January 24, 2009

WTO DISPUTE RESOLUTION: SHORT-TERM SOLUTIONS PROVIDING THE FOUNDATION FOR LONG-TERM TRADE AGREEMENTS

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Comment

Patrick Delaney

Introduction

When the majority of people around the world wake up their most immediate concerns do not usually involve where the banana they ate for breakfast or cotton shirt they wore to work came from. While most would answer this question by looking at the label indicating where the product was manufactured or processed, few would consider the country where the commodity of cotton or bananas originated. This is the job of the enigmatic World Trade Organization (“WTO”). The WTO regulates trade agreements among its members in order to improve market access for commodities and goods manufactured and produced around the world.

During an interview regarding her role in the movie BATTLE IN SEATTLE, the actress Charlize Theron commented “when [someone] said ‘WTO’ . . . I didn’t really truly know what the whole thing was . . . [and] it affects everything in our lives . . . from the moment you get up in the morning . . . .”

Although Ms. Theron’s comment may have an ominous undertone, its premise is true. Whether one is a citizen of the United States, the United Kingdom, China, or a member of the

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1 Student, St. Thomas University School of Law in Miami, Florida. Juris Doctor candidate. Expected graduation in May 2010. Member of the St. Thomas University Law Review
3 WTO Basics, supra note 2.
4 BATTLE IN SEATTLE (Redwood Palms Pictures 2008). The film provides an account of the 1999 protests of the WTO Ministerial conference in Seattle, Washington. Id.
5 Interview by John Stewart with Charlize Theron, on The Daily Show (Sept. 17, 2008).
European Union, most of the goods we use or consume are not manufactured within our home country.\(^6\) The WTO provides a venue for its Members to trade their goods freely.\(^7\) Members of the WTO subject themselves to the WTO rules governing trade agreements, and in the event a Member gains an unfair trade advantage, the Dispute Settlement Body of the WTO exists as a neutral forum to settle disputes.\(^8\) While this ruled-based system was held as an immense improvement from its predecessor, the General Agreement on Tariffs and Trade,\(^9\) high-profile trade disputes have shown the shortfalls of the Dispute Settlement process specifically concerning compliance with WTO rulings and the adequacy of remedies available to WTO Members. Lingering questions concerning the Dispute Settlement process have led Members to approach Dispute Settlement not as a remedy to an unfair practice, but view the decisions of the Dispute Settlement Body as a short-term solution, which provides the foundation for long-term trade agreements.

This comment will examine the effects of the procedural elements of the World Trade Organization’s Dispute Settlement process and how that procedure is influencing the trade negotiations of the Doha Development Agenda. Part I will provide a background on how trade disputes between member countries are settled within the WTO.\(^10\) Part II discusses the Doha Development Agenda, its progress, and the importance of agriculture within the negotiations.\(^11\) Part III will be an examination of high-profile agriculture cases settled by the WTO and their

\(^6\) See WORLD TRADE ORGANIZATION, INTERNATIONAL TRADE STATISTICS 2008, WORLD TRADE DEVELOPMENTS IN 2007, http://www.wto.org/english/res_e/statis_e/its2008_e/its08_merch_trade_product_e.pdf (last visited Nov. 17, 2008) (showing the range of commodities that are traded among nations. No one country produces all the products necessary for its citizens).

\(^7\) See WTO Basics, supra note 2.


\(^10\) See infra Part I.

\(^11\) See infra Part II.
lingering effects. Part IV will analyze the Dispute Settlement cases from Part III and how those cases are influencing the Doha Development Agenda. And finally, Part V will propose solutions to the compliance and remedy issues of Dispute Settlement and how these solutions can aide in the completion of the Doha Development Agenda.

Part I - World Trade Organization Dispute Settlement

Since its inception, the WTO dispute settlement function has received more attention than any other area in which it operates. Trade disputes within the WTO are resolved through the Dispute Settlement Body ("DSB"). The DSB is governed by the Dispute Settlement Understanding ("DSU"). The function of the DSU’s rule-based text is to provide member countries with a legal forum in which to combat the unfair trade practices of other WTO members.

Countries engaged in trade negotiations strive to improve their comparative advantage in the world market. In the arena of international trade, advantages are sporadically gained through unfair trade practices such as subsidies, dumping, countervailing duties, or subsidies are "[a] grant made by a government to any enterprise whose promotion is considered to be in the public interest." BLACK’S LAW DICTIONARY 1469 (8th ed. 2004).
imposing tariff-rate quotas on certain traded goods.\textsuperscript{22} The goal of any international trade agreement is to create wealth by expanding the market access of the countries involved, with the goal of raising the real living standards of its citizens.\textsuperscript{23} Before 1994, most international trade agreements whether bilateral or multilateral were governed by the General Agreement on Tariffs and Trade ("GATT").\textsuperscript{24} With the creation of the WTO in 1995, members, for the first time, had a neutral international forum with which to bring a trade dispute.\textsuperscript{25} The original Members of the WTO knew the dispute settlement process was a significant improvement from provisions under GATT.\textsuperscript{26} However, in recent years, procedural issues have arisen with dispute resolution regarding the timing of disputes, compliance with DSB rulings, and the availability of adequate remedies.\textsuperscript{27} These procedural problems have in turn demonstrated their influence on the Doha

\textsuperscript{20} Dumping is "[t]he act of selling a large quantity of goods at less than fair value." \textit{Id.} at 540. A country will flood a foreign market with a product and offer the product at a lower price than the market value. \textit{Id.} This practice lowers the value of the market on two levels since the high volume will drive the price down, and the significantly low price forces the domestic manufacturers of the product to lower their prices as well just to compete. \textit{Id.} "Dumping is generally recognized as an unfair trade practice because it can disrupt markets and injure producers of competitive products in an importing country." EDWARD G. HINKELMAN, DICTIONARY OF INTERNATIONAL TRADE 62 (6th ed. World Trade Press 2005) (1994).

\textsuperscript{21} A countervailing duty is "[a] tax imposed on manufacturers of imported goods to protect domestic industry by offsetting subsidies given by foreign governments to those manufacturers." BLACK'S \textit{supra} note 19 at 545.

\textsuperscript{22} Trade barriers are "[a]ny one or group of tariff or non-tariff barriers to trade." HINKELMAN, \textit{supra} note 20 at 170. In the present context members are concerned with both countervailing duties and tariff-rate quotas, which are "an [a]plication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate." \textit{Id.} at 165.


\textsuperscript{24} See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. GATT was originally agreed to in 1947, as an attempt to create and improve trade relations among countries in the wake of World War II. This version of GATT is referred to as GATT '47. GATT operated from 1947 through 1994, and provided for world trade while presiding over some of the highest growth rates in international commerce. World Trade Organization, Basics, \textit{supra} note 3. While GATT’s success in promoting the liberalization of world trade is incontestable, it began to outlive its relevancy in the 1980’s with the early stages of the globalization of the world economy. \textit{Id.} Therefore, in 1994, GATT was amended and adopted as part of the WTO agreements. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187. Under the new amendments, GATT has become referred to as “GATT ’94.”

\textsuperscript{25} See GRIMMETT, \textit{supra} note 9 at 2.


\textsuperscript{27} See infra Part II; see Meier-Kaienburg, \textit{supra} note 14 at, 208 – 220 (discussing the effectiveness of the WTO Dispute Settlement procedure); see also Shin-yi Peng, \textit{How Much Time is Reasonable? -- The Arbitral Decisions Under Article 21.3(c) of the DSU}, 26 BERK J. INT’L L. 323, 324 – 333 (2008) (discussing inconsistent measures in the WTO); see also Thomas Sebastian, \textit{World Trade Organization Remedies and the Assessment of Proportionality}:
Development Agenda trade round. To understand the procedural difficulties within the DSU, one must first examine the DSU process itself.

A WTO member (“Member”) begins the DSU process by first requesting a consultation with the non-compliant Member (“defending Member”), and the latter has ten days in which to respond. Consultations between the complaining and defending Members must begin within 30 days of the initial request “with a view of reaching a mutually satisfactory solution.” The initial request for consultation is an attempt to encourage a settlement between the disputing Members. If a solution cannot be reached through the bi-lateral negotiations, then the complaining Member may request a dispute panel (“Panel”).

