

**The Banana War  
And World Trade:  
Fighting Trade Wars  
With The WTO Weapon:  
A Popular Misconception**

An Abbreviated Version Adopted for UT Int'l Business Class 3670

Mark Allen Davis

## Table of Contents

- I. Introduction
- II. The Legal History of the Banana Dispute
- III. Legal Issues
  - A. The Dispute Process
  - B. Legal Arguments
  - C. Evading Responsibility (The System Flaw)
- IV. Effect on World Trade
  - A. European Consumers
  - B. United States Businesses
  - C. Caribbean Nations
  - D. Latin Countries (Ecuador)
- V. Economics and Policy Considerations
  - A. Everbody Wins With Trade
  - B. Policies To Promote Trade
  - C. Protectionist Fears
- VI. Analysis: Trade Is Not Warfare; The WTO Is Not A Weapon
  - A. Trade Is Not Warfare
  - B. In Real War, Everyone Loses
  - C. The WTO Is Not A Weapon
- VII. Conclusion

## I. Introduction

“America and Europe are at war!”<sup>1</sup> Instead of tanks and ICBM’s, the two continents are fighting over trade in bananas. More than a mere “rattling of swords,”<sup>2</sup> some claim that trade warfare has become the new conflict after the Soviets are gone.<sup>3</sup> One commentator even compared the threatened American tariffs over bananas to a “pre-emptive missile strike against Iraq without Security Council Approval.”<sup>4</sup>

Such violent reactions really have much less to do with the banana dispute than with how the world trades goods and services. This paper first reviews the banana dispute in historical detail and from that foundation further evaluates the effect of the banana dispute aftermath on the World Trade Organization and international law.

## II. The Legal History of the Banana Conflict

### A. The Treaty of Rome

Although the public does not seem to care,<sup>5</sup> the trade dispute over bananas has become the trade case of the decade.<sup>6</sup> It began even before the existence of the European Union. In 1957, “Konrad Adenauer, the postwar German chancellor, refused to sign the Treaty of Rome until he secured for Germany a ‘Banana Protocol.’ This provision in the Treaty of Rome guaranteed Germany unimpeded access to any bananas it wished to import.”<sup>7</sup>

## **B. The Lome Conventions**

The German preference to unimpeded access to the world banana market conflicted with the series of Lome Conventions beginning in 1975.<sup>8</sup> The spirit of the Lome Conventions was to favor former European colonies in an effort to remedy past colonial exploitation.<sup>9</sup>

“Consistent with the spirit of the Lome relationship is the Lome IV Protocol 5 ... [which] promises that no ACP [African-Caribbean-Pacific] State that has traditionally supplied bananas ... will be placed, in regards to the EU Single Market, in a less favorable position that they presently or previously have enjoyed.”<sup>10</sup>

## **C. The Germany v. European Council Case**

Given the German preference for unimpeded access, Germany challenged the banana import regime of the Lome Protocol in the European Court of Justice in 1991.<sup>11</sup>

“Belgium and the Netherlands joined the case in support of Germany while Greece, Spain, France, Italy, Portugal and Britain joined the case in support of the [European] Council.”<sup>12</sup>

Because Germany alone accounted for 40 percent of the European banana market, the Continent was equally divided.<sup>13</sup> Surprisingly, Germany lost the case in a bizarre twist whereby the Court of Justice ignored article 173 of the EC Treaty and transformed the State of Germany into a private individual without standing.<sup>14</sup> Equally surprising is that the European Court of Justice, an institution of an organization founded upon the ideals of free trade, chose to protect the trade barriers for bananas over the wishes of half of it’s consumers.

#### **D. The Quota Regime Challenged Under GATT**

After Germany lost the case, the European Community members took two years to negotiate a new banana regime.<sup>15</sup> The new regime consisted of a quota system under Regulation 404/93 that consisted of 22 sub-quotas.<sup>16</sup> “Four different categories of banana suppliers were identified: traditional ACP country imports, non- traditional ACP country imports, non- ACP third country imports, and EEC bananas. Up to a maximum of 857,700 tons of traditional ACP country imports are allowed to enter the common market duty free.”<sup>17</sup>

The new tariff system was challenged twice under GATT.<sup>18</sup> In both cases, the GATT panel found the tariff system inconsistent with the European Union’s obligations under the GATT treaty.<sup>19</sup>

For an import restriction to be valid, it must meet seven conditions under GATT Article XI:2(c)(i).<sup>20</sup> In particular, the EEC failed to prove that the import restriction was “necessary” as required by the fifth condition.<sup>21</sup>

[T]he EEC had not demonstrated that the restrictions applied in the case of France were “necessary” for the implementation of governmental measures designed to restrict the level of domestic production of bananas. On the contrary, besides the fact that the measures in question were not meant to restrict domestic production of bananas the EC had admitted that the French restrictions applied to bananas from Latin America were “necessary” to protect domestic production and to allow an outlet to bananas from ACP sources. This was in contravention of the strict requirements for exceptions to Article XI.

