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The Banana Split: Has the Stalemate Been Broken in the WTO Dispute? The Global Trade Community's "A-Peel" for Justice?

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Abstract

This Comment examines the latest developments of the banana trade dispute, which threatens to disrupt the economies of Third World countries and international relations on a general scale. Part I reviews the background of the legal treaties and the international organizations involved in the dispute, as well as the parties involved, and the dispute's basic history. Part II examines the dispute's procedural history, as presented before the World Trade Organization ("WTO"), and also highlights recent developments. Part III evaluates the WTO's legal rulings and analyzes key aspects of the banana dispute. Part III also suggests that while the system of preferential treatment, granted to the developing countries, contradicted the language of certain GATT provisions, the principles behind the preferential treatment complied with the tenets of international economic development law; therefore the treatment was not per se wrong. Part III suggests that the present regime should remain for a short transition period until the EU implements an alternative system. Finally, Part III suggests the most feasible alternative is a regionalized cooperative agreement between the EU and the developing countries. This Comment concludes that under international development law, globalization should be advanced with preferential treatment, in order to give participants, at various stages of economic prosperity, the same opportunity to integrate themselves and grow in the international trade community.

COMMENT

THE BANANA SPLIT: HAS THE STALEMATE BEEN BROKEN IN THE WTO BANANA DISPUTE? THE GLOBAL TRADE COMMUNITY'S "A-PEEL" FOR JUSTICE

*Aisha L. Joseph**

INTRODUCTION

Globalisation—I wish the word had never been invented. It's not something which politicians or political parties dreamed up one day. It is a process which dates back to the first time men emerged from caves, walked upright and decided to have a look at what was going on around them.¹

The on-going banana trade war concerns U.S. and Latin American objections of the European Union's ("EU") preferential treatment towards banana exports received from developing, third world nations over Latin American-produced bananas.² The United States and Latin America see this preferential treatment as illegal and discriminatory.³ The banana regime drew out conflicting opinions about the advancement of globalization, setting international economic development theory⁴

* J.D. Candidate, 2001, Fordham University School of Law. I would like to dedicate this Comment to my mother, Lauretta St. Brice Joseph, my stepfather, Gualbert B. Louisy, my father Louis, my sister Maureen, my nephew Meshach, and my niece Yasmin. I would like to thank my friends for their unconditional support and encouragement, as well as the editors and members of the Fordham International Law Journal for their extremely valuable feedback, assistance, and patience.

1. See *WTO's Moore Calls for Debt Write-Off for Poorest Countries*, available at <http://sg.dailynews.yahoo.com/headlines> (Apr. 14, 2000) (quoting Mike Moore, Director-General of World Trade Organization in speech National Press Club in Washington D.C.).

2. See Rodrigo Bustamante, *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, 533 (1997) (remarking that preferential regime is being challenged on various institutional grounds including violations of General Agreement on Tariffs and Trade ("GATT") as well as infringement on European Community Member States' sovereignty as per Treaty on European Community).

3. *Id.*

4. See LEGAL ISSUES IN INTERNATIONAL TRADE, 4 (Petar Sarcevic & Hans Van Houtte eds., 1990) (stating that international development law regulates relationship between sovereign but economically unequal States and it is not considered law of Third World, but international law of modern era); see also HANS VAN HOUTTE, THE LAW OF INTERNA-

against free market capitalism principles under the umbrella of international law,⁵ in order to ascertain what place preferential treatment has in international trade.⁶ Globalization requires the representation of all competing nations to come together on a global scale and compete in a more cooperative manner.⁷ During the last decade, the attainment of globalization, through preferential treatment within the world of international trade, became more complex and problematic.⁸ Supporters of a system of preferential treatment view such treatment as an advancement of international development that calls for a balance of trade among all who wish to participate but are on unequal economic footing.⁹ Those more apt to subscribe to classic international law assert that globalization has not positively impacted *all*

TIONAL TRADE 36-37 (1995) [hereinafter VAN HOUTTE] (explaining that international development law is based on two principles: developing countries have right to development; and developed countries have duty of solidarity towards developing countries as per Charter of Economic Rights and Duties).

5. See LEGAL ISSUES IN INTERNATIONAL TRADE, *supra* note 4, at 4 (stating that international law is based on rule of sovereign equality); see also VAN HOUTTE, *supra* note 4, at 36 (explaining that under tenets of sovereign equality, every state is equal and sovereign under law, regardless of that state's political or social system; each state can structure its own state and economic arrangement).

6. See generally Phedon Nicolaides, *Preferences for Developing Countries: A Critique*, 19 J. OF WORLD TRADE 373, 376-77 (1985) (discussing developing countries' involvement in globalization process under conflicting views of international economic development principles and free market capitalism principles).

7. See Michael Moore, *Challenges For the Global Trading System in the New Millennium*, Sept. 28, 1999, at http://www.wto.org/english/news_e/pres99_e/PR139_e.htm [hereinafter *Challenges*] (stating that WTO's central policy is to make prosperity that flows from globalization reachable to people; governments must cooperate in trade, investment, and financial arenas to secure maximum benefits from international specialization, while simultaneously leaving necessary space to address any fallout from change affecting certain groups).

8. EUROPEAN COMMISSION, GREEN PAPER ON RELATIONS BETWEEN THE EUROPEAN UNION AND THE ACP COUNTRIES ON THE EVE OF THE 21ST CENTURY—CHALLENGES AND OPTIONS FOR A NEW PARTNERSHIP, CHAPTER I—GLOBAL CHANGES AFFECTING ACP-EU RELATIONS (1996). See Michael Moore, *Trade, Poverty and the Human Face of Globalization*, June 16, 2000, at http://www.wto.org/english/news_e/spmm_e/spmm32_e.htm [hereinafter *Human Face*] (acknowledging that globalization is controversial and critics believe problem with globalization is that it lacks human face); see also, Michael Moore, *The Backlash Against Globalization?*, Oct. 26, 2000, at http://www.wto.org/english/news_e/spmm_e/spmm39_e.htm [hereinafter *Backlash*] (acknowledging backlash against liberalism).

9. See Nicolaides, *supra* note 6, at 375-76; see also Jack J. Chen, *Going Bananas—How The WTO Can Heal the Split in the Global Banana Trade Dispute*, 63 FORDHAM L. REV. 1283, 1304 (1995) (stating that developing countries must be treated differently in order to function on equal footing with developed countries and that developing countries will lag behind in economic development unless given time to stimulate their economies).

who participate in international trade.¹⁰ To the contrary, critics argue that preferential treatment only serves to mar the concepts of free market capitalism and trade.¹¹ Critics also maintain that if all trade participants were on equal footing, there would not be a need for trade.¹² Trade survives on the concept of economic disparity of its participants, which determines the prices of goods.¹³ Where one country has the competitive advantage to produce a particular product, another country should gain its competitive advantage in the production of another commodity.¹⁴ Detractors also blame globalization for increasing the income disparity between wealthy and poor countries, and view globalization as an economic threat.¹⁵

This Comment examines the latest developments of the banana trade dispute, which threatens to disrupt, the economies of Third World countries and international relations on a general scale. Part I reviews the background of the legal treaties and the international organizations involved in the dispute, as well as the parties involved, and the dispute's basic history. Part II examines the dispute's procedural history, as presented before the World Trade Organization¹⁶ ("WTO"), and also highlights recent developments. Part III evaluates the WTO's legal rulings and analyzes key aspects of the banana dispute. Part III also suggests that while the system of preferential treatment, granted to

10. See *Challenges*, *supra* note 7 (stating that WTO detractors blame globalization for widening gap between wealth of developed and developing countries and that developing countries are economically worse off than they were 20 to 30 years ago).

11. See Nicolaidis, *supra* note 6, at 377-78; see also Chen, *supra* note 9 (stating that only way to encourage ACP development is to place them in as close to free market economy possible and force them to streamline their businesses and learn to compete with more developed nations).

12. See Nicolaidis, *supra* note 6, at 377 (arguing that if all trading nations possessed same kind of labor, capital, and production functions, concept of trade would be unnecessary).

13. See *id.* at 378 (stating that in international trade it is important to ascertain how much of one genre of goods may be exchanged for another genre of goods; comparative advantage determines what should be produced and traded by particular nation).

14. *Id.* See Hale Sheppard, *The Lomé Convention in the Next Millennium: Modification of the Trade/Aid Package and Support for Regional Integration*, 7 KAN. J. L. & PUB. POL'Y 84, 95 (1998) (stating that opponents to regime suggest that developing countries should diversify and expand what they export to products or areas in which they hold competitive advantage).

15. See *Challenges*, *supra* note 7.

16. Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

the developing countries, contradicted the language of certain GATT provisions, the principles behind the preferential treatment complied with the tenets of international economic development law; therefore the treatment was not per se wrong. Part III suggests that the present regime should remain for a short transition period until the EU implements an alternative system. Finally, Part III suggests the most feasible alternative is a regionalized cooperative agreement between the EU and the developing countries. This Comment concludes that under international development law, globalization should be advanced with preferential treatment, in order to give participants, at various stages of economic prosperity, the same opportunity to integrate themselves and grow in the international trade community.

I. THE WORLD TRADE ORGANIZATION AND THE BANANA REGIME

The principal body of law at the center of the banana dispute is the General Agreement on Tariffs and Trade¹⁷ ("GATT"). GATT contains a commitment from its Member States to reduce tariffs and regulate government interference that constrains or misconstrues international trade.¹⁸ GATT was improved upon by the establishment of the WTO during the Uruguay Round negotiations.¹⁹ The creation of the WTO served as a turning point in GATT's history.²⁰ The WTO held that the primary responsibility for administering a dispute settlement system where Member State parties to GATT and to other agreements could seek to enforce their respective rights.²¹ GATT provided preferential treatment to developing nations, in response to their desire to liberalize their market access.²² GATT granted this preferential treatment in order to recruit developing coun-

17. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

18. See Bustamante, *supra* note 2, at 552 (stating that in order to comprehend dispute settlement mechanism, one must accept GATT's general premise, which is to prevent governments from imposing or continuing to impose restraints or distortions on international trade).

19. *Id.*

20. See Bustamante, *supra* note 2, at 552 n.104 (stating that Agreement forming WTO signified new era in GATT's history).

21. *Id.* at 552.

22. ROBERT E. HUDEC, TRADE POLICY RESEARCH CENTER, DEVELOPING COUNTRIES IN THE LEGAL SYSTEM 41 (1987).

tries as Member States.²³

A. *The WTO*

During the first half of the twentieth century, the world was in the middle of an ongoing depression.²⁴ The United States and the United Kingdom entered into discussions to set up the International Trade Organization²⁵ ("ITO") to alleviate the depression by advancing economic development through trade, investment, and business regulation.²⁶ At the same time, a number of countries negotiated a set of trade tariff concessions and regulations that became part of GATT.²⁷ The signatories drafted GATT as an interim trade liberalizing mechanism until the actualization of the ITO.²⁸ The ITO was never established leaving GATT as the only agreement to regulate international trade.²⁹

1. Former System

Originally, the signatories intended GATT to serve as a multilateral trade agreement that eventually would become the central point for international government cooperation with regard to trade.³⁰ GATT aimed to act as a trade liberalizing mechanism.³¹ GATT fulfills three primary functions for the interna-

23. *Id.*

24. See AN ANATOMY OF THE WORLD TRADE ORGANIZATION 1 (Konstantinos Adamantopoulos ed., 1997).

25. See LEGAL ISSUES IN INTERNATIONAL TRADE, *supra* note 4, at 210 (explaining that International Trade Organization was proposed at United Nations Conference on Trade and Employment, held from November 21, 1947, to March 1948, in Cuba, to promote postwar-economic reconstruction and trade by re-establishing and expanding world trade with International Monetary Fund and World Bank).

26. See *id.* (claiming that United States and United Kingdom, at end of World War II, met to discuss development of system to regulating world trade to avoid tragic economic events like that of 1930s).

27. See ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 24, at 1-2 (explaining that during 1947, significant tariff reduction negotiations were held that resulted in binding concessions affecting about US\$10,000,000,000 in trade).

28. See ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 24, at 2 (explaining that GATT was not supposed to be independent legal instrument, but interim measure to effectuate ITO commercial policy provisions).

29. *Id.*

30. Sheppard, *supra* note 14, at 87. See GATT (stating that GATT was effected on January 1, 1948).

31. See Richard Lyons, *European Banana Controversy*, 9 FLA. J. INT'L L. 165, 179 (1994) (noting that GATT's purpose is to diminish protectionist barriers among contracting parties).

tional trade community.³² GATT provides a system of rules to regulate the trade of goods.³³ GATT provides a means to resolve trade disputes.³⁴ Finally, GATT facilitates negotiations concerning matters of international trade.³⁵

There are three basic sets of rules under GATT.³⁶ The first set of rules governs the application of trade rules.³⁷ Article II allows the use of tariffs as a limit to trade, but not in excess of agreed upon levels.³⁸ Article XI bans the use of quotas and other non-tariff trade restrictions, subject to certain exceptions.³⁹ These exceptions include the use of quantitative restrictions as permitted under Article XIII.⁴⁰

32. GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 952 (1993).

33. *Id.*

34. *See id.* at 954 (explaining that dispute settlement is GATT's principle function; if GATT member cannot solve dispute with another GATT member through consultations, then dispute is brought before appointed panel of international trade experts).

35. *See id.* (explaining that GATT serves as multilateral forum to negotiate tariff reductions and trade agreements).

36. *Id.*

37. *See id.* (stating that GATT provides forum to negotiate international trade issues).

38. *See* GATT art. II (explaining that use of tariffs arises from premise that tariffs are least misconstruing trade restriction because they favor most efficient exporter and because they do not bar imports; they only increase exporters' costs); BERMAN, *supra* note 32, at 952 (explaining that tariffs are common import restriction used in commodity trade, which serve to protect domestic industries against competitive, foreign imports); JOHN H. JACKSON, *INTERNATIONAL ECONOMIC RELATIONS- LEGAL PROBLEMS* 376 (3rd ed. 1995) (noting that GATT stipulates that tariffs are more favorable to importing government because tariffs do not require government subsidization, tariffs are easier to create, tariffs do not require licensing system, tariffs allow government to keep profit it created, and tariffs offer little trade protection to importers); Jackson *supra* at 377 (noting foreign importer needs to be almost self-sufficient in order export to country that imposes tariffs); *id.* (noting, however, GATT recognizes that, unlike use of tariff system, quota restrictions allow importing government to plan how much of particular product can be imported).

39. GATT art. XI. Article XI states

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product . . . or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Id. para. 1.

40. GATT art. XIII. Article XIII(5) states that "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions." *Id.*; *see* JACKSON, *supra* note 38, at 376 (arguing that quantitative restrictions are most uti-

The second set of rules is non-discrimination rules.⁴¹ Article I, commonly known as the most-favored-nation⁴² ("MFN") clause, bans discrimination against imported goods.⁴³ The MFN clause asserts that any advantage granted to the goods of one country must be given to like products imported from all other countries.⁴⁴ One important exception to this rule grants preferential tariff treatment to developing countries.⁴⁵ The Generalized System of Preferences⁴⁶ ("GSP") and the Lomé Conven-

lized form of import restraints and go even further than tariff in specifying amount of particular good that may enter country at given time).

41. See BERMAN, *supra* note 32, at 953.

42. GATT art. I. GATT Article I(1) states:

[w]ith respect to customs duties and charges of any kind imposed or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports . . . and with respect to all rules and formalities in connection with importation and exportation . . . any advantage, favour privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other contracting parties.

Id.

43. *Id.*

44. GATT art. I. See JACKSON, *supra* note 38, at 436 (arguing that MFN clause is viewed as foundation of rules under GATT). The MFN clause exists in several other treaties besides GATT and specifically has been cited as a treaty-based concept by the United Nations International Law Commission. Jackson, *supra* note 38, at 438, 444.

