\) Source of entire section: Wto.org, *Dispute Settlement*

\(^{12}\) See Annex I. ‘Dispute settlement timetable’
C. The case *EC-Bananas III*

I. History of the case

Prior to 1993, there were three separate national banana import regimes among EU countries. In what became known as *Bananas I*, a panel found infringements of GATT by those national regimes which provided preferential market access to bananas from overseas territories and former colonies. On 1 July 1993, the Common Market Organisation for Bananas (CMOB) was established as the EU’s common regulatory regime for the importation, sale and distribution of bananas. It combined obligations to former colonies with the single European market by providing preferential entry to ‘traditional importers’ and by restricting entry from other countries including Latin American countries.

A GATT panel concluded in 1994 that CMOB was in breach of the GATT most-favoured-nation (MFN) principle (Box 2). However, the consensus requirement of the GATT dispute settlement mechanism allowed the EU to block the adoption of the *EC-Bananas II* judgement.

Box 2: Article I.1 GATT 1947 on General Most-Favoured-Nation Treatment

> “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

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13 1) Germany: duty-free banana imports.
2) France, Greece, Italy, Portugal and the United Kingdom: restricted banana imports via quantitative restrictions and licensing requirements, giving preferential access to traditional suppliers.
3) Other countries: 20% tariff on bananas, most imports from Latin America
Source: Unctad.org, *Economic policies*

14 Vranes (2003) p. 4

15 For details on CMOB see Annex II. ‘CMOB rules on banana importation, 1993’
Impact of CMOB: The banana surplus of 1993 caused global banana prices to fall, e.g. by 7% in the US.
Source: Arias et al (2003) chapter 3.2
Thus, Colombia, Costa Rica, Nicaragua and Venezuela instead agreed with the EU on the Framework Agreement on Bananas (FAB), modifying CMOB to improve the position of Latin American countries party to the agreement.\(^\text{16}\) FAB however aggrieved the position of Ecuador as it was not party to the agreement. Ecuador hence joined the WTO in 1995 and issued a new complaint about CMOB with Guatemala, Honduras, Mexico and the USA in 1996. The 1997 DSB judgement on *EC-Bananas III* found that the EU’s banana import regime and its licensing procedures for banana imports were inconsistent the EU’s WTO commitments.\(^\text{17}\) In 1999, the EU thus reformed CMOB\(^\text{18}\); however, following a complaint by Ecuador, DSB found these measures again to violate WTO agreements by setting aside a quantity for ACP countries and allocating licenses based on historic imports.

DSB then authorised the USA (in 1999) and Ecuador (in 2000) to suspend concessions towards the EU with a value of, respectively, $191.4 and $201.6 million a year. The USA implemented retaliation measures and the EU was pressured into reaching agreements with the USA and Ecuador. In 1999, the EU informed the WTO of its intention to implement a two-stage reform of its banana regime in line with its 2001 Understandings on Bananas with the USA and Ecuador. The first stage was implemented in 2001 and consisted of three tariff rate quotas allocated on the basis of historical licensing.\(^\text{19}\)

The second stage of the EC’s reform in 2006 implemented a tariff-only regime which is still in place today. After unsuccessful negotiations about the tariff level,\(^\text{20}\) the EU unilaterally introduced a duty-free import quota limited to 775,000 tonnes for ACP countries and a €176/mt tariff on imports from third countries including Latin American countries. The latter claim that the tariff remains too high and discriminates against non-ACP suppliers. The parties first engaged in bilateral talks under the good offices of the Norwegian Foreign Minister. These broke down and Ecuador requested a compliance panel in 2007. Its 2008 ruling stated that the EU’s preferential treatment of ACP countries through the duty-free quota is an advantage inconsistent with MFN, that the tariff rate quota for bananas of ACP origin is inconsistent with

\(^{16}\) For details on FAB see Annex III. ‘Framework Agreement on Bananas, 1994’
\(^{17}\) For details on DSB decision, see Annex IV. ‘DSB Judgement on EC-Bananas III, 1997’
\(^{18}\) The new import regime abandoned the system of license allocations by type of operators, reviewed the country allocation of tariff rate quotas according to their performance in 1994-1996, lifted the quota allocations to traditional ACP exporters, and allowed for licenses to be tradable among operators. Source: Arias et al (2003) chapter 3.2
\(^{19}\) For details on the 2001 reform, see Annex V. ‘EU banana import regime 2001’
\(^{20}\) Bridges Weekly Trade News Digest, *EU Banana Import Rules Challenged Again, This Time By Colombia*, Vol. 11, No. 11, 28th March 2007
non-discriminatory administration, and that the MFN tariff of €176/mt exceeds that scheduled. Thus, negotiations about CMOB reform have recommenced.

II. Current negotiations

Since the 2008 judgement, a host of unsuccessful negotiations have occurred. A near-agreement on a 34% tariff reduction over 7 years, negotiated under the good offices of WTO Director General Lamy, was rejected by Latin American countries in 2008. Negotiations between Latin American and ACP countries, where ACP countries offered a €26 tariff cut and a 5-year tariff standstill, also broke down. The most significant near miss was the “Geneva Agreement on Trade in Bananas” between the EU and eleven Latin American countries. The EU agreed to cut banana tariffs by 35% to €114/mt by 2016, with the first cut occurring in 2009 to €148/mt. In return, the EU was to be exempted from banana tariff cuts under the Doha deal and all existing banana disputes against the EU at the WTO would be settled. However, the deal agreed on 27 July 2008 broke down with the collapse of the Doha rounds only two days later. The EU claimed that the Geneva Agreement was part of the broader Doha deal and that its concessions depended on commitments by all WTO members to tariff reductions. By contrast, Latin American producers claimed the deal was a separate pact, to be honoured independent of the conclusion of Doha.

Whilst some complainants vowed to revive WTO litigation against the EU, the Representative of Ecuador at the WTO stated in December 2008 that he hope it would not be necessary to exercise Ecuador’s cross retaliation rights and negotiations have resumed.21 The latest offer by the EU is to lower the MFN tariff to €114/mt by 2019, i.e. three years later than agreed in the deal of July 2008. It proposes annual cuts to reach the €114/mt level and freezing the tariff at €136/mt between 2011 and 2013. The offer is contingent upon an end to the case before the WTO and no additional banana concessions by the EU in Doha negotiations. However, Ecuador maintains its demand to uphold the more stringent Geneva Agreement whilst ACP countries criticise the EU’s offer as too generous.

21 EUbusiness.com, Ecuador threatens WTO retaliation if EU fails to settle banana case, 11 December 2008
III. The parties’ positions

The parties to *EC-Bananas III* are the EU as defendant; the USA, Ecuador, Guatemala, Honduras and Mexico as complainants at the initial case in 1996; and ACP countries as interested third parties.\(^\text{22}\) The EU defends the preferences granted to ACP countries due to their historical relationship as former EU-member colonies. This special status is reflected in preferential trading agreements, financial aid and technical assistance, currently enshrined in the Cotonou Convention and in Economic Partnership Agreements (EPAs).\(^\text{23}\) Within the EU, interests differ regarding ACP countries and their banana imports. Countries such as France and the UK have strong colonial ties to ACP countries and French and British banana importing firms have enjoyed economic rents through preferential licensing arrangements.\(^\text{24}\) They are hence the main supporters of the EU’s preferential banana import regime. By contrast, Germany has twice challenged CMOB in the European Court of Justice (ECJ) and Denmark, Portugal, Belgium and the Netherlands also opposed the policy during negotiations.

Among the complainants, interests and reasons for involvement are also heterogeneous. The USA is involved based on lobbying pressure from Chiquita Brands International, whilst for Ecuador, Guatemala, Honduras and Mexico wider macroeconomic interests are at stake. The USA is defending domestic agricultural groups’ and a main fruit producer, Chiquita’s, interests. Chiquita is a US-owned company operating in Latin America, which claimed it had lost millions of dollars in sales because its business decisions had relied on a liberalisation of the EU banana regime. It filed a petition with the US Trade Representative (USTR) in 1994 which triggered the USA’s request for the establishment of a WTO dispute settlement panel in 1996.\(^\text{25}\) US negotiators have also been under considerable pressure from agricultural interest groups to aggressively pursue the banana case in the WTO. These are concerned, with view to the US-EU

\(^{22}\) ACP countries are: Belize; Cameroon; Canada; Colombia; Costa Rica; Dominica; Dominican Republic; Ghana; Grenada; India; Jamaica; Japan; Nicaragua; Philippines; St. Lucia; St. Vincent; Senegal; Suriname; Venezuela; Côte d’Ivoire; Brazil; Madagascar; Panama.

\(^{23}\) The EU has renewed its EPAs with ACP countries, e.g. in 2008 between the EU and Caribbean countries, and on 25 March 2009 with Côte d’Ivoire. The EPA with Caribbean countries established a free trade area to protect ACP countries’ banana preferences from WTO law. The EU recognized that any ‘unavoidable’ protection reduction would be phased in over as long a period as possible.

\(^{24}\) Some argue that these firms rather than the ACP countries that have been the main beneficiaries of the EC banana regime. See World Bank, Australia’s Bureau of Agricultural and Resource Economics and Economist magazine in Hanrahan (1999)

\(^{25}\) Hanrahan (1999)

Dole Foods and Del Monte, Chiquita’s main competitors, did not join the process because they had fewer stakes in the matter as a result of different planning.
meat hormone dispute, about the precedent that the EU’s non-compliance with a DSB decision might establish, that could challenge and enforceability of DSU.26

Latin American countries challenge the EU banana regime as it limits their countries’ export opportunities by restricting EU import volumes and reducing global banana prices. This results in large losses through foregone revenues for Latin American economies. The heterogeneity of their interests27 and differences with the USA complicate finding a common position among complainants in negotiations. For example, the US’s representation of Chiquita’s interests could adversely affect Ecuador as Chiquita distributes more bananas from other countries in Central America than Ecuador.28

ACP countries are mainly former EU colonies. Bananas are among the most important agricultural export products of many Caribbean states, e.g. in St. Lucia ca. 30% of employment stems directly or indirectly from banana production.29 Higher costs make ACP bananas competitive only where they enjoy preferential treatment. Thus, the EU captures more than 90% of the island states’ banana exports. Within the ACP group, however, there are large differences in banana export competitiveness. Cameroon, Côte d’Ivoire and the Dominican Republic have cost structures similar to Latin American countries and their exporting capacity may thus be maintained despite EU preference erosion, albeit at lower export prices. Traditional ACPs, particularly the small island states, have high production and shipment costs; hence their exports may not survive preference erosion. Finally, an intermediate group of Belize and Surinam may be able to join the competitive suppliers through organizational reforms, productivity gains and improved marketing. ACP countries in general may attempt mitigating the adverse impact of tariff reductions by targeting “luxury” banana markets such as “fair trade” consumers as well as by substituting trade preferences with aid payments by the EU.30

26 Hanrahan (1999)
27 Reflected for instance in attitudes towards the Geneva Agreement July 2008: Ecuador said Lamy’s offer fell short and asked for deeper and more immediate duty cuts; Costa Rica seemed more positive towards Lamy’s proposal and Colombia was also willing to accept the offer to quickly lock a separate trade deal with the EU over a wider range of products: “experts said Latin American exporters were unlikely to agree as heavyweights Ecuador, Colombia and Costa Rica have different interests.” The Guardian, Latin American vs. ACP differences over EU banana tariffs threaten WTO talks, 20 July 2008
28 Ecuador's Ambassador to the WTO February 1, 1999, in Hanrahan (1999)
29 Arias et al (2003) chapter 2
30 Further discussion on p. 30, footnote 113
IV. Obstacles to resolution

WTO Members comply with WTO rulings most of the time. In all 16 cases where the EU was found to be in violation of certain of its WTO obligations, it has committed to bring itself fully into compliance with the adverse panel and AB reports, and, according to some authors, there are but “residual” compliance issues *EC-Bananas*.\(^{31}\)

The difficulties in resolving *Bananas* may seem surprising as the case involves neither significant factual disagreement nor disagreements over deep-seated values. The EU does not have a significant banana industry, many EU countries have opposed the EU banana policy from the beginning, EU consumers suffer from high banana prices, the system is cumbersome for EU importers and it discriminates against those among them that lack licenses. Furthermore, the EU has suffered US retaliation through 100% tariffs on goods from bed linen to coffee makers and Ecuador’s strategy established the legal precedent for cross-retaliation in WTO agreements. Finally, the case has tested the WTO’s legitimacy with the EU’s intransigence as evidence of some of DSU’s weaknesses and inequality. Similarly, the aggressive stance of the USA in pursuing the case cannot be explained by strong national trade interests, with bananas accounting for only 0.03% of transatlantic trade.\(^{32}\) Why, then, has *EC-Bananas* not been resolved in nearly 15 years?

The reasons for EC non-compliance relate to the complicated treaty network of the EU, to US involvement and to Ecuador’s weak position in forcing the EC into compliance. The EC attempted to combine several international commitments in its banana policy in 1994. First, it sought to combine the three banana import regimes existing in Europe in order to achieve the EU Single Market. Second, it sought to honour obligations towards former colonies of EU countries as laid down in the Cotonou Convention between the EU and ACP countries. Third, it had to provide preferential access to imports from developing countries following the GATT obligations.