A Panel consists of three persons who are “well-qualified 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 . . . .” The Secretariat of the WTO has the initial input as to the makeup of the Panel. The Secretariat first proposes a list of names to the complaining and defending Members for their approval. Members are generally not allowed to object to the Panel, unless they have “compelling

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28 Dispute Settlement Understanding, supra note 16 at art. 4 §3.
29 Id.
30 See GRIMMETT, supra note 9 at 3.
31 Dispute Settlement Understanding, supra note 16 at art. 4 §3.
32 Id. at art. 6 §1. “Composition of the Panel is one of the most important aspects of any WTO dispute.” Meier-Kaienburg, supra note 8 at 215. “There is no permanent Panel at the WTO; rather, a different Panel is composed for each dispute on an ad hoc basis.” Id.
33 See Meier-Kaienburg, supra note 13 at 215.
34 See Meier-Kaienburg, supra note 16 at art. 6 §4, §6.
reasons.”

If an agreement is not reached within 20 days of the establishment of the Panel, then the Director General of the WTO, along with the Chairman of the DSB, shall decide the final composition of the Panel, and inform the Members within ten days of their decision.

After reviewing written and oral arguments from the complaining and defending Members, the Panel will issue a report of its findings to the DSB. “[T]he report of a Panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.” The Panel report is submitted to the DSB and the Members of the dispute. The complaining and defending Members have up to 20 days to make objections to the Panel findings. If there are no objections, the Panel report will be adopted after 20 days. A Panel generally should submit its report within six months of establishment, however, the Panel may request extra time should it be deemed necessary. Extra time notwithstanding, pursuant to Article 12, section 9 of the DSU, the Panel process should not exceed nine months from the establishment of the Panel. Unless a Member objects

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36 Id. at art. 6 §6. “Compelling reasons” is not defined per the DSU; however, citizens of Members who are parties to a dispute are barred from serving on the Panel. Id. at art. 8 §3. This exemption can be waived by a mutual agreement between the parties to the dispute. Id. “It has become more common for the Director General to appoint the Panel. Approximately eighty percent of the time the selection of the panelists falls to the Director-General.” Meier-Kaienburg, supra note 13 at 216. Citizens of four countries: Australia, Canada, New Zealand, and Switzerland, have made up nearly one third of all WTO Panel positions. Id.

37 Dispute Settlement Understanding, supra note 16 at art. 6 §7.

38 Id.

39 Id.

40 Id.

41 Id. at art. 16 §1.

42 Id. at art. 16 §1. While the DSU language of requiring a consensus vote remains the same from GATT, Panel reports in the WTO are adopted by a reverse consensus vote. Dispute Settlement Understanding, supra note 16 at art. 16 §1. This means a Panel report will be adopted unless every member of the WTO objected to its findings. Id. Therefore, a WTO member cannot block the adoption of a Panel report by simply voting it down. Id.

43 Id. at art. 12 §9. The DSU language is ambiguous concerning when additional time may be granted.

When the panel considers that it cannot issue its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will issue its report. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.

Id.
to the Panel report and files a notice of appeal,\textsuperscript{45} or the DSB decides not to adopt the report, the Panel report will be adopted within 60 days of its circulations to the Members.\textsuperscript{46}

In the event either the complaining or defending Member files a notice of appeal with the DSB, an appellate body will be commissioned to hear the Member’s appeal.\textsuperscript{47} A standing appellate body consisting of seven Members hears all appeals of the Panel reports.\textsuperscript{48} While the proceedings of the appeal are kept confidential, pursuant to the DSU rules, an appeal is limited to the legal matters covered in the panel report.\textsuperscript{49} The appellate body must release a report within 60 days of the appeal unless the Body determines additional time is necessary, in which case an additional 30 days may be granted.\textsuperscript{50} Upon a determination of the legal issues presented in the dispute, the Appellate Body will present a report to the DSB.\textsuperscript{51}

If the defending Member receives a negative ruling, either through an appeal or the initial Panel report regarding their trade practices, the Member has 30 days after the adoption of the Panel report to inform the DSB of their implementation plans to correct the trade imbalance.\textsuperscript{52} If

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\textsuperscript{45} Id. at art. 17 §4.
\textsuperscript{46} Dispute Settlement Understanding, supra note 15 at art. 16 §4. In addition, “[i]f a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.” Id.
\textsuperscript{47} Id. at art. 17 §1.
\textsuperscript{48} Id. at art. 17 §1. The members of the Appellate Body are to be “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreement generally.” Id. at art. 17 §3. This section also notes that the members of the Appellate body are not to be employees of any government, therefore the Trade Ministers to the WTO, or any appointee cannot serve on the Appellate Body. Dispute Settlement Understanding, supra note 16 at art. 17 §3. This is interesting since the decisions of the WTO are made by the Members through a consensus vote. Id. at art. 2 §4. Therefore the Appellate Body is one of the only entities within the WTO where the WTO staff actually makes a decision affecting trade. See World Trade Organization, Understanding the WTO: Appellate Body, http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Nov. 18, 2008).
\textsuperscript{49} Dispute Settlement Understanding, supra note 16 at art. 21 §6.
\textsuperscript{50} Id. at § 5. The DSU is clear in its language concerning appeals when it reads, “[i]n no case shall [the appeal] proceedings exceed 90 days.” Id.
\textsuperscript{51} Much like an American appeals court, the appellate body can make legal determinations regarding the dispute, and uphold, modify, or reverse the panel’s findings. Id. “The appellate body may uphold, modify or reverse the legal findings and conclusions of the panel.” Id. at art. 21 §13.
\textsuperscript{52} Id. art. 21 §3.
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the Member believes that it is “impracticable to comply immediately”\(^{53}\) with the Panel report, the Member can request an extension for a “reasonable period of time”\(^{54}\) to comply with the report.\(^{55}\)

In the event the defending Member fails to comply with the Panel decision within the established timeframe, pursuant to Article 22, retaliatory remedies are available to the complaining member should the DSB agree to the measures.\(^{56}\) In order to seek a retaliatory sanction the complaining Member must begin negotiations with the defending member within the timeframe established by the Panel report pursuant to Article 21 of the DSU.\(^{57}\) If the Members cannot agree on a satisfactory trade remedy within 20 days after the “reasonable period of time” has expired, the complaining Member may request to suspend certain trade concessions

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53 Dispute Settlement Understanding, supra note 16 at art. 21 §3.
54 Id. The “reasonable period of time” can be determined by one of three ways: 1) the Member may propose a time which is subject to the approval of the DSB; 2) the parties to the dispute can mutually agree on a time, but it must be agreed to within 45 days of the adoption of the report; or 3) a period of time determined by binding arbitration which must be completed within 90 days of the adoption of the Panel report. Id. In the event the time is determined through arbitration, the reasonable period of time is not to exceed 15 months. Id. art. 21 §3(c).
55 Article 21 of the DSU has come under increasing scrutiny on its own, due to its ambiguous language. Professor Shin-yi Peng has noted “no matter how carefully and precisely negotiated, the rules in the WTO Agreements maintain their value only if a system for resolving disputes is in place to allow the expeditious application and reliable enforcement of the rules.” Peng, supra note 27 at 324 (discussing inconsistent measures in the WTO). Professor Peng goes on to list the most frequently raised factors by parties to the arbitrators when calculating the “reasonable period of time.” Id. These factor include “(1) legislative procedures; (2) political sensitivity; (3) general economic matters; (4) congressional schedule; (5) developing country’s special attention claim; (6) particular political events; (7) other international obligations; (8) fiscal difficulty; (9) scientific studies; and (10) punitive deadlines.” Id. at 332. The concept of being unable to comply immediately with a panel report goes hand in hand with requesting a reasonable period of time. Reasons for not being able to comply with the panel have varied. See id. The United States has argued that a Presidential election year would make it difficult to comply, which the arbitrator rejected. See id. at 335 – 36. Korea argued that it would need to enact a legislative amendment to its Liquor Tax Act in order to comply with a panel report for the EC – Korea Alcoholic Beverages dispute. See id. at 334. The arbitrator found this to be a legitimate excuse, and extended an additional 15 months of time. See Peng, supra note 27 at 334. Members have also cited economic crises for being unable to comply immediately. Id. at 340. During the Argentina-Bovine Hides dispute, Argentina requested an additional 46 months to comply with the panel, because their financial situation “had seriously deteriorated over the past years.” Id. at 341. The arbitrator in this case cited a ruling from a previous dispute case and stated “‘some degree of adjustment by the domestic industry ‘will be necessary in order for the member to come into compliance. Consequently, the arbitrator determined that difficult structural adjustments should not be relevant . . . .’” Id. at 340
56 Dispute Settlement Understanding, supra note 16 at art. 22 §2.
57 This could create a sequencing problem, since the Complaining Member must request a consultation with the Defending Member regarding their non-compliance with the DSB Panel report, within the timeframe in which the Defending Member has to comply. See GRIMMETT, supra note 9 at 4.
covered in the WTO agreements.\textsuperscript{58} Should the DSB approve the removal of the concession the result is the complaining Member takes a retaliatory trade advantage over some other product or service, which it previously conceded to the defending Member.\textsuperscript{59}

