

Compliance Bargaining in the WTO:

Ecuador and the Bananas Dispute

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I. INTRODUCTION

Studies of bargaining in the international economy routinely focus on negotiations regarding the original terms of agreements *ex ante* rather than on discussions regarding compliance with those commitments *ex post*. A few scholars have called attention to this often neglected aspect of international negotiations (e.g., Albin 2001:49), which Jönsson and Tallberg (1998, 2001) refer to as compliance bargaining. The dynamics of compliance bargaining have particular importance for developing countries, whose post-agreement negotiating power is arguably constrained in many settings. This paper examines compliance bargaining in the World Trade Organization (WTO) through a case study of Ecuador's tactics in its challenge against the banana import regime of the European Union (EU).

After prevailing in its legal case against the EU banana scheme (as a co-complainant with the United States and others), Ecuador pursued an aggressive strategy to encourage European compliance with the ruling. In the framework of Odell (2000), Ecuador's stance in this high-profile dispute can be understood as a purely distributive strategy. In the universe of international economic negotiations, all compliance bargaining tilts toward the distributive end of the spectrum, as one party claims another has failed to deliver benefits that were previously promised. In the bananas dispute, Ecuador's negotiators creatively sought to maximize their leverage within the specific institutional framework of WTO rules. What is striking about this case is the extent to which those rules — some of them interpreted and applied for the first time — enabled Ecuador, in effect, to punch above its weight in the multilateral trade system.

As a test of developing country leverage in WTO compliance bargaining, the bananas dispute would seem to be a least likely case. At the outset of the dispute, as Ecuador rushed its WTO accession to join the proceedings, the odds of success were hardly in its favor. The EU had already defied two GATT panel rulings against its banana regime in 1993 and 1994. A broad coalition of African, Caribbean, and Pacific (ACP) countries staunchly defended their preferential access to the European market, playing the same developing country card on which Ecuador would in part rely. Finally, despite the obvious advantages of joining a complaint filed by the United States (US), Ecuador's economic interests diverged in several crucial respects from those of Chiquita

International, the multinational banana company on whose behalf the US (and others) initiated the dispute. Facing the prospect of pressure from the US, rather than from Latin American countries alone, the EU was more likely to comply with an adverse ruling than in the past — but whether it would accommodate Ecuador's specific concerns in choosing how to do so remained an open question.

Conventional measures of political power suggested that Ecuador's demands would carry little weight in this cacophony of competing interests. Ecuador is the world's largest banana exporter, but market power in that limited economic realm offered it little or no direct political leverage over the broad issue in dispute: EU trade preferences for former colonial territories in Africa and the Caribbean. Despite overwhelming asymmetries (in market size, political clout, and legal resources) between Ecuador and the principal disputants on either side of the Atlantic, Ecuador managed to play an influential role throughout the controversy. Its negotiators did so by creatively charting an independent and assertive course through the maze of WTO dispute settlement procedures, many of which at that time remained largely untested.

While collaborating with the other complainants, Ecuador's negotiators were careful to maintain their independence at several crucial junctures. When the US moved quickly to retaliate against the EU, for example, Ecuador refused to follow its lead, insisting that a WTO compliance panel first rule on the legality of the revised European regulations. Although this move drew criticism from Washington, it won support from other member states and has since been adopted as customary practice in subsequent WTO disputes. Similarly, when the EU and US finally reached a settlement, Ecuador initially refused to ratify their deal, threatening to challenge it before a second compliance panel unless important modifications were made.

Ecuador's negotiators also made assertive use of certain WTO rules to enhance their bargaining leverage. Two instances stand out as worthy of note. First, Ecuador sought and won the authority to retaliate against the EU by suspending benefits in areas outside of merchandise trade in goods — marking the first time that the WTO ever endorsed the right of cross retaliation. Ecuador's innovative request to cross retaliate focused on the intellectual property rights of European firms in several sensitive sectors, including industrial design patents, copyrights in the music industry, and (most

significantly) geographical indications for alcoholic beverages. By obtaining this authority, Ecuador signaled its commitment to press for full compliance on the part of the EU, enhancing its leverage in subsequent negotiations.

Second, after reaching a settlement in the case, Ecuador continued to adopt an aggressive stance by demanding special institutional guarantees that the EU would honor its commitment to comply fully with the WTO rulings by 2006. During the Doha ministerial meetings, Ecuador made its support of two waivers sought by the EU (for the Cotonou pact and for the transitional banana regime, both of which give preferences to ACP countries) contingent on the creation of a special ad hoc arbitration procedure. This institutional innovation, which is outside of the normal WTO dispute settlement system, guarantees a timely review of whether the EU's banana regime (for 2006 and beyond) will diminish Ecuador's market access. If arbitrators were to find against the EU, Ecuador could revoke the waiver for the Cotonou agreement and reinstate its dispute settlement case, which it merely suspended pending full compliance.

This combination of tactics enabled Ecuador to wield surprising influence over the ultimate resolution of the bananas dispute, considering the high profile of the case and the diversity of interests at stake. Although some distance from Ecuador's ideal point, the outcome was a compromise that incorporated many of Ecuador's core demands. The EU's twin settlements with the United States and Ecuador included a firm commitment to adopt by 2006 a tariff-only system, which favors Ecuador as the world's lowest-cost banana exporter. During the transitional phase of tariff quotas that began in 2001, Ecuador received better terms than other similarly positioned Latin American countries (Costa Rica and Columbia) that did not join the case as complainants. Moreover, in exchange for the waivers at Doha, Ecuador obtained an institutional guarantee from the EU in the form of a special arbitration procedure that goes beyond what WTO rules typically provide in terms of the speed and finality of third-party review.

In my view, Ecuador's negotiators achieved these results by capitalizing on the bargaining leverage afforded by certain WTO rules. The primary hypothesis for evaluation in this case is that Ecuador's tactics enhanced its position during compliance bargaining with the EU. To test this claim, it is important first to compare Ecuador's results with those of other Latin banana producers. It may also be helpful to consider a

counterfactual scenario: what was the likely outcome if Ecuador had not asserted its independence from the US, threatened cross retaliation, contested the terms of the EU-US settlement, and held the waivers hostage at Doha? Examining the details of the case with a focus on these twin comparisons, I conclude that Ecuador's bargaining strategy yielded benefits that would not otherwise have been easily obtainable.

Generalizing from Ecuador's experience, this study emphasizes the way in which developing country negotiators may be able to utilize certain details of institutional design in the WTO to improve negotiated outcomes in bilateral trade disputes. The institution, in this approach, essentially operates as an intervening variable that affects the selection of bargaining strategies. These strategies, in turn, shape the distribution of benefits in any negotiated settlement.

I take the institutional setting of the WTO as exogenous in order to focus on compliance bargaining within that framework. As an historical aside, however, it is interesting to note that the very same details of institutional design utilized by Ecuador to gain leverage in the bananas dispute were originally established at the insistence of more powerful WTO members. The US, in particular, was the foremost proponent of the right to cross retaliate, which was an issue of critical importance to its intellectual property and service sectors during the Uruguay Round. Ironically, U.S. negotiators had to overcome the objections of developing countries such as India. The common assumption was that cross retaliation would serve only to enforce the new areas agreements, not to legitimate violations of them. Similarly, the US has been the staunchest defender of the tradition of consensus decision-making. Despite several provisions in WTO agreements for super-majority votes on issues such as waivers, the US has objected to voting in any form whenever the topic has been broached — which the EU did twice in this dispute.¹ These institutional provisions, while obviously beneficial to powerful states, may also present opportunities for developing countries to improve their bargaining position, often in unanticipated ways.