Failing to succeed under the Article XI:2(c)(i) exception, the European Union tried to grandfather the Lome Convention into GATT under the Protocol of Provisional Application.<sup>22</sup> The Protocol of Provisional Application did not apply because the

European Union failed to meet the three requirements (that the Banana Protocol be preexisting legislation, that is formal, and mandatory).<sup>23</sup>

Because the quota regime violated multiple provisions of GATT, the GATT panel found the European Union's quota regime unlawful. But before the European Union dismantled the quota regime, GATT changed into the World Trade Organization (WTO). Under the WTO, the challenges to Europe's banana regime would begin anew.

### **E. Banana Dispute Under The WTO**

"In 1996, Ecuador, Honduras, Guatemala, Mexico and the U.S. requested a dispute settlement panel at the WTO. In May 1997, the panel ruled that many provisions of the EU banana policy were inconsistent with a dozen WTO rules about non-discrimination. In September 1997, the WTO Appellate Body confirmed this ruling."<sup>24</sup>

The internal European Union dispute over bananas became transcontinental in nature when the United States challenged the quota system of the European Union through the WTO. Interestingly enough, neither the United States nor the European Union grow bananas<sup>25</sup> but the United States leads the world in distributing bananas through Chiquita Brands International and Dole Foods Company.<sup>26</sup>

Because the European quota system effectively shut out Chiquita from the world's largest banana market (Europe accounts for 40% of the world's banana consumption),<sup>27</sup> it cost American distributors approximately \$520 million in annual lost revenue.<sup>28</sup>

To catch the ear of American trade officials, Chiquita, by one account, donated hundreds of millions of dollars to both the Democrat and Republican parties.<sup>29</sup> While such large donations seem extreme, another source claims that the US government took

Europe's banana trade to the WTO within 24 hours of Chiquita Brands making a \$500,000 donation to the Democratic Party.<sup>30</sup>

Thus in September 1994, Chiquita Brands International, Inc. filed a petition under Section 301 of the 1974 Trade Act with the United States Trade Representative (USTR).<sup>31</sup> Thereafter, the United States Trade Representative filed a complaint against the European Union. In its complaint, the United States addressed the remedial aspect of the European banana quota.

The complainants are well aware of the needs and problems of developing countries. The EC is attempting to portray its regime as the only way to address the needs of certain ACP suppliers, a portrayal that is neither accurate nor relevant. There are obviously other ways to assist developing countries. The EC cannot be allowed to force other WTO Members to accept its misguided economic policies and to ignore its commitment to preserve the most basic principle of international trade upon which countries rely to develop—that of comparative advantage.<sup>32</sup>

One commentator has argued that the United States lacked standing in the banana dispute.<sup>33</sup> As in the Barcelona Traction case, the United States may not have a strong enough interest because almost all of Chiquita's employees and equipment resides outside the United States.<sup>34</sup> However, the DSU<sup>35</sup> of the WTO has no locus standi limitation.<sup>36</sup> "Article, 3.7 of the DSU simply asks for that ' "Before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful."

The World Trade Organization ruled in favor of the United States et al.<sup>37</sup> In reaction, the European Union change its banana regime but simply tweaked it slightly.<sup>38</sup> This caused the United States to have to again challenge the tweaked regime as unlawful which caused a great deal of anger from the Clinton Administration. "Not only has the

EC used every single delaying tactic available under the rules of the system, but it has also invented new gimmicks along the way—all as a result of its compulsion to stall for time.”<sup>39</sup>

Because Europe had previously avoided compliance with GATT and WTO rulings, the United States added some teeth to the third arbitration. Under DSU 22.2 the loser of an arbitration has the right to appeal once, but if they lose and fail to comply, the plaintiff may impose retaliatory sanctions.<sup>40</sup> So on January 14, 1999, “the United States, pursuant to Article 22.2 of the DSU, requested the Dispute Settlement Body (DSB) to authorize suspension of the application to the European Communities (EC) and its member States of tariff concessions and related obligations under GATT 1994 covering trade in an amount of US \$520 million.”<sup>41</sup>