While the Dispute Settlement process provides a forum for Members to resolve their ongoing trade disputes, as the diagram on the following page illustrates, the process is one that is cumbersome and slow, and does not always result in a favorable outcome for the complaining party.\textsuperscript{60}

\textsuperscript{58} Dispute Settlement Understanding, \textit{supra} note 16 at art. 22 §2. This provision of the DSU has also come under criticism due to the seemingly arbitrary nature of the DSB remedies. \textit{See} Sebastian, \textit{supra} note 27 at 350 – 60 (discussing the different retaliatory measures available to WTO Members). Two basic remedy approaches are available to a retaliating member. \textit{See id.} Arbitrators will consider, at the request of the Complaining Member either the equality-of-harm approach or the amount-of-subsidy approach. \textit{See id.} The equality-of-harm approach is essentially a 1:1 ratio of harm. \textit{See id.} at 350. The amount of trade in dollars blocked by the defending member should equal the amount received in monetary payments or sanctions given to the complaining member. \textit{See id.} at 350-51. The amount-of-subsidy approach has “consistently been a matter of controversy between the [disputing] parties.” \textit{Id.} at 357. To apply the amount-of-subsidy approach the “value of trade from the defending member affected by the complaining members retaliatory response \textit{must} equal the amount of subsidy involved in the underlying violation by the defending member.” Sebastian, \textit{supra} note 27 at 358.


The Dispute Settlement Process of the WTO

Since the inception of the DSU, the Members of the WTO have shown an increased willingness to operate their trade practices without regard for possible sanctions from the DSB.\(^6\) This increased willingness, however, is not an attempt to gain an advantage from a temporary unfair trade practice, but more an act of defiance in an attempt to bring Members back to the table in order to renegotiate trade agreements and achieve a long-term solution. Dispute Settlement is expensive and can be a risky investment for Members who must hire private firms for the litigation;\(^6\) often times the remedies available to the complaining Member are untimely or inadequate to address the effects of the unfair advantage they have suffered.\(^6\) Therefore, Members are enticed to seek long-term solutions via protracted multi-lateral trade rounds such as the Doha Development Agenda.

**Part II – The Doha Development Agenda**

On November 9, 2001, trade representatives from WTO Member countries met in Doha, Qatar for the Fourth WTO Ministerial Conference.\(^6\) At Doha, Member countries agreed to

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\(^6\) From January 1995 to October 2008, 381 disputes were settled by the DSB. World Trade Organization, The Disputes, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes (last visited Nov. 18, 2008). China is a good example of this willingness to operate outside the trade rules without regard for DSB. Since China’s assertion to the WTO in 2001, they have participated as the respondent in eleven DSB hearings. Id. Ten of those eleven hearings came post 2006, and the first complaint filed against China occurred in 2004. Id.

\(^6\) See Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement*, 9 J. INTL ECON L. 427, 429 (2006). The estimated cost of one trade dispute taken to the appellate body is approximately $500,000. *See id.* The length and cumbersome nature of the dispute settlement process again is illustrated by the diagram. *See World Trade Organization, Dispute Settlement Diagram, supra note 61.*

\(^6\) See Sebastian, *supra* note 27 *passim*. Sebastian’s argument is the WTO’s monetary sanctions fall into two categories, the Equality of Harm approach and the Amount of Subsidy approach. *See supra* note 58. The allowable monetary amount for a sanction largely depends on the approach of an arbitration panel, and while arbitration panels attempt to use the different approaches for specific unfair trade practices, there is no defining regulation which dictates a panel, must use one approach over the other. *See id.*

\(^6\) See IAN F. FERGUSSON, THE WORLD TRADE ORGANIZATION NEGOTIATIONS: THE DOHA DEVELOPMENT AGENDA 2 (CRS Report for Congress, Congressional Research Service January 18, 2008). The Ministerial Conference represents the highest-level body in the WTO. *See id.* It consists of political trade representatives from each Member country. *See id.* The Ministerial Conference must meet at least every two years, and its function is to examine the existing trade programs and set the agenda for future trade negotiations. *See id.* The DDA has been the main function of the Ministerial Conference meetings since 2003. For a detailed diagram of the WTO’s organizational structure, refer to Appendix - I.
begin a new round of trade negotiations. This round of negotiations has become known as the Doha Development Agenda (“DDA”). The Doha Ministerial Conference adopted a declaration (“Doha Ministerial Declaration”) designed to guide the DDA, which merged on-going negotiations on agriculture and trade-in-services into the broader focus of the DDA. As a result, agriculture was thrust to the forefront of the new DDA negotiations. Trade ministers agreed the DDA would be one comprehensive agreement, meaning none of the provisions of the trade negotiations would become final until the entire agreement was final. The DDA’s ultimate goal was to expand trade liberalization for agriculture products and to integrate developing countries into the world trading system. However, since the beginning of the

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66 Id.
68 See FERGUSSON, supra note 65 at 2.
69 See id. The Uruguay Round of negotiations, required certain WTO member countries to engage in ongoing negotiations related to agriculture and trade-in-services. See id. at 2 – 3.
70 See id. The Uruguay Round of negotiations, required certain WTO member countries to engage in ongoing negotiations related to agriculture and trade-in-services. See id. at 2 – 3.
71 See id. The Uruguay Round of negotiations, required certain WTO member countries to engage in ongoing negotiations related to agriculture and trade-in-services. See id. at 2 – 3.
72 The WTO classifies member countries into three categories, developed, developing, and least developed. World Trade Organization, Understanding the WTO: The Organization, http://www.wto.org/english/tratop_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 6, 2008). A developed country is “one of the more industrialized nations-including all Organization for Economic Cooperation and Development member countries.” HINKELMAN, supra note 20 at 57. A developing country is characterized by “lack[ing] a high degree of industrialization, infrastructure and other capital investment, sophisticated technology, widespread literacy, and advanced living standards among their population as a whole.” Id. at 58. Approximately two-thirds of the WTO’s 153 members are classified as developing countries. World Trade Organization, Understanding the WTO: Developing Countries, (2008) http://www.wto.org/english/tratop_e/whatis_e/tif_e/dev1_e.htm (last visited Nov. 6, 2008) [hereinafter WTO Developing Countries]. Least developed countries are “generally characterized by low: per capita incomes, literacy levels, and medical standards; subsistence agriculture, and a lack of exploitable minerals and competitive industries.” HINKELMAN, supra note 20 at 112. “The least-developed countries receive extra attention in the WTO. All the WTO agreements recognize that they must benefit from the greatest possible flexibility, and better-off members must make extra efforts to lower import barriers on least-developed countries’ exports.” WTO Developing Countries, http://www.wto.org/english/tratop_e/whatis_e/tif_e/dev1_e.htm (last visited Nov. 6, 2008). Developing and least developed countries are afforded certain privileges, not available to developed Members of the WTO, in order to compensate for their status. See World Trade Organization, Development: Definition, http://www.wto.org/english/tratop_e/develop_e/d1who_e.htm (last visited Nov. 19, 2008). These privileges often consist of longer transition periods before a developing or least developed country is required to fully comply with a trade agreement. Id. In addition, technical assistance is also available to both developing and least developed Members of the WTO. Id.
DDA negotiations, agriculture has been the source of repeated breakdowns and suspensions in trade talks.  