The remainder of the paper explores the details of Ecuador's role in the bananas dispute and assesses the implications of its strategy for other developing countries

¹ During the sequencing crisis (on whether the US had to request a compliance panel before retaliating), the EU threatened to seek an authoritative interpretation from three-fourths of the member states. Later it raised the possibility of a similar three-fourths vote on the waivers.

engaged in WTO compliance bargaining. The next section offers a brief overview of the complex economic and political terrain on which the bananas dispute took place, emphasizing the divergent interests of the various parties. Subsequent sections examine Ecuador's bargaining tactics at four stages of the compliance bargaining process in turn: the sequencing crisis, the cross-retaliation request, the twin settlements, and the waivers.

II. ORIGINS OF THE BANANA WARS

The banana wars of the 1990s, which generated no fewer than five separate GATT and WTO rulings against the EU regime, originated in Europe's attempt to forge a common external trade policy with the advent of the single market in 1993. Prior to that date, European countries had sharply divergent national regimes for banana imports. At the liberal end of the spectrum were Germany, Denmark, Ireland, and the Benelux countries, most of which applied a 20 percent tariff (Germany had no tariff) and imported bananas almost exclusively from the “dollar banana” zone of Central and South America. At the protectionist end of the spectrum were France, the United Kingdom, Italy, Greece, Spain, and Portugal, all of which used quota systems and tariff discrimination to grant preferential status to bananas from national producers or ACP countries, most of which were former colonial territories (Tangemann 2003a, 19-28).²

After considerable debate and several months of delay, the EU Council of Ministers narrowly adopted Regulation 404 establishing the Common Organisation of the Market for Bananas (COMB), which went into effect on July 1, 1993.³ The COMB, informally known as the European banana regime, harmonized the various national policies by erecting an extraordinarily complex system of quotas, tariffs, and licenses that restricted the market access of Central and South American bananas in favor of imports from ACP countries. These preferences reflected the fact that production costs in ACP countries were roughly twice the average cost in the dollar banana zone (Paggi and Spreen 2003, 14). This regime led to artificially high (and thus lucrative) banana prices in Europe, well above the international market price.

² Spain and Greece met domestic demand by producing their own bananas in the Canary Islands and Crete, respectively. Portugal met 40 percent of its consumption through production in the Azores and Madeira.

³ In two Council votes the COMB proposal barely exceeded the qualified majority of 54 votes, with margins of 4 votes in December 1992 and 2 votes in February 1993 (Tangemann 2003a, 35).

The COMB regime, rather predictably, also led to a series of legal challenges. A coalition of Latin American banana producers — Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela — filed two complaints under GATT, the first against the policies of individual European countries in 1993 and the second against the COMB in 1994. Both GATT panels ruled against the EU, but in both cases the EU blocked adoption of the panel reports. At the same time, the EU attempted to appease the Latin American countries in separate negotiations. In 1994 the EU signed the Banana Framework Agreement with four of the five complainants. Only Guatemala held out, refusing to settle. Colombia, Costa Rica, Nicaragua, and Venezuela agreed not to push for adoption of the second panel report and not to challenge the COMB until 2003 (Dickson 2002, 3). In exchange, the EU offered increases in country-specific quota allocations that significantly increased their market access. The EU also enabled them to issue export licenses for 70 percent of their quotas, which effectively transferred to them part of the quota rent formerly held by European importers (Tangemann 2003b, 47).

This attempt by the EU to settle the first two GATT complaints through the provision of country-specific side payments introduced sharp divisions within the dollar banana zone and eventually gave rise to a third case under the WTO. The Framework Agreement offered benefits only to certain Latin American producers — namely, those that had filed GATT complaints. Others in the region saw their market access in Europe, already jeopardized by the COMB, further deteriorate. By attempting to satisfy some of the larger Latin producers, in particular Colombia and Costa Rica, the EU merely succeeded to alienate others (Josling 2003, 175). In addition to Guatemala, which had refused to settle its GATT dispute, the list of aggrieved countries now included Ecuador, Honduras, Mexico, and Panama.

Also opposed to the COMB and the Framework Agreement were two influential U.S.-based banana multinationals, Chiquita International and Dole Foods, which together account for more than half of world banana trade (Paggi and Spreen 2003, 12). These two companies had pursued divergent corporate strategies as the single European market approached. Dole positioned itself to maintain market access in Europe. It diversified its holdings by investing in ACP banana production, and it acquired European ripening facilities in order to qualify for import licenses (Stovall and Hathaway 2003, 152).

Chiquita bet instead that the single market in Europe would be essentially free and that it would be able to expand across the continent from its stronghold in Germany (Taylor 2003, 88). Under the new regime, Chiquita paid a heavy price for this miscalculation. Its share of the European market fell from 30 percent in 1992 to 19 percent by 1995. During the same period, by contrast, Dole's share rose from 12 to 16 percent (Taylor 2003, 85).

The United States had traditionally been *laissez faire* in its approach to the banana trade. Attempts by U.S. banana interests to involve the Bush administration in the first GATT case came to naught, in part because the Latin American complainants — presciently, in retrospect — did not want their interests to be lost in a US-EU battle (Stovall and Hathaway 2003, 153). Chiquita intensified its lobbying of the Clinton administration and Congress, however, and U.S. Trade Representative (USTR) Mickey Kantor eventually agreed to initiate a WTO complaint against the EU in September 1995. Honduras and Guatemala, which were important suppliers of Chiquita, also joined the case at that time, as did Mexico (which at that time had links to Del Monte, the third largest trading company).

Meanwhile, the US had threatened Colombia and Costa Rica, both of which had settled their earlier complaints against Europe, with retaliatory action under Section 301. Although fearful of being caught in the transatlantic crossfire, Colombia and Costa Rica in January 1996 signed understandings with the US that committed them to support an open market for bananas in Europe — despite the gains they stood to reap under the Framework Agreement. That pact obligated them not to join the case as complainants, but the US ensured these two major banana exporters were no longer in the EU's camp before terminating its Section 301 actions (Stovall and Hathaway 2003, 155-56).

The missing piece in the coalition assembled by the US was Ecuador. U.S. officials were eager to have Ecuador join the WTO proceedings. In the words of one U.S. negotiator, Ecuador — as the "Saudi Arabia" of bananas — was in a special position to lend credibility to the U.S. case.⁴ The US obviously does not produce bananas, and both Honduras and Guatemala (relatively minor players in the global market, accounting for 7 percent of world exports) were seen as extensions of Chiquita, which had extensive operations in both countries (Paggi and Spreen 2003, 11-13).

⁴ Telephone interview with U.S. official, Geneva, July 10, 2003.

In this context, Ecuador was unique in several respects. First, it is by far the world's largest banana exporter, a distinction it has enjoyed since 1953 (Brenes and Madrigal 2003, 105). Ecuador alone accounts for more than one-third of global banana exports (34 percent), with roughly twice the share of the next largest exporter (Costa Rica) in the late 1990s.⁵ Second, in sharp contrast to other countries in the dollar banana zone, multinationals play a very limited role in the Ecuadorian industry, most of which is domestically controlled. Significantly, Chiquita owns no banana farms in Ecuador, while Dole has only minor holdings (Taylor 2003, 97). Production lies almost exclusively in private local hands. Multinationals are active as traders of Ecuadorian bananas, but the largest export company in Ecuador, Grupo Noboa, is domestically owned.⁶ There are also scores of other local trading companies whose combined market share is substantial. Finally, Ecuador is among the most efficient banana producers in the world, with production costs and average purchase prices even lower than those of its relatively competitive neighbors (Paggi and Spreen 2003, 14; Brenes and Madrigal 2003, 108).

