

A CRITICAL REVIEW OF CROSS-RETALIATION AS A JUSTICIABLE COUNTERMEASURE WITH REFERENCE TO THE EC – BANANAS III (ARTICLE 22.6 – EC) CASE¹

Abstract

The World Trade Organisation (WTO) is the international legal personality which regulates the World Trading System. It is governed by a set of six covered Agreements which are divided into sectors and subsectors. A dispute is said to have arisen in the WTO when the industry of a member-state is affected by measures taken by another member-state. A complaint lies before the Dispute Settlement Body (DSB) of the WTO which upon conclusive hearing of a matter comes up with recommendations which the defaulting party has to implement. In the face of non-compliance the erring party may be subjected to countermeasures which may be within the sector where violation occurred. But the aggrieved party has the discretion to suspend concessions or obligation in another sector but under the same agreement where violation occurred or even to suspend under another covered agreement. Cross-retaliation is basically about the ability of a party to counter adverse measures by suspending obligations or other concessions in another sector or under another covered agreement, different from where the nullification and impairment occurred. The thrust of this article is to unravel the truth behind the wide discretions afforded the aggrieved party in relation to cross-retaliation as a countermeasure and to critique the extent of its justiciability. These aims are achieved through an appraisal of the provisions of the Dispute Settlement Understanding (DSU) and a critique of the EC Bananas III case² which is a locus classicus case in this regard. It further critiques the position of the law and how relevant it is to reality and then makes recommendations for further improvements.

Key words: *Cross-Retaliation, Justiciability, EC-Bananas III, Countermeasure.*

1. Introduction

The World Trade Organisation (WTO) as an international legal personality regulates the World Trading System to ensure smooth, free, fair and predictable flow of international trade. It is “the only International Organisation dealing with the global rules of trade between nations”³ It is governed by a set of Agreements signed by the member-states on 15th April 1994 at Marrakesh. There are basically six covered agreements – The Umbrella WTO Agreement, GATT⁴, GATS⁵, TRIPS⁶, DSU⁷ and Trade Policy Review (TPR)⁸. For clarity and ease of reference, these agreements are divided into sectors and subsectors. The organisation is governed by:

1. The Ministerial Conference⁹ - the supreme authority composed of representatives of all member-states.

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² EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU Available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/27ARBECU.doc>. Last accessed 24/04/09. This case inaugurates the Regime for the Importation, Sale and Distribution of Bananas² (WT/DS27 – Ecuador)

³ The World Trade Organisation, *The WTO in brief* Available at http://www.wto.org/english/res_e/doload_e/inbr_e.pdf. Last accessed 24/04/09

⁴ General Agreement on Tariffs and Trade

⁵ General Agreement on Trade in Services

⁶ Trade Related Aspects of Intellectual Property Rights

⁷ Dispute Settlement Understanding

⁸ World Trade Organisation, *Understanding the WTO*, SECTION 2: The Agreements. Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap2_e.pdf. Last accessed 24/04/09

⁹ WTO Agreement, Article IV:1

2. The General Council¹⁰ - the chief decision-making body which administers the TPR¹¹ and the Dispute Settlement Body¹² (DSB). It constitutes of representatives of all member-states.

Upon the conclusive hearing of a matter, the DSB comes up with recommendations which the losing party has to implement. In the face of non-compliance with DSB recommendations, the losing party may as a temporary measure negotiate to pay compensation or be subjected to countermeasures¹³. Such countermeasures may be within the sector where violation occurred¹⁴. But if the aggrieved party considers this impracticable or ineffective, he may seek to suspend concessions or obligation in another sector but under the same agreement where violation occurred¹⁵. And if the party further considers this impracticable, he may seek to suspend under another covered agreement¹⁶. Cross-retaliation is basically about the ability of a party to counter adverse measures by suspending obligations or other concessions in another sector or under another covered agreement, different from where the nullification and impairment occurred.

The provisions of the DSU seem to leave very wide discretions to the aggrieved party. He is to decide what is practicable and effective, and under which sectors or agreement (as the case demands) he can most effectively retaliate. How wide is this discretion in actuality? Is it all about the aggrieved party? Is the arm of justice one-sided? Is this discretion unlimited? To what extent does this discretion get before the DSB intervenes? What are the limits to judicial review? What does the law say? What is obtainable in reality? What should it be?