The difficulties in combining these obligations are illustrated by the fact that it took four years of negotiations to reach an outcome that established extremely complex rules and is opposed by many stakeholders. The difficulties in negotiations arising from within the EU came from

\(^{31}\) Wilson (2007) p. 397

\(^{32}\) Alter and Meunier (2006) p. 363
different country interests and EU budget rules. France and the UK supported CMOB as it was advantageous to the French DOMs\textsuperscript{33} Guadeloupe and Martinique and the UK agro-industrial company Geest and the Windward Islands. Germany, Belgium and the Netherlands voted against the policy, and Denmark and Portugal also strongly opposed it during negotiations.\textsuperscript{34} EU budget rules further complicated negotiations as they do not allow earmarking tariff revenue for specific purposes.\textsuperscript{35} This made alternative solutions such as raising tariffs on all bananas and redirecting that income to ACPs infeasible. Direct financial support to banana importers would have had to come from the foreign aid budget (for ACPs) or in the form of subsidies (for European banana importers), thus entailing budgetary costs. The attraction of the regime as it was first conceived was hence that there were no immediate budgetary costs whilst ACP preferences were preserved.

US involvement resulted from the intense lobbying efforts of Chiquita, which had made extensive investments based on its belief that the European market would liberalise. The USA’s involvement became particularly significant in its ability to suspend concessions after it was authorised to retaliate in 1999. Hence, the second reason why the case has continued is that US involvement as a strong counter-power to the EU has disallowed the latter to maintain WTO-incompliant practices unchallenged.

The third factor for the enduring nature of the dispute is that Ecuador and its developing country co-plaintiffs have been unable to force the EU into compliance. This may partly be due to the fact that Ecuador has not made use of its cross-retaliation rights granted by the DSB in 2000. This thesis will also argue that even retaliation to its full potential by Ecuador may not succeed in bringing about EU banana reforms as WTO sanctions do not grant developing countries sufficient leverage to pressurise developed countries into compliance.

\textsuperscript{33} ‘Départements d’outre-mer’ (departments of France outside metropolitan France)
\textsuperscript{34} Alter and Meunier (2006) p. 367
\textsuperscript{35} Alter and Meunier (2006) p. 372

One reason for the EU’s budget rules is that earmarking tariff revenue could generate an incentive to protect.
D. Evaluating DSU

*EC-Bananas* highlights both improvements in DSU compared to the GATT dispute settlement system, as well as enduring deficiencies such as the continued importance of political and economic power in dispute resolution. To evaluate DSU, I will consider first whether the system successfully resolves trade disputes, and second whether there is “equality of access and outcomes”. Arguably, the first criterion can be affirmed and will be further discussed under I. ‘Strengths’. II. ‘Weaknesses’ evaluates why *EC-Bananas* is an exception to this rule, and discusses why the conclusion to the second criterion is negative: despite theoretical equality of access, the perspective of non-implementation of judgements in favour of weaker developing nations discourages developing countries’ use of DSU.

I. Strengths in dispute resolution

In 2003, the Chairman to the WTO Trade Negotiations Committee stated: “Ten years on and the majority of WTO members believe that ‘the system is working well’.” The same can be said of scholarly analysis: “In [the legal] literature, the system received a particularly warm, if not enthusiastic, welcome” “characterized by a near irrational exuberance”. The “unprecedented” power to a legal tribunal to enforce WTO obligations has been praised as the “crown jewel” and a “core linchpin” of the multilateral trading system, allowing DSU to be hailed as a model for other international organizations.

The successes of DSU include providing a forum for disputes, successfully adopting judgements, establishing a system of sanctions for non-compliance, and the observed impact it has had on Members’ behaviour. First, the strength of DSU as a forum of disputes and for adopting judgements derives from the quasi-automatic adoption of DSB decision. The negative consensus requirement for DSB decisions ensures DSB’s “compulsory jurisdiction”, allowing every case to be heard and reducing the relevance of considerations of economic and political clout for approaching DSU. Further, the quasi-automatic adoption of panel and AB reports has

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36 Perdikis and Read (2005) p. 270
37 Report by the Chairman to the Trade Negotiations Committee, 6 June 2003 (TN/DS/9)
38 Zimmermann (2005) p. 35
39 Zimmermann (2005) p. 35

Further, the ‘integrated character’ of DSU means any dispute arising under a WTO Agreement will be subject to DSU.
“removed blockage possibilities for losing defendants that had existed in dispute settlement under the old GATT”\(^{41}\) such that the “adoption rate for panel and AB reports has of course increased compared to the GATT 1947 system – from wherever it was to 100 per cent.”\(^{42}\) Finally, these reports are binding as a “DSB report must be unconditionally accepted by the parties to the dispute”.\(^{43}\) The change from the GATT regime is clear in *EC-Bananas III* by Ecuador’s recurring ability to challenge CMOB before DSU. In contrast, the inability to adopt controversial judgements prior to DSU led to the unresolved termination of *EC-Bananas I* and *II*.

The assured recourse to legal adjudication also gives developing countries greater leverage in negotiations with their powerful trade partners as a judgement gives a common standard for evaluating outcomes, DSU guarantees the right to negotiation, and there is the option of several countries joining a dispute.\(^{44}\) Davis finds in a comparative study that: “Developing countries that use these institutional mechanisms by initiating complaints based on a strong legal case and in cooperation with other states will improve their capacity to gain concessions from other states. In contrast, developing countries that are not WTO members, or Members that do not use the dispute settlement system, will often be unable to negotiate any concessions from more powerful states.”\(^{45}\)

Furthermore, DSU provides Members with incentives to change a policy found to violate trade rules.\(^{46}\) These incentives work via sanctions for non-compliance, concerns over international reputation (“shaming”\(^{47}\)), and the desire to preserve the functionality of the system. The lack of a positive consensus requirement “has meant that the DSB has the authority to permit plaintiffs to impose trade sanctions on those respondents that refuse to implement the findings and recommendations of dispute panels. The mere threat of trade sanctions targeted at respondents’ economically and politically sensitive sectors has generally been sufficient to ensure compliance. This was evident in the cases of bananas, steel and foreign sales corporations

\(^{41}\) Zimmermann (2005) p. 36  
\(^{42}\) Magnus (2005) p. 242  
\(^{44}\) Davis (2006) p. 220  
\(^{45}\) Davis (2006) p. 220, based on a case comparison of Peru, a WTO member, and Vietnam, a non-WTO country, both negotiating access for exports in fish/seafood.  
\(^{46}\) Davis (2006) p. 220  
\(^{47}\) Spadano (2008) p. 512 and 513
and has resulted in “a generally high level of compliance with adverse decisions from adjudicating bodies”\textsuperscript{49}. 

**II. Weaknesses**

The core critique arising from *EC-Bananas* is that DSU has a pro-developed country bias. This section will evaluate that critique with respect to a bias first in the use of DSU and second in DSU’s outcomes.\textsuperscript{50}

1. **Bias in use**

The principal users of DSU are industrialised countries, notably the EU and US, and increasingly NICs.\textsuperscript{51} If we assume that disputes should be equally distributed according to market share, the scant participation of developing countries may be partly explained by their relatively low share of global trade. However, politically and economically less powerful countries may also be more likely to face infringements of their rights as they are less able to enforce judgements. Thus, we may expect to see proportionally more frequent disputes involving ‘weak’ states as plaintiffs. Current DSU use statistics thus do not rule out a pro-developed country bias of DSU.

The rationale for a potential bias is that DSU is “relatively harder for poor and small countries to use”.\textsuperscript{52} Constraints on developing country participation include litigation costs, their lack of qualified human resources to identify and defend national interests, the ineffectiveness of retaliation, and that “developing countries are more susceptible to the use of economic and political leverage by the leading industrialised countries to secure mutually agreed settlements rather than use DSU – the ‘deep pocket’ argument”.\textsuperscript{53} Furthermore, small developing countries

\textsuperscript{48} Perdikis and Read (2005) p. 270; arguably, whilst in *Bananas* it did not induce compliance, it did reduce EC discrimination by inducing reforms.

\textsuperscript{49} Wilson (2005) pp. 22-24

Magnus (2005) p. 242 criticises that compared with the GATT regime, compliance “seems to be running roughly at or slightly above the previous rate – that is, it occurs usually but not always”. However, as previously only those decisions were adopted with which the losing party agreed, i.e. where a positive consensus could be found, arguably similar compliance rates between GATT and WTO judgements speaks in favour of DSU’s strength.

\textsuperscript{50} Read (2005) pp. 41-43

\textsuperscript{51} Perdikis and Read (2005) p. 270

\textsuperscript{52} Low (2007) p. 353

may sometimes be a politically reluctant to bring cases against their large trading partners if they fear repercussions through reduced ODA or other preferences.\textsuperscript{54} Such financial and political problems are demonstrated in \textit{EC-Bananas}, as ‘dollar’ importers relied strongly on the USA to exert implementation pressures on the EU, and Papua New Guinea decided not to participate as an interested third party in the case due to the related legal costs, despite its “enormous” interest in the outcome.\textsuperscript{55}

\section*{2. Bias in outcomes: enforcement problems}

Most scholars agree that the overall record of Members’ enforcement of DSB decisions is good: “roughly 60\% of panel reports requiring implementation have been implemented promptly [and] another 20\% have been implemented, albeit with significant delay”.\textsuperscript{56} The remaining 20\% have involved disputes over non-implementation under Article 21.5 DSU (Box 3). Zimmermann argues that this represents relatively few such complaints “in stark contrast to the public perception of these ‘trade wars’” which concern high profile cases such as \textit{EC–Bananas}, \textit{EC–Hormones}, and \textit{U.S.–Foreign Sales Corporations}.\textsuperscript{57}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Box 3 Article 21.5 DSU} & \\
\hline
“Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.” & \\
\hline
\end{tabular}
\end{table}

However, the fact that delayed implementation is primarily a problem of the US, EU, Japan, Canada and Australia, that disputes over non-implementation primarily involved the USA, and that in contrast 81\% of developing countries implemented DSB decisions promptly\textsuperscript{58}, indicates a bias in DSU such that developed countries feel more able to retain non-compliant measures

\begin{itemize}
\item \textsuperscript{54} Low (2007) p 353
\item \textsuperscript{55} Chakraborty and Khan (2008) p. 191
\item \textsuperscript{56} Davey (2005) p. 9
\item \textsuperscript{57} Zimmermann (2005) pp. 32-33
\item \textsuperscript{58} Davey (2005) p. 9
\end{itemize}
than developing countries do. This may be due to ineffective remedies against developed countries, which become important as ‘extrinsic’ motivations for compliance when ‘intrinsic’ incentives do not suffice.

Reasons for compliance are generally twofold. The group of ‘intrinsic’ incentives covers concerns about international reputation and the functionality of the system. The ‘extrinsic’ incentives result from domestic or international pressures for compliance, e.g. through sanctions. Davey argues that “the overall positive record of implementation in the WTO is due to the good faith desire of its Members to see the dispute settlement system work effectively”. 59

This is particularly true during the early “honeymoon” period we have been observing, where Members make an effort to allow the system to take root. “It is unclear,” Shirzad however argues, “whether after some period of time, countries will become less cooperative and more contentious in their approach to dispute settlement.” 60

*EC-Bananas* represents a “difficult chapter in the short history of the system” 61 and highlights deficiencies in ‘extrinsic’ incentives that could become more salient with time. Non-implementation will usually occur where WTO members face difficulties in implementation. They will thus weigh the consequences of non-implementation against the costs of reform. Deficiencies in the consequences of non-implementation relate firstly to the difficulties in the use of enforcement mechanisms for developing countries and secondly to the prospective nature of remedies. Where SCOO is weak, non-implementation will prevail, as in *EC-Bananas*. 62 The absence of SCOO against any of the most powerful WTO nations such as USA, EU, Japan or Canada 63 suggests that the weakness of such remedies for developing countries applies more widely. This section will thus evaluate the general viability and effectiveness of SCOO for developing countries.

