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GOING BANANAS OVER EEC PREFERENCES?: A LOOK AT THE BANANA TRADE WAR AND THE WTO’S UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

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I. INTRODUCTION

IN DECEMBER 1994, the Contracting Parties of the General Agreement on Tariffs and Trade (GATT), pursuant to a request by the European Economic Community (EEC) under Article XXV of the GATT, approved a five-year waiver on the trade provisions of the Fourth Lomé Convention (Lomé IV). This waiver allows the EEC to provide preferential treatment for products originating in African, Caribbean, and Pacific group countries (ACP) until February 29, 2000, free of the application of Article I of the GATT which requires most-favored-nation treatment among all GATT contracting parties. In particular, this waiver affects a

* B.A., University of Pennsylvania 1991; J.D., University of Pittsburgh 1996. I dedicate this Article to my grandmother, Cornelia Méc, for her infinite wisdom and support through the years. I would also like to acknowledge my appreciation to Professor Ronald Brand for his guidance and many helpful comments.

1 Article XXV(5) provides: “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 . . . .” General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.A.I.S. No. 1700, 55 U.N.T.S. 187, reprinted in 4 GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 1, 44 (1969) [hereinafter GATT]. The term EEC in this Article will also represent the European Union (EU) in order to maintain consistency.


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most controversial aspect of Lomé IV: the EEC’s banana import regime. Under Lomé IV, the EEC has set up a banana import regime that gives preference to bananas originating in ACP countries over bananas originating in third countries, primarily Latin American “dollar zone” countries.5

Ever since the Latin American banana-producing countries lodged their first complaint with the GATT in 1993 against the various EEC Member States’ pre-common market banana import regimes, the issue of EEC’s banana import regime has escalated into a “banana trade war.” After two unadopted GATT panel reports finding against two different EEC banana import regimes, a European Court of Justice upholding the current EEC regime, and two U.S. Section 301 investigations being initiated against (1) the current EEC regime and (2) an EEC side agreement with a number of Latin American countries. The tensions between the involved parties are running high with no imminent solution in sight.7 By obtaining the waiver, though, the EEC precludes any further attack upon its banana import regime on the basis of an Article I violation of GATT.8

Under the former GATT dispute settlement system, the EEC did not have to fear being bound to a panel decision, because it could easily block the adoption of a panel report.9 In contrast, under the new World Trade Organization’s (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (Understanding), a panel report is adopted automatically.10 In light of the strictness of the new Understan-
ing, the waiver gives the EEC some breathing room. Although the waiver
does not preclude any contracting party from challenging the banana
import regime on either violations of other GATT provisions or non-
vviolations that otherwise nullify or impair a contracting party's benefits
under the GATT agreement or impede the attainment of any objective
under the agreement, the possibilities of either kind of challenge are very
slim. However, the United States has been feverishly trying to find
ways around the waiver as well as looking for methods available outside
the realm of the WTO to attack the regime. There have also been
suggestions that Guatemala may seek to request a panel under the
WTO. Furthermore, when the waiver expires in February of the year
2000, the EEC banana import regime will probably not be able to
withstand a challenge under the WTO's Understanding.

The banana trade war has set up an ideal situation to analyze the
effects of a GATT waiver on the possible actions and remedies available
under the new WTO system. This Article considers actions and remedies
available under the new WTO dispute settlement system in a challenge
against the EEC's current banana import regime, despite the waiver of the
trade provisions under Lomé IV from Article I obligations. The Article
first examines the history of the banana trade war by looking at the roots
of the EEC-ACP relationship, the structure of the different banana import
regimes, the previous GATT panel rulings, the European Court of Justice
case, the GATT waiver, the EEC framework agreement with certain Latin
American countries, and the recent U.S. Section 301 actions against the
EEC and certain Latin American countries. The Article then discusses and
analyzes major dispute settlement changes which might affect the banana
trade war. One of the major changes is the procedural distinction between
an Article XXIII(1)(a) violation complaint and an Article XXIII(1)(b) non-
violation complaint. Although the Understanding provides adequate
remedies for a violation case, the remedies afforded to a non-violation

provide that a panel report is adopted unless the GATT members decided by consensus
not to adopt it. In essence, the Understanding turns the table on the old system by
taking away the veto power. Understanding on Rules and Procedures Governing the
Settlement of Disputes, Annex 2 of the Agreement Establishing the World Trade
Organization, arts. 16(4), 17(14), reprinted in PIERRE PESCATORE, HANDBOOK OF GATT
DISPUTE SETTLEMENT D8/1, D8/15-17 (1994) [hereinafter Understanding].
11 See Waiver, supra note 4; EU Includes Framework Agreement, supra note 2, at
10, 11.
12 See EU's Brittan Affirms Willingness to Negotiate on Bananas, INSIDE U.S.
the banana import regime situation).
case under Article 26(1) of the Understanding are vague.\textsuperscript{14} Under Article 26(1) of the Understanding, the question is open as to whether the aggrieved Member may suspend its concessions against the aggrieving Member.\textsuperscript{15} Finally, this Article explores the possible actions and remedies available, if any, in a challenge to the EEC's banana import regime in the face of a GATT waiver. This last part, \textit{inter alia}, addresses the applicability of and the limitations on a U.S. Section 301 action. In the past, Section 301 was a very effective tool in expediting the panel process as well as encouraging settlement.\textsuperscript{16} However, under the Understanding, both its effectiveness and compatibility with the dispute settlement system are suspect.\textsuperscript{17}

II. HISTORY OF THE BANANA WAR

A. The Lomé Conventions

In order to have a complete understanding of the banana trade war, we must briefly look at the foundation of the relationship between the EEC and the ACP countries. Lomé IV is the culmination of this relationship. In a series of Lomé\textsuperscript{18} Conventions which began in 1975, an alliance was set up between an advanced market economy and less-developed countries with the purpose of promoting the development of the ACP countries through special economic arrangements.\textsuperscript{19}

The roots of the Lomé Conventions, however, reach far back to the era of European imperialism. In fact, most of the ACP countries are ex-colonies of Britain, Belgium, and France. The ex-colonies' organization as sovereign states and access to the modern international order was a result

\textsuperscript{14} See Understanding, \textit{supra} note 10, arts. 21-26.
\textsuperscript{15} See \textit{id.}, art. 26(1). The provisions do not explicitly mention the suspension of concessions. The use of the phrase suspension of concessions in the rest of the this text also implies the suspension of other obligations under the covered agreements of the Understanding. See \textit{id.}, art. 22. Member is referred to here and throughout the text as being a member of the WTO and is synonymous with the term "contracting party." See Agreement Establishing the World Trade Organization, art. XI(1), \textit{reprinted in} PIERRE PESCATORE, \textit{HANDBOOK OF GATT DISPUTE SETTLEMENT} WTO 1 (1994) [hereinafter WTO Agreement].
\textsuperscript{18} Lomé is the capital of the African nation Togo.
\textsuperscript{19} BABARINDE, \textit{supra} note 3, at 1-5.
of their colonial experience. It was this colonial relationship that laid the foundations for the Lomé Conventions.\textsuperscript{20} However, it was a relationship dominated by Europe, where the attitude of the imperialistic powers was arrogant and contemptuous, often leading to paternalistic, patronizing, dictatorial, and sometimes brutal behavior.\textsuperscript{21}

The twentieth century brought an end to European imperialism with the surge of anti-colonialism and a shift in power as a result of the world wars. Consequently, after the Second World War, a new era of North-South relations began. The imperial powers, aspiring for a better world order, started to decolonize, and by the early 1960s had relinquished most of their colonial possessions.\textsuperscript{22} Furthermore, devastated and left in ruins from the war, the European countries realized that they had much to gain economically by including the colonies and ex-colonies within their scope of rebuilding.\textsuperscript{23} Therefore, in the Treaty of Rome of 1957, which established the EEC between the six signatory states, eighteen African nations were included within the EEC under associate status, keeping the special relationship that had previously existed between the EEC members and their ex-colonies.\textsuperscript{24} As a result of their status, the African nations benefitted from economic and technical assistance, including tariff preferences for their exports to the EEC market.\textsuperscript{25} In exchange, the associates provided the same preferential treatment to the imports from the EEC members. Thus, these arrangements were reciprocal in nature. These arrangements basically kept their same characteristics in the subsequent Yaounde Conventions of 1963 and 1969.\textsuperscript{26}

The Treaty of Accession in 1973, which brought Britain, Ireland, and Denmark into the EEC, changed the face of the relationship between the EEC and the ex-colonies.\textsuperscript{27} Britain pressed to have its former colonies,
otherwise known as the Commonwealth of Nations (which included Caribbean and Pacific nations in addition to African nations), included in the EEC under associate status as well. This pressure, along with an appeal for a new international economic order in the late 1960s, prompted the EEC to replace the Yaoundé Conventions with a new arrangement and change the relationship from association to partnership. \(^{28}\) The ensuing negotiations resulted in an agreement in 1975 between the EEC and close to fifty African, Caribbean, and Pacific (ACP) countries, called the First Lomé Convention (Lomé I). \(^{29}\) Major characteristics of this agreement included: (1) a move toward non-reciprocal duty-free and quota-free access to EEC markets for the ACP countries, (2) an export earnings stabilization scheme, (3) financial and technical assistance towards the development of the ACP countries, and (4) establishment of implementing institutions for the convention. \(^{30}\) Lomé I was seen as the beginning of a new era in the economic relations between the two groups, and an effort to deal with the chronic economic problems that plagued the ACP countries. \(^{31}\)

Subsequently, Lomé has been renegotiated three times. The second Lomé Convention was signed in 1980, the third in 1985, and the fourth in 1989. \(^{32}\) Lomé IV expires February 28, 2000. \(^{33}\) Aside from minor changes and improvements, the major characteristics and the essential nature of the subsequent conventions remains the same. \(^{34}\)

B. EEC Banana Import Regimes

Banana production within the EEC has never been a big industry. Therefore, the minimal production among the Member States, which is unable to compete in the normal market because of structural disadvantag-
es, has been shielded from external competition such as the Latin American "dollar zone." To make up for the remaining demand of bananas, some Member States have imported their bananas from ex-colonies, where similar structural disadvantages exist. The Lomé Conventions have always protected these imports. However, Member States such as Germany, without either their own banana production or ex-colonies from which to export, have imported the cheapest bananas they could find, usually from the "dollar zone."

1. Pre-Common Market

Prior to July 1, 1993, the EEC's only common policy concerning the importation of bananas was a tariff rate of twenty percent ad valorem. In fact, this policy was not even that common. First, under Article 168(1) of Lomé IV, bananas imported from ACP countries entered the EEC duty free. Second, under the EEC Treaty, a protocol applying exclusively to Germany provided for a quota of cheaper, "dollar zone" bananas to be imported duty free. In reality, a number of national import regimes existed.