To address these queries and more is the main objective of this article. The thrust is to unravel the truth behind the wide discretions afforded the aggrieved party in relation to cross-retaliation as a countermeasure and to critique the extent of its justiciability. This is achieved through an appraisal of the provisions of the DSU and a critique of the *EC Bananas III case*¹⁷ which is a *locus classicus* case in this regard. It further critiques the position of the law and how relevant it is to reality and then makes recommendations for further improvements. To achieve these objectives, the essay is divided into four sections. The first section generally introduces and clarifies the topic, and delineates the aims and objectives of the article. The second section appraises the dispute settlement mechanism of the WTO and the remedies which avail an aggrieved party in the face of non-compliance. The third section reviews cross retaliation as a countermeasure, being one of the remedies available to an aggrieved party under the WTO dispute settlement mechanism. This section probes into the whole idea of cross-retaliation and particularly its justiciability, with a direct critique of Article 22 of the DSU and the *EC Bananas III case*¹⁸. And it rounds up by appraising the relationship between the position of the law and what is obtainable in reality. The fourth section which is the final section concludes on all the issues raised in this article and makes recommendations for future adjustments.

¹⁰ WTO Agreement, Article IV:2

¹¹ WTO Agreement, Article IV:3

¹² WTO Agreement, Article IV:4

¹³ Article 22.1 DSU

¹⁴ Article 22.3(a) DSU

¹⁵ Article 22.3(b) DSU

¹⁶ Article 22.3(c) DSU

¹⁷ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU Available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/27ARBEUCU.doc>. Last accessed 24/04/09

¹⁸ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15)

2. The Dispute Settlement Mechanism and Remedies

2.1 Dispute Settlement in the World Trade Organisation

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system¹⁹. It is principally established to administer the DSU as well as the consultation and dispute settlement provisions of the covered agreements²⁰. It is presided over by a Panel/Appellate Body which reports to the DSB. A dispute is said to have arisen when the industry of a member-state is affected by measures taken by another member-state and the former files a complaint before the DSB. Both parties are required to enter into bilateral negotiations within 30 days of the filing of the complaint²¹. If after 60 days, consultations prove unsuccessful, the Complainant may request that the DSB establish a panel²² to look into the matter. Unless there is consensus to the contrary, the DSB would establish a 3-man independent panel²³ to adjudicate over the case²⁴.

The panel procedures are regulated by Article 12 DSU. The panel would normally complete its work and issue a report within 6 months or in cases of urgency, 3 months. Unless there is consensus agreement to the contrary, the DSB would adopt the panel report within 60 days except in cases of urgency²⁵. Where either of the parties seek to appeal, it must be on issues of law and he will first have to notify the DSB of any such intention. Appeals lie before the Appellate Body which is established by the WTO Agreements. The Appellate Body consists of 7 members, 3 out of whom will serve in any given case²⁶. Its procedures are regulated by Article 17 DSU. It will normally complete its work and issue a report within 60 days²⁷. And the DSB would adopt and publish the report within 30 days unless there is a consensus to the contrary²⁸.

2.2 Remedies for Non Compliance

Where a panel/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 agreement²⁹. Once adopted by the DSB, every recommendation is binding on the parties to the dispute. The losing party is expected to comply promptly with the recommendations of the DSB in order to ensure effective resolution of disputes³⁰. However, if it is impracticable for a party to comply immediately, he shall be given a reasonable period of time within which to do so³¹. If in any event a party fails to comply within the reasonable period of time, the aggrieved party has two possible remedies which avail him temporarily while implementation is pending. These remedies are *compensation* and *retaliation*.

¹⁹ DSU Article 3.2

²⁰ DSU Article 2.1

²¹ DSU Article 3.3

²² DSU Article 4.7

²³ DSU Article 8.5

²⁴ DSU Article 6.1

²⁵ DSU Article 16.4

²⁶ DSU Article 17.1

²⁷ DSU Article 17.5

²⁸ DSU Article 17.14

²⁹ DSU Article 19.1

³⁰ DSU Article 21.1

³¹ DSU Article 22.3

2.2.1 Compensation

Compensation refers to a sum paid or something else given or done to pay for loss or damages. Where the losing party fails to comply with the DSB recommendations within a reasonable period of time, compensation can be negotiated between both parties to the dispute not later than the expiration of the reasonable period of time. And this must be concluded within 20 days from the expiration of the reasonable period of time³². Compensation must be voluntary and mutually agreed upon by the parties and must be consistent with the covered agreements³³. It should only be resorted to if the immediate withdrawal of the measure is impracticable. It is a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement³⁴. If negotiations are unsuccessful, the complainant may request authorisation by the DSB to retaliate.