The sanctions on “European luxury goods, that if imposed, would chill the blood of shoppers along Rodeo Drive and wandering the aisles at Balducci’s.”<sup>42</sup> Both United States importers of luxury goods and European exporters of luxury goods expressed their shock.<sup>43</sup> “This is totally insane,” said Laura Jones, executive director of the U.S. Association of Importers of Textiles and Apparel.<sup>44</sup>

Resorting to retaliation for trade violations has only occurred once before in recent United States history. “In 1995, in the fight with Japan over automobiles, the U.S. withheld clearance on 13 of Japan’s top- of- the- line luxury car brands, threatening \$6 billion in duties. Japan never had to actually pay.”<sup>45</sup> Japan never had to pay because the two sides worked out a deal and the sanctions were not retroactive.<sup>46</sup>

If the Europeans fail to comply with the WTO decision, the following products would receive 100% tariffs, effectively pricing them out of the United States market.

#### “The Hit List

- Bath preparations other than bath salts
- Candles, tapers and the like
- Cashmere sweaters and waist coats
- Cotton bed linen
- Electrothermic coffee or tea makers
- Folding cartons
- Nonadhesive plates, sheets, film, foil and strip
- Lead-acid storage batteries
- Paper lithographs
- Pecorino cheese, from sheep’s milk
- Parma ham and other pork products
- Plastic handbag articles
- Plastic handbags
- Sweet biscuits, waffles and wafers
- Uncoated felt paper”<sup>47</sup>

On April 6, 1999, the arbitrators proclaimed their decision, which stated that the “the level of nullification or impairment suffered by the United States in the matter “European Communities-Import Regime for the Import, Sale and Distribution of Bananas is US \$191.4 million per year.”<sup>48</sup> Thus, the Arbitrators effectively gave the United States the legal authority to retaliate against the Europeans for violation of GATT provisions by the banana quota system in the amount of \$191 million per year.<sup>49</sup>

Following this arbitration decision, the European Union agreed to comply with the WTO rulings and eliminate its banana quota system.<sup>50</sup> One commentator believes that “America’s ‘victory’ is a hollow one; and the damage to the world trade system is real. The biggest reason why American triumphalism is misguided is that the WTO itself has been left looking rickety.”<sup>51</sup>

The commentator is misguided. Free trade has won out over protectionism and the WTO acted as a valuable forum for resolving the dispute.

---

<sup>1</sup> See Leader, *Going Bananas: America and Europe Are Starting a Trade War Over Bananas., Their Reckless Risks Testing the Young World Trade Organizations to a Breaking Point.*, THE ECONOMIST 20, v. 350:Issue 8109, March 6,1999.

<sup>2</sup> See Dahlburg,John-Thor, U.S. and Europe Edging to Brink of a Trade War Commerce: Banana Conflict Could De Dwarfed by Battles Over Genetically Altered Food and Aircraft Noise, L.A. TIMES A1, March 15,1999.

<sup>3</sup> See Leader, *supra*, note 1, at A1.

<sup>4</sup> See Charlotte Denny, *Analysis: Could the Destructive Commercial Wars of the Thirties Be Repeated?*, THE GUARDIAN (London) 19, 1998 WL 18677827 (Nov. 19, 1998).

<sup>5</sup> See David Adams, *Americans shrug as Europe goes Bananas*, ST. PETERSBURG TIMES 2A, (March 5, 1999)

<sup>6</sup> See Kevin Whitelaw, *Banana-Trade Split A Clash Between the U.S. and Europe May Ultimately Define the Power of the WTO*, 126 U.S. NEWS & WORLD REPORT 49, 1999 WL 8432075 (Jan. 11 1999).

<sup>7</sup> See Richard Lyons, *European Union Banana Controversy*, 9 FLA.J. INT'L L.165, 176 (1994).

<sup>8</sup> See Zsolt K. Bessko, *Going Bananas Over EEC Preferences?: A Look at the Banana Trade War and the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT'L LAW 265, 267 (1996).

<sup>9</sup> See *id.*

<sup>10</sup> See Lyons, *supra* note 7, at 177.

<sup>11</sup> See Bessko, *supra* note 8, at 272.

<sup>12</sup> See *id.*

---

<sup>13</sup> *See id.*

<sup>14</sup> *See* Jack J. Chen, *Going Bananas: How the WTO Can Heal the Split in the Global Banana Trade Dispute*, 63 *Fordham L Rev.* 1283, 1312 (1995).

<sup>15</sup> *See* Bessko, *supra* note 8, at 278.

<sup>16</sup> *See* Patrick A. Messerlin, *Europe's costly Banana Regime*, *WALL ST. J. EUR.* 6, March 12, 1999.

<sup>17</sup> *See* Bessko, *supra* note 8, at 278.