Banana production within the EEC occurs in the countries of France, Greece, Portugal, and Spain. Quantitative restrictions on third country imports protected these bananas from competition under Regulation 288/82 as well as the Act of Accession regarding Spain and Portugal. Britain, France, and Italy are the main importers of bananas originating from the ACP countries. As mentioned above, banana imports from the ACP countries were always afforded special treatment by the Lomé Conventions. In addition to Article 168(1), Protocol 5 of Lomé IV applies exclusively to bananas and provides that "no ACP State shall be placed, 

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35 EECKHOUT, supra note 5, at 225.
36 Id.
37 See Lomé I, supra note 29; Lomé II-IV, supra note 32.
38 EECKHOUT, supra note 5, at 225.
39 Council Regulation 2658/87, 1987 O.J. (L 256) 1, as last amended by Regulation 2913/92, 1992 O.J. (L 301) 1.
40 Lomé IV, supra note 32, art. 168(1).
41 EEC Treaty Protocol Concerning the Tariff Quota for Imports of Bananas.
42 EEC banana production is concentrated in four areas: Crete (Greece), Madeira (Portugal), the Canary Islands (Spain), Martinique, and Guadeloupe (French overseas departments). EECKHOUT, supra note 5, at 227.
43 Commission Regulation 288/82, 1982 O.J. (L 31) 1; Treaty of Accession, supra note 27, protocol 2.
44 Britain is traditionally supplied by Caribbean countries such as Saint Lucia, Dominica, Saint Vincent, and the Grenadines, Grenada, and Jamaica; France by Cameroon and Cote d'Ivoire; and Italy by Somalia. EECKHOUT, supra note 5, at 228.
as regards access to its traditional markets and its advantages on those markets, in a less favorable situation than in the past or at present." In recognizing that the various national import regimes might cause problems for the completion of the EEC internal market, the Joint Declaration Relating to Protocol 5 further provided that:

Article 1 of Protocol 5 does not prevent the Community from establishing common rules for bananas, in full consultation with the ACP, as long as no ACP State, traditional supplier to the Community, is placed as regards access to, and advantages in, the Community, in a less favorable situation than in the past or at present.47

Pursuant to the above provisions, Britain, France, and Italy have protected ACP banana imports by applying quantitative restrictions against "dollar zone" imports under Regulation 288/82 and Article 115 of the EC Treaty.48

Before the EEC common market was in place, this patchwork of national banana import regimes existed. For France, Portugal, Spain, and Britain, quota restrictions on banana imports existed. In addition, a twenty percent ad valorem tariff applied to banana imports, except for bananas originating from ACP countries, into these countries as well as into Belgium, Denmark, Greece, Ireland, Luxembourg, and the Netherlands. Germany, on the other hand, essentially allowed all of its banana imports, primarily from the "dollar zone," to enter duty free.

2. Post-Common Market

In the wake of the organization of the common market, the EEC realized that its patchwork of national import regimes needed to be consolidated into some type of uniform regime. Reaching an acceptable accord among the Member States was a difficult task, in light of (1) the EEC's pledge under Lomé IV to protect the traditional ACP banana imports regardless of the common market, (2) the EEC's commitment to adhere to the GATT, (3) the need to protect the EEC's own production of bananas, (4) the need to keep the interests of the "dollar zone" countries in mind, and (5) the goal of offering EEC citizens (particularly

45 Lomé IV, supra note 32, protocol 5.
46 ECKHOUT, supra note 5, at 228.
47 Lomé IV, supra note 32, annex LXXIV.
48 Commission Regulation 288/82, supra note 43; EEC Treaty art. 115. ACP bananas are the only non-EEC products that have benefitted from Article 115 protection. Normally, Article 115 is only imposed if national products are exposed to being harmed by indirect imports. ECKHOUT, supra note 5, at 229.
Germans) reasonable prices.\footnote{See id. at 230-31.}

After over two years of extensive negotiations, the EEC Council adopted a uniform banana regime in February 1993 to take effect on July 1 of that year.\footnote{Commission Regulation 404/93, 1993 OJ. (L 47) 1; see Eeckhout, supra note 5, at 232-33.} Regulation 404/93 set up a structured tariff quota system. Four different categories of banana suppliers were identified: traditional ACP country imports, non-traditional ACP country imports, non-ACP third country imports, and EEC bananas.\footnote{Commission Regulation 404/93, supra note 50, art. 15.} Up to a maximum of 857,700 tons\footnote{See id., arts. 15, 18 & Annex.} of traditional ACP country imports are allowed to enter the common market duty-free. Non-traditional ACP country\footnote{Non-traditional ACP bananas include the quantities above the traditional amount supplied by the ACP countries. Id., art. 15.} and third country imports are allowed to enter the common market up to a tariff quota of two million tons. Within this quota, ACP country bananas enter duty-free while third country bananas are subject to a 100 ECU per ton tariff, which is essentially equivalent to the previous twenty percent \textit{ad valorem} tariff. Imports above this quota are subject to a 750 ECU per ton tariff for ACP country bananas and an 850 ECU per ton tariff for third country bananas.\footnote{Id., art. 18.}

The allocation of import licenses for bananas within the tariff quota is also established under the new regulation. These licenses for the non-traditional ACP and third country bananas are distributed among three categories:

(a) 66.5% of the licenses to operators who had marketed third country and/or non-traditional ACP bananas;
(b) 30% to operators who had marketed Community and/or traditional ACP bananas;
(c) 3.5% to operators established in the Community who started marketing bananas other than Community and/or traditional ACP bananas from 1992.\footnote{Id., art. 19(1).}

The amount each importer under (a) and (b) can import is determined on the basis of the average quantity each has sold in the three most recent years for which figures are available.\footnote{Id., art. 19(2).} The effect of this quota and license system is that, in order to maintain or expand market share,
importers of "dollar zone" bananas have to import EEC and traditional ACP country bananas.\textsuperscript{57}

C. "Dollar Zone" Reaction — GATT Panels

1. Pre-Common Market Regime

After failed consultations concerning the various national banana import regimes between the EEC and a group of "dollar zone" banana producers\textsuperscript{58} in 1992, the "dollar zone" group requested the establishment of a GATT panel. The "dollar zone" group complained that the various import regimes, particularly the quota restrictions and the ACP preferences, were inconsistent with a number of GATT provisions, including Articles I, XI, and XXIV.\textsuperscript{59} The GATT Council established a panel on February 10, 1993, and the panel submitted its report to the contracting parties on June 3, 1993.\textsuperscript{60}

All told, the panel found in favor of the "dollar zone" group, holding that the various EEC Member States' banana import regimes were inconsistent with certain GATT provisions. First, the panel found that the quota restrictions on bananas were inconsistent with Article XI(1)'s prohibition of quantitative restrictions.\textsuperscript{61} The EEC argued that the restrictions were excepted by Article XI(2)(c)(i), which allows quantitative restrictions on agricultural products if they are necessary to the enforcement of governmental measures aimed at restricting the quantities of the like domestic product permitted to be marketed or produced.\textsuperscript{62} The panel, however, found that the EEC did not meet the criteria of this clause.\textsuperscript{63} The EEC further argued that the quota restrictions were valid in light of the existing legislation clauses contained in the protocols through which the certain EEC Member States had become contracting parties to the GATT.\textsuperscript{64} These protocols provide that Part II of the GATT, which includes Article XI, only applies to the extent not inconsistent with their existing legislation on the day of the protocol.\textsuperscript{65} The panel, on the contrary, found that the pre-existing laws were not mandatory in nature, which is a necessary condition, and therefore were inconsistent with

\begin{itemize}
\item \textsuperscript{57} \textit{EECKHOUT, supra} note 5, at 234.
\item \textsuperscript{58} This group included Costa Rica, Colombia, Nicaragua, Guatemala, and Venezuela.
\item \textsuperscript{59} \textit{GATT Panel #1, supra} note 6.
\item \textsuperscript{60} \textit{Id.}, para. 2.
\item \textsuperscript{61} \textit{Id.}, para. 326.
\item \textsuperscript{62} \textit{Id.}, para. 327.
\item \textsuperscript{63} \textit{Id.}, paras. 328-41.
\item \textsuperscript{64} \textit{Id.}, para. 342.
\item \textsuperscript{65} \textit{GATT, supra} note 1, Protocol of Provisional Application, at 77.
\end{itemize}
Article XI. The panel recommended that the Contracting Parties request the EEC to bring these quantitative restrictions into conformity with Article XI.

Second, the panel found EEC tariff preferences accorded to ACP country bananas inconsistent with Article I’s most-favored nation (MFN) clause. It rejected the EEC’s contention that the preferences could be justified by the application of Article XXIV, which relates to customs unions and free-trade areas, in conjunction with Part IV of the GATT. There was no argument over whether the tariff preferences were inconsistent with Article I’s MFN clause. Clearly, the zero tariff for the ACP bananas was not extended to the “dollar zone” bananas, for which a 100 ECU per ton tariff applied. As to the applicability of Article XXIV and Part IV, the panel first found that Lomé IV was not covered by Article XXIV. Article XXIV is designed to allow the removal of all trade restrictions among members of a custom union or free trade area. However, Lomé IV’s preferences are non-reciprocal, only removing restrictions on imports from the ACP countries to the EEC. The panel further found that the preferences were not justified taking Article XXIV in conjunction with Part IV of the GATT. Part IV was intended to create obligations for developed parties towards less-developed parties in addition to those found in the other parts of GATT. However, Part IV does not allow contracting parties to accord preferences inconsistent with Article I. Part IV was not intended to subtract from the other obligations set forth in the rest of the GATT. Therefore, the panel recommended that the Contracting Parties request the EEC to bring the tariff preferences into conformity with GATT provisions or seek a waiver for the preferences under Article XXV.

This panel report was only a temporary success for the “dollar zone” group. First, the panel report was never adopted by the Contracting Parties, since it was continually blocked by the EEC and ACP countries. Second, the various national banana import regimes were terminated less than one month after the panel report had been submitted to the Contracting Parties with the implementation of the new uniform

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66 GATT Panel #1, supra note 6, paras. 343-57.
67 Id., para. 374.
68 Id., para. 375.
69 Id., para. 368.
70 Id., para. 369.
71 Id., para. 375.
72 See EC Member States’ Import Restrictions on Bananas, GATT Focus, July 1993, 2, 3; Council Defers Action on Banana Reports as EC Offers to Negotiate with all Parties, GATT Focus, June 1994, 1, 5.
banana import regime. However, this panel report showed the weakness of Lomé IV’s preferences as to international obligations and the EEC’s import regime philosophy.

2. Post-Common Market Regime

Even before the establishment of the first panel, above and before the implementation of EEC’s new banana import regime, the “dollar zone” group was on track to obtain a second panel decision concerning the validity of the new regime. On January 28, 1993, the “dollar zone” group requested consultations with the EEC pursuant to Article XXII(1) of GATT to discuss the EEC’s new regime. However, since the new regime had not yet been officially adopted, the EEC declined the request, stating that the future regime could not be considered as a measure to which the GATT would apply.

The “dollar zone” group was successful the second time around. The group made another request for consultations on February 19, shortly after the EEC Council of Ministers officially adopted the new regime under Regulation 404/93, and consultations were held between March 22 and April 19, 1993. As a result of a failure to reach a mutually satisfactory solution, the “dollar zone” group requested, pursuant to Article XXIII(2), that a panel be established to investigate the new regime. The request was granted and the panel was established on June 16, 1993.

The panel report, which again found in favor of the “dollar zone” group was not submitted to the Contracting Parties until March 23, 1994, nine months later.

The panel concluded, inter alia, that (1) the specific tariffs the EEC applied in its new regime are inconsistent with Article II, schedule of concessions; (2) the tariff preferences granted to ACP bananas imported into the EEC are inconsistent with Article I’s MFN clause; and (3) the allocation of import licenses under the tariff quota is inconsistent with

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73 The panel report was submitted June 3, 1993 and the new regime was implemented on July 1, 1993.
74 See ECKHOUT, supra note 5, at 237.
76 Id.
77 Id.
78 Id., para. 2.
Article I and the national treatment requirements of Article III. As to the inconsistency with Article II, the “dollar zone” group argued that the specific tariffs applied by the EEC in its new regime accorded less favorable treatment to banana imports than the EEC’s twenty percent \textit{ad valorem} tariff contained in its schedule of concessions. Article II(1)(a) provides that “each contracting party shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.”

The panel gave two reasons why the new tariffs were inconsistent with Article II. First, the tariff had changed from focusing on the value of the bananas to focusing on the weight of the bananas. Second, the “dollar zone” group had evidenced that the 100 ECU per ton tariff, and more significantly the 850 ECU per ton tariff, had already exceeded the twenty percent \textit{ad valorem} equivalent after July 1, 1993. Therefore, the panel concluded that since the duty changed from an \textit{ad valorem} to a specific tariff and the new bound rate was either actually or potentially higher than the twenty percent \textit{ad valorem}, the new tariffs accorded less favorable treatment to banana imports than that provided for in the EEC’s schedule of concessions.

The “dollar zone” group also argued that the EEC’s new import regime is inconsistent with Article I’s MFN clause. Article I(1) states:

> With respect to custom duties and charges of any kind . . . 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.

