

The WTO Dispute Settlement Mechanism: The Case of Bananas

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EXECUTIVE SUMMARY

There has been a great deal of controversy about the GATT dispute settlement procedure (DSU). There were many in the international community that preferred a DSU process which would seek settlements through a negotiated process. Others, including the US pushed for a more juridical process, whereby the DSU would make findings that were rigorously worked through analytically, and would become binding on the parties at the end of the process. What has developed as a result of the Uruguay Round and US pressure is a DSU which has all the requirements of a strong juridical approach. In fact, the approach now is quite automatic. Because there can be no blocking, it is virtually automatic that the results of a panel report will be adopted. But there is added to this an appeal process which is very analogous to an appeal process in domestic law. This is a new phenomenon in international organizations. Furthermore, given the banana brawl with the EU the issue of non-compliance and non-enforceability by the WTO is becoming very apparent.

I. INTRODUCTION

The US Administration plans to initiate retaliatory trade action against the European Union (EU) for failing to implement World Trade Organization (WTO) rulings on bananas.¹

In the post-Uruguay environment is such a trade posture a reality? Do bananas represent a new international battle ground? Why would the WTO rule on bananas? Why is the EU failing to implement WTO market-opening rulings?

The World Trade Organization's (WTO) dispute settlement mechanism has provoked consternation among nationals by raising fears of country sovereignty rights as international disputes are increasingly being brought before an international "judge and jury." Detractors have argued that the past three year experience of the WTO has demonstrated that it has only successfully dealt with cases involving classic infraction of trade accords while in cases involving competition policy disputes, as in the Kodak-Fuji case, the WTO's dispute settlement mechanism completely ignored the competition issue.

¹ As reported in The Bureau of National Affairs, Inc., *International Trade Reporter* Vol. 15, No. 40; Pg. 1689, October 14, 1998

The fundamental elements of WTO law include - transparency and due process; access to markets; fair competition within markets; and the dispute settlement mechanism. Normally when international disputes are encountered and the parties choose a non-WTO forum, the general results can include either informal bilateral negotiations or formal challenges in a “domestic” forum where WTO law becomes the appropriate “domestic” law. If the parties bring the dispute inside the WTO, the process initiated is the formal dispute settlement mechanism. This process can take an average of 30 to 35 months till full implementation.

The basic objective of the dispute settlement mechanism is attempting to guarantee a “mutually agreed solution.” Implicit in this approach is the question of enforceability of the panel reports, once all appeals are completed. In the banana brawl with the EU the WTO panel had upheld complaints from Ecuador, Guatemala, Honduras, Mexico, and the United States that aspects of the EU's regime for bananas imported from the African, Caribbean, and Pacific (ACP²) group of nations -- many of which are former European colonies --violated the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services. The Appellate Body subsequently affirmed the substance of the dispute settlement panel's findings. The EU was given until Jan. 1, 1999, to bring its regime into compliance with WTO rules

This paper will investigate the DSU in light of the very long and time consuming litigation involving the import regime of the EU concerning banana imports. An outline of dispute settlement system is presented in Section II. The facts around the banana

² The ACP designation applies to the following 70 states who are also parties to the Lome Convention: Angola*, Antigua and Barbuda*, Bahamas, Barbados*, Belize*, Benin*, Botswana*, Burkina Faso*, Burundi*, Cameroon*, Cape Verde, Central African Republic*, Chad*, Comoros, Congo*, Cote d'Ivoire*, Djibouti, Dominica*, Dominican Republic*, Eritrea, Ethiopia, Fiji*, Gabon*, Gambia*, Ghana*, Grenada*, Guinea, Guinea-Bissau*, Equatorial Guinea, Guyana*, Haiti*, Jamaica*, Kenya*, Kiribati, Lesotho*, Liberia, Madagascar*, Malawi*, Mali*, Mauritania*, Mauritius*, Mozambique*, Namibia*, Niger*, Nigeria*, Papua New Guinea, Rwanda*, Saint Kitts and Nevis*, Saint Lucia*, Saint Vincent and the Grenadines*, Western Samoa, Sao Tome and Principe, Senegal*, Seychelles, Sierra Leone*, Solomon Islands, Somalia, Sudan, Suriname*, Swaziland*, Tanzania*, Togo*, Tonga, Trinidad and Tobago*, Tuvalu, Uganda*, Vanuaru, Zaire*, Zambia* and Zimbabwe*. An asterisk indicates GATT contracting party status. The ACP countries benefit from a very generous regime, since almost all their exports have free access to the European market without the condition of a reciprocal arrangement. Furthermore, with regard to the origin of products exported by ACP countries to the European Union (EU), the EU authorizes exemptions from the basic "10% foreign components rule." Products imported from an ACP country, of which components up to 45% come from the EU or another ACP country are considered to be ACP products, and benefit from preferential access to the EU.

dispute are presented in Section III. The historical record in the banana dispute are presented in Section IV. Some legal issues along with a comparison of the dispute resolution system, pre and post WTO, are presented in Section V.

II. THE DISPUTE SETTLEMENT SYSTEM

With the adoption of the Ministerial Declaration opening the Uruguay Round negotiations, a major issue consuming the US delegation concerned the dispute settlement process.³ According to the US, the major problems with the earlier GATT dispute resolution system was that the process was too long and that panel reports could be blocked by the losing party to the disputes.⁴ The Dispute Settlement Understanding (DSU), adopted at the end of the Uruguay Round, met the major U.S. concerns by including provisions that covered the adoption and implementation of panel reports, timeliness, and strengthened remedies for prevailing complainants.⁵

The resulting DSU applies to all disputes arising under the GATT agreements, the obligations undertaken as part of the WTO, and disputes about the operation of the dispute settlement system itself.⁶ A major drawback of the system is that a panel report adopted by the Dispute Settlement Body (DSB) decides only the case before the DSB,

³ Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, GATT B.I.S.D. (33rd Supp.) at 19, 25 (1987): "In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations."

⁴ 2 The GATT Uruguay Round: A Negotiating History at 2727-28 (Terence P. Stewart, ed. 1993).

⁵ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, in The Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1244, Art. 12.9, 16.4, 20, 21.1 & 22. A losing Member State is to implement the recommendations of the panel (as adopted by the Dispute Settlement Body (DSB)). If such implementation does not occur, the complaining party can seek compensation or the suspension of concessions. [hereinafter Dispute Settlement Understanding].

⁶ Dispute Settlement Understanding, *supra* note 3, at app. 1. Appendix 1 lists all of the agreements that are subject to the DSU process. All of the Multilateral Trade Agreements are covered. The Plurilateral Agreements are covered only if the member States that are parties to them agree to use the DSU process.

and therefore, lacks any precedential value for future WTO trade disputes.⁷ The WTO dispute settlement process is triggered when a Member State complains that a benefit it expected under a GATT Agreement has been "nullified or impaired" by: (1) the failure of another Member State to carry out its obligations under the GATT, (2) the application by another Member State of any measure whether or not it conflicts with the GATT, or (3) the existence of any other situation. This third cause is a creation of the new WTO dispute settlement system.⁸

The dispute settlement process has been used by a wide range of countries. The United States is the principal user of the system: It is a complaining party in ten of the twenty-one panel matters and a respondent in six of the others. However, a total of twenty-two countries have been or are now involved in WTO panels as parties; even more have been involved as third parties or in consultations. Developing countries have been frequent users of the system. Fifteen developing countries have been involved as complainants before panels, five as respondents.