45. See GATT art. I(2) (stating that Article I(1) will not require elimination of preferences involving import duties and charges under specified contingencies). *But see* ROMAN GRYNBERG, NEGOTIATING A FAIT ACCOMPLI: THE WTO INCOMPATIBILITY OF THE LOMÉ CONVENTION TRADE PROVISIONS AND THE ACP-EU NEGOTIATIONS, ECDPM, WORKING PAPER No. 38 (Sept. 1997) (stating that although WTO has accepted that there is justification for departure from MFN reductions in tariffs that is allowed for developing countries, MFN principles remain ideological nucleus of WTO law).

46. See Waivers of Generalized System of Preferences, June 25, 1971, GATT B.I.S.D. (18th Supp.) 24-26 (1972) [hereinafter GSP] (recognizing that contracting parties' principal goal is to promote trade and export earnings of developing countries in furtherance of developing countries' economic development). The GSP states:

(a) That without prejudice to any other Article of the General Agreement, the provisions of Article I shall be waived for a period of ten years to the extent necessary to permit developed contracting parties, subject to the procedures set out hereunder, to accord preferential tariff treatment to products originating in developing countries and territories with a view to extending to such countries and territories generally the preferential tariff treatment referred to in the Preamble to this Decision, without according such treatment to like products of other contracting parties—[p]rovided that any such preferential tariff arrangements shall be designed to facilitate trade from developing countries and territories and not to raise barriers to the trade of other contracting parties

tion⁴⁷ ("Lomé" or "Lomé waiver") first granted such preferential treatment to developing countries.⁴⁸ Article XXIV, another exception to Article I, provides for the formation of free trade areas and customs unions.⁴⁹ In part, Article XXIV permits free trade areas where the contracting parties have eliminated all trade restrictions.⁵⁰

The legal rationale behind preferential treatment given by such exemptions, like Article XXIV, is premised on the Enabling Clause.⁵¹ The Enabling Clause permits the preferential tariff and non-tariff treatment from developed countries, reciprocal preferences between developing countries, and special preferential treatment in favor of least-developed countries.⁵² The final set of GATT rules allow parties to enforce trade restrictions under stipulated circumstances.⁵³

47. ACP-EEC Convention of Lomé, O.J. (L 25), *reprinted in* 14 I.L.M. 595 (1975) [hereinafter Lomé I].

48. See JACKSON, *supra* note 38, at 436 (explaining that GATT approved GSP in June of 1971 allowing developed contracting parties to give more favorable treatment to products for developing countries versus those exported from developed countries for period of ten years); Sheppard, *supra* note 14, at 84 (explaining Lomé Convention, five year renewable agreement that grants preferential treatment to developing countries and EU).

49. See GATT art. XXIV(5) (stating that "the provisions of [GATT] shall not prevent, as between territories of contracting parties, the formation of a customs union or a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or a free-trade area").

50. GATT art. XXIV(8)(b). Article XXIV(8)(b) states:

A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Id.

51. See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, L/4903 (Nov. 28, 1979) [hereinafter Enabling Clause]. Article 1 states that "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties." VAN HOUTTE, *supra* note 4, at 104 (noting that enabling clause forms legal justification for preferential treatment of developing countries).

52. See Enabling Clause.

53. See generally GATT arts. VI, XII, XVI, XVIII(b), and XIX. Article VI(2) states: In order to offset or prevent dumping, contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

2. Current System

The growth in international services and trade, as well as the increasing interdependency of international economies, highlighted GATT's inherent limitations.⁵⁴ During the 1994 Uruguay Round negotiations,⁵⁵ the breadth of GATT expanded with the creation of the WTO.⁵⁶ GATT member nations automatically became members of the WTO, provided they assumed all obligations stipulated under the WTO agreement.⁵⁷

a. Functions of the WTO

The WTO serves as the legal and institutional base to foster a global trading network.⁵⁸ The WTO has five major functions.⁵⁹

Article XII(1) states that "[n]otwithstanding the provisions of paragraph 1 of Article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported, subject to the provisions of the following paragraphs of this Article." See GATT art. XVIII(b) (using quotas to counteract balance of payment problems). Article XIX(1)(a) states:

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Id.

54. Sheppard, *supra* note 14, at 87.

55. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

56. Chen, *supra* note 9 (explaining that WTO Agreement incorporated series of agreements served to remedy problems that arose under GATT).

57. COMMITTEE ON TRADE AND DEVELOPMENT, DEVELOPING COUNTRIES AND THE URUGUAY ROUND: AN OVERVIEW, NOTE BY THE SECRETARIAT, 77th Session, Nov. 21 and 25, (1994), available at http://www.wto.org/wto/legal/ldc2_512.htm [hereinafter COMMITTEE ON TRADE AND DEVELOPMENT]. Members must assume the obligations pursuant to several agreements in the area of goods, services, and intellectual property. *Id.* Members must also submit concession schedules addressing goods and services. *Id.* This ideology is known as single undertaking approach to the Uruguay Round resolutions, meaning that membership to the WTO is contingent upon accepting all the resolutions to the 1994 Uruguay Round negotiations without exception. *Id.*

58. See DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 13 (1999). See WTO Agreement art. IV(1) (stating that WTO functions are carried out by Ministerial Conference).

First, it facilitates the implementation, administration, and operation of WTO objectives, as well as those objectives under the Multilateral and Plurilateral Trade Agreements.⁶⁰

Second, the WTO provides a forum for negotiations.⁶¹ Such a forum allows Member States to address matters involving multilateral trade relations.⁶² The WTO creates a forum to facilitate negotiations and develops a framework to implement resolutions arising from these negotiations.⁶³

Third, the WTO resolves claims under its dispute resolution system.⁶⁴ In order to resolve a dispute, the WTO applies the Rules and Procedures Governing the Settlement of Disputes ("DSU").⁶⁵ The Dispute Settlement Body ("DSB") uses the DSU

WTO Agreement art. IV(1) (stating that Ministerial Conference is comprised of Member State representatives, who have authority to make decisions with regards to matters covered by Multilateral Trade Agreements at request of Member States). This function is carried out according to the stipulations within this Agreement and applicable Multilateral Trade Agreements. *Id.* The WTO's Secretariat is headed by a Director-General. *Id.* art. VI(1). The Ministerial Conference appoints the Director-General and established the powers, term of office, and obligations under this position. *Id.* para. 2. The Director-General appoints the staff and establishes the responsibilities of the Secretariat. *Id.* para. 3. The scope of the responsibilities of the Director-General and Secretariat shall be solely on an international scale and discharged only by the WTO. *Id.* para. 4. The WTO also has a General Council comprised of representatives from Member States. *Id.* art. 2(2). These members meet as deemed necessary and carry out the functions of the Ministerial Conference in between the Conference's meetings. *Id.* The General Council will meet to discharge the responsibilities of both the DSB and the Trade Policy Review Body. *Id.* paras. 3-4.

59. *See generally* WTO Agreement art. III.

60. WTO Agreement art. II(1). Under Article II of the WTO Agreement, the Multilateral Trade Agreements are integral parts of the WTO Agreement and, thus, binding upon all Member States. *Id.* art. II. Also under Article II, the Plurilateral Trade Agreements only bind those Member States who have accepted them and do not levy obligations or rights upon Members who have not accepted these agreements. *Id.*

61. WTO Agreement art. III(2) Article III(2) states:

[t]he WTO shall provide the forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

Id.

62. *Id.*

63. *Id.*

64. *Id.* para. 3.

65. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, art. 3(2), LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1226 (1994) [hereinafter DSU].

to address disputes arising under the WTO Agreement.⁶⁶ The DSU handles issues arising under individual trade agreements.⁶⁷

Fourth, the WTO administers the Trade Policy Review Mechanism,⁶⁸ in order to study the trade policies of Member States.⁶⁹ Finally, the WTO operates the International Bank for Reconstruction and Development and its affiliated agencies in cooperation with the International Monetary Fund ("IMF").⁷⁰ Such a coalition is considered extremely important as it improves monitoring over national policies and assures that developing countries will receive the necessary financial assistance to adjust to a liberalized multilateral trade system.⁷¹

b. Legal System

Scholars consider the DSB a crucial aspect of international, multilateral trade.⁷² This adjudicatory system is officially known as the Dispute Settlement Body ("DSB"), which handles disputes in accordance with the DSU.⁷³ Under the DSU, WTO members may assert a claim based on any of the multilateral trade agreements annexed under the WTO Agreement.⁷⁴ An independent

66. PALMETER & MAVROIDIS, *supra* note 58, at 16.

67. See COMMITTEE ON TRADE AND DEVELOPMENT, *supra* note 57 (stating that such integration reflects single undertaking approach adopted by WTO members).

68. See AN ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 24, at 24 (explaining that purpose of Trade Policy Review Mechanism ("TPRM") is to oversee trade policies and practices of WTO Members and to evaluate their impact on both multilateral and plurilateral trading systems). The TPRM is expected to achieve greater transparency and understanding of Member trade policies, which will lead to better operation of global trade system. *Id.*

69. *Id.*

70. WTO Agreement art. III(5). Article III(5) states: "With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies." *Id.*

71. See COMMITTEE ON TRADE AND DEVELOPMENT, *supra* note 57 (noting that coalition also dismissed idea of inconsistency between trade policy recommendations, with regards to developing country lending policies and requirements under what is now WTO).

72. See DSU art. 3(2) (stating that General Provisions state that DSB is central element in providing immunity and stability to multilateral trading system).

73. DSU art. 2(1). The DSB works under the authority of the General Council. WTO Agreement art. IV(3). The DSB has its own chairman and procedural rules necessary to accomplish its responsibilities, which are provided for in the DSU. *Id.*

74. DSU art. 1(1). Article 1(1) states:

The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this

panel, which is comprised of experts in international trade and in the consistency of trade measures under GATT, hear these actions.⁷⁵

At the 1994 Uruguay Round, the DSU modified the GATT adjudicatory system.⁷⁶ Under the WTO adjudicatory system, Member States may not unilaterally determine violations or suspend concessions.⁷⁷ Instead, they must adhere to the rules and regulations of the DSU in order to accomplish such a goal.⁷⁸ Member States, furthermore, do not need a consensus for procedures leading up to the adoption of panel rulings.⁷⁹ Rather, the

Understanding as the "covered agreements"). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the "WTO Agreement") and of this Understanding taken in isolation or in combination with any other covered agreement.

Id.

75. *Id.* art. 8(1). Article 8(1) states:

Panels shall be composed of 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 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Id.

76. See ANATOMY OF WTO, *supra* note 24, at 59.

77. See DSU art. 23(2)(a). Article 23(2)(a) states:

[Member States shall] not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding

Id.

78. *Id.* Along the lines of limiting unilateral action, under DSU Article 23, a Member cannot make its own determination that a violation or non-violation has occurred. *Id.* The Member State must rely on the dispute settlement process, unless its own findings are consistent with what is determined under a panel or appellate body report. *Id.*

79. 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 L. 265 (1996) (noting that prior to DSU panel report had to be adopted by consensus, therefore any contracting party could block adoption of report). DSU asserts that panel report is considered adopted unless either a disputant appeals report's findings or DSB decides, by consensus, not to adopt report. *Id.*

WTO uses a negative consensus, which mandates a consensus only to *stop* proceedings from advancing during any stage of the formal dispute resolution process.⁸⁰

The establishment of an independent panel and the adoption of a panel report is now virtually automatic.⁸¹ An Appellate Body (the "AB") affords an independent panel to disputing parties before a panel report becomes legally binding.⁸² The newly formed AB is comprised of seven members, three of whom serve on a given case.⁸³ The AB only reviews issues of law covered within the panel report, as well as the Panel's legal interpretations.⁸⁴

Once a panel or AB report is issued, the relevant party must notify the Panel or AB of its intentions to adopt the recommended implementations.⁸⁵ If a party cannot immediately comply with a panel report, the DSU will give that party a reasonable

80. *Id.*

81. *Id.*

82. See Bessko, *supra* note 79 (explaining that shorter, more exact time limits for each procedural stage have been established). Under the DSU, a Member who wishes to assert a claim must actually enter into consultations within 30 days from its request to enter into said consultations within another Member country. DSU art. 4(3). If a settlement has not been achieved after sixty days from this initial request, the complaining party may seek the assembly of a panel. *Id.* para. 7. A panel generally completes its work within 6 months (or 3 months in a case of exigency). *Id.* art. 12. Panel reports may be considered by the DSB 20 days after are issued to Members. *Id.* art. 16, para. 1. Within 60 days after issuance, the panel report will be adopted, unless the DSB decides, by consensus, not to adopt the report or unless one of the disputing parties notifies the DSB that it will appeal. *Id.* para. 4. Shorter time limits allow an alternative means to unilateral action and also speed up the dispute settlement process. Bessko, *supra* note 79.

83. DSU art. 17(1). Article 17(1) states:

[a] standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

Id.

84. *Id.* art. 17(6). These proceedings last no longer than sixty days from the date that a party serves notice that it will appeal. *Id.* art. 17(5). The DSB issues a report that must be accepted, without condition, by the disputants within 30 days of that report's issuance to the relevant parties and Members States, unless otherwise rejected by a DSB consensus. *Id.* art. 17(4).

85. *Id.* art. 21(3). Article 21(3) states:

At a DSB meeting held within 30 days 11 after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the rec-

amount of time to comply.⁸⁶ This reasonable amount of time will be memorialized by an agreement between the parties and subject to subsequent DSB approval within forty-five days of the panel report's adoption or via arbitration within ninety days from a report's adoption.⁸⁷

c. Treatment of Developing and Least-Developed Countries

The WTO promotes the continued growth, in the area of international trade, of its developing and least-developed Member States.⁸⁸ Least-developed countries receive special considerations with regards to market access.⁸⁹ Such special considerations include provisions that allow longer transition periods for implementing certain trade obligations and complete exemption from obligations normally required of Member States.⁹⁰ In furtherance of these least-developed countries fulfilling their obligations, while simultaneously reaping the benefits of the multilateral trade system, the WTO agreed that all measures created to assist these countries will be guaranteed via regular reviews.⁹¹

The original GATT agreement also gave these Member States a similar special consideration with regard to market access.⁹² Therefore, some of the provisions provided under the

ommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so.

Id.

86. *Id.*

87. *Id.* art. 21(3)(b). Article 21(3)(b) states that a reasonable time period is that which is "mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement" *Id.*

88. *See* WTO Agreement (stating that parties to agreement "[r]ecogniz[e] . . . that there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development").

89. VAN HOUTTE, *supra* note 4, at 39. Economists have generated criteria to determine whether a country is developed or developing. *Id.* Developing countries are further divided into: the least-developed countries, less developed countries and new industrialized countries. *Id.* In the area of international trade law, a country that wants to be recognized as a developing country can present itself as such for approval by richer nations. *Id.*

90. GATT art. XI.

91. *See* Decision on Measures in Favor of Least-Developed Countries, Apr. 15, 1994, WTO Agreement, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1248 (1994).

92. COMMITTEE ON TRADE AND DEVELOPMENT, *supra* note 57.

WTO build upon what is provided under GATT.⁹³ The WTO Committee on Trade and Development provides technical assistance that allows these countries to develop, strengthen, and diversify their production and export markets.⁹⁴ These countries, therefore, may maximize their newly found, liberalized access to the trade market.⁹⁵

The WTO expressed the need for the allocation of financial and non-financial resources to developing countries.⁹⁶ This allocation of resources would assist developing countries in the relief of their monetary debts and the insurance of their economic development.⁹⁷ The WTO also acknowledged the specific needs of these countries and agreed to continue the use of positive measures, in favor of these countries, in order to expand their trading opportunities.⁹⁸

The WTO predicted improved market access in the area of agriculture.⁹⁹ A reduction of trade barriers, domestic support measures, subsidies used to promote export competition, as well as an increase in the role of bindings enabled these improvements.¹⁰⁰ These improvements also required Member States to convert all non-tariff measures to tariffs, as well as bind 100% of agricultural tariff lines.¹⁰¹

93. See COMMITTEE ON TRADE AND DEVELOPMENT, *supra* note 57 (explaining that in addition to retaining provisions from original GATT 1947, new agreements under WTO will have provisions for developing and least-developed countries that will require longer transition periods to fully implement obligations).