Since the preference of duty-free importation of bananas granted to the ACP countries was not accorded immediately and unconditionally to the bananas imported from the “dollar zone” countries, the panel found that the regime is inconsistent with Article I. The panel also rejected the EEC’s argument that Article XXIV justified its inconsistency with Article I. As in the first panel report, the panel determined that Lomé IV did not fall under Article XXIV, and therefore the inconsistency with Article I

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10 GATT Panel #2, supra note 75, para. 170, at 230.
11 \textit{Id.}, para. 132, at 216.
12 GATT, supra note 1, art. II(1)(a), at 3.
13 GATT Panel #2, supra note 75, para. 134, at 217.
14 \textit{Id.}, paras. 134-35, at 217.
15 \textit{Id.}, para. 154, at 223.
16 GATT, supra note 1, art. I(1), at 2.
17 GATT Panel #2, supra note 75, para. 155, at 223.
}
could not be justified.\textsuperscript{88} The panel further rejected the EEC's argument that the tariff preferences under the Yaounde and Lomé Conventions were justified under Article XX(h) as being part of an intergovernmental commodity agreement.\textsuperscript{89}

The last issue addressed by the panel concerns the allocation of import licenses under the EEC's tariff quota. The "dollar zone" group contended that the regime, by reserving thirty percent of the licenses under the tariff quota to operators who marketed EEC or traditional ACP bananas in the past, distorts competition.\textsuperscript{90} This distortion occurs, the group argued, because such operators have a greater incentive to purchase EEC or traditional ACP bananas. By purchasing more EEC or traditional ACP bananas, these operators acquire a larger share of the tariff quota licenses, and, in turn, a larger portion of quota revenues. Therefore, the group argued, the regime is inconsistent with Article III(4) by favoring EEC bananas over "dollar zone" bananas.\textsuperscript{91} Article III(4) provides that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin.\textsuperscript{92} The panel concluded that not only is the import licensing scheme more favorable to EEC bananas than to "dollar zone" bananas, but it is also more favorable to ACP bananas than to "dollar zone" bananas, and therefore inconsistent with Article III(4) as well as Article I(1), respectively.\textsuperscript{93}

The panel, however, did find that certain parts of the EEC's new regime are not inconsistent with GATT provisions. First, the panel determined that the tariff quota on non-traditional ACP and third country bananas is not inconsistent with the Article XI prohibition on quantitative restrictions, or the Article XIII prohibition on discrimination among supplying countries.\textsuperscript{94} Second, the panel concluded that "the security requirements and other formalities connected with the importation of bananas [are] not inconsistent with Article VIII."\textsuperscript{95} Finally, the panel found that the EEC did not "act inconsistently with its obligation under Article XVI(1) to discuss, upon request, the possibility of limiting the subsidiza-

\begin{footnotes}
\item[88] Id., paras. 156-63, at 223-27.
\item[89] Id., para. 165, at 227.
\item[90] Id., para. 143, at 220.
\item[91] Id.
\item[92] GATT, supra note 1, art. III(4), at 6.
\item[93] See GATT Panel #2, supra note 75, paras. 143-48, at 220-21.
\item[94] Id., para. 169, at 230.
\item[95] Id.
\end{footnotes}
tion of bananas.\textsuperscript{96}

The panel concluded that the measures taken by the EEC under its new banana import regime constituted a \textit{prima facie} case of nullification or impairment of benefits under Article XXIII,\textsuperscript{97} and in turn, recommended that the Contracting Parties request the EEC to bring its banana tariffs and the distribution of its tariff quota import licenses into conformity with the provisions of GATT.\textsuperscript{98} Once again, however, adoption of the panel report was blocked by the EEC and ACP states. Nevertheless, this report put the EEC banana import regime into further jeopardy, reemphasizing the inconsistency of Lomé IV's preferences with the GATT.

3. The Framework Agreement

During the second GATT panel report concerning the EEC's banana import regime, the EEC and the "dollar zone" group continued negotiations. Shortly following the submission of the panel report to the Contracting Parties, the two parties, without the participation of Guatemala, pieced together a framework agreement on bananas (Framework Agreement) on March 29, 1994.\textsuperscript{99} The Framework Agreement, in exchange for waiving GATT action against the EEC, raised the tariff quota for non-traditional and third country banana imports to 2.2 million tons in 1995, and lowered the tariff under the quota to seventy-five ECUs per ton.\textsuperscript{100} The Framework Agreement, which divides up the quota on a country-by-country percentage basis, gives Colombia, Costa Rica, Venezuela, and Nicaragua the right to issue export licenses as well as charge fees to banana producers and marketers to enable exports to the EEC.\textsuperscript{101} The Framework Agreement, however, did not go into force right away. Each country had to implement the agreement separately, and as of January 1, 1995, only Colombia, Costa Rica, and the EEC have done so.\textsuperscript{102} The

\begin{itemize}
  \item \textsuperscript{96} Id.
  \item \textsuperscript{97} Id., para. 167, at 228.
  \item \textsuperscript{98} Id., para. 170, at 230.
  \item \textsuperscript{99} See Framework Agreement on Banana Imports, 34 I.L.M. 1 (1995) [hereinafter Framework Agreement].
  \item \textsuperscript{100} Id., paras. 1, 7, 11.
\end{itemize}
agreement was opposed by other Latin American banana producers (in particular Guatemala), the U.S., and Germany.103

D. German Objection-European Court of Justice Decision

In 1991, the EEC’s supply of fresh bananas totaled close to 3.63 million tons, of which Germany’s share was about 1.35 million tons or thirty-eight percent. Of this German share, 1.345 million tons, or 99.7% of fresh bananas, were imported from “dollar zone” countries.104 These figures, however, do not include unified Germany, which would raise German consumption to almost half of that of the EEC.105 In 1992, the World Bank published a report which, inter alia, calculated banana prices in the different EEC Member States before the new banana import regime went into effect. In Germany, the consumer price for bananas was about $1.50 U.S. per kilogram, while in Britain and France it was $2.00 per kilogram, and in Spain and Italy, it was around $2.50 per kilogram.106 Deducing from these figures, Germany has a big stake in the ramifications of the EEC’s new banana import regime. With the new tariff quota and the allocation system of import licenses, German importers are forced to import more ACP and EEC bananas, therefore raising consumer prices.107 In order to protect its banana consumers as well as to maintain the international integrity of the EEC, Germany challenged the banana import regime in the European Court of Justice.

On May 23, 1993, Germany filed a complaint against the Council of the European Union (Council), claiming that Regulation 404/93, the new banana import regime, illegally discontinued its protocol under the EU Treaty which allowed Germany to import an annual quota of bananas duty-free. Furthermore, Germany argued that the new regime infringes EEC law as well as the provisions of GATT.108 On June 29, 1993, the

104 See GATT Panel #2, supra note 75, Annex, at 233.
105 See EU Upholds Banana Quota Despite German Challenge, WALL STREET J. EUROPE, Oct. 6, 1994, available in WESTLAW, 1994 WL-WSJE 2039954 [hereinafter EU Upholds Banana Quota].
107 See EU Upholds Banana Quota, supra note 105.
European Court of Justice (Court) rejected Germany’s request for an interim measure to allow it to maintain its duty-free imports until the Court’s decision on the substantive issues of the case. On July 13, 1993, Belgium and the Netherlands joined the case in support of Germany while Greece, Spain, France, Italy, Portugal, Britain, and the Commission of the European Communities joined the case in support of the Council.

On October 5, 1994, the Court delivered its judgment, rejecting each element of Germany’s complaint and upholding the validity of Regulation 404/93. The Court first held that the procedure for adopting the regulation was carried out properly and, therefore, Germany’s protocol was effectively discontinued. The Court then found that the new banana import regime does not violate any of the substantive laws of the EEC. The Court maintained that it was the objective of the EEC to create a common organization of the market and to safeguard and ensure EEC and ACP production, and that a difference in treatment is inherent in such an integration. The Court further rejected Germany’s claim that the banana regulation breaches Article 168 of Lomé IV by according different treatment to ACP banana imports than before, i.e. applying tariffs to ACP bananas exceeding the quota where previously ACP bananas were exempt from all customs duties. The Court stated that the EEC’s only obligation is to maintain the advantages previously accorded to ACP countries, and that the EEC has not breached this obligation under the new regulation. Last of all, the Court held that an individual within the EEC can only invoke GATT provisions in a court to challenge EEC law and that the Court can only take GATT provisions into consideration in limited circumstances. These circumstances only arise if either (1) the EEC intended to implement a specific obligation entered into within the GATT framework, or (2) the EEC act expressly refers to particular GATT provisions. Therefore, the Court concluded that this situation did not fall under either of these exceptions and that Germany could not invoke GATT provisions to challenge the EEC’s banana regulation.

the banana regulation infringes. The court points out that the point is moot because it is precluded from taking GATT provisions into consideration to assess the validity of this regulation. Id., paras. 103-12, at 175-76. See discussion infra.

109 Id., para. 24, at 169.
110 Id., para. 25.
111 See id., para. 119, at 176.
112 See id., paras. 27-43, at 169-70.
113 See id., paras. 44-99, at 170-75.
114 Id., paras. 100-02, at 175.
115 See id., paras. 103-112, at 175-76.
Although Germany's bid to bring down the banana import regime was unsuccessful, it has not given up. Germany has submitted another complaint to the Court challenging the Framework Agreement under Article 228 of the EU Treaty. Furthermore, along with Belgium, Denmark, Luxembourg, and the Netherlands, Germany has protested against the banana import regime in the form of a written reservation to the Uruguay Round accord.

E. U.S. Section 301 Investigation of the Banana Import Regime

Section 301 provides the medium in the United States through which private parties can enforce U.S. rights under international trade agreements and respond to certain unfair trade practices. In essence, Section 301 is a domestic counterpart to the GATT dispute settlement system. An investigation may be initiated by any person filing a petition to the U.S. Trade Representative (USTR) or the USTR may initiate action on its own. Under a Section 301(a) finding, akin to violation under Article XXIII(1)(a) of GATT, the USTR is obligated to take action against policies or practices that either (1) violate, are inconsistent with, or deny U.S. rights or benefits under any trade agreement or (2) are unjustifiable and burden or restrict U.S. commerce, unless either a GATT panel finds that U.S. rights were not violated or U.S. benefits were not nullified or impaired under any trade agreement, or the USTR finds that the foreign country is taking satisfactory measures to remedy the issue. Under a Section 301(b) finding, akin to a non-violation under Article XXIII(1)(b) of GATT, the USTR has discretion in taking action against policies or practices it believes to be unreasonable or discriminatory and burdens or restricts U.S. commerce. In either case, the USTR is authorized to suspend, withdraw, or prevent the application of trade concessions; impose duties or import restrictions; or enter into agreements that remedy the situation.

On September 2, 1994, Chiquita Brands International, Inc. (Chiquita) and the Hawaii Banana Industry Association (Association) filed a petition with the USTR alleging that certain policies and practices of the EU, Co-

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116 See US to Examine New Regime, supra note 103.
120 Id. § 301(a), 19 U.S.C. § 2411(a).
121 Id. § 301(b), 19 U.S.C. § 2411(b).
122 Id. § 301(c), 19 U.S.C. § 2411(c).
lombia, Costa Rica, Nicaragua, and Venezuela regarding the trade of bananas are discriminatory, unreasonable, and burden or restrict U.S. commerce. The petitions alleged that:

(1) Regulation 404/93 and related rules implementing an EEC banana policy, including a restrictive and discriminatory licensing scheme designed to transfer market share to firms traditionally trading bananas from ACP countries and from EEC overseas territories and dependencies; and

(2) the March 29, 1994 Framework Agreement between the EEC and Colombia, Costa Rica, Nicaragua, and Venezuela are discriminatory and unreasonable as applied to U.S. banana marketing companies importing bananas from Latin America. Chiquita's main complaint against the EEC is that the second category of import licenses for "dollar zone" bananas, only available to those importers that traditionally sell bananas from traditional ACP banana supplying countries, limits its ability to obtain import licenses for "dollar zone" bananas because the company does not sell ACP bananas.