Under the DSU process, a dispute begins with a consultation phase. A complaining Member State requests consultation about another Member State's GATT breach (or non-breach which causes harm) with that country and notifies the Dispute Settlement Body (DSB) about its request.⁹ The goal of this consultation stage is to reach "a mutually satisfactory solution."¹⁰ Failure of the consultation (or the failure of the defending Member States' participation in the process) allows the complaining party to request the establishment of a panel.¹¹ In addition to the consultation phase, the DSU provides for a mediation facility which can take place any time during the operation of

⁷ Testimony by John H. Jackson Before the U.S. Senate Finance Committee Hearing, March 23, 1994 on the Uruguay Round Implementing Legislation, reprinted in 6 *World Trade & Arb. Materials* 125, 132-33 (Sept. 1994).

⁸ General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, A40-A41; 55 U.N.T.S. 187, 266-68.

⁹ Dispute Settlement Understanding, *supra* note 3, at arts 4.3 & 4.4. The complaining party must notify the DSB, the relevant Council (Goods, Services or TRIPs) and any other Committee related to the Agreement that is the subject of the dispute.

¹⁰ *Id.* at art. 4.3.

¹¹ *Id.* at art. 4.7.

the dispute settlement process. These initial provisions of the DSU strongly encourage Member States to settle their disputes outside of the formal panel process. The parties to consultation or mediation are required not to disclose any information about the proceeding; therefore, any position taken by one party in a settlement with one trading partner cannot be used against it by another country.¹²

If the parties cannot negotiate a settlement to their trade dispute, the panel process then becomes available to them. Once a complaining party requests a panel, it will be established unless there is a highly unlikely consensus against establishment.¹³ The WTO panel process itself is tightly controlled and overseen by the WTO (acting through the DSB), as is the enforcement stage of a dispute. Consequently, it is the DSB rather than the Member State parties to the dispute that controls the life of the dispute once the system is triggered.¹⁴ If the two sides can negotiate a GATT- consistent settlement, they can extricate themselves from the DSB process.¹⁵

A panel in the WTO system normally consists of three panelists who must be “well-qualified governmental and/or non-governmental individuals.” None of the panelists can be from any Member State that is a party or third-party to the dispute unless the parties agree otherwise. The WTO Secretariat assists in the selection process of the panelists.¹⁶ Since the ultimate objective of the panel system is to produce a final report for the DSB which resolves the dispute between the two parties, the DSU establishes working procedures for the panels, dictates standard terms of reference, and requires the

¹² Id. at arts. 4.6 & 5.2.

¹³ Id. at art. 6.1

¹⁴ The DSB must be notified of a dispute and of the request for a panel. Id. at art. 12. The DSB also oversees the establishment of a panel in a particular dispute. Id. at art. 8. Once the panel process is underway the DSB oversees it and must be asked for any extension of time the panel finds necessary to complete its task. Id. at art. 12.9. Once the final report is done by the panel it is circulated to the DSB, which places the report on its agenda and then takes comments until it takes action to adopt the report. Id. at art. 16. Finally, it is the DSB which pursues the issue of implementation of the panel or Appellate Body panel report. The DSB must be notified of a losing party's plan to implement. Id. at art. 21.3. The DSB also becomes involved in assisting the parties over conflicts regarding how implementation should proceed. Id. at arts. 21.3 & 21.4. Finally after implementation the DSB conducts surveillance of the implementation to make sure the panel report has been dealt with by the losing party. Id. at art. 21.6.

¹⁵ Id. at art. 3.7.

¹⁶ Id. Id. at arts. 8.1, 8.3, 8.4 & 8.7.

panels to accept both written submissions and oral arguments on the factual and legal issues presented by the dispute.¹⁷

Although the parties can protest the panel decision and express their views during the DSB consideration of the report, the final panel report will be adopted unless there is a consensus against adoption. Either party can stop the adoption of the panel report only by notifying the DSB of its intention to appeal the decision.¹⁸ Any appeals of final reports will be considered by a three-member panel of a seven member Appellate Body.¹⁹ Thus, although the DSB adds a level of appellate review to the panel process, it does not establish an appellate court. The entire Appellate Body will never sit on any given dispute. The Appellate Body panel in any particular dispute is empowered to review only the issues of law raised by the panel report and the panel's legal conclusions. The Appellate Body panel can uphold, modify, or reverse the panel report it reviews, but it lacks the power to remand a dispute back to the panel. Whatever course the Appellate Body panel report takes, it will automatically be adopted unless there is a consensus against adoption.²⁰

If the dispute presents a claim of a violation of a GATT obligation under one of the GATT agreements the panel report must recommend that the offending party bring its legislative measure or practice into conformity with the agreement that is the subject of the dispute. Such a recommendation will require, in most cases, that the Member State

¹⁷ Id. at arts. 7.1; 8.7; 12.6 & 15. After the parties have presented all of their arguments the panel must prepare and circulate to them only a written interim report which contains both the panel's findings of fact and its legal findings and conclusions. Parties are allowed to review the report and meet with the panel regarding the interim report. If no such review is requested the interim report becomes the final report. If review and additional arguments are held after the interim review, the final report must reflect the panel's consideration of the issues considered during that review.

¹⁸ Id. at arts. 12.7, 16.2, 16.4, & 17.14.

¹⁹ The establishment of the Appellate Body was a completely new innovation for the GATT dispute settlement system. In the 1990 Draft Final Act for the Uruguay Round tabled by then Director- General Dunkel, there was a provision for an appellate body of seven members "three of whom shall serve on any one case." GATT Secretariat, Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/35/Rev. 1 (Dec. 3, 1990) at 296. The Draft Act provision on the Appellate Body was ultimately adopted in the DSU. The nationality breakdown of the Appellate Body membership has a membership representing each of the major trading nations (EU, Japan and United States), three developing countries (Egypt, the Philippines and Uruguay) and one mid-size developed country (New Zealand). WTO Focus, Dec. 1995 at 2.

²⁰ Dispute Settlement Understanding, supra note 3, at art. 16.

substantially modify or eliminate the measure in question. The panel hearing the dispute is allowed to suggest ways in which the Member State can implement its recommendations.²¹

If the dispute is a non-violation nullification or impairment case, then the panel report cannot impose an obligation upon the Member State to withdraw the measure. Instead of requiring withdrawal of the measure, the offending party is supposed to reach a “mutually satisfactory adjustment” with the complaining party. Such a mutually satisfactory adjustment can be reached between the parties with the assistance of an arbitration panel and can consist of compensation provided by the offending party to the complaining party.²²

The DSU authorizes the “lesser remedy” of compensation in GATT- violation cases only as a temporary measure pending the proper course of action, the withdrawal of the GATT-illegal measure.²³ If the offending party fails to withdraw the measure or compensate the complaining party, then the DSB must authorize the suspension of concessions (trade retaliation) by the complaining party against the offending country. Even if this “last resort” remedy of suspending concessions is authorized, it is only temporary in nature. Retaliation is authorized only until the offending measure is removed, the nullification or impairment of benefits is solved, or the parties to the dispute settle the case.²⁴

The DSU requires the DSB to conduct active surveillance of whether, and in what manner, the offending party complies with the panel's recommendations. A Member State is given a “reasonable” time to implement the recommendations of the panel report before it must compensate or face a suspension of concessions.²⁵ The offending party is entitled to an arbitral panel on the issue of what would constitute a “reasonable” time

²¹ Id. at arts. 3.4, 12.7 & 22.1

²² Id. at art. 26.

