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Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations

Benjamin L. Brimeyer

The Uruguay Round of Multilateral Trade Negotiations changed the face of international dispute settlement by creating the World Trade Organization (WTO).\(^1\) The WTO was designed to take the place of the flawed General Agreement on Tariffs and Trade (GATT) regime.\(^2\) In so doing, the WTO created a more rule-based dispute resolution process. This new process seeks to eliminate much of the delay and subsequent lack of compliance associated with the GATT dispute settlement mechanism.\(^3\)

In the years since the creation of the WTO, several disputes have traversed its dispute resolution process. Each dispute has shed light on the operation of the WTO, revealed its shortcomings, and ultimately led to many scholarly debates. The United States and the European Union currently stand deadlocked in two separate disputes that have run the course of the WTO dispute resolution process. First, in a dispute regarding the European Banana Import regime, the WTO found the EU regime discriminatory.\(^4\) Because the European Union failed to bring its regime into compliance with the ruling, the United States has been forced to impose sanctions. Similarly, in a dispute regarding the European Union’s ban on hormone

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2. See id.
4. See infra notes 191-99 and accompanying text.
treated beef, the WTO found the ban invalid.\textsuperscript{5} Again the European Union failed to lift its ban and the United States was forced to impose sanctions. While these disputes raise many questions about the dispute resolution process generally, the non-compliance of the losing party in each instance may seriously undermine the effectiveness of the WTO’s dispute resolution process.

This Note will show the ineffective nature of the dispute resolution process under the WTO and its apparent inability to achieve compliance from superpower nations in light of the recent disputes regarding bananas and beef hormones. Part I describes the history of international dispute resolution by looking at the GATT system, its evolution into the current WTO, and dispute settlement under the WTO. Part II discusses in detail and analyzes the current disputes between the United States and the European Union regarding bananas, and beef hormones. Part III looks into some of the other factors that go into compliance with WTO rulings. Although the WTO is still new to international dispute resolution and much will change in the coming years, the disputes regarding beef hormones and bananas demonstrate some of the shortcomings of the WTO. The shortcomings demonstrated by the beef and banana disputes will ultimately point to the WTO Dispute Settlement Process as an ineffective mechanism to achieve compliance from superpower nations.

I. BACKGROUND OF THE WTO

In order to best analyze the ability of the WTO to effectively achieve compliance from superpower nations, one must first understand the origins of the system under the GATT, the evolution into its current state, and the workings of its dispute settlement mechanism.

A. IN THE BEGINNING THERE WAS THE GATT

Following World War II, several nations entered into a trade agreement known as the General Agreement on Tariffs and Trade\textsuperscript{6} intending to liberalize trade and reduce tariffs.\textsuperscript{7}

\textsuperscript{5} See infra notes 246-50 and accompanying text.
\textsuperscript{7} See William E. Scanlan, A Test Case for the New World Trade
These nations, known collectively as the contracting parties, did not intend the GATT to be an actual organization, but merely a temporary agreement. Indeed, while creating the GATT the contracting parties simultaneously worked on the creation of the International Trade Organization (ITO) to absorb the GATT. The ITO never came into existence, however, because the United States Congress refused to ratify it. The collapse of the ITO left the GATT, an organization without the constitutional and institutional foundation necessary to function, as the international community's focus for cooperation on trade matters. As a result, the GATT remained ill equipped to handle the broad task of regulating world trade relations and found itself in a state of "constant improvisation." Many of the shortcomings, flaws, and weaknesses of the GATT can be attributed to its inauspicious inception as an international trade organization.

1. The GATT Dispute Settlement Mechanism

The GATT contracting parties utilized the provisions of Articles XXII and XXIII to serve as the basis for the dispute settlement procedure. Under this procedure, legal disputes

8. See id. at 594.
10. See Hudec, supra note 1, at 4.
11. See Jackson Testimony, supra note 9.
13. See Jackson Testimony, supra note 9.
15. See Jackson Testimony, supra note 9.
16. See Khansari, supra note 3, at 189.
17. Scanlan, supra note 7, at 594.
19. See GATT Agreement, supra note 6, arts. XXII and XXIII.
20. See Hudec, supra note 1, at 4-5.
21. The GATT Agreement specifically refers to disputes regarding "customs regulations and formalities, anti-dumping and countervailing duties, quantitative and exchange regulations, subsidies, state-trading operations, sanitary laws and regulations for the protection of human, animal or plant life or health, and generally all matters affecting the operation of this Agreement." GATT Agreement, supra note 6, art. XXII.
between contracting parties first went through consultation and negotiation.\textsuperscript{22} In the event that the parties failed to reach a solution, the dispute would "be submitted to panels of three to seven GATT delegates from neutral countries who would issue legal rulings on the merits of the complaint."\textsuperscript{23} The panel would take evidence, hear arguments, and submit a written decision to the GATT council.\textsuperscript{24} Once the council received the written decision of the panel, it could adopt the panel's decision only by a unanimous vote of all the GATT Council Contracting Parties.\textsuperscript{25} In extreme instances contracting parties, acting collectively,\textsuperscript{26} could authorize a contracting party to suspend the application to any other contracting party of obligations or concessions under the Agreement as they determined to be appropriate under the circumstances.\textsuperscript{27}

Despite its "inauspicious beginning" and ill-defined dispute settlement system, the GATT enjoyed success for much of its history,\textsuperscript{28} especially during its first decade of use.\textsuperscript{29} According to a leading GATT scholar:

Governments understood the legal rulings implicit in its vaguely worded decisions, and once these rulings were approved by the GATT Contracting Parties, defendant governments almost always felt it necessary to comply. The reason these impressionistic half-decisions were successful was that the early GATT of the 1950s was essentially a small "club" of likeminded trade policy officials who had been working together since the 1946-1948 ITO negotiations . . . Thus they did not need a very elaborate decision-making procedure to generate an effective consensus about what particular governments were expected to do.\textsuperscript{30}

Eventually the rather homogeneous group of contracting
parties gave way to a larger, more diverse group of nations. While the GATT had developed its dispute settlement mechanism into a powerful legal instrument by the end of the 1980s, it was confronted with an ever-increasing degree of difficulty in settling disputes and political criticism. "The GATT system was being increasingly challenged by the changing conditions of international economic activity," resulting in an increased number of disputes that the system could not successfully resolve. These continued difficulties and failures of the GATT dispute settlement system revealed its procedural weaknesses and caused great concern.

2. Problems with the GATT Dispute Settlement Process and Movement Towards the WTO

As explained, the most glaring problems with the GATT dispute settlement system stemmed from its troublesome inception. Because the contracting parties never intended the GATT to be an international trade organization, its formal structure remained flimsy and it often operated with procedural weakness. Thus, many of these "birth defects" contributed to the ongoing struggles and failures of the GATT dispute resolution process.
One of the most troublesome aspects of the GATT dispute resolution process stemmed from the voluntary nature of the procedure.39 Every decision made by the organization required complete consensus.40 "This meant that the defendant had a virtual right to veto every step of the process, from the appointment of a panel to the adoption of the panel's legal ruling and the authorization of trade sanctions for noncompliance."41 The ability of the defendant country to block adverse decisions decreased confidence in the GATT's ability to provide justice in international trade dispute resolution.42

As confidence in the GATT dispute resolution process decreased, the GATT's role in the international community diminished.43 Similarly, other procedural flaws in the GATT system left many contracting parties frustrated, and there arose a growing lack of coordination and discussion among officials of national governments.44 These procedural problems also involved too many competing codes and dispute settlement arrangements, which undermined the coherence and respect for the GATT system.45 Other procedural problems included forum shopping in order to get a desired result, delays in the organization and working of panel proceedings, and a concern

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Provisional application and Grandfather rights exceptions, ambiguity about the powers of the Contracting Parties to make certain decisions, ambiguity regarding the waiver authority and risks of misuse, murky legal status leading to misunderstanding by the public, media, and even government officials, certain defects in the dispute settlement procedure, and lack of institutional provisions generally, so constant improvisation was necessary.