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See* Report of the Panel, *EEC – Member State's Import Regimes For Bananas*, *GENERAL AGREEMENT ON TARIFFS AND TRADE*, 1993 WL 840284, \*13 (1993). The seven requirements are: (i) the measure must be an import restriction, not amounting to a complete import prohibition; (ii) the measure must be a restriction applicable to an agricultural or fisheries product; (iii) there must be a governmental measure operating to restrict the quantities of a product to be marketed or produced, i.e., to keep output below the level (which would have existed) in the absence of restrictions; (iv) the import restriction and domestic supply restriction must apply to "like" products; (v) the import restriction must be "necessary" to the enforcement of the domestic supply restriction; (vi) a public notice must be given of the total quantity or value of the quota for each products; and (vii) reasonable proportion must be observed between the internal restriction and the restriction on imports.

<sup>21</sup> *See id.* at \*21.

<sup>22</sup> *See id.* at \*34.

---

<sup>23</sup> See *id.* at \*36, 42.

<sup>24</sup> See Messerlin, *supra* note 16.

<sup>25</sup> See Jonathan Peterson, *Bananas Creating a Bunch of US-Europe Trade Troubles*, PITTSBURGH POST GAZETTE A9, 1999 WL 5256069 (Feb. 7, 1999).

<sup>26</sup> See Adams, *supra* note 5.

<sup>27</sup> See Rodrigo Bustamente, *The Need For A GATT Doctrine of Locus Standi: Why The United States Cannot Stand The European Community's Banana Import Regime*, 6 MINN. J. GLOBAL TRADE 533, 534 (1997).

<sup>28</sup> See Dahlburg, *supra* note 2.

<sup>29</sup> See *Outlook: Europe Slips Up in the Banana War*, THE INDEPENDENT (London) 19, March 5, 1999.

<sup>30</sup> See Denny, *supra* note 4.

<sup>31</sup> See Bustamente, *supra* note 27, at 538.

<sup>32</sup> *Rebuttal Submission of Ecuador, Guatemala, Honduras, Mexico and the United States., European Communities- Regime for the Importation Sale and Distribution of Bananas*, WORLD TRADE ORGANIZATION 5 (October 3, 1996).

<sup>33</sup> See Bustamente, *supra* note 27, at 548.

<sup>34</sup> See *id.*

<sup>35</sup> The DSU acronym describes the “Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)” European Communities – Regime For the Importation, Sale, and Distribution of Bananas, The World Trade Organization, WT/DS27/49 (April 9, 1999).

<sup>36</sup> See Rebutal Submission, *supra* note 32, at 10.

---

<sup>37</sup> See *The Beef Over Bananas: The Trade War Between America and Europe Over Bananas, and a Looming Clash Over Hormone-Treated Beef, Expose Big Weaknesses in World Trade Rule*, THE ECONOMIST 65, v. 350: Issue 8109, (March 6, 1999).

<sup>38</sup> See *id.*

<sup>39</sup> Rita D. Hayes, *Europe Started the “Banana War: Speech by the US Representative to the World Trade Organization on the Banana Imports Dispute*, THE INDEPENDENT (London), March 10, 1999.

<sup>40</sup> See *The Beef Over Bananas Article*, *supra* note 37.

<sup>41</sup> See *European Communities- Regime for the Importation Sale and Distribution of Bananas*, WT/DS27/49, April 9, 1999.

<sup>42</sup> David Sanger, *U.S. – Europe Trade War Looms Over Bananas*, 12/22/98 N.Y. TIMES ABSTRACTS 1, 1998 WL 22338382 (Dec. 22, 1998).

<sup>43</sup> See Cooper, Helena: *U.S. Starts Its Threatened Banana Fight With Europe*, WSJ A2, March 4, 1999.

<sup>44</sup> See *id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *id.*

<sup>47</sup> *Id.*

<sup>48</sup> See *World Trade Organization, European Communities- Regime for the Importation Sale and Distribution of Bananas*, WT/DS27/49, April 9, 1999.

<sup>49</sup> See *id.*

---

<sup>50</sup> See Naomi Koppel, *EU Cries Uncle In Banana Battle: As U.S. Tariffs Win Approval, Europe Says It Will Comply With WTO Rules - But It Could Take Awhile*, 4/20/99

ORANGE COUNTY REG. C01, 1999 WL 4295957, \*1 (April 20, 1999).

<sup>51</sup> See *Fruitless But Not Harmless: America Is Declaring Victory In It Absurd Bananas War With Europe*, 4/10/99 THE ECONOMIST 18, 1999 WL 7362454, \*1 (April 10, 1999).