²³ Id. at art. 22.1.

²⁴ Id. at art. 21.3.

²⁵ Id. at art. 22.2.

under the circumstances of the case.²⁶ If the suspension of concessions stage is reached in a dispute, the complaining party is required to retaliate only within the GATT world. It should first seek to suspend concessions in the same sector of trade in which a violation was found.²⁷ If such a response is not “practicable or effective,”²⁸ then the complaining party can turn to other sectors of trade in the same GATT agreement, or in sufficiently serious circumstances, to another GATT agreement altogether.²⁹ In the worst case scenario--where the nullification or impairment of benefits is severe and the offending party refuses to withdraw the offending measure or compensate, the DSU authorizes cross retaliation.

The complaining country in a WTO dispute is not allowed to determine the amount or extent of retaliation by itself. Any retaliation must be proportional--equivalent to the level of nullification or impairment--and can be objected to by the offending country.³⁰ Thus, the level of retaliation can become the subject of an arbitral decision.³¹

III. The Framework Agreement on Bananas (BFA)

The banana complaint examined by the WTO Panel relates to the EC's common market organization for bananas introduced on July 1, 1993. The importance of this ‘organization’ shift should not be underestimated. First, world production of bananas in

²⁶ Id. at art. 21.3.

²⁷ Id. The DSU defines “sector” as: (i) with respect to goods, all goods; (ii) with respect to services, a principal sector as identified in the current “Services Sectoral Classification List” which identifies such sectors; (iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPs; Id. at art. 22.4(f).

²⁸ Id. at art. 22. The DSU does not define what “practices or effective” means.

²⁹ Id. at art. 22.3(a).

³⁰ Id. at art. 22.4.

³¹ Id. at arts. 22.6 & 22.7. The arbitrator (individual or group) is authorized to determine: (a) whether or not the retaliation is proportional; and (b) whether or not the party proposing to suspend concessions is properly retaliating in the same sector, different sector of the same agreement or a different agreement. Its decision about the amount and form of retaliation is final and binding.

1995 is estimated by the FAO to be 54.5 million tones.³² In 1994 the largest exporters were: Ecuador (2.35 million tons), Costa Rica (2 million tons), Colombia (1.7 million tons), the Philippines (1.2 million tons) and Panama (0.7 million tons). For the countries bringing the complaint, Honduras and Guatemala each exported 0.4 million tons, Mexico exported 0.2 million tons and for the United States there are no, or only negligible, quantities of bananas exported. Second, in 1994, the EC was the world's second largest importer of bananas, after the United States (3.7 million tons) and followed by Japan (0.9 million tons).³³ According to official data submitted by the EC, supplies of fresh bananas in the EC - 12 totaled approximately 3.5 million tons in 1994, 2.1 million tons of which originated in Latin American countries and 727,000 tons in African, Caribbean and Pacific (ACP) countries³⁴ that are parties to the Lomé Convention.³⁵

³² The largest producer countries were India (9.5 million tones) and Brazil (5.7 million tones) followed by Ecuador (5.4 million tones), China (3.3 million tones) and the Philippines (3.2 million tones). Banana production of the Complaining parties, other than Ecuador, was as follows: Mexico 2.1 million tones, Honduras 0.8 million tones, Guatemala 0.5 million tones and the United States (including Puerto Rico) 54,500 tones. See FAO for further statistics.

³³ See Eurostat and FAO.

³⁴ The leading suppliers of Latin American bananas to the EC were Costa Rica, Ecuador, Colombia, Panama and Honduras (in descending order). The leading suppliers of ACP bananas to the EC were Cameroon, Côte d'Ivoire, St. Lucia, the Dominican Republic, Jamaica, Belize and Dominica (in descending order). For many ACP countries, banana exports to the EC represent a very high proportion of their total banana exports. Domestic EC producers include the Canary Islands, Martinique, Guadeloupe, Madeira, the Azores and the Algarve, and Crete and Lakonia. Combined they produce, approximately 645,000 tones of the bananas consumed in the EC.

³⁵ The Lomé Convention, links 70 countries in Africa, the Caribbean and the Pacific to the 12 European Union Member States. It remains the largest collective cooperation agreement in the history of relations between the countries of the North and those of the South. Its foundation was laid in the Treaty of Rome itself (March 25, 1957) whose signatories confirmed the solidarity which links Europe and overseas countries. Then after the 1960's independence's, there followed the two Yaounde Conventions of 1963 and 1969 between the EC and 18 African States.

In 1975, the European Community signed the first Lomé Convention (Lomé, the capital of Togo, was where the signing ceremony took place) with a group of 46 independent States. 57 States signed the Lomé II Convention (1980-1985), 65 the Lomé III Convention (1985-1990) and 69 ACP countries the fourth Lomé Convention (1990-2000) in 1989. This number was taken to 70 in 1993 with the accession of Eritrea to independence. For a detailed analysis of the Lomé Conventions, including a discussion of the institutions the Conventions have created, see Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 *Cal. W. Int'l L.J.* 1, 26 (1991).

The EC's organizational structure which affects the banana market is governed by Council Regulation (EEC) 404/93³⁶, which replaced the various national banana import regimes previously in place in the EC's member States.³⁷ The disputed market arrangement consists of five separate titles. Titles I to III regulates the internal aspects of the common market organization. Title I provides that common quality and marketing standards for bananas are to be established in subsequent regulations. Title II contains rules concerning producers' organizations and "concentration mechanisms" to promote the establishment of organizations for the purposes of, *inter alia*, concentrating supply, regulating prices at the production stage, and improving EC production structures and quality. Title III establishes EC assistance for the domestic banana sector. Under this title, members of recognized EC producer organizations (and individual producers under certain circumstances) are eligible for compensation of any income loss resulting from the implementation of the EC banana regime, the maximum quantity for such compensation being fixed at 854,000 tons of bananas for the EC as a whole.

Title IV and V regulate the external aspects of the common market organization and are thus the subject of the dispute. Title IV regulates trade with third countries. In particular, it establishes three categories of imports: (i) traditional imports from twelve

³⁶ Regulation 404/93. This regulation disturbs the global banana trade, causing firms and individuals working with Latin bananas to lose money and firms and individuals working with ACP bananas to earn more.

³⁷ Under the previous national import regimes, France, Greece, Italy, Portugal and the United Kingdom restricted imports of banana by means of various quantitative restrictions and licensing requirements. Spain maintained a de facto prohibition on imports of bananas. The French market was supplied principally from the overseas departments of Guadeloupe and Martinique, with additional preferential access granted to the ACP States of Côte d'Ivoire and Cameroon. The United Kingdom granted preferential access to bananas from the ACP States of Jamaica, the Windward Islands (Dominica, Grenada, St. Lucia and St. Vincent and the Grenadines), Belize and Suriname. Bananas from ACP countries were permitted duty-free into all EC member States. The Spanish market was almost exclusively supplied by domestic production from the Canary Islands. A major part of Portuguese supply came from Madeira, the Azores and the Algarve, with additional volumes being imported from Cape Verde and any remaining requirements being imported from third countries. The Greek market was in part supplied by bananas from domestic sources (Crete and Lakonia) and in part by third countries. Italy offered preferential access to bananas from Somalia. Belgium, Denmark, Germany, Luxembourg, Ireland and the Netherlands did not apply quantitative restrictions and, except for Germany, used a 20 per cent tariff as the sole border measure (paragraph below refers). These countries almost exclusively imported bananas from Latin America. Germany had a special arrangement, set out in the banana protocol of the Treaty of Rome, permitting duty-free imports of third-country bananas reflecting the level of estimated consumption. See "Panel on EEC - Import Regime for Bananas", DS38/R (not adopted), ¶¶. 17 *et seq.*

ACP countries³⁸; (ii) non-traditional imports from ACP countries which are defined as both any quantities in excess of traditional quantities supplied by traditional ACP countries and any quantities supplied by ACP countries which are not traditional suppliers of the EC; and (iii) imports from third (non-ACP) countries. The tariffs applied by the EC on banana imports is presented in Table 1.