94. *Id.* (explaining that technical assistance allows developing countries to reap benefits of multilateral trading system).

95. *Id.*

96. See COMMITTEE ON TRADE AND DEVELOPMENT, *supra* note 57 (explaining that WTO acknowledges need for financial and real investment resources for developing nations as well as more efforts to assist developing countries to relieve their debt).

97. *Id.*

98. See Decisions on Measures in Favor of Least-Developed Countries, *supra* note 91, para. 3. (stating that Member States “[a]gree to keep under review the specific needs of the least-developed countries and to continue to seek the adoption of positive measures which facilitate the expansion of trading opportunities in favour of these countries”).

99. COMMITTEE ON TRADE AND DEVELOPMENT, *supra* note 57.

100. See *id.* (stating that bindings, with respect to tariffs on certain products at particular level, occur when country agrees not to increase tariffs above that level; bindings have played crucial part in establishing domestic and international credibility for domestic reform programs); see also Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

101. See COMMITTEE ON TRADE AND DEVELOPMENT, *supra* note 57 (noting that

B. *The Banana Regime*

During the twentieth century, the two World Wars brought economic ruin to, and shifted world power away from, Europe.¹⁰² Since the wars ended European imperialism, Europe sought to create a new world order in an effort to rebuild itself as a collective world power.¹⁰³ In furtherance of this goal, the European countries realized that they stood to gain a tremendous economic advantage if they included their colonies and former colonies in their post-World War II revitalization plans.¹⁰⁴

1. Background

In 1957, the Treaty of Rome¹⁰⁵ established the European Economic Treaty among several European countries.¹⁰⁶ The European Economic Treaty granted several African colonies special status that allowed them economic and technical assistance, including tariff preferences for their exports to the EEC market.¹⁰⁷ In return, the African colonies gave reciprocal preferential treatment to imports from European Economic Community ("EEC") members.¹⁰⁸

During the 1960s, the United Nations Conference on Trade and Development,¹⁰⁹ developed a system under which the more developed countries would lower the customs duties levied on imports from developing countries.¹¹⁰ As a result, the producers in developing countries would have a better opportunity to com-

under new tariff measures, security of trade products will be greater than industrial products for first time in GATT's history).

102. See Bessko, *supra* note 79 (explaining that twentieth century ended European imperialism by way of anti-colonialism struggles and World Wars I and II).

103. See *id.* (noting that after World War II, new era of North-South relations commenced and by 1960s Europe released many of their colonies).

104. *Id.*

105. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

106. *Id.* The European countries involved were France, Belgium, the Netherlands, Luxembourg, Italy, and West Germany. *Id.*

107. EEC Treaty arts. 131-36 and annex IV; Bessko, *supra* note 79.

108. See Bessko, *supra* note 79 n.26 (citing to Conventions of Association between EEC and African and Malagasy States Associated with that Community.)

109. See VAN HOUTTE, *supra* note 4, at 102 (stating that United Nations Conference on Trade and Development ("UNCTAD") is comprised of 190 member countries). UNCTAD was created to promote economic growth in the developing countries through international trade, to create principles and policy for international trade and economic development as well as to make proposals in furtherance of these goals. *Id.*

110. *Id.* at 105.

pete with domestic producers in importing countries.¹¹¹ This laid the foundation for a GSP.¹¹²

In 1971, GATT contracting parties executed a GSP.¹¹³ A GSP aims to help developing countries increase their export earnings, increase their economic growth, and promote their industrialization.¹¹⁴ Under a GSP, individualized regimes with developing countries promote the export growth of these countries while, simultaneously, allows developed countries to determine the precise nature of the concessions they would allow.¹¹⁵

Meanwhile, in 1973, the Treaty of Accession¹¹⁶ drew Denmark and the United Kingdom into the EEC.¹¹⁷ Subsequently, Great Britain lobbied to bring its former colonies, which included several African, Caribbean, and Pacific nations, under EEC status.¹¹⁸ Great Britain's lobbying efforts, and the overall desire for a new international economic regime, which would allow the EEC to engage in a partnership with their former colonies, resulted in the birth of Lomé.¹¹⁹

111. *Id.* The EU and 18 former French and Belgian colonies in Africa echoed the principle of preferential treatment during the Yaoundé Convention. BERMAN *supra* note 32, at 948. At the conclusion of the second Yaoundé Convention in 1969, the EU had entered into the Arusha Agreement with Tanzania, Uganda, and Kenya. BERMAN, *supra* note 32, at 948. Similar to its predecessors, this agreement dealt with providing financial and technical assistance to these countries. *Id.*

112. VAN HOUTTE, *supra* note 4, at 106.

113. See generally GSP. See JACKSON, *supra* note 38, at 1126 (discussing that under GATT GSP waived Article I for period of 10 years). See also VAN HOUTTE, *supra* note 4, at 106 (explaining that even though GSP originated from UNCTAD, its regulation lies with GATT).

114. JACKSON, *supra* note 38, at 1128. See VAN HOUTTE, *supra* note 4, at 106 (arguing that based on studies of application of GSP between 1971 and 1980, it appears system favored newly industrialized countries).

115. *Id.*

116. See Documents Concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland, Decision of the Council of European Communities of 22 January 1972 on the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Atomic Energy Community, 1972 O.J. L73 [hereinafter Treaty of Accession].

117. *Id.*

118. See Bessko, *supra* note 79 (stating that Britain lobbied to include its former colonies, known as Commonwealth of Nations, as part of EEC under associate status).

119. See Bessko, *supra* note 79 (stating that pressure from Great Britain resulted in replacement of Yaoundé Conventions with Lomé, which changed relationship between EEC and former colonies from association to partnership).

2. Regulations

Lomé served as a way for the EU to aid in the economic development of its former Third World colonies.¹²⁰ Lomé promoted the concept of sustainable development based on the resources *available* to these countries, their respective social values, and their economic potential.¹²¹ Lomé provided the framework for Regulation EEC No. 404/93, which similarly granted preferential treatment to developing African, Caribbean and Pacific (“ACP”) nations under a slightly more complicated system.¹²²

a. The Lomé Conventions

Lomé, which allocated duty-free and quota-free preferences, was the largest non-GSP program.¹²³ Under Lomé, the EU granted a wide range of preferences and financial assistance to ACP nations.¹²⁴ Under a GSP scheme, industrialized nations grant a narrower set of preferences to certain products from developing nations.¹²⁵

i. Lomé Conventions One Through Three

In 1975, the EEC, its Member States, and forty-six ACP countries signed the first Lomé Convention¹²⁶ (“Lomé I”).¹²⁷

120. *See id.* (commenting that EU viewed Lomé as means to test their desire for regional economic integration and developing countries view Lomé as breakthrough in their quest to develop economically, politically, and socially with rest of industrialized world).

121. *Id.* *See* Sheppard, *supra* note 14, at 95 (noting that ACP countries argue that alternative exports are not feasible because these crops must face disadvantages of terrain, climate, and size of plantations). The ACPs argue that in order generate profits, any substitute product would require access to major markets, the majority of which are already ingrained in competition. Sheppard, *supra* note 14, at 95. Other exports must depend on regular shipping service, which can only be insured by the volume of banana sales. *Id.*

122. Bustamante, *supra* note 2, at 533.

123. JACKSON, *supra* note 38, at 1130-31. *See* MAURITIUS FREEPORT DEVELOPMENT: LOME, at <http://mfd.intnet.mu/cross/lome.htm> [hereinafter MAURITIUS] (stating that Lomé allows products into EU, duty free, as long as certificate of circulation, known as “EUR 1” is obtained). EUR 1 is similar to certificate of origin and is secured only where product being exported was entirely produced in an ACP nation. MAURITIUS, *supra* note 123.

124. JACKSON, *supra* note 38, at 1131.

125. *Id.*

126. Lomé I.

127. Sheppard, *supra* note 14, at 84. The Member States of EU that were present include: Germany, Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom. *Id.* at 84, n.1

Lomé I created a cooperative atmosphere between the EEC, its Member States, and the ACP nations, which would serve as a catalyst for the social, economic, and cultural development of the ACP nations.¹²⁸ Pursuant to this goal, Lomé I supported sustainable development based on the ACP nation's social and cultural values, human capital, natural resources, and the potential for economic growth.¹²⁹

Similar to pre-Lomé treaties, Lomé I provided financial and trade preferences to ACP nations.¹³⁰ Financial aid, which was renewable every five years, included money from the EU Member States that was placed in a fund called the European Development Fund, as well as financing by the European Investment Bank in the form of low interest loans.¹³¹ The trade preferences included stability preferences for extended periods of time and mutually agreed upon contractuality preferences, which may not be modified unilaterally.¹³²

Lomé I established another preference: non-reciprocity under which ACP countries are exempted from extending reciprocal trade preferences to EU exports.¹³³ The Stabex system provided stable prices on the banana and sugar exports to the EU.¹³⁴ Lomé I also insured that ACP nations had duty-free access to the EU market on almost 100% of all its products.¹³⁵ Lomé signatories renewed and renegotiated the convention three additional times.¹³⁶ They signed Lomé II in 1979 and

128. *See id.* at 84 (noting that Lomé's original purpose calls for partnership-like relationship). Lomé exists to promote and expedite the economic, cultural, and social development of the ACP states, as well as consolidate and diversify the relationship between the European Community and the ACP nations. *Id.*

129. *Id.*

130. BERMANN, *supra* note 32, at 948.

131. Sheppard, *supra* note 14, at 84 (commenting that terms of this direct financing agreement must be renewed every five years).

132. *Id.*

133. BERMANN, *supra* note 32, at 949.

134. *Id.* The Stabex system was in response to the fact that ACP export earnings of have traditionally depended on agricultural commodities, which are foodstuffs and other raw materials; ACP export earnings have been subject to significant fluctuations because the prices of those commodities are often subject to large oscillations in world markets. *Id.* *See generally* VAN HOUTTE, *supra* note 4, at 109 (setting out conditions to be met in order to apply this stabilization mechanism).

135. Sheppard, *supra* note 14, at 84; BERMANN *supra* note 32, at 949.

136. *See* Bessko, *supra* note 79 (commenting that foundation and principal characteristics of subsequent conventions remain close to Lomé I).

Lomé III in 1984, each having a five year term.¹³⁷

ii. Fourth Lomé Convention

Lomé IV, the most recent Lomé agreement, expired February 29, 2000.¹³⁸ Although Lomé IV encompassed provisions similar to the previous Lomé Conventions, it modified the Stabex system¹³⁹ and extended the range of recipients who would receive financial and technical assistance.¹⁴⁰ Lomé IV allocated more funding than Lomé III.¹⁴¹ In addition, Lomé IV established a number of committees to further the cooperative efforts between the EU and the ACP nations.¹⁴²

Lomé IV established Protocol Five, which pertained exclusively to the banana trade.¹⁴³ Protocol Five guaranteed that any ACP nation that supplies bananas to the EU will not be placed in a less favorable position than they would have enjoyed upon the actualization of a single EU market.¹⁴⁴ In addition, Protocol Five allowed the EU to establish general regulations for the banana trade: under the conditions that the EU fully consult with the

137. Second ACP-EEC Convention of Lomé, Oct. 31, 1979, O.J. [L 347/2 (1980)], reprinted in 19 I.L.M. 327 (1980) [hereinafter Lomé II]; Third ACP-EEC Convention of Lomé, Dec. 8, 1984, 24 I.L.M. 571 (1985) [hereinafter Lomé III]. Lomé ran from 1980 through 1985 and was signed by 65 states; Lomé II ran from 1985 through 1990 and was signed by 69 states. Sheppard, *supra* note 14 at n.12.

138. African, Caribbean and Pacific States-European Economic Community: Final Act, Minutes, and Fourth ACP-EEC Convention of Lomé, Dec. 15, 1989, 29 I.L.M. 783 (1990) [hereinafter Lomé IV].

139. See MAURITIUS, *supra* note 123 (stating that Stabex system was designed to stabilize prices for some agricultural products exported by ACP countries).

140. BERMANN, *supra* note 32 at 949-50. Unlike its predecessors, Lomé IV, signed on December 15, 1989, lasted for a 10-year period; the financial protocol, which was contingent upon the 7th European Development Fund, was signed for five-year period. MAURITIUS, *supra* note 123.

141. See *id.* (explaining that Lomé IV allotted approximately ECU3,500,000,000 to alleviate foreign debt problems faced by many ACP countries, and make them more competitive force in banana trade).

142. *Id.*

143. Lomé IV, protocol 5. Protocol 5 states:

The Community and the ACP States agree to the objectives of improving the conditions under which the ACP States' bananas are produced and marketed and of continuing the advantages enjoyed by traditional suppliers in accordance with the undertakings of Article 1 of this Protocol and agree that appropriate measures shall be taken for their implementation.

Id.

144. *Id.* Protocol 5, art. 1 stipulates: "[N]o ACP State shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favorable situation than in the past or at present." *Id.*

ACP countries to formulate these regulations, and that no traditional ACP supplier is placed in a less favorable position in lieu of these regulations.¹⁴⁵ This Protocol supplements Article 168(1) of Lomé IV, which stipulates that banana imports to the EU from ACP countries are duty free.¹⁴⁶

iii. Overall Critiques of Lomé

The European Commission, presented a recent analysis concerning Lomé IV's impact.¹⁴⁷ According to this report, in 1997, the twelve ACP states used only 75% of their allocation, under Protocol Five, and generated about ECU400,000,000.¹⁴⁸ From 1988-97, total ACP exports grew by just under 4% in volume as compared to other developing countries that grew by 75%.¹⁴⁹ Only five of these ACP countries grew at a rate greater than other developing countries as a result of a margin of preference.¹⁵⁰ The ACPs under Lomé, as compared to the GSP regime, enjoy a preferential margin of 2%.¹⁵¹

145. *Id.* Protocol 5, art. 2. Article 2 states:

Each of the ACP States concerned and the Community shall confer in order to determine the measures to be implemented so as to improve the conditions for the production and marketing of bananas. This aim shall be pursued through all the means available under the arrangements of the Convention for financial, technical, agricultural, industrial and regional cooperation. The measures in question shall be designed to enable the ACP States, particularly Somalia, amount being taken of their individual circumstances, to become more competitive both on their traditional markets and on the markets of the Community. Measures will be implemented at all stages from production to consumption

Id.

146. *Id.* art. 168(1). Article 168(1) states that “[p]roducts originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect.”

147. REPORT OF THE EUROPEAN COMMISSION, AN ANALYSIS OF TRENDS IN THE LOMÉ IV TRADE REGIME AND THE CONSEQUENCES OF RETAINING IT, CE/TFN/GCEC3/09-EN, ACP/61/002/99 (1999), available at http://www.acpsec.org/gb/trade/pref/pref_ane.html.

148. *See id.* (noting that 640,409 tons of ACP bananas were exported).

149. *Id.*

150. *See id.* (identifying five countries as Mauritius, Jamaica, Madagascar, Kenya, and Zimbabwe; Lomé preference is defined as products having preferential margin higher than 3%, excluding commodity protocol products).