Pursuant to Section 301's procedures, the USTR initiated an investigation of the EU banana import regime and requested consultations with the EU on October 17, 1994. The USTR refrained from initiating an investigation of the Framework Agreement at that time because the measures under the Agreement had not yet been implemented. However, the USTR did warn that implementation of the Agreement would warrant an investigation, and requested the involved parties to withdraw from the agreement and instead, to seek a solution that conforms to obligations under the GATT.

F. The Lomé IV Waiver Under GATT

Under the collective pressure of two unfavorable GATT panel reports, protest from within the EEC, the U.S. Section 301 investigation, and threats from "dollar zone" countries to bring an action under the new

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124 Id.
127 Id.
WTO, the EEC and the ACP countries which are Contracting Parties sought to obtain a waiver for the trade provisions under Lomé IV in November 1994.\(^{128}\) Article XXV(5) of the GATT provides that "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."\(^{129}\) Under the GATT 1947, the granting of a waiver only required a two-thirds majority vote, while the WTO, which took effect January 1, 1995, requires a three-fourths majority vote.\(^{130}\) Therefore, it was clearly in the EEC's and ACP countries' interest to try and obtain the waiver before January 1, 1995.

At the December 1994 GATT Council meeting, the Contracting Parties approved a five-year waiver of the trade provisions under Lomé IV from Article I's MFN clause. The waiver reads, in part:

Subject to the terms and conditions set out hereunder, the 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.\(^{131}\)

The waiver, in essence, permits the EEC to continue granting preferential tariff treatment to ACP bananas. However, a Member can require the EEC to enter into consultations "with respect to any difficulty or matter that may arise as a result of the implementation of the preferential treatment" covered by the waiver.\(^{132}\) If the Member "considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of such implementation," the consultations must look to the possibility of making a satisfactory adjustment of the matter.\(^{133}\) The waiver further allows any Member to establish a panel if such party believes that the relevant Lomé IV provisions under the waiver are being applied inconsistently with the waiver, or that any benefits accruing to such Member under the GATT are being impaired unduly as a result of the implementation of the preferential treatment to ACP

\(^{128}\) See Wide Support for GATT Waiver on Lomé IV, GATT Focus, Nov. 1994, at 6.

\(^{129}\) GATT, supra note 1, art. XXV(5), at 44.

\(^{130}\) Id.; WTO Agreement, supra note 15, art. IX(3).

\(^{131}\) Waiver, supra note 4, para. 1.

\(^{132}\) Id., para. 3.

\(^{133}\) Id.
products and the consultations have proved unsatisfactory.\textsuperscript{134} Last of all, the waiver does not preclude affected Contracting Parties to have recourse to Articles XXII and XXIII of the GATT.\textsuperscript{135}

Although the waiver only prevents a challenge to the EEC’s banana import regime on the basis of an Article I violation, the regime appears to be safe from almost any other attack. However, a possible violation claim is the allocation of the import licenses under Article III (national treatment) discussed in the second GATT panel. Since the banana policy was included in the Uruguay Round agreement and is contained in EEC’s schedule of concessions, an Article II violation claim, which was successfully challenged under the second GATT panel, would not be possible.\textsuperscript{136} The possibility of these claims and other actions will be further discussed later in this Article.

G. U.S. Section 301 Investigation of the Framework Agreement

In the investigation of the EEC’s banana import regime on October 17, 1994, the USTR declined to investigate the Framework Agreement because it had not yet been implemented by the involved “dollar zone” countries. The USTR did, however, warn that an implementation of the agreement would clearly warrant such an investigation.\textsuperscript{137} On December 1, 1994, Colombia implemented the Framework Agreement to take effect on January 1, 1995.\textsuperscript{138} On December 27, 1994, Costa Rica also implemented the Framework Agreement.\textsuperscript{139} On January 9, 1995, the USTR initiated an investigation to determine whether Colombia’s and Costa Rica’s policies and practices under the Framework Agreement are unreasonable, discriminatory, and burden or restrict U.S. commerce.\textsuperscript{140} Pursuant to Section 301 procedure, the USTR requested consultations with Colombia and Costa Rica concerning the matter under investigation.\textsuperscript{141} On March 8, 1995, the Framework Agreement came into force.\textsuperscript{142}

\textsuperscript{134} Id., para. 4.
\textsuperscript{135} Id., para. 6.
\textsuperscript{136} See U.S. Launches Case on EU, supra note 101, at 12.
\textsuperscript{139} Id. at 3284.
\textsuperscript{140} Id. at 3283-84.
\textsuperscript{141} Id.
\textsuperscript{142} Belgium: EU, Latin Banana Trade Deal to Start Next Week, REUTERS NEWSWIRE, Mar. 1, 1995, available in WESTLAW, Int-News Database.
H. The Status of Recent Negotiations

As of June 15, 1995, no significant progress had been made in solving the banana trade war. The United States had tried, to no avail, to pressure Colombia and Costa Rica into dropping the Framework Agreement. The two countries insisted that the United States must take the issue to the WTO rather than take unilateral action, which would have been in violation of the WTO. However, the United States hinted that it might act outside the WTO by targeting sectors that are not covered by the WTO, such as maritime services and investment. The EEC, as well, did not give in to the pressures from the United States, Guatemala, or even from within its own body, Germany and Belgium.

Nevertheless, the EEC reluctantly looked at two U.S. proposals to change the banana regime. In the first proposal, the major changes the United States pushed for included: (1) increasing the third country quota volume from 2.553 million metric tons in 1995 to 2.75 in 1996, with an annual growth rate thereafter; (2) establishing a license-free monthly subquota system replacing the current complex system; and (3) eliminating the Framework Agreement. The proposal did not seek to change any of the preferences accorded to ACP banana imports. This first proposal apparently did not go over well with the EEC because on March 20th, the United States came out with a more lenient proposal. The United States was willing to accept the country-specific quotas under the Framework Agreement as long as the figures were changed in a way that was more favorable to Chiquita. Also, the United States proposed a revamping of the import license allocation system in favor of companies importing “dollar zone” bananas. The United States, however, still insisted that the quota be raised to 2.75 million metric tons in 1996 and that the Framework Agreement be immediately withdrawn. EEC officials, however, have hinted that even this proposal is too far-reaching.

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144 Id.
145 The quota was raised in 1995 to accommodate for the addition of Austria, Finland, and Sweden to the European Union. Commission Regulation 479/95, 1995 O.J. (L 49) 1.
147 Id.
148 See USTR Asks EU, supra note 125, at 24.
149 Id., at 24-25.
150 Id.
III. MAJOR CHANGES UNDER THE WTO DISPUTE SETTLEMENT SYSTEM

A. Introduction to the WTO

As a result of the Uruguay Round of multilateral trade negotiations, a new "world order" was created by the establishment of the World Trade Organization (WTO).\textsuperscript{151} On January 1, 1995, the WTO replaced the old GATT system providing a common institutional framework for the conduct of trade relations between its members (Members) concerning the agreements negotiated under the Uruguay Round.\textsuperscript{152} Agreements on goods, services, intellectual property, investments, and in particular, an understanding on the rules and procedures governing dispute settlement, are all under the auspices of the WTO.\textsuperscript{153}

The WTO provides a more formalistic organization than the previous GATT system. The functions of the WTO include implementing, administering, and operating the covered agreements as well as providing the forum for trade negotiations among its Members concerning the matters under the covered agreements.\textsuperscript{154} The structure of the WTO is made up of a Ministerial Conference and a General Council, each composed of representatives of all the Members, which meet at least once every two years and as appropriate, respectively. The General Council basically takes over the functions of the Ministerial Conference in between its meetings by carrying out the functions of the WTO, making decisions on all matters under any of the multilateral trade agreements, and taking any necessary actions to such effect.\textsuperscript{155} The General Council is also in charge of discharging the responsibilities of the Dispute Settlement Body provided for in the Understanding.\textsuperscript{156} Finally, councils and committees are created for various elements under the WTO, such as trade in goods, services, and intellectual property, and development, finance, and the budget.\textsuperscript{157}

\textsuperscript{151} See WTO Agreement, supra note 15.
\textsuperscript{152} Id., art. II(1).
\textsuperscript{153} Id., at List of Annexes.
\textsuperscript{154} Id., art. III.
\textsuperscript{155} Id., art. IV(1)-(2).
\textsuperscript{156} Id., art. IV(3).
\textsuperscript{157} Id., art. IV(5), (7).
B. The Understanding on Rules and Procedures Governing the Settlement of Disputes

1. Introduction

The establishment of the WTO brought about, *inter alia*, a new system of settling disputes covered by the Understanding. Under the Understanding, the dispute settlement system received its own governing body, the Dispute Settlement Body (DSB). The DSB is authorized to administer the rules and procedures under the Understanding, including establishing panels, adopting panel reports, maintaining surveillance of implementation of the rulings and recommendations, and authorizing suspension of concessions. In terms of coverage, the Understanding applies to the Agreement Establishing the WTO, the Multilateral Trade Agreements, and the Plurilateral Trade Agreements.

The Understanding introduces some fundamental changes concerning the rules and procedures of dispute settlement under the GATT. The key changes under the Understanding include: stricter time limits, automatic establishment of panels, automatic adoption of panel reports, appellate review, limits on unilateral action, automatic authorization for suspension of concessions, and separate treatment of non-violation complaints.

2. Stricter Time Limits

A crucial change from the previous dispute settlement system is the imposition of time limits throughout the whole dispute settlement process. The time limits set out under the Understanding improve upon and give legal force to those set up under the previous Improvements to the GATT Dispute Settlement Rules and Procedures Decision of 12 April 1989, which was only applied on a trial basis. As demonstrated in the Oilseeds case, the lack of strict time limits within the dispute settlement system allowed the EEC to delay the process, and arguably the only reason why the process moved along was the effectiveness of U.S. Section 301 threats to retaliate. The addition of strict time limits will

158 Understanding, *supra* note 10, art. 2.

159 See *id.*, art. I & Appendix 1. The applicability of the Understanding to the Plurality Trade Agreements is subject to the decision of the parties to a particular agreement to set out the terms for the application of the Understanding. *Id.*, Appendix 1.


161 Brand, *supra* note 16, at 127. Lack of strict time limits was only part of the
most likely speed up the process and take the pressure off the use of unilateral action.

Some of the main time-frames set up in the Understanding concern consultations and the panel process. Regarding consultations, the time-frame was set up in the following manner. After receiving a request for consultations, a Member must reply within ten days and must enter into consultations in good faith within at least thirty days. If the Member does not respond to the request within the ten-day period or does not enter into consultations within the thirty-day period, the requesting Member may proceed directly to request the establishment of a panel. If consultations are entered into, the Members have sixty days from the date the request for consultations was received to come to a settlement; otherwise, the requesting Member may request the establishment of a panel. However, the requesting Member can request the establishment of a panel within the sixty day period if the consulting Members jointly agree that consultations have failed to settle the dispute.

The normal time frame within which a panel is composed and the panel report is submitted to the parties in dispute must not exceed a period of six months. In case of urgency, though, the panel must try to issue its report within three months. If the panel believes it cannot meet the given time frame, it must notify the DSB, in writing, of the reasons for the delay and an estimate of when the report will be issued. However, in all situations, the time period from the establishment of a panel to the submission of the panel report to the Members may not exceed nine months. Once the panel report is circulated to the Members for consideration, the report cannot be considered for adoption for at least twenty days. The report will be adopted at a DSB meeting within sixty days after the date of circulation of the report unless either a party to the dispute officially notifies the DSB of its decision to appeal, or the DSB decides by consensus not to adopt the report. In the case of an appellate review, the Appellate Body must submit its report within sixty days of the date the party to the dispute formally notifies the DSB of its decision to appeal. The Appellate Body may delay the submission of its report by notifying the DSB of its reasons for delay and estimated

ability to delay the process. The possibility to block the adoption of a panel report was also a main factor in delaying a final settlement to the dispute. Id.