Table 1		
EC tariff treatment of banana imports		
Category of banana imports	Source/Definition	Tariffs applied
Traditional ACP bananas	Bananas within country-specific quantitative limits totaling 857,700 tons established for each of 12 ACP countries.	Duty-free.
Non-traditional ACP bananas	Either ACP imports above the traditional allocations for traditional ACP countries or any quantities supplied by ACP countries which are non-traditional suppliers.	Duty-free up to 90,000 tons, divided into country-specific allocations and an "other ACP countries" category; ECU 693 per ton for out-of-quota shipments in 1996/97.
Third-country bananas	Imports from any non-ACP source.	ECU 75 per ton up to 2.11 million tones as provided in the EC Schedule. An additional 353,000 tons were made available in 1995 and 1996. Country-specific allocations were made for countries party to the Framework Agreement on Bananas (BFA), plus an "others" category ³⁹ ; ECU 793 per ton for out-of-quota shipments in 1996/97.
Source: WTO. Panel Report		

³⁸Belize, Cape Verde, Côte d'Ivoire, Cameroon, Dominica, Grenada, Jamaica, Madagascar, Suriname, Somalia, St. Lucia, and St. Vincent and the Grenadines (Article 15.1 of Council Regulation (EEC) 404/93 (as amended)).

³⁹The EC has opened additional tariff quota access under hurricane licenses.

Imports of bananas from the twelve traditional ACP countries enter duty-free up to the maximum quantity fixed for each ACP country as listed in Table 2.⁴⁰ These allocations collectively amount to 857,700 tons. These quantities are not bound in the EC Schedule. There is no provision in the EC regulations for an increase in the level of traditional ACP allocations.

Country	Traditional quantities as set out in EC Regulation 404/93 (tons)	Non-traditional quantities as set out in EC Regulation 478/95 (tons)
Belize	40,000	15,000
Cameroon	155,000	7,500
Cape Verde	4,800	
Côte d'Ivoire	155,000	7,500
Dominica	71,000	
Dominican Republic		55,000
Grenada	14,000	
Jamaica	105,000	
Madagascar	5,900	
Somalia	60,000	
St. Lucia	127,000	
St. Vincent and the Grenadines	82,000	
Suriname	38,000	
"Other" ⁴¹		5,000
Total	857,700	90,000

Source:

Imports of non-traditional ACP bananas and bananas from third countries are subject to a tariff quota (also referred to by the EC as the "basic tariff quota") of, originally, 2 million tons (net weight). This tariff quota was increased to 2.1 million tons in 1994 and to 2.2 million tons as of 1 January 1995. These tariff quota quantities were bound in the EC Uruguay Round Schedule.⁴² The tariff quota can be adjusted on the

⁴⁰ See Article 15.1 of Council Regulation (EEC) 404/93 (as amended).

⁴¹ E.g. Ghana and Kenya.

⁴² Schedule LXXX - European Communities.

basis of a "supply balance" to be derived from production and consumption forecasts prepared in advance of each year.⁴³ In 1995 and 1996, a volume of 353,000 tons was added to the tariff quota as a result of "consumption and supply needs" resulting from the accession of three new EC member States, Austria, Finland and Sweden. This additional volume is not bound in the EC Schedule. In practice, however, the EC's tariff quota for non-traditional ACP and third-country banana imports was increased to 2.553 million tons.⁴⁴

Under the terms of the BFA, the EC allocated in its Schedule specific shares of the bound tariff quota of 2.1 million tons in 1994 and 2.2 million tons in 1995, respectively, as follows. (See Table 3)⁴⁵

⁴³Article 16 of Council Regulation (EEC) 404/93 (as amended).

⁴⁴ Of the tariff quota referred to above, 90,000 tons are reserved for duty-free entries of non-traditional ACP bananas. This volume is bound in the EC Schedule as a result of the BFA. By regulation, the EC allocated this import volume largely among specific supplying countries. In addition, the EC issued hurricane licenses. See Article 1 of Commission Regulation (EC) 478/95 (as amended) and Annex 1 thereto.

⁴⁵ See "Framework Agreement on Bananas", Annex to Part I, Section I-B (tariff quotas) in Schedule LXXX - European Communities. The BFA also provides that, "In case of *force majeure*, a country listed in paragraph above, may, on the basis of an agreement notified in advance to the Commission, fulfil all or part of its quota with bananas originating in another country listed in paragraph above. In this case, the deliveries from the two countries concerned shall be adjusted accordingly in the following year." See ¶ 3. Furthermore, "If a banana exporting country with a country quota informs the Community that it will be unable to deliver the quantity allocated to it, the short-fall shall be reallocated by the Community in accordance with the same percentage shares indicated under paragraph 3 (including 'others'). However, countries with country quotas may jointly request and the Commission shall agree to a different allocation amongst those countries." See ¶ 4. The EC also undertook to allocate any increase in the EC tariff quota in proportion to the shares set out in paragraph 3, including to "others". However, according to the BFA, "...countries with country quotas may jointly request and the Commission shall agree to a different allocation amongst those countries." See ¶ 5.

Table 3	
BFA allocations under the bound tariff quota for third-country and non-traditional ACP banana suppliers	
Country	Share
Costa Rica	23.40 %
Colombia	21.00 %
Nicaragua	3.00 %
Venezuela	2.00 %
Others	(1994) 46.32 % (1995) 46.51 %
Dominican Republic and other ACP countries concerning non-traditional quantities	90,000 tons
Source:	

From November 1994 to May 1996, the EC issued 281,605 tons of supplemental "hurricane licenses". Hurricane import volumes enter in addition to the 2.553 million ton tariff quota and are subject to the third-country (non-ACP) in-quota tariff (ECU 75 per ton). Hurricane licenses may be used to import bananas from any source.⁴⁶

In order to enforce the quantitative restrictions, the EC created a licensing procedure to cover both traditional ACP and non-traditional ACP/third-countries banana imports. According to Commission Regulation (EEC) 1442/93, banana imports into the EC are managed on a quarterly basis. For each of the first three quarters in any year, "indicative quantities" are established based on past trade patterns, seasonal trends, and the supply and demand balance prevailing in the EC market. These indicative quantities determine the volumes of traditional ACP bananas and non-traditional ACP/third-country bananas, respectively, that are available for a given quarter for the purpose of issuing import licenses.⁴⁷ The import volumes thus available are divided proportionally among origins in accordance with the allocations indicated in the tables 3 and 4.⁴⁸ The licenses

⁴⁶See e.g. Commission Regulation (EC) 2791/94.

⁴⁷Article 16 of Council Regulation (EEC) 404/93 (as amended); Articles 9 and 14 Commission Regulation (EEC) 1442/93 (as amended).