### a. Tariff retaliation

Tariff retaliation is criticised for being ineffective as a measure used by small developing economies, for hurting the retaliating Member’s economy, and for its negative systemic

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59 Davey (2005) p. 11
60 Shirzad (2000) p. 4
61 Shirzad (2000) p. 4
62 Davey (2005) p. 11
63 Davey (2005) pp. 11-12
repercussions. Tariff retaliation is only likely to represent adequate sanctions against a
developed country in cases where the developing Member is an important trading partner.
Where a strong asymmetry of market size between a developing country plaintiff and a
developed non-complying Member exists, retaliation is weak because a developing country
may not be able to hurt a non-complying developed Member, e.g. Ecuador’s market made up
only 0.07% of total EU exports in 2007.\textsuperscript{64} This was acknowledged by the arbitrators examining
Ecuador’s ability to retaliate in 2000: “given the fact that Ecuador, as a small developing
country, only accounts for a negligible proportion of the EC's exports of these products, the
suspension of concessions is unlikely to have any significant effect on demand for these EC
exports”\textsuperscript{65}

Second, “in situations where the complaining party is highly dependent on imports from the
other party, it may happen that the suspension of certain concessions or certain other
obligations entails more harmful effects for the party seeking suspension of concessions than
for the other party”.\textsuperscript{66} Similar to any other import restriction, SCOO could weaken the
competitiveness of the complainant’s domestic industries because it shuts out or substantially
raises the prices of raw materials or intermediate products used in production – the “shot-in-the-
foot” argument. Ecuador argued that suspending tariff concessions was not feasible for it as the
overwhelming proportion of its EC imports are primary and investment goods, in particular
chemicals and machinery\textsuperscript{67}, whose prices are relevant for domestic production.\textsuperscript{68} The degree of
harm caused to domestic industry depends on the plaintiff’s reliance on the defendant’s
imports.\textsuperscript{69} Arguably, Ecuador relies strongly on the EU as its 4\textsuperscript{th} largest importer providing
9.2% of Ecuador’s imports in 2007.\textsuperscript{70} Full tariff retaliation by Ecuador could thus have hurt
domestic business substantially whilst barely affecting the EU economy.\textsuperscript{71} Finally, tariffs may
promote rent-seeking in the complainant’s newly-protected industries and thus further
undermine their long-term competitiveness.\textsuperscript{72} The ‘self-harm’ dangers of tariff retaliation are

\textsuperscript{64} Wto.org, Trade Profile: Ecuador
\textsuperscript{65} Decision by the Arbitrators, EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 95
\textsuperscript{66} Decision by the Arbitrators, EC – Bananas III (Ecuador) (Article 22.6 – EC), para. 73. Also see para. 86.
\textsuperscript{67} Trade.ec.europa.eu, EU Economic and trade indicators: Ecuador
\textsuperscript{68} Ruse-Kahn (2008) p. 343
\textsuperscript{69} Decision by the Arbitrators, EC – Bananas III (Ecuador) (Article 22.6 – EC)
\textsuperscript{70} Trade.ec.europa.eu, EU Economic and trade indicators: Ecuador
\textsuperscript{71} An even starker case is presented by US–Gambling: as 50% of Antigua’s imports are from the US, SCOO could
have “a much greater negative impact on Antigua . . . than it would on the United States”; Source: Recourse by
Antigua and Barbuda to Article 22.2 of the DSU, United States – Measures Affecting the Cross-Border Supply
\textsuperscript{72} Zimmermann (2005) p. 37
hence both that retaliation becomes a non-credible threat for the retaliating Member and that retaliation, if it takes place, is ‘unfair’ by further harming that Member whose rights are being infringed.

Third, SCOO may generate systemic problems. First, it reduces the predictability of trade conditions and counteracts the aim of trade liberalisation for which the WTO was initially established. Second, SCOO may have negative externalities on third countries, for instance, if their industries supply inputs to industries in the defendant country. Finally, SCOO may have a misleading psychological connotation as it creates the erroneous impression that trade restrictions would make a country better off. In summary, tariff retaliation is a problematic means of inducing compliance both due to its ineffectiveness and unfairness when used by small developing countries and due to its systemic repercussions.

b. Cross-retaliation

The arbitrators in *EC-Bananas* acknowledged the above limits to tariff retaliation and hence set a precedent authorising cross-agreement retaliation (cross-retaliation). Ecuador was authorized to suspend concessions in a sector or agreement other than that in which its benefits had been nullified or impaired. This meant retaliation not only under GATT or GATS, but also under TRIPS.

There is debate about how effective TRIPS retaliation is for developing countries. Vranes is pessimistic about the success of TRIPS suspension as an enforcement mechanism, arguing that it is “rather obvious that a small (developing) country still has little potential of inducing a reluctant major trading power like the EC to promptly comply with WTO decisions”. Subramanian and Watal take the opposite view that suspension of TRIPS is “feasible, effective, legal” and that “its very threat ... could lead to improved compliance by developed countries”.

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73 Zimmermann (2005) p. 37
74 WTO document WT/DS27/ARB/ECU, 24 March 2000
75 The strength of cross-retaliation generally derives from TRIPS suspension as GATS retaliation faces the same drawbacks for developing countries as GATT retaliation. It is dependent upon a developing countries often limited market size, developing countries have notably few commitments under GATS and suspension of GATS is subject to ‘self-harm’ difficulties. Spadano (2008) p. 532
76 Vranes (2003) p. 128
77 Subramanian and Watal (2000) p. 403
I will endorse Spadano’s intermediate view that suspension of IPRs can provide developing countries with important additional, but limited, leverage.\(^{78}\)

The intellectual property (IP) obligations contained in TRIPS are of significant value for politically and economically important companies in developed economies due to the strength of obligations enshrined in TRIPS. For example, copyrights must extend for at least 50 years after an author’s death (Art. 7 TRIPS) and patents must last for at least 20 years (Art. 33 TRIPS). Hence, even the threat or minimal use of TRIPS suspension by developing countries may generate a significant lobbying response by companies with strong IPR interests such as those in pharmaceutical and information technology industries. As these are “very powerful lobbyists”\(^{79}\) in a number of industrialized countries, TRIPS suspension may place industrialized governments under considerable pressure to comply with DSB rulings.

Furthermore, IP protection tends to disproportionately serve the interests of developed countries as they have a comparative advantage in innovation, whilst developing countries tend to be large net-exporters of copyright-, patent- and trademark-related royalties.\(^ {80}\) For example, Costa Rica paid BoP $51 million but received only BoP $0.5 million in royalty and license fees, i.e. 1% of its outflows, in 2004.\(^ {81}\) Correctly selected and applied, suspending IPRs could thus have welfare-enhancing effects for developing countries via three channels. First, businesses periodically paying royalties to nationals of the target nation could temporarily suspend these payments. Second, those developing countries with a basic level of technological expertise could engage in the production of goods using IPRs for which protection is suspended, particularly in areas where businesses can be established quickly and at relatively low costs such as the reproduction of sound recordings.\(^ {82}\) Third, those developing countries without sophisticated technological know-how could reap welfare gains by importing cheap replicas of otherwise IP protected products such as pharmaceuticals for immediate use or importing IP protected components to be assembled and further utilized in the retaliating country.\(^ {83}\) TRIPS retaliation may hence avoid the ‘shot-in-the-foot’ problem of tariff retaliation, which in turn makes it more a credible threat against developed countries.

\(^{78}\) Spadano (2008) p. 540
\(^{79}\) Ruse-Kahn (2008) p. 334
\(^{80}\) e.g. World Bank statistics find that developing countries had net outflows of $9.3 billion for license fees to developed economies in 2002. Source: http://www.atacmarburg.de/wissensallmende/trips.php
\(^{82}\) Subramanian and Watal (2000) p. 413
\(^{83}\) Ruse-Kahn (2008) p. 352
However, cross-retaliation has been authorized by DSB only twice so far and has not yet been implemented. The arbitrators in *EC–Bananas* cautioned that TRIPS retaliation may involve distinct legal, practical and economic difficulties for the retaliating Member. Domestic legal issues may arise if affected nationals of the suspending state argue that temporary IPR withdrawal amounts to a “de facto expropriation” of the IP owner and is thus illegal. A potential solution to this problem is enacting provisions in domestic legislation implementing TRIPS but reserving the right to suspend IPRs where DSB authorises cross-retaliation. Brazil has been considering such a draft law and specific suggestions to amend Antigua’s laws have been made to facilitate cross-retaliation towards the USA. A second solution would be interpreting WTO law and DSB retaliation authorisations as directly applicable in national courts. The disadvantage for governments is that this decision is at the judges’ discretion. However, Spadano argues that “it is not unreasonable to suggest rather pragmatically that in most cases courts would look sympathetically at their government’s attempt to induce compliance by a WTO Member whose failure to abide by the rules is negatively affecting national economic interests.” Further, in some countries such as Brazil WTO agreements are already incorporated into domestic law and thus DSU decisions are applicable as such.

TRIPS suspension may also create limited economic ‘shot-in-the-foot’ problems for a developing country if TRIPS suspension detrimentally affects foreign direct investment (FDI) in IP-sensitive areas. This depends on how and how often cross-retaliation is applied; if, as is likely, TRIPS suspension occurs only in a “rare set of pre-specified circumstances”, it “should not unduly deter such investors”. Further, whilst the protection of IPRs will certainly affect

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84 Spadano (2008) p. 524
85 Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, paras. 130-165.
86 Vranes particularly argues that the “potential for legal conflict can hardly be underestimated.” (2003) p. 127
89 E.g. a ten point model is outlined in *Turning TRIPS on its Head: Cross Retaliation at the WTO* by Shamnad Basheer, 14 February 2008, at www.spicyindia.blogspot.com
91 Spadano (2008) p. 535; Chowdhury also argues at the example of India that often courts de facto interpret WTO law as directly applicable, see The (Absence of) Direct Effect of WTO Law – Current Developments within the Indian Legal System, SSRN, 20 May 2008
92 This however not yet the case in the EC, as Armin von Bogdandy and Tilman Makatsch argue in Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO and European Union Law, in De Búrca, Gráinne, and Joanne Scott (eds.), *The EU and the WTO*, Hart Publishing, 2001 p. 144
business decisions, potential temporary TRIPS suspension is only one of many FDI considerations, and arguably far from decisive.\textsuperscript{92}

There are also a host of practical limits to the effectiveness of cross-retaliation. First, there are international legal limits on its use due to the principle of territoriality in IP law. This principle denotes that IP protection results from national laws implementing international agreements, i.e. IPRs and their suspension are limited to national territory. In \textit{Bananas} the arbitrators stressed that the authorization “to suspend certain TRIPS obligations would concern Ecuador only” and “does not exonerate any other WTO member from abiding by its WTO obligations, including those under the TRIPS Agreement.” This restriction may be a significant limit for the effectiveness of TRIPS retaliation for small developing countries as it limits the degree of retaliation to their domestic market size.\textsuperscript{93} As counterfeit goods may not be exported to other Members, the effectiveness of cross-retaliation depends on the significance of the developing Member’s economy for the IP-protected products of the offending party in much the same way as tariff retaliation depends on the importance of the developing economy as an export market.\textsuperscript{94}

A second international legal limit on the suspension of IPRs is that cross-retaliation under WTO law may be in conflict with other international obligations e.g. those in World Intellectual Property Organisation (WIPO) Conventions which are included as part of TRIPS. However, scholars have argued that WTO law is likely to be favoured in a case of conflict. First, a DSB decision to suspend IPRs following Article 22 DSU is a more specific rule than the general protection of IPRs, hence the former should prevail.\textsuperscript{95} Second, TRIPS is a later agreement than the WIPOs. Thus following customary rules of interpretation, the former should prevail.\textsuperscript{96}

\textsuperscript{92} Spadano (2008) p. 538
\textsuperscript{93} Spadano (2008) p. 536
\textsuperscript{94} Whilst the principle of IP territoriality has been relaxed for the extraterritorial application of national IP laws where countries fear insufficient IP protection of their companies abroad, IP law extraterritoriality only applies to limit the power of suspending such rights and cannot equally be used as a weapon for the retaliating Member to extend its TRIPS suspension beyond its national borders.
\textsuperscript{95} Following the principle \textit{lex specialis derogat generali} denoting that a law governing a specific subject matter (\textit{lex specialis}) is not overridden by a law which only governs general matters (\textit{lex generalis}).
\textsuperscript{96} Vranes (2003) pp. 125-127
Following the principle \textit{lex posteriori derogat priori} denoting that more recent law prevails over an inconsistent earlier law.
An economic limit to the effectiveness of cross-retaliation is the extent to which businesses are able and willing to suspend TRIPS. First, the temporary suspension of TRIPS results in uncertainty impeding the ability of domestic businesses to make reliable investment and business decisions making use of the suspended IPRs. This was recognised by the arbitrators in *Bananas* when they explicitly required that economic actors “should be fully aware of the temporary nature of the suspension of certain TRIPS obligations so as to minimise the risk of them entering into investments and activities which might not prove viable in the longer term”. Second, the suspension of IPRs could disrupt ongoing business relations between enterprises. Some such relationships may for instance depend upon local recognition of IPRs, thus their suspension could trigger contractual problems. Further, some suppliers of IP-protected products from the defendant country may decide to curtail exports during the period of suspension, and alternative sources of supply may be limited. Thus, to the extent that “domestic businesses do not become alternative sources of supply of the products whose IPRs are suspended, the legal monopoly associated with such IPRs will not be diluted and the benefits of the suspension of TRIPS obligations may not ensue”. Practical solutions to some of these problems however exist, e.g. suspending TRIPS for IP categories with low initial investments such as copyrights and trademarks, and choosing patented “products that are reaching the end of their patent life” “so that competitors can quickly enter the market”.

The prospects for future authorisation of cross-retaliation are mixed. Hudec argues that: “the panel’s rather unclear response was encouraging enough to make it worthwhile for developing country officials to think about the possibility of cross-retaliation in dispute settlement cases involving uncured violations.” However, Spadano argues that the difficulties Ecuador – “a rather small developing country suffering huge losses due to the EC banana import regime” – faced in convincing arbitrators suggests that developing countries with large economies would have an even “harder time”. This would limit the effectiveness of cross-retaliation as the importance of market size and know-how suggest that cross-retaliation is an “interesting option” mainly for large, mid-income developing countries like China, India or Brazil.