Id.
40. See id.
41. Id.
42. See Khansari, supra note 3, at 185.
43. See id.
44. See id. (quoting John H. Jackson, Managing the Trading System: The World Trade Organization and the Post-Uruguay Round GATT Agenda, in MANAGING THE WORLD ECONOMY FIFTY YEARS AFTER BRETON WOODS 131, 142 (Peter B. Kenen ed., 1994)).
45. See Kendall W. Stiles, The New WTO Regime: The Victory of Pragmatism, 4 J. INT'L L. & PRAC. 3, 7 (1995). Stiles cites to John H. Jackson’s prediction that “the interrelationships between the various Codes and the GATT will become increasingly complex.” Id. (citing J. JACKSON, RESTRUCTURING THE GATT SYSTEM 25 (1990)). Such complexities will make it harder for the general public to understand the GATT system resulting in less public support for the system. See id. The complexities will also give rise to a variety of legal disputes among contracting parties and “will contribute to the belief that the richer nations can control and can manipulate the GATT system for their own advantage.” Id.
regarding the quality of the panelists themselves. Once a decision had been rendered, its vague wording often resulted in difficulties determining the panel’s reasoning. Similarly, because documents related to the decision-making process were unavailable, future claimants lacked notice of what to expect from the dispute resolution process. This montage of procedural problems ultimately resulted in a dispute settlement mechanism lacking a worthwhile body of case law.

While the procedural problems with the GATT system clearly undermined its development, some contend that the failure of the system resulted from both a lack of consensus regarding GATT norms and the lack of compliance with GATT decisions. The lack of consensus regarding the GATT norms can be traced to the shift in the contracting parties from the original homogenous “club” to a diverse and complex group of nations with differing ideas regarding the dispute settlement process. These differing philosophies led to inconsistent GATT panel decisions and “growing unwillingness among Contracting Parties to comply with GATT decisions.” Indeed, by the mid-nineties, compliance with GATT panel decisions fell to under sixty percent. Similarly, several of the cases brought to the GATT dispute settlement mechanism were either abandoned or withdrawn due to the parties’ belief that the system was

46. See Stiles supra note 45, at 8. “Legal scholars generally deplored the lack of legal experts on GATT panels.” Id. Similarly, because so few panels convened, it was often difficult to find experienced GATT panelists. See id.
47. See id. at 9.
48. See id.
49. See id.
50. See Khansari, supra note 3, at 184-86. But see Hudec, supra note 1, at 9-10. Professor Hudec argues that up through 1990, the procedural weaknesses of the GATT procedure did not really have all that much impact on its overall success. Although the procedure was not compulsory, defendant governments almost always decided to cooperate with it. Although compliance was not always forthcoming, the pressure to comply was almost always there once the community arrived at a consensus that the ruling was correct.

Id.
51. See Mora, supra note 18, at 127.
53. See Khansari, supra note 3, at 186-87.
54. See id. at 187. See also Stiles supra note 45, at 9-10.
55. See Stiles, supra note 45, at 9. Stiles states that during GATT’s first twenty years “implementation of GATT panel decisions hovered around eighty percent.” Id.
ineffective. The lack of compliance and the growing belief that the GATT was an ineffective dispute settlement mechanism served to further undermine the authority of the GATT and created a need for changes in the system.

The deterioration of the dispute settlement system under the GATT meant that problems within the system needed to be addressed. The contracting parties would first have to "define once and for all... the main function of the procedure in general and the panels in particular." They would also have to resolve the particular procedural problems within the system and come to some agreement as to the norms themselves. The Uruguay Round of Multilateral Trade Negotiations addressed these issues and brought into existence the WTO.

B. A NEW SYSTEM: THE WTO

The Uruguay Round of Multilateral Trade Negotiations began in 1993 and concluded in December of 1996. The contracting parties to the GATT intended that the negotiations address many of the problems and shortcomings of the GATT system, including the dispute settlement process. During the seven-year negotiations many important objectives were accomplished, including the establishment of the charter for the WTO.

1. WTO Basics and Differences from the GATT

The WTO fulfills many of the functions proposed in the 1940s for the failed ITO. Most importantly, it replaces the GATT as the institution intended to be the authority on world trade

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56. See Schaefer, supra note 54, at 320.
57. See Khansari, supra note 3, at 186.
58. See Scanlan, supra note 7, at 597.
59. See Mora, supra note 18, at 127.
60. See id.
61. See Jackson Testimony, supra note 9.
62. See Scanlan, supra note 7, at 597.
63. See Scanlan, supra note 7, at 597.
64. See Scanlan, supra note 7, at 597 (citing Results of the Uruguay Round Trade Negotiations: Hearings Before the Senate Comm. on Fin., 103d Cong. 198 (1994)). Many feel that the Uruguay Round "accomplished more than any of the previous seven rounds of GATT-sponsored negotiations." Id. Some of the accomplishments of the Uruguay Round include the lowering of tariffs and the extension of protection to services and intellectual property. See id; see Jackson Testimony, supra note 9.
relations, negotiations, and dispute resolutions. The WTO implements the rules negotiated in the Uruguay Round and is guided by GATT decisions, procedures, and practices. The WTO differs from the proposed ITO, however, in that "the WTO charter itself is entirely institutional and procedural, but it incorporates the substantive agreements resulting from the Uruguay Round into annexes." Because all member countries must accept the entire package of substantive agreements in order to join, the WTO can avoid a system in which countries are free to "pick and choose which rules to follow and which to ignore."

Generally, the Final Act of the Uruguay Round of Multilateral Trade Negotiations intended that the WTO serve five main functions: (1) facilitate the implementation, administration and operation, and further the objectives of the agreement; (2) provide a forum for negotiations among its members concerning matters addressed under the agreement; (3) administer the Understanding on Rules and Procedures Governing the Settlement of Disputes; (4) administer the Trade Policy Review Mechanism; and (5) cooperate with the International Monetary Fund, International Bank, and related agencies for reconstruction and development with a view towards achieving greater coherence in global economic policy.

The general structure of the WTO contains three main entities. The Ministerial Conference consists of representatives of all Contracting Parties, meets at least once every two years,
and carries out the functions of the WTO. The General Council consists of representatives of all Contracting Parties, and carries out the functions of the WTO only as shall be appropriate in the intervals between meetings of the Ministerial Conference. Finally, the Secretariat consists of a Director-General and staff, and the Ministerial Conference will define its duties.

One of the most significant differences between the GATT and the WTO lies in the new Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This new procedure for adjudicating international legal disputes is set out in detail as compared to the relatively informal dispute settlement procedure of the GATT. The DSU continues to rely on Articles XXII and XXIII of the GATT, but also significantly expands the procedure's legal powers. Because, unlike the GATT system, the WTO is permanently chartered and is the exclusive source of procedure to solve disputes, it will provide a more flexible framework and reduce uncertainty in the system.

Additional changes from the GATT dispute settlement system include the creation of an appellate body to review legal issues settled by the panels, and the automatic adoption by the Dispute Settlement Body (DSB) of the panel report unless the DSB decides by consensus not to adopt the report. This

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76. See id. art. IV, para. 1. The functions of the WTO include “the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making” in the agreement. Id. The Dispute Settlement Body falls under the General Council. See id. art. IV, para. 3.

77. See id. art. IV, para. 2.

78. See id. art. VI, paras. 1-2.

79. See id. art. VI, para. 3. The Final Act further instructs that the Director-General and staff of the Secretariat “shall refrain from any action which might adversely reflect on their position as international officials.” Id. at para. 4. As such the Final Act demands that they not accept instructions from any government external to the WTO and that members of the WTO respect the international character and responsibilities of the Secretariat. See id.