Substantive negotiations on the DDA began in 2003, at the Fifth Ministerial Conference held in Cancun, Mexico (“Cancun Ministerial”). The Cancun Ministerial provided Members the opportunity to determine the future of the DDA negotiations, and served as a progress report for the DDA negotiations. Nevertheless, Member countries began to show their fundamental disagreements concerning agriculture. Ultimately, the Cancun Ministerial failed to develop a plan for continuing the DDA, or establish an agreement between Members on modalities.

Following the Cancun Ministerial, on July 31, 2004, WTO Member countries were able to reach an agreement that would provide the framework for the future of the DDA negotiations concerning agriculture (“the July Framework”). The July Framework “set the stage for negotiations to determine modalities for curbing trade-distorting domestic support, reducing trade barriers and eliminating export subsidies.” Through the July Framework, Members

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One of the first, and most important outcomes of the Doha Ministerial Conference was the inclusion of developing countries into the multilateral negotiations. See FERGUSSON, supra note 65 at 3. Since the beginning of GATT, international trade was usually conducted by developed countries such as the United States, the United Kingdom, France . . . etc; however, amid the controversy during the 1999 Seattle Ministerial Conference, developing countries within the WTO were successful in gaining a voice in the next round of negotiations. See id. Developing countries were able to convince the developed countries that they would not support another round of multilateral negotiations unless the developed countries realized some concessions up-front and the new trade agenda included the interests of the developing countries. See id.


79 Id.

80 See FERGUSSON supra note 65.
agreed to: (1) establish detailed modalities with the goal of eliminating all export subsidies at an agreed upon future date; (2) establish a three-tiered system to substantially reduce trade-distorting domestic support; and (3) all Members, except those who are classified as Least Developed Countries agreed to improve market access through a tiered system with larger reductions for countries placed in the higher tiers. ⁸¹

Negotiations continued in December 2005, with the Sixth Ministerial Conference in Hong Kong (“Hong Kong Ministerial”). ⁸² While the DDA’s initial deadline of January 1, 2005, had already passed, negotiations on the pillars established in the July Framework were to continue during the Hong Kong Ministerial, and a deadline of April 30, 2006, was set for a final agreement on the agriculture pillars. ⁸³ Progress on the negotiations during the Hong Kong Ministerial was slow but significant, and when the Hong Kong Declaration was released, the pillar of export subsidies showed concrete progress. ⁸⁴ The Hong Kong declaration set the year 2013, as the official deadline for the elimination of subsidies. ⁸⁵ Members also agreed to the three-tiered system to combat domestic support subsidies and agreed that the percentages within the tiers would be determined through the proposals to be submitted by July 31, 2006. ⁸⁶ In prevailing in international trade. These include direct payments to producers, and input and market cost reduction measures available only for agriculture production.” WTO Glossary, supra note 78. An export subsidy is “a benefit conferred on a firm [or producer] by the government that is contingent on exports.” Id. Unlink domestic support subsidies; export subsidies are directly linked to exports. Id. ⁸¹ See HANRAHAN & RANDY SCHNEPF, supra note 73 at 27.
 ⁸² See Doha Negotiations and Implementations, supra note 67.
 ⁸³ See Id; see also HANRAHAN & SCHNEPF, supra note 73 at 5. Members agreed to submit their draft proposals of the modalities within the pillars before July 31, 2006, which would allow the DDA to be completed by 2006. See Doha Work Programme, supra note 79.
 ⁸⁴ See HANRAHAN & SCHNEPF, supra note 73 at 5.
 ⁸⁵ See World Trade Organization, Ministerial Declaration of 22 Dec. 2005, WT/MIN(05)/DEC/22 [hereinafter Hong Kong Declaration].
 ⁸⁶ Id. at para. 6. The three tiers would have set percentages for reduction commitments for all WTO Members with Members in the highest tier being subject to the largest reductions. See HANRAHAN & SCHNEPF, supra note 73 at 6 – 7. The EU would be place in the highest tier, the United States and Japan would be in the middle tier and all other WTO Members including developing countries would be in the bottom tier. See id. The reductions within the tiers would also correspond to the WTO system of classifying domestic subsidies. See id. The WTO classifies permissible agriculture domestic subsidies into three “Boxes,” amber box, blue box and green box. WTO Glossary, supra note 78. Amber box domestic support is considered the most harmful because they distort trade and are
addition, a four-tiered system was agreed to for improving market access and combating trade barriers.\textsuperscript{87} Once again, the percentages and numbers on the modalities were to be determined from the Members proposals.\textsuperscript{88}

Perhaps the most important agreement during the Hong Kong Ministerial specifically involved cotton. Enumerated within the Hong Kong Declaration was the agreement to “address cotton ambitiously, expeditiously, and specifically” within the framework of the three pillars outlined for the DDA.\textsuperscript{89} This was a significant development. The U.S. had just lost a DSB Panel hearing and an appeal with Brazil, and had been instructed to comply with the Panel report immediately.\textsuperscript{90} With cotton specifically enumerated in the Hong Kong Declaration, a final DDA agreement would have to include a final agreement on domestic support subsidies on cotton.\textsuperscript{91} Unlike Brazil, developing and least developed Members in Africa who were affected by the U.S.’s cotton domestic subsidy programs began bypassing the DSU process and seeking long-term relief within the DDA negotiations.\textsuperscript{92}

\textsuperscript{87} See Hong Kong Declaration, supra note 85 at para. 7.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} See infra Part III, Brazil – U.S. Subsidies on Upland Cotton; see also Panel Report, United States – Subsidies on Upland Cotton, WT/DS267/7 (Sept. 8, 2004); see also Appellate Body Report, United States – Subsidies on Upland Cotton, WT/DS267/7 (March 3, 2005).
\textsuperscript{91} See FERGUSSON, supra note 71 at 3. This is due to the single undertaking required for the completion of the DDA. Id.
\textsuperscript{92} See Karen Halverson Cross, King Cotton, Developing Countries and the ‘Peace Clause’: The WTO’s US Cotton Dispute Decision, 9 J. INT’L. ECON. L. 149, 168 (2006). Four countries within Africa, Benin, Burkina Faso, Chad and Mali, initially proposed the initiative to include cotton as part of the DDA in May of 2003. See id. All of these Members are considered least developed countries within the WTO. World Trade Organization, Understanding the WTO: The Organization, Least Developed Countries (2008). http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last visited Nov. 6, 2008). Cotton is the main source of economic production for these countries therefore any unfair trade practice that distorted the price of cotton would have a draconian effect on the economy and living standards of these Members because their main export would be devalued and possibly taken away altogether. See Central Intelligence Agency, CIA – The World Factbook, http://www.cia.gov/library/publications/the-world-factbook/; Telephone Interview with Representative of the Delegation of the European Communities, Trade Section (Oct. 16, 2008) [hereinafter EC Representative Interview]. Although a DSB settlement could be the only mechanism to save these domestic industries; WTO
The work completed at the Hong Kong Ministerial was overshadowed by the Member countries inability to reach a common ground, and on July 24, 2006, WTO Director Pascal Lamy announced the suspension of the DDA negotiations. The principal cause for the suspensions was that a core group of WTO Member countries had reached an impasse over specific methods to achieve the broad aims of the [DDA]. Specifically, the proposals revealed the Members were at loggerheads on the modalities relating to market access and domestic support.

The United States, the European Communities (“EC”), Brazil, and India continued to work in multilateral meetings on the impasses in the DDA. Following their continued efforts, Director Lamy announced the DDA negotiations had officially resumed on January 31, 2007, with the aim of concluding the round by 2007. Once again, the 2007 deadline passed without a final agreement being reached. Finally, in July 2008, WTO members met in Geneva in hope of finalizing the DDA. Unfortunately, after nine days of negotiating, the talks were suspended after the United States, China, and India could not reach an agreement on Special Safeguard Measures (“SSM”) related to agriculture. In the event an agreement had been reached on dispute resolution can become cost prohibitive for a least developed country in this circumstance when the entire issue can be addressed via the ongoing trade negotiations which an which a developing or least developed Member will automatically take part in. See Mosoti, supra note 63 at 429.

