

1995

Going Bananas: How the WTO Can Heal the Split in the Global Banana Trade Dispute

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Cover Page Footnote

I am grateful to Professors Victor Essien and Valentine Korah for reading earlier drafts of this Note.

GOING BANANAS: HOW THE WTO CAN HEAL THE SPLIT IN THE GLOBAL BANANA TRADE DISPUTE

JACK J. CHEN*

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*"It will be easier to get cocaine into Europe than a contraband banana."*¹

*If the people of Dominica cannot make a living exporting bananas, they will export cocaine.*²

*The European Community's tariff regime on bananas is nothing more than a "programme to promote the production of cocaine."*³

* * *

INTRODUCTION

Latin Americans are losing jobs, and some fear that the unemployed will resort to growing and exporting cocaine to Europe and the United States. Europeans in the transport industry, particularly Germans, are losing jobs because of the European banana tariff. American multinational corporations worry about losing millions of dollars in Latin American and European investments, while European multinational corporations are eager to capture the market share that the Americans are unable to serve.⁴ Meanwhile, African, Caribbean and Pacific ("ACP") nations rejoice over their guaranteed exports to Europe. The reason for the disturbance is the European Community's quota for bananas.

The European Community is, among other things, a large customs union designed to regulate the external trade of a common market consisting of the entire Western European region, with the exception

1. *Belgium: Steichen Says EC Farm Market Access Offer Final*, Reuter Newswire, Dec. 15, 1993, available in LEXIS, World Library, ALLNWS File (quoting Enrique Betancourt, director of the Panama-based Union of Banana Exporting Countries).

2. John Rothchild, *The Banana Wars*, Time, Oct. 17, 1994, at 39 (referring to warning from Dame Eugenia Charles, Prime Minister of the island of Dominica).

3. *EC: Wave of Reactions to EC Decisions on Bananas*, Agence Europe, Reuter Textline, Feb. 18, 1993, available in LEXIS, World Library, ALLNWS File (quoting Edward Linter, German Secretary of State at the Interior Ministry).

4. European firms that trade in bananas have seen their shares rise since the implementation of the banana regime. *Banana Shares Ripen*, The Guardian, Jan. 13, 1995, at 17.

of Iceland, Liechtenstein, Norway and Switzerland. In 1993, the Community, through its Council of Ministers, created a banana tariff regime, allowing traditional ACP-grown bananas to enter into the market freely. The Community also set a quota on Latin-grown bananas, reducing the Latin American share in the EC market. This regulation⁵ disturbs the global banana trade, causing firms and individuals working with Latin bananas to lose money and firms and individuals working with ACP bananas to earn more.

This banana tariff regime does not pass muster under international trade rules. The regime strikes at the heart of the international trade regulation system known as the General Agreement on Tariffs and Trade⁶ ("GATT"). The GATT, an international trade regulatory body, enforces many multilateral trade agreements, one of which is also termed the General Agreement on Tariffs and Trade ("General Agreement"). The General Agreement is the legal basis used by the involved trade parties to fight for their interests. The EC banana regime, by differentiating between ACP and Latin bananas, is inconsistent with certain articles of the General Agreement. Nevertheless, while the United States fears the prospect that its multinational corporations will suffer large losses because of the regime, the European Community does not want to terminate its banana regime. Additionally, the ACP nations want to protect the regime because it is in their benefit. The United States is currently identifying European targets for possible trade retaliation.⁷

Despite the existence of the GATT, the banana trade dispute remains unresolved because the GATT system contains many weaknesses, rendering it ineffective as a trade regulating organization. In fact, many contracting parties of the GATT are dissatisfied with the GATT and its inability to resolve certain trade debates. In response, the GATT contracting parties recently completed negotiations on a large series of agreements known as the Uruguay Round.⁸ The contracting parties intend that these accords, in particular the Agreement Establishing the World Trade Organization, remedy the perceived faults of the older GATT system.⁹

This Note examines how the banana dispute, a politically controversial trade dispute, can be resolved through legal means. Part I ex-

5. Council Regulation 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas, 1993 O.J. (L 47) 1.

6. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A5, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948).

7. See Debra Percival, *Trade-Bananas: Threat of Trans-Atlantic Trade War over Bananas*, Inter Press Service, Jan. 10, 1995, available in LEXIS, World Library, ALLNWS File.

8. See Uruguay Round Implementing Legislation, COM(94)414 final.

9. The WTO is a new international organization created to monitor and enforce world trade agreements such as the General Agreement. For a more in-depth discussion of the WTO, see *infra* notes 250-304 and accompanying text.

plains the basic structure of the GATT. Part II highlights the institutional structure of the WTO as well as its intended functions in global trade. Part III scrutinizes the background to the banana trade dispute and the current situation and examines the case law of the Court of the European Communities regarding the General Agreement. Part IV applies the GATT dispute resolution procedure to the banana trade debate to demonstrate the GATT's inadequacies. Finally, Part V explores the WTO resolution process to demonstrate how the GATT and the WTO operate differently. This Note concludes that any controversial trade debate, such as the banana dispute, can be resolved only by a single forum, the WTO, with its strict rules on dispute resolution and its ability to enforce panel decisions.