80. See Hudec, supra note 1, at 2-3.

81. See id. see also Dispute Settlement Understanding, supra note 72.

82. See Dispute Settlement Understanding, supra note 72, art. 4, para. 11; see also Khansari, supra note 3, at 190.

83. See Hudec, supra note 1, at 3.

84. See Scanlan, supra note 7, at 598.

85. See Dispute Settlement Understanding, supra note 72, art. 1, para. 1.

86. See Khansari, supra note 3, at 190.

87. See Dispute Settlement Understanding, supra note 72, art. 16, para. 4; see also Hudec, supra note 1, at 3.

88. “The DSB shall be deemed to have decided by consensus on a matter
procedure will eliminate the ability of a single member to block a panel decision using its veto power. Similarly, "by making panel decisions valid law at the moment of inception, the DSU seeks to eliminate much of the delay and subsequent lack of compliance associated with the GATT's dispute settlement mechanism."^90

2. Dispute Settlement Under the WTO

The DSU procedure under the WTO consists of five stages: consultations, a panel, appellate review, arbitration, and compensation.

Consultation

When a dispute arises pursuant to a covered agreement a member must request a consultation.^91 The member implicated by the request must then reply within ten days and enter into consultations within thirty days.^92 The purpose of the consultation is to attempt to obtain a satisfactory adjustment of the matter. If a member does not respond within ten days or enter into consultation within thirty days, or if the parties fail to settle the dispute within sixty days, the complaining party may request a panel.^95

The Panel Phase

Upon the request of a complaining party a panel will be established. In order to prevent panel blocking, the panel will

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90. See Dispute Settlement Understanding, supra note 72, art. 2, para. 4, n.1.
91. See id. art. 21, para. 4.
92. See Dispute Settlement Understanding, supra note 72, art. 4, para. 3.
93. See id.
94. See id. art. 4, para. 5.
95. See id. art. 6, para. 1. The request for a panel must be in writing and must specifically identify the measures at issue and provide a summary of the legal basis of the complaint. See id. art. 6, para. 2.
be convened unless the DSB decides by consensus not to establish one.97 Panels will be composed of three well-qualified individuals unless the parties to the dispute agree to a panel of five.98 The panelists are nominated by the Secretariat and the parties to the dispute should not oppose the nominations except for compelling reasons.99 If, however, the parties cannot agree to the composition of the panel within twenty days, the Director-General in conjunction with the DSB and the relevant Council or Committee will appoint the panelists.100

The purpose of the panel is to make an objective assessment of the matter before it by examining the facts of the case and the relevant covered agreements, in order to assist the DSB in making recommendations or giving rulings.101 The panel accomplishes this task through confidential102 analysis of written submissions,103 oral arguments,104 expert witnesses,105 and other relevant sources.106 The entire panel period is to last no more than six months.107

Following oral arguments and rebuttal submissions, the panel submits to the parties its findings.108 After the parties submit their comments regarding the findings, the panel responds with an interim report.109 This report includes the panel’s findings and conclusions.110 Unless a party requests that

97. See id. art. 6, para. 1
98. See id. art. 8, para. 5.

Well qualified individuals [includes] governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a member.

Id. art. 8, para. 1. Note also that “[c]itizens of Members whose governments are parties to the dispute . . . shall not serve on a panel concerned with that dispute. . . .”

Id. art. 8, para. 3.
99. See id. art. 8, para. 6.
100. See id. art. 8, para. 7.
101. See id. art. 7.
102. See id. art. 14, para. 1 (“Panel deliberations shall be confidential.”).
103. See id. art. 12, para. 6.
104. See id. art. 15, para. 1.
105. See id. art. 13, para. 2.
106. See id.
107. See id. art. 12, para. 8.
108. See id. art. 15, para. 1.
109. The parties have limited period of time, set by the panel, in which to submit their comments in writing. See id.
110. See id. art. 15, para. 2.
the panel review specific aspects of the interim report, it will be considered the final report and circulated to members.\textsuperscript{111} Twenty days after circulation members may consider adoption of the report, but must submit any objections ten days prior to the meeting at which the report will be considered.\textsuperscript{112} Unless a party to the dispute notifies the DSB of its intention to appeal or the DSB decides by consensus not to adopt the report, the report is automatically adopted.\textsuperscript{113}

Appellate Review

Upon a party's decision to appeal the panel report, the report will be referred to the Appellate Body.\textsuperscript{114} The Appellate Body is composed of seven persons of recognized authority,\textsuperscript{115} "three of whom shall serve on any one case."\textsuperscript{116} The appeal will be limited to the issues of law covered in the panel report and should not exceed sixty days in length.\textsuperscript{117} The proceedings of the Appellate Body will be confidential and the opinions expressed are anonymous.\textsuperscript{118} Unless the DSB decides by consensus not to adopt the Appellate Body report, it will be adopted within thirty days following its circulation to members.\textsuperscript{119}

Binding Arbitration

Upon consensus by both parties to a dispute, binding arbitration may be utilized as an alternative means of dispute resolution.\textsuperscript{120} The parties involved must agree on the procedures and abide by the arbitration award.\textsuperscript{121} Arbitration awards are subject to the agreement's other provisions regarding implementation and compensation.\textsuperscript{122}

\begin{thebibliography}{99}
\bibitem{111} See id.
\bibitem{112} See id. art. 16, paras. 1-2.
\bibitem{113} See id. art. 16, para. 4.
\bibitem{114} See id. art. 17, para. 1.
\bibitem{115} See id. art. 17, para. 3. "Persons of recognized authority" include those "with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally." \textit{Id.} "They shall be unaffiliated with any government." \textit{Id.}
\bibitem{116} Id. art. 17, para. 1.
\bibitem{117} See id. art. 17, paras. 5-6.
\bibitem{118} See id. art. 17, paras. 10-11.
\bibitem{119} See id. art. 17, para. 14.
\bibitem{120} See id. art. 25, para. 1.
\bibitem{121} See id. art. 25, paras. 2-3.
\bibitem{122} See id. art. 25, para. 4.; see also id. arts. 21-22.
\end{thebibliography}
Implementation and Compensation

If immediate compliance is impracticable, the DSU requires compliance with recommendations or rulings of the DSB within a reasonable time. The reasonable time can be a period proposed by the member concerned and approved by the DSB, a period mutually agreed upon by the parties to the dispute, or a period determined through binding arbitration ninety days after the date of adoption of the recommended rulings. In the event of arbitration, "a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed fifteen months from the date for adoption of a panel or Appellate Body report." Regarding disagreements as to the adequacy of compliance with WTO rulings, the DSU provides:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it.

The DSB will continually monitor the implementation of adopted rulings to ensure that it occurs within a reasonable time.

In the event that a party fails to implement the recommended measures, the member may be requested to enter into negotiations with the complaining party in order to develop mutually acceptable compensation. If no agreeable compensation plan is developed, "any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

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123. See id. art. 21, para. 3(a)-(c).
124. See id. Because this time period is specifically spelled out in the DSU it leaves little room for ambiguity or delay, unlike the GATT system. See Scanlan, supra note 7, at 603.
125. Dispute Settlement Understanding, supra note 72, art. 21, para. 3(c).
126. Id. art. 21, para. 5.
127. See id. art. 21, para. 6.
128. See id. art. 22, para. 2.
129. Id.
II. CURRENT EXAMPLES OF NON-COMPLIANCE

In the upcoming years, the WTO will face many tests in regulating international trade and settling disputes between member countries. One of the key factors in determining the success of the WTO's dispute settlement mechanism will be the compliance achieved from member countries on the losing end of disputes.130 Already, clashes between the United States and the European Union, have begun to result in delay and incomplete compliance. Specifically, the current trade wars between these two superpowers involving beef and bananas demonstrate the difficulty the WTO may face in achieving compliance from member countries on the losing end of a dispute.131 If the WTO fails to adequately deal with these compliance problems they could undermine the entire new dispute resolution system132 and the organization's credibility.133

A. THE BANANA WAR

Although bananas have been at the center of international disputes throughout the century,134 the conflict between the European Union and the United States over the tropical fruit began in July 1993.135 Several European countries had been providing their ex-colonies in Africa, the Caribbean, and the Pacific with preferential access to EU banana exports.136 These countries effectively discriminated against banana imports from Central America.137 Other European countries allowed unrestricted trade or instituted other import regimes, resulting

131. See id. at 787.
134. See Gordon Fairclough & Darren McDermott, The Banana Business is Rotten, So Why Do People Fight Over It?, WALL ST. J., Aug. 9, 1999, at A1 (explaining that "[f]or more than a century, [bananas] have provoked riots and coups" and that "[l]eaves have been dispatched to protect them.").
137. See Guy de Jonquières, supra note 135.
in a patchwork of national policies. In 1993 the European Union decided to unify these policies by introducing a single common market called the European Union Banana Regime. This new regime set up a structured tariff quota system to imports from countries that were not ex-colonies. It also established import licenses preferential to former colonial lands. Europe's new banana regime angered leading United States distributors of Central American bananas, who saw a decline in their profits after the introduction of the new tariffs and quotas.