Given Ecuador's status in the global market, it is no surprise that bananas play a significant role in its domestic economy. In 1997 bananas become Ecuador's leading export product, and they have long been an important source of hard currency (Brenes and Madrigal 2003, 105). Bananas account for roughly 30 percent of total exports, making the economy dependent on secure access to banana markets overseas. Ecuador's position in Europe was impaired by Regulation 404 and especially by the Framework Agreement, which severely disadvantaged its producers and traders (Stovall and Hathaway 2003, 156; Brenes and Madrigal 2003, 116). Given its competitive advantages in production and its firms' investments in the export business, Ecuador also stood to gain substantially from any further liberalization of Europe's banana markets.

In summary, Ecuador was important to the U.S. case, and the WTO dispute was clearly of consequence to Ecuador. The only problem was that Ecuador was not a member of the WTO in 1995 when the other complainants requested consultations. Officials in Ecuador decided that the case was of such paramount concern that they

⁵ Paggi and Spreen 2003, 11; Brenes and Madrigal 2003, 102.

⁶ Grupo Noboa is the fourth-largest banana trading company in the world (after Chiquita, Dole, and Del Monte). It controls more than 10 percent of global trade and more than one-third of Ecuador's exports. It

rushed their negotiations to gain entry to the WTO in order to ensure their status as a complainant. Domestic firms in other sectors complained about the speed of the accession process, but the timetable was driven by the bananas dispute.⁷ Panama, which also suffered under the Framework Agreement, was in a similar position, but it did not manage to complete the accession process until September 1997, after the initial WTO panel ruling had been issued.⁸ Ecuador officially joined the WTO on January 26, 1996. Less than two weeks later, it joined the request for consultations in the bananas dispute (Josling 2003, 175-76).

III. THE SEQUENCING CRISIS

The early stages of the banana dispute unfolded largely as expected. With previous GATT panel rulings on their side, the complainants were confident in the legal merits of the case. To gain maximum leverage, their strategy was to allege a broad array of violations under WTO agreements covering both goods and services (Stovall and Hathaway 2003, 156). This approach paid off, as both the panel and the Appellate Body found the EU regime to be incompatible with a variety of WTO commitments.⁹ In particular, the EU's quota allocation and import licensing systems violated the nondiscrimination and national treatment provisions of both GATT and GATS. The rulings also held that the existing waiver for the EU-ACP Lomé Convention did not cover these departures from WTO obligations (Josling 2003, 178-85). The EU was given a full 15 months to comply with the rulings. In late 1998 it adopted a revised import scheme, but neither Ecuador nor the US viewed the modified rules as WTO compliant.

How to proceed at this point in the dispute was not clear under the rules of the WTO Dispute Settlement Understanding (DSU). The EU contended that its revised regime should be deemed acceptable until a compliance panel convened under DSU Article 21.5 ruled otherwise. The US, by contrast, argued that it could move immediately to request authority to retaliate at the conclusion of the reasonable time period for implementation. In its view, a panel requested by the EU under DSU Article 22.6 to

also has the world's largest shipping operation; is the most diversified exporter among the large trading companies; and controls a significant share of the European market. (Brenes and Madrigal 2003, 107).

⁷ Interview with Ecuadorian official, Geneva, October 1, 2002.

⁸ See list of accession dates at <http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm>.

determine the appropriate level of sanctions did not have to await a ruling by a compliance panel. The text of the DSU did not clearly specify the relationship between the two review processes under Articles 21 and 22, creating what became known as the "sequencing" problem.¹⁰

Any debate regarding how to interpret these two DSU provisions would not seem to involve terribly high stakes. What appeared to be a minor procedural glitch, however, quickly evolved into a full-blown institutional crisis for the WTO. Both the US and the EU depicted the issue as a threat to the viability of the DSU itself. For the US, if sanctions were not promptly available at the end of the (already lengthy) reasonable time period for compliance, the credibility of the entire system would suffer as countries that ignored or evaded WTO rulings further delayed the day of reckoning. For the EU, if complainants were allowed unilaterally to judge whether replacement measures were lawful — and to request sanctions on the basis of that judgment alone — the WTO's guarantee of multilateral review would mean little.

Brooking no compromise, the two sides brought the work of the Dispute Settlement Body (DSB) to a halt over the usually routine adoption of the agenda, an unprecedented departure from customary practice. The EU threatened to seek an authoritative interpretation of the DSU from WTO members, which could issue such a decision by a three-fourths vote. The US adamantly refused to allow the WTO to vote on such a sensitive issue. Although it seems odd in retrospect, it is no exaggeration to claim that the future of the WTO dispute settlement system hung in the balance for several days. Eventually, both sides moved forward on their preferred paths simultaneously, but no agreement was reached on how to resolve the sequencing problem.¹¹

This crisis placed Ecuador in an extremely delicate situation.¹² Its leaders were lobbied heavily by USTR (which itself was under pressure from Congress) to join the U.S. move toward immediate retaliation.¹³ To the disappointment of hardliners in

⁹ For the appellate decision, see WTO Document WT/DS27/AB/R (9 September 1997).

¹⁰ For an legal overview of the crisis, see Salas and Jackson 2000.

¹¹ This account draws on interviews with various U.S. and EU officials in Geneva, Washington, and Brussels during 1999 and 2002.

¹² Telephone interview with Ecuadorian official, Geneva, October 16, 2002.

¹³ There were some divisions within the U.S. camp. At least one official from the State Department quietly encouraged Ecuador early on to request an Article 21.5 panel, hoping such a move would prompt the US to do the same. Telephone interview with U.S. official, Geneva, July 10, 2003.

Washington, Ecuador decided to go it alone. Instead of seeking authority to retaliate, Ecuador requested that the original panel first be reconstituted under Article 21.5 to review the legality of the EU's revised regime.¹⁴ The US then moved alone to retaliate against the EU and filed a new complaint against the revised banana scheme with Guatemala, Honduras, Mexico, and Panama (which had become a WTO member).¹⁵

As the compliance panel began its work, Ecuador's Ambassador to the EU issued a press release in Brussels on February 2, 1999, explaining his government's decision — and chiding the twin trade powers for losing sight of the real issues at stake:

“We are dismayed that the US and the EU seem to be using the banana dispute to pursue trade policy agendas which have little to do with bananas. As the world's largest banana exporter, we have the major interest in ensuring that the EU's banana import system fully conforms with the WTO rules. That is why we have asked the original panel to rule on the new system. . . The banana issue is too important to us to leave the solution in the hands of the USA and the EU; and we intend, as responsible WTO partners, to play a full part in developing a solution to this very difficult dispute. Both the US and the EU need to recognize that other countries are heavily impacted by the prolonged bilateral ‘to-ing and fro-ing’ that is taking place. While these two giants battle it out, Ecuador, whose industry is really at stake, is being caught in the middle.”¹⁶

Ecuador's establishment of the compliance panel under Article 21.5 proved to be helpful in resolving the sequencing crisis. Rather bizarrely, three separate panels — all with the same members as the original panel — were working at the same time: two under Article 21.5 (as requested by the EU and Ecuador), and one under Article 22.6 (to determine the level of U.S. sanctions). The panelists strategically delayed their Article 22.6 ruling so that all three reports could be issued at the same time in April 1999. Through this maneuver, they were able to rely on the findings of Ecuador's compliance panel that the EU regime remained illegal when authorizing the US to suspend concessions against Europe. The US-EU sequencing debate was by no means resolved, but Ecuador's decision to have a compliance panel review any replacement measure before requesting sanctions became customary practice in subsequent WTO disputes.