151. *See id.* (explaining that protocols maintain traditional trade for benefiting countries, therefore advantage derived by Lomé protocol can only be measured by amount of imports and not by preferential margin compared to MFN or GSP tariffs, which according to Commission would prevent imports into EC). Commission states that compared with the GSP in 1996 the preferential margin was ECU504,000,000

Opponents of Lomé strongly believe that such preferential treatment encourages a welfare-like state of dependency on the EU for access to the common market and financial aid.¹⁵² Opponents believe that where ACP nations are forced into the free market economy and compete with developed nations, international development should be defined.¹⁵³ Critics attribute the historical division of labor between the ACPs and the EU as a another reason for Lomé's failure; more specifically that the production of primary commodities are given to developing nations, while the production of industrialized commodities are assigned to Europe.¹⁵⁴ Opponents also believe there is a waning interest by EU partners to assist the ACP nations.¹⁵⁵

iv. Overall Advantages of Lomé

Proponents of Lomé argue that countries must be given some time to develop their economies in order to function, on an equal footing, with developed nations in the long run.¹⁵⁶ Lomé supporters argue that Lomé has converted the ACP-EU relationship from one of exploitative colonialism to a willingness by the EU to provide assistance to ACP nations in consideration of their specific needs.¹⁵⁷ Several political reasons have been as-

(2.5%) and the MFN preferential margin, based on the 1996 EU tariff, was ECU734,000,000. *Id.*

152. See Sheppard, *supra* note 14 at 89 (stating that critics argue Lomé prolongs problems of ACP countries by creating dependence on EU, which promotes paternalistic and agent/principle relationships instead of partnership as was originally intended under Lomé).

153. See *id.* at 89 (stating commentators believe that international development theory has reached impasse and lacks direction).

154. See Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1, 5 (1991) (stating that historic division of labor allocates production of primary commodities to African nations, while production of industrial goods are designated to Europe).

155. See Sheppard, *supra* note 14, at 88-90 (explaining decline in interest has been attributed to several factors which include: EC's goals of achieving new international economic order and recruiting newly democratized Eastern European and Mediterranean nations; disappointing decrease in ACPs' share of EU banana market; failure to diversify export products; end of Cold War; formation of single EU market; rigidity of ACPs' somewhat diverse socio-political and economic structures; and decrease in financial aid which has rerouted itself back to EU's sovereign interests and concerns).

156. See Chen, *supra* note 9, at 1303 (explaining that developing countries will continue to lag behind in economic development unless they are given time to invigorate their economies).

157. See Matthews, *supra* note 154, at 5 (arguing that examples in support of this

serted in support of Lomé as well.¹⁵⁸

b. EEC Regulation No. 404/93

Before 1993, the EU still had not achieved its goal of a single market.¹⁵⁹ Twelve regimes existed before 1993.¹⁶⁰ These regulations placed quantitative restrictions against non-ACP countries that also exported bananas to the EU.¹⁶¹ Many countries called for a single and uniform trade policy to regulate banana imports.¹⁶² After much negotiation, the EEC adopted Regulation 404/93 in February of 1993.¹⁶³

Regulation 404/93 established four categories of banana imports: traditional ACP country imports, non-traditional ACP country imports, third country imports, and EU bananas.¹⁶⁴

evolution include emphasis on self-reliance in Southern Hemisphere and highly concessional terms with regard to aid).

158. See Chen, *supra* note 9, at 1305 (explaining that if Latin and U.S. GATT signatories had refused to approve Lomé, repercussions would be initiated by EU and other contracting Parties).

159. See Bessko, *supra* note 79 (stating that EU needed to agree on uniform banana regime that factored Lomé obligations, EU's domestic banana production, Latin American banana production, and securing reasonable prices for EU consumers).

160. See Sheppard, *supra* note 14, at 86 (explaining regimes could be classified into four categories of regimes that ranged from complete ban on banana imports to regime with no restrictive tariffs); see Bessko, *supra* note 79, n.48 (stating that pursuant to Protocol Five, Britain, France, and Italy had protected banana imports under Regulation 288/82 and Article 115 of EC Treaty). Council Regulation 288/82 uses quantitative restrictions to protect banana production within France, Greece, Portugal, and Spain. Bessko, *supra* note 79, n.43. EEC Treaty Article 115, which is normally invoked if national products are harmed by indirect imports, extends to the protection of ACP bananas. *Id.* at n.48.

161. Bessko, *supra* note 79, at n.43.

162. Bessko, *supra* note 79.

163. Regulation 404/93 became effective on July 1, 1993. Council Regulation No. 404/93, O.J. L 47/1 (1993) [hereinafter EEC 404/93]. EEC 404/93 stipulates that its purpose is "to ensure a satisfactory marketing of bananas produced within the [EC] and of products originating in the ACP states within the framework of the Lomé Convention Agreements." *Id.*, at para. 16. Under Regulation 404/93, uniform rules were established in the areas of: common quality and marketing standards, assistance, banana producer's organizations and concentration devices, and more specifically the trade of bananas with third countries. Lyons, *supra* note 31 at 178.

164. Lyons, *supra* note 31, at 178. See Bustamante, *supra* note 2, at 540 (noting that in case at bar, traditional imports from ACP nations are defined as amount of bananas originating in ACP states that had traditionally exported bananas into EC). Non-traditional imports are bananas from ACP states not traditionally exported to the EU and those from traditional ACP suppliers that exceeded the allotted duty free ton allocation. Bustamante, *supra* note 2, at 540. Imports from third countries are defined as those bananas produced in non-ACP, Latin American nations. *Id.*

Regulation 404/93 allowed ACP countries to import bananas to Europe, duty free, whereas non-ACP bananas were subject to a tariff quota.¹⁶⁵ Regulation 404/93 also established a licensing system to appease third country and non-traditional, ACP banana importers.¹⁶⁶

II. THE BANANA DISPUTE

At one end of the banana dispute are the ACP countries that trade with the EU.¹⁶⁷ At the other end of the dispute are several Latin American countries, which also produce and export bananas to the EU.¹⁶⁸ Similar to many of the ACP coun-

165. Bessko, *supra* note 79. ACP countries are allowed to import up to a maximum of 857,700 tons of bananas into the common market duty free. EEC 404/93 arts. 15, 18. Non-traditional ACP countries and third countries may import up to 2,000,000 tons into the common market at a 100ECU/ton tariff. *Id.* art. 15. Imports over the 2,000,000 ton quota are subject to a 750ECU/ton tariff for ACP country imports and an 850 per ton tariff for third country imports. *Id.* art. 18.

166. Bessko, *supra* note 79. Regulation 404/93 also allocated banana import licenses for the benefit of importers from non-traditional ACP countries and third country importers is as follows: 65.5% of the licenses were given to importers who market third country or non-traditional bananas; 30% of the licenses were given to operators who market EU and/or traditional ACP bananas and 3.5% were given to importers established with the EU and marketing bananas other than EU or traditional ACP bananas starting in 1992. EEC 404/93 art. 19(1). The amount each importer under the first two categories is allotted is based upon "the average quantity each has sold in the three most recent years for which figures are available." *Id.* art. 19(2). See Azar M. Khansari, *Searching For The Perfect Solution: International Dispute Resolution and the New World Trade Organization*, 20 HASTINGS INT'L & COMP. L. REV. 183, 199 (1996) (noting that Colombia, Guatemala, Costa Rica, Nicaragua, Venezuela, Honduras, Panama, Mexico, and El Salvador were most adversely affected by Regulation 404/93).

167. Lyons, *supra* note 31 at 171. See *Europa Development—ACP Countries*, available at http://europa.eu.int/comm/development/country/index_en.htm (listing 71 ACP countries that participated under Lomé IV: Angola, Antigua and Barbuda, Bahamas, Barbados, Belize, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Cook Islands, Cote d'Ivoire, Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Ethiopia, Eritrea, Fiji, Gabonese Republic, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Haiti, Jamaica, Kenya, Kiribati, Lesotho, Liberia, Madagascar, Malawi, Mali, Marshal Islands, Mauritania, Mauritius, Micronesia, Mozambique, Namibia, Nauru, Niger, Nigeria, Niue, Palau, Papua New Guinea, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, Sudan, Suriname, Swaziland, Tanzania, Togolese Republic, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, and Zimbabwe). At the other end of the dispute are several Latin American countries and the United States, which will be discussed in further detail in subsection 1. Lyons, *supra* note 31, at 171.

168. See Lyons, *supra* note 31, at 172 (noting that these countries include Bolivia, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua,

tries, agriculture, particularly bananas, is the principal export of these Latin American countries.¹⁶⁹

1. Opponents

With financial support from the United States, it is cheaper for Latin American countries to produce their bananas than it is for the ACP nations.¹⁷⁰ The Latin American nations asserted that the *preservation* of preferential treatment towards the ACP exports would be detrimental to their respective economies.¹⁷¹ The ACP nations argued that the *elimination* of a preferential export system would prove detrimental to their respective economies.¹⁷²

Mexico, Panama, and Venezuela). Honduras, Panama, Ecuador, Mexico, El Salvador, and Cuba did not belong to GATT. *Id.* at n.67.

169. See Lyons, *supra* note 31 at 173 (explaining that this is due to falling prices of other major Latin American exports, such as sugar and coffee, on international market).

170. *Id.*

171. See *id.* (arguing that production cost advantages they possess is worthless if banana regime exists, thus depriving Latin American countries of full value of their production capabilities). Latin American countries warn that hundreds of thousands of jobs will be lost and economic health will be in jeopardy if the current banana regime is not modified. *Id.*

172. See Khansari, *supra* note 166, at 198 (arguing that competition from Latin American countries may prevent ACP countries from having central role in market). See CLAIRE GODFREY, POLICY DEPARTMENT, OXFAM UK AND IRELAND, A FUTURE FOR CARIBBEAN BANANAS—THE IMPORTANCE OF EUROPE'S BANANAS MARKET TO THE CARIBBEAN (March 1998), at <http://www.oneworld.org/textve/oxfam/policy/papers/bananas.htm> (noting that OXFAM is proponent for banana regime and Lomé argue that their share of European banana market will be compromised with elimination of preferential treatment; thousands of people will be condemned to poverty and even pose serious threat to Caribbean Winward islands' future political and economic stability). OXFAM argues that Eastern Caribbean would suffer the most in the Caribbean region because of shared currency and in general Caribbean Community because of intra-regional trading. Some farmers may abandon their farms and turn to the illegal drug trade to make ends meet or emigration. Godfrey, *supra*; see also Sheppard, *supra* note 14, at 94 (commenting that other adverse consequences as result of Lomé's elimination include: unemployment, political unrest, adversity in tourism industry, and illegal immigration); Dr. Stephen J. H. Dearden, *The EU Banana Regime and the Caribbean Island Economies*, DSA European Development Policy Study Group, Discussion Paper No. 1 (Dec. 1996), available at <http://www.euforic.org/dsa/dp1.htm> (noting potato production has been encouraged as substitute for banana imports in Dominica; in St. Lucia locally grown fresh vegetables, which would be supplied to tourist industry would serve as banana substitute). In order to replace bananas as dominant export crop, Dominica and St. Lucia have promoted production of mangos, grapefruits, avocados, and oranges, but these attempts have been met with limited success because bananas, with their labor-intensive capital-saving production and quick returns, are a better crop. Dearden, *supra*.

a. Latin America

Unlike the ACP countries, Latin American countries have significantly cheaper production costs.¹⁷³ This is mostly attributed to the fact that several large multinational corporations, including the Dole Food Company, Inc. ("Dole") and Chiquita Brands International, Inc. ("Chiquita"), have made large capital investments in Latin America's banana industry.¹⁷⁴ As a result, many Latin American banana plantations are much larger than the ACP plantations, which are generally owned by independent farmers and therefore, the Latin American plantations are more economically efficient in their production.¹⁷⁵ The Latin American countries are labeled as *dollar zone* banana producing countries because of their extremely cheap production costs.¹⁷⁶

b. The United States

The United States initiated the banana dispute when it filed a petition under Section 301 of the U.S. Trade Act of 1974 with the United States Trade Representative ("USTR").¹⁷⁷ Section

173. Khansari, *supra* note 166, at 198.

174. *Id.*

175. *See id.* (noting that ACP bananas are twice as expensive as Latin American bananas).

176. *See id.* (noting that apparently, dollar zone bananas are quarter of cost that it is for Caribbean to produce bananas; in addition, labor and transportation costs are less expensive in Latin American producing countries versus their Caribbean counterparts). These Latin American countries export to several European countries, such as Germany, which has the highest consumption of bananas in Europe as well as a preference for Latin American bananas, because they are cheaper to grow and apparently tastier. *Id.* Because of their U.S. backing, the Latin American countries are able to ship their bananas fully ripe, whereas the Caribbean producers ship bananas green and undersized. *Id.*

177. *See* Trade Act of 1974 §§ 301-09, *amended by*, 19 U.S.C. §§ 2411-2420 (1988). Section 2411(a) discusses mandatory action, which states:

If the United States Trade Representative determines under section 304(a)(1) [19 USCS § 2414(a)(1)] that:

- (A) the rights of the United States under any trade agreement are being denied; or
- (B) an act, policy, or practice of a foreign country—
 - (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce; the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such

301 is the U.S. complement to GATT's, and now the WTO's, dispute settlement system.¹⁷⁸ Section 301 allows private parties to assert their U.S. rights under various international trade agreements and to file suit against trade practices that they believe are unfair.¹⁷⁹

On September 2, 1994, Chiquita and the Hawaii Banana Industry Association joined the banana dispute and filed a petition with the USTR.¹⁸⁰ They claimed that the present trade regimes under Regulation 404/93 and the Banana Framework Agreement¹⁸¹ ("BFA"), which the EU, Colombia, Costa Rica, Venezuela, and Nicaragua adopted, discriminated against U.S. marketers importing Latin American produced bananas.¹⁸² The USTR subsequently launched an investigation in October, 1994

rights or to obtain the elimination of such act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

Id.

178. See Bessko, *supra* note 79 (stating that statute is domestic counterpart to GATT (now WTO) dispute settlement system).

179. See *id.* (noting that petition under section 301 may be filed by either private party or by USTR itself). With regards to a violative measure or practice, the USTR acts when there is an inconsistency or denial of U.S. rights under any trade agreement or when there is an inexcusable burden on U.S. commerce. See Trade Act of 1974 § 301(a). With regards to a non-violation measure, the USTR may take action against measures that it believes are discriminatory and burden U.S. commerce. *Id.* § 301(b). The USTR, however, cannot take action if a panel determines that no violation of U.S. rights occurred or is attempting to rectify the issue. *Id.* The USTR must suspend, withdraw, or prevent the application of concessions, impose duties and/or restrictions, and enter into an agreement that will serve to rectify the situation. *Id.*

180. Bustamante, *supra* note 2, at 545.

181. Costa Rica-Colombia-Dominican Republic-European Community-Nicaragua-Venezuela: Framework Agreement on Banana Imports, March 29, 1994, 34 I.L.M. 1 (1995) [hereinafter BFA]. This agreement was created by the EU and adopted by all complaining parties to the case at bar (except for Guatemala), in a quid pro quo to get country-specific shares in exchange for the Latin American countries to stop their efforts to get the EU regime to comply with GATT rules. *Id.* The BFA called for a tariff quota of 2.1 and 2.2 million tons for the years 1994 and 1995 respectively to be allocated to specific Latin American countries and other ACP countries. *Id.*

182. See Bessko, *supra* note 79 (asserting that Regulation 404/93 contained discriminatory and restrictive licensing system that steered market share predominately to firms trading bananas from ACP nations). Latin American producers claim that the licensing system restricts its ability to obtain license. *Id.* This is because available licenses to import from Latin America will only be distributed to those who have traditionally sold bananas produced in ACP nations. *Id.* They claim that the licensing system restricts its ability to obtain license because available license to import from Latin America will only be distributed to those who have traditionally sold bananas produced in ACP nations. *Id.*; see also Bustamante, *supra* note 2, at 551.

concerning Regulations 404/93 and the BFA.¹⁸³ The USTR requested that the contracting parties either re-negotiate or withdraw from the BFA.¹⁸⁴ The parties refused.¹⁸⁵

2. Proponents: A Divided European Union

Countries within the EU disagree on how to handle the banana dispute.¹⁸⁶ Opponents to the banana regime include Belgium, Germany, Luxembourg, and the Netherlands.¹⁸⁷ Germany¹⁸⁸ leads the EU opposition against the banana regime. Germany asserts that the 2,000,000 ton quota and tariff regulations implemented by Regulation 404/93 will decrease the amount of bananas that Germany will be able to import from Latin America and raise the prices of the bananas in the long run.¹⁸⁹ In addition, Germany and other banana regime opponents believe that these restrictions may be detrimental to Latin American banana producing countries.¹⁹⁰ Opponents argue that the regime would cause a rise in unemployment and would compromise the trade relationships that certain EU countries have with Latin American countries.¹⁹¹

Proponents for the banana regime believe that these quotas and tariffs comply with GATT and will protect the ACP countries from severe economic adversity.¹⁹² For example, the EEC justifies its regime's alleged inconsistency with the MFN clause of Article I of GATT as being allowed under Article XXIV.¹⁹³ The EEC argues that it created such a free trade zone with the ACP countries through the Lomé Conventions and, therefore, the

183. Bessko, *supra* note 79.

184. *Id.*

185. *Id.*

186. *See Lyons, supra* note 31, at 174 (noting that current regime was based by very narrow margin and that many European countries side with Latin American countries concerning dispute).