Prior to the 1993 adoption of the European Union Banana Regime, the United States, in conjunction with several Central American banana producers, complained to the GATT regarding Europe's patchwork of preferential treatment. Initial consultations failed between the then European Economic Community (EEC) and the United States. Although a GATT panel eventually held that the various EEC banana import regimes violated certain GATT provisions, the contracting parties did not adopt the report, due to continual blocks by the EEC. The Caribbean banana producers brought another complaint to the GATT shortly after the adoption of the European Union Banana Regime. Once again the GATT panel ruled that the new regime remained inconsistent with GATT provisions, but the EEC blocked adoption of the panel report.

With the creation of the WTO and its new dispute resolution mechanism, the United States and Central American

138. See id.
139. See id.
141. See Cooper, supra note 136, at 971.
142. See Guy de Jonquières, supra note 135.
143. See id.
144. See Bessko, supra note 140, at 286.
145. See id. Specifically, the panel found that the "quota restrictions on bananas were inconsistent with Article XII's prohibition of quantitative restrictions." Id. at 274. It also found the tariff preferences inconsistent with Article I's most-favored nation clause. See id. at 276.
146. See Bessko, supra note 140, at 275.
147. See id. at 276.
148. See id. at 276-79. This time the panel held that "the measures taken by the EEC under its new banana import regime constituted a prima facie case of nullification or impairment of benefits under Article XXIII . . ." Id. at 279.
149. See id. at 279.
banana producers needed not fear blockage by the European Union, since the panel report is now adopted automatically. In 1996 the United States joined with Ecuador, Guatemala, Honduras, and Mexico to challenge the EU Banana Regime before the WTO. In May of 1997 the WTO issued a panel report finding that the EU's "banana import regime and its licensing procedures for the importation of bananas were inconsistent with various obligations of the GATT 1994 and related WTO agreements." Refusing to accept the initial decision of the WTO dispute settlement process, the European Union soon announced its decision to appeal the ruling. By September of 1997 the WTO Appellate Body had issued and adopted a report upholding most aspects of the panel decision. This decision meant that the European Union either had to comply with the WTO ruling or face retaliation from the United States.

Initially the European Union split as to the implementation of the required changes. Some countries pushed for alternatives to compliance, such as payment of compensation to the complaining members, while other countries expressed support for implementation. Despite the split, the European Union announced that it would accept the verdict of the WTO and would make future decisions regarding implementation of the ruling. While the European Union refused to disclose any details of its implementation plan, it insisted on maintaining some trade preferences established in its banana regime. In response the United States commented that it would settle for nothing less than full implementation of the WTO ruling and that compensation would not be acceptable.

150. See Dispute Settlement Understanding, supra note 72 and accompanying text.
151. See Cooper, supra note 136, at 971.
152. Reif & Florestal, supra note 130, at 776.
153. See Frances Williams, EU Appeals Against WTO Banana Ruling, FIN. TIMES, June 12, 1997, at 6.
154. See Reif & Florestal, supra note 130, at 776-77. The report was issued on September 9, 1997 and was adopted by the DSB on September 15, 1997. See id.
155. See Cooper, supra note 136, at 971.
156. See Reif & Florestal, supra note 130, at 777.
157. See id.
158. See Frances Williams, EU Accepts Ruling on Banana Regime, FIN. TIMES, Sept. 26, 1997, at 5. The European Union initially stated that it would make a statement on how it intended to implement the WTO decision at its next meeting in October of 1997. See id.
159. See id.
160. See id. Specifically, "[t]he United States declared that it would accept only a
Dissatisfied with the European Union's failure to specify its plans for implementation, the United States, Honduras, Guatemala, Ecuador and Mexico requested binding arbitration in November 1997.\(^{161}\) The arbitrator held that "the EC would have fifteen months and one week to implement the WTO decision and bring its banana import regime into compliance."\(^{162}\) In January 1998 the European Union adopted a proposal to modify its banana regime.\(^{163}\) While the new proposal contained some changes,\(^{164}\) the United States contended that it remained just as discriminatory as the previous regime.\(^{165}\) The United States again asserted its desire to see the European Union abolish the entire regime.\(^{166}\)

Based on its belief that the EU plan for implementation failed "to make any significant changes to bring the [EU's] regime in line with WTO provisions,"\(^{167}\) the United States in July 1998 asked that the new regime go back to the WTO panel for a ruling.\(^{168}\) This was the first time that a panel had been asked to judge a disputed settlement and implementation.\(^{169}\) The United States further maintained that if the European Union did not comply with the WTO ruling by its January 1999 deadline, it would impose sanctions no later than March 1999.\(^{170}\)

The European Union responded by stating that it would only

\(^{161}\) See Reif & Florestal, supra note 130, at 778.  
\(^{162}\) See id. at 778.  
\(^{163}\) See id. at 779.  
\(^{164}\) See id. at 779-80.  
\(^{166}\) See Reif & Florestal, supra note 130, at 780.  
\(^{167}\) Id. (quoting Office of the Trade Representative, USTR Barshefsky Reacts to EU Banana Decision, Press Release 98-63).  
\(^{168}\) See Williams, supra note 165.  
\(^{169}\) See id.  
\(^{170}\) See Frances Williams, WTO Enters Uncharted Territory, FIN. TIMES, Nov. 18, 1998, at 9. The United States believed that it did not have to wait for a panel ruling before asking for WTO authorization to retaliate against the European Union. See Frances Williams, EU and U.S. locked in Negotiations, FIN. TIMES, Nov. 26, 1998, at 7 [hereinafter Locked in Negotiations].
agree to the panel if the United States dropped its threat of sanctions, thus delaying the establishment of such a panel.  

In January 1999, the United States notified the WTO that it would not back away from its intentions to suspend concessions on particular products totaling almost $570 million in trade.  

The WTO agreed that a panel should rule on whether the EU's amended banana import regime complies with the previous WTO judgments.  

By the end of January, the EU asked for WTO arbitration to review the proposed sanctions and the United States suspended the threatened trade sanctions until March.  

The WTO stated that the arbitrator would produce a decision regarding the proposed sanctions on March 2, 1999 and the panel would reach a result regarding the new banana import regime by April 12, 1999.  

On March 2, 1999 the WTO arbitrators returned with an unexpected delay and requested more time and information to assess the amount of sanctions.  

Frustrated by the delays, the United States announced that it would begin imposing 100 percent duties on $520 million of selected European exports.  

The United States stated that "it is time for the EU to bear some of the consequences for its complete disregard for its GATT and WTO obligations."  

The European Union responded that the United States could not impose such sanctions until the WTO had pronounced its amended regime illegal.  

It further

171. See Locked in Negotiations, supra note 170. Similarly, "[t]he United States attempted to present its unilateral measures per the DSU, but faced a number of procedural delays from other Contracting Parties." Cooper, supra note 136, at 972.  