Understanding, supra note 10, art. 4(3).
Id., art. 4(7).
Id., art. 12(8).
Id., art. 12(9).
Id., art. 16(1).
Id., art. 16(4).
time of submission, but in no case may the proceedings exceed ninety days.\footnote{Id., art. 17(5).}

In general, the period from the establishment of a panel to the time
the DSB considers the panel or appellate report for adoption must not
exceed nine months if the panel report is not appealed, or twelve months
if the report is appealed, unless the panel or Appellate Body decides to
extend the deadline for issuance as outlined above.\footnote{Id., art. 20.}

3. Establishment of Panels

Another significant change with the dispute settlement process was
that the establishment of a panel is now by and large, automatic under
the Understanding. Previously, to establish a panel, the Contracting Parties
had to agree by consensus, which meant that establishment could have
been blocked by any Contracting Party.\footnote{See Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance, Nov. 28, 1979, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 210, 212 para. 10 (26th Supp. 1980).} Now, at the request of the complaining party, a panel is established no later than the next DSB meeting unless the DSB decides by consensus \textit{not} to establish a panel.\footnote{Understanding, \textit{supra} note 10, art. 6(1).} Therefore, in order to block the establishment of a panel, every Member must be against such establishment. At the worst, if every other Member decides against the establishment of a panel, the complaining party has the deciding vote whether or not to establish a panel. Since it was the complaining party who requested the establishment of a panel in the first place, it will most likely decide in favor of establishing a panel. Essentially, this translates into an automatic establishment of a panel.

4. Adoption of a Panel Report

Similar to the establishment of a panel, the adoption of a panel
report under the Understanding is essentially automatic. Previously, a
panel report had to be adopted by consensus, therefore allowing any
contracting party to block the adoption of the report.\footnote{See Ministerial Declaration, 38th Session at Ministerial Level, Nov. 29, 1982, L/5424, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 9 (29th Supp. 1983).} The Understanding provides that the panel report is considered adopted unless either (1) a party to the dispute appeals the finding of the report or (2) the DSB decides by consensus \textit{not} to adopt the report.\footnote{Understanding, \textit{supra} note 10, art. 16(4).} If the panel report is
appealed, it is submitted for review by the Appellate Body.\textsuperscript{174} If the panel report is not appealed, the situation is analogous to that of the establishment of a panel: the report is, in essence, adopted automatically, and the parties to the dispute are bound to the findings of the report.

5. Appellate Review Report Adoption

A completely new addition to the dispute settlement system, appellate review allows a dissatisfied party to the dispute to have the panel report reviewed by a separate body, the Appellate Body.\textsuperscript{175} Once the Appellate Body issues its report, the report is adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus \textit{not} to adopt the report.\textsuperscript{176} Once again, as explained above, since a consensus not to adopt the report is very unlikely, the adoption of the report is rendered automatically, and the parties to the dispute are bound to the reports' findings.

6. Limits on Unilateral Action

A considerable change to the dispute settlement system under the Understanding was the express limitation put on unilateral action in Article 23 of the Understanding. This limitation, not found at all in the prior dispute settlement system, and in conjunction with stricter time limits, attempts to strengthen the multilateral system by requiring the Members to invest more reliance in the dispute settlement process.\textsuperscript{177}

Article 23 provides that when a Member seeks the redress of a violation or a non-violation\textsuperscript{178} claim under any of the agreements covered by the Understanding, it has recourse to, and must abide by, the rules and procedures of the Understanding.\textsuperscript{179} Under these situations, a Member is limited to the actions it may take. A Member cannot, on its own, make a determination that a violation or a non-violation has occurred \textit{except} through recourse to the dispute settlement process under the Understanding. If a Member does make its own determination, it must be consistent with the findings of the adopted panel or Appellate Body.

\textsuperscript{174} Id., art. 17(1).
\textsuperscript{175} See id., art. 17.
\textsuperscript{176} Id., art. 17(14).
\textsuperscript{177} See id., art. 23.
\textsuperscript{178} A non-violation complaint is defined here as a nullification or impairment of benefits other than a violation of obligations under the agreements covered by the Understanding or an impediment to the attainment of any objective of the covered agreements. See GATT, \textit{supra} note 1, art. XXIII(1)(b), at 39.
\textsuperscript{179} Understanding, \textit{supra} note 10, art. 23(1).
As regards retaliation, a Member must follow the Understanding procedures on surveying the implementation of recommendations and rulings set forth in Article 21 as well as the procedures on determining the level of suspension of concessions or other obligations set forth in Article 22. Furthermore, before a Member suspends concessions or other obligations under the covered agreements in response to the opposing Member’s failure to implement the recommendations and rulings, the Member must obtain DSB authorization in accordance with Article 22 procedure.1

The Understanding appears to severely limit unilateral actions by Members. In particular, the United States’ use of Section 301 action seems greatly reduced. This limitation, however, may not be as severe as one might think. First, Article 23 does not mention and, therefore, does not seem to limit taking initial procedural steps under unilateral action. For example, in the U.S. a private party or the USTR can initiate an investigation on a certain measure and request for consultations under Section 301. In turn, the U.S. would request a WTO panel if it decided the issue was worth pursuing.182 Second, the Article 23 limitation only applies to situations covered by the WTO. For example, if the U.S. wanted to redress an unfair trade practice that is not covered under any of the agreements under the WTO, it could unilaterally retaliate. Likewise, if the egregious party is not a WTO member, unilateral action can be taken. Nonetheless, the use of remedial unilateral action in response to, in particular, GATT violations or non-violations seems to be clearly prohibited by Article 23. Recourse to the Understanding in this type of situation appears to be mandatory.183

7. Authorization of Suspension of Concessions

In the previous dispute settlement system, the authorization of and resort to suspension of concessions was authorized in only one case.184 However, under the new rules and procedures, the use of suspension of concessions may proliferate. In the prior system, authority to suspend concession had to come from the Contracting Parties, which meant that

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180 Id., art. 23(2)(a).

181 Id., art. 23(2)(b)-(c).


183 See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW, 237 (1993) [hereinafter HUDEC, ENFORCING]; See also Brand, supra note 16, at 137.

184 In 1953, the Netherlands was authorized to suspend concessions against the United States. See Netherlands Measures of Suspension of Obligations to the United States, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 32 (1st Supp. 1953).
there had to be agreement by consensus. Under the Understanding, Article 22(6) provides that if a member fails to implement the recommendations of the panel or Appellate Body and to agree to compensation, a request to the DSB by the aggrieved party to authorize suspension of concessions will be granted by the DSB unless the DSB decides by consensus to reject the request. Like the establishment of a panel and the adoption of a panel or Appellate Body report, the authority to suspend concessions is essentially granted automatically. However, the level of the suspension of concessions must not surpass the level of the nullification or impairment.

The aggrieved party can either object to the level of the suspension proposed or claim that the principles and procedures in determining what concessions are to be suspended were not followed properly under Article 22(3). If this is the case, then the matter is referred to arbitration. If the arbitrator concludes that the level of the suspensions is too high or that the aggrieved party did not properly follow the principles and procedures under Article 22(3), then the aggrieved party must conform to such a decision. In any case, the arbitrator's decision is final and the parties may not seek a second arbitration. Again, this change further takes away the need to resort to unilateral action by allowing Members to rely on the WTO's dispute settlement system.

8. Non-Violation Complaints

A substantial alteration to the previous dispute settlement system was the separation and distinction of the remedies afforded to a violation and a non-violation complaint. The stricter, more legal-minded dispute settlement rules and procedures under the Understanding are geared more toward a violation complaint. Under Article 26 of the Understanding, an exception is carved out for a non-violation complaint, steering this type of case more toward using negotiations to come to a mutual settlement rather than forcing the offending party to abide by the rules of the

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185 HUDEC, ENFORCING, supra note 184, at 194. See also GATT, supra note 1, art. XXIII(2), at 40.
186 Understanding, supra note 10, art. 22(6).
187 Id., art. 22(4).
188 Id., art. 22(6).
189 Id., art. 22(7).
190 See id., art. 26. Complaints of the type described in Article XXIII(1)(c) of the GATT, i.e. the catch-all, is not analyzed here because (1) the remedy accorded to this type of complaint is the same remedy that was accorded to it under the previous system and, (2) this type of complaint has never been used before. See id., art. 26(2).
covered Agreement.\textsuperscript{191} This scheme, of course, makes sense under the view that in a non-violation case, no express provisions are actually transgressed. However, the fact is that under a non-violation case, benefits are being nullified or impaired. Therefore, this irony leads to a major issue of whether an aggrieved party may have any actual remedies available in a non-violation case.

Generally, the rules and procedures under the Understanding apply to a non-violation complaint, but they are subject to certain provisions. First, the complaining party must proffer a \textit{detailed} justification in support of any complaint which relates to a measure taken by the aggrieving party that does not conflict with the relevant covered agreement.\textsuperscript{192} In contrast, for a violation complaint, the complaining party only has to provide a \textit{brief} summary of the legal basis of the complaint which sufficiently presents the issue in a clear manner.\textsuperscript{193} In effect, this difference affects the establishment of the merits in a non-violation case by shifting the burden of proof to the complaining party, therefore making it all the more difficult to achieve a remedy.

Second, where a measure is found to be a non-violation impairment or nullification of benefits or impediment of attaining any objective under the relevant covered agreement, the aggrieving party has \textit{no obligation} to withdraw the measure. In such cases, the panel or Appellate Body only recommends that the aggrieving party make a mutually satisfactory adjustment.\textsuperscript{194} In contrast, where a measure is found to be a violation of the relevant covered agreement, the panel or Appellate Body recommends that the aggrieving party bring the violating measure into \textit{conformity} with such agreement.\textsuperscript{195} Then, if the aggrieved party does not implement the recommendation to conform within the stipulated period of time determined under Article 21(3), the complaining party may seek compensation or be authorized to suspend concessions.\textsuperscript{196} Therefore, the issue in a non-violation case becomes whether the aggrieved party may take such action, i.e. resort to compensation or suspension of concessions, if the aggrieving party does not implement the recommendation to make a mutually satisfactory adjustment.\textsuperscript{197}

Third, where the parties have entered into binding arbitration under Article 21(3) to determine the reasonable period of time within which

\begin{itemize}
\item \textsuperscript{191} See \textit{id.}, art. 26(1).
\item \textsuperscript{192} \textit{id.}, art. 26(1)(a).
\item \textsuperscript{193} \textit{id.}, art. 6(2).
\item \textsuperscript{194} \textit{id.}, art. 26(1)(b).
\item \textsuperscript{195} \textit{id.}, art. 19(1).
\item \textsuperscript{196} \textit{id.}, art. 22(2).
\item \textsuperscript{197} See Brand, \textit{supra} note 16, at 140.
\end{itemize}
implementation must occur, upon the request of either party, the arbitration may include a determination of the amount of benefits that have been nullified or impaired as well as suggestions of ways and means to reach a mutually satisfactory adjustment. However, these suggestions will not be binding upon the parties to the dispute. Nevertheless, it appears as though the determination of the amount of benefits nullified or impaired would be binding upon the parties to the dispute.

Last of all, as a final settlement to the dispute, compensation may be part of a mutually satisfactory adjustment. In contrast, for a violation case, Article 22(1) indicates that compensation and suspension of concessions are only to be used as temporary measures, and that full implementation of a measure is preferred. Although Article 26(1)(d) answers the question whether compensation may be sought in a non-violation case, the provision does not mention whether suspension of concessions may be part of a mutually satisfactory adjustment as final settlement of the dispute. Does the absence of it being mentioned in this provision and the other provisions mean that the aggrieved party in a non-violation case may not suspend concessions at all or does it mean that the aggrieved party may not suspend concessions only as a final settlement of the dispute? It can at least be logically deduced that the aggrieved party may not suspend concessions as a final settlement of the dispute. First, since Article 26(1)(d) only mentions compensation, it appears that the drafters intentionally precluded suspension of concessions as a possible part of a final settlement by failing to expressly include it in the provision. Second, the possibility of suspension of concessions as a part of a final settlement of the dispute is clearly prohibited in Article 22(1), which expressly identifies suspension of concessions as a temporary measure. Therefore, only an express provision declaring suspension of concessions as a possibility to a final settlement would suffice to negate the Article 22(1) stipulation.