187. *Id.* at 175.

188. *See id.* at 174 (stating that Germany imported most of its bananas from Latin America because they were cheaper and were apparently of better quality).

189. *Id.* at 175.

190. *Id.*

191. *Id.*

192. *See id.* at 175 (stating that proponents include France, Portugal, Spain, Italy, and the United Kingdom).

193. *See id.* at 180 (explaining that EU felt justified under GATT Part IV, which addresses trade disparity between developed and developing nations).

overall cohesion of Lomé IV could not be challenged.¹⁹⁴ GATT, officially, never stipulated that Lomé IV did not establish a free trade area, but did hold that there were some inconsistencies with the MFN clause.¹⁹⁵ Nothing, as a result, prevented the parties of Lomé IV from achieving their objectives with measures that are GATT-consistent.¹⁹⁶

B. 1997 Controversy

Under the WTO, dispute settlement procedures became more stringent in order to make international trade laws more binding.¹⁹⁷ Article 23 of the DSU prohibits unilateral action that was once allowed under GATT.¹⁹⁸ As a signatory to GATT and a WTO Member, the United States must now seek redress through the DSB.¹⁹⁹ The United States, along with Ecuador, Guatemala, Honduras, and Mexico exercised its option to bring a claim under the newly established WTO in October, 1995.²⁰⁰

1. WTO's Decision

On February 5, 1996, Ecuador, Guatemala, Honduras, Mexico, and the United States requested consultations with the EU in accordance with the DSU.²⁰¹ A Panel convened on May 8,

194. Khansari, *supra* note 166, at 200.

195. *See id.* (stating that while Panel recommended that regime should conform with GATT, Panel never officially held that Lomé did not establish free trade area).

196. *Id.* at nn.185-86.

197. Bessko, *supra* note 79.

198. *See id.* (noting that unilateral action brought by United States to levy sanctions is now prohibited).

199. *Id.*

200. *See* Bustamante, *supra* note 2, at 546 (noting that Ecuador joined complaint in February, 1996).

201. *See European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Complaint by the United States, Report of the Panel, WT/DS27/R/USA, (May 22, 1997) [hereinafter 1997 Panel Report] (commenting this request was made pursuant to GATT article XXIII and DSU article 4). *See* GATT art. XXIII. Article 23 states:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

DSU art. 4. Article 4(1) states that "Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members."

1996 to consider the complaint lodged against the EU's banana regime.²⁰² The regime encompassed Regulation 404/93, and subsequent, supporting regulations and procedures that were revisions of the BFA.²⁰³ The complaining parties asserted that the regime is inconsistent with GATT Articles I, XI and XIII, among other Agreements under the WTO.²⁰⁴

a. Panel Decision

On May 22, 1997, the Panel held that the EU banana regime was inconsistent with its obligations under GATT Articles I(1), III(4), X(3), XIII(1) with respect to Ecuador's complaint.²⁰⁵ The Panel held that the regime was inconsistent under GATT Articles I(1), III(4), X(3), and XIII(1) with respect to both Guatemala and Honduras' complaints.²⁰⁶ Concerning

202. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 1 (Sept. 7, 1997) [hereinafter 1997 AB Report].

203. *Id.*

204. See *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Ecuador, Report of the Panel, WT/DS27/R/ECU (May 22, 1997); *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Guatemala, Report of the Panel, WT/DS27/R/GTM (May 22, 1997); *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Honduras, Report of the Panel, WT/DS27/R/HND (May 22, 1997); *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Complaint by Mexico, Report of the Panel, WT/DS27/R/USA (May 22, 1997) (noting that all complaining parties also asserted inconsistencies under Articles 1.2, 1.3, 3.2, and 3.5 of Agreement on Import Licensing Procedures, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm [hereinafter Licensing Agreement], and Articles 2 and 17 of the General Agreements in Trade Services, Apr. 15, 1994, WTO Agreement, Annex 1B, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1168 (1994) [hereinafter GATS]).

205. See 1997 AB Report para. 2 (holding that regime was inconsistent under Article 1.2 of Licensing Agreement and GATS Articles 2 and 17). Article 1.2 of the Licensing Agreement states:

[m]embers shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 . . . with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing county Members.

Licensing Agreement art. 1(2). GATS article 2 is a most-favored-nation clause similar to GATT Article I. GATS art 2. GATT article 17 concerns national treatment where "each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than it accords to its own like services and services suppliers." *Id.* art. 17.

206. See 1997 AB Report para. 2 (finding inconsistency under Article 1.3 of Licensing Agreement). *Id.* Article 1.3 states "[t]he rules for import licensing procedures shall

Mexico's complaint, the Panel held that the regime was inconsistent with its obligations under GATT Articles I(1), III(4), X(3), and XIII(1).²⁰⁷ Concerning the United States' complaint, the Panel held that the regime contained inconsistencies under GATT Articles I(1), III(4), X(3) and XIII(1).²⁰⁸

b. Appellate Body Decision

On June 11, 1997, the EU notified the DSB that it wanted to appeal certain issues and interpretations of law discussed in the Panel Report.²⁰⁹ On appeal, the AB upheld most of the Panel's findings.²¹⁰ The AB reversed three of the Panel's conclusions with regards to the regime's consistency under GATT and the Lomé Convention.²¹¹

The AB upheld the Panel's conclusion that the Agreement on Agriculture²¹² does not allow the EU to deviate from the obligations stipulated under GATT Article XIII.²¹³ The preamble to the Agreement on Agriculture stipulates that the Agreement exists for the purposes of reforming agricultural trade and that such a reform process will come about in part through effective GATT rules and provisions.²¹⁴ According to the AB, all GATT

be neutral in application and administered in a fair and equitable manner." Licensing Agreement, art. 1(3).

207. *See id.* (finding inconsistencies under Articles 1.2 and 1.3 of Licensing Agreement and GATS Articles 2 and 17).

208. *Id.*

209. 1997 AB Report para. 3.

210. *Id.*

211. *See id.* para. 255 (upholding EU's tariff quota licensing system was within scope of Licensing Agreement). The AB reversed the Panel's prior decision that system was inconsistent with Article 1.3 of Licensing Agreement. *Id.* paras. 255(l)-(m). The AB also upheld the Panel's decision that the regime's licensing was inconsistent under GATS Articles 2 and 17. *Id.* paras. 255(s)-(v).

212. Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

213. 1997 AB Report para. 158.

214. Agreement on Agriculture. The Preamble states:

[Members] [h]aving decided to establish a basis for initiating a process of reform of trade in agriculture in line with the objectives of the negotiations as set out in the Punta del Este Declaration; [r]ecalling that their long-term objective as agreed at the Mid-Term Review of the Uruguay Round 'is to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'.

provisions, including Article XIII, apply to the case at bar.²¹⁵ In addition, the AB reasoned that no provision of the Agreement on Agriculture expressly stipulates that all market access concessions and agreements made during the Uruguay round, with regards to agriculture, are inconsistent with Article XIII.²¹⁶ The AB held that the allocation of quota shares to some Member States having a substantial interest in supplying the EU with bananas was inconsistent with GATT Article XIII obligations.²¹⁷ Although Article XIII(2) does not expressly mention Member States that do not have a substantial interest, they too should be allowed to benefit from the non-discrimination clause.²¹⁸

Article XIII requires the non-discriminatory application of quantitative restrictions and tariff quotas.²¹⁹ Specifically, Article XIII(1) asserts that the importation and exportation of Member State product is prohibited only when the importation of a like product from a third country is similarly prohibited or restricted.²²⁰ Under Article XIII(2), the distribution of a product must be in such a way that Member States would have reasonably expected their respective share absent the existence of the re-

215. See 1997 AB Report para. 155 (noting that all GATT provisions apply except where specifically covered by Agreement on Agriculture).

216. See *id.* para. 157 (stating that nothing in Articles 4.1 and 4.2 of Agreement on Agriculture specifically deals with tariff quotas and contracting parties would have been more explicit if they intended to address this issue).

217. *Id.* para. 162.

218. See *id.* para. 161 (reasoning that when implementing tariff quotas and import restrictions, contracting parties must adhere to Article XIII(2); even though Article XIII(2) does not have specific rules for those Member States that do not have significant interest in supplying product at involved, these Members must still be subject to follow principles of non-discrimination). According to the AB, to not apply Article XIII(2) without distinguishing whether or not a contracting party has substantial interest is considered a violation of Article XIII(1). *Id.* GATT art. XIII(2). Article XIII(2) states "In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which various contracting parties might be expected to obtain in the absence of such restrictions . . ." *Id.*

219. GATT art. XIII.

220. GATT art. XIII(1). Article XIII(1) states:

No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory or any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

Id.

strictions.²²¹

The AB upheld the Panel's ruling that tariff reallocation quota rules under the BFA are inconsistent with Article XIII(1) and Article XIII(2).²²² The rules allow BFA countries to request the reallocation of unused shares to other BFA countries.²²³ In addition, these reallocation rules exclude non-BFA banana suppliers, to prevent them from taking advantage of the unused shares.²²⁴ As a result, the AB believed that the BFA does not similarly restrict the imports from BFA and non-BFA Member States and is inconsistent with Article XIII(1).²²⁵ In addition, the AB reasoned that the re-allocation of these unused shares to other BFA countries, at the exclusion of non-BFA countries, does not qualify as an allocation of tariff quota shares that would be expected by a Member State should no such restrictions exist.²²⁶ Therefore, according to the AB, the BFA reallocation rules are also inconsistent with the ideals of Article XIII(2).²²⁷

The AB held that under Lomé, the EU must provide duty-free access to traditional ACP bananas.²²⁸ EU should allot 90,000 tons of non-traditional ACP bananas and provide a margin of tariff preference of 100 ECU per ton for all additional non-traditional ACP bananas.²²⁹ The EU must allocate tariff shares to the traditional ACP states in accordance with those countries pre-1991 best-ever export volumes.²³⁰ Protocol Five of Lomé IV stipulated that no ACP state could be placed in a less favorable position than it is at present or was in the past with regard to access in the traditional banana markets.²³¹ Article

221. GATT art. XIII(2).

222. 1997 AB Report para. 163.

223. *See id.* (commenting that under BFA reallocation rules, portion of tariff quota that goes unused by BFA country assigned that particular tariff portion may reallocate unused portion to other BFA countries at joint request of all participating BFA countries).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See id.* at 173 (holding that duty-free access is considered Lomé requirement).

229. *See id.* (holding that import allocation and tariff for non-traditional ACP bananas is required under Lomé).

230. *Id.* paras. 172, 178. *See id.* para. 178 (stating that duty-free allocation is required by EU under Lomé, but EU is not required to allocate quota shares in excess of pre-1991 best-ever export volumes).

231. Lomé IV protocol 5, art. 1.

168(2) (a) (ii) of Lomé IV seeks to ensure more favorable treatment of all ACP products, including bananas, that come under a common market and are subject to import restrictions, versus the treatment given to third country bananas that benefit from the MFN clause for like products.²³² Protocol Five specifically deals with the favorable treatment of traditional ACP bananas, whereas Article 168(2) (a) (ii) covers the favorable treatment of all ACP bananas.²³³ The AB reasoned that even prior to the enactment of Regulation 404/93, the traditional ACP countries enjoyed preferential duty-free access for their bananas.²³⁴ Thus, the EU's duty-free treatment was within the parameters of the Lomé IV—the continuation of favorable treatment towards the ACP countries was no less favorable than in the past or at the present time.²³⁵

Article 168 neither specifies that any particular measure is the only applicable measure granting preferential export treatment in the case at bar, nor does it stipulate what constitutes a *necessary* measure of preferential treatment under Lomé IV.²³⁶ The EU's regime grants duty-free access to 90,000 tons of non-traditional ACP bananas, a tariff preference of 100ECU per ton and a beyond-quota rate of ECU693 per ton.²³⁷ Under MFN treatment, the in-quota tariff for third country bananas²³⁸ are ECU75 per ton while beyond-quota imports is taxed at ECU793 per ton.²³⁹ Such regulations are, obviously, more favorable than what is permitted under Article 168(2) (a) (ii), which is applicable in the case at bar.²⁴⁰ Therefore, the AB reasoned that the

232. Lomé IV art. 168(2) (a) (ii). Article 168(2) (a) (ii) states that concerning products originating in ACP nations "for products other than those referred to under [sub-division I], the Community shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products."

233. See Lomé IV protocol 5; Lomé IV art. 168(2) (a) (ii); see also 1997 AB Report para. 172 (reasoning that with regard to traditional ACP bananas, Article 168(2) (a) (ii) reinforces Protocol Five).

234. See 1997 AB Report para. 172 (arguing that it was given rule that under Lomé IV ACP nations enjoyed duty free access prior to EEC 404/93, therefore duty-free access provided under EEC 404/93 was seen as required by tenets of Lomé IV).

235. *Id.*

236. *Id.* See generally Lomé IV art. 168.

237. 1997 AB Report para. 173.

238. See Bustamante, *supra* note 2, at 540 (stating that third country bananas are non-ACP bananas produced in Latin America).

239. 1997 AB Report para. 173.

240. *Id.*

measures taken by the EU were necessary and required under the Lomé waiver.²⁴¹ In addition, the AB held that the EU need not allocate shares to ACPs exporting non-traditional ACP bananas, nor maintain import licensing procedures applicable to third countries and non-traditional bananas.²⁴²

The AB relied on the European Court of Justice to justify its ruling that the EU's allocation of shares for traditional ACP supplier states was required under Lomé.²⁴³ The Court of Justice held that the EU may permit access and free duty only to bananas imported from traditional ACP supplier states at zero duty in the best year prior to 1991.²⁴⁴ The AB held that the EU's allocation of shares to certain ACP Member States, in excess of their pre-1991 best-ever export volumes so as to reflect the increases in future trading, as unnecessary.²⁴⁵ The AB held also that future increases in trade were speculative at best.²⁴⁶

Concerning the allocation of tariff shares to non-traditional ACP countries, the AB simply held that under the applicable rule of Article 168(2)(a)(ii), the more favorable treatment of non-traditional ACP bananas could be accomplished without allocating tariff quota shares.²⁴⁷ Concerning the import licensing

241. *See* 1997 AB Report para. 173 (arguing that article 168(2)(a)(ii) does not stipulate that only one specific kind of trade measure is necessary for non-traditional ACP bananas; EU could have devised other measures that would also provide more favorable treatment, but measures at issue here are sufficient to be declared necessary measures as prescribed under article 168(2)(a)(ii)).