173. See id.  


177. See Frances Williams, WTO Calls Meeting on Banana Row, FIN. TIMES, March 6, 1999, at 3.  


179. The European Union also asked for an additional WTO panel to rule on the controversial Section 301 of U.S. trade law. See Frances Williams, Brussels Seeks WTO Ruling on U.S. Trade Sanctions Law, FIN. TIMES, Feb. 18, 1999, at 3. The United States was using section 301 to invoke unilateral trade sanctions against the European Union. See id. EU officials contended that the timetable laid down in section 301 was not compatible with retaliation procedures in the WTO. See id.
contended that the sanctions displayed "blatant disregard" for the WTO's multilateral settlement procedures.180

Worried that the standoff between the European Union and the United States regarding the banana regime would undermine the authority of the dispute settlement system, the WTO members urged the two superpowers to resolve their dispute.181 The standoff continued, however, until an April 1999 ruling by the WTO holding that the amended banana import regime failed to comply with previous WTO rulings.182 The arbitration panel did rule, however, that the United States had over-estimated the costs of the regime to the United States economy.183 By the end of April, the WTO had formally authorized the United States to impose $191.4 million in trade sanctions against European goods as retaliation.184 This represented the first time in more than fifty years that authorization to retaliate against a member country has been granted by the WTO or the GATT.185 The United States insisted that retaliation was only a last resort measure designed to push the European Union into compliance.186

In response to the negative ruling, the European Union announced that it would comply with the WTO's previous ruling.187 The WTO formally adopted the panel verdict in May 1999.188 While the European Union decided not to appeal the verdict, it claimed it might take until January 2000 to find a solution.189 The European Union began consulting with other WTO members regarding the solution to the banana import regime, but admitted in July 1999 that further delays in

180. See Williams, supra note 177.
182. See Frances Williams, Outcome Seen as Opportunity for Reform, FIN. TIMES, April 8, 1999, at 6.
183. See id.
185. See Frances Williams, EU 'Needs 8 Months' to End Banana Crisis, FIN. TIMES, April 20, 1999, at 9.
186. See id.
187. See Frances Williams, Panel to Condemn EU Regime, FIN. TIMES, April 28, 1999, at 8.
189. See supra note 179. The United States responded by stating that it was prepared to lift sanctions as soon as a solution was implemented. See id. The European Union further warned that it would be difficult to find a solution that satisfied all the competing interests. See id.
implementing reforms remained likely.  

Again in September 1999 the European Union warned that they were experiencing difficulties in devising changes to the European Union’s banana imports regime. There remained a split between those European countries that wanted to maintain a strong protection for former colonies and those European countries pushing for compliance with the WTO ruling. By the end of September the European Union announced that it would implement a tariff-only system if trading partners and EU members continued to disagree on how to change the current illegal import regime. The United States indicated that it would consider the system, provided that it was not prohibitive, although some Central American countries felt that tariff preferences alone would not be enough to keep their bananas competitive in the European market.

In November 1999, the Caribbean banana exporters and Ecuador agreed to a tariff rate quota arrangement that they hoped would satisfy United States concerns about the European Union’s import regime. Unfortunately, this arrangement appeared to be possibly incompatible with the rules of the WTO. As a result, the European Union proposed a “first come, first served” tariff-only regime, which would eliminate all quotas by 2006. This discriminatory tariff-only policy, however, would likely reduce EU imports of Latin American bananas. By mid-November the European Union stood firmly by its tariff-

190. See Frances Williams, Reforms to EU Banana Import Regime Delayed, Fin. Times, July 27, 1999, at 8. Although EU officials had previously said that recommendations regarding reforms would be made in July 1999, it admitted that it would not be able to make proposals until September 1999 when the new EU Commission takes office. See id.


192. See id. Those countries favoring protection of former colonies included the United Kingdom, France and Spain, while the countries favoring a more liberalized market included Germany and the Netherlands. See id.


194. See id.


196. See id.


198. See Borell, supra note 197.
only system despite acknowledging that the banana exporting countries would prefer a tariff rate regime.\footnote{199}{See Mike Smith, \textit{Brussels Proposes New Regime for Bananas}, \textit{FIN. TIMES}, Nov. 11, 1999, at 14.} Frustrated with the European Union's latest unsatisfactory proposal to end its current import regime, Ecuador "became the first developing country to use the sanctions provisions of the World Trade Organization when it asked the WTO to approve retaliation worth $450 million" for what it described as "blatant non-compliance."\footnote{200}{Frances Williams, \textit{Ecuador Seeks to Retaliate in Banana Dispute}, \textit{FIN. TIMES}, Nov. 20, 1999, at 7.} By March of 2000 tensions had only increased. First, a WTO panel ruled in favor of the European Union in its complaint that the United States violated international trade rules in their on-going banana dispute by imposing sanctions against EU companies before obtaining WTO authorization.\footnote{201}{See Frances Williams, \textit{WTO Raps U.S. Over Banana Dispute Sanctions}, \textit{FIN. TIMES}, March 16, 2000, at 12.} Second, in a landmark ruling by the WTO, Ecuador had been given approval to administer its requested trade sanctions against the European Union.\footnote{202}{See Frances Williams and Edward Alden, \textit{Ecuador Sanctions Plea Backed}, \textit{FIN. TIMES (LONDON)}, March 18, 2000, at 2.} By the summer of 2000 the European Union had not reached a satisfactory decision on how to implement the WTO ruling that its banana import regime illegally discriminated against certain Central American countries.\footnote{203}{See Michael Smith, \textit{EU Slips Up Over Import of Bananas}, \textit{FIN. TIMES}, July 18, 2000, at 16.} Indeed, the European Union seems content to continue implementing discriminatory regimes to the dissatisfaction of the banana exporters. The United States expects continued delays and compliance may not be reached until sometime later in the decade. Similarly, the United States banana industry has begun placing increased pressure on the United States government to impose strict sanctions.\footnote{204}{See Edward Alden, \textit{U.S. Industry Pushes for Sanctions Against EU}, \textit{FIN. TIMES}, August 23, 2000, at 10.} As a result the United States sanctions imposed in retaliation appear likely to stay in place for several months.\footnote{205}{See Williams, \textit{supra} note 190.} 

B. THE BEEF HORMONES DISPUTE

During the 1980s the presence of certain growth hormones
in European meat products used in baby food caused severe defects in infants. The European Community reacted by instituting a ban on the use of certain hormones in European cattle and imported beef. The United States, on the other hand, has been using natural and synthetic hormones on livestock for several decades. While the health effects of the residual hormones in beef consumed by humans remains unknown, some scientific research has suggested that such consumption may be carcinogenic, may increase the effects of other carcinogens, and may reduce male fertility.

As members of the WTO and the GATT, the European Union and United States are obligated to prevent trade discrimination by treating domestic and foreign products similarly. At the same time, however, WTO member countries may discriminate in order to protect public health. The ability of a member to adopt food safety measures falls under the WTO Agreement on the application of Sanitary and Phytosanitary Measures (SPS Agreement). The SPS Agreement allows a member to lawfully discriminate in situations that help protect health and the environment.

The SPS Agreement presumes the legality of protectionist measures based on internationally accepted standards. For those measures not supported by internationally accepted standards, the SPS Agreement requires that the measure be justified by scientific evidence of harmful effects of the regulated product. The purpose of requiring such scientific evidence is to

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206. See Layla Hughes, Limiting the Jurisdiction of Dispute Settlement Panels: The WTO Appellate Body Beef Hormone Decision, 10 GEO. INT'L ENVTL. L' REV. 915, 916 (1998). The specific hormone believed to have caused the defects was diethylstilbene (DES). See id. This was found to cause premature development of breasts and menstruation in infants. See id.