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98 WTO document WT/DS27/ARB/ECU, 24 March 2000, para. 165  
99 Abbott (2009) p. 11  
100 Spadano (2008) p. 539  
101 Subramanian and Watal (2000) p. 413  
103 Spadano (2008) p. 542  
104 Korotana (2009) p. 2
Nevertheless, Brazil’s request for cross-retaliation has been taken seriously by the USA in negotiations on resolving *US-Upland Cotton*. The cost of TRIPS suspension would be substantial particularly for US copyright/entertainment and pharmaceutical industries, which have hence placed considerable pressure on the US government to reach a suitable settlement with Brazil. Furthermore, the USA fears an adverse precedent if Brazil’s request for were to succeed. The request for cross-retaliation has thus raised Brazil’s bargaining leverage.\(^{105}\)

Cross-retaliation hence seems to have limited benefits for larger developing countries, although gaining authorization to suspend TRIPS may be difficult for them. The next section will evaluate the difficulties specifically Ecuador, as a smaller developing country, may face in using cross-retaliation and alternative strategies for solving *EC-Bananas* within the existing system.

\(^{105}\) Abbott (2009) p. 9
E. Strategies within DSU

The costs of EU non-compliance are mounting both for the plaintiffs through foregone market access and legal costs, and for the WTO by questioning its legitimacy and effectiveness. Spadano suggests that developing countries should seek “intelligent and feasible ways for reforming the DSU remedial system” and “understand the rules of the game properly so that they can be used in their favour”. I will thus evaluate proposals towards solving EC-Bananas within the current system in this section, and possible reforms to DSU for raising compliance in the following chapter.

To increase Ecuador’s leverage in current negotiations, I suggest it more strongly threaten and implement the cross-retaliation measures DSB authorised in 2000 to pressurise the EU into compliance. The EU could introduce a WTO-compliant banana import regime and continue honouring the Cotonou Convention by granting ACP countries higher ODA in lieu of preferential market access.

I. Current situation

1. Futile negotiations?

The present situation is characterised by the difficulty of bringing the EU, ACP and MFN banana exporters into agreement on a new EU banana regime. In February 2009, the EU tabled proposals to lower the current tariff of €176 per tonne to €114 per tonne by 2019, frozen at €136 per tonne from 2011 to 2014. It also called for Ecuador to drop the Bananas case whilst the deal is negotiated. Ecuador has rejected this request, and requires the EU to ‘stick to the tariff deal negotiated in July 2008’ which provided for tariff cuts to €114 by 2016 with an initial cut to €148.

ACP countries are critical of the EU proposal, arguing that it would cost their suppliers €350 million in lost revenues between 2009 and 2016. In response the EU has offered to establish a new banana sector assistance programme with an allocation of €100 million for 2010-2013. ACP governments have rejected this offer as inadequate, arguing that it “doesn’t even scratch

the surface of the needs of our banana growers”.

The economic crisis has added complexity to negotiations as ACP countries ask the EU to commit more financial aid in case effects of the crisis cannot be reversed. They hence demand €500 million as compensation for lowering EU customs duties for MFN bananas. Following talks in May 2009, both sides concluded to “remain flexible” – a result one reporter characterized as “[d]iplomatic speak for ‘no one budged.’”

2. EU implementation difficulties

Due to nested and overlapping international obligations, it has been difficult for the EU to combine its commitments under WTO laws with those under its ACP development agreements. Ongoing negotiations between the EU and Latin American countries suggest that granting higher ODA to ACP countries could allow the EU to make its various legal commitments compatible. The EU’s commitments under successive partnership agreements with the ACP such as the CARIFORUM/EC Economic Partnership Agreement (EPA) require the EU to avoid drastic and rapid cuts in favour of MFN producers. Article 42 EPA commits the EU to “endeavour to maintain significant preferential access” for traditional agricultural exports from “CARIFORUM States for as long as is feasible and to ensure that any unavoidable reduction in preference is phased in over as long a period as possible.”

To make the EU’s development support to ACP countries WTO-compliant, preferential market access could be substituted with ODA. Stiglitz argues that “[a]ssistance for critical industries and their workers is a preferred solution to the maintenance of preference margins … First, delayed liberalization discriminates against developing countries which do not benefit from preferences … [Second,] the maintenance of long term preferences induces beneficiaries to specialize in activities in which they may never be competitive once preferences are removed. This discourages

107 Agritrade.com, Ecuador rejects EU calls to drop banana suit
108 Potts (2009) dw-world.de
However, even if agreement were found roughly along the lines of current proposals, a revamping of the dispute would still be conceivable in the longer term. MFN countries could argue, as Colombia did in its separate complaint in 2007, that the EU’s scheduled in-quota duty of €75 per tonne within a quota of 2.2 million tonnes did not justify levying a higher tariff on all MFN bananas. In order to apply a higher duty, Colombia argued that the EU “should have renegotiated its tariff concession” with potentially-affected banana producing countries, as required by the WTO rules on modifying bound commitments (GATT Article XXVIII ‘Modification of Schedules’), as well as by the EU’s 2001 Understandings on Bananas with the US and Ecuador. Any agreements such as those currently debated would thus not guarantee a long term solution to the case.

110 Freshplaza.com, CARICOM calls on EU to revisit banana tariff proposals
industrial diversification and increases adjustment costs when the preferences are eventually removed.”

The removal of trade preferences should however be gradually phased in while greater ODA is granted by the EU to ACP countries. ODA should cover lower prices to farmers who will face greater competition and uncertainty and support the smooth transition to new industries where ACP countries have a comparative advantage. With “growing populations and facing irreversible declines in employment and income from bananas, [ACP countries] must find new sources of productive activity in which they can be internationally competitive … But they require time for orderly transition if they are to be able to make the necessary adjustments”.

II. Raising implementation pressures

It is fair to assume that the EU has a basic willingness to implement DSU decisions due to considerations of international reputation and because it has an important stake in a rule-based international trading system, being plaintiff under DSU in 79 cases. As the AB has argued, “with the increased interdependence of the global economy … Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, either directly or indirectly.” These factors have arguably contributed to the generally positive compliance record of EU; however it is clear that they have not been strong enough to induce compliance in Bananas. I will hence consider the EU’s costs of non-compliance as affected by international and domestic pressures to determine which strategies are viable for Ecuador in the present circumstances.

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112 Stiglitz and Charlton (2006)
113 Laurent (2006) pp. 440/441
114 Wto.org, Find dispute cases
115 Appellate Body Report, WT/DS27/AB/R, para. 136
1. **International pressure**

Diplomatic pressure on the EU to change its banana regime could be exercised by the plaintiffs during negotiations on the dispute, during Doha negotiations, and during negotiations on other disputes or through other parties.

**a. Negotiations on EC-Bananas**

Ecuador has proved more active than other developing country plaintiffs in *EC-Bananas*. “It pressed the case aggressively at each stage … Even after reaching a transitional settlement, its leaders continued to agitate for Ecuador’s interests, threatening to torpedo the launch of the Doha round”\(^{116}\). Ecuador neither accepted the EU’s offer of increased country-specific quotas despite their obvious inconsistency with the WTO rulings, as did Colombia and Costa Rica; nor has it relied on the US to negotiate on its behalf during the implementation phase of the dispute, as did Guatemala, Honduras, and Mexico. It was aware that its interests diverged from the US regarding especially the system for allocating EU import licenses, which was crucial to Ecuador’s own trading companies. It thus refused to ratify the settlement the EU and USA reached in 2000, threatening to challenge it before a second compliance panel unless important modifications were made.\(^ {117}\)

The success of this strategy is evidenced both by Ecuador’s 2001 settlement and the EU’s 2006 reforms. The 2001 agreement conferred significant benefits to Ecuador compared to its regional competitors as the EU had agreed to abolish country-specific quotas. From July 2001 to December 2002, Ecuador’s share of the EU banana market rose sharply while the shares of Costa Rica and Colombia stagnated and those of its other Latin co-complainants fell. The EU’s transition to a tariff-only regime further allowed Ecuador to gain better market access as the lowest-cost producer of bananas. Ecuador pushed this regime by insisting that there be a date certain for transition.\(^ {118}\) It thus seems fair to conclude from the past successes that Ecuador should maintain its proactive negotiation strategy of pushing for a more rapid phase-in of MFN tariff reductions.

\(^{116}\) McCall Smith (2006) pp. 283-284


b. Doha negotiations

*EC-Bananas* can adversely affect Doha negotiations for the EU both by reducing Members’ cooperation if they perceive the EU not to be sticking to its commitments, and by potentially granting Ecuador leverage to elicit specific concessions regarding the banana regime. Ecuador used Doha negotiations to promote its *Bananas* goals with some success in the past by demanding special institutional guarantees that the EU would honour its commitment to comply fully with WTO rulings by 2006 in return for its support of EU’s interests. Specifically, Ecuador made its support of two waivers for the Cotonou pact and for the transitional banana regime contingent on the creation of an *ad hoc* arbitration procedure to guarantee a timely review of whether the EU’s banana regime (for 2006 and beyond) would diminish the market access of Ecuador and other Latin American banana exporters.\(^{119}\) Ecuador’s successful establishment of this institutional innovation indicates the degree of leverage it can gain through Doha negotiations. There is, however, not much scope for this strategy at present. Although the declaration at the end of the G20 summit this year included a pledge to complete Doha negotiations, the next “scaled-down” WTO ministerial conference in November 2009 will not be a negotiating session.\(^ {120}\)

c. Other disputes or parties

The EU does not currently have a complaint against Ecuador before the WTO. However, the USA, Ecuador’s co-plaintiff, currently has 31 cases against the EU, which may give the USA options to trade off concessions by the EU in *Bananas* against US concessions in another dispute. Ecuador however only has limited scope to influence US policy as the US and Ecuador’s interests in *Bananas* differ. There may also be tension in US-Ecuadorian trade relations due to a current case brought by Ecuador against the USA concerning anti-dumping measures on shrimp.\(^{121}\) Third, the fact that the USA has other controversial cases which demand negotiations with the EU such as the poultry meat and beef hormones cases may make negotiations on *Bananas* a lower priority for it.

\(^{119}\) McCall Smith (2006) p. 259
\(^{120}\) according to the chairman of the General Council on 26 May 2009.
\(^{121}\) Wto.org, *Disputes by country*
A more successful strategy may thus involve Ecuador encouraging other MFN banana exporters to take a hard stance towards the EU. So far, these have largely deferred to Ecuador and the USA to pressurise the EU. For example, Ecuador’s co-plaintiffs could request authorisation to retaliate, whilst those not party to the dispute could consider litigation themselves, preferably using ‘accelerated procedures’ as requested by Colombia. Colombia challenged the EU’s banana import rules in 2007 in order to move from its third-party observer role to a party able to impose retaliatory sanctions.\textsuperscript{122} It sought to subject the case to accelerated procedures, arguing that “as a developing country heavily dependent on bananas… [it could] ill-afford yet another lengthy dispute settlement proceeding conducted according to standard time frames”.\textsuperscript{123} The same strategy should thus be adopted by other banana exporters.

2. Domestic pressure

Domestic pressure for WTO-compliance tends to be most effective through organised lobby groups with clear-cut demands. The most obvious domestic victims of the EU banana regime are banana consumers. The free-rider problems of collective action by the broad public when bananas make up only a tiny portion of a household’s budget make this an unlikely source of support for Ecuador. The DSU retaliation system provides an alternative form of raising domestic pressure by allowing plaintiffs to raise tariffs on non-compliant Members’ products. Ecuador’s retaliation could thus induce EU producers to lobby the EU towards a WTO-compliant banana regime. Having concluded that standard tariff retaliation is not effective for Ecuador, the next section will discuss the potential impact that Ecuador’s use of cross-retaliation and carousel retaliation could have on EU compliance.

a. Cross-retaliation

Legally, Ecuador may still use its retaliation rights granted in 2000 as the DSB has never withdrawn Ecuador’s right to retaliate.\textsuperscript{124} Ecuador has used its authorization to cross-retaliate to

\textsuperscript{122} Ictsd.net, Bridges
\textsuperscript{123} Ictsd.net, Bridges
\textsuperscript{124} Accelerated procedures would allow the panel to issue its report within two rather than six to nine months after panel composition, following Article 4.8 DSU.

Ecuador could take the position that it may continue to retaliate as authorized in 2000. The EU could object and file a new case adducing legal arguments as to why Ecuador was violating its WTO obligations (as it did in the US/Canada beef hormones retaliation cases). As in all WTO disputes the adjudicators would ultimately decide the parties may interpret and apply their WTO rights and obligations.
its advantage in the past regarding the 2001 Understanding on Bananas.\textsuperscript{125} It also enhanced the legitimacy of its actions and gained support among WTO members when it refused to use its retaliation rights until a WTO compliance panel had ruled on the legality of the revised European regulations. Continuing to threaten cross-retaliation may thus further enhance its leverage in negotiations.\textsuperscript{126}

However, as outlined in the general evaluation of the effectiveness of cross-retaliation, the practical harm to the EU through TRIPS suspension by Ecuador depends crucially on domestic firms’ willingness to suspend IPRs. Although suspension is authorised for sectors particularly sensitive to European firms, including industrial design patents, copyrights in the music industry, and geographical indications for alcoholic beverages\textsuperscript{127}, Vranes’ evaluation finds that potential for beneficial SCOO is in fact limited. As regards sound recordings and, more rarely, industrial designs, the problem arises that ‘such works will usually include creative contributions from nationals of different states’. Regarding European geographical indications, Vranes argues that it is not clear how their suspension would benefit Ecuadorian businesses.\textsuperscript{128} Thus, whilst Ecuador should make use of all its retaliation options to gain leverage, we should be under no illusion that this would in fact be successful in inducing compliance.