⁴⁸Article 14 Commission Regulation (EEC) 1442/93 (as amended); Article 1 of Commission Regulation (EC) 478/95 (as amended).

available in the fourth quarter of any calendar year are determined by subtracting those issued in the first three quarters from the total quantity available for each origin.⁴⁹ In the case of "unused" quantities covered by licenses, there is a procedure for reallocation to the same operators in any subsequent quarter.⁵⁰

License applications for imports of traditional ACP bananas must state the quantity and origin from which operators intend to source their bananas. Applications are also required to be accompanied by an ACP certificate of origin testifying to the status as traditional ACP bananas.⁵¹ In contrast, import licenses for third-country bananas and non-traditional ACP bananas are allocated on the basis of several cumulatively applicable procedures, including:

- (i) allocation of licenses based on three operator categories;
- (ii) allocation of licenses according to three activity functions;
- (iii) export certificate requirements for imports from Costa Rica, Colombia and Nicaragua; and
- (iv) a two-round quarterly procedure to administer license applications.

Under the EC's operator category rules, import licenses are distributed among three categories of operators based on quantities of bananas marketed during the latest three year period for which data are available (see Table 4).⁵² As operators in Category C ("newcomers") do not have reference quantities based on past trade, their allocation is dependent on the volume of license applications the newcomer portion of the tariff quota.⁵³ Category A and B licenses are transferable (tradable) among operators,

⁴⁹ Import license applications are to be lodged with the competent authority of a EC member State within a specified period of time for the purpose of obtaining a license for the subsequent quarter. Commission Regulation (EEC) 1442/93 (as amended), Articles 9 and 14.

⁵⁰ Id., Articles 10 and 17.

⁵¹ Id., Articles 14.4 and 15.

⁵² Article 19 of Council Regulation (EEC) 404/93 (as amended).

⁵³ Commission Regulation (EEC) 1442/93 (as amended), Article 4.4 .

including to operators in Category C. Category C licenses are, however, not transferable to Categories A and B. Transferred licenses are taken into account in establishing reference quantities.⁵⁴

⁵⁴ Id., Article 13.

Table 4 Operator categories under the tariff quota for third-country/non-traditional ACP imports		
Operator category definition⁵⁵	Allocation of import licenses allowing the importation of bananas at in-quota rates	Basis of determining operator entitlement
<i>Category A:</i> operators that have marketed third-country and/or non-traditional ACP bananas.	66.5%	Average quantities of third-country and/or non-traditional ACP bananas marketed in the three most recent years for which data are available.
<i>Category B:</i> operators that have marketed EC and/or traditional ACP bananas.	30%	Average quantities of traditional ACP and/or EC bananas marketed in the three most recent years for which data are available.
<i>Category C:</i> operators who started marketing bananas other than EC and/or traditional ACP bananas as from 1992 or thereafter ("newcomer category").	3.5%	Divided pro rata among applicants.
Source:		

The operator Categories A and B are further subdivided into three types of qualifying entities ("activity functions"), as set forth in the table 5. In order to qualify as Category A and/or B operators, economic agents must have performed at least one of these activities in "marketing"⁵⁶ bananas during the rolling three-year reference period (i.e. the period determining their reference quantities; for 1993, the years 1989-91). In

⁵⁵Article 19 of Council Regulation (EEC) 404/93 (as amended) and Article 2 of Commission Regulation (EEC) 1442/93 (as amended).

⁵⁶According to Article 15.5 of Council Regulation (EEC) 404/93 (as amended), "'market' and 'marketing' mean placing on the market, not including making the product available to the final consumer". Furthermore, Article 3.2 of Commission Regulation (EEC) 1442/93 (as amended) provides that "wholesalers and retailers shall not be considered operators solely by virtue of such activities" (i.e. the activities as set out in table 5) but does not define these terms.

addition, operators must be established in the EC and have traded a minimum of 250 tons of bananas in any one year of the reference period.⁵⁷

Table 5		
Activity function system under the tariff quota for third-country/non-traditional ACP imports		
Activity functions	Definitions⁵⁸	Weighting coefficients
Activity (a): "primary importer"	"the purchase of green third-country bananas and/or ACP bananas from the producers, or where applicable, the production, and their subsequent consignment to and sale of such products in the Community"	57 per cent
Activity (b): "secondary importer or customs clearer"	"as owners, the supply and release for free circulation of green bananas and sale with a view to their subsequent marketing in the Community; the risks of spoilage or loss of the product shall be equated with the risk taken on by the owner"	15 per cent
Activity (c): "ripeners"	"as owners, the ripening of green bananas and their marketing within the Community"	28 per cent
Source:		

Pursuant to the BFA, supplying countries that have country allocations may deliver special export certificates for up to 70 per cent of their allocations. Colombia, Costa Rica and Nicaragua have chosen to issue such certificates. According to EC regulation, presentation of such certificates ("export licenses") by Category A and

⁵⁷Commission Regulation (EEC) 1442/93 (as amended), Article 3.

⁵⁸Id., Article 3. The weighting coefficient assigned to each type of activity function multiplied by the average quantity of bananas marketed by each operator of Categories A and B in the three most recent years, determines the individual operator's reference quantity. Id., Article 5. Operators are expected to identify the activity function or functions upon which they are making their claim of license entitlement (operators may have performed more than one activity and thus obtain a weighting coefficient of up to one hundred per cent). The reference quantities are, after the application of a single provisional reduction coefficient for operator Categories A and B, respectively, used in calculating an individual operator's provisional annual entitlement to banana import licenses. Id., Article 6. These entitlements are normally determined a few months before the beginning of the applicable year, although they may be, and generally are, subject to changes throughout the year (including the application of a final reduction coefficient). In practice, the total reference quantities established by the EC for each of the marketing years since the introduction of the common market organization for bananas have exceeded the volume of the tariff quota available for distribution amongst operators so that reduction coefficients were applied.

Category C operators constitutes a prerequisite for the issuance, by the EC, of licenses for the importation of bananas from these countries.⁵⁹

To create more complexity to the process, regulation 478/95 (as amended) establishes two rounds of import license applications within each quarter. In the first round, A and B operators can request licenses up to their quarterly entitlements. Category C operators may apply for their full annual entitlement in any given quarter. In their applications, companies must designate the source from which they plan to import and the desired volumes. Category A and C operators importing from BFA countries other than Venezuela must attach special export certificates. All license applications are transmitted by the competent authorities of the EC member States to the EC Commission which, if the applications for any country of origin exceed the indicative quantity available for that origin (in any given quarter), applies a country-specific reduction coefficient which reduces such applications proportionally. "First round" licenses are to be issued by the competent authorities by the 23rd day of the month preceding the relevant quarter (where that day is not a working day, the licenses are issued on the first subsequent working day).⁶⁰

IV. History of The Trade Disputes Relating to Bananas Under the GATT

The brawl concerning banana trade is an old one. Some of the elements of the present EC market organization for bananas were the subject of a complaint by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela in 1993. The panel which

⁵⁹Article 3.2 of Commission Regulation (EC) 478/95 (as amended).