207. See id.

208. See id.

209. See id. at 917.

210. See id.

211. See id.


213. See Hughes, supra note 206, at 917.

214. See id. "The SPS Agreement also requires Members to avoid arbitrary or unjustifiable distinctions in the levels of protection they consider appropriate in different situations, such as the acceptable amounts of residue from different hormones present in beef, if such distinctions result in discrimination or a disguised restriction on international trade." Id. (quoting Agreement on the Application of Sanitary and Phytosanitary Measures, GATT Doc. MTN/FA II-A1A-4, art. 5 para. 5
prevent the use of these measures as disguised discriminatory barriers to trade.\footnote{215} In 1996, the United States filed a complaint with the WTO alleging that the EU import ban on hormone-induced beef could not be sustained under the SPS Agreement.\footnote{216} The United States made three basic claims in its argument: (1) “the precautionary principle was not sufficiently developed in international law to be relevant to the interpretation of the SPS Agreement;” (2) the hormone ban was not supported by scientific facts showing the harmful effects of hormone induced beef; and (3) the ban “adopted arbitrary distinctions among the levels of protection appropriate in different situations.”\footnote{217} The United States did not argue that health standards higher than the international consensus violated the SPS Agreement, but reiterated that such measures must be based on scientific evidence.\footnote{218} Indeed, scientific evidence existing at the time of the complaint remained insufficient to prove that residue from hormones poses a health risk to human consumers.\footnote{219} The European Union argued, however, that the hormone ban could still be considered permissible in light of general information pointing to the negative effects of hormone consumption and that it was justified in exercising caution in situations of scientific uncertainty.\footnote{220} The beef dispute reflects profoundly different views in the United States and Europe over altered or adulterated foods. European fear of food tampering increased with the outbreak of 'mad cow' disease in Britain several years ago. More recently, those anxieties intensified over a scandal in Belgium over chicken and other food products contaminated with the cancer-causing chemical dioxin.\footnote{217}


\footnote{219} See Huges, supra note 206, at 917.

\footnote{220} See id. citing GATT Doc. WT/DS26/AB/R, note 4, para. 121. Specifically the EU pointed to the precautionary principle, which justifies the exercise of such caution by regulatory agencies in the event of scientific uncertainty. See id. The
In August of 1997, the WTO panel addressing the United States complaint ruled that the EU ban on meat produced with growth promoting hormones created an unfair trade barrier.\(^{221}\) The United States hailed the victory as a signal that the WTO can handle complex disputes in which a WTO member attempts to justify trade barriers by disguising them as health measures.\(^{222}\) On the other hand, the European Union expressed concern that the panel's conclusions limit the right of governments to determine the level of protection that they deem to be appropriate for their consumers.\(^{223}\)

In September 1997, the European Union launched its appeal of the panel ruling striking down its beef hormone ban.\(^{224}\) It defended the ban on the grounds that governments have the fundamental right to choose the level of health protection they consider necessary for their citizens.\(^{225}\) The European Union also argued that the WTO ignored the testimony of two experts supporting the claim that hormone consumption posed legitimate health risks.\(^{226}\)

The WTO issued an Appellate Body decision in January 1998 affirming the result of the earlier panel ruling, but overturning some aspects of its reasoning.\(^{227}\) Both the United States and the European Union claimed victories based on the decision.\(^{228}\) The European Union claimed that the decision gives it the right to establish a scientific basis for its hormone ban.\(^{229}\) As such the European Union initially stated that it would

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\(^{222}\) See id.

\(^{223}\) See id.


\(^{226}\) See id. Although two experts did back the EU view that consumption of hormone residue in beef leads to health risks, three other experts did not share this opinion. See id. The European Union argues that it was wrong of the WTO to base decisions regarding human health issues on majority scientific views. See id.

\(^{227}\) See Reif & Florestal, *supra* note 130, at 781-82. The DSB adopted the appellate decision in February 1998. See id.


\(^{229}\) See Dunne, *supra* note 218.
maintain the ban for at least fifteen months while it conducted scientific studies and considered plans to implement the WTO ruling.\textendash\textsuperscript{230} The European Union then proposed an implementation timetable of two and one half years.\textendash\textsuperscript{231} Conversely, the United States interpreted the appellate ruling as requiring immediate termination of the hormone ban.\textendash\textsuperscript{232} According to the United States, failure to remove the ban would seriously threaten the effectiveness of the WTO dispute settlement mechanism.\textendash\textsuperscript{233}

As in the banana dispute both parties were frustrated with the inability to agree upon an implementation time period and submitted the controversy to WTO arbitration.\textendash\textsuperscript{234} In April 1998 the arbitrator ruled that the European Union had fifteen months to comply with the previous WTO ruling.\textendash\textsuperscript{235} Again the United States claimed that this ruling required the European Union to lift its ban.\textendash\textsuperscript{236} Similarly, the European Union responded that the ruling showed it could keep the ban intact while it pursued scientific evidence in its support.\textendash\textsuperscript{237}

Throughout the latter months of 1998 tensions increased between the United States and the European Union.\textendash\textsuperscript{238} Each party threatened to retaliate against the other's exports.\textendash\textsuperscript{239} By the end of the year the United States began considering trade sanctions against the European Union for not properly complying with the rulings of the WTO.\textendash\textsuperscript{240} At the same time the European Union remained insistent that it would not repeal the ban until it had completed a scientific risk assessment.\textendash\textsuperscript{241}

After European veterinary experts found hormone residues in meat certified as hormone free, the European Union, in April

\begin{quote}

\textsuperscript{231} See Reif & Florestal, supra note 130, at 782.

\textsuperscript{232} See id.

\textsuperscript{233} See id.

\textsuperscript{234} See id.

\textsuperscript{235} See Michael Smith, \textit{EU Told it has 15 Months to Comply with WTO Rule}, FIN. TIMES, May 29, 1998, at 7. The WTO ruling was held retroactive to February 1998, meaning that the European Union would have to bring its hormone ban into compliance by May 1999. See id.

\textsuperscript{236} See id.

\textsuperscript{237} See id.


\textsuperscript{239} See id.

\textsuperscript{240} See id. These considerations come at relatively the same time that the United States began looking into retaliation in the banana dispute.

\textsuperscript{241} See Reif & Florestal, supra note 130, at 782.
\end{quote}
1999, announced plans to ban all beef imported from the United States.242 This decision increased tensions with the United States who claimed that the proposed ban would violate WTO rules because it was not supported by scientific evidence that all beef from the United States posed a health risk.243 Furthermore, in May 1999, the European Union categorically ruled out lifting its ban on meat treated with hormones.244 The European Union claimed that it based its decision on a new study identifying the health risks of hormones.245 In response, the United States labeled the study's findings as misleading246 and stated that "the European Union appeared not to be serious about meeting its WTO obligations."247 The United States further announced that there would be a "price to pay" if the European Union failed to comply with its May 13, 1999 deadline.248

Indeed, the United States announced on May 14, 1999 that it would seek authorization from the WTO to impose 100 percent tariffs on $202 million of EU exports.249 The European

242. See Michael Smith and Nancy Dunne, Europe May Ban All U.S. Beef as New Trade Dispute Looms, FIN. TIMES, April 22, 1999, at 26; see also Edmund L. Andrews, Europeans Threaten Ban on U.S. Beef Imports, N.Y. TIMES, April 22, 1999, at C8 (indicating that about 12 percent of the samples from U.S. beef contained enough hormone residue to indicate that they came from cattle raised with hormones).
243. See id.
244. See Guy de Jonquières, EU Digs in for Beef War with the U.S., FIN. TIMES, May 5, 1999, at 5.
245. See id.
246. See id. The United States further claimed that the findings were at odds with the overwhelming weight of international scientific evidence that growth promoting hormones "posed no health risk if properly administered to cattle." Id.
247. See id. The European Union further commented that it would not be able to comply with its May 13 deadline because the results of further scientific studies would not be ready until the end of 1999. See id. The European Union has said, however, that it would offer temporary compensation for lost exports until the studies are completed. See id.
249. See Guy de Jonquières, U.S. Starts to Play the Long Game on Dispute over Hormone-Treated Meat Exports to EU, FIN. TIMES, May 17, 1999, at 5. After the United States had received criticism for jumping the gun in imposing sanctions in the banana dispute, it chose to handle the beef dispute somewhat differently. See id. The United States delayed disclosing the exact products it would target with the sanctions. See id. It announced that it intended to take a more gradual approach to the situation so that it might increase pressure for the European Union to lift the ban. See id. After all, the United States had previously said that it wished not to pursue compensation, but an end to the hormone ban. See Bruce Clark, U.S. Hails EU Beef Imports Ruling by WTO, FIN. TIMES, May 10, 1997, at 2.