\textbf{b. Carousel and increasing retaliation}

Carousel retaliation was contemplated by the USA in 1999 when it was authorised to suspend concessions vis-à-vis the EU. It mandated USTR “to periodically revise the list of products subject to retaliation when another country fails to implement a [WTO] dispute decision” in order to “exert more pressure on a trading partner to comply with a WTO ruling.”\textsuperscript{129} Ecuador in its 2002 DSU reform paper also argues that carousel retaliation could help minimise economic injury to domestic traders relying on products for which tariffs are raised, particularly when it is possible that compliance will not occur promptly and hence injury to domestic users of protected products will be significant.\textsuperscript{130} Carousel retaliation has not been implemented to date, but USTR “credits the threat of action under carousel authority with helping [towards resolving] the banana case, and says that carousel authority might be used as leverage in the

\textsuperscript{125} Outlined under E.II.1.a
\textsuperscript{126} McCall Smith (2006) pp. 283-285
\textsuperscript{127} McCall Smith (2006) pp. 283-285
\textsuperscript{128} Vranes (2003) p.127
\textsuperscript{129} Sek (2002) p. 1
\textsuperscript{130} WTO document TN/DS/W/9, 8 July 2002, p.3
future.”\textsuperscript{131} It may thus be a strategy the US could further pursue. For Ecuador, however, even full suspension of EU imports would insufficiently hurt the EU, thus limiting Ecuador’s scope to use carousel retaliation. Furthermore, carousel retaliation is politically and legally controversial, as demonstrated in 2000 when the EU requested legal consultations on it.\textsuperscript{132}

Another strategy within the current DSU for tariff-retaliation is gradually increasing sanctions up to the level of nullification or impairment authorised. The strong psychological effect of this strategy was demonstrated in the FSC case where the duty the EU imposed on US products started at 5\% and was increased by 1\% each month. “The monthly change focused attention on the case each month and the impending increase, even if small, created an incentive to act so as to forestall it. In US congressional debates on the FSC implementation legislation … some members of Congress have made this point.”\textsuperscript{133} Again, Ecuador’s market size is too small to implement this tariff retaliation strategy. However, it could attempt to encourage the USA towards considering it in \textit{Bananas}.

\section*{III. Conclusion}

Ecuador has been very active and successful compared to its market size in using the WTO rules and negotiations “to punch above its weight” in the multilateral trade system.\textsuperscript{134} It “threatened cross retaliation, challenged the US-EU settlement, and held the waivers hostage”\textsuperscript{135} to achieve innovative retaliation rights and to ensure its interests were respected in negotiated agreements. It is thus evident that WTO rules have been somewhat successful and that Ecuador should maintain its aggressive strategy. Further, it could attempt to encourage the

\textsuperscript{131} Sek (2002) p. 1
\textsuperscript{132} The EU’s complaint did not proceed to the panel stage. It claimed that carousel retaliation was illegal as it would affect a larger volume of trade than authorized by the WTO, and that it was “fundamentally at odds with the basic principles” of DSU. Article 3.2 DSU, sentence 1, states: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system”. As the strength of carousel retaliation derives precisely from its unpredictability, this may run counter to that aim. However, if carousel retaliation enables enforcing DSB decisions, it is arguably ultimately more a means towards security and predictability of the trading system than its absence would be. (European Commission report 2000, p.3; in Charan Devereaux, Robert Z. Lawrence, Michael Watkins, \textit{Case Studies in US Trade Negotiation: Resolving disputes} p. 78)
\textsuperscript{133} Controversy around carousel retaliation is also demonstrated in reform proposals during DSU review negotiations: the USA sought a footnote to Article 22.7 explicitly allowing carousel retaliation, whilst the EU sought one explicitly disallowing it. Thailand, the Philippines and Australia sided with the EC by requiring that SCOO measures cannot be unilaterally changed without the arbitrator’s approval. (Hauser and Zimmermann (2003) p. 243)
\textsuperscript{134} Davey (2005) p. 15
\textsuperscript{135} McCall Smith (2006) p. 257
\textsuperscript{135} McCall Smith (2006) pp. 284-285
USA to raise pressure on the EU for compliance. However, the failure to induce compliance over nearly 15 years, the differences in interests between the US and Ecuador, and the limits to what Ecuador can itself actively do to achieve compliance indicate that current WTO rules do not suffice to resolve the case.
F. Reform of DSU

Political statements about DSU have claimed that the “operation of the dispute settlement system in the WTO has been a remarkable success”; “the most important principle for reforming the DSU should be not to ‘do any harm’”\(^1\)\(^{136}\); and what needs improvement? “Not much”\(^2\)\(^{137}\). However, while most Members feel the system is working well, many also realize there is room for improvement.\(^2\)\(^{138}\) I will thus evaluate proposals to tackle some of the sources of the enduring nature of EC-Bananas.

I. Institutional reform

A 1994 Ministerial Decision provided that DSU should be reviewed by 1\(^{st}\) January 1999. DSU review started in 1997 and deadlines to complete the review have been continually postponed since. A major difficulty in agreeing on concrete reforms is that amending DSU articles requires the consensus of all 148 WTO members, sporting heterogeneous interests due to different market structures, different political clout, different experiences with the system and key judicial decisions which “have created controversial views on specific aspects of the system that have become increasingly difficult to bridge.”\(^2\)\(^{139}\) Further, these positions are subject to permanent change as “Members continuously gather new experience in new cases and new reports.”\(^3\)\(^{140}\) For example, the USA in reform negotiations 2002-2004 switched from proposals to improve the transparency of dispute settlement to submissions transferring influence from adjudicative bodies to parties of disputes, reflecting the USA’s new defensive stance in disputes at the time.\(^4\)\(^{141}\) Finally, the challenge of agreeing on DSU reform is compounded by the fact that changes are likely only to be adopted after agreement has been found on the substantive WTO agreements – Members will first wish to agree on ‘what’ they are bound to, before they determine the ‘how’. As substantive negotiations are experiencing a current impasse, DSU negotiations are unlikely to find conclusion soon.

\(^{136}\) Evans and Pereira (2005) pp. 252-253 quoting from The Future of the WTO, Addressing institutional challenges in the new millennium, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, p. 254


\(^{138}\) Evans and Pereira (2005) p. 253

\(^{139}\) Zimmermann (2005) p. 49

\(^{140}\) Zimmermann (2005) p. 49

\(^{141}\) Zimmermann (2005) p. 46
These general difficulties are raised by the contentiousness of SCOO reform proposals. When a single country can veto any given change, even changes that are perceived as “innocuous and long overdue become a real challenge”\textsuperscript{142}, never mind contentious proposals such as those addressing the enforceability of DSU decisions. The controversy over SCOO reform is demonstrated, for example, in the fact that the proposals of developing countries run counter to the USA and Chile’s proposals for “improving flexibility and member control in WTO dispute settlement”\textsuperscript{143}. However, evaluating SCOO reform proposals should nonetheless be valuable given that DSU is what most commentators view as the unique strength of the WTO and thus an element whose viability should be maintained. DSU reforms to that end may well find codification when difficulties mount, notwithstanding current opposition.

II. Judicial activism

DSU can also be reformed in practice through reinterpretation of the existing treaty. We have seen multiple examples of this in the past, e.g. in \textit{Bananas} the panel resolved the question of whether it could authorize retaliation when the losing party had modified its offending practice.\textsuperscript{144} The scope for judicial activism is determined by the ambiguity of DSU and the extent to which principles of public international law can be used in its interpretation.

DSU constitutes \textit{lex specialis}\textsuperscript{145}, excluding the application of general principles of international law on issues where there are specific provisions in DSU. If WTO law were “self-contained”\textsuperscript{146}

\begin{footnotes}
\item[142] Shirzad (2000) p. 6
\item[143] Hauser and Zimmermann (2003) p. 3
\item[144] Shirzad (2000) p. 6
\item[145] Similarly, in \textit{Shrimp-Turtle} the AB resolved some ambiguity surrounding the authority of panels under Article 13.2 of the DSU to consider amicus briefs.
\item[146] The International Law Commission (ILC) has codified the principle of \textit{lex specialis} in Article 55 of the Draft Articles on State Responsibility: “These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law.”
\item[147] Defined and accepted as public international law in the \textit{Case Concerning United States Diplomatic and Consular Staff in Tehran}: The International Court of Justice held that diplomatic law was a self-contained regime: “The rules of diplomatic law, in short, constitute a self-contained regime”. In the event of a breach of a diplomatic law an injured party was not permitted to pursue a remedy other than the one available in the diplomatic law; in I.C.J. Reports 1980 p. 3; from Korotana (2009) p. 3. However, the concept is itself controversial, e.g. an ILC report suggests that no such entities as self-contained regimes exist, and that no specialized international legal regime can be created outside the framework of general international law: the notion of self-contained regimes ‘is simply misleading’ and ‘there is no support for the view that anywhere general law would be fully excluded’. It suggests that ‘special regimes’ are a more appropriate term. (by M. Koskenniemi, \textit{Study on the Function and Scope of the Lex Specialis Rule and the Question of ‘Self-Contained Regimes’}, UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1, 2004). From Lindroos and Mehling (2006) p. 858
\end{footnotes}
it would be completely insulated from the application of general principles of international law except where explicitly permitted in DSU.\textsuperscript{147} Mavroidis and Korotana argue that WTO law could be construed as self-contained because it “is centred on the idea of trade liberalization”, i.e. it is underpinned by principles other than public international law.\textsuperscript{148} However, there are also strong grounds for arguing the opposite, that there is considerable scope for DSB to draw on principles of public international law to interpret ambiguities and gaps in DSU. Most importantly, there is no provision in DSU that explicitly insulates it from public international law. This in itself has been construed as an implicit acceptance of the application of international law.\textsuperscript{149} Further, Article 3.2 DSU explicitly permits the interpretation of “the existing provisions of [the covered] agreements in accordance with international rules of interpretation of public international law”\textsuperscript{150}. Finally, the WTO’s historic development under customary law or treaties suggests the relevance of principles of public international law.

The AB’s judgements support this reasoning. It argued that covered agreements must not be interpreted “in clinical isolation from public international law”\textsuperscript{151} in \textit{Shrimps-Turtles} litigation\textsuperscript{152} and that there is no basis “to exclude reference to the broader rules of customary international law in interpreting a claim properly before the Panel” in \textit{Korea–Measures Affecting Government Procurement}\textsuperscript{153}. In examining proposals for DSU reform I will hence also consider the degree to which these proposals could be construed as within DSU and thus implemented without formal DSU reform.

III. Areas of reform

The proposals that have been introduced cover a plethora of aspects of DSU. This thesis will focus on those most relevant for reducing the length of disputes and for reducing developing country losses. The lengthiness of \textit{EC-Bananas} seems the most important to remedy, as it is causing losses to Ecuador through continuing limited access to the EU market, through

\textsuperscript{147} Mavroidis (2000) p. 765
\textsuperscript{148} Korotana (2009) p. 3
\textsuperscript{149} Pauwelyn (2001) p. 540
\textsuperscript{150} Pauwelyn (2001) p. 540
\textsuperscript{151} WTO document WT/DS2/AB/R, p.16, para.17
\textsuperscript{153} Further: “We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreement in accordance with customary rules of interpretation of public international law.” In Panel report, WT/DS163/R, DSR 2000, VIII: pp.3757-3758, para.7.101, in Korotana (2009)
Ecuador’s legal costs and it furthermore has systemic impacts by potentially reducing the perceived authority of the WTO and by impeding trade liberalisation. DSU itself “emphasizes that prompt settlement of disputes is essential to the effective functioning of the WTO.”\textsuperscript{154} The two areas in which time lags are possible under DSU are during litigation on the initial complaint itself, and during implementation proceedings thereafter.Whilst time schedules for the initial litigation phase until the adoption of the report by DSB are arguably tight, scope for acceleration exists during the implementation phase.\textsuperscript{155}

After DSB passes a verdict, a losing respondent must rectify its policies within a reasonable period of time, usually negotiated between the two sides. However, if the losing side does not implement the recommendations during that time, it causes continued economic losses to the complainant, as experienced by the plaintiffs in \textit{Bananas}.\textsuperscript{156} There thus seems to be room for improving incentives towards rapid compliance. As remedies aim to redress illegality and act as a credible threat against further violations\textsuperscript{157}, the primary focus of the reform proposals I present will be on reforming remedies. Remedies will be evaluated based on their effectiveness at inducing compliance and on the fairness of the result, where effectiveness (i.e. inducing compliance) is seen as the primary goal of DSU.\textsuperscript{158} It is evaluated by gauging the incentive for compliance “on the basis of the cost inflicted on the infringing government (more is better)”.\textsuperscript{159} Fairness is evaluated by gauging “the readjustment of concessions on the basis of the expected revenue” generated by the injured government.\textsuperscript{160} This includes taking into account the economic cost retaliation imposes on the complainant. Further considerations will be the tension between retaliation and key objectives of the WTO Agreement, the circumstances that retaliation may undermine the stability and integrity of the WTO Agreement as a treaty, and the harm retaliation does to private parties of the responding Member as well as of the complaining

\textsuperscript{154} Narasaiah (2008) p. 79

\textsuperscript{155} Thus, DSU sets out in great detail the procedures and timetable to be followed (Annex I.).