⁶⁰ After the first round, the EC publishes the sources and quantities that were not exhausted for purposes of a second round allocation. See e.g. Commission Regulations (EC) 704/95, 1387/95, 2234/95 (as amended) and 2913/95. Those operators whose initial license applications are scaled back by a reduction coefficient have the option to participate in a second round of applications in respect of the difference between their original application and their allocation for one of the origins where the allocations are not exhausted. Article 4 of Commission Regulation (EC) 478/95 (as amended).

was established by the GATT to examine the matter submitted its report on 11 February 1994 (second *Banana* panel).⁶¹ Prior to the establishment of the common market organization for bananas on July 1, 1993, the banana regimes of individual EC member States were the subject of a complaint by the same listed parties. The resulting GATT panel (first *Banana* panel) issued its report on June 3, 1993.⁶² Neither panel report was adopted by the GATT.

In 1994, the EC negotiated the BFA with Colombia, Costa Rica, Venezuela and Nicaragua. The four Latin American parties to the BFA agreed not to pursue the adoption of the report of the second *Banana* panel. Guatemala, the fifth complaining contracting party to the second *Banana* panel, is not a party to the BFA. The BFA was incorporated into the EC's Uruguay Round Schedule in March 1994.⁶³ The BFA came into force on 1 January 1995⁶⁴ and its functioning is scheduled to be reviewed "before the end of the third year" with full consultations with Member Latin American suppliers. The BFA is applicable until 31 December 2002.⁶⁵

From 1963, the EC had a consolidated tariff of 20 per cent ad-valorem on bananas. With the introduction of the common market organization for bananas on 1 July 1993, a tariff quota was established with an in-quota tariff of ECU 100 per ton for third-country bananas and ECU 850 per ton for out-of-quota imports. Out-of-quota imports of ACP bananas were subject to a tariff of ECU 750 per ton. On 26 October 1993, the EC notified the contracting parties of its intention to renegotiate the 1963 concession on bananas in accordance with the provisions of Article XXVIII:5 of GATT 1947. On 1

⁶¹ Panel on "EEC - Import Regime for Bananas", DS38/R (not adopted).

⁶² Panel on "EEC - Member States' Import Regimes for Bananas", DS32/R (not adopted).

⁶³ Schedule LXXX - European Communities.

⁶⁴ Commission Regulation (EC) 3223/94 (as amended).

⁶⁵ Paragraph 9 of the Annex "Framework Agreement on Bananas" in Schedule LXXX - European Communities.

July 1995, the EC's Uruguay Round Schedule, including its tariff concession on bananas, became effective.⁶⁶

A further concern of the complaining parties was the introduction of a country specific preference scheme. This was introduced by the Fourth Lomé Convention, signed on 15 December 1989 between the EC and 70 African, Caribbean and Pacific (ACP) developing countries. Among the elements contained in the Convention was a protocol concerning bananas.

On 10 October 1994, the EC requested, together with the ACP contracting parties, a waiver from the EC's obligations under Article I:1 of GATT 1947.⁶⁷ The waiver was granted by the contracting parties on 9 December 1994 and provides, in paragraph 1 of the waiver decision, as follows:

"[T]he provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party."⁶⁸

Following the accession of Austria, Finland and Sweden to the EC on 1 January 1995, the EC autonomously increased access under in-quota tariff conditions (ECU 75 per ton) by 353,000 tons, to reflect the average yearly consumption of bananas in these

⁶⁶ In signing the Final Act, Guatemala submitted a letter stating that it was reserving "all GATT and WTO rights" relative to the EC's Schedule as regards bananas. In accordance with the EC reduction commitments as a result of the Uruguay Round, the level of the bound tariff was reduced on 1 July 1995 to ECU 822 per ton and on 1 July 1996 to ECU 793 per ton. The final bound MFN rate at the end of the six-year implementation period of the Uruguay Round results will be ECU 680 per ton. In accordance with the BFA entered into by the EC with Colombia, Costa Rica, Nicaragua and Venezuela, the MFN in-quota tariff rate was reduced and bound at ECU 75 per ton from 1 July 1995 (though it was applied from 1 January 1995).

⁶⁷ GATT document L/7539 of 10 October 1994 and L/7539/Corr.1.

⁶⁸ Para. 1 of GATT document L/7604 of 19 December 1994. On 14 October 1996, the Lomé waiver as granted by decision of the GATT contracting parties at its December 1994 session was extended until 29 February 2000 (in accordance with the procedures mentioned in paragraph 1 of the Understanding in respect of Waivers and those of Article IX of the WTO Agreement). See WT/L/186 of 18 October 1996.

three countries in the period 1991-93. The administration of these additional quantities is subject to the same procedures as the bound tariff quota, although they have not been bound in the EC Schedule.

On 25 September 1997, the DSB adopted the Appellate Body Report⁶⁹ and the Panel Reports⁷⁰, with respect to the EU import regime in bananas. On 16 October 1997, the European Communities informed the DSB, pursuant to Article 21.3 of the DSU, that it would fully respect its international obligations with regard to this matter.⁷¹ At the same meeting, the European Communities stated that -- while intending to act expeditiously -- it would, in view of the complexity of the matter at issue, require *a reasonable period* of time in which to examine all the options to meet its international obligations.⁷² Unable to establish a consensus via consultation, the Complaining Parties, on 17 November 1997, requested that the "reasonable period of time" be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.⁷³ The WTO, pursuant to Article 21.3(c), determined that the "reasonable period of time" for the European Communities to implement the recommendations and rulings of the DSB shall be the period from 25 September 1997 to 1 January 1999.

V. Legal Issues in the Banana Dispute

The EU banana tariff regime may at its core be considered as prejudicing banana imports from Latin America in favor of ACP producers. Both Latin and ACP contracting parties are GATT contracting parties, and the Community, by discriminating between these two kinds of GATT contracting parties, strikes at the heart of the General Agreement, the Most-Favored-Nation clause in article I GATT.⁷⁴ The Most-Favored-Nation clause can be interpreted to mean that contracting parties such as the EC cannot

⁶⁹WT/DS27/AB/R.

⁷⁰Complaint by Ecuador, WT/DS27/R/ECU; Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND; Complaint by Mexico, WT/DS27/R/MEX; Complaint by the United States, WT/DS27/R/USA.

⁷¹WT/DSB/M/38, p. 3.

⁷²*Id.*

⁷³WT/DS27/13, G/L/209, 20 November 1997.

⁷⁴ See EEC-Import Regime for Bananas, Report of the Panel, GATT Doc. DS38/R (Jan. 18, 1994) (restricted) 52. GATT, *supra* note 6, art. I(1) provides that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." *Id.* art. I(1).

discriminate between the GATT contracting parties and, in this case, between an ACP and a Latin American contracting party.

Important differences exist between ACP bananas and Latin American bananas. Latin bananas are called "dollar bananas" because they are grown by American multinational corporations such as Dole and Chiquita in Latin America on huge plantations.⁷⁵ ACP bananas, on the other hand, are grown by independent farmers. These bananas are twice as expensive as the Latin bananas.⁷⁶

GATT's Waiver of the Lome Convention

The GATT contracting parties never definitively concluded whether the Lome Conventions providing for the Community's non-reciprocal preferential treatment of ACP goods are compatible with the GATT.⁷⁷ As a result of the banana trade dispute, the Community and the ACP countries applied to the GATT Council for a waiver of the Lome IV Convention. The waiver was issued in December of 1994.⁷⁸

⁷⁵ See Petition of Chiquita Brands Int'l, Inc. and the Haw. Banana Indus. Assoc. Before the Section 301 Comm., Office of the U.S. Trade Representative 6 (Sept. 2, 1994) (indicating Chiquita, the world's largest banana company, has plantations primarily in Latin America).