U.S. officials say their gradualist tactics are intended to keep EU member
Union immediately labeled the amount as excessive and announced that it would ask a WTO arbitrator to review the United States claim.\textsuperscript{250} In June 1999, WTO arbitrators authorized the United States to implement sanctions on $128 million in European exports.\textsuperscript{251} At the same time, the European Union agreed to postpone its ban on all United States beef after assurance from the United States that the beef would be more closely monitored to ensure that it did not contain hormones.\textsuperscript{252}

This concession was short lived as the European Union again angered the United States in September 1999 by announcing that it would likely need a year before returning to the WTO to seek a resolution of the hormone dispute.\textsuperscript{253} As of March 2000, the European Union had not completed the seventeen studies it ordered to find scientific support for its hormone ban.\textsuperscript{254} It did, however, state its desire to renew serious negotiations in 2000 and establish clear criteria for banning products on health and safety grounds when there is no conclusive evidence that they are dangerous.\textsuperscript{255} The European Union continues to assert its opinion that there is a growing body of evidence supporting the proposition that consumption of hormone induced beef can lead to serious health risks.\textsuperscript{256} Similarly, the United States continues to assert its disappointment with the European Union’s failure to comply with the WTO ruling.\textsuperscript{257} Because no consensus has been reached regarding proper compliance with the WTO ruling, the

\begin{quote}
states off guard and increase pressure on them to lift the ban. However, recent experience has also taught Washington that rushing into combat with all guns blazing would be unlikely to achieve this objective – and could prove self-defeating.
\end{quote}

de Jonquières, supra.


\textsuperscript{254} See id.

\textsuperscript{255} See Guy de Jonquières, \textit{Brussels Aims to Clarify Safety Ban Criteria}, FIN. TIMES, Nov. 1, 1999, at 12; Frances Williams, \textit{EU Keen to Start Talks on Farm Trade}, FIN. TIMES, March 14, 2000, at 12.

\textsuperscript{256} See de Jonquières, supra note 244.

\textsuperscript{257} See id.
European Union's hormone ban will likely remain intact far into this century.

C. COMPLIANCE ISSUES RAISED BY THE BANANA AND BEEF DISPUTES

The disputes between the United States and the European Union regarding bananas and beef pose two of the toughest tests of the WTO's ability to achieve compliance from superpower nations. As each of these disputes have run the course of the WTO dispute settlement process and remain unresolved, they suggest several areas of concern regarding rule compliance. First, the cases show that substantial differences can exist between the views of the winning member and the losing member with respect to the losing member's obligations. These differences can result in delay and further complications with compliance. Second, the two sides also differ regarding the proper procedure for determining the losing member's compliance obligations. Third, the speed with which compliance must occur remains unsettled. Finally, these cases suggest that more powerful countries will chose to accept sanctions or compensation rather than comply with unfavorable WTO rulings.

The banana dispute in particular demonstrates the difficulties caused by disagreements among parties as to what constitutes full compliance. After the United States had achieved a positive WTO ruling in the Banana dispute, the European Union was to design and implement a new banana import regime. While the United States demanded abolition of the banana import regime, the European Union attempted to interpret the WTO ruling in a manner that would allow an amended regime to continue. However, its new regime remained just as discriminatory as the first, and was again struck down by the WTO dispute settlement body. Political frictions within the European Union itself led to further difficulties in creating a viable solution. Ultimately, the inability of the European Union and the United States to come

258. See Reif & Florestal, supra note 130, at 756.
259. See de Jonquières, supra note 244.
260. See Reif & Florestal, supra note 130, at 786.
261. See Cooper, supra note 136 and accompanying text.
262. See supra notes 168-171 and accompanying text.
263. See Williams, supra note 188 and accompanying text.
264. See supra notes 162-166 and accompanying text.
to an agreement regarding compliance with the WTO ruling led to delays and non-compliance. Although the United States did not prefer compensation to settle this dispute, it was forced to adopt sanctions.\textsuperscript{265} At this time, compliance with the WTO ruling remains doubtful due to disagreement as to what full compliance actually entails. Without more specific rulings detailing what is meant by full compliance, losing members will continue to interpret the rulings in a way that leads to non-compliance.

The banana dispute also demonstrates the role of politics in WTO compliance.\textsuperscript{266} Political dynamics within the European Union compounded the difficulties in achieving compliance and added to the delays.\textsuperscript{267} Similarly, the implementation process itself provides opportunities for the losing party to delay compliance through the use of political strategies within the WTO.\textsuperscript{268} For example, it may convince one of the winning members that full compliance would not be in its best interest.\textsuperscript{269} Politics external and internal to the WTO will continue to play a key role in future compliance issues.

The beef hormone dispute also demonstrates the difficulties confronted by disagreements over the proper interpretation of WTO decisions. Specifically, the hormone case calls into question the proper procedure for dealing with such disagreements. The United States insists that the decision of the WTO requires the European Union to lift its hormone ban, while the European Union believes that the decision allows it to keep the ban in place and attempt to justify it by conducting scientific research.\textsuperscript{270} Because the two parties disagreed on how the fifteen-month implementation period should be used, further delays occurred and the hormone ban was not brought into compliance. Again the United States instituted sanctions, despite its desire to see the ban lifted. Some commentators have argued that the implementation period will become “a defacto
remand to the losing member, in which, at the end of the implementation period, the member's action is reviewed by the original panel for adequacy with the panel and/or Appellate Body's original decision.\textsuperscript{271} Such a consequence would render the reasonable time requirement of the DSU ineffective.\textsuperscript{272} The losing party to a WTO decision would know that it has over a year to reinterpret the decision and find an implementation method that skirts the desire of the winning party and falls short of full compliance. Without more stringent application of the DSU procedure, non-compliance will become more common.

The two disputes have also brought to light the unsettled issue of the compliance timeframe.\textsuperscript{273} In each of the two disputes there existed an initial question as to how long the reasonable time for compliance would be. Each case went to arbitration to determine the issue and each resulted in a fifteen-month timeframe. While these decisions helped to clarify the WTO's interpretation of a reasonable time, they also saw the losing party fail to achieve full compliance within that timeframe.\textsuperscript{274} A clear definition of reasonable time will be of little consequence if the losing party has no intention of complying with the WTO decision.

Finally, the disputes over beef and bananas show that the EU, and possibly others, may prefer to see the imposition of sanctions rather than comply with the WTO ruling. This disturbing trend will seriously undermine the effectiveness of the WTO dispute settlement process. Although the European Union has stopped short of outright rejection of the negative decisions, it has interpreted decisions in a way that falls short of full compliance and has caused lengthy delays. If disputes between the United States and European Union continually follow a lengthy process and result simply in the imposition of sanctions, member countries may be deterred from utilizing the WTO as the proper method of dispute resolution.

\textsuperscript{271} See Reif & Florestal, \textit{supra} note 130, at 783.
\textsuperscript{272} See Dispute Settlement Understanding, \textit{supra} note 128 and accompanying text.
\textsuperscript{273} See Reif & Florestal, \textit{supra} note 130, at 786.
\textsuperscript{274} See \textit{supra} notes 195-96 and 251-52 and accompanying text.
III. FACTORS OF COMPLIANCE: PROBLEMS WITH THE SYSTEM, INTERNATIONAL PRESSURES, AND THE THREAT TO SOVEREIGNTY

In addition to the compliance issues raised by the banana and beef disputes, several other factors may help determine the ability of the DSU to achieve compliance from losing parties to disputes. Certain structural aspects of the dispute settlement system lend themselves to greater non-compliance. On the other hand, several WTO experts argue that international pressures may be enough to assure compliance in the world trade market. Finally, many nations have espoused fear of loss of sovereignty with the advent of the WTO. Such a fear may manifest itself through lesser compliance with WTO rulings.