¹⁴ WTO Document WT/DS27/41 (18 December 1998).

¹⁵ WTO Documents WT/DS27/43 (14 January 1999) and WT/DS158/1 (25 January 1999).

¹⁶ “Ecuador Charges US and EU with Exploiting Banana Issue,” *South-North Development Monitor* (available on web at <<http://www.twinside.org.sg/title/eu-cn.htm>>).

This somewhat risky move to distance itself from the US offered several advantages to Ecuador. First, it helped the disputants and panelists overcome the sequencing impasse, allowing the case to move forward. Second, it signaled Ecuador's willingness to act independently and to disagree openly with its more powerful co-complainant. Finally, as an integrative tactic of sorts in the framework of Odell (2000), the move also won Ecuador appreciation from the EU and support from other delegations that shared its interpretation of the DSU. The EU representative in the DSB, for example, stated that the EU "recognized, in particular, that Ecuador, unlike other Members, had followed all the correct steps under the DSU in order to defend its rights."¹⁷ This accumulated goodwill with the EU was reportedly helpful to Ecuador as negotiators from all sides later worked to reach a settlement.¹⁸

IV. THE CROSS-RETALIATION REQUEST

While the United States moved quickly to impose sanctions, Ecuador opted to allow time for negotiations with the EU, even after the compliance panel's ruling, in the hopes of reaching a settlement. In a creative maneuver, Ecuador had specifically asked the compliance panel to go beyond its traditional mandate by offering policy guidance to the disputants. The panel, in response, identified three general approaches that might bring the EU regime into compliance with WTO rules (Josling 2003, 190). These recommendations were the basis for talks that continued throughout the summer of 1999. During this period there was movement on the part of several delegations, as both the US and Ecuador modified certain demands.¹⁹ By the fall, however, it became clear that the EU was not easily going to be able to forge a settlement that would win approval from the US, Ecuador, and EU member states.²⁰

After this series of intensive consultations yielded little progress, Ecuador was eventually prompted to threaten sanctions itself, despite the obvious obstacles it faced as a small developing country. On November 8, 1999, the EU delivered a routine status

¹⁷ WTO Document WT/DSB/M/78 (12 May 2000), 8.

¹⁸ Telephone interview with EU official, Brussels, July 18, 2003.

¹⁹ "U.S., EU Wrestle over Three Proposals for New Banana Trade Rules," *Inside U.S. Trade* 17 (3 September 1999), 15.

²⁰ "EU Official Reports Failure to Reach Consensus on New Banana Regime," *Inside U.S. Trade* 17 (10 September 1999), 3-6.

report on its efforts (all in vain) to comply with the WTO rulings. The report, however, also noted that the EU Commission would issue a formal proposal on ways to resolve the dispute later that week.²¹ Ecuador's negotiators, frustrated with the discussions to date and aware that matters could be coming to a head, filed their request for authority to retaliate against the EU the very next day. Given the timing, the request seems to be an attempt to enhance Ecuador's leverage at a crucial juncture; the text notes that Ecuador "does not rule out the possibility that progress may be made in the coming days in bilateral consultations" on the issue of compensation, which Ecuador clearly preferred to retaliation.²² Of course, no quick progress was made. Ecuador had instead opened a lengthy new phase of the dispute with a bold move that no other developing country had attempted in the WTO.

The WTO enforcement system relies on decentralized sanctions, a remedy that is intrinsically more attractive to larger, less trade dependent economies than to small developing countries. In the bananas dispute, several factors made any move toward retaliation a daunting prospect for Ecuador. First, Ecuador's imports from Europe were an infinitesimal share of EU trade. Losing access to the Ecuadorian market was unlikely to do serious harm to any European exporters. Second, the majority of imports from Europe were capital goods and raw materials without which the Ecuadorian economy was almost certain to suffer. Finally, the level of injury caused by the EU banana regime was large as a proportion of imports from Europe. Ecuador estimated that the level of nullification and impairment in the case (which it put at \$450 million per year) amounted to more than half of all goods exported by the EU to Ecuador.²³

Aware of these obstacles, Ecuador adopted an innovative and unprecedented strategy in its request for sanctions. Instead of relying on the goods sector, it proposed to suspend the application of intellectual property rights under the TRIPS Agreement. DSU Article 22 included certain rules enabling complainants to suspend obligations under one WTO treaty in order to induce compliance with another covered agreement. A coalition of developed countries led by the US had insisted on these cross-retaliation provisions during the Uruguay Round. Their objective was to ensure that the US, for example,

²¹ WTO Document WT/DS27/51Add.3 (8 November 1999).

²² WTO Document WT/DS27/52 (9 November 1999).

²³ WTO Document WT/DS27/52 (9 November 1999), 2.

could use its leverage as an importer of goods to compel compliance by developing countries with new rules on services and intellectual property. Ecuador aimed to reverse the arrow, retaliating under TRIPS — an agreement highly valued by influential interests such as the software, entertainment, and pharmaceutical industries — to ensure EU compliance with GATT. Histories of the Uruguay Round negotiations suggest that no delegations anticipated such a move; many developing countries, in fact, were staunch opponents of cross retaliation.

With this request, Ecuador was charting new legal territory. Not only was it the first attempt by a developing country to retaliate against a developed country in the GATT or WTO, it was also the first use of cross retaliation by any WTO member.²⁴ Ecuador's initial request did not offer many details on how it would seek to utilize any authority to retaliate under TRIPS. It simply identified three general types of intellectual property that were in the crosshairs: music copyrights, geographical indications, and industrial designs.²⁵ The EU immediately demanded arbitration on both the amount and the form of retaliation that Ecuador proposed, raising a host of legal objections.

It was during this arbitration that the details of Ecuador's strategy came to light. The first aspect to note is the sophistication of Ecuador's target selection. On the political side, Ecuador exempted both the Netherlands and Denmark from its request, in recognition of their 1998 votes against the revised banana regime (Josling 2003, 190). Ecuador's objective was to focus sanctions on EU members (such as France, Spain, and the United Kingdom) that were most hostile to liberalization. In terms of economic impact, Ecuador was careful to restrict its targets to categories of intellectual property in which there was little or no technology transfer, so as not to jeopardize its access to valuable technologies. Music and alcohol, after all, are the functional equivalent of consumer non-durables in the context of intellectual property.

To defend itself against legal challenges, Ecuador proposed an innovative system of limited and revocable licenses. In effect, the government would grant licenses to domestic firms to violate TRIPS only up to certain specified levels — and for markets only within Ecuador, not for export. The EU had objected that Ecuador would have few

²⁴ Technically, US retaliation in the bananas dispute also crossed agreements, as the US imposed sanctions under GATT for EU violations of both GATT and GATS.

²⁵ WTO Document WT/DS27/52 (9 November 1999), 3.

means of ensuring that its sanctions did not exceed the level of nullification and impairment. But Ecuador rebutted these assertions using estimates calculated by European industry associations regarding the size of its domestic market. For example, the combined value of its markets for European music and for alcoholic products with European geographical indications was smaller than the level of sanctions authorized by the WTO arbitrators.²⁶ Another crucial aspect of the licensing system is that the licenses would be temporary and could be revoked once the EU came into compliance.