242. *Id.* paras. 176, 178. *See id.* para. 176 (holding that while only article 168(2)(a)(ii) applies to non-traditional ACP bananas, this statute can be followed without allocating tariff quota shares; therefore quota shares should not be required).

243. *Id.* para. 174.

244. *Id.* at para. 174. *See* *Germany v. Council*, Case C-280/93, [1994] E.C.R., I-4973 (stating that under Article 1 of Protocol 5, must permit access, free of customs duty, only to bananas actually imported, at zero duty, in pre-1991 best year amounts from each ACP State that is traditional supplier). In *Germany v. Council*, Germany challenged the legality of Regulation 404/93 under the EEC Treaty. *Id.*

245. *See id.* para. 175 (holding that tariff quota shares in excess of pre-1991 best-ever export volumes that reflect potential future increases in trade are unnecessary guarantees that traditional ACPs are not placed in less favorable position before 1991). The AB holds that the only difference would be if prior to 1991, the ACPs had a guarantee that their traditional markets would export quantities that may have been a result of the investments they made some time in the future; but this is not the case in reality. *Id.*

246. *Id.*

247. *See id.* para. 176 (reiterating that although only article 168(2)(a)(ii) applies to non-traditional bananas—not broadly constructed Article 1 under Protocol 5, more favorable treatment could be provided for non-traditional bananas without allocating tariff quota shares).

measures that apply to third country and non-traditional ACP banana exporters, the AB reasoned that some form of an import licensing system was needed to allocate traditional ACP bananas in the amount of their pre-1991 best ever export volumes.²⁴⁸ According to the AB, however, the licensing procedures in the banana regime appeared to favor EU operators that market traditional ACP bananas, which amounted to cross-subsidization.²⁴⁹ Lomé IV does not require cross-subsidization and, therefore, the import licensing procedures here were not required under Lomé.²⁵⁰

The AB reversed the Panel's ruling that Lomé IV allows inconsistencies with Article XIII(1), allowing the EU to allocate shares to the traditional ACP states.²⁵¹ In its report, the AB reasoned that the Lomé waiver specifically applied to the provisions of Article I to the extent necessary to allow ACP states more preferential treatment of products they produce.²⁵² The AB disagreed with the Panel's need to create a real effect of Lomé IV and its relationship between Articles I and XIII of GATT.²⁵³ On its face, Lomé IV only applied to Article I and not to any other provision or related agreement.²⁵⁴ Even where Article I and XIII bear a close relationship the Lomé waiver does not extend to

248. *Id.* para. 177.

249. *Id.* See Terence P. Stewart and Timothy C. Brightbill, *Trade Law and Competition Policy in Regional Trade Agreements*, 27 L. & POL'Y IN INT'L BUS. 937, 939 (1996) (arguing that cross-subsidization creates fallacious allotment of resources and leads to inaccurate outcomes in competition between two companies). Cross-subsidization occurs in only two instances: (1) where producer utilizes supracompetitive profits from one or more other products to cover the insufficient profits (or losses) of the subsidized product; or (2) where producer's overall return on funds invested is inadequate, and company is engaged in "going out of business" mode. *Id.* See John Temple Lang, *Defining Legitimate Competition: Companies' Duties to Supply Competitors and Access to Essential Facilities*, 18 FORDHAM INT'L L. J. 437, 519 (1994) (explaining that cross-subsidization is considered illegal when low price is charged during course of economic competition and is exclusionary, or when high price is charged during non-competitive period and that price is exploitative).

250. See 1997 AB Report para. 177 (holding that nothing in language of Lomé IV implies that cross-subsidization is required).

251. *Id.* para. 188.

252. See *id.* paras. 180-188 (holding that wording of Lomé IV is unambiguous). See generally Lomé IV.

253. See *id.* paras. 181-184 (finding it difficult to incorporate GATT Article XIII with GATT's limited experience with interpreting waivers, strict regulations of waivers under WTO Agreement, history behind Lomé waiver, and GATT's limited experience with granting waivers for obligations under Article XIII).

254. *Id.* para. 183.

Article XIII according to the AB.²⁵⁵

The AB upheld the Panel's ruling that the non-discrimination provisions in GATT Articles I(1) and XIII applied to relevant EU regimes, regardless of whether more than one regime that controls the importation, distribution, and sale of bananas existed.²⁵⁶ The AB reasoned that the provisions apply to all banana imports regardless of how the imports are categorized, otherwise, the purpose of a non-discrimination clause would be easily defeated if such a provision could only apply within a regime that a Member State created.²⁵⁷ The AB held that both Articles I(1) and XIII apply to the point that obligations are waived under the Lomé convention, regardless of the origin of the bananas or the basis for imposing restrictions on those bananas.²⁵⁸

2. EU Response

Following the WTO's 1997 ruling, the EU attempted to modify its banana regime in conformity with WTO standards, the single European market goal, and the Lomé IV provisions.²⁵⁹ In 1998, the EU proposed to continue with a tariff quota system that distinguished between the product's source.²⁶⁰ Within the EU, the traditional ACP suppliers would still be allowed up to 857,700 tons and the Latin American suppliers allotment would be increased to 2,200,000 tons.²⁶¹ Latin American countries would have a reduced tariff duty of ECU75 per ton initially, with a ECU765 per ton duty for every ton over the quota.²⁶² The ACP countries' quota would now be for all ACP exporters as a whole. The EU, therefore, proposed ECU370,000,000 in financial assis-

255. *See id.* (holding that although articles I and XIII are both non-discrimination clauses, their relationship does not necessitate that waiver from article I obligations is automatic waiver from article XIII obligations).

256. *Id.* para. 191.

257. *See id.* para. 190 (commenting that Member state could easily get around GATT's non-discrimination provisions and provisions of multilateral agreements if those provisions only applied within regime established by particular Member state).

258. *Id.* para. 191.

259. *See* GODFREY, *supra* note 172 (commenting that EU rejected free-market system supported by proponents for Latin American banana producers and will continue to use managed market system).

260. *See id.* (stating that allocation for bananas produced within EU would be 854,000 tons; EU producers include Martinique, Guadeloupe, and Canary Islands).

261. *Id.*

262. *See id.* (noting that each Latin American country with substantial interest in banana market would be given specific share of total 2,200,000 ton quota).

tance over a ten year period to alleviate any economic hardship this proposal may cause.²⁶³

C. 1999 Controversy

Ecuador alleged that the EU's revised regime²⁶⁴ was the same with a few exceptions.²⁶⁵ Ecuador noted the elimination of individual country quotas in the ACP allotment for traditional ACP bananas.²⁶⁶ Ecuador also noted there was no longer a 90,000 ton cap on the amount allotted to non-traditional bananas, that non-traditional bananas can enter the EU duty-free under the "other" category containing third country quotas; in addition, that the tariff preference for these bananas had been increased to EUR200 per ton.²⁶⁷ There were no longer country-specific allocations to non-traditional suppliers.²⁶⁸

1. Proceedings

On August 18, 1998, Ecuador, Guatemala, Honduras, Mexico and the United States, acting jointly and severally, requested a meeting with the EU to implement the DSB's recommendations concerning the banana regime.²⁶⁹ One month later the parties met and the consultations reached an impasse.²⁷⁰ On November 13, 1998, Ecuador requested to renew consultations with the EU.²⁷¹ These consultations were held ten days later and resulted in another impasse.²⁷² Finally, on December 18, 1998,

263. *Id.*

264. *See European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Recourse to Article 21.5 by Ecuador, Report of the Panel, WT/DS27/RW/ECU (April 12, 1999) 1, 3 [hereinafter 1999 Panel Report] (stating revised regime in question is that applied from January 1, 1999 with regard to following amendments: EC Regulation 1637/98, which amended EEC 404/93 EEC Regulation 2362, which stipulated rules for implementation of EEC 404/93).

265. *Id.*

266. *See id.* (noting that EU provision for increase in traditional ACP bananas allotment is not provided).

267. *See id.* at 4 (noting that non-traditional bananas are limited to 240,748 tons or 9.43% of the 2.553 million ton tariff quota). Although the net weight of the Latin American banana quota is 2.2 million, the EC, under Regulation 1637, allots an additional 353,000 tons which is considered an autonomous tariff quota. *Id.* at 3.

268. *Id.* at 3.

269. *Id.* at 2.

270. *See id.* (noting that consultations were held on September 17, 1998).

271. *Id.*

272. *See id.* (noting that consultations were held between EU and Ecuador on November 23, 1998).

Ecuador requested that the original panel reconvene to discuss the implementation of the DSB's recommendations.²⁷³ The Panel convened on January 12, 1999, and submitted its report on April 6, 1999.²⁷⁴

a. Arguments

Ecuador challenged the revised banana regime in accordance with GATT Articles I and XIII.²⁷⁵ Ecuador requested the Panel to reaffirm its prior holdings, which were upheld and modified by the AB.²⁷⁶ Ecuador also requested that the Panel provide the EU with more explicit guidelines for compliance with its rulings and recommendations.²⁷⁷ The EU requested that the Panel reject Ecuador's claims and hold that the EU complied with the Panel's 1997 rulings and recommendations.²⁷⁸

273. *See id.* (requesting examination of implementation of DSB recommendations pursuant to article 21(5) of DSU); *see also* DSU art. 21(5). Article 21(5) states:

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

Id.

274. *Id.* at 3 (noting that under DSU Article 10, Brazil, Belize, Cameroon, Colombia, Costa Rica, Côte D'Ivoire, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Mauritius, Nicaragua, Saint Lucia, and Saint Vincent and the Grenadines reserved third party right to be heard by Panel); *see also* DSU art. 10. Article 10(2) states that "[a]ny Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report."

275. *See id.* at 10 (asserting that revised regime, particularly licensing system, still violated GATS Articles 2 and 17). Ecuador argues that its wholesale suppliers cannot obtain import license on conditions as favorable as ACP suppliers. *Id.* at 91.

276. *Id.* at 10.

277. *Id.*

278. *Id.* With regards the alleged inconsistencies under GATS, the EC's arguments include: that GATS does not guarantee a specified amount of market shares at a designated time; that, under the Licensing Agreement, it has the right to base future allocations of licenses on the maximization of licenses already given. *Id.* at 93. *See id.* at 92-93 (explaining EU arguments that their licensing system conforms with GATS).

i. Article I

With regards to traditional and non-traditional ACP bananas, the Latin American countries argued that the revised system was inconsistent with GATT Article I, the DSB's prior Panel rulings, and the AB rulings.²⁷⁹ Ecuador argued that the 857,000 tons allocation was the same amount as the total sum of the previous individual traditional ACP country allocations given before January 1, 1999.²⁸⁰ Under the revised system, the 857,700 ton allocation would be distributed to traditional ACP countries as a cumulative share.²⁸¹ Ecuador asserted that the allocation still exceeded each country's best-ever level before 1991 because, in theory, each traditional ACP supplier is allowed to ship 857,000 tons of bananas duty-free.²⁸² Ecuador argued that, without individual limitations, the revised regime exceeded the scope of Lomé and still violated Article I.²⁸³

Ecuador maintained that the non-traditional banana tariffs were not required by the Lomé waiver.²⁸⁴ Under the revised regime, the 90,000 ton cap on duty-free exports was eliminated and the over-quota tariff was increased to EUR200 per ton.²⁸⁵ Ecuador reasoned that the AB's decision that the EU was not limited to one form of a tariff quota preference, did not bestow a *carte blanche* to the EU to grant more preferences under their regime.²⁸⁶ As a result, the EU's revised regime with the ACP states is illegal under Lomé IV and according to previous DSB reports.²⁸⁷

279. *Id.* at 10.

280. *See id.* (noting that Panel and AB already ruled that allocations exceeded Lomé requirements).

281. *See* GODFREY, *supra* note 172.

282. 1999 Panel Report, at 10.

283. *See id.* at 11 (arguing also that inconsistencies could not be remedied by curtailing allocations of less efficient traditional suppliers). Ecuador noted that Lomé IV permitted traditional suppliers to export bananas only up to that country's pre-1991 best-ever amount, and that some of these traditional suppliers would lose access to the EU because purchasers would naturally buy from the more efficient and cheaper suppliers. *Id.*

284. *See id.* at 13 (noting it was unjustifiable to expand preferences from old system into revised system; neither prior DSB ruling nor Lomé waiver justifies revised tariffs).

285. *Id.* at 10.

286. *See id.* at 14 (arguing that 1997 AB's rationale that other tariff preferences could have been chosen was used by EU to justify its insertion of similar, but more significant preferences under new regime).

287. *Id.*

The EU argued that Protocol Five of Lomé IV required it to provide duty free access for all traditional ACP bananas.²⁸⁸ The EU asserted the AB held that pre-1991 best ever import volumes permitted traditional ACP banana imports beyond the tariff quota.²⁸⁹ Therefore, according to the EU, a maximum of 857,700 tons was within the Lomé IV requirements.²⁹⁰

Concerning non-traditional ACP imports, the EU argued that the AB never established a ceiling on the preferences that the EU could grant to non-traditional ACP suppliers in 1997.²⁹¹ The AB only had to determine whether the measures implemented by the EU were necessary under the tenets of Lomé IV, since the AB previously held that the scope of Article 168(2)(a)(ii) of Lomé IV allowed for many different preferences from which to choose.²⁹² Article 168(2)(a)(ii), therefore, did not prescribe a limit on volume allotment or tariff amounts for products imported beyond the allotted quota.²⁹³ Ecuador and the other Latin American countries argued that the EU abused its power, granted by Lomé IV, by relinquishing the 90,000 ton cap on duty-free imports and the EUR200 per ton tariff preference for imports above the quota.²⁹⁴ The EU argued that the elimination of the cap did not go beyond the prescription under Article 168 and that the increase in tariff preference to EUR200 was only done to balance what it lost by eliminating the 90,000 ton cap.²⁹⁵ According to the EU, it did not give preferential

288. *Id.* at 11 (arguing that duty-free treatment was in addition to requirements under Article 168(2)(a)(ii) and therefore, corresponded with limitations on volume that Lomé prescribed).

289. *See id.* (arguing that it was justified in setting 857,700 ton maximum for traditional ACP bananas based on AB Report).

290. *Id.* *See id.* at 81 (arguing that its pre-1991 best ever export volume totaled 952,939 tons, due to an extra 100,000 tons from investments which AB held could not be factored into coming up with pre-1991 best ever amount). Even without the extra volume, the EU still feels that the export volume of 857,700 is justifiable. *Id.* at 81-82.

291. *See id.* at 14 (explaining that 92,000 tons quota and 100ECU tariff did not indicate upper limit for non-traditional banana allocation).

292. *See id.* (stating that AB had to determine whether measures fulfilled what was prescribed under Article 168(2)(a)(ii)).

293. *See id.* (arguing that Lomé covers preferential treatment including that prescribed by EU to extent that application of Lomé waiver was contingent on finding that preferential was considered required by Lomé).