\textsuperscript{156} As regards the initial litigation phase, the time taken from the establishment of the panel by the DSB to adoption of a report should generally not exceed nine to twelve months (see Annex I.). Whilst there is a risk that “the importer switches to another exporter in the meantime” and that loss of market may be particularly significant for developing countries, who often depend on a narrow export basket, the DSU time schedule is arguably tight and scope for further contraction is limited.

\textsuperscript{157} Narasaiah (2008) p. 179

\textsuperscript{158} Mavroidis (2000) pp. 763–764

\textsuperscript{159} This is in line with the ranking of DSU aims of many contemporary scholars. See Spadano (2008) p. 9, Davey in Jackson et al. (2002) p. 247 and Jackson (2004) pp. 117–118. They reason that “Whenever a violation occurs, the goal of a rule-oriented dispute settlement system must be to stop the violation.” (Spadano (2008) p. 9)

\textsuperscript{160} Bagwell, Mavroidis and Staiger (2004) p. 16
Proposals have been categorized as those presenting alternatives to retaliation, those improving retaliation, and those improving sanctions in general.

1. Alternatives to retaliation

   a. Financial compensation

Compensation for non-implementation of a DSB ruling is referred to in Article 22.1 DSU as voluntary and negotiated by both parties to the dispute (Box 4). Compensation may occur both by reducing tariffs and through financial payments. As trade compensation faces significant practical drawbacks and is not much discussed in the literature, I will focus on financial payments. Mandatory monetary damages are neither explicitly prohibited nor allowed in DSU. Voluntary compensation has been used only once in US Copyright “where the US made a cash payment to the EC to excuse three years or so of non-compliance” and has otherwise only been used “to excuse compliance for a limited period of time.”

Box 4: Article 22.1 DSU

“Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.”

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162 For more information see Bronckers and van den Boeck (2005) pp. 107-108. They argue that compensation “in the classic GATT or WTO sense” does not refer to financial compensation but denotes that the non-complying country will offer additional trade concessions (e.g. a tariff reduction). “The advantage of trade compensation, as opposed to retaliation, is that compensation does not restrict trade but actually opens up trade”. However, compensation is hardly ever offered. “In other contexts where WTO rules also envisage (trade) compensation, for instance in the context of safeguards or tariff modifications, it has also proven to be very difficult for countries to find and offer compensatory reductions of trade restrictions”. The reasons are:
   - Domestic opposition: “[i]nnocent bystanders in the importing country (say, car manufacturers) will oppose any proposal from their government to expose them to more foreign competition as a means of compensating another country for problems created in a different sector (say, agriculture). This, they will argue, is not and should not become their problem.”
   - Enforcement problems: the “risk is that the country not complying with a WTO-ruling will not comply with this obligation either.”

As regards considerations of ‘fairness’, “reparation of injury is rather unlikely.”

163 Collins (2009) p. 228, see also footnote 19.
164 Davey (2005) pp. 11-12
165 Davey (2005) pp. 11-12
As voluntary compensation has thus proved ineffective, mandatory compensation may be necessary. It could address the problems observed with retaliation as its effectiveness is independent of the complainant’s market size, it does not induce financial injury to the retaliating nation, it does not run counter to the trade liberalisation objectives of the WTO, and it does not harm agents in the losing nation that seek to export to the winning complainant.\textsuperscript{166} Further, it would allow a degree of rebalancing that could not be achieved with retaliation.\textsuperscript{167} However, “WTO panels and the Appellate Body have no powers under the current law to award financial compensation to a party that has prevailed in WTO dispute settlement proceedings.”\textsuperscript{168} Such powers cannot be derived from customary international law on the grounds, for instance, that DSU does not explicitly exclude the award of financial damages. As DSU sets forth its own system of remedies, Bronckers and van den Broek argue that the relevance and application of general principles of public international law are limited.\textsuperscript{169}

Ecuador and LDCs have thus proposed reforms to DSU\textsuperscript{170} to explicitly provide for mandatory financial compensation for WTO violations, e.g. by allowing “a prevailing party to choose between suspension of concessions and receipt of a periodic monetary payment”\textsuperscript{171} or by introducing an automatic obligation to pay compensation until a measure is WTO compliant, an alternative compensation has been negotiated, or retaliatory measures have been implemented. The enforceability of such proposals has been questioned due to the principle of state sovereignty. There is “no way to ensure that a monetary award could be enforced without some kind of retaliatory sanction, resort to which then renders monetary damages meaningless”.\textsuperscript{172} Conceivably, a recalcitrant responding Member refusing to implement a DSB ruling may likewise refuse paying monetary compensation.\textsuperscript{173} Further, separate domestic legislative approval may be necessary for such payments which could make their enforcement difficult.

\textsuperscript{166} Collins (2009) p. 228, referring to other authors, see footnote 17.
\textsuperscript{167} Bronckers and van den Broek (2006) p. 60 [book]
\textsuperscript{168} Bronckers and van den Broek (2006) p. 123 [journal]
\textsuperscript{169} Bronckers and van den Broek (2006) p. 123 [journal]
\textsuperscript{170} WTO document TN/DS/W/9 p. 5, TN/DS/W/17 point 13, TN/DS/W/33 point 4
\textsuperscript{171} Davey (2005) p. 14
\textsuperscript{172} Collins (2009) p. 242, footnote 92
\textsuperscript{173} Malacrida (2008) p. 17
However, we have seen in *Bananas* that implementation of DSB rulings is dependent not only on willingness but also on the ease of implementation. We have seen that international reputation and preserving the functionality of DSU are important incentives for DSB compliance. Thus, to the extent that financial compensation by the defendant is more easily implemented than a WTO-compliant reform, it seems realistic that monetary compensation would be paid.\(^{174}\) Where implementation of monetary compensation is difficult, several options have been considered in the literature. Malacrida suggests that the complainant may “seize physical or financial assets of the responding Member, or of the Member’s nationals, that are within the complaining Member’s jurisdiction”\(^{175}\) such that the value of the assets corresponds to the compensation due or such that the defendant is pressured into paying compensation. Malacrida and Davey also suggest requiring Members to contribute to a country-specific, WTO-administered “dispute settlement liability fund”\(^ {176}\) “from which damages could be paid without specific legislative approval”\(^ {177}\) in a manner similar to the payment of civil judgments against governments.\(^ {178}\) Whilst a practical difficulty could be to determine “the level of contributions that would be necessary to secure payment of monetary compensation”\(^ {179}\), US Congress’s authorization of ca. $50 million for the US to pay “damages” in trade cases\(^ {180}\) is an example of the concept’s use and acceptance.

Another solution is for Members to allow the enforcement of multilaterally agreed compensation in domestic courts. Magnus suggests that DSB decisions should have direct effect: “Members shall provide for decisions adopted by the DSB to have automatic and conclusive effect in domestic legal proceedings of all types, constraining the behaviour of administrative/executive agencies to the same extent as would decisions issued by domestic courts.”\(^ {181}\) He reasons that while “the ability of the WTO to adopt reforms is mixed, it is important to focus on the role of national governments in addressing and remedying some of the most significant weaknesses in the system on their own.”\(^ {182}\) Malacrida argues that “this

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\(^{174}\) Further, experience in other international trade law disputes shows that governments are willing and able to pay financial awards issued to them. E.g. state-investor disputes in ICSID or NAFTA; claims paid by Iran and USA to private interests on the basis of awards by the Iran-United States Claims Tribunal; from Bronckers and van den Broek (2006) p. 59

\(^{175}\) Malacrida (2008) p. 17

\(^{176}\) Malacrida (2008) p. 17

\(^{177}\) Davey (2005) p 14

\(^{178}\) E.g. US practice described at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/10mciv.htm

\(^{179}\) Malacrida (2008) p. 17

\(^{180}\) Davey (2005) p. 14

\(^{181}\) Magnus (2005) p. 250

\(^{182}\) Shirzad (2000) p. 7
would require a degree of “hand-tying” that few Members are likely to be comfortable with agreeing to *ex ante*, given the uncertainty surrounding the amount of future dispute settlement liabilities.”\(^{183}\) Nonetheless, he argues that Canada has accepted this kind of mechanism in the North American Free Trade Agreement (NAFTA) side agreement on the environment, the North American Agreement on Environmental Cooperation, and that thus this mechanism may be gaining international acceptability.

Regarding the effectiveness of monetary compensation, one critique argues that financial sanctions may be weaker than retaliation if they allow rich Members to ‘buy’ their way out of compliance. ‘Buying’ non-compliance is less likely with trade retaliation as it targets domestic lobby groups which have political clout. The size of the ‘buying out’ risk depends notably on the amount of monetary compensation due.\(^{184}\) Where it is low, a plaintiff could choose tariff retaliation instead. However, even the payment of small sums may be politically difficult for offending nations. E.g. the payment of compensation by the EC to Ecuador for a regime that raises domestic banana prices could be exploited by Euro-sceptic parties perceiving excess profligacy by the EU. Moreover, Davey argues that despite potential problems with monetary compensation, “the right to receive a payment will still be more valuable than the never-used and probably unusable right to suspend concessions.”\(^{185}\)

In terms of the reform feasibility of mandatory payments, it is encouraging to have seen the case for making compensation a more attractive alternative to retaliation not only in developing country proposals but also in those of the EU.\(^{186}\) It derives additional legitimacy from its long-standing debate under GATT and the WTO since 1966\(^{187}\) and from the tradition of reparations for injury in public international law. Hence, I believe that among DSU reform proposals this is one of the more viable concepts.


North American Agreement on Environmental Cooperation Annex 36A.2: “Canada shall adopt and maintain procedures that provide that: (a) subject to subparagraph (b), the Commission, at the request of a complaining Party, may in its own name file in a court of competent jurisdiction a certified copy of a panel determination; … (c) when filed, the panel determination, for purposes of enforcement, shall become an order of the court”

\(^{184}\) Malacrida (2008) p. 18

\(^{185}\) Davey (2005) p. 14

\(^{186}\) WTO document TN/DS/W/1; from Zimmermann (2006) p. 238

b. Suspension of non-trade rights

To incentivise compliance, suggestions have been tabled to suspend rights to voting in DSB or to recourse to DSU.\(^\text{188}\) These would entail no concerns about trade contraction\(^\text{189}\) and could be highly effective in inducing compliance. As regards DSU rights suspension, even “in the case of members that have mostly defensive commercial interests, the prospect of a suspension of the right to a panel might possibly induce compliance … [because it] might trigger opportunistic behaviour on the part of other Members.”\(^\text{190}\) It could certainly be a strong incentive for compliance in \textit{EC-Bananas} given that the EC currently has 79 cases pending as complainant.\(^\text{191}\) However, arguably the suspension of such rights may be construed as “disproportionate” countermeasures and should only be considered when a Member persistently fails to comply with WTO rulings.\(^\text{192}\) Further, it may be problematic that there are no means of varying the intensity of such remedies. Thus, the harshness of the sanction may lead to the conclusion that the reform feasibility of this proposal is low.

2. More effective retaliation

“[N]otwithstanding a number of concerns many Members have about retaliation, their discussions in the context of the DSU negotiations have tended to focus, not on replacing retaliation by another enforcement mechanism, but on reforming it.”\(^\text{193}\) Retaliation has the advantage that a “complaining Member has undecided and exclusive jurisdiction to enforce a multilaterally authorized suspension of concessions or other WTO obligations”\(^\text{194}\) and thus retaliation is not dependent on the cooperation of the responding Member.

a. Simpler use of cross-retaliation

Developing countries have requested that they always be able to seek authorization for SCOO in the sectors of their choice.\(^\text{195}\) The usual procedure for cross-retaliation authorization is for

\(^{189}\) Bronckers and van den Broek (2006) p. 51 [book]
\(^{190}\) Malacrida (2008) p. 18
\(^{191}\) Wto.org, \textit{Disputes by country}
\(^{193}\) Malacrida (2008) p. 17
\(^{194}\) Malacrida (2008) p. 17
\(^{195}\) see Annex VII. ‘Simpler use of cross-retaliation: Suggested amendments to DSU’
Members to prove that same-sector or same-agreement SCOO is either not practicable or not effective and that circumstances are “serious enough” to allow cross-retaliation (Art. 22.3(c) and (d) DSU, Box 5). Ecuador’s experience in Bananas shows that the burden of proof for cross-retaliation may be “quite onerous”. Facilitating the authorisation of cross-retaliation could thus reduce litigation costs, allow faster retaliation and reduce retaliation costs in cases where cross-retaliation would otherwise not have been granted.

**Box 5: Article 22.3 (c) and (d) DSU**

“...In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures: …

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

d) in applying the above principles, that party shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations;”

In Bananas, facilitating recourse to cross-retaliation could motivate Ecuador’s co-complainants to seek authorisation for retaliation to support their and Ecuador’s requests. However, Spadano cautions that “it does not seem likely that this proposal will gain support among developed country Members” in DSU reform, especially due to the proposal’s particular benefit to large developing countries. The USA, for example, is likely to be sceptical due to Brazil’s current DSU request to suspend IPRs of US corporations in US-Upland Cotton. Ecuador may thus be advised to concentrate political capital on other SCOO reforms such as financial compensation and transferable remedies.