The question still remains, however, whether the aggrieved party may suspend concessions as a temporary measure. To answer this question, further analysis of Article 26(1) is required. Article 26(1) provides that the procedures in the Understanding will apply to a non-violation complaint subject to the provisions set out within the article. These provisions, as explained above, include the non-obligation to withdraw the

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198 Understanding, supra note 10, art. 26(1)(c).
199 Id., art. 26(1)(d).
200 Id., art. 22(1).
201 See Brand, supra note 16, at 140.
202 Understanding, supra note 10, art. 22(1).
203 Id., art. 26(1).
measure, the requirement that the panel or Appellate Body recommend that the aggrieving party make a mutually satisfactory adjustment, and the possibility of compensation to be part of the final settlement of the dispute. Therefore, it seems quite clear that where a procedure in another article of the Understanding conflicts with the provisions set out under Article 26(1), the latter provisions will prevail. But if there is no conflict with the Article 26(1) provisions, then the procedure in the other article of the Understanding will apply.

Using this premise, the procedures leading to a suspension of concessions must be analyzed. It is assumed that a panel or Appellate Body has found the measure to be a non-violation nullification or impairment of benefits. Although the aggrieving party is not required to withdraw its measure under Article 26(1)(b), the panel or Appellate Body is required to recommended that the aggrieving party make a mutually satisfactory adjustment. Under Article 21(3), the aggrieving party must comply with the recommendations immediately. However, if it is impracticable to comply immediately, a reasonable period of time within which the aggrieving party is to comply with the recommendation is determined by either (1) the DSB, (2) the parties to the dispute, if mutual, or (3) arbitration. Up to this point, the only conflict is with the provision under Article 26(1)(c), which does not affect the ability to suspend concessions.

Next, Article 22(1) provides that compensation and suspension of concessions are temporary measures which are “available in the event that the recommendations and rulings are not implemented within a reasonable period of time.” At this point, Article 26(1)(d) does conflict, but it only refers to compensation not suspension of concessions, as explained above. Then, Article 22(2) specifically sets out two conditions of which one must be met to proceed with compensation and suspension of concessions:

1. the aggrieved party must fail to bring the measure found to be inconsistent with a covered agreement into conformity with the relevant covered agreement within the determined reasonable period of time, OR
2. the aggrieved party must fail to comply with the recommendations and rulings within the determined reasonable period of time.

The first condition clearly precludes a non-violation case since it only applies to a measure that is inconsistent with, or in other words, violates a covered agreement. However, a non-violation case does fall under the

\[204\] Id., art. 26(1)(b).
\[205\] Id., art. 21(3).
\[206\] Id., art. 22(1).
\[207\] Id., art. 22(2).
second condition. Actually, it appears as though the drafters intended to include this second condition exclusively for a non-violation case. First, any violation case clearly falls under the first condition, and therefore would not need the use of the second condition. Second, Article 22(3), which lays out the procedure in determining what concessions are to be suspended, uses the language "[where] the panel or Appellate Body has found a violation or other nullification or impairment." This language plainly applies to both a violation and a non-violation situation because the only other type of nullification or impairment besides a violation nullification or impairment is a non-violation nullification or impairment. Third, Article 22(8) stipulates that:

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

Again, it appears as though the drafters used this language to include both a violation and a non-violation situation. Furthermore, the rest of the language of Article 22(2), which states that the aggrieved party may request authorization for suspension of concessions if satisfactory compensation has not been agreed to, does not conflict with any of the provisions in Article 26(1). Therefore, from this analysis, it is possible to suspend concessions as a temporary measure in a non-violation case in order to induce the aggrieving party to make a mutually satisfactory adjustment.

In conclusion, although Article 26(1) veers somewhat away from the legal-minded, enforceable nature of a violation case and makes a non-violation case more difficult to pursue by shifting the burden of proof upon the aggrieved party and encouraging negotiation, it appears as though material remedies do exist for non-violation cases.


The Understanding contains a few provisions in which special consideration is given to either least-developed or developing countries. Although special treatment had been accorded to less-developed countries
in the previous dispute settlement system, the Understanding distinguishes between developing and least-developed country Members.

Special considerations to developing countries are mentioned in three different provisions in the Understanding. First, Article 8, which deals with the composition of panels, requires a panel to include at least one panelist from a developing-country if the dispute is between a developing Member and a developed-country Member when the developing-country Member makes such a request.  

Second, Article 12, which deals with panel procedures, furnishes three special considerations for developing-country Members: (1) allows the time limits for consultations to be extended where a measure taken by a developing-country Member is in dispute; (2) requires a panel to accord sufficient time for a developing country to prepare and present its argument where the complaint is against the developing-country Member; and (3) where at least one party to the dispute is a developing-country Member, the panel’s report must explicitly indicate the method in which account was taken of the relevant provisions (under the agreement(s) covered by the WTO) favoring developing-country Members which had been raised by the developing-country Member during the dispute settlement.  

Last of all, Article 21, which deals with the surveillance of implementations of recommendations and rulings, stipulates that “particular attention should be paid to matters affecting the interests of developing-country Members with respect to measures” subject to dispute settlement. Furthermore, where the case is brought by a developing-country Member, Article 21 requires the DSB, in considering what appropriate action might be taken, to take into account the economic impact of the complained of measures on the developing-country Members concerned.

As to special considerations given to least-developed country Members, Article 24 stipulates special procedures where least-developed country Members are involved. The issue here is how involved does a least-developed country Member have to be in order for these considerations to apply. The language of Article 24 tends to point to including only those least-developed country Members who are actual parties to the dispute. Article 24(1) mentions “measures taken by a least-developed country” and Article 24(2) mentions a least-developed country Member requesting the DSB’s good offices, conciliation and mediation before a

212 Id., art. 8(10).
213 Id., art. 12(10)(11).
214 Id., art. 21(2).
215 Id., art. 21(8).
216 Id., art. 24 (emphasis added).
request for a panel is made.\textsuperscript{217} If Article 24 was meant to be more expansive, the word “affecting” would have been used instead of “involving.” Nevertheless, where the dispute settlement procedures involve least-developing country Members, Article 24 requires that Members give particular consideration to the special situation of such Members at all stages of the dispute by exercising due restraint in raising matters under dispute procedures. These matters include asking for compensation or seeking authorization to suspend concessions.\textsuperscript{218} In addition to Article 24 of the Understanding, Article XI(2) of the Agreement Establishing the World Trade Organization stipulates:

The least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities.\textsuperscript{219}

The biggest issue, however, of who is a developing country and who is a least-developed country, is still unanswered. Although Article XI(2) of the Agreement Establishing the WTO says that least-developed countries are determined by the United Nations, it is unclear who these countries are.

IV. THE BANANA TRADE WAR UNDER THE WTO’S UNDERSTANDING

A. Possible Avenues Around the GATT Waiver?

As described in part II.E, the GATT waiver of the trade provisions of Lomé IV does not grant complete immunity to the EEC’s banana import regime. First, only GATT’s Article I MFN clause is waived which allows the EEC to provide preferential treatment for bananas originating in ACP countries without extending the same preferential treatment to other Contracting Parties.\textsuperscript{220} This waiver only protects the EEC from challenges based on Article I’s MFN clause. Second, the waiver allows any Member to bring a challenge if either the relevant Lomé IV provisions under the waiver are being applied inconsistently or if any benefits are being impaired or nullified as a result of the preferential treatment to ACP products.\textsuperscript{221} Finally, the waiver does not preclude affected Members from having recourse to Articles XXII and XXIII of the GATT.\textsuperscript{222}

\textsuperscript{217} Id.

\textsuperscript{218} Id., art 24(1).

\textsuperscript{219} WTO Agreement, supra note 15, art. XI(2).

\textsuperscript{220} Waiver, supra note 4, para. 1.

\textsuperscript{221} Id., para. 4.

\textsuperscript{222} Id., para. 6.
It must be noted here that the EEC is not obligated under Lomé IV to implement the banana import regime as it currently stands. The only obligation the EEC has to the ACP countries as to banana imports is not to place the ACP countries who are traditional suppliers to the EEC “in a less favorable situation than in the past or at present” as regards access to, and advantages in, the EEC market.223 The EEC had a choice as to how to afford preferential treatment to ACP banana imports; however, it chose to do it in a way that turns out to apparently conflict with the GATT.224 Consequently, despite securing of the waiver, a couple of avenues might be available to challenge the banana import regime under the WTO’s Understanding. The possible types of claims that might be available in a GATT challenge are:

(1) a claim where the preferential treatment for ACP bananas covered by the waiver is being applied inconsistently with the waiver;
(2) a violation claim under Article XXIII(1)(a) where the banana import regime violates a GATT provision other than Article I’s MFN clause; or
(3) a non-violation claim under Article XXIII(1)(b) where a benefit accruing to a Member under the GATT is being nullified unduly by the implementation of the banana import regime.

Whether or not any of these types of claims can be brought and achieve an adequate remedy under the new Understanding is yet to be seen.

1. Inconsistent with Waiver Claim

Any Member may establish a panel where it considers that the preferential treatment for ACP banana imports covered by the waiver is being applied inconsistently with the waiver if consultations have proved unsatisfactory.225 This type of claim would most likely occur where the EEC either grants additional concessions or adds new countries or products to Lomé IV.226 However, this type of claim would most likely involve new products and concessions that would be outside the scope of

223 Lomé IV, supra note 32, protocol 5 and Annex LXXIV.
224 The World Bank’s most recent study of the banana trade war states that the EEC, in making up the banana regime, chose one of the worst and inefficient methods to help out the ACP countries. The Bank says that the consumers and the efficient “dollar zone” producers are being penalized while the few marketers of ACP bananas are raking it in. The Bank suggests that the ACP countries should get direct aid from the EEC instead. The World Bank Has Published a Study Criticizing the EU’s Banana Regime, MULTINATIONAL SERVICE, Feb. 2, 1995, available in WESTLAW, 1995 WL 836024.
225 Id.
226 See EU Includes Framework Agreement, supra note 2, at 11.
the banana import regime. Furthermore, even if this type of claim involved the banana import regime, i.e., adding new countries, such a violation would probably not force the EEC to change its banana import regime, but rather limit its application.

2. Violation Claim

The EEC banana import regime may also be challenged by a Member under an Article XXIII(1)(a) violation claim where such Member’s benefits under the GATT are being impaired unduly as a result of the EEC’s failure to carry out its obligations under the GATT.227 Of course, the obligation under Article I’s MFN clause is excluded by reason of the waiver. The number of inconsistencies or violations, with GATT provisions, however, seem to be quite limited.

A look at the last GATT panel on the EEC’s current banana import regime shows that the regime was inconsistent with Articles I(1), II, and III, but was consistent with Articles XI, XIII, and XVI of the GATT.228 An Article I(1) challenge, though, is not feasible since the MFN clause is exempted by the waiver. An Article II schedule of concessions challenge, likewise, will not work because the EEC’s banana import regime was implemented in the schedule of concessions as part of the Uruguay Round.229 This leaves an Article III challenge of the discriminatory effect of the allocation of import licenses under the EEC’s tariff quota.230

Assuming a panel or Appellate Body, agreeing with the last GATT panel, concludes that the EEC’s banana import regime violates Article III, the question of available remedies remains. Under Article 19 of the Understanding, where a panel or Appellate Body finds that a measure violates a GATT provision, it must recommend that the aggrieving party bring the measure into conformity with the relevant provision.231 Furthermore, as noted in part III.B.4-5, the adoption of a panel or Appellate report is essentially automatic. In other words, if a panel or Appellate Body finds that the banana import regime violates Article III, the EEC will be bound by the decision and would have to change its regime to conform with Article III.232 However, Article III only deals with giving

227 Waiver, supra note 4, para. 4; GATT, supra note 1, art. XXIII(1)(a), at 39.
228 GATT Panel #2, supra note 75, paras. 169-70, at 230.
229 U.S. Launches Case on EU, supra note 101, at 12.
230 See discussion supra part II.C.2.
231 Understanding, supra note 10, art. 19(1).
232 Article 21(1) states that “prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit
import products the same treatment as domestic products. Therefore, this violation only concerns the treatment of "dollar zone" banana imports as compared to the treatment of EEC bananas in the context of the import licensing scheme. Nevertheless, assuming that the EEC is in violation of Article III, it would either have to alter the licensing scheme to accord "dollar zone" bananas the same treatment as EEC bananas, or abolish the licensing scheme altogether.