294. *Id.*

295. *See id.* at 15 (arguing that EU arrangement with suppliers to increase margin of preference for beyond-quota imports, 100ECU, serves as partial compensation for loss of 90,000 quota allocation).

treatment towards non-traditional ACP bananas.²⁹⁶

ii. Article XIII

Ecuador asserted that the revised banana regime did not conform with the tenets of GATT Article XIII.²⁹⁷ Under the regime 857,700 tons were allotted, duty free, to traditional ACP bananas while 2,553,000 tons were allowed, preferentially, to other banana importers.²⁹⁸ The revised regime maintained a tariff-rate quota system that Ecuador felt offered more favorable treatment of traditional ACP bananas.²⁹⁹ Ecuador argued that favoritism towards the product of a group of countries, even where there existed a lack of such favoritism towards a single country, is prohibited under Article XIII(1).³⁰⁰ Ecuador argued that Article XIII, as held by the original Panel, did not allow the allocation of shares to some non-substantial suppliers, while not allocating shares to others.³⁰¹

More specifically, Ecuador asserted that the EU violated Article XIII(2), which stipulated that trade distribution must approach, as closely as possible, the portion of shares that Member States should expect in the absence of such trade preferences or restrictions.³⁰² Ecuador further asserted that the EU banana regime undermined the tenets of Article XIII(2)(d), which stipulated that the allocation among suppliers of any product must be based on proportions allocated during a previous representative period that considers any factors that affected or are presently affecting that product.³⁰³ The EU used the period of 1994 to

296. *Id.*

297. *See id.* (adding that revised regime aggravated problems with previous regime concerning Article XIII).

298. *See id.* (arguing that allotment had not changed from previous regime).

299. *Id.* *See id.* at 22 (arguing that Ecuador's allocation under revised regime was unfair based on objective criteria such as trend of Ecuador's exports and that Ecuador retains larger share of global market—which is beyond EU market).

300. *Id.* at 15, 22.

301. *See id.* at 16, 22 (arguing that EU allocated individual shares to Costa Rica and Columbia, both substantial suppliers, and to Nicaragua and Venezuela, both non-substantial suppliers, while Ecuador did not have specific allocation and was relegated into "other" category).

302. *See id.* at 22 (asserting that its respective share is very limited to what it would have expected without regime). Ecuador cited proof that its share of the EU market and of the world market greatly surpassed what it is presently allocated under the EU banana regime. *Id.* at 22-23.

303. *Id.* at 24. GATT art. 13(2)(d). Article 13(2)(d) states:

(d) In cases in which a quota is allocated among supplying countries the con-

1996 to devise its allocations to suppliers not classified in the traditional banana category.³⁰⁴ According to Ecuador, aspects of the BFA and the licensing system marred utility of this time period; thus 1994 to 1996 was not a representative period under Article XIII(2)(d).³⁰⁵ Since using a pre-1991 period to determine best ever allocation could mean any year prior to 1991, Ecuador argued the older the information, the less representative that information would be of current conditions in the banana markets.³⁰⁶

In an answer to Ecuador's allegations under GATT Article XIII, the EU asserted several defenses.³⁰⁷ The EU argued that, under Article XIII, the 857,700 ton quota for traditional ACP exports falls outside of the MFN quota of 2,553,000 tons and Ecuador should not have a stake in it.³⁰⁸ According to the EU the traditional ACP quota was an upper limit on duty-free tariff preferences for this kind of import.³⁰⁹ The EU also argued that the elimination of the allotments to individual, traditional ACPs

tracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any contracting party from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.

Id.

304. *Id.*

305. *Id.* at 23 (arguing that allocation based on pre-1991 best-ever amounts was so high, it could not be justified under GATT article XIII; if 1994-1996 period applied to Ecuador and other countries was applied to traditional suppliers, traditional suppliers would get lower share whereas respective shares belonging to Ecuador and third countries would increase). Ecuador reasoned that it was unclear as to whether any country-share allotment could be formulated based on a given representative period, in addition to a general conformity under article XIII(2). *Id.*

306. *See id.* at 23 (noting that because productive efficiency and capacity oscillated, older representative period would be less accurate; Article XIII does not exist to generate trade preferences factored by past trading patterns).

307. *Id.* at 17.

308. *Id.* at 18.

309. *See id.* (noting that this tariff preference is required under Lomé IV and not under Article XIII).

should not adversely affect Ecuador's export interests.³¹⁰ The EU argued that the price and volume of traditional ACP exports should bear no consequence on the price and volume of Ecuador's exports.³¹¹

Concerning Ecuador's specific claim under Article XIII(2), the EU argued that dispensing country-specific allocations to suppliers contradictory to Article XIII is prohibited based on the prior AB ruling.³¹² The EU claimed, therefore, to be justified in assigning a collective allocation.³¹³ In addition, the EU claimed its decision to base the collective allocation on the years 1994 through 1996 was because this time period was the most recent data upon which it could rely.³¹⁴

b. Holding

Concerning the asserted Article XIII claims, the Panel ruled that the 857,700 ton volume limit on traditional ACP exports applies to Article XIII.³¹⁵ In addition, the Panel held that there was no need for ACP import quotas to count against the tariff quota allotted under the MFN clause.³¹⁶ Based on prior rulings, the Panel held that the rudimentary principle, under Article XIII, required that like products be treated equally, regardless of origin and no matter how Member States classified the imports.³¹⁷ Again, based on prior rulings that Lomé IV did not extend to Article XIII, any inconsistencies that existed under Article XIII cannot be waived under Lomé.³¹⁸ The Panel held that

310. *Id.*

311. *Id.*

312. *Id.* at 74 (arguing that AB report mandates it to provide collective allocation of 857,700 tons to traditional suppliers).

313. *Id.* at 21.

314. *See id.* at 24 (explaining that 1994-1996 period was most favorable to Ecuador based on data available at given time and that data from 1997 was available, but it was provisional at time Regulation 2362 was drafted).

315. *See id.* at 71-72 (holding that because tariff quota is generally defined as quantitative limit on specific tariff rate's availability). Panel also held that GATT article XIII applies to tariff quotas. *Id.* *See* GATT XIII(5). Article XIII(5) states that "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party, and, in so far as applicable, the principles of this Article shall also extend to export restrictions."

316. *Id.*

317. *See id.* at 72 (explaining that Member state could avoid non-discrimination provisions by choosing different legal justification for implanting import restrictions or tariff rates, thus there would be no purpose for non-discrimination provisions).

318. *Id.*

ACP suppliers had access to another category under the MFN quota once they exhausted their 857,700 ton quota, whereas non-substantial suppliers had no access to the 857,700 ton tariff quota once they depleted their MFN tariff quota of 240,748 was unfair.³¹⁹

According to the Panel, country specific allocations to substantial suppliers were inconsistent with Article XIII(2).³²⁰ The Panel held that although the use of quantitative restrictions is generally prohibited, the EU should apply these quantitative restrictions, where it is prohibited, in a non-discriminatory manner that is least disruptive to trade.³²¹ In addition, the EU must allocate quotas based on the amount of shares that a Member State would have expected in the absence of such special restrictions.³²² The Panel required the EU to use a representative period that is recent and undistorted by restrictions in order to determine the proper allocation amounts.³²³ Given that the representative period of 1994-1996 was during the time that the BFA was in effect, the Panel held this period of time was not a truly representative period upon which to allocate quotas under the tenets of Article XIII.³²⁴

Under Article I, the 857,700 ton allocation may be considered within the scope of the Lomé IV, as long as the allocation is based on pre-1991 best ever exports.³²⁵ The Panel held the argument asserting that Lomé IV required a collective allocation of the 857,700 tons was not within the scope of Protocol Five.³²⁶

319. *See id.* at 73 (arguing that non-substantial suppliers lacked access to 857,700 tariff quota once they used up their allocated volume, therefore similar restriction does not exist).

320. *Id.* at 74.

321. *Id.* at 75.

322. GATT art. XIII(2).

323. 1999 Panel Report, at 75. *See id.* at 76 (holding that if out-of-date or distorted data are used, where relevant market is restricted, use of that data misses purpose of Article XIII(2)(d)).

324. *Id.* at 77-78 (holding that before 1993, the EU applied different national import regimes where some states applied import restrictions, while others used tariff-only or duty-free systems; therefore anytime before 1993 could not serve as representative period). Under Article XIII, even where imports from some countries were formulated based on data from less distorted time periods, significant distortions from a particular group of suppliers will impact all substantial and non-substantial suppliers within a given product market; therefore 1994-1996 is not a truly representative period because it used data at a time prior to implementation of the BFA. *Id.*

325. *See id.* at 103 (excluding investments from formulation).

326. *Id.*

Subsequently, the treatment of imports from traditional ACP countries in excess of the pre-1991 best ever volumes is not required under Lomé IV and, therefore, is inconsistent with Article I(1).³²⁷ Finally, under GATT Article I, Article 168 of Lomé IV covers the preferences for non-traditional ACP exports at a zero tariff, as well as the increase of the beyond-quota tariff for non-traditional exports to EUR200 per ton.³²⁸

On the issue of collective allocations, the Panel believed that Protocol Five required the allocation of shared to traditional suppliers based on pre-1991 best ever volumes, but it did not require certain traditional ACP suppliers to exceed that volume under the revised regime.³²⁹ The Panel held that the existence of a collective allocation would allow more substantial and traditionally competitive suppliers to exceed the pre-1991 best ever requirement and gain an advantage over the less substantial suppliers.³³⁰ Therefore, this collective allocation went beyond the scope of Lomé and subsequently violate Article I(1).³³¹

Concerning non-traditional imports, the Panel looked to Article 168(2)(a)(ii).³³² The Panel reasoned that the language of the statute allowed for the favorable treatment for all ACP bananas versus the treatment given to third country bananas benefiting under the MFN clause.³³³ According to the Panel, the original allocation of 90,000 tons of non-traditional ACP bananas duty free and the EUR100 per ton tariff charged to beyond quota bananas met the language of the statute.³³⁴

327. *Id.*

328. *See id.* at 104 (concluding that all violations nullify or impair benefits allowed to complainants under GATT 1994 and must be brought into conformity within tenets of GATT 1994).

329. *Id.*

330. *See id.* at 82-83 (referring to AB's opinion that Lomé specifically refers to country-specific pre-1991 best-ever amount).

331. *Id.* at 82.

332. *Id.* *See generally* Lomé IV art. 168(2)(a)(ii).

333. *Id.* at 83-84.

334. *Id.* *See id.* at 82-83 (noting Panel had to determine whether this allocation was necessary under Lomé IV). The Panel agreed with the AB holding that Article 168 did not limit what was necessary as more favorable treatment. *Id.* at 83. Because the Panel already held that the preferential tariff of 90,000 tons without any duty was inconsistent under the GATT, the Panel held that the EU should be allowed some leeway to create more consistent, preferential treatment. *Id.* at 83-84. The idea that non-traditional ACP countries export bananas at zero tariff within the "other" category under the MFN clause is not unreasonable under Article 168 according to the Panel. *Id.* at 84. Therefore, the preferential tariff survives under the Lomé IV. *Id.*

The Panel also ruled on Ecuador's complaint the increased tariff of non-traditional ACP imports to EUR200 per ton as not beyond the scope of Lomé IV.³³⁵ Given the liberal interpretation of what constitutes a necessary measure to insure favorable treatment for all ACP bananas, the EU's increase of the beyond quota tariff to EUR200 per ton in order to counter-balance the elimination of the 90,000 ton volume under the MFN quota, is conceivable.³³⁶ With the 1999 Panel ruling, the WTO also gave the United States permission to levy a US\$191,400,000 retaliatory sanction against the EU.³³⁷

2. EU Response

In November of 1999, the United States and Latin America rejected another EU proposal.³³⁸ That proposal called for the EU to move into a tariff-only system by January 1, 2006.³³⁹ Under this proposed tariff quota system, there would be a 2,553,000 ton quota with a tariff of EUR75 per ton, which would be open to all suppliers.³⁴⁰ Under the protection of the Lomé waiver, the ACP suppliers would still have duty free access to the EU market.³⁴¹

3. Recent Developments

On, May 3, 2000 and May 8, 2000, the WTO's General Council approved a series of measures that address the needs of both developing countries and least-developed countries.³⁴² The measures call for meetings to find plausible solutions to the economic concerns of these underdeveloped nations.³⁴³ These meetings and any resulting resolutions would subsequently serve

335. *Id.* at 85.

336. *Id.* at 84. *See id.* at 104 (holding that aspects of regime's licensing scheme violated GATS Article 2 and 17).

337. *See* Joseph Kahn, *U.S. Wins Round in Trade War with Europe*, N.Y. TIMES, Dec. 23, 1999, at C2 (noting sanction as compensation for trade lost by U.S. banana growers in Latin America as consequence of banana regime).

338. *U.S., Latin America Reject EU Banana Proposal*, ST. LUCIA ONE STOP NEWS, Nov. 17, 1999, at <http://www.sluonestop.com/news1.htm>.

339. *See id.* (noting that this move would occur after transition period under complex tariff-quota system).

340. *Id.*

341. *See id.* (adding that U.S. retaliatory sanctions are still in effect).

342. WTO, *Moore Hails General Council Outcome*, May 8, 2000, at http://wto.org/english/news_e/pres00_e/pr177.htm.

343. *See id.* (stating that meetings were scheduled for June 2000).

to boost the public's diminished confidence in the WTO and the international trade system.³⁴⁴ The Member States, specifically, held that continued technical assistance needs to improve; they sought a significant increase in financial aid by CHF10,000,000 over a three year period.³⁴⁵

The WTO also reported that Canada, the EU, Japan, and the United States, among other members, will create and implement preferential, tariff, and quota free measures that will be consistent with international treaty regulations and domestic regulations on products with an LDC origin.³⁴⁶

In October of 2000, the European Commission proposed a new compromise to the existing banana regime.³⁴⁷ The new proposal is a new system that would allocate import licenses on a first-come, first-served basis.³⁴⁸ The new system would be temporary until 2006.³⁴⁹ In January 2001, Chiquita filed suit, against the EU, alleging that the banana regime is illegal.³⁵⁰ Chiquita announced in mid-January, 2001 that it may have to seek Chapter 11 bankruptcy protection as a result of the on-going banana dispute.³⁵¹

344. *Id.*

345. *Id.* See Raj Bhala, *The Bananas War*, 31 McGEORGE L. REV. 839, 950 (2000) (discussing that U.S President William Clinton signed into law Trade and Development Act of 2000 (H.R. 434), focuses on amending GSP to extend duty-free treatment to specified products from sub-Saharan African countries); see also Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251

346. See Michael Moore, *WTO Now in Much Better Shape with New Agreements*, May 3, 2000, at http://www.wto.org/english/news_e/spmm_e/spmm28_e.htm (commenting that this news is good starting point).

347. See Geoff Winestock, *Europe Proposes Compromise in Dispute With Washington Over Banana Quotas*, WALL ST. J., Oct. 5, 2000, at A21.

348. *Id.*

349. See *id.* (commenting that transitory system would be replaced by tariff-only system). The plan is to be implemented April 2001. *Id.*

350. See Jonathan Eig & Geoff Winestock, *Chiquita Sues EC Over Limitations on Banana Trade*, WALL ST. J., January 26, 2001, at B5 (stating that Chiquita has filed suit alleging that EU illegally restricted banana imports). The case has been filed in the Court of First Instance. *Id.* It seeks U.S.\$525,000,000 and reserves the right to seek future damages contingent upon the banana regime's existence. *Id.*

351. *Id.* According to Chiquita's President and Chief Operating Officer, Steven G. Warsaw, Chiquita did not file suit only for the money. *Id.* Chiquita wanted the European Commission to propose and adopt a WTO-compatible regime. *Id.* But see *id.* (explaining EU spokesman Anthony Gooch's view that Chiquita's financial woes are not primarily attributed to banana regime given that Chiquita's competitors like Dole and Del Monte Food Co. are in adequate financial shape). Dole also has filed seven separate claims in the European Court of First Instance seeking damages because of the banana regime. *Id.*

Neither side to the banana dispute has yet to produce a resolution that will serve to please all involved parties, although a number alternatives have been proposed in recent years.³⁵² Additional, alternative regimes have been proposed, in addition to the aforementioned proposal to maintain a temporary tariff-quota regime pending the complete transition to a tariff-only scheme.³⁵³ These options include: maintenance of the status quo;³⁵⁴ the removal of Lomé trade preferences and the provision of a financial aid package only;³⁵⁵ the requirement of all ACPs to extend reciprocity of open market access and not tax the EU after a specified amount of time;³⁵⁶ and the regionalization of Lomé.³⁵⁷

352. See generally Bhala, *supra* note 345, at 952 (commenting that settlement has not yet been reached in dispute).

353. See generally U.S., *Latin America Reject EU Banana Proposal*, ST. LUCIA ONE STOP NEWS, Nov. 17, 1999, at <http://www.sluonestop.com/news1.htm> (discussing proposed move to tariff-only system by 2006).