2.2.2 Countermeasures - Suspension of Concession or Other Obligation

Countermeasures are measures aimed at opposing other measures with a corrective or retaliatory intent. This is commonly referred to as ‘retaliation’ or ‘sanctions’. It generally includes the suspension or withdrawal of *concessions* or *other obligations* under covered agreements on a discriminatory basis vis-à-vis the other member subject to authorisation by the DSB.³⁵

- *Concessions* - basically deal with tariffs and fiscal policies
- *Other obligations* - basically refer to non-tariff bindings e.g. legal responsibility to provide protection for intellectual property rights.

Suspension in this regard implies that the country would be relieved of its legal responsibilities and obligations in respect of the concession/obligation to be suspended. The use of countermeasures as a WTO remedy is also recognised in the SCM Agreements³⁶. This remedy is only a temporary measure pending full implementation³⁷ and not an alternative to implementation. It is however a last resort by the Complainant and is only exercised upon authorisation by the DSB³⁸.

3. Cross-Retaliation as a Countermeasure: A Critique of its Justiciability

3.1 The Concept of Cross-Retaliation A Complainant should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel/appellate body has found a violation or other nullification or impairment³⁹. This is otherwise known as *parallel retaliation*. However, where this is impracticable, he may seek authorisation to cross-retaliate. The term *cross-retaliation* does not appear in the DSU. However, it is a common term used to describe certain other forms which retaliation could take, and these are:

- *Cross-sector retaliation*: This involves the suspension of concessions or other obligations in other sectors which are different from but under same agreement as that in which violation or impairment occurred⁴⁰.

³² DSU Article 22:2

³³ DSU Article 22.1

³⁴ DSU Article 3.7

³⁵ DSU Article 3.7

³⁶ Subsidy and Countervailing Measures Agreements Article 4.10

³⁷ DSU Article 22.1

³⁸ DSU Article 3.7

³⁹ DSU Article 22:3(a)

⁴⁰ DSU Article 22:3(b)

- *Cross-agreement retaliation*: This involves the suspension of concession or other obligations under another covered agreement which is different from that in which violation or impairment occurred⁴¹.

Cross-retaliation only avails a complaining party where parallel retaliation is considered not to be practicable or effective. In such cases, cross-sector retaliation becomes the first available option. Cross-agreement retaliation only avails a party where cross-sector retaliation is considered by that party to be impracticable or ineffective. The circumstances under which cross-retaliation can be authorised are governed by Article 22.3 DSU. Cross-retaliation is most useful where it is adjudged that the impact of parallel retaliation would not be felt by the losing party, mostly because of the varying economic status of both parties. Larger countries may hardly feel the impact of lost exports, while smaller ones might cause serious self-harm by increasing the cost of imports from the offending member. In such cases, cross-retaliation is believed to provide an avenue for smaller economies to induce compliance by larger ones.⁴²

3.2 The Justiciability of Cross-Retaliation as a Countermeasure

It is entirely within the discretion of the Complainant to choose which form of retaliation would be practicable or effective. This discretion must however be guided. In applying this discretion, the party shall take into account the provisions of Article 22.3 DSU. In other words, he shall first consider parallel retaliation as a countermeasure⁴³. Where he considers that it would not be practicable or effective, he will opt for cross-sector retaliation⁴⁴. Where he also considers this not to be practicable or effective and the situation is serious, he shall request for authorisation to embark on cross agreement retaliation⁴⁵. It is worthy of note that the DSU lays it on the Complainant to decide which form of retaliation would be practicable and effective for him. When he so decides, he seeks authorisation to implement same. This does not imply an obligation to establish that a particular form of retaliation is more practicable than other forms of retaliation or that it would be most practicable or most effective for the party.

Furthermore, the party shall consider the trade in the sector or agreement under which the panel or Appellate Body has found violation and the importance of such trade to that party⁴⁶. The importance of this sector or agreement and trade therein invariably determines what steps he can take and how such a step would affect his economy. He would further take into account, the broader economic elements related to the nullification or impairment and the broader economic consequences of suspending concessions or other obligations⁴⁷. In other words, he shall not only consider the importance of the sector/agreement to his economy but he shall also consider the general world market and the economies of other countries that may possibly be affected by the violation and the consequent suspension. These considerations should guide the Complainant in his choice of retaliatory measures. He is not expected to take arbitrary actions without considering the effects.