In March 2000, the arbitrators delivered their decision, siding with Ecuador almost across the board.²⁷ By effectively playing "the developing country card," in the words of one EU negotiator, Ecuador had persuaded the arbitrators that it met the standards set forth under DSU Article 22.3.²⁸ In particular, Ecuador demonstrated to the panel's satisfaction that it was neither "practicable" nor "effective" for it to retaliate exclusively against European goods and services, and that circumstances were "serious enough" for it to justify suspending concessions under TRIPS.

The arbitrators required that Ecuador begin its retaliation against consumer non-durable goods, but permitted it to apply the balance of its \$201.6 million annual authority under TRIPS. They also warned that any suspension of TRIPS, even if carefully crafted, involved a number of potential legal complications of which Ecuador should remain aware. Ecuador had always acknowledged that any use of TRIPS would be messy — one official likened it to "using a shotgun to hit a precise target" — but part of the strategy's utility came from this very fact.²⁹ Ecuador's negotiators, admitting the limited size of their markets, stressed the implications of their TRIPS maneuver as an example for larger developing countries such as India and Brazil.

The response to Ecuador's request and the arbitration ruling was predictably mixed. Other developing countries, such as Honduras and Guatemala, applauded Ecuador on its "great achievement" and expressed gratitude to it for having "removed the obstacles faced by small and weak economies."³⁰ The US, another co-complainant, was far more restrained. While some U.S. officials welcomed any development that placed

²⁶ Interview with Ecuadorian official, Geneva, October 1, 2002.

²⁷ WTO Document WT/DS27/ARB/ECU (24 March 2000).

²⁸ Telephone interview with EU official, Brussels, July 18, 2003.

²⁹ Telephone interview with Ecuadorian official, Geneva, October 16, 2002.

additional pressure on the EU, USTR quickly sent a team of lawyers from Washington to ask questions and express concerns to Ecuador's WTO Ambassador — who refused to meet with them, sending his senior staff aide instead.³¹

EU officials initially viewed Ecuador's proposed retaliation as a "real concern," primarily because of the precedent it would set for future disputes.³² Even if Ecuador were to act on its authority, the economic impact on the EU would be relatively minor. This fact was of little consolation, however, to certain EU industries whose leaders feared what the precedent could mean for their rights under TRIPS in other disputes. A number of EU governments and firms requested meetings with Ecuadorian diplomats across Europe, mainly to ask questions about the intended targets, which were unclear.³³ The only industry to mount a concerted lobbying effort was the European Confederation of Spirits Producers (CEPS). Its representatives informed EU officials that they were prepared to apply aggressive measures if Ecuador violated their geographical indications, including a boycott and a campaign to label it as an international pariah.³⁴ In its annual report, CEPS touted its efforts: "CEPS secured the European Commission's assurance that it would seek to prevent any WTO retaliation by Ecuador, including its threatened withdrawal of protection for spirits with geographical indications."³⁵

Ecuador soon took steps to move forward on its threat, issuing a lengthy target list of consumer non-durable imports from Europe, as required by the arbitrators, in May 2000.³⁶ By that time, however, many observers suspected that Ecuador would not actually impose sanctions. Press reports from that period suggested that Ecuadorian officials had given assurances to the EU that retaliation would not occur.³⁷ It is not clear why Ecuador backed down from its threat. One official pointed to the intrinsic risks of violating TRIPS, emphasizing that such a move could easily discourage the foreign investment that Ecuador (like other developing countries) was so eager to attract.³⁸

³⁰ WTO Document WT/DSB/M/78 (12 May 2000), 9.

³¹ Telephone interview with Ecuadorian official, Geneva, October 16, 2002.

³² Telephone interview with EU official, Brussels, July 18, 2003.

³³ Interview with Ecuadorian official, Geneva, October 1, 2002.

³⁴ Interview with EU official, Geneva, June 10, 2002.

³⁵ *CEPS Annual Report 2000* (Brussels: European Confederation of Spirits Producers), 23.

³⁶ WTO Document WT/DS27/54 (8 May 2000).

³⁷ Saint Lucia's representative referred with relief to these reports in the DSB. See WTO Document WT/DSB/M/78 (12 May 2000), 10.

³⁸ Telephone interview with Ecuadorian official, Brussels, July 22, 2003.

Another official suggested that the authority was mainly intended to be of symbolic value, establishing a precedent of concern to the EU.³⁹ Other reports, however, contend that the EU quietly "supported Ecuador in the reduction of its external debt in the *Club of Paris* in exchange for Ecuador's not implementing cross retaliation" (Vranes 2002, 214).

Whatever the rationale for Ecuador's decision to forgo sanctions, observers in the WTO and participants in the dispute broadly agree that the pace of negotiations with the EU accelerated as the prospect of cross retaliation approached.⁴⁰ The EU made good faith efforts, for example, to try to arrange compensation for Ecuador — in terms of trade preferences, development aid, or debt reduction — but the Commission encountered obstacles to all three forms of compensation (any of which Ecuador would have preferred to the prospect of retaliating).⁴¹ It also continued to consult actively with Ecuador while trying to forge a settlement with the different stakeholders. In sum, Ecuador's innovative cross-retaliation gambit — which it undertook alone — appeared to enhance its leverage at the bargaining table beyond what the WTO system of remedies would normally provide a small developing country.

V. THE TWIN SETTLEMENTS

Throughout late 1999 and 2000, the EU had conducted extensive consultations with the various parties to the dispute. Since at least November 1999, it seemed clear that the most likely resolution would involve a two-stage settlement, with a revised tariff quota system as a transitional device en route to a tariff-only regime that would clearly be WTO consistent. Within its coalition, EU officials were juggling competing claims from ACP countries, banana importers, and divided member states. The chief difficulty confronted by the EU vis-à-vis the complainants, however, was that the US and Ecuador sharply disagreed on what a transitional tariff quota system should look like. As Ecuador moved forward with its authority to retaliate, the EU's representative in the DSB summed up its dilemma as follows: "The EC had a choice either to satisfy Ecuador and to remain

³⁹ Telephone interview with Ecuadorian official, Geneva, October 16, 2002.

⁴⁰ Telephone interviews with WTO Secretariat official, Geneva, June 12, 2003; with U.S. official, Geneva, July 10, 2003; and with Ecuadorian official, Geneva, October 16, 2002.

⁴¹ Interview with EU official, Geneva, June 10, 2002; telephone interview with EU official, Brussels, July 18, 2003.

under sanctions of US\$191.4 million or to satisfy the United States and to remain under sanctions of US\$201.6 million."⁴²

This assertion was not entirely accurate, but there were indeed a number of basic issues on which the US and Ecuador differed. The first was regarding the desirability of a tariff-only system as the ultimate outcome. In the early stages of the dispute, both the US and Ecuador favored such a solution, but under pressure from Chiquita — which, facing the prospect of bankruptcy, came to value the guaranteed market shares and rents associated with quota allocations — U.S. officials later signaled their willingness to accept a revised tariff quota system during a transitional period of indeterminate length.⁴³ Even Ecuador wavered at times on this point, but in the end its negotiators pressed for a firm commitment from the EU to adopt a tariff-only regime.