354. See Sheppard, *supra* note 14, at 92; EUROPEAN COMMISSION, GREEN PAPER ON RELATIONS BETWEEN THE EUROPEAN UNION AND THE ACP COUNTRIES ON THE EVE OF THE 21ST CENTURY—CHALLENGES AND OPTIONS FOR A NEW PARTNERSHIP, CHAPTER IV—TOWARDS A NEW PARTNERSHIP (1996) [hereinafter GREEN PAPER CHAPTER IV] (noting that one obvious option would be to maintain the current non-reciprocal ACP-EU agreement). A renewable waiver would still be necessary since the status quo affords the ACP countries differentiated treatment. GREEN PAPER CHAPTER IV, *supra* 354. The advantages and disadvantages to the status quo have already been discussed in the disrupting parties' arguments. *Id.*

355. See Sheppard, *supra* note 14, at 92-93; GREEN PAPER CHAPTER IV, *supra* note 354. EU concessions would be unilateral. Sheppard, *supra* note 14, at 92-93. Preferential treatment would be given to ACP nations and non-ACP least-developed countries and would be non-reciprocal. *Id.* The system would be more like a GSP. *Id.* The ACP would cease to receive preferential treatment in the former ACP-EU partnership, while creating a regime that conformed with WTO protocol. *Id.*

356. See Sheppard, *supra* note 14, at 93. Such a reciprocity scheme would create a Free Trade Area between developed and developing nations. *Id.* The disadvantage to this idea would be that all ACP nations involved would be forced to devise a single plan that considers varying trade patterns. *Id.*

357. See Sheppard, *supra* note 14, at 93-94; GREEN PAPER CHAPTER IV, *supra* note 354. There would be three regional agreements between the EU, Africa, the Pacific islands and the Caribbean islands respectively. GREEN PAPER IV, *supra* note 354. Each agreement would require uniform reciprocity, while tailoring itself to the needs and conditions of each ACP region. *Id.* The disadvantage with such a regionalized scheme is that the ACP nations must form an intra-regional, reciprocal FTA, which will take some time, in addition to the time that it will take to establish such reciprocity with the EU. *Id.* See Michael Moore, *Globalizing Regionalism: A New Role for MERCOSUR in the Multilateral Trading System*, Nov. 28, 2000 at, http://www.wto.org/english/news_e/spmm_e/spmm45_e.htm (explaining that regional trade agreements, in combination with multi-lateral liberalization, can help developing countries, in particular, build upon their comparative advantages, sharpen the efficiency of their industries, act as starting point

III. IS THE BANANA REGIME REALLY DISCRIMINATORY AND ILLEGAL?—AN ANALYSIS

On the surface, there does not appear to be a grave inconsistency with the WTO's most recent ruling. Because the language of Lomé IV explicitly waives the non-discriminatory and non-reciprocity principles under Article I *only*, it cannot be applied where inconsistencies under Article XIII exist.³⁵⁸ Article XIII calls for the equitable treatment of *all* contracting parties, substantial and non-substantial, with regard to the allocation of import restrictions on like products.³⁵⁹ Based on the Panel's rationale, its rulings on the regime's non-conformity with GATT were sound. The ruling does not mean that the EU's goals and method of execution were unsound. The problem with this dispute is more abstract in scope and, it appears, has been ignored by the WTO.

A. Quantitative Restrictions versus Tariffs

Based on the rationale used in their 1997 and 1999 rulings, the Panel and AB appeared uncomfortable with the idea of quantitative restrictions. The use of quantitative restrictions as part of the banana regime is an important sub-issue to this dispute. Out of all the available forms of import restrictions, GATT favors the use of tariffs.³⁶⁰

While the combination of a licensing system and a tariff system is unnecessary according to GATT, quantitative restrictions is problematic under a licensing system.³⁶¹ As a result, the use of quantitative restrictions is generally prohibited under GATT Ar-

for integration into world economy, as well as, focus and strengthen their political commitment to open economy). *But see* Moore, *supra* (noting that regionalism carries risks; coherence and predictability offered by multilateralism will weaken as governments turn to regional agreements). Regionalism alone, without complementary multilateral liberalization will create an unbalanced system, where rich countries are in the sphere of control and developing countries are on the periphery. Moore, *supra*. While regionalism, can be a positive force, both politically and economically, and complement the multilateral system, it is not a substitute for a multilateral system. *Id.*

358. *See supra* notes 254-55 and accompanying text (explaining reason that Lomé does not apply to GATT Article XIII).

359. *See supra* note 220 (discussing GATT Article XIII).

360. *See supra* note 38 and accompanying text (explaining advantages and disadvantages of tariff use).

361. *See supra* notes 40 (discussing disadvantages of quantitative restrictions).

title XI with explicit exceptions.³⁶²

The problem with prohibiting the use of quantitative restrictions in the EU banana regime is that many of the ACP importers are not self-sufficient enough to compete in a tariff-only system.³⁶³ With a quota cap, the ACPs can integrate their bananas into the market. A tariff-only system would flood the market with bananas—more so with Latin American bananas. As a result, banana prices would decrease drastically. Given that Latin American bananas are produced cheaply, Latin American exporters and the United States are able to turn a profit more quickly and thus benefit from a tariff-only system.³⁶⁴ The independent ACP farmers, meanwhile, produce their banana crops at a greater expense and thus, earn less of a profit with low banana prices.³⁶⁵ Although preferential treatment by use of quantitative restrictions is generally prohibited under Article XI, quantitative restrictions allow ACPs to compete in the market at all. Since the ACPs stand to lose more than Latin American producers because of the ACPs' high production costs, quantitative restrictions allow ACPs the opportunity to increase their marginal profits.³⁶⁶

B. *The Impact of the Lomé Waiver*

Statistically, Lomé IV has been unsuccessful, but its principle is still warranted.³⁶⁷ Many critics of the Lomé waiver argue that the developing countries have not made significant progress under Lomé IV, while various European Member States still preserve their individual interests, and their collective interests as a community.³⁶⁸ Critics believe that ACPs should not depend upon the EU and the EU common market for aid.³⁶⁹ They ar-

362. *Id.*

363. *See supra* note 172 and accompanying text (explaining ACPs' need for quantitative restrictions under EU bananas regime).

364. *See supra* note 176 and accompanying text (describing Latin American banana production advantages).

365. *See supra* note 175 (stating that ACP production costs are twice as expensive as Latin American production costs).

366. *Id.*

367. *See supra* notes 147-151 and accompanying text (explaining that ACPs gained marginal benefits under Lomé).

368. *See supra* note 155 (explaining other reasons for ACPs' alleged lack of progress under Lomé).

369. *See supra* note 152 (arguing that Lomé promotes permanent state of dependency on developed nations).

gue that the ACP nations should simply learn to tailor their export portfolios for free market competition.³⁷⁰ This diversification may be accomplished either by improving the quality of their export commodities or by diversifying the types of commodities available for export, so as to effectively compete in the market³⁷¹—akin to the notion that those *most fit* to survive in a given competitive arena will do so.

In addition to the statistical evidence that points to the actual economic impact of Lomé IV, critics attribute several abstract reasons for Lomé's decline.³⁷² Although there are problems with Lomé IV's effectiveness, adverse sociological, political and economic consequences will follow if the EU eliminates the Lomé waiver concept.³⁷³ These adverse consequences include a loss of jobs, which would lead to imminent, major, socio-political disruption.³⁷⁴ The tourism industry, another major source of income for many of the Caribbean countries, would also suffer.³⁷⁵ Additional adverse consequences include the increase of: the ACPs foreign debts, the ACPs' inability to pay off their debts, the entrance into the drug trade by displaced, unskilled laborers, and U.S. emigration, which many U.S. opponents believe burdens the U.S. economy.³⁷⁶ Suggestions have been made for ACPs to diversify their exports in order to acquire their own comparative advantage. Many ACPs cannot simply diversify their exports in order to have a competitive advantage depending on that nation's respective climate, terrain, and land space.³⁷⁷

Proponents of Lomé IV appear to justify its necessity in a context that applies principles of international development law.³⁷⁸ International law originally developed as a law of coexis-

370. See *supra* notes 12, 14 and accompanying text (stating that ACPs should diversify their exports products in order to develop market comparative advantage).

371. *Id.*

372. See *supra* notes 152-53 and accompanying text (stating reasons for Lomé's alleged lack of economic effect).

373. See *supra* note 172 and accompanying text (explaining ACPs' view of consequences that will result from elimination of Lomé preferences).

374. *Id.*

375. *Id.*

376. *Id.*

377. See *supra* note 121 (discussing why Caribbean nations cannot diversify their exports and must depend on bananas as principle commodity).

378. See *supra* note 9 and accompanying text (explaining concept of international development law).

tence between separate, but equal, states based on the idea of reciprocity.³⁷⁹ With the devastation of World War II, a need for cooperation among European nations gave way to the development of international organizations and international laws that would foster the gradual formation of the EU.³⁸⁰ Under this new law of international cooperation, participants have an obligation to act on a multilateral level.³⁸¹ More specifically, states must adhere to rules based on a common concern for growth as an international community, and the preservation of an individual state's citizens.³⁸² Lomé IV advances the goal of international development law, which evolved from a concern about intrastate affairs to a concern about the community-wide initiatives to attain a higher standard of living and development for all.³⁸³

Not every Member State is the same economically and socially speaking. Therefore, a state's ability to fulfill obligations under the law may not be as easily achieved. In the present case, countries that were former European colonies have *only* gained their independence with the last twenty to thirty years. These countries are still in the process of their industrialization—if they are participants in the process at all. These countries must adjust their economies in order to be on equal footing and effectively compete with countries that have been industrialized for the past century. In order to accomplish this, some form of assistance, such as elements found in the current banana regime, is very necessary. Lomé IV and its predecessors allowed these developing countries a chance to enter the international trade sphere at some reasonable level of competitiveness.

Detractors against the EU banana regime argue that preferential treatment under Lomé IV is discriminatory on the face of the MFN clause and only fosters a welfare state of dependency. They also argue that the EU banana regime does not promote a

379. *See supra* note 5 and accompanying text (explaining concept of international law).

380. *See supra* notes 102-04 and accompanying text (describing post World War II revitalization plan).

381. *See supra* note 4 and accompanying text (explaining that international development law requires multilateral cooperation from trade participants).

382. *See supra* note 7 and accompanying text (describing concepts and goals of globalization requiring growth as whole community particular attention paid to economically impoverished participants).

383. *See supra* notes 138-146, 156-158 (discussing Lomé's role in connection with international development law).

competitive free market, which is the foundation of Western economics and international law, therefore, they conclude that such preferential treatment is unfair and illegal.

The Lomé waiver did not abandon the notion of fair competition, but simply modified the means needed to achieve the goal of an equal and fair opportunity to compete effectively. The principle of equal treatment in competitive trade still exists, but the process has been adjusted to grant different rights and obligations to different Member States based on that state's degree of social and economic progress thus far.³⁸⁴ International organizations all agree that states should cooperate with one another to foster worldwide economic growth, especially for less developed nations.

Under international law, every country has the right to determine the structure of its respective economic system whether by granting special privileges or some other form of equal treatment across the board. A contracting party is not legally obligated to impose equal treatment under international law. The only recourse lies in the MFN clause, but the MFN clause is considered a voluntary, contractual rule and not a rule under international law.³⁸⁵ Thus, the rules of international law, which supports short-term preferential treatment in favor of equality in the long run, seem to and should override the principles espoused by the MFN clause when it comes to international trade and international development law in the 21st century. Preferential treatment is not discriminatory where it seeks to rectify and balance a pre-existing unbalanced situation. Therefore, the principle of the MFN clause is not appropriate in the case at bar and was rightfully waived by Lomé IV. However valid the MFN principle may be for the regulation of trade relations among more industrialized nations of equal economic potency, indeed, it is unsuitable for trade involving countries of vastly disparate economic strengths.

The most effective and logical resolution to the banana dispute would be to preserve the Lomé waiver for another five to ten years until the EU and the ACPs are ready to enter into re-

384. See *supra* note 9 and accompanying text (discussing how international law addresses ideals of level competitive field under international development law).

385. See *supra* note 44 and accompanying text (explaining basic concept of MFN clause).

gionalized, cooperative FTAs with each other.³⁸⁶ Each ACP region would tailor a unique plan with the EU, which benefits the ACPs, while establishing a system of uniform reciprocity as per the language of GATT.³⁸⁷ The reason for the preservation of the Lomé waiver until a transition to an FTA is made considers that not every ACP nation is ready to handle such an immediate transition based on that country's particular economic and socio-political scheme.³⁸⁸

CONCLUSION

The banana dispute has evolved into a very complicated and controversial issue that may or may not have an immediate resolution. Or, does such a resolution exist, but interested parties want to ignore it in order to preserve their own self-interests? Social development and cooperation comes with tolerance, patience, and understanding—terminology that is not frequently used to dissect complex issues of international trade and economics. But in fact, this type of thinking is vital to the case at bar. Given the predicted consequences, the banana dispute is an example of the most complex issues globalization has brought to the forefront. Although it seems like the recent developments in the dispute only attempt a small amount of progress, it must be remembered that credible solutions do not guarantee that economic change and prosperity for developing third-world nations will be immediate or will even occur at all.

Much of the world embraces the tenets of free market capitalism. In the wake of globalization and international economic development, the explicit rules of free market capitalism and popular Western economics should be set aside. This is in order to assist those countries that are generally seen as less desirable and not advanced, but, at one point, were considered so essential to the reality of globalization and the restoration of the world's present economic superpowers.

Was there ever a true or even altruistic purpose behind globalization? Or is globalization the economic superpowers' fumbled attempt at a remorseful gesture to its former colonies

386. See *supra* note 357 and accompanying text (discussing advantages and disadvantages of regionalized cooperative agreement).

387. *Id.*

388. *Id.*

for their being the *have-nots* of a world so laden with technology and resources, no one nation should really be considered a *have-not*. Is globalization simply being retarded by those who want to exist in a world of free market competition—where alliances are formed for the sake of later trumping supposed allies when their purpose has been exhausted?

In the wake of these questions, regionalism, perhaps under a looser multilateral scheme, is the best way to go. Countries can form trading blocs with each other because of their shared geographic location and economic interests, while perhaps, competing with other nations, beyond the trading bloc, on a less intensively multilateral level. With this a more profound degree of free market competition would be preserved, but that degree of competition would be on a more micro-economic level. There is no clear answer to this issue, but one must be found soon.

The ultimate winners cannot be predicted at this point—if there are any real winners to the banana war. The real losers should include all the parties to this dispute. The EU, the United States and even the WTO should be criticized for letting this issue fester for this long. The developing and least developed nations, who are pretty much stuck in the middle of this dispute, stand to lose the most, out of all parties involved, because they never had a true voice or a genuine advocate to champion their cause loudly enough. We have some choices here: level the trading field, so that everyone has a chance to walk away with a piece of globalization; sectionalize the trading field in order for participants to compete with their respective equals without compromising to weaker competitors too much; or remain at status quo where an economic headache and embarrassment is all that has been and will be gained from such non-cooperation.