If the Complainant, keeping all these points in view considers cross-retaliation to be practicable and effective, he shall first request for authorisation to implement it. In his application, he shall

⁴¹ DSU Article 22:3(c)

⁴² ICTSD, "Brazil asks for Cross-Retaliation Under TRIPS, GATS in Cotton Dispute with US" (2005) *Bridges Weekly Trade News Digest*; Vol. 9 No. 34, Available at <http://ictsd.net/i/news/bridgesweekly/7349/>

⁴³ DSU Article 22.3(a)

⁴⁴ DSU Article 22.3(b)

⁴⁵ DSU Article 22.3(c)

⁴⁶ DSU Article 22:3(d)(i)

⁴⁷ DSU Article 22:3(d)(ii)

state the reasons for this request,⁴⁸ justifying same. He shall give reasons why this request should be granted and outline the considerations he has made in conformity to the provisions of Article 22.3 DSU. This request shall be forwarded to the DSB as well as the relevant councils and also the relevant sectoral bodies in the case of cross sector retaliation.⁴⁹

The DSU does not make any provisions for cases where the DSB may probe into the propriety or otherwise of the request for authorisation or the reasons adduced therein. In fact, the Understanding expressly states that the arbitrators “shall not examine the nature of the concession or other obligation to be suspended”.⁵⁰ Therefore the party is not obliged to list out the particular obligations and concessions sought to be suspended for the arbitrators to rule on its propriety or otherwise. However the DSB reserves the right to reject the application on certain grounds. Firstly, the DSB may reject such application where there is a consensus of its members to that effect⁵¹. Secondly, it may reject such application where the covered agreement prohibits such suspension⁵². Besides these, no other reason is recognised under the DSU for the refusal of authorisation to cross-retaliate. It is therefore logical to conclude that the only ground for refusal would be if there is a consensus agreement to the contrary. This is because even if a situation arises under Article 22.5 where the proposed countermeasure is prohibited by law, it would still take a consensus decision for the refusal to be effective. It is noteworthy at this point that WTO consensus refers to a negative consensus of its members

This right to cross-retaliate is exclusive to the Complainant but not arbitrary. It is entirely left to his discretion to choose which mode of retaliation would be practicable or effective to induce compliance. This right is not subject to any form of probe. It must however be exercised within the confines of the law. The guidelines and procedures outlined in Article 22.3 DSU must be adhered to. The DSU further provides that the level of proposed suspension shall be equivalent to the level of nullification or impairment suffered.⁵³ The losing party who is ultimately the primary victim of the retaliatory measures cannot oppose a Complainant’s right to countermeasures. He can only object to the level of the proposed suspension and the non-compliance with the stipulated WTO procedures.⁵⁴ In other words, once the Complainant is diligent enough to follow the outlined procedures, the only objection open to the other party pertains to the equivalence of the proposed suspension to the level of nullification or impairment. And where an objection is raised on either ground, an arbitral panel shall be constituted to look into the contentions⁵⁵.

The powers and duties of the arbitral panel are regulated by Article 22.6 of the DSU. Its jurisdiction is limited to the points of objection raised. The panel is not to probe into the nature of the concessions or other obligations to be suspended.⁵⁶ This provision implies that cross-retaliation as a countermeasure is non-justiciable. The arbitral panel is only to probe into issues of equivalence and compliance with procedures. The SCM however empowers the arbitrators to determine whether the countermeasures are appropriate⁵⁷ and this provision has been

⁴⁸ DSU Article 22:3(e)

⁴⁹ DSU Article 22:3(e)

⁵⁰ DSU Article 22.7

⁵¹ DSU Article 22:6

⁵² DSU Article 22:5

⁵³ DSU Article 22:4

⁵⁴ DSU Article 22:6

⁵⁵ DSU Article 22:6

⁵⁶ DSU Article 22.7

⁵⁷ Subsidy and Countervailing Measures Agreements Article 4.11

followed in a number of cases⁵⁸. However, to the extent that it conflicts with the DSU, the DSU provisions prevail. The arbitrators are not empowered to examine the nature of the concessions or other obligations sought to be suspended. They are limited to the points of objection raised and the question of whether the suspension is prohibited by law⁵⁹. Where it finds that due process has not been followed, the Complainant is to comply. However, where it finds that the request for authorisation is in accord with the provision of the DSU, it shall render an award to give effect to this request. The Complainant shall then forward an application to the DSB which is consistent with the award of the arbitral panel. Once this application is made in consistence with the decision of the arbitrators, the DSB shall grant the Complainant authorisation to cross-retaliate unless there is a consensus to the contrary.