I. WHAT IS GATT?

The term "GATT" usually refers to one of two things. First, the General Agreement is referred to as the GATT. Second, the organizational staff located in Geneva is called the GATT.¹⁰

A. *The General Agreement*

The General Agreement was adopted in 1948 by major trading countries seeking an immediate reduction of tariffs.¹¹ The General Agreement was not intended to give rise to an international organization.¹² Rather, the Agreement was meant to function as a temporary trade agreement. The participating countries were not interested in creating a document to be strictly construed.¹³ As a result, the text of the Agreement contains a provisional character that remains today.¹⁴

In contrast to the General Agreement, the participating countries planned to create an International Trade Organization to function permanently. The ITO's intended function was to enforce a strict set of trade regulations. The ITO was to serve as one of the three pillars of post-Second World War international economic development, alongside the International Monetary Fund and the International

10. For some, the term GATT is used to refer to more than 180 treaties that deal both directly and indirectly with the General Agreement. John H. Jackson, *Restructuring the GATT System* 26 (1990). In addition, GATT serves as a forum for the continuing discussion of multilateral trade agreements on the reduction of tariffs and trade policy. See Ernst-Ulrich Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 *Common Mkt. L. Rev.* 397, 419 (1983) [hereinafter *Application of GATT*]. The text of the General Agreement will be referred to as the "General Agreement." The organization in Geneva will be referred to as "GATT."

11. Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* 57 (2d ed. 1990) [hereinafter *Legal System*].

12. *Id.*

13. See *id.* at 58.

14. See Olivier Long, *Law and its Limitations in the GATT Multilateral Trade System* 11 (1987).

Bank for Reconstruction and Development ("World Bank"). As one of the three pillars, the ITO was to nurture world trade and thereby revitalize the global economy.¹⁵ The major trading powers intended that the ITO absorb the provisional General Agreement when the ITO came into force.¹⁶ But the ITO was never adopted by the United States Senate because the Senate did not approve of the ITO,¹⁷ presumably because of its strict rules. In fact, the ITO was not adopted by most of the nations, and, as a result, the General Agreement became a permanent international accord.

The General Agreement, as a provisional document, is applied by the contracting parties on the basis of the "Protocol of Provisional Application of the General Agreement" of October 30, 1947¹⁸ and subsequent Protocols of Accession to the General Agreement.¹⁹ The Protocol of Provisional Application contains two major clauses: (1)

15. See *id.* at 1. As one commentator noted:

[T]he ITO was not designed simply to enforce a set of trade rules, but was to be an organization for dealing with a range of post-war international economic problems, including the moderation of fluctuations in international commodity prices, promoting balance of payments equilibrium (in cooperation with the IMF), eliminating restrictive business practices, and promoting employment.

Raymond F. Mikesell, *Antecedents of the ITO Charter and Their Relevance for the Uruguay Round*, 14 N. Ill. U. L. Rev. 323, 328 (1994). Therefore, the ITO would have imposed a stricter code of behavior than the provisional document, the General Agreement. In retrospect, the idea of an international organization that has the power to adjudicate disputes and take cohesive actions may not seem so incredible. The concept of sovereign states granting an international body the power to limit their power to retaliate in international trade affairs was a new principle at the time. Legal System, *supra* note 11, at 40.

16. *Id.* at 50.

17. Long, *supra* note 14, at 1; Ernst-Ulrich Petersmann, *The EEC as a GATT Member*, in *The European Community and GATT* 23, 24 (Meinhard Hilf, et al. eds., 1986) [hereinafter *The EEC as a GATT Member*].

The ITO contained provisions creating quasi-judicial bodies formed to adjudicate claims, and the ITO's decisions could have led to the creation of a comprehensive body of ITO common law. Legal System, *supra* note 11, at 37. This "common law" aspect reappears in the WTO, because article XVI(1) of the WTO Agreement states that the WTO "shall be guided by the decisions" of GATT 1947. Agreement Establishing the World Trade Organization, *reprinted in* Proposal for a Council Decision Concerning the Conclusion of the Results of the Uruguay Round of Multilateral Trade Negotiations (1986-94), COM(94)143 final 9, art. XVI(1). While in a practical sense article XVI(1) is providing for continuity in the adjudication of claims, it nonetheless carries over from the GATT a body of case law that could have precedential effect. *Stare decisis* does not exist in international law, but the GATT panels do rely somewhat heavily on prior panel decisions. Miquel Montaña i Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 Colum. J. Transnat'l L. 103, 162 (1993).

18. Of all the contracting parties, only Haiti and Liberia have ratified the General Agreement. *The EEC as a GATT Member*, *supra* note 17, at 26. The Agreement applies to subsequent contracting parties by their individual accession agreements rather than the Protocol. Long, *supra* note 14, at 11-12.