⁷⁶ The difference in prices between the two kinds of bananas is staggering. In the United States, where the amount of ACP bananas is negligible, the average price per box is \$9.00. Panama-Commodities: Record Banana Exports for 1994, Inter Press Service, Jan. 4, 1995, available in LEXIS, World Library, ALLNWS File. In the European Community, the average price per box is \$20.00.

⁷⁷ The Community has invoked article XXIV as its legal basis for concluding preferential trade agreements with more than 100 countries, including the ACP countries. *The EEC as a GATT Member*, *supra* note 17, at 42.

⁷⁸ Article XXV(5) of the General Agreement provides the legal basis for a waiver. In exceptional circumstances not elsewhere provided for in this Agreement, the contracting parties may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The contracting parties may also by such a vote (i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and (ii) prescribe such criteria as may be necessary for the application of this paragraph. See GATT, art. XXV(5). Note that this article does not establish a criteria as to how the contracting parties should arrive at their conclusion. The article therefore effectively gives the contracting parties the authority to make a purely political decision in granting or denying the waiver.

Within the banana dispute one can trace out the effectiveness of the dispute resolution procedure. In Section II above we outline the WTO DSU procedure. Within this section we use the banana case to compare the outcomes of this trade dispute under both models - the GATT system and the WTO – DSU set up.

The Dispute Resolution Process for Bananas Under the GATT System

The dispute resolution procedure under the General Agreement is outlined in four main legal texts: GATT articles XXII and XXIII, supplemented by the "Understanding regarding notification, consultation, dispute settlement and surveillance" and by the "Decision of the CONTRACTING PARTIES dated November 10, 1958 in regards to article XXII procedures." Although consensus decision making is no longer required at every step of the procedure,⁷⁹ the ability of a defending contracting party to delay the dispute resolution procedure is still insurmountable.

The General Agreement's dispute resolution procedures, was viewed as informal and loosely constructed.⁸⁰ The laxity which pervaded the whole procedure resulted from the practice of the contracting parties.⁸¹

An important reason exists for the pragmatic approach of the GATT dispute resolution procedure. The contracting parties are lax in enforcing the General Agreement because GATT started off with a cohesive membership. The dispute resolution process was not necessarily legalistic and could afford to be informal; the early legal disputes were easily resolved. Regardless of whether pragmatism is a principle contained in the General Agreement, however, commentators believe that a system regulating global trade

⁷⁹ See DSU, art. 6.

⁸⁰ Case C-280/93, Germany v. Council at P110 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file) (stating that the test is whether GATT contains unconditional, clear and precise obligations so as to be directly applicable in the Community); see also Case 26/62, Van Gend en Loos v. Nederlandse administratie der belastingen, 1963 E.C.R. 1, 13, C.M.L.R. 105, 130 (1963) (stating that the test is whether the Treaty contained a clear and unconditional prohibition "not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects. . . .").

⁸¹ The General Agreement has weaker sources of regulatory authority than what the ITO would have provided because GATT was intended to be provisional. Legal System, supra note 11, at 58.

could have survived only by adopting such a pragmatic and political approach to the resolution of disputes as opposed to a strict legalistic approach.⁸²

The process began when a legal claim is referred to a panel of either three or five independent people selected by the GATT Secretariat with the consent of the parties. The most frequent problems in the dispute resolution process involved delays by the defending contracting party, including hindering of the panel's creation. Once created, however, the panel receives oral and written legal arguments from the parties, as well as interveners. The panel, after hearing the arguments, deliberated with the assistance of the GATT Secretariat and produced a report that should contain a well-reasoned legal opinion settling the dispute. The panel report has no legal force unless the contracting parties adopt it. If a panel decision is not adopted, it is as if the report was never written. Thus, many contracting parties refuse to accept panel rulings, thereby denying the panel decisions legal effect.

Even if a panel decision was adopted, the legal effect of the ruling was tenuous for two reasons. First, panel reports were originally drafted in ambiguous language for political reasons. As a result, the body of legal rulings interpreting the General Agreement did not truly develop until the mid 1980s. Second, panels originally had no right to review government actions, thereby severely limiting their abilities.

The GATT dispute resolution procedure functioned more as a catalyst to facilitate dialogue and to enable debating contracting parties to reach a mutually agreeable resolution rather than to force one contracting party to admit its guilt. Perhaps the GATT never envisioned a dispute resolution process that could quickly adjudicate each contracting party's legal obligations and faults. Rather, the GATT may see its prime objective as ensuring that violations of the General Agreement are only temporary and resolved as quickly as possible.

The only remedy available to a contracting party is retaliation, but, "neither punitive action nor direct coercion by the Contracting Parties [sic] is provided for in the General Agreement against a member country in breach of its obligations." Feuding

⁸² Besides the pragmatism, the most damaging aspect of the GATT dispute resolution process is the consensus requirement of contracting parties. "Decision-making in the various GATT organs is characterized by the practice of consensus (notwithstanding the general rule of voting by majority provided for in art. XXV). . . ."

contracting parties cannot be forced to come to a settlement, nor can the panel quickly make a determination of who is right or wrong. In addition, the party at fault cannot be punished for its violation of its obligations under the General Agreement. According to this text, therefore, the only force available to a contracting party to remedy its violations of the General Agreement, other than the complaining contracting party's unilateral trade retaliations, is "moral pressure" on the defending contracting party to adhere to its duties under the Agreement.

By operating by positive consensus the system created effectively meant that if any contracting party objected to a GATT decision when the General Council met to adopt decisions on the meaning of the GATT Agreement or panel reports generated by the dispute settlement system, the GATT General Council could not take action. A contracting party seeking to delay or avoid a case brought under the dispute settlement system could block or delay the process at any or all of the three following points: (1) the establishment of a panel, (2) the adoption of the terms of reference for a panel, and (3) the adoption of the panel report by the General Council.⁸³

During the years preceding the Uruguay Round negotiations and during the negotiations from 1986 to 1993, there had been an increase in each of these activities.⁸⁴ Despite the inevitable slowing down and loss of credibility incurred by each new breakdown of the GATT system, the early negotiations aimed at reforming the process faltered over the issue of abandoning the traditional idea of consensus.⁸⁵ Apart from the United States, most countries wanted to allow consensus to continue to govern whether a panel report would be adopted and whether or not the General Council would authorize retaliation against a non-complying defendant. Over time, and especially after US use of

⁸³ A party to a GATT dispute did not formally have to object to block the establishment of a panel or the adoption of the terms of reference, but if it failed to cooperate fully, the matter could drag on for months and thus stymie third-party resolution of the dispute through the panel process.

⁸⁴ See Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* at 234-70 (1993).

⁸⁵ See 2 *The GATT Uruguay Round: A Negotiating History* 2762 (Terence P. Stewart, ed. 1993), at 2732-42.

Section 301, the views of most negotiators shifted toward the view of the American view favoring the abandonment of positive consensus for the dispute settlement system.⁸⁶

In the banana trade dispute, a panel issued a report specifically addressing the EC banana tariff regime's GATT-compatibility.⁸⁷ The panel decided that the regime violated the General Agreement,⁸⁸ but the Community blocked the adoption of the report by the Council. Thus, most of the Latin banana exporters entered into the Framework Agreement.