3.3 *EC Bananas III*:⁶⁰ A Case Study

In this case, Ecuador having obtained a DSB ruling against the EC (which had failed to comply within a reasonable period) sought authorisation to impose countermeasures up to a level of US\$450 million. Ecuador claimed that withdrawal of concessions in the goods sector would not be practicable or effective and that the circumstances were serious enough to warrant authorisation to cross-retaliate under TRIPS. Ecuador further claimed that it equally reserved the right of cross-sector retaliation under Article 22.2 DSU in the event that these may be applied in a practicable and effective manner. It was on account of this that the EC raised objections which led to the formation of the Article 22.6 Arbitral Panel. EC contended that the level of suspension sought by Ecuador was beyond the level of impairment it suffered and that the principles and procedures set out in Article 22.3 DSU had not been followed.

The arbitrators held pursuant to Article 22.7 DSU that if they find the proposed amount of suspension not to be equivalent to the impairment suffered, they would have to estimate the level of suspension considered to be equivalent to the impairment suffered by Ecuador⁶¹. This was to ensure the finality of their award as no further recourse is available to the parties. And this is also in conformity with the position of the arbitrators in the *EC Hormones case*.⁶² I agree with this reasoning because judicial activism requires that arbitrators do not just stamp yes or no to the proposed suspension; but where it is considered not to be equivalent they are to recalculate and suggest an amount in order to render a decision which is final and conclusive. Judicial activism is employed here to cover up the loopholes created by the draftsman. Some scholars have argued that if in such cases, arbitrators do not estimate the level of suspension that they would consider to be equivalent to the impairment suffered, the member would need to make new estimates and arguably submit new proposals for consideration⁶³. This further proposal may also be rejected, leading to a chain of actions revolving around the same issues. EC objected to the method of calculation submitted by Ecuador, the arbitrators refused to rule on its admissibility or otherwise but rightly held that in past cases, arbitrators have developed their own methodology for recalculating the equivalence of the proposed suspension to the level of impairment and would request additional information from the parties where it is

⁵⁸ US – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the US under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, (30 August 2002) WT/DS108/ARB, DSR 2002:VI, 2517

⁵⁹ DSU Article 22.7

⁶⁰ EC – Bananas III (Ecuador) (Article 22.6 – EC) (n 15)

⁶¹ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) at Paragraphs 11 - 14

⁶² EC – Hormones, Arbitration under Article 21.3 of the DSU (29th May 1998) WT/DS26/15 and WT/DS48/13 available at [http://www.worldtradelaw.net/reports/213\(c\)awards/ec-hormones\(213\(c\)\).pdf](http://www.worldtradelaw.net/reports/213(c)awards/ec-hormones(213(c)).pdf). Last accessed 24/04/09

⁶³ Palmeter, D., *et al*, *Dispute Settlement In The World Trade Organisation; Practice And Procedure*, 2nd Edition, (Cambridge: 2004) P.274

necessary.⁶⁴ On the basis of the revised *EC bananas regime* which entered into force on 1 January 1999, according to the report of the Article 21.5 panel convened on the request of Ecuador and adopted on May 1999⁶⁵, they recalculated the level of impairment to be US\$201.6 million per year.

The arbitrators held that as a minimum requirement, the application should specify the proposed level of suspension pursuant to Article 22.4 DSU as well as the agreements and sector(s) under which suspension is intended pursuant to Article 22.3 DSU⁶⁶. Consequently, Ecuador's first submission of 8/Nov/1999 stating the amount of nullification as US\$450 million was accepted against the second submission stating the total harm as US\$1 billion.⁶⁷ The submission of Ecuador of its intention to suspend Article 14, sections 1, 3 and 4 of TRIPs *inter alia* was accepted.⁶⁸ The arbitrators were reminded of the applicability and implications of Article 22.8 DSU in the calculation of equivalence as Ecuador is a developing country. But Ecuador's further submission that it reserves the right to suspend additional concessions under the GATT in the event that it may be applied in a practicable and effective manner were rejected for its failure to specify the particular sectors to which the proposed suspension would relate,⁶⁹ noting also that it contradicts its earlier assertions and requests under Article 22.3 (b) and (c) DSU⁷⁰. I would opine that this is not the position of the law *stricto sensu*. The DSU only provides that the procedures in 22.3 be followed and that the level of proposed suspension be equivalent to the level of the nullification and impairment. The Understanding does not require the Complainant to list out the intended areas of suspension neither should this be made subject to the scrutiny of the arbitrators. However, the arbitrators seem to have echoed an earlier decision in EC – Hormones⁷¹.