93 See FERGUSSON, supra note 65 at 6.
94 Id.
95 See id. Market access and domestic support were exactly the issues being addressed by the EC-Bananas and U.S.-Subsidies on Upland Cotton disputes; Bananas being affected by market access, and Cotton being affected by the domestic support programs of the United States.
96 See HANRAHAN & SCHNEPF, supra note 73 at 3.
97 See id.
98 See id.
99 See id. at 6.
101 Id.; see also American Enterprise Institute, Events, The Collapse of the WTO Doha Round Trade Talks: Implications and Future Options, http://www.aei.org/events/filter.all,EventID.1767/transcript.asp (last visited Nov. 6, 2008) [hereinafter AEI Doha Roundtable]. SSM’s are a temporary increase on an import duty in order to offset a surge of imports for a specific product or commodity. See WTO Glossary, supra note 78. The SSM is an agreed modality number, which when reached triggers the increase in the import duty on a specific product. Id. The goal is to protect a specific domestic industry which could be seriously harmed by an increase in imports. World Trade
SSM’s, cotton was to be the next item on the agenda, which could have produced a breakdown itself depending on the veracity of developing countries in approaching the subject.\textsuperscript{101}

One may ask, why is agriculture causing all of the problems with the DDA? “It is precisely [because] agriculture earnings are so important to developing countries that [developing countries] target the highly protective farm policies of a few wealthy countries in the WTO negotiations.”\textsuperscript{102} Agriculture is one of the most basic forms of trade because it is practiced in every country; and it does not require industrialization or a highly trained work force.\textsuperscript{103} This also can present problems, since every country has a form of agriculture, and most countries impose high tariffs and practice a form of protectionism.\textsuperscript{104}

All countries engaged in trade agreements, whether developed, developing, or the least developed, are constantly in search of revenue.\textsuperscript{105} Developing countries are frequently trying to improve their access to the markets of developed countries for their farm products, where their goods will generate greater value for the developing country.\textsuperscript{106} For a developing country, the market access opportunities in agriculture are more prevalent and have a higher degree of probable success than trade in other sectors.\textsuperscript{107} It was not until the WTO was established in

\textsuperscript{101} EC Representative Interview, supra note 92.
\textsuperscript{102} Kym Anderson & Will Martin, Agriculture Trade Reform and the Doha Development Agenda 4 (Palgrave McMillan and World Bank, 2006).
\textsuperscript{103} See id.
\textsuperscript{104} Protectionism is “[t]he deliberate use or encouragement of restrictions on imports to enable relatively inefficient domestic producers to compete successfully with foreign producers.” Hinkelman, supra note 20 at 143.
\textsuperscript{105} It is a misconception that free trade creates or destroys jobs. See Glassman, supra note 18. Trade creates wealth within a country, which ultimately raises the overall standard of living. See Tupy, supra note 23 at A13. While, trade may reallocate jobs among countries engaged in trade agreements; the best jobs for a particular country will remain, so countries can focus their efforts on what it produces better than anyone else. See Glassman, supra note 18. Countries also engage in trade for imports, not exports. See id. We pay for the imports we receive with the exports we produce that other countries both need and want. See id.
\textsuperscript{106} See Anderson & Martin, supra note 102 at 4.
\textsuperscript{107} See id.
1995, that countries began negotiating agricultural provisions of trade agreements on a multilateral level.\textsuperscript{108} “If agriculture were to be ignored in the Doha negotiations, there is a risk that [increased] protectionism would start rising again.”\textsuperscript{109}

“Trade in agriculture products accounts for less than ten percent of world merchandise exports but is perhaps the most volatile of trade issues.”\textsuperscript{110} “In small undeveloped countries, agriculture represents an accessible means by which governments can establish productive industries to raise the standard of living for its citizens.”\textsuperscript{111} Since the inception of the WTO, 26 of the 379 dispute cases filed with the DSB have concerned agriculture products, and 19 of the 26 agriculture cases have been filed since 2002, after the DDA negotiations began.\textsuperscript{112} Of the countless amount of agriculture products traded internationally, few have garnered as much attention as bananas and cotton.\textsuperscript{113}

Part III - The Agriculture Disputes

United States – European Communities, Banana Dispute

The U.S.-EC Banana Dispute initially highlighted the shortfalls of the DSU process.\textsuperscript{114} “The banana case was one of the first opportunities for the WTO to test its new [more

\textsuperscript{108} See id. One of the principal foundations of the WTO is the concept of Most-Favored Nation (“MFN”) status. See World Trade Organization, The Legal Texts: GATT 1947 (2008). http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited Nov. 6, 2008). MFN requires a WTO member country to not discriminate among its trade partners. Id. More easily said, if a member country extends a trade advantage to another member country, the initial member country must extend that advantage to every member it trades with. What a member gives to one, it must give to all. Id.

\textsuperscript{109} ANDERSON & MARTIN, supra note 101 at 6.


\textsuperscript{112} World Trade Organization, The Disputes, supra note 61.

\textsuperscript{113} See AEI Doha Roundtable, comment by Gary Horlick supra note 99; see also Cross, supra note 91 at 168; see also Erin N. Palmer, Comment, The World Trade Organization Slips Up: A Critique of the World Trade Organization’s Dispute Settlement Understanding Through the European Union Banana Dispute, 69 TENN. L. REV. 443, 456 (2002).

\textsuperscript{114} See Hunter R. Clark, The WTO Banana Dispute Settlement and Its Implications for Trade Relations Between the United States and the European Union, 35 CORNELL INT’L L. J. 291, 299 (2002).
adjudicative] dispute resolution process.” While the DSU process intended to settle disputes among Members through a rule based initiative, twelve years after the *U.S.-EC Banana Dispute* began, a workable solution has not been implemented.

In 1996, the U.S. joined a coalition of countries in filing a dispute at the WTO against the European Communities (“EC”), alleging the EC’s banana import regime violated Articles I (Most Favored Nation treatment), III (National Treatment Obligation), and XIII (non-discriminatory administration of quantitative restrictions) of GATT. The EC banana import regime was a multi-layered system of quotas established in an attempt to give former overseas territories preference to the EU markets. These territories included former colonies of EC countries located in Africa, the Caribbean, and the Pacific (“ACP”). This import regime in turn restricted the access to the EC market for producers of bananas in Latin America.

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116 *See generally* AEI Doha Roundtable, comment by Gary Horlick, *supra* note 100.


119 *See id.* The WTO classified the case as DS27. *See id.* *See* Gassama, *supra* note 115 at 716. This was actually the third action taken against the EC. *See Clark, supra* note 114 at 295 – 97. The first two actions were applied named Banana I, and Banana II, began in 1993, when a group of banana producing Latin America countries brought action under GATT against the EC. *See id.* While the GATT council found in both actions that the EC had violated GATT trade provisions, the Council report was never adopted and could not be implemented. *See id.* The reason for this was GATT required a consensus among the members to adopt a report. *See id.* For example, a defending member who received a negative ruling under GATT, could block the adoption of a report by voting against it, which frequently happened. *See id.* With the implementation of the WTO; however, panel reports became adopted by a reverse consensus, which meant in order to block a panel report it must be voted down by a consensus. Essentially, one member could no longer block the adoption of a panel report. *See id.* at 298 – 99.

120 *See* HANRAHAN, *supra* note 117 at 1.

121 *See id.* The EC designated banana imports from its traditional suppliers of African, Caribbean, and Pacific (“ACP”) countries as tariff-free up to 875,000 tons. *See id.* Banana imports from non-traditional ACP suppliers were assessed a tariff of 150% ad valorem. *See id.* Finally, banana imports from non-ACP countries were assigned a tariff-rate quota of 2.2 million tons. *See id.* Ad valorem is defined as “a duty assessed as percentage rate or value of the imported merchandise.” HINKELMAN, *supra* note 20 at 9.

122 *See Clark, supra* note 114 at 294 – 95.
Although the U.S. does not produce or export any bananas, multinational corporations such as Chiquita Brands International have headquarters in the U.S. and therefore the U.S. had a definitive interest in the dispute.

The initial consultation stage of the dispute failed mostly due in part to the EC’s Member countries’ refusal to allow the European Union to negotiate a settlement with the complaining Members. While the DSU requires the request for consultations, it does not impose an obligation on the Members to produce a settlement. The requirement of “good-faith” is imposed by the DSU on Members, therefore any agreement during consultations will be a result of the Members willingness to resolve the dispute. Furthermore, the consultation phase can be seen as a formality, much like a pre-trial conference for an American civil suit, because only after requesting consultations can a Member request a Panel.