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196 WTO document TN/DS/W/19
197 Larger developing countries such as Brazil, India or China may otherwise have problems convincing the judges of the ‘practicability and effectiveness’ criteria for authorisation.
198 Spadano (2008) p. 542
b. Transferable remedies

This popular proposal among developing countries\(^{199}\) suggests that upon authorisation of retaliation, Members may jointly undertake SCOO. Allowing SCOO rights to be transferable via negotiations or auctions\(^{200}\) would enable a more efficient allocation of those rights to developing countries best able to benefit from them, and would allow small developing countries such as Ecuador to ensure retaliation to the full extent authorized where they do not have the “capacity to effectively suspend concessions to the infringing Member”\(^{201}\). It would also allow a “[b]etter readjustment of concessions, since the affected Member would be able to obtain a tangible benefit in exchange for its right to suspend.”\(^{202}\)

Some argue that transferable remedies are compatible with the current DSU text by referring to principles of public international law.\(^{203}\) For example, Article 54 of the Draft Articles on State Responsibility of the International Law Commission (ILC)\(^{204}\) contains the remedy of “collective countermeasures”.\(^{205}\) The legitimacy of collective countermeasures in international law is based on the assumption that multilateral agreements have a multilateral effect in the event of their violation\(^{206}\); As a breach impairs the interests of all other Members, collective measures are required as a last resort remedy. However, state practice in international law suggests that countermeasures are available only to the injured parties due to the concept of

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\(^{199}\) First suggested by developing countries in 1965 as a reform to the GATT dispute settlement mechanism; in 1999 by India; in 2002/2003 by Mexico (TN/DS/W/23 and TN/DS/W/40), by the African Group (TN/DS/W/15, No. 6, and TN/DS/W/42, No IX), and by the LDC Group (TN/DS/W/17).

\(^{200}\) Bagwell, Mavroidis and Staiger (2004) pp. 2 & 16 and Bagwell, Mavroidis and Staiger (2007) p. 331 argue in favour of auctions in order that retaliation rights are “efficiently allocated to the WTO Member who values this right most highly.” They discuss different auction designs depending on the primary purpose of retaliation, finding that the basic auction in which the violating Member may not bid is best if DSU’s primary aim is to induce compliance.


\(^{203}\) Korotona (2009) p. 196

\(^{204}\) The ILC was established by the United Nations to promote “the progressive development of international law and its codification.”, see United Nations General Assembly Resolution A-RES-174(II), on 21 November 1947, and Statute of the International Law Commission, Art. 1.1

\(^{205}\) Article 54 ILC about “Measures taken by States other than an injured State”: “This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.” Article 48 is about “Invocation of responsibility by a State other than an injured State”; from Korotona (2009) p. 203

locus standi²⁰⁷. E.g. in Military and Paramilitary in and against Nicaragua the International Court of Justice (ICJ) ruled that third states could contribute in countermeasures but rejected the United States’ claim to have unilateral rights against Nicaragua.²⁰⁸ This suggests that unilateral countermeasures by third states are prohibited in international law but does not rule out collective action under a treaty arrangement. Thus, collective retaliation may be interpreted as within the current DSU. Of-course, as with many proposals outlined here, codification would significantly strengthen its legitimacy. The proposal is likely to be opposed by developed country Members as it is primarily targeted at retaliation against them. However, the strong support across developing countries makes this a proposal they could jointly push in negotiations.

3. Proposals applicable under both regimes

a. Early SCOO authorisation

Diego-Fernández calculates, based on the annual retaliation value awarded to Ecuador in 2000 and ignoring legal costs, that a country typically incurs losses of ca. $550 million until its counterparty implements WTO-compliant measures, a further $110 million if it does not implement WTO-compliant measures, and another $50–125 million if the counterparty implements a new measure which remains WTO-noncompliant.²⁰⁹ A Mexican proposal thus seeks to reduce the time a complainant must wait for WTO compliance through early determination of non-compliance and early implementation of sanctions. To enable a timely determination of the level of nullification of impairment, the proposal would allow SCOO arbitration during the panel stage, after the provisional report, or at any point after report adoption by amending Art. 22.1 and 22.2 DSU²¹⁰ such that compensation or retaliation is available if there is no immediate compliance.

²⁰⁷ ‘locus standi’: individual member states, having suffered no injury to themselves, do not have the independent or inherent right to bring claims for breaches of the mandate agreement; from Korotana (2009) p. 202
²⁰⁸ Nicaragua v. United States 1986, ICJ Reports 14, paras. 146-149
²⁰⁹ Similarly, in South West Africa the ICJ held that Liberia and Ethiopia had no legal interest in South Africa’s treatment of the inhabitants of Namibia although both Liberia and Ethiopia were members of the League of Nations, and as a consequence had certain rights and obligations under the mandate agreement between the League of Nations and South Africa;
²¹¹ Box 4 and Annex VI.
The advantages of this proposal are incentives for prompt and effective compliance (i.e. fewer reforms inconsistent with WTO obligations), as sanctions will be imposed throughout the negotiation and implementation periods, until the measure in question is made WTO-compliant. Further, negotiations are encouraged and facilitated through better information as Members are aware of the level of nullification and impairment before the report is officially adopted. It has been criticised that it may be difficult to rapidly calculate the level of nullification and impairment. A solution Bronckers and van den Broek suggest is using a “liquidated damages formula” preset at a certain annual level of compensation for all violations, perhaps taking into account the size or development of the economy. Arbitration would allow Members to raise or lower this amount if necessary. Early determination thus seems to be a realistic reform proposal as it does not involve fundamental legal, economic or practical questions difficulties. In EC-Bananas, it would allow slightly raising pressure for compliance.

b. Temporary financial compensation

Temporary compensation via lower applied customs duties or financial payments during negotiation periods and the ‘reasonable time’ for implementation has been proposed to link financial compensation and early determination reforms. It would incentivise rapid compliance, reduce losses between determination of non-compliance and compliance, and omit the self-injury often caused in retaliation. A practical problem that may arise in addition to difficulties already addressed in the sections on financial compensation (F.III.1.a) and on early determination (F.III.3.a) is that “monetary penalties may be particularly onerous for developing nations who have limited access to hard currency”\(^\text{212}\). This would make the proposal unfair or unfeasible. However, special and differential treatment of developing countries may allow for provisions such that only developed countries are required to pay temporary compensation, or that financial compensation is capped for developing countries during an initial period\(^\text{213}\); and LDCs could argue under Art. 24.1 DSU\(^\text{214}\) that Members should “exercise due restraint” in seeking compensation or authorisation of SCOO. Thus, temporary financial compensation seems a viable proposal though it would only affect compliance at the margins.

\(^{211}\) Bronckers and van den Broek (2006) p. 70 [book]
\(^{212}\) Collins (2009) p. 228
\(^{214}\) Article 24.1 DSU: “...If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.”
c. Retroactive measures

There is a general assumption in the literature on DSU that WTO remedies are prospective.\textsuperscript{215} However, DSU provides no guidance on the prospective or retroactive nature of remedies. “Article 19.1— the alleged basis for this notion – does not say anything to that effect.”\textsuperscript{216} (Box 6). Whilst the WTO adjudicating bodies have generally preferred prospective to retroactive remedies, the case \textit{Australia-Subsidies Provided to Producers of Automotive Leather}\textsuperscript{217} introduced the precedent of interpreting retroactive remedies as within the current DSU. The Panel argued “we do not believe that Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action.”\textsuperscript{218}

\textbf{Box 6 Article 19.1 DSU}

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“Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.”
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The panel’s findings are sound from an international public law perspective by incorporating “principles similar to the customary rules on state responsibility”.\textsuperscript{219} For example, the Statute of the Court of International Justice, Article 36.2 (d), clearly acknowledges the validity of claims to reparation: “The states parties to the present Statute may at any time declare that they recognize as compulsory \textit{ipso facto} and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: the nature or extent of the reparation to be made for the breach of an international obligation.” The Permanent Court of International Justice in \textit{Factory at Chorzów} furthermore ruled that: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is an indispensable component of a failure

\begin{flushleft}
\textsuperscript{215} e.g. Davey (2005) p. 12: “To understand the impact of an authorization to suspend concessions, it is important to recall that WTO remedies are prospective.”
\textsuperscript{216} Diego-Fernández (2007) p. 239
\textsuperscript{217} WTO document WT/DS/126
\textsuperscript{218} para. 6.31 of Arbitrators’ report
\textsuperscript{219} Diego-Fernández (2007) p. 239
\end{flushleft}
to apply a convention and there is no necessity for this to be stated in the convention itself.”

Customary international law is relevant for DSU “to the extent that [it] does not contain specific provisions dealing with the issue of remedies.” DSU is vague on this issue because the “second sentence of Article 19(1) DSU does not prejudge the form of remedies that the WTO adjudicating bodies can suggest. To the extent, consequently, that the WTO regime does not provide for specific remedies, the ILC codification is relevant.”

Reforms to DSU to secure the idea of retroactive measures have also been discussed, first under GATT in 1966. A recent Mexican proposal suggests amending Articles 22.2, 22.4 and 22.7 DSU “to make it clear that the level of nullification and impairment should be counted retroactively and that compensation start either from the date of (i) imposition of the measure, (ii) request for consultations, or (iii) establishment of the Panel.”

Retroactive measures have distinct economic advantages. First, retrospective remedies provide incentives not to unduly lengthen Panel procedures, to try to reach an agreement before the Panel Report is circulated, and if no remedy is imposed when implementation occurs within the reasonable period of time, “there would be an incentive to meet that deadline for implementation.” This addresses the critique that the current system of prospective remedies “gives countries no incentive to comply promptly and may even encourage foot-dragging.”

Retroactive measures may further give the prevailing Member more leverage in negotiations as the value of retaliation it would be authorised to exercise absent mutual arrangements would be greater. Third, as DSU does not provide a procedure for lifting the authorisation to retaliate when the defendant has complied, retroactivity incentivises the prevailing Member to lift its retaliating measures following compliance. “Otherwise, it might eventually have to pay retroactively for unduly maintaining these measures.”

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220 Permanent Court of International Justice in Factory at Chorzów, PCIJ, Jurisdiction, Judgement No 8, 1927, Ser A No 9, Claim for Indemnity, at 21; in Bronckers (2001) p. 62 footnote 90
221 Mavroidis (2000) p. 765
222 Breuss (2007) and Breuss (2003)
223 see Annex VIII. ‘Transferable retaliation: Mexico's suggested amendments to DSU’.
224 Diego-Fernández (2007) p. 239
225 Diego-Fernández (2007) p. 239
226 Davey (2005) p. 14
227 Davey (2005) p. 14
228 Diego-Fernández (2007) p. 239
rebalancing and hence “give meaning to the notion that the level of suspension needs to be equivalent to the level of nullification or impairment”\(^\text{230}\) (Art. 22.4 and 22.7 DSU\(^\text{231}\)).

In *Bananas*, retroactive damage payments could have amounted to ca. US$3528 million from first GATT banana panel 1992 to mid 2009, or ca. US$1713.6 million from the 1996 WTO complaint to mid 2009.\(^\text{232}\) These are significant sums for the EU if one considers that tedious negotiations about ODA for ACP countries concern only fractions of these amounts. A retroactive calculation of damages may hence be a strong incentive for EU compliance.

The reform feasibility of the proposal is however mixed. Whilst many Members’ response to the Panel’s authorisation of retroactive remedies was adverse, this may have partly been due to a perception that the Panel was crossing its legitimate boundaries of interpretation rather than due to opposition to the principle of retroactivity per se. We “might expect that the application of familiar legal concepts may placate a violating state’s distaste for imposed monetary sanctions. Recourse to common law contract law principles, such as the reliance measure of damages, is prudent because we may expect that the WTO’s two most frequent and most economically powerful users, the United States and the European Union, will be less likely to resist monetary awards that may be imposed against them should such awards employ remedies that mirror those of their domestic legal systems.”\(^\text{233}\) Thus, support for retroactive measures may be forthcoming, and it is certainly encouraging that judicial activism by the Panels and AB may see this proposal put into practice prior to or absent formal reform.

d. *Sanctions exceeding nullification or impairment*

“Whatever instrument one uses, as long as the level of retaliation, compensation or monetary compensation is calculated … based on the level of trade concerned … a small (developing) economy is at a disadvantage compared with a large (developed) economy in terms of pressure it can exercise”.\(^\text{234}\) One means of raising incentives for prompt compliance would be to allow for the payment of fines and damages. As remedies are currently limited to the level of

\(^{230}\) Diego-Fernández (2007) p. 239

\(^{231}\) See Annex VI. ‘Articles 22.2, 22.4 and 22.7 DSU’

\(^{232}\) Approximations based on the amount Ecuador has been authorised to retaliate annually in 2000. Ecuador was awarded the right to retaliate for $US201.6 million per year. Multiplied by 17.5 yields the first figure (US$3528 million); multiplied by 8.5 we come up with the second figure (US$1713.6).

\(^{233}\) Collins (2009) p. 243

nullification or impairment, Ecuador makes two reform suggestions. First, it suggests that DSU Articles on special and differential treatment “be made more effective and authorize developing countries, when they suspend concessions to a developed country, also to take into account the impact on their economies and not only on the level of nullification or impairment.”

Second, it proposes that the “level of nullification or impairment determined in the arbitration should be multiplied by a factor that is at least twice the amount authorized by the DSB for the suspension of concessions or other obligations.” Both ideas would provide greater incentives for compliance and address the market power asymmetries between developing and developed countries. Further, the former would allow a fairer rebalancing of costs and benefits. A third idea is to increase sanctions above impairment over time and make use of the psychological effects this can have.