Pronouncing on the strict nature of the procedure outlined in Article 22.3 DSU to the effect that this is a mandatory procedure which must be followed, the arbitrators held that it is not practicable to suspend under 22.3(a) and (c) or (b) at the same time unless in exceptional cases like where the amount of suspension which is practicable under 22.3(a) is insufficient and the party seeks to further suspend under 22.3(b) or (c) to measure up the suspension to a reasonable level of equivalence. In their opinion, if the procedure is not followed or the proposed suspension exceeds the level of impairment suffered, Ecuador would be required to make another request for authorisation under Article 22.7 DSU.⁷²

On the issue of methodology, the time and manner of submissions as well as its admissibility, they held that these are procedural issues and not issues of law. Parties are expected to be guided by precedents but a breach does not amount to a breach of the law.⁷³ The arbitrators had to admit the methodology and documents submitted by Ecuador though noting that it would have been better if they were submitted earlier⁷⁴. This I would admit is a well-thought out holding.

⁶⁴ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU *op cit* Paragraph 18

⁶⁵ EC – Bananas III (Ecuador) Recourse to Article 21.5 (adopted on 6 May 1999) Available at [http://www.worldtradelaw.net/pr/ds27-80\(pr\).pdf](http://www.worldtradelaw.net/pr/ds27-80(pr).pdf). Last accessed 24/04/09

⁶⁶ EC – Bananas III (Ecuador) Recourse to Article 21.5 (n 63) Paragraph 21

⁶⁷ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 22 - 23

⁶⁸ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 25 - 26

⁶⁹ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 27 - 29

⁷⁰ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 30

⁷¹ EC – Hormones, Arbitration under Article 21.3 of the DSU (n 60)

⁷² EC – Hormones, Arbitration under Article 21.3 of the DSU (n 60) Paragraph 33

⁷³ EC – Hormones, Arbitration under Article 21.3 of the DSU (n 60) Paragraphs 34 - 36

⁷⁴ EC – Hormones, Arbitration under Article 21.3 of the DSU (n 60) Paragraph 41

On the issue of burden of proof, the arbitrators upheld the ruling in *EC – Hormones*⁷⁵ and held that it is for the party who alleges a fact to prove its existence. Thus Ecuador's calculation on the equivalence, practicability and effectiveness of its proposed suspension is presumed to be correct until it is otherwise proven by EC⁷⁶. And on Ecuador's alleged non-compliance with Article 22.3 DSU, the arbitrators held that Article 22.3 (a) – (d) only state the considerations that *must* be taken into account by the Complainant and 22.3(e) provides that reasons for its conclusion must be given. Thus the onus lies on the EC to present *prima facie* evidence to prove that Ecuador has not complied and it will then fall back on Ecuador to disprove this.⁷⁷ I agree with this position as it is consistent with what is obtainable in standard WTO disputes that where the existence of a specific fact is alleged, the burden is on the party alleging the fact to prove its existence. And it can rightly be extended to apply in this instance so that it is for the EC which is claiming Ecuador's non conformity with the procedure to prove same.

We must appreciate the arbitrators' decision and interpretation of Article 22.3 DSU. They held that Article 22.3(d) should not be read in isolation of Article 22.3(a)-(c). Furthermore, the law requires the Complainant to consider suspending concessions or other obligations under the same sector and if this is not practicable or effective, under another sector and if this is not practicable, under other covered agreement. It does not imply that the Complainant must show that suspension under another sector/agreement other than where violation occurred is *most* practicable or *most* effective. If Ecuador in seeking to suspend under another sector or other covered agreement claims to have taken all the factors in 22.3(a)-(c) into consideration, it is presumed that suspension under same sector/agreement is not practicable or effective until EC is able to prove otherwise⁷⁸.

In the present case, suspension in same sector where nullification and impairment occurred is practicable in the sense that the amount involved is realistically attainable by Ecuador.⁷⁹ However considering the effect it would have on the Ecuadorian economy, it is not practicable.⁸⁰ And the level of required practicability and effectiveness is not provided for by the DSU.⁸¹ Further considering the peculiarities of the services agreement between EC and Ecuador, the arbitrators found that cross sector retaliation by Ecuador would not be practicable or effective.⁸² Also the degree of inequality existing between the EC and Ecuadorian economies implies that parallel or cross sector retaliation may not be practicable or effective and this justifies the seriousness of the circumstances.⁸³ Since there are no laid out standards for establishing the seriousness of the circumstances, it raises another instance for *prima facie* presumption of seriousness. The burden is on the EC to show that the circumstances are not serious enough to warrant authorisation to cross-retaliate⁸⁴. It is obvious that the lapses that exist in the DSU complicate the duties of the arbitrators and lays greater burden on the losing party.