19. *The EEC as a GATT Member*, *supra* note 17, at 26; Long, *supra* note 14, at 11-12.

that the contracting party governments assume the legal obligations of the General Agreement "provisionally"; and (2) that the governments agree to bind themselves only "to the fullest extent not inconsistent with existing legislation."²⁰ The General Agreement does not have retroactive effect, but violations of the General Agreement by contracting parties can be made through subsequent legislation.²¹

B. GATT, the Organization

The GATT, the organization, oversees all GATT activities. In addition to supervising the enforcement of the General Agreement, the organization serves as a forum for the creation of additional trade agreements.²² Some of these agreements, such as the Multifibre Agreement, bind countries that are not contracting parties to the GATT.²³

Despite the deliberate attempt to avoid making the GATT a formal international organization at the GATT's inception,²⁴ a regulatory system developed to implement the General Agreement and to ensure its effectiveness.²⁵ At the highest level of the GATT are the CONTRACTING PARTIES who are responsible for performing all official decision making functions.²⁶ Because at least 123 GATT contracting

20. Legal System, *supra* note 11, at 51 (citation omitted).

21. The General Agreement is an international accord that is binding upon the contracting parties based on the idea of *pacta sunt servanda*, as codified in article 26 of the Vienna Convention on the Law of the Treaties, which is a general principle of law common to all legal systems represented in the GATT. Montaña i Mora, *supra* note 13, at 112. *Pacta sunt servanda* means that parties to every treaty in force must perform their obligations in good faith. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331.

22. Some have thus used the term the GATT to refer to a series of separate multilateral trade negotiations. See Long, *supra* note 14, at 16.

23. For example, the People's Republic of China became a party to the MFA on January 18, 1984. Long, *supra* note 14, at 41.

24. Legal System, *supra* note 11, at 51.

25. This is especially so because the ITO failed to come into existence. Had the ITO been created, it would have been charged with administering and implementing all the multilateral trade accords. For a discussion of the ITO, see *supra* notes 15-17 and accompanying text.

26. Legal System, *supra* note 8, at 51.

Following standard convention, throughout this Note, wherever reference is made to the contracting parties acting jointly in their official capacity, they are designated as the CONTRACTING PARTIES. GATT, *supra* note 6, art. XXV.

As of July 31, 1994, the 123 contracting parties to the GATT and the year in which they signed are: Angola (1994), Antigua and Barbuda (1987), Argentina (1967), Australia (1948), Austria (1951), Bahrain (1994), Bangladesh (1972), Barbados (1967), Belgium (1948), Belize (1983), Benin (1990), Bolivia (1990), Botswana (1987), Brazil (1948), Brunei (1993), Burkina Faso (1963), Burundi (1965), Cameroon (1963), Canada (1948), Central African Republic (1963), Chad (1963), Chile (1949), Colombia (1981), Congo (1963), Costa Rica (1990), Côte d'Ivoire (1963), Cuba (1948), Cyprus (1963), Czech Republic (1993), Denmark (1950), Dominica (1993), Dominican Republic (1950), Egypt (1970), El Salvador (1991), Fiji (1993), Finland (1950), France (1948), Gabon (1963), Gambia (1965), Germany (1951), Ghana (1957), Greece

parties exist, and decisions must be made frequently, another entity known as the Council²⁷ facilitates the process. The Council is the CONTRACTING PARTIES' inter-sessional body, which is authorized to address any issues normally dealt with by the CONTRACTING PARTIES during their sessions and any urgent matters when it is logistically easier to call a meeting of the Council than the CONTRACTING PARTIES.²⁸ The Council is comprised of all of the representatives of the contracting parties that have requested such representation.²⁹ Two of the Council's most important tasks are the appointment of panel members in the dispute resolution process and the determination of the panels' terms of reference.³⁰ While the Council also adopts panel reports, such panel reports have legal effect only if they are referenced in the Council's annual report, and the CONTRACTING PARTIES in turn adopt the annual report.³¹

II. WHAT IS THE WTO?

Currently, a new international trade regulating body, the WTO, stands to absorb the GATT. If the WTO Agreement is adopted by all the GATT contracting parties,³² the current GATT structure will

(1950), Grenada (1994), Guatemala (1991), Guinea-Bissau (1994), Guyana (1966), Haiti (1950), Honduras (1994), Hong Kong (1986), Hungary (1973), Iceland (1968), India (1948), Indonesia (1950), Ireland (1967), Israel (1962), Italy (1950), Jamaica (1963), Japan (1955), Kenya (1964), Korea (1964), Kuwait (1963), Lesotho (1988), Liechtenstein (1994), Luxembourg (1948), Macau (1991), Madagascar (1963), Malawi (1964), Malaysia (1957), Maldives (1983), Mali (1993), Malta (1964), Mauritania (1963), Mauritius (1970), Mexico (1986), Morocco (1987), Mozambique (1992), Myanmar (1948), Namibia (1992), Netherlands (1948), New Zealand (1948), Nicaragua (1950), Niger (1963), Nigeria (1960), Norway (1948), Pakistan (1948), Paraguay (1993), Peru (1948), Philippines (1979), Poland (1967), Portugal (1962), Qatar (1994), Romania (1971), Rwanda (1966), Saint Kitts & Nevis (1994), Saint Lucia (1993), Saint Vincent (1993), Senegal (1963), Sierra Leone (1961