Note, however, that Article 21 stipulates that in implementing the ruling of the panel, particular attention should be paid to how these changes may affect developing-country Members. Article 24, on the other hand, requires special attention to be paid throughout the dispute settlement procedure where the dispute involves least-developed country Members. The level of special consideration will depend on how the certain ACP or "dollar zone" banana supplying country Members are classified and whether they will be involved in the dispute. Although an Article III violation only directly concerns the treatment of EEC bananas, a change in the banana import regime may have some indirect effects on ACP banana imports and countries. For example, an Article III violation may require the EEC to alter or abolish the licensing scheme which, in turn, may cause a reduction in banana imports from the ACP countries. However, the EEC would still be bound under Lomé IV's Protocol 5 and Annex LXXIV to import the traditional amounts duty free and maintain the advantages in the EEC market that the ACP countries had previously enjoyed. Furthermore, the fourteen-member Caribbean Community and Common Market (CARICOM) argues that a change or abolishment of the current banana import regime would have an enormous negative economic impact upon and possibly jeopardize the stability of the Caribbean nations. Therefore, even in implementing a panel's ruling that the EEC bring the banana import regime into conformity with Article III, these conflicting issues, as well as the situation of the "dollar zone" countries might have to be taken into account.

Keeping the above in mind, if the EEC does not bring the banana import regime into conformity with Article III within the reasonable time period determined by Article 21(3), then the aggrieved party has recourse of all Members. Id., art. 21(1).

233 GATT, supra note 1, art. III, at 6.
234 Id., art. 24.
235 See Lomé IV, supra note 32, Protocol 5 & Annex LXXIV.
236 Id., art. 24.
to Article 22. Article 22 provides for compensation and suspension of concessions as temporary measures. If the EEC and the aggrieved party cannot agree to satisfactory compensation, then the aggrieved party may request authorization from the DSB to suspend concessions under the covered agreements of the Understanding. Article 22(3) not only allows the suspension of concessions from the same sector as the violating measure, in this case, goods, but also from another agreement covered by the Understanding, such as services or intellectual property, if the aggrieved party believes it is not practicable to suspend concessions in the same sector or same agreement and that the circumstances are serious enough. Consequently, the aggrieved party would not be limited in suspending concessions against the EEC under the GATT. As noted in part III.B.7, the authorization to suspend concessions is essentially automatic. Therefore, it would not be a surprise if suspension of concessions will be more frequently resorted to under this new system to enforce a panel or Appellate Body report. Finally, as provided in Article 22(8), the aggrieved party would be able to suspend concessions against the EEC until either the EEC conforms its banana import regime to be consistent with Article III or a mutually satisfactory solution is reached.

In conclusion, the possibility of a violation claim against the EEC's banana import regime, armed with the imposing waiver, is very limited. However, a successful Article III challenge under the Understanding, with its stricter rules, would seem at least to afford an effective partial remedy to the discriminatory licensing scheme.

3. Non-violation Claim

In order for a complaining party to bring a non-violation claim against the EEC's banana import regime, the complaining party must either allege (1) that its benefits under the GATT are being impaired or nullified, or (2) that the attainment of any objective of the GATT is being impeded as a result of the implementation of the banana import regime, regardless of whether or not the complained of measure conflicts

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238 See Understanding, supra note 10, art. 21.
239 Id., art. 22.
240 At least one commentator has proposed that compensation does not mean money damages, but instead the grant of a concession by the aggrieving party on a product or service that is of interest to the aggrieved party. Andreas F. Lowenfeld, Remedies Along with Rights: Institutional Reform in the New GATT, 88 Am. J. Int'l L. 477, 486 (1994).
241 Understanding, supra note 10, art. 22(2).
242 Id., art. 22(3).
243 Id., art. 22(8).
with the provisions of GATT. This would include, as set out in the waiver, the “undue” impairment of benefits as a result of the preferential treatment to ACP banana imports. Since the waiver only waives the provisions of Article I(1) and expressly allows a Member to have recourse to Article XXIII, it appears as though a Member may bring a non-violation claim against the EEC’s current banana import regime. However, the issue is whether such a claim can be made despite the waiver, and if it can be made successfully, whether an effective remedy is available under the new Understanding.

A possible first non-violation claim is that although the MFN clause of Article I is waived, thereby precluding an Article I violation claim, an Article I non-violation claim can be brought because a non-violation claim does not require a conflict with any provisions of GATT. In other words, the claim would be that the preferential treatment under the EEC’s banana import regime, although “not violating” Article I(1) since the obligation arising from the MFN clause has been waived, nevertheless impairs or nullifies benefits accrued under the GATT. However, this claim does not seem to work. In the banana trade war, the main contention is that the “dollar zone” bananas are not accorded the same preferential treatment as ACP bananas, which is required under Article I(1) of the GATT. But since the waiver covers the EEC’s obligation to apply most-favored nation treatment toward third country bananas, it seems as though a Member should be precluded from bringing any kind of claim based on the banana import regime’s preferential treatment.

In Restrictions on Importation of Sugar, a previously adopted GATT panel report, the panel dealt with an EEC non-violation claim against a U.S. measure that was covered by a waiver. The panel held that the fact that the measure at issue, found to be inconsistent with Article XI(1), is covered by a waiver does not prevent the EEC from bringing a non-violation claim. The panel recognized that a non-violation claim may be based on GATT provisions other than Article U. The panel further held that it was up to the EEC to show that the nullification or impairment of benefits accruing to it under the GATT resulted from such

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244 GATT, supra note 1, art. XXIII(1)(b), at 39.
245 Waiver, supra note 4, para. 4.
246 See id., para. 6.
247 GATT, supra note 1, art. I(1), at 2.
249 Id., para. 5.20, at 261.
250 Id.
However, the panel stated that the non-violation claim must be supported by a justification that goes beyond a mere characterization of the measure at issue as inconsistent with the GATT. In other words, a non-violation claim may not be based exclusively on an inconsistency with GATT, despite the fact a waiver covers the inconsistent measure. There must be another basis for the non-violation claim besides the inconsistency itself. In conclusion, though, the panel did state that the EEC was not precluded from bringing a non-violation claim with the required detailed justification. This panel decision seems to open the window for a non-violation complaint in a waiver situation, even though the opening is just a small crack. But the chance for another shot at a non-violation claim for the EEC seemed more like a consolation because there was nothing left on which to base a non-violation claim.

Although previously adopted panel reports do not carry stare decisis effect, the precedential effect of Restrictions on Importation of Sugar makes a non-violation claim based on the banana import regime's inconsistency with Article I(1), in spite of the waiver, seem implausible. Such a claim could only be made if the complaining party justifies the claim with more than allegations that the regime is inconsistent with Article I(1). The complaining party would have to demonstrate that the preferential treatment afforded to ACP bananas nullifies or impairs some other benefit accruing to it under the GATT besides the benefit under Article I(1). This type of showing seems to be almost impossible since no benefits under the banana tariff concession are being impaired (i.e., by a subsidy) and if benefits were being impaired under other provisions of the GATT, it would be considered an Article XXIII(1)(a) violation claim.

However, there is a possible non-violation claim that fits through the crack. As Restrictions on Importation of Sugar suggests, a non-violation claim may be ‘based’ on other provisions of the GATT besides Article II. The claim is that the EEC’s banana import regime impairs or

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251 Id.
252 Id., para. 5.21, at 262.
253 Id., para. 6.3, at 263.
254 Id., para. 5.21, at 262. In the unadopted panel report, EC-Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region, Feb. 7, 1985, the panel stated that an Article XXIII(1)(b) claim was not limited to those benefits accruing under Article II. The panel said that the drafting history of Article XXIII confirmed that this Article protected any benefit under the GATT, including, for example, the benefits accruing under Article I(1). The panel further noted that “the basic purpose of Article XXIII:1(b) was to provide for offsetting or compensatory adjustment in situations in which the balance of rights and obligations of the contracting parties had been disturbed.” GATT, ANALYTIC INDEX: GUIDE TO GATT LAW AND
nullifies a banana-supplying third country Member's benefit accrued to it under Article XI's general elimination of quantitative restrictions. In the alternative, the Member can claim that the banana import regime impedes the attainment of the GATT objective to prohibit quantitative restrictions.

In the last GATT panel decision regarding the banana import regime, the panel held that the regime did not violate Article XI of the GATT. Article XI stipulates that a Member cannot institute any "prohibitions or restrictions other than duties, taxes or other charges, whether made effectively through quotas, import or export licenses or other measures" on products imported from or exported to another Member. The panel found that the Contracting Parties had never regarded tariff quotas as "restrictions" within the meaning of Article XI nor high tariff rates as quantitative restrictions under Article XI merely because of their adverse trade effects. The panel further found that the existence of non-automatic import licensing, which was the case under the tariff quota, did not contribute to making the tariff quota a quantitative restriction because the importers had a right to import bananas outside the quota.

Since the banana import regime's tariff quota, at least according to one GATT panel, does not violate Article XI, a non-violation argument is possible. First, Members accrue certain benefits directly or indirectly under the GATT. For example, Members accrue a benefit from (1) being accorded most-favored nation status under Article I(1), (2) tariff concessions negotiated under Article I, or (3) having their products accorded the same treatment as another Member's like domestic products under Article II. Likewise, Members accrue a benefit from having their products exempt from quantitative restrictions under Article XI.

Under the banana import regime, even though the tariff quota is not considered de jure a quantitative restriction, it effectively imposes de facto a quantitative restriction on third country banana imports.

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255 See GATT, supra note 1, art. XI, at 17.
256 GATT Panel #2, supra note 75, paras. 139-40, at 218-19.
257 GATT, supra note 1, art. XI(1), at 17.
258 GATT Panel #2, supra note 75, para. 139, at 219.
259 id., para. 140.
260 Dr. Coombs, the author of the original text of Article XXIII which was drafted during the ITO negotiations, explained "benefits" as those which "countries derive from the acceptance of the wider obligations imposed by the Charter [now GATT]." ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE POLICY 43 (1990).
262 See id., art. XI, at 17.
263 The EEC, arguably, effectively imposed a quantitative restriction on third country
Consequently, third country banana suppliers' benefits to export the actual amounts the EEC market would demand are impaired. In the alternative, if it is found that a benefit does not accrue from Article XI, it can be argued that the elimination of quantitative restrictions is an objective of the GATT and its attainment is being impeded as a result of the banana import regime's tariff quota. Again, the argument remains that this particular tariff quota is \textit{de facto} a quantitative restriction. For both of these claims, an analogy with European Community law is appropriate.

Article 30 of the EEC Treaty, the equivalent of Article XI of the GATT, prohibits "quantitative restrictions on imports and \textit{all measures having equivalent effect}.\textsuperscript{264} The concept "measures having equivalent effect" has been given a very broad interpretation by both the European Commission and the European Court of Justice, and has become a powerful tool in the efforts to achieve market integration within the EEC.\textsuperscript{265} Basically, any type of measure that effectively acts as a quantitative restriction in any kind of way has been found to violate Article 30.\textsuperscript{266} Although Article XI of the GATT does not include the concept "measures having equivalent effect," by analogy, it could be used as a basis for a non-violation claim. As previously mentioned, Article XI of the GATT is meant to prohibit non-tariff quantitative restrictions among all GATT members. But what if a certain measure, such as a tariff quota, which does not "fit" within the express meaning of Article XI, nevertheless has an \textit{equivalent effect} of a quantitative restriction?\textsuperscript{267} Should a Member be allowed to disguise a quantitative restriction, for example as a tariff quota, and circumvent Article XI? This is where a non-violation claim comes in. Even though such a measure does not violate Article XI, it nonetheless is an \textit{effective equivalent} of a quantitative restriction and therefore impairs the benefit accrued under Article XI and/or impedes banana imports by charging a tariff eight and one-half times more than the applicable tariff under the quota to imports that exceeded the quotas and a restrictive import licensing scheme. It would be infeasible for third country banana suppliers to enter the EEC market at such a high tariff level. \textit{See} Commission Regulation 404/93, \textit{supra} note 50, art. 18; GATT Panel \#2, \textit{supra} note 75, paras. 53-63, at 195-98.