Ecuador being a developing country and having delineated the extent of its economic reliance on bananas over and above every other economic sector, the arbitrators held that it had satisfied

⁷⁵ EC – Hormones, Arbitration under Article 21.3 of the DSU *op cit*

⁷⁶ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 37

⁷⁷ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 59

⁷⁸ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 65 - 80

⁷⁹ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 100

⁸⁰ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 96

⁸¹ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 102

⁸² EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 103 - 120

⁸³ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 121 - 127

⁸⁴ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraph 81

the provisions of Article 22.3(d)(i).⁸⁵ The “broader economic elements” to be considered is not limited to the economy of the primary victim of the cross-retaliation as several other independent parties may also be affected by these countermeasures.⁸⁶ Ecuador having explained the economic crisis it faced at that material time, the arbitrators held that the provisions of Article 22.3(d)(ii) had been discharged even though Ecuador had failed to establish a causal link between its economic crisis and the EC bananas regime.⁸⁷ To the extent that the DSU does not require the Complainant to establish a causal link, this position is acceptable. The Complainant only has to admit that he has considered the provisions of 22.3(d) in making his decision and the burden automatically falls on the losing party to disprove this.

Extending Article 19 DSU, the arbitrators went on a frolic of their own to give recommendations on the scope of the TRIPS obligations to be suspended. Pointing out the applicability of the TRIPS and other International Intellectual Property Laws to the EC, it warned Ecuador of the need to be cautious in the proposed suspension because some complications may arise⁸⁸. The arbitrators also warned that care should be taken as the suspension may have some effect on third-party WTO members. Indeed it would be best to limit the suspension to goods and products to be sold or circulated domestically as third party WTO members are not obliged to enforce the suspension⁸⁹. The suspension may also give rise to domestic disputes within the party states and may equally affect individual rights holders and producers who are not party to government policies. Such persons may suspend the exportation of their goods and products to Ecuador to avoid infringement⁹⁰.

Conclusively, the arbitrators held that Ecuador should submit another request for authorisation pursuant to Article 22.7 DSU to suspend concessions and other obligations on a level not exceeding US\$201.6 million per year. They then queried the nature of the proposed suspension on the basis of the classification of goods and their importance as submitted by Ecuador, and also made recommendations on the nature of suspension which Ecuador could seek in its subsequent application. They held that Ecuador may request for authorisation to suspend under GATT, certain categories of goods which the arbitrators think as practicable and effective pursuant to Article 22.3(a). They recommended that Ecuador in its subsequent application should list the products which it intends to suspend. Ecuador may pursuant to Article 22.3(a) obtain authorisation to suspend with respect to ‘wholesale trade services’ (CPC622) in the principal sector of distribution services. They also listed the TRIPS sectors under which Ecuador may seek authorisation to suspend if the level of suspension requested under GATT and GATS is insufficient or impracticable. From the provisions of the DSU, the nature of the obligations to be suspended and whether they are made in full or in part under any covered agreement is beyond the jurisdiction of arbitrators. This award was made in contravention of Article 22.7 DSU which precludes arbitrators from examining the nature of the concessions and other obligations to be suspended. To this extent, it is *ultra vires* and an error of law.

3.4 The Law and the Facts: A Critique

Strictly speaking, to the extent that Article 22.7 DSU prohibits arbitrators from examining the nature of the concessions and other obligations to be suspended, cross-retaliation as a countermeasure is non-justiciable. If at all it is justiciable, its justiciability is limited to issues

⁸⁵ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 127 - 130

⁸⁶ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 83 - 86

⁸⁷ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 131 - 135

⁸⁸ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 139 - 152

⁸⁹ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 153 - 156

⁹⁰ EC – Bananas III (Ecuador) (Article 22.6 – EC) WT/DS27/ABR/ECU (n 15) Paragraphs 157 - 158

of whether it is permitted by the covered agreement, its equivalence to the level of nullification and its compliance with Article 22.3 procedures. Beyond this, it is not justiciable.

Suffice it to say that the arbitrators in *EC Bananas III*⁹¹ erred in law when they went on to probe into the nature of the concessions and obligations to be suspended and when they made recommendations to this effect. This *ultra vires* award ought to have been corrected if any form of judicial review were provided for by the DSU. However, the fact that their award remains final and enforceable does not reverse the provisions of the law on the non-justiciability of cross-retaliation as a countermeasure.