A. PROBLEMS WITH THE SYSTEM

One of the most significant differences between the WTO dispute resolution mechanism and that instituted under the GATT involves the creation of panels and adoption of their rulings. Each dispute settlement system begins with consultation and negotiation between the two parties. Upon the failure of this process, each system allows the formation of panels to resolve the dispute. Under the GATT, parties to a dispute had the ability to block panel formation or prevent the adoption of the panel ruling. The panel ruling would only be adopted by a unanimous vote of the contracting parties. This procedure changed under the WTO. A party to a dispute could not block the creation of a panel. Similarly, a party no longer has the power to singularly veto the adoption of a panel ruling. The panel ruling becomes binding on both parties.

The new procedure under the WTO has resulted in the creation of fewer panels. One leading WTO expert suggests two

275. See generally Hudec, supra note 1; Jackson, supra note 9; Schaefer, supra note 52; Gary Horlick, Dispute Resolution Mechanism: Will the United States Play by the Rules? 29 J. WORLD TRADE 163 (1995).
276. See Khansari, supra note 24 and accompanying text.
277. See id.
278. See Dispute Settlement Understanding, supra note 97 and accompanying text. "If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB’s agenda, unless at that meeting the DSB decides by consensus not to establish a panel." Id.
279. See Dispute Settlement Understanding, supra note 117 and accompanying text.
possible explanations for the reduction in panel formation under the WTO. First, the binding quality of the new procedure may persuade governments to remove illegal practices voluntarily. Second, governments may use legal complaints as negotiating tactics without the intention of actually carrying through with litigation.

Obviously, the binding nature of the WTO dispute resolution procedure has had strong effects in settling disputes. Once a complaint is brought against a party, that party can avoid the panel process through negotiation, but no longer has the ability to block the panel process. In the case where a party suffers a negative panel ruling it may bring an appeal. If the party is not successful upon appeal it usually has three options: (1) compliance with the WTO ruling; (2) maintenance of its illegal practice while compensating the losing party for its loss; or (3) complete disregard of the ruling. The disputes regarding beef and bananas have each resulted in the losing party choosing to disregard the WTO ruling.

The main objective behind making panel decisions valid law at the moment of inception was to eliminate delay and the lack of compliance. The beef and banana disputes, however, demonstrate that even without the ability to block panel decisions, the losing party can create lengthy delays and avoid compliance. Indeed, without the ability to block an adverse ruling, long delays and non-compliance may actually become more viable alternatives. While on the one hand the new binding nature of the DSU serves to bring more negotiated settlements and fewer panels, it may also result in greater non-compliance from losing parties.

Concerns about the appellate process may also produce greater non-compliance. One of the reasons for the creation of the appellate process was to alleviate the effects of the automatic adoption of panel rulings. While a majority of

280. See Khansari, supra note 3.
281. See id.
282. See supra notes 119-26 and accompanying text.
283. See International Staff, U.S. Beef, Fin. Times, July 2, 1997, at 27. Indicating that if the EU appeal fails in the beef hormone dispute, the European Union would have three options: "to lift the ban on hormone-treated beef; to maintain restrictions and compensate the United States for lost trade . . . ; or to ignore the ruling, which has been urged by France." Id.
284. See Khansari, supra note 86 and accompanying text.
experts express positive opinions of the Appellate Body's functioning in the first three years, some new concerns have arisen. Critics have pointed to two major concerns: (1) vagueness and lack of specificity within the ruling; and (2) inconsistency and contradictory reasoning. Such problems with the appellate process may undermine a party's faith in the system. As such, non-compliance may be seen as a more enticing solution.

B. INTERNATIONAL PRESSURES

Probably the most compelling factor leading to compliance is the desire to see a functioning legal process in the area of international trade. A leading WTO expert argues that the main reason the GATT achieved any success at all was due to a strong community consensus that every GATT member should have a right to have its legal claims heard by an impartial third-party decision-maker... Although compliance was not always forthcoming, the pressure to comply was almost always there once the community arrived at a consensus that the ruling was correct.

Obviously, compliance based on international pressures brings into question some of the other factors already discussed. International pressure to comply will not exist if a consensus cannot be reached regarding the correctness of the ruling. Similarly, a lack of faith in the appellate process may also reduce international pressures to comply. Ultimately, however, the international community will likely see the rule-based regulatory system as advantageous. A leading WTO expert suggests four advantages of such a system:

A rule-based system is the most resource-efficient way to resolve conflicts with other countries. A rule-based system is also the most effective way to negotiate and capture desired policy changes in achievable incremental steps. A rule-based system creates the most predictable conditions for business decisions. Finally, a rule-based system helps to cement one's own liberal trade policies against the internal political pressures of protectionism.

286. See id. at 193.
287. See id.
289. Hudec, supra note 1, at 9.
290. Id.
As such, increased faith in the rule-based regulatory system will lead to international pressures for losing countries to comply with WTO rulings.

C. THE THREAT TO SOVEREIGNTY

Since the creation of the WTO, member countries have worried that it may pose a risk to sovereignty or the ability to take necessary governmental actions on behalf of citizens. The United States conducted hearings to determine the effect of the WTO on United States sovereignty.291 Several critiques of the WTO resulted from sovereignty concerns. Critics argued against the ability of unknown bureaucrats to determine that United States laws violate international policy, and the United States' ability to impose unilateral sanctions.292 These sovereignty concerns could be used in the future to justify non-compliance with an adverse ruling.293

Indeed, the beef hormone dispute has seen the apprehension regarding sovereignty come to fruition. The European Union has, and continues to claim, that the WTO ruling infringes upon its right to determine the level of protection it deems appropriate for its own citizens.294 Because the European Union disagreed with the WTO decision, it chose an implementation course than led to further delays and non-compliance.295

If countries continue to see the WTO as infringing upon their sovereignty and do not see a viable means of settling the dispute, non-compliance may become an acceptable option. This presents a situation in which member nations simply choose between compliance and sanctions. Where sanctions represent the ultimate end of a given dispute, the WTO has failed in its attempt to achieve compliance and help settle disputes. Indeed, if superpower nations continue to choose sanctions over compliance, the WTO serves little purpose in the arena of dispute resolution. The disputes regarding beef and bananas demonstrate the WTO's failure to achieve compliance from superpower nations.

291. See Jackson Testimony, supra note 9.
292. See Schaefer, supra note 52, at 333-36.
293. This can also be attributed to the inability to block panel rulings. In a situation in which the losing party feels that its sovereignty has been infringed upon, its only real option may be non-compliance.
294. See Buckley, supra note 226 and accompanying text.
295. See supra notes 225-31 and accompanying text.
IV. CONCLUSION

One of the main reasons for the creation of the WTO and its new dispute settlement process was to eliminate much of the delay and subsequent lack of compliance associated with GATT's dispute settlement mechanism. The WTO institutes a dispute resolution mechanism more rule-oriented than its predecessor. It also prevents parties to a dispute from blocking panel rulings. At the same time, the current disputes between the United States and the European Union regarding bananas and beef hormones demonstrate the WTO's inability to achieve compliance from superpower nations. Each case has seen lengthy delays, disagreements as to the interpretation of WTO rulings, and ultimately, non-compliance from the losing party. The banana and beef hormone disputes reveal that the WTO, like its GATT counterpart, is ineffective at preventing both delay and non-compliance. Without an ability to effectively settle disputes, especially those between superpower nations, the WTO serves little purpose in the dispute settlement arena.