\textsuperscript{264} EEC Treaty, art. 30 (emphasis added).

\textsuperscript{265} \textsc{George A. Bermann}, \textsc{Cases and Materials on European Community Law} 341-42 (1993).

\textsuperscript{266} For example, a Belgian law requiring importers to furnish a certificate of origin for certain types of hard liquor where the certificate has to actually come from the country of origin. \textit{Case} 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837.

\textsuperscript{267} Of course, not all tariff quotas are going to be effectively equivalent to a quantitative restriction. Only those which impose a high enough over-the-quota tariff where it would be practically and economically impossible for a product to be imported will be effectively equivalent to a quantitative restriction.
the attainment of one of the objectives under the GATT.

Therefore, assuming a successful challenge of a non-violation claim against the EEC's banana import regime, the question of whether any effective remedies are available remains. Unlike the straightforward and rather effective remedies available under a successful violation case, those available to a successful non-violation case are somewhat ambiguous. As previously analyzed under part III.B.8 of this Article, the Understanding made a break from the prior system by distinguishing the remedies available to a violation and a non-violation complaint. Under Article 26(1) of the Understanding, the pursuit of remedies under a GATT Article XXIII(1)(b) non-violation complaint, in contrast to what is normally afforded to a GATT Article XXIII(1)(a) violation complaint, is subject to certain provisions.268 However, although the Understanding distinguishes non-violation cases from violation cases, it appears as though an aggrieved party can still obtain nearly the same remedies for a successful non-violation case. In effect, even though Article 26(1) makes a non-violation case more difficult to establish (i.e. by shifting the burden of proof to the complaining party), and tries to encourage mutual agreement (i.e. negotiation) rather than strict conformity to the covered agreement, the remedies of compensation and suspension of concessions are available to ensure a satisfactory mutual solution to the dispute.

Thus, if an aggrieved party successfully challenges the EEC's banana import regime in a non-violation case, effective remedies will be available to enforce the decision. For example, although the EEC would not be obligated to withdraw the banana import regime, it would be required to make a mutually satisfactory adjustment. This type of adjustment would probably include negotiations between the parties to the dispute where the EEC would either compensate the other party(ies) with the granting of certain concessions269 or even modify certain parts of its import regime, or both. As noted in the above analysis, in a non-violation case, Article 26(1)(d) allows compensation to be voluntarily part of a final settlement of the dispute.270 However, in such a case where the EEC would fail to make a mutually satisfactory adjustment, the EEC would be able to suspend concessions as a temporary measure to compel the EEC to make such an adjustment.271 It must be noted, though, that the level of the suspensions of concessions must not surpass the level of the nullification

268 See Understanding, supra note 10, art. 26(1).
269 Cf. Lowenfeld, supra note 240, at 486 (proposing that compensation might include the granting of concessions by the aggrieving party).
270 Understanding, supra note 10, art. 26(1)(d).
271 Id., art. 22(8).
or impairment.\textsuperscript{272}

In conclusion, even though the window seems to be shut on bringing a non-violation claim, one narrow type of a non-violation claim may possibly work against the banana import regime. If such a claim is successful, it also appears as though the new Understanding may furnish adequate remedies. Nevertheless, if the dispute involves either a developing or least-developed country Member, special consideration must be given to such Members.\textsuperscript{273} However, since the measure at issue is that of the EEC, due restraint does not need to be exercised in asking for compensation or seeking authorization to suspend concessions.\textsuperscript{274} Since neither Article 26(1) nor the entire Understanding has yet been applied to a GATT dispute, the banana trade war would be an ideal case to test its waters.

\textbf{B. The Role of Unilateral Action — U.S. Section 301}

Under the Understanding, the role of unilateral action appears to be severely limited by the Members' efforts to strengthen the adherence to the multilateral system of dispute settlement.\textsuperscript{275} This limitation raises the question of whether U.S. use of Section 301 in the banana trade war would be compatible with the Understanding and to what extent Section 301 may be used under a GATT dispute.

Section 301 investigations and findings are completely separate from any international dispute settlement system. However, Section 301 is seen as the domestic counterpart to the prior GATT dispute settlement system. Under that system, Section 301 was a helpful tool in catalyzing dispute settlement where contracting parties either refused to follow the dispute settlement procedures or to implement the recommendations of a panel report.\textsuperscript{276} This use was clearly evident in the \textit{Oilseeds} case, where the threat of U.S. retaliation under Section 301 led to an agreement with the EEC to resolve the dispute, notwithstanding the EEC's refusal to fully implement one GATT panel report and blocking the adoption of another panel report.\textsuperscript{277}

The use of Section 301 as a complement to the Understanding,

\textsuperscript{272} Id., art. 22(4).
\textsuperscript{273} See id., arts. 21, 24. See discussion supra part III.B.9.
\textsuperscript{274} See Understanding, supra note 10, art. 24(1).
\textsuperscript{275} See HUDEC, ENFORCING, supra note 183, at 234-39.
\textsuperscript{277} See Brand, supra note 16, at 130-32.
however, seems to be limited by two factors. First, the new changes to the dispute settlement system have appeared to fill in the gaps where Section 301 was used to facilitate the enforcement of the system. These changes, such as stricter time limits in settling disputes, automatic establishment of panels, automatic adoption of panel or Appellate Body reports, and automatic authorization of suspension of concessions, have strengthened the binding effect of the system, giving less cause for using Section 301, or any unilateral action for that matter. Second, Article 23 of the Understanding expressly precludes the use of unilateral action where a Member seeks redress of an impairment or nullification under any of the covered agreements. In other words, Members must rely on the dispute settlement system to remedy the dispute. Therefore, under this provision, the use of Section 301 to impose unilateral sanctions in a GATT dispute appear to be prohibited.

However, a couple of instances may exist where Section 301 could be used as a counterpart to the new dispute settlement system. First, Section 301 may still be used as a vehicle for private parties to initiate a GATT complaint. This is the situation with the banana war. The U.S. banana companies, Chiquita and the Association, have initiated, through Section 301, investigations into the EEC's banana import regime. Accordingly, the United States requested consultations with the EEC pursuant to Section 301 procedure, which conforms to GATT's Article XXII. If the USTR determines that a solution to the dispute cannot be met with the EEC, the next logical step would be to request the establishment of a panel under the Understanding and let the process take care of itself in the international arena.

A second instance where Section 301 may still be used, although not under the dispute resolution system, is to take unilateral action in areas not covered by the Understanding and against countries which are not WTO members. This type of action, of course, is not relevant to the banana trade war because the banana trade war is specifically covered by GATT, an agreement covered by the Understanding, and the EEC is a Member of the WTO.

Despite the limitation on the use of Section 301, the United States has hinted that it might retaliate on its own under Section 301.

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278 See Partan, supra note 16, at 346-47; see discussion supra part III.
279 Understanding, supra note 10, art. 23.
280 Lowenfeld, supra note 240, at 481.
282 Id.; see GATT, supra note 1, art. XXII, at 39.
284 Kantor Threatens Retaliation Over European Banana Policy, INSIDE U.S. TRADE,
threat of unilateral action brings up the question of whether threats of unilateral retaliation are permitted under Article 23 of the Understanding. Article 23 only requires that a Member "not make a determination to the effect that a violation has occurred, [etc.] except through recourse to dispute settlement" under the procedures and rules of the Understanding. Article 23 does not explicitly forbid threats of unilateral retaliation. However, given the fact that actual unilateral retaliation is illegal under Article 23, is not the threat of doing something illegal considered to be illegal as well? Perhaps not. But even inferring that Article 23 forbids threats of unilateral retaliation will not prevent such threats from occurring because there is no substantial penalty provided for such an "action." Since there is generally no material harm or damage from such threats, the penalty would add up to no more than a slap on the wrist. Furthermore, although the United States might be threatening unilateral retaliation, it might not follow through with that threat. If the United States unilaterally retaliates, it would violate the Understanding, exposing itself to a challenge under a WTO panel and damaging its international reputation. In other words, the cards are in the players’ hands, and the cards should fall as they will. It is up to the EEC to call the bluff of the United States. In order for threats of unilateral retaliation to be illegal and deterred under the Understanding, a provision with an explicit penalty is needed.

Given the nature of the changes made to the new dispute settlement system under the Understanding to strengthen its enforceability, unilateral action, such as the use of United States’ Section 301, now appears to


255 Understanding, supra note 10, art. 23(2)(a).

256 A threat alone may only cause apprehension of the possibility of being harmed. In such a case, no real economic harm is inflicted, such as a rise in tariffs. Where no true harm is done, there is nothing tangible against which a penalty can be measured. However, it can be argued that the intimidation itself caused or forced the threatened party to “give in” and change its measure, and therefore, as a result, being economically injured. But isn’t this the end result that was being sought in the first place—for the threatened party to conform to international norms? Is this really a harm or damage? Should we penalize the threatening party for “achieving” such a result? Again, how would you measure such a penalty? As it stands, the Understanding does not provide an adequate penalty for threats of unilateral action. If such threats were considered a violation of Article 23, the only remedy would be for a panel to recommend that the threatening party stop threatening, because Article 22(4) only allows the level of the suspension of concessions to be equivalent to the level of impairment. See Understanding, supra note 10, arts. 1(1), 22(4), 23. Again, with a threat, is there a tangible impairment?

257 See Partan, supra note 16, at 349; Sykes, supra note 277.
serve only limited purposes.

V. CONCLUSION

The dawning of the WTO, with a radically new Understanding on the Rules and Procedures Governing the Settlement of Disputes, in the midst of an overheating banana trade war has provided a perfect environment in which to analyze both the possible actions and remedies available under the GATT and the new Understanding despite an imposing waiver. This analysis demonstrates that although the EEC's waiver of the trade provisions of Lomé IV from Article I's MFN clause has precluded almost all challenges against the EEC's banana import regime, the regime is perhaps vulnerable to attack. The possibility of an Article XXIII(1)(a) violation action is limited to an Article III claim which does not directly involve ACP bananas, while the possibility of an Article XXIII(1)(b) non-violation claim is limited to a new concept of "equivalent effect" involving the prohibition of quantitative restrictions under Article XI. Whether or not these claims will succeed under a WTO panel is yet to be seen.

The new dispute settlement system under the rules and procedures of the Understanding provides a more legalistic and time-conscious approach, binding offending Members to decisions while keeping the whole process within a stringent time-frame. If a challenge is successful, there would be a difference in the procedures in achieving remedies under violation and non-violation cases. The former is more rule-enforcement oriented, requiring the aggrieved party to conform its measure to the provisions of GATT while the latter is more negotiation-based, only requiring a mutually satisfactory solution. However, both situations permit the use of retaliation in order to achieve a final settlement to the dispute. Nevertheless, in disputes which involve either developing or least-developed country Members, certain special considerations may have to be afforded to these Members. And by requiring Members to rely on the system for resolving their disputes and by changing the system to be more effective, the drafters have limited the use of and the need for unilateral action.

Currently, the EEC is under pressure to change its banana import regime. However, if the EEC does not significantly alter its regime by the time the waiver expires, February 29, 2000, the regime will be in great jeopardy. Not only will the waiver expire that day, but so will Lomé IV. Without the cover of the waiver and the backing of Lomé IV, the regime will be easily challenged under an Article I(1) violation claim. And under the legalistic rules of the Understanding, the EEC will be forced to completely overhaul its regime to provide third country banana imports the similar treatment it provides ACP banana imports.