In reality, cross-retaliation as a countermeasure is only a modest remedy which barely adequately compensates (least of all overcompensates) the Complainant. The non-justiciability provisions of the DSU are only lenient provisions to ensure that the Complainant is not totally at a loss. To further limit the discretion of the Complainant in this regard or to submit it to judicial review would not only be unfair but would make the option of cross-retaliation a highly unattractive one. Scholars have opined that since the essence of cross-retaliation is to induce quick compliance, equivalence should not be the focus; rather it should be on what could be done to ensure quick compliance⁹². To further limit the non-justiciable discretion of the Complainant would defeat the whole aim of cross-retaliation.

4. Conclusion and Recommendations

The DSU provides for cross-retaliation as a countermeasure. It then provided the rules and principles by which a party seeking countermeasure must be guided. If the due process is not followed or if the level of the proposed cross-retaliatory measure is not equivalent to the level of nullification or impairment, the respondent may raise objections which may warrant the establishment of an arbitral panel to probe into the objections. However, this panel's jurisdiction is restricted to the points of objections raised. In fact, the DSU expressly provides that the arbitrator "shall not examine the nature of the concession or other obligation to be suspended."⁹³ To this extent we shall agree that cross-retaliation as a countermeasure is not justiciable.

However, in practice it is not exactly so. The arbitrators tend to overstretch the ambit of their discretion in a bid to ensure the finality of their award. As we can see in the *EC Bananas III case*⁹⁴, the arbitrators went on to examine the nature of the proposed suspension notwithstanding the provisions of the DSU. The need to give a comprehensive and conclusive award considering the finality of the award should not and does not under the law fetter the discretion of the Complainant as it relates to cross-retaliation and its non justiciability. But another pathetic issue is that since the award is final, the parties are bound by it and can do nothing to change it.

Conclusively, cross-retaliation as a countermeasure is non-justiciable under the DSU provisions. Though arbitrators have occasionally subjected this non-justiciable discretion to judicial review, it is no basis for concluding that it is justiciable.

As a remedy to the issues noted above, we would suggest the following:

⁹¹ EC – Bananas III (Ecuador) (Article 22.6 – EC) (n 15)

⁹² Anderson, K., *Peculiarities of retaliation in WTO dispute settlement* (March 2002) Available at <http://www.adelaide.edu.au/cies/papers/0207.pdf>. Last accessed 24/04/09

⁹³ DSU Article 22.7

⁹⁴ EC – Bananas III (Ecuador) (Article 22.6 – EC) (n 15)

- The award of the Article 22.6 panel should be subjected to some form of judicial review to ensure that justice is not only done but is manifestly and undoubtedly seen to be done.
- The principles and procedure outlined in Article 22.3 DSU should be made more flexible as the focus should be on inducing compliance and not equivalence or observance of due process.
- Arbitrators should be trained and enlightened on the need to limit themselves to the confines of their jurisdiction though giving effect to the provisions of the DSU.
- Any determination by an arbitrator of the level of authorised retaliation must have a solid evidentiary basis, coupled with rigorous analysis⁹⁵. This would rid the award of political influence and ensure certainty.
- Notwithstanding the need to maintain state confidentialities, parties to a dispute should be discouraged from withholding useful information from the arbitrators.
- Rather than tightening up the law to imply judicial review, arbitrators should be more liberal and reduce the emphasis on technicalities. We would also join forces with the US in advocating carousel retaliation because it would be a more effective means of inducing compliance.
- A reform in the WTO and DSU provisions is proposed to deal with contradictions. I say this with particular reference to the contradictions between the term *appropriate* in the SCM⁹⁶ and the term *equivalence* in the DSU⁹⁷.
- A modification of the DSU provisions is also suggested to deal with issues of ambiguity and to infuse greater clarity. This recommendation is made with particular reference to the uncertainties regarding the level of required practicability, effectiveness, seriousness and equivalence.

The essence of these recommendations is to give effect to the actual intentment of cross-retaliation as a countermeasure which is to induce compliance. It would also make cross-retaliation more attractive to WTO members. And finally it would make cross-retaliation practicable for developing countries and poorer economies so that the WTO system does not end up as an organisation ruled by the rich, but rather its objective of promoting fairness and equity is realised.

⁹⁵ B. McGivern, “Retaliation Revisited: Compliance and Implementation issues in WTO Dispute Settlement” SECTION 13 in D. Georgiev, *et al* (eds) *Reform and Development of the WTO Dispute Settlement System* (London: 2006). P. 243

⁹⁶ Subsidy and Countervailing Measures Article 4.11

⁹⁷ DSU Article 22.6