The WTO Dispute Resolution and the Banana Case

The structural alterations to the dispute settlement system mark a shift away from a diplomatic dispute settlement system towards the adjudicative one the United States has always sought.⁸⁹ As the GATT Agreement expanded to cover new areas of trade (such as trade in services and agricultural trade) and trade-related disciplines (like the agreements on trade-related intellectual property rights and trade-related investment measures), the WTO acted to enforce these obligations against Member States within the WTO system itself.⁹⁰

⁸⁶ See Robert E. Hudec, *Dispute Settlement in Completing the Uruguay Round: A Results Oriented Approach to the GATT Trade Negotiations* 180, 186 (1990).

⁸⁷ Panel Report, at 52.

⁸⁸ *Id.* The Panel Report found the Community's tariff regime to be inconsistent with a number of General Agreement articles: (1) the duties levied on banana imports are inconsistent with article II; (2) the tariff preference accorded to ACP bananas over Latin bananas are inconsistent with article I and cannot be justified by article XXIV or article XX(h); and (3) the system of allocating import licenses is inconsistent with articles I and III and could not be justified by article XXIV nor by article XX(h). *Id.*

⁸⁹ Almost every GATT scholar has commented on the change in the dispute settlement system towards an adjudicative model. For one notable case see, William J. Davey, *The WTO/GATT World Trading System: An Overview*, in 1 *Handbook of WTO/GATT Dispute Settlement* 13-77 (Pierre Pescatore et al., eds. 1995) Davey devotes an entire section of his review of the WTO system with an analysis of why adjudicative system is superior to a diplomatic/negotiation system. Davey contends that an adjudicative system both discourages rule violations by countries and results in greater compliance with the rules.

⁹⁰ As long as the GATT system operated by consensus there was the possibility that there would be no compliance by a losing State. This inability to guarantee compliance meant that a country could justify using self-help measures to obtain the relief it sought. The change to a negative consensus in the DSU leaves the losing party without the right to avoid the process. The DSU also deprives the complaining party of the right to take action unilaterally in any case that belongs within the scope of GATT Article XXIII. According to Davey, the DSU put a more "judicial like system in place. That occurred because the EC and

One of the goals of the Uruguay Round discussions was to address the common dissatisfaction with the dispute resolution procedures of GATT. The negotiating group responsible for revising the dispute resolution procedure was therefore instructed to make the process more manageable and enforceable.⁹¹

As we noted in Section II, above, the Dispute Settlement Board ("DSB") administers the rules and procedures laid out in the Understanding. It has authority "to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreements." Significantly, all Board decisions shall be done by consensus. Whether this consensus requirement will impair the dispute resolution process is unclear. Perhaps the DSB can maintain the strictest independence from the members and judge objectively each request for a panel.⁹²

The Understanding is intended to be a substitute for country specific measures including retaliation. For the United States a provision of the US Trade Act requires the President to impose unilateral sanctions where a vital US trade interest is at stake, the so called Section 301 weapon.⁹³ Section 301 provides for private parties to submit petitions to the United States Trade Representative's office to seek relief.⁹⁴ After a period of investigation, if the Trade Representative determines that rights of the United States under any trade agreement are being violated or that any act, policy, or practice of a foreign country "denies benefits" to the United States,⁹⁵ then the Trade Representative

others decided that a more adjudicative system would be desirable as a means of limiting the U.S. tendency to take unilateral trade action on the ground that the GATT system was inadequate." Davey, *supra* note 84, at 77.

⁹¹ The negotiating team was given the following charge: In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations. See Jackson, at 3-4.

⁹² Art. 2(1) and 2(4).

⁹³ See *19 U.S.C. § 2411* (1988).

⁹⁴ See *19 U.S.C. § 2412(a)* (1988).

⁹⁵ *19 U.S.C. § 2411(a)(2)(A)* (1988).

may suspend or withdraw obligations, impose duties, or enter into binding agreements to ensure elimination of the act or policy.⁹⁶ Section 301 was enacted so that the United States administration would take strong action against foreign trade barriers through GATT when the General Agreement was insufficient for stronger acts.

Article 23 of the DSU seems directed at section 301 and would not permit unilateral action by a WTO member outside the WTO forum. Article 23 provides in part:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefit under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

2. In such cases, Members shall:

(a) not make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding.⁹⁷

The DSU states that the aim of the dispute resolution is not to determine guilt, but "to secure a positive solution to a dispute."⁹⁸ If no resolution results, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."⁹⁹ In this respect the WTO dispute resolution process resembles the GATT

⁹⁶ 19 U.S.C. § 2411(c) (1988).

⁹⁷ DSU, art. 23.

⁹⁸ Id. art. 3(7).

⁹⁹ Id.

1947 process, because the aim is to end quickly any potential violations and to seek an equitable solution rather than to determine who is right or wrong.

If the process ends without resolution, the WTO member's unilateral trade retaliation is strictly controlled. Article 22 of the Understanding provides that the DSB must authorize the suspension by one member of concessions or other obligations under the covered agreements.¹⁰⁰ The Understanding also provides a long list of factors to consider in deciding what concessions or other obligations to suspend. First, the complaining member should seek to suspend concessions within the same sector "as that in which the panel or Appellate Body has found a violation or other nullification or impairment."¹⁰¹ If the first option is not available, the complaining party should seek to suspend concessions and other obligations in other sectors under the same agreement.¹⁰²

The DSB grants authorization to suspend a concession or other obligations unless a consensus decides to the contrary.¹⁰³ If the defending member protests the level of suspension proposed or claims that the procedure laid out in article 22(3) was not followed, the matter is referred to arbitration by the original panel, if possible, or by an arbitrator appointed by the Director-General.¹⁰⁴ The concessions and other obligations are not to be suspended pending the outcome of the arbitration. Rather, the arbitration decision is final.¹⁰⁵ Suspension of concessions and other obligations only lasts until the DSB's surveillance mechanism finds that the violating measure is removed.¹⁰⁶

Under the WTO's dispute settlement rules, the losing party is given a "reasonable period of time" to implement a decision. The reasonable period is determined by one of three methods: mutual agreement, by the Dispute Settlement Body in accordance with a proposal, or by an arbitrator. WTO guidelines for determining a reasonable period of time

¹⁰⁰ DSU, art. 22(2).

¹⁰¹ *Id.* art. 22(3)(a).

¹⁰² *Id.* art. 22(3)(b).

¹⁰³ *Id.* art. 22(6).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* art. 22(7).

¹⁰⁶ *Id.* art. 22(8).

through arbitration state that the period should not exceed 15 months from the DSB's adoption of a decision. The revised import rules adopted by EU ministers June and July 1998 continued the same measures that had been found to violate international trading rules by a WTO panel.

Although the Dispute Settlement Understanding (DSU) has worked well so far, a significant limitation is posed by disputes based on gaps in the WTO agreements. In particular, there are questions about the system's ability to enforce its decisions. The banana case demonstrates a major challenge to the system. That is, to make sure that the winners get the benefits of a decision and that the losers have to implement it.

The United States and its Latin American partners later denounced the partial reforms as "primarily cosmetic," saying they would perpetuate the discrimination found to be inconsistent with international trading rules.

The five countries then threatened to resort to Article 21.5 of the WTO's Dispute Settlement Understanding, which allows for recourse through the WTO regarding any disagreements between member countries over measures taken to comply with panel rulings. Article 21.5 states that such disputes "shall be decided through recourse to these (DSU) procedures, including wherever possible resort to the original panel."