As a result of the failed consultations, a Panel was requested by the U.S. and agreed to by the WTO. On May 22, 1997, the Panel report was circulated to WTO Members. The Panel found the banana import regime to be in violation of WTO trading rules. The Panel report was appealed by the EC, and the “appellate body subsequently upheld the conclusions of the

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123 As Douglas Ierley pointed out “[t]he United States sought retaliatory action against the EU for a product it did not produce.” Ierley, supra note 60 at 629.
125 See Gassama, supra note 115 at 714 – 717.
126 See Palmer, supra note 113 at 456.
127 See id. at 466.
128 See id.
129 The United States Federal Rule of Civil Procedure 16 requires a mandatory pre-trial conference in an attempt to streamline the litigation or possibly encourage a settlement between the parties, before a trial can begin. See Fed. R. Civ. P. 16.
130 See Palmer, supra note 113 at 466 – 67.
132 See Palmer, supra note 113 at 456.
133 See id. at 466.
DSB.”

Despite the issuance of the DSB . . . the [EC] failed to specify a design for implementation of a revised . . . WTO consistent banana import regime.”

As a result, the U.S. requested binding arbitration. The WTO arbitrator gave the EC fifteen months to comply with the Panel report. Meanwhile, the import regime which was found to be illegal, continued while the EC determined how to comply with the DSB Panel report.

In January 1998, the EC circulated its plan for a modified banana import regime. The U.S. was dissatisfied with this proposal since the modified regime continued to maintain the current Latin America banana tariff-rate quota. As a result, “the [U.S.] sought remedy through DSU Article 22, based upon its conviction that the EC failed to institute a WTO-consistent banana import regime.”

In 1999, the WTO permitted the U.S. to impose yearly retaliatory trade sanctions of $191.4 million against selected European products due to the EC’s failure to comply with the Panel report. “This authorization from the WTO represented the first instance in almost fifty years that the WTO and GATT granted permission to retaliate against a WTO or GATT member country.”

In April 2001, while the sanctions were still in effect, the U.S. and the EC announced they had negotiated a settlement on the banana dispute. This settlement called for a tariff-only banana import system to be implemented by January 1, 2006. In the interim the EC was to be

134 See id. at 456.
135 Id.
136 See id.
137 See Gassama, supra note 115 at 719.
138 See Clark, supra note 114 at 298 – 300.
139 See Palmer, supra note 113 at 466.
140 Id. at 457. DSU supra note 56.
141 See Clark, supra note 114 at 299. A tariff-only import system would fix customs duty on banana imports. WTO Glossary, supra note 78. This duty is either on an “ad valorem basis (percentage of value) or a specific basis (e.g. $7 per 100 kgs). Id. This would be a distinct difference from the tariff-rate quota system for important bananas. See HANRAHAN, supra note 121 at 2.
142 Palmer, supra note 113 at 458.
143 See HANRAHAN, supra note 117 at 3.
144 See Clark, supra note 114 at 300.
granted a temporary waiver to maintain a modified system of tariff-rate quota’s, in an attempt to ease the impact the new system would have on the ACP countries and suppliers.145

Nevertheless, the negotiated settlement was short lived.146 When the settlement went into effect on January 1, 2006, the EC conveniently neglected to remove the temporary waivers granted to the ACP countries and suppliers under the agreement.147 This allowed ACP countries duty free access of bananas into EC countries.148 Member’s of the private sector acknowledged the then current banana regime was in violation of Article XIII of GATT, since the EC’s waiver had essentially expired.149

Subsequently, following the collapse of the DDA negotiations on June 29, 2007, the U.S. requested the DSB to form another Panel pursuant to Article 21.5 of the DSU.150 The timing of the additional Panel request was not a coincidence. The main concern for the EC was market access for bananas originating from ACP countries.151 The goal of the EC was to provide direct market access for developing and least developed ACP countries in an attempt to increase their comparative advantage and thereby improve the living standards of the ACP countries.152 Since one of the principle pillars of the DDA was the improvement of market access for agriculture products, a long-term solution to the banana problem was being negotiated during the DDA rounds. When it became apparent the DDA would not be completed, the only option available to the U.S. was to request an additional Panel.153

145 Id.
147 Id.
148 See EC Bananas Panel Report, supra note 58. ACP countries were granted duty free access up to 775,000 metric tons. Id.
149 See Strawbridge, supra note 146 at 25.
150 See id; see also EC Bananas Panel Report, supra note 59.
151 EC Representative Interview.
152 Id.
Again, the Panel report found the EC’s banana import practices inconsistent with WTO rules, and instructed the EC to bring the import regime into compliance with the obligations under GATT.\textsuperscript{154} The EC has since filed an appeal, but the appellate body has not issued a report. The EC’s banana import practices continue while the appellate body decides the dispute.

One of the principal difficulties of the DSU process made clear by the \textit{US-EC Banana Dispute} case concerned compliance with a DSB ruling.\textsuperscript{155} As the U.S. did, pursuant to Article 22.2 of the DSU, the complaining Member is allowed to request retaliatory sanctions against the defending Member in the event the defending Member fails to comply with an adopted DSB Panel report.\textsuperscript{156} However, there is nothing to compel a defending Member to comply with a Panel report. “The acceptance of sanctions rather than compliance with WTO recommendations and rulings ‘seriously undermines the effectiveness’ of the DSU.”\textsuperscript{157}

This can essentially shift the adjudicative power of the Members during the DSU process. For example, a defending Member can begin an unfair trade practice against the complaining Member, which yields the defending member $100 million in increased revenue per year. This practice continues for two years before complaining member files a DSU complaint. By the time the Panel report is adopted, an additional year has passed and the defending member has yielded $300 million in revenue. Having no intention to comply with the Panel report, an additional 15 months pass, provided no appeal is filed, and the defending member is given the maximum amount of time to comply before the complaining Member can request retaliatory sanctions. Provided the WTO agrees to the retaliatory sanctions, the complaining member will be allowed to impose retaliatory tariffs at a yearly rate, which equal the amount they are being harmed.

\begin{footnotesize}
\footnote{154}{See id; see also Strawbridge, \textit{supra} note 146 at 25.}
\footnote{155}{See Palmer, \textit{supra} note 113 at 473.}
\footnote{156}{\textit{Id.} at 457; accord, Dispute Settlement Understanding, \textit{supra} note 56.}
\footnote{157}{Palmer, \textit{supra} note 113 at 457.}
\end{footnotesize}
however, the amount of damages awarded is not a precise calculation, where the complaining Member is not always awarded expectation damages.\textsuperscript{158} Therefore, in this example, the defending member has a net gain of over $400 million, while the complaining member takes the initial losses and is only re-compensated from the point they request the sanctions.

The \textit{US-EC Banana Dispute} provides a complete example of the DSU’s shortfalls concerning compliance with Panel reports, which lead to Members seeking long-term solutions via multilateral trade negotiations such as the DDA. “Because the [EC] voluntarily failed to fully comply with WTO recommendations, and rulings the WTO authorized the U.S. to retaliate against the [EC] . . . through the issuance of $191.4 million in sanctions. Thus, the [EC] essentially elected the imposition of $191.4 million in sanctions . . . over full compliance with the WTO . . . rulings.”\textsuperscript{159} In addition, the DSU does not require a defending member to submit progress reports, of their implementation initiatives to comply with Panel reports.\textsuperscript{160} “The current surveillance mechanisms of the DSU insufficiently promote compliance by a Member nation and essentially empower a Member to continually evade WTO obligations.”\textsuperscript{161}

\textit{Brazil – United States, Subsidies on Cotton Dispute}

Cotton is the most important textile fiber in the world, and the United States is its largest exporter, accounting for 40\% of world exports.\textsuperscript{162} In September 2002, Brazil requested consultations with the United States, alleging the U.S.’s domestic subsidy programs of cotton were “inconsistent with the provisions of the Agreement on Agriculture under GATT ’94, and

\begin{footnotes}
\footnote{158} See Sebastian, \textit{supra} note 27 at 364 – 75.\footnote{159} Palmer, \textit{supra} note 113 at 482.\footnote{160} See \textit{id.} at 479.\footnote{161} \textit{Id.}\footnote{162} See \textit{RANDY SCHNEPF, BRAZIL’S WTO CASE AGAINST THE U.S. COTTON PROGRAM: A BRIEF OVERVIEW} 1 (Congressional Research Service, CRS Report for Congress, Jan. 25, 2008); see also Newell, \textit{supra} note 111 at 317.}

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the Subsidies and Countervailing Measures Agreement.” When the consultations did not yield positive results, in February 2003, Brazil requested the establishment of a Panel to decide the dispute. The magnitude of this dispute filing could not be overlooked. Brazil had strategically timed the complaint to coincide with the DDA negotiations and the upcoming Cancun Ministerial. Brazil being classified by the WTO as a developing country, was taking on an economic powerhouse in the U.S., who was one of the principal participants of the DDA. During the Cancun Ministerial, developing countries were beginning to show their willingness to defy the developed nations’ interests, and put forward their own agendas. If the DSB Panel report reflected negatively upon the domestic subsidy programs of the U.S., it would give developing countries and least developed countries more leverage during the DDA negotiations.