The more fundamental differences between the complainants dealt with the design of any transitional tariff quota system. One issue was the size of the quotas for each of the exporting countries in the dollar banana zone. If allocated on a country-specific basis, these quotas obviously imply a zero-sum game between Ecuador and the Central American complainants. The more complicated issues, however, dealt with the administration of the import licensing system for banana trading companies. One recurring debate was the selection of a historical reference period. This period would be used to determine the licenses allocated to "traditional" importers under any new regime. Chiquita, which lost market share immediately after Regulation 404 went into effect, pushed the US to insist on a pre-1993 period. Ecuador, by contrast, at first opposed any reference period and later requested a more recent period, 1995-97, because its trading companies had gained licenses by that time.⁴⁴ Ecuador also wanted to secure improved access for so-called "newcomers" — which Chiquita clearly was not. In particular,

⁴² WTO Document WT/DSB/M/78 (12 May 2000), 8.

⁴³ "U.S., EU Wrestle over Three Proposals for New Banana Trade Rules," *Inside U.S. Trade* 17 (3 September 1999), 15-17.

⁴⁴ "U.S., EU Wrestle over Three Proposals for New Banana Trade Rules," *Inside U.S. Trade* 17 (3 September 1999), 15-16. Also "U.S., EU Continue Wrangling Over Commission Banana Proposal," *Inside U.S. Trade* 18 (17 November 2000), 10.

Ecuador pressed for newcomers to have no less than a 20 percent market share, while the US proposed only 12.5 percent.⁴⁵

With the Bush administration in power and with the list of transatlantic trade disputes growing, there was a renewed emphasis on both sides in early 2001 to resolve the festering banana dispute once and for all. On April 11, 2001, the US and EU announced that they had reached an agreement to settle the case. As expected, the agreement called for the EU to adopt a transitional tariff quota system before moving to a tariff-only regime by 2006.⁴⁶ Ecuador's response was swift and, on the surface, severe. Its negotiators denounced the agreement in an April 16 press release: "In order to defend the two million Ecuadorians for whom the banana industry is their livelihood, the government of Ecuador will not declare that the 'banana war' is over until a fair agreement is reached which takes into account the interests of Ecuador, the largest banana exporter in the world, and the main supplier to the EU."⁴⁷

Ecuador immediately requested consultations with the EU, threatening to reconvene an Article 21.5 compliance panel to review the US-EU agreement if its concerns were not addressed.⁴⁸ From a legal perspective, this threat was all too credible, as even an internal EU study admitted that any licensing system based on a historical reference period "would be vulnerable to a challenge under international trade rules."⁴⁹ For the case to be fully resolved and removed from the WTO agenda, Ecuador would have to agree, and this fact gave it leverage during the consultations that followed.

While Ecuadorian officials condemned the agreement in the press, observers noted that the US-EU deal already included substantial benefits for Ecuador.⁵⁰ The EU had anticipated Ecuador's response in its talks with the US, playing that card openly to resist certain U.S. demands. According to one U.S. negotiator, the EU frequently

⁴⁵ "U.S., EU Banana Deal will be Implemented in Stages, Beginning in July," *Inside U.S. Trade* 19 (13 April 2001), 19; and "Banana Deal Effectively Locks in U.S. Share of EU Market," *Inside U.S. Trade* 19 (13 April 2001), 24.

⁴⁶ "U.S., EU Banana Deal will be Implemented in Stages, Beginning in July," *Inside U.S. Trade* 19 (13 April 2001), 1, 18-21.

⁴⁷ "Ecuador Seeks Changes in Banana Deal, Threatens Consultations," *Inside U.S. Trade* 19 (20 April 2001), 19.

⁴⁸ WTO Document WT/DS27/55 (20 April 2001).

⁴⁹ "Internal EU Paper Says Banana Deal Could Run Afoul of the WTO," *Inside U.S. Trade* 19 (27 April 2001).

⁵⁰ "Ecuador Seeks Changes in Banana Deal, Threatens Consultations," *Inside U.S. Trade* 19 (20 April 2001), 1, 18-19.

exclaimed, "But what about Ecuador? We can't agree to that."⁵¹ Because several of Ecuador's concerns had already been accommodated, its aggressive stance in the three weeks following the US-EU announcement was primarily a negotiating tactic to extract additional concessions from the EU — and this strategy was successful in many respects.

Still, it was not a course without risks. As one report noted, "Ecuador is also keenly aware of the price it may pay for pursuing a dispute settlement panel, one official signaled. It is difficult for Ecuador as a small developing country with severe economic problems to resist major pressure from the U.S. and EU over the banana issue, he said."⁵² Ecuador enjoyed support from certain EU member states: Sweden, Finland, Austria, and Germany all complained that the settlement did not adequately account for Ecuador's interests.⁵³ After two weeks of talks, on April 30, 2001, Ecuador and the EU reached a separate agreement that modified aspects of the US-EU deal, primarily by adding terms that improved Ecuador's access to import licenses.⁵⁴

What did Ecuador receive in these twin settlements? First, in terms of the original US-EU deal, Ecuador was pleased to see a firm commitment by the EU to adopt a tariff-only system by 2006. Throughout the negotiations, Ecuador had insisted on such a system, and it had strong support on this point from certain EU members, especially Germany. The US-EU agreement also called for an increase of 100,000 tons in the quota allocated to dollar zone bananas, which was more than the EU had offered to transfer from the ACP quota in earlier discussions. Also crucial was the removal of the country-specific quota allocations that had been part of the EU's Framework Agreement with the original GATT complainants. This reform favored Ecuador at the expense of Costa Rica and Colombia, which was to be "particularly hurt" by the change.⁵⁵ In terms of the historical reference period, Ecuador had to accept 1994-96 rather than 1995-97, but in its view either was better than the pre-1993 period the US had backed. Finally, although it

⁵¹ Telephone interview with U.S. official, Geneva, July 10, 2003.

⁵² "Ecuador Seeks Changes in Banana Deal, Threatens Consultations," *Inside U.S. Trade* 19 (20 April 2001), 18.

⁵³ "EU Members Unlikely to Block Banana Deal as Ecuador Seeks Changes," *Inside U.S. Trade* 19 (27 April 2001), 5.

⁵⁴ WTO Document WT/DS27/60 (9 July 2001).

⁵⁵ "Ecuador Seeks Changes in Banana Deal, Threatens Consultations," *Inside U.S. Trade* 19 (20 April 2001), 18.

had pressed for a 20 per cent market share for newcomers, Ecuador preferred the 17 percent on which the US and EU settled to the 12.5 percent formerly proposed by the US.

Despite these accommodations, Ecuador still had a series of specific concerns regarding implementation of the US-EU deal. In particular, it worried that the EU's management of import licenses in the newcomer (or "non-traditional" operator) category would deny its traders access to the increased quota for dollar zone bananas. Noboa, Ecuador's largest banana company, was guaranteed to retain a share of roughly 5 or 6 percent of available licenses, but there were concerns that a politically important Ecuadorian operator, Costa Trading, and others could suffer under the transitional regime.⁵⁶ Ecuador pressed for and received a number of new rules that would ensure its operators a fair chance to compete for licenses. Among other provisions, the pact established minimum thresholds (on years of registration and import volumes) and operational requirements (regarding shipping and security deposits) that would discourage speculators from applying for import licenses that they intended only to resell to operators actually in possession of bananas.⁵⁷

These additional provisions discouraging secondary market speculators and fraud reassured Ecuador substantially. Less widely publicized was another development of value to Ecuador. In addition to increasing the quota for dollar zone bananas by 100,000 tons, the EU reassigned the Dominican Republic in June 2001 from the Latin American quota to the ACP quota.⁵⁸ The effect of this move was to increase the available market share for dollar zone bananas by almost another 100,000 tons.⁵⁹ Perhaps the best evidence of Ecuador's successful tactics leading up to the twin settlements is its growing share of the EU market in the brief interval since July 2001.