The critiques of Ecuador’s proposals are similar to those raised for temporary and financial compensation, e.g. relating to the disparity in fine-paying ability among Members and to developed countries ‘buying their way out’ of obligations, and have been addressed above. However, it seems that finding consensus for this proposal will prove difficult given the fact that retroactivity, a logical precursor of this proposal, is not yet provided for in DSU. Thus, it is a proposal that can be kept in mind but that Ecuador should not concentrate its political capital on.

e. Relief for legal costs

The cost of WTO litigation can be high, especially in lengthy cases such as EC-Bananas. Whilst this has not deterred Ecuador from litigating, it may be one of the reasons for the relatively passive stance of its co-complainants. Developing countries have argued that legal costs for DSU cases are “prohibitively high” largely because developing countries’ “lack of requisite legal expertise” requires them “to depend on foreign legal advisors based in Brussels or New York, which is extremely expensive.”

Developing countries could hence argue that
based on special and differential treatment provisions a ‘developed loser pays’ system which reimburses developing countries for their legal costs in cases where they prevail should be implemented: “If a developed-country Member is found to be in violation of its [WTO] obligations … in a dispute brought by a developing-country Member or if the developed-country Member failed to prove its claims against a developing-country Member in a dispute brought by it, the panel/AB shall determine the reasonable amount of the legal costs and other expenses of the developing-country Member, to be borne by the developed-country Member.”\(^{241}\) In addition to reducing the DSU’s bias in use, this proposal would also incentivise more rapid compliance as developed countries would not unduly delay implementation by seeking AB reports when it is clear that their measures are WTO noncompliant, as the EU has done in *Bananas*.

Again, this may be a proposal that should follow rather than precede a reform for retroactive remedies, and may thus be a less feasible demand at present. A practical response to high legal costs has however been developed with the establishment of the Advisory Centre on World Trade Law (ACWL) which “provides legal training, support and advice on WTO Law and dispute settlement procedures to developing countries, in particular LDCs” against modest fees varying with the share of world trade and per capita GNP of user governments.\(^{242}\) For example, it has represented, assisted and advised Colombia in *EC-Bananas* in its separate request for consultations in 2007 and as a third participant in the AB proceedings of the original dispute, and it “expects to assist Colombia in further phases of this dispute, including the good offices process, in 2009”.\(^{243}\) Hence, its establishment has been a practical remedy to some of the resource constraints developing countries face and directly benefited the plaintiffs in *EC-Bananas*.\(^{244}\)

**IV. Conclusion**

The mixture of reforms we would recommend Ecuador to endorse depends on how much we value compliance relative to rebalancing and relative to Member control. Further, some measures may substitute others, e.g. early determination of impairment is less important where retroactive remedies are allowed. Finally, particularly sharp changes such as a simultaneous

\(^{241}\) WTO document TN/DS/W/19

\(^{242}\) Zimmermann (2005) p. 51

\(^{243}\) ACWL, *Report on Operations 2008*

\(^{244}\) Zimmermann (2005) p. 51
introduction of retroactive measures and sanctions exceeding nullification, as well as the more drastic proposals such as the suspension of non-trade rights, may not be politically feasible. As Hudec points out, the “optimum legal system is not simply the strongest legal system. It is the legal system that will be most helpful in enforcing one’s trade agreement rights as complainant, while at the same time preserving the desired degree of freedom to deal with adverse legal rulings against one’s own behaviour”. As countries are repeat players they should anticipate finding themselves both in the roles of defendant and plaintiff.

For Ecuador to maximise the attainability of SCOO reform, it is important that developing countries weigh their objectives and find proposals they will prioritise as a group. Bronckers and van den Broek argue that one of the current problems in negotiations on DSU is the number of proposals on the table. A “winning strategy” may thus be to “bet on one horse”, preferably financial compensation. This is a recognised principle in international law, is already available under DSU on a voluntary basis, both induces compliance and rebalances injuries, and there are reasonable ways to enforce it. Furthermore, it can be combined with other proposals such as retroactivity of damages or ‘loser pays’ rules, which can be added or deleted from practical proposals depending on the a bargaining situation and the negotiating leverage the Members have. This places it among the more feasible and effective reform proposals. Ecuador is hence advised to work towards agreement among developing countries in support of mandatory financial compensation as an additional remedy to SCOO.

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245 Hudec (2000) p. 355
G. Conclusion

“[O]ne of the objectives of legal research is to prepare the ground for change”. I have hence introduced a variety of reform proposals aimed at levelling the DSU playing field. Acknowledging the difficulty of agreement on DSU reforms, I have suggested Ecuador and other developing countries focus on financial compensation as their core suggestion in discussions on remedies. Furthermore, I have demonstrated that Ecuador can “punch above its weight” using the WTO rules, and should continue doing so to maximize its bargaining power.

As a final thought, considerations regarding the termination of SCOO are relevant if DSU sanctions are to be strengthened. Given that remedies are likely to be more powerful and harmful if any of the above reforms are successful, a formal procedure should be established for ending sanctions. “Under the current rules, a Member has to go through a normal panel procedure to determine that the retaliation imposed against it is no longer warranted; it is further required to grant a reasonable period of time for its counterpart to stop its retaliatory measure and, if it fails to do so, can ask for its own authorisation to retaliate against the other Member’s retaliatory measures.” This is excessively complicated and an automatic procedure for ending compensation or retaliation would have to be put in place to balance the rights of defendants and plaintiffs. Combining such a proposal for strengthening defendants’ rights with the above remedies reform proposals may hence strengthen Ecuador’s bargaining position.

It is clear from the above debate that fundamental reform will be difficult and may not take place soon. However, absent successful reform, it is evident that practical reinterpretation of DSU and the establishment of institutions such as ACWL can address some of DSU’s current deficiencies. Zimmermann argues that “the system seems to build once more on its historic strength, which is to evolve with a certain degree of flexibility and in a pragmatic spirit. We should not be surprised if, as in the past, these elements of evolving practice were to be codified into a new or modified text at a later date.”

249 Zimmermann (2005) p. 52
Annex

I. Dispute settlement timetable

<table>
<thead>
<tr>
<th>Event</th>
<th>Duration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Consultations, mediation, etc</td>
<td>60 days</td>
</tr>
<tr>
<td>Panel set up and panellists appointed</td>
<td>45 days</td>
</tr>
<tr>
<td>Final panel report to parties</td>
<td>6 months</td>
</tr>
<tr>
<td>Final panel report to WTO members</td>
<td>3 weeks</td>
</tr>
<tr>
<td>Dispute Settlement Body adopts report (if no appeal)</td>
<td>60 days</td>
</tr>
<tr>
<td><strong>Total without appeal</strong></td>
<td><strong>= 1 year</strong></td>
</tr>
<tr>
<td>Appeals report</td>
<td>60-90 days</td>
</tr>
<tr>
<td>Dispute Settlement Body adopts appeals report</td>
<td>30 days</td>
</tr>
<tr>
<td><strong>Total with appeal</strong></td>
<td><strong>= 1 year 3 months</strong></td>
</tr>
</tbody>
</table>

II. CMOB rules on banana importation, 1993

- 857 700 tonnes duty free quota to traditional ACPs\(^{252}\) on historical basis.
- ECU 100 per tonne quota rate for 2 million tonnes\(^{253}\) non-traditional ACP and third country bananas, administered through a import license system with three operator categories:
  A: 66.5% transferable licenses for established operators of third country (‘dollar’) and non-traditional ACP bananas.
  B: 30% transferable licenses for established operators that marketed EC and ACP bananas (European companies).
  C: 3.5% non-tradable licenses for new EC operators who started importing bananas from sources other than EC and/or traditional ACP bananas after 1992.
- ECU 850 per tonne tariff on out-of-quota imports from third countries
- ECU 750 per tonne tariff on out-of-quota imports from non-traditional ACP banana exporting counties and EC producer territories.
- Compensation payments for up to 854 000 tonnes of domestically produced bananas to EC producers if prices fell below production costs.

\(^{250}\) Wto.org, *Understanding the WTO: Settling disputes*

\(^{251}\) Unctad.org, *Economic policies.*

\(^{252}\) traditional ACPs: Ivory Coast, Cameroon, Somalia, Cape Verde, St Lucia, Jamaica, Belize, St Vincent and the Grenadines, Dominica, Suriname and Grenada

\(^{253}\) increased in 1994 to 2.1 million tonnes and to 2.2 million tonnes in 1995
III. Framework Agreement on Bananas, 1994

- Expanded the MFN tariff quota: the EU would allocate certain amounts of within the bound tariff quota to the parties to the agreement
- Decreased the within-quota tariff to 75 ECU per tonne, thus reducing the degree of preferential market access granted to ACP countries.
- In return, the complainants agreed not to bring forward further legal complaints about the CMOB or to press for the adoption of the EC-Bananas II panel report.

IV. DSB Judgement on EC-Bananas III, 1997

- The allocation of tariff quota shares to some but not other WTO members interested in supplying bananas to the EC is inconsistent with the GATT principle of non-discrimination (GATT Art. XIII).
- The licensing scheme discriminates against imports from Latin America by creating unfavourable conditions compared to the simple arrangements for traditional ACP bananas (GATT Art. I (MFN) and III (National Treatment (NT))).
- The licensing procedures are also discriminatory under GATS by creating advantages for European operators compared to those from Latin America (GATS Art. II (MFN) and XVII (NT)).

V. EU banana import regime 2001

<table>
<thead>
<tr>
<th>3 tariff rate quotas</th>
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<tbody>
<tr>
<td>A: 2.2mt</td>
</tr>
<tr>
<td>B: 0.453mt</td>
</tr>
<tr>
<td>C: 0.75mt</td>
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<tr>
<td>• Managed as one (quota A/B) for imports from all third countries.</td>
</tr>
<tr>
<td>• €75 per tonne</td>
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<tr>
<td>• 83 % traditional</td>
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<tr>
<td>• 17 % non-traditional operators</td>
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<tr>
<td>• For banana imports from ACP countries</td>
</tr>
<tr>
<td>• Zero duty</td>
</tr>
<tr>
<td>• 89 % traditional operators</td>
</tr>
<tr>
<td>• 11% non-traditional operators</td>
</tr>
<tr>
<td>• Traditional operators: established in EU, purchased min. 250t from 3rd countries</td>
</tr>
</tbody>
</table>

254 Unctad.org, Economic policies.
A/B: minimum quantity of third-country/non-traditional ACP bananas
C: minimum quantity of traditional ACP bananas.

• Non-traditional operators: established in EU, imported bananas for over €1.2m
• Licenses allocated on basis of historical references: after 2003 share of import licenses
  based on usage of licenses issued since 1 January 2002.

VI. Articles 22.2, 22.4 and 22.7 DSU

Art. 22.2 “If the Member concerned fails to bring the measure found to be inconsistent with a
covered agreement into compliance therewith or otherwise comply with the recommendations
and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article
21, such Member shall, if so requested, and no later than the expiry of the reasonable period of
time, enter into negotiations with any party having invoked the dispute settlement procedures,
with a view to developing mutually acceptable compensation. If no satisfactory compensation
has been agreed within 20 days after the date of expiry of the reasonable period of time, any
party having invoked the dispute settlement procedures may request authorization from the
DSB to suspend the application to the Member concerned of concessions or other obligations
under the covered agreements.”

Art. 22.4 “The level of the suspension of concessions or other obligations authorized by the
DSB shall be equivalent to the level of the nullification or impairment.”

Art. 22.7 “The arbitrator acting pursuant to paragraph 6 shall not examine the nature of the
concessions or other obligations to be suspended but shall determine whether the level of such
suspension is equivalent to the level of nullification or impairment. The arbitrator may also
determine if the proposed suspension of concessions or other obligations is allowed under the
covered agreement. However, if the matter referred to arbitration includes a claim that the
principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall
examine that claim. In the event the arbitrator determines that those principles and procedures
have not been followed, the complaining party shall apply them consistent with paragraph 3.
The parties shall accept the arbitrator's decision as final and the parties concerned shall not
seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator
and shall upon request, grant authorization to suspend concessions or other obligations where
the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.”

VII. Simpler use of cross-retaliation: Suggested amendments to DSU255

Article 22.3bis: “…in a dispute in which the complaining party is a developing-country Member and the other party, which has failed to bring its measures into consistence with the Covered Agreements is a developed-country Member, the complainant shall have the right to seek authorization for suspension of concessions or other obligations with respect to any or all sectors under any covered agreements.”

VIII. Transferable retaliation: Mexico's suggested amendments to DSU

Article 3.7: “...The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures, as well as the possibility of transferring this right of suspending the application of concessions or other obligations under the covered agreements to other Member(s).”

Article 22.7bis: “The right to suspend concessions or other obligations may be transferred to one or more Member(s). In that case, the Member(s) transferring the right to suspend concessions or other obligations and the Member(s) acquiring such right shall jointly request the DSB that it authorizes the latter to suspend concessions or other obligations. In that case, the DSB shall grant each acquiring Member authorization to suspend concessions or other obligations within 30 days of such request, unless the DSB decides by consensus to reject the request. In no case shall the transfer(s) exceed the level of suspension authorized by the DSB.”

255 WTO document TN/DS/W/19
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