163 Newell, supra note 111 at 312. The United States engages in domestic subsidy programs to increase production, stabilize prices and assure adequate supplies. See Raj Bhala & David Gantz, WTO Case Review 2005, 23 ARIZ. J. INT’L & COMP. L. 107, 215 – 28 (2006). This authority was designated to the Secretary of Agriculture as part of the Commodity Credit Corporation Charter Act of 1948. See id. The WTO classifies subsidies into two different categories, Prohibited and Actionable subsidies. See SCHNEPF, supra note 162 at 2.

Prohibited subsidies are treated with a greater sense of urgency, since they have the ability to cause greater harm. Id. “Two of the United States subsidy programs were found to be operating as prohibited subsidies: Step 2 payments and export credit guarantees.” Id. Step 2 payments are those which were made to exporters and domestic mill producers who purchased U.S. upland cotton. Id. This type of cotton tends to be more expensive on the world market. The U.S. was ultimately compensating domestic users for their purchase of U.S. cotton. This was deemed illegal because it discriminated against foreign produced cotton and gave preference to domestic products. Id.

The export credit guarantee programs were an attempt to underwrite the credit extended by private banks to foreign banks for the purchase of U.S. upland cotton. Id. “Specifically, the [Sec. of Agriculture] is authorized to guarantee repayment of credit made available to finance commercial export sales of agriculture commodities from privately owned stocks on credit terms between ninety days and three years.” Bhala & Gantz, supra note 163 at 215. The program does not provide funding to the foreign banks, but essentially guarantees the payments due from those banks. Id. The WTO found this program functioned as an export subsidy program “because the financial benefit’s returned to the government by these programs failed to cover their long running operating costs.” SCHNEPF, supra note 162 at 2 – 3. “In other words, so long as the credit guarantees act as an implicit export subsidy, only U.S. program crops that have scheduled export subsidies are eligible for U.S. export credit guarantees.” Id.

Actionable subsidies are those which fit the WTO definition of a subsidy and are alleged to have cause adverse effects to the interests of the WTO Members. Id. BLACK’S supra note 19. “In particular, price-contingent payments (i.e., payments dependent on changes in current market prices) . . . were identified as contributing to serious prejudice to the interests of Brazil by depressing prices for cotton on the world market during the marketing years 1999 – 2002.” SCHNEPF, supra note 162 at 3.

164 Request for the Establishment of a Panel by Brazil, United States—Subsidies on Upland Cotton, WT/DS267/7 (Feb. 7, 2003). The WTO classified this dispute as DS267. Id.

165 See Cross, supra note 92 at 149.

166 See generally FERGUSSON supra note 65 at 4.
negotiations. This leverage could then be used to bring the developed countries such as the U.S. and the EC closer to the modality proposals of the developing nations.

“In September 2004, the Panel circulated its report to the WTO’s DSB, ordering the U.S. to eliminate ‘without delay’ subsidies under the export credit guarantee and Step 2 programs and to modify support under the marketing and loan and other domestic support programs.” While this ruling gave developing countries the leverage they desired, their influence was already apparent after the breakdown of DDA negotiations at the Cancun Ministerial.

The U.S. subsequently appealed the Panel report, however, in March 2005, the Appellate Body upheld all of the panel’s major findings. Although the Hong Kong Ministerial was already scheduled for December of 2005, the Appellate Body again gave credence to the motives of developing countries in the DDA negotiation process.

Fast-forward to July 2008. While the DDA negotiations broke down due to disagreements regarding SSM’s, next on the agenda was an agreement on cotton. Such an agreement had to be accomplished within the framework of the DDA pillars, pursuant to the Hong Kong Declaration. While cotton was not the proximate cause of the breakdown, it was still being negotiated although the DSB and Appellate Body had already instructed the U.S. to bring its domestic subsidy programs into compliance. It is in this light we see the Dispute Settlement function of the WTO setting the foundation of the DDA negotiations.

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167 See Newell, supra note 111 at 317 – 19.
168 Cross, supra note 92 at 168.
169 See Appellate Body Report, United States – Subsidies on Upland Cotton; see also Cross, supra note 85 at 168.
170 EC Representative Interview, supra note 92.
171 See Hong Kong Ministerial Declaration, supra note 85 at para. 11.
172 See Cross, supra note 92 at 168.
Part IV – Dispute Settlement and the Doha Development Agenda

While the DSU process was inventive in creating an international neutral forum for trade disputes between WTO Members, the process is long and expensive.\textsuperscript{173} With more than two-thirds of the WTO Members classified as developing or least developed countries, many WTO Members lack the legal infrastructure to adjudicate a WTO dispute.\textsuperscript{174} These Members must then hire private firms within the United States or the European Union to adjudicate their trade interests, which can be costly given the duration and amount of preparation required for a DSU dispute.\textsuperscript{175}

During the Cancun Ministerial, developing and least developed countries began asserting their trade interests on a unified front, thereby increasing their negotiating power during the DDA.\textsuperscript{176} With the DSU process being arduous and issues concerning compliance with DSB Panel reports increasing, developing and least developed Members saw the opportunity to achieve long-term solutions through the DDA negotiations, instead of the DSU process. This has essentially changed the role of the DSU to one of a temporary solution between WTO Members. Developing and least developed Members saw the banana dispute go on for over a decade, without any long-term solution. To date, the only remedy the U.S. has gained has been in the

\begin{footnotesize}
\textsuperscript{173} See Ierley, supra note 60 at 622.
\textsuperscript{174} World Trade Organization, Understanding the WTO: Developing Countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (last visited Nov. 6, 2008); see Mosoti supra note 63 at 428 – 30.
\textsuperscript{175} See Gregory Schaffer, Michelle Raton Sanchez & Barbara Rosenberg, The Trials of Winning at the WTO: What Lies Behind Brazil’s Success, 41 CORNELL INT’L L.J. 383, 435 (2008). Brazil itself was/is accustomed to hiring foreign private law firms for its disputes. See id. While this is not always done directly through the government, the Brazilian government has allowed private corporations to pay the legal fees, thereby allowing the State to focus on the cost of the dispute. See id. Although the Brazilian government has in the past deferred to the wishes of private corporations, Brazil signaled its lack of faith in its own legal infrastructure to be able to litigate a WTO dispute, by welcoming the development of WTO law into the Brazilian bar. See id.
\textsuperscript{176} See FERGUSSON supra note 65 at 4.
\end{footnotesize}
form of an allowed trade sanction against the EC.177 Meanwhile, the EC continues to provide preferential access to bananas from the ACP countries.

Cotton provides a similar example. While Brazil engaged in a DSU dispute, it is clear the dispute was timed to correspond with the Cancun Ministerial, in hope of a beneficial Panel report, which would increase Brazil’s negotiating prowess during the DDA.178 Furthermore, the available remedies within the DSU are at best a temporary fix. Panel reports ordering a member to bring an unfair trade practice within the accepted trade regulations of the WTO frequently do not provided guidelines or set parameters for what may satisfy actual compliance with the Panel report. ACP countries had little incentive to initiate or join the action taken by Brazil against the United States, if they did not reasonably believe the U.S. would comply with the Panel report in an amount of time that would alleviate the harm suffered by their cotton producers. Therefore, during the Hong Kong Ministerial, developing and least developed countries too a different approach and, were able to add cotton to the July Framework, and have it considered individually within the pillars of the DDA thereby ensuring its eventual resolution.179

Part V – Proposed Changes to the Dispute Settlement Understanding in order to Provide Adequate Remedies and Improve Compliance.