⁵⁶ "U.S, EU Banana Deal will be Implemented in Stages, Beginning in July," *Inside U.S. Trade* 19 (13 April 2001), 19; "Ecuador Seeks Changes in Banana Deal, Threatens Consultations," *Inside U.S. Trade* 19 (20 April 2001), 1, 18.

⁵⁷ WTO Document WT/DS27/58 (2 July 2001), 6-7.

⁵⁸ The Dominican Republic only joined the ACP in 1990 upon ratifying the Lomé IV Convention. See web at <http://www.rvhb.com/faq_15.htm>. Unlike other ACP banana producers, it lacked a former colonial patron in Europe. These factors could explain its anomalous connection to the dollar zone quota and subsequent transfer.

⁵⁹ Telephone interview with Ecuadorian official, Brussels, July 22, 2003.

Government statistics suggest that Europe accounted for roughly 33 percent of Ecuador's banana exports in 2001; in 2002, this figure increased to 37 percent or so.⁶⁰

VI. THE WAIVERS

Although satisfied generally with the terms of the twin settlements, Ecuador and other Latin American producers remained anxious about how the EU would go about making the transition to a tariff-only system in 2006. In particular, they feared that the EU would set the tariffs on dollar zone bananas so high, compared to their competitors in ACP countries, that it would effectively price them out of the market. For the EU to maintain any kind of tariff differential between ACP and Latin bananas would require waivers from WTO rules. The waiver that applied to the Lomé IV pact between the EU and ACP expired in February 2000, like that agreement itself. To fully resolve the banana dispute, given the rulings of the panel and Appellate Body, the EU needed two waivers: one from GATT Article XIII for its transitional banana regime until the end of 2005, and another from GATT Article I for the new EU-ACP Cotonou agreement, which was to be in effect until the end of 2007.

In the WTO, waivers are traditionally granted only through consensus. The EU knew that this decision rule opened the door to mischief on the part of the complainants in the banana dispute (among others). As a result, its settlements with the US and Ecuador obligated each of them to "lift its reserve" regarding the Article I waiver and to "actively work toward promoting the acceptance" of the Article XIII waiver.⁶¹ The EU hoped that the road to these waivers would be relatively smooth after the settlements. Ecuador, after all, had been the most active opponent of the waivers in the WTO Council on Trade in Goods, where it held the waiver hostage while seeking changes in the US-EU pact.⁶² There was likely to be opposition from Costa Rica and Colombia, the two parties most harmed by the twin settlements, but the EU hoped to be able to compensate them.

⁶⁰ "Analysis of the Banana Juncture 2002-2001," 3. Available on web at <http://www.sica.gov.ec/ingles/cadenas/banano/docs/coyuntura_2002-2001.pdf>.

⁶¹ WTO Document WT/DS27/58 (2 July 2001), 2, 5.

⁶² In an April 18, 2001, meeting of the Goods Council, Ecuador "tried unsuccessfully to block the agenda item" on the waiver. See "Latin WTO Members Speak out against EU Tariff Banana Waiver," *Inside U.S. Trade* 19 (20 April 2001), 10.

In the months after the settlements, the EU resumed trying to commence the required working party review of its waiver requests in the Council on Trade in Goods. Each time it placed this issue on the agenda, however, a coalition of Latin countries objected to the review on the basis that the EU had not provided adequate documentation regarding the future tariff-only regime. As soon as a working party is formed, the clock begins and WTO members have 90 days to decide on the waiver request. By blocking the establishment of a working party, the Latin countries indefinitely delayed the waivers. This coalition — which included Guatemala, Honduras, Nicaragua, and Panama — feared that if they granted the EU *carte blanche*, it could enact unlimited tariff differentials between Latin and ACP bananas during 2006 and 2007 while remaining immune from challenge under the DSU. The coalition continued to use this procedural ploy to prevent formal consideration of the EU waiver requests throughout the summer of 2001.

As the fall approached, the frustration of many EU officials was building. They resented both Ecuador and the US for not doing more to encourage progress on the waivers. To break the impasse, the EU began to suggest its interest in invoking a formal voting clause in the WTO Agreement that allows for approval of waivers by a three-fourths majority when no consensus can be reached. This move got the attention of the US, which did not want to confront another institutional crisis. The US and EU then began to apply intense pressure on the Central American delegations, "including offers of new trade benefits and threats that potential ones may not be realized."⁶³ The campaign paid off, as Guatemala, Nicaragua, and Panama dropped their objections. Honduras, the last holdout, did not want to be perceived as undermining the tradition of consensus decision making by itself. On October 5, 2001, the Council on Trade in Goods finally formed a working party to review the EU requests.⁶⁴

With the clock having begun on October 5, the expectation was that the WTO should be able to decide on the waivers before January 1, 2002, when the EU had to begin implementing its revised tariff quota for ACP bananas. That timetable, however,

⁶³ "WTO Moves to Consider EU Banana Waivers, Roadblock Dropped," *Inside U.S. Trade* 19 (12 October 2001), 16.

⁶⁴ "WTO Moves to Consider EU Banana Waivers, Roadblock Dropped," *Inside U.S. Trade* 19 (12 October 2001), 15-16.

was still regarded as inadequate by the EU. Its leaders strongly preferred to resolve the waivers before the November 2001 Doha ministerial meetings, at which WTO members would attempt to launch another round of negotiations. The reason was that ACP countries, anxious about the legal status of their Cotonou pact preferences in the WTO, had begun to insist that the waivers be approved before they would support the launch of a new trade round. In light of the many issues under discussion leading up to the Doha talks, the EU had difficulty persuading other members that the waivers were a matter for urgent consideration. As the ministerial approached, the waivers were not on the agenda — much to the relief of the Latin American countries, which did not want to confront the intense political pressures likely to be applied at Doha in order to launch the round.⁶⁵

At Doha, however, the representative from Kenya, as chair of the ACP group, surprised the assembled delegations by placing the waivers on the agenda without having undertaken the traditional preliminary consultations in the Council on Trade in Goods.⁶⁶ With this move, the ACP countries capitalized on a procedural opening to gain leverage rather like Ecuador did at other stages of the dispute. The Latin American countries suspected that the EU arranged this maneuver, but both it and the US (more credibly) professed surprise. The result was several days of intense consultations between the EU, the Latin American countries, and ACP delegations, with the US serving as mediator. The Latin American countries — which included Colombia, Costa Rica, Ecuador, Honduras, and Panama — began the discussions together, but their coalition soon fractured.

Several Latin demands were rejected out of hand by the EU and ACP delegations. One casualty was a proposal to limit the Article I waiver to the end of 2005, at which point it could be renewed through 2007 if the tariff-only regime proved acceptable.⁶⁷ Costa Rica dropped its demand that approval of the waiver be contingent on the acceptance of new tariff negotiations by the ACP countries. The coalition abandoned its insistence on the right to request suspension of the waiver at any time after it came into effect. And they also gave up a demand for assurances that expanded market access after

⁶⁵ Interview with U.S. official, Geneva, June 11, 2002.

⁶⁶ Telephone interview with EU official, Brussels, June 17, 2002.

⁶⁷ "WTO Moves to Consider EU Banana Waivers, Roadblock Dropped," *Inside U.S. Trade* 19 (12 October 2001), 16.