The question remains, whether the DDA is too large an unwieldy to ever reach a final agreement? Despite the repeated breakdowns the answer is no. The DDA can proceed and be finalized if permanent changes are made to the DSU. Developed Members of the WTO would be more willing to concede trade advantages to developing and least developed Members if they felt the DSU could provide adequate remedies and structured compliance within the Panel reports of the DSB.

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177 See generally AEI Roundtable, comment by Gary Horlick supra note 110.
178 See Cross supra note 92 at 166.
179 Supra note 92.
Remedies available to the Members of the WTO come either in the form of adjusting an unfair trade practice, or in cases such as the banana dispute, the complaining Member is allowed to seek sanctions in an amount which equals the unfair trade practice.\textsuperscript{180} However, while provisional remedies exist within the DSU for intellectual property violations,\textsuperscript{181} no provisional remedies are available to a complaining Member when dealing with unfair practices such as subsidies, tariff rate quotas, restricted market access, or dumping. United States Federal Rule of Civil Procedure 65 permits a party to seek a preliminary injunction when the potential harm suffered from denying the injunction substantially outweighs the harm from granting the injunction.\textsuperscript{182} This provisional remedy allows a complaining party to fully adjudicate a disputed matter without fear of incurring further damages during the trial.

A complaining Member of the WTO does not have the option of a preliminary injunction, and therefore must work around an unfair trade practice until it is settled by the DSB. A DSU amendment which would provide the provisional remedy of a preliminary injunction would allow Members engaged in the DDA negotiations to work with softer modalities because the fear of another country breaking the agreement would not present a long-term threat to its domestic industry. As has been the case with the disputes involving bananas and cotton, the unfair practices which were being settled by the DSB, continued essentially until the losing Member of the dispute complied with the Panel report.

Improving compliance with Panel reports will also add validity to the DSU process. Currently, the DSU requires Members to comply with the panel reports on somewhat open-ended

\textsuperscript{180} See Sebastian \textit{supra} note 27 at 351 – 55.
\textsuperscript{182} See \textit{Fed. R. Civ. P.} 65; \textit{see also} American Hosp. Supply Corp. v. Hospital Products Ltd., 780 F.2d 589, 593 – 94 (7th Cir. 1985) (noting the test to grant a preliminary injunction is whether the harm to the plaintiff if the preliminary injunction is denied will exceed the harm to the defendant if it is granted).
timeframes and without much guidance.\textsuperscript{183} The DSU should be amended to address compliance by: 1) requiring progress reports on a Member’s initiatives to comply with a Panel report;\textsuperscript{184} 2) requiring Panel reports to provide detailed suggestions for compliance; and 3) automatic retaliatory sanctions for the complaining Member in the event the defending Member has failed to comply with the Panel report within the specified timeframe.

Progress reports would provide both the WTO and the complaining Member advance notice of the initiatives the defending Member was undertaking, and allow both entities to prepare for the possibility of retaliatory sanctions should compliance not be met.\textsuperscript{185} By requiring the Panel reports to suggest initiatives for bringing an unfair practice within the rules of the WTO, it would allow a defending Member to properly manage their time and see exactly how they could adjust their practice.\textsuperscript{186} This would also avoid the possibility of future DSB actions for the same practice, much like what occurred through the \textit{U.S.-E.C. Banana Dispute}. The DSB Panel is ideally placed to provide such suggestions, because they have reviewed the arguments of both Members in a dispute, know the damaging effects unfair practices have on particular industries, and are familiar with the domestic interests of the Members involved in the dispute. Finally, the DSU should be amended to add an automatic trigger allowing the complaining Member of a dispute the opportunity to seek retaliatory sanctions in the event the defending member fails to comply with the Panel or Appellate Body report.\textsuperscript{187} There is little excuse for not

\textsuperscript{183} See Palmer, supra note 113 at 479 – 81.

\textsuperscript{184} See id.

\textsuperscript{185} See id.

\textsuperscript{186} I must stress the importance of the DSB Panel suggesting initiatives for compliance. If the DSU were amended to require mandatory compliance with the detailed recommendations of the DSB for correcting a trade imbalance, the WTO would quickly take on an aura of world law. Should that be the case, Members would yield some form of sovereignty to the DSB of the WTO, which is countintuitive of the WTO’s main function.

\textsuperscript{187} By requiring the sanctions come form an automatic trigger this would also remove the guess work from the DSB, and add validity to their decisions. By being a member of the WTO, all countries would agree to the possibility of an automatic retaliatory sanction. Automatic triggers would allow the WTO to operate in a normal function promoting trade, and not as an overreaching legislative body of world law.
complying with these reports; however, Members presently do not fear retaliatory sanctions since they are rarely handed down. WTO Members would be more inclined to comply with the report in the period of time granted if they knew the failure to do so would result in the automatic authorization of retaliatory sanctions in the amount that equaled their unfair advantage.

Conclusion

Skeptics of the WTO and global trade initiatives see the repeated breakdowns in DDA negotiations as a sign the WTO is not working and that multilateral trade rounds have become too complex to accommodate every nation’s interests. However, the July 2008 breakdown in the DDA provides insight that suggests the WTO and multilateral trade agreements are working and with changes to the DSU in terms of the available remedies and compliance with Panel reports, the WTO can continue to flourish. It is important to note that within the DDA negotiations, and every other multilateral trade negotiation, trade ministers from the respective countries have to return home with a “win.” That is to say, a trade minister must carefully balance the initiatives of a trade round with those of his country, and under no circumstances, can he sacrifice a domestic industry in order to gain an advantage elsewhere or finalize a trade agreement. More easily said, trade ministers must return home with a trade agreement that allows them to “have their cake and eat it too.”

When we combine the difficulties facing trade ministers with the shortfalls of the DSU we can see WTO Members treating the DDA more seriously. Should an agreement have been

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188 Supra note 54.
189 See generally AEI Doha Roundtable, supra note 100.
190 See id.
191 See id.
reached during the DDA talks in Geneva of 2008, the finalized DDA would have produced a long-term solution on market access, which would have solved the banana problem, and addressed cotton specifically within the pillars of the DDA.\footnote{See AEI Doha Roundtable, comment by Gary Horlick \textit{supra} note 100.} When the talks broke down, eighty percent of the key issues had already been resolved;\footnote{See Ashton \textit{supra} note 192.} regardless of the source of the breakdown, India’s insistence on certain modalities numbers related to the SSM’s shows us that Members want a trade agreement they can abide by. After all, what would be the purpose of signing a trade agreement, when a Member knew it could not adhere to its terms, and face the possibility of settlement and sanctions within the DSU.

Although the DDA negotiations are presently suspended, talks are expected to resume, and no one, including WTO Director Pascal Lamy, has given up on completing the DDA.\footnote{See Beattie & Williams, \textit{supra} note 99.} Meanwhile, the dispute settlement function of the WTO will continue to influence the upcoming Ministerial Conferences and substantive talks on the DDA. Until measures are taken to improve the DSU by providing Members with provisional remedies and stricter compliance initiatives with the DSB Panel reports, parties to the DDA negotiations will continue to stand-fast on modality figures putting forth a protectionist atmosphere. These developing and least developed Members are not trying to restrict their market access to developed Members, but merely are guarding a domestic industry, which in certain cases is the only means for improving their competitive advantage.

A finalized DDA agreement will benefit all Members of the WTO.\footnote{Catherine Ashton, a European Union trade commissioner, recently suggested a completed DDA would pave the way for a new decade of global economic growth, much like the final act of the Uruguay Round in 1994 “helped lay the foundations for a decade of trade growth.” \textit{Supra} note 192. Ms. Ashton commented further by saying “[a] Doha...}}
allow the DDA’s completion to arrive more expeditiously because Members will have faith any potential concerns will be adequately settled by the DSB.

design deal would also strengthen the World Trade Organization, which is one of the few international institutions that already offer a full role to growing powers . . . .” Id.
APPENDIX - I

The World Trade Organization\textsuperscript{197}

\textsuperscript{197} \textsc{World Trade Organization, Understanding the WTO: The Organization,}\n\url{http://www.wto.org/english/thewto_e/whatis_e/tif_e/organigram_e.pdf} (last visited, Nov. 17, 2008).