EU enlargement would be available to all suppliers on a competitive basis. After several meetings, Colombia, Costa Rica, Honduras, and then Panama all agreed to drop their objections and approve the waiver early on November 13, 2001 — one day before the final Doha plenary session.⁶⁸

With only hours remaining before the conclusion of the ministerial, Ecuador stood alone as the solitary holdout. It wanted the EU to offer some guarantee that its market access would not be diminished during 2006 and 2007, after the transition to a tariff-only regime. In particular, it sought a numerical target for the level of tariff that would be applied. The EU refused to offer any such assurance, arguing that it could not guarantee market outcomes under a tariff system and was not prepared to limit its rights prematurely in the Article XXVIII negotiations that would later set the new tariff levels. The result was an impasse that lasted late into the evening on November 13. Ecuador had signaled that its banana concerns were serious enough to justify its trade minister taking the blame for spoiling the launch, if necessary. Ecuador claimed that such a story would play well at home, despite the obvious costs it would bear in the international arena.

The credibility of this threat, fortunately, was never put to the test. Late on the evening of November 13, soon after the departure of a key Ecuadorian official for the airport at 11:00PM, Ecuador agreed to accept a compromise crafted by the US, Colombia, and others.⁶⁹ Instead of numerical targets on market share or tariff levels, the compromise gave Ecuador and other Latin countries a special procedural guarantee. Attached to the Article I waiver, as an annex, is a procedure for arbitral review of the EU's proposed tariff-only regime prior to its implementation.⁷⁰ Ecuador won the status of "principal supplier" in the GATT Article XXVIII negotiations that will determine the new tariff levels on bananas, but other Latin countries received the right to be notified of the results of the talks. The EU agreed that its revised tariffs would not "diminish the total market access" of the Latin banana producers. If the arbitrator finds otherwise, Ecuador (or others) could suspend the effect of the waiver, returning parts of the Cotonou agreement to legal limbo. Ecuador, moreover, could reactivate its case against the

⁶⁸ "EU Waivers Approved as Latin Americans Drop Banana Demands," *Inside U.S. Trade* 19 (15 November 2001), 10-11.

⁶⁹ Telephone interview with Ecuadorian official, Brussels, July 22, 2003.

⁷⁰ WTO Document WT/MIN(01)/15 (14 November 2001).

banana regime and potentially move again to request authority to retaliate against the EU immediately, rather than having to file an entirely new complaint.

While not the bedrock guarantee Ecuador was seeking on the future tariff level, this procedural compromise offered the Ecuadorian delegation several advantages. It included a guarantee on timelines, obligating the EU to complete its Article 28 negotiations in a timely fashion — well before its deadline at the end of 2005. Ecuador also received a speedier and more focused form of multilateral review than would have been available under the DSU. Finally, the EU agreed not to diminish the total market access of the Latin banana producers, which eased Ecuador's fears regarding the potential for punitive tariff differentials between Latin and ACP bananas. US officials report that the EU was reluctant to endorse even this procedural compromise, but Ecuador viewed the absence of any constraints on future tariff levels as a deal breaker.⁷¹

VII. CONCLUSION

The independent and often creative path that Ecuador charted through the tortuously complex bananas dispute was not without risks. As a small developing country highly dependent on access to markets in Europe and the US (not to mention investment and development assistance from those same powers), Ecuador was not expected to wield significant negotiating leverage in the transatlantic banana war. Nevertheless, its leaders made a costly decision to rush Ecuador's accession to the WTO in order to join the complaint. It pressed the case aggressively at each stage and devised an unprecedented approach to compliance bargaining after winning at the panel and appellate levels. Even after reaching a transitional settlement, its leaders continued to agitate for Ecuador's interests, threatening to torpedo the launch of the Doha round.

Despite a lengthy delay from start to finish, Ecuador's sophisticated strategy eventually bore fruit (so to speak). In one test of the primary hypothesis, Ecuador's settlement with the EU conferred significant benefits when compared to regional competitors in the banana industry. For example, Costa Rica and Colombia — the chief beneficiaries of the 1994 Banana Framework Agreement — saw their competitive position diminished after the EU agreed to abolish its country-specific quotas during the

⁷¹ Interview with U.S. official, Geneva, June 11, 2002.

transitional period. Especially in the later stages of the dispute, co-complainants Guatemala and Honduras relied more heavily on the US to represent their views, thanks to their more extensive ties to US trading companies. Ecuador disagreed with the US on a number of basic issues. In the second test, it thus seems safe to conclude that if Ecuador had not actively pushed its agenda, a settlement endorsed by the US on its behalf would have been much less to its liking. Finally, the specific guarantee at Doha that the tariff-only system the EU eventually implements will not diminish the market access of Latin producers in 2006, along with a novel procedural mechanism to ensure this commitment is honored, were also of value to Ecuador.

In addition to being intrinsically interesting for these reasons, the bananas dispute offers perhaps the only opportunity (to date) to investigate a difficult case of compliance bargaining in the WTO by a developing country. In almost every other dispute filed by developing countries against developed WTO members, the defendants have complied with rulings of violation before the reasonable time period for implementation has expired. Examples include the complaint by Brazil and Venezuela against U.S. gasoline standards; Costa Rica's case against U.S. restrictions on imported underwear; the complaint by India, Malaysia, Pakistan, and Thailand against the U.S. shrimp ban; Brazil's initial case against Canadian aircraft subsidies; India's complaint against EU antidumping duties on bed linen; and Pakistan's case against U.S. cotton safeguards. In all of these disputes, the defendant complied more fully and faster than the EU in the bananas case (arguably because the stakes were smaller and the issues less complicated).

Because those early cases were relatively easy in no way suggests that difficult disputes do not lie ahead. In fact, Brazil has already begun to pursue a number of politically sensitive challenges to agricultural policies in the US and Europe. The question is whether the Ecuador case offers lessons for other developing country complainants such as Brazil, and I believe the answer is yes. Ecuador's strategies are a model for developing countries seeking to maximize their bargaining leverage by utilizing certain procedural maneuvers within the institutional context of the WTO.

In terms of the specifics of its strategy, Ecuador's pathbreaking move to request cross retaliation should now be a weapon in the arsenal of every developing country complainant. As with any form of sanctions, there are considerable obstacles to using

cross retaliation (Vranes 2003). Nevertheless, WTO arbitrators have endorsed the move in principle, and scholars such as Subramanian and Watal (2000) have begun to trumpet its attractive attributes. Although Ecuador opted not to implement its authority to cross retaliate, observers suggest that the mere possibility of TRIPs retaliation focused additional EU attention on Ecuador's demands. For larger developing countries that are more attractive to (or less dependent on) foreign investment, the threat of cross retaliation against intellectual property could serve as an even more effective tool in compliance bargaining with the US, EU, and other advanced industrial powers.

Ecuador's moves during the sequencing crisis and cross retaliation request speak to a more general truth regarding the DSU. Despite its detail, it is very much an evolving instrument, open to surprising interpretations and potentially advantageous procedural moves. With regard to the negotiations in Doha, the tradition of approving waivers in the WTO by consensus gave Ecuador and other Latin banana producers the chance to attempt to extract certain concessions at Doha. It was an uphill climb in that case, but there are likely to be occasions on which developing countries will be able to gain leverage by wielding their veto carefully — especially when they do so as a coalition.

Ecuador, in sum, capitalized repeatedly on certain institutional rules to enhance its bargaining leverage. Institutions may cast a longer shadow over compliance bargaining than over other forms of international economic negotiation. This seems certain whenever there are procedural rules in place for dispute settlement, as is the case in the WTO. Still, multilateral economic negotiations have a structure all their own (Odell 2003; Winham 1986), making it useful for developing countries to pay close attention to institutional details in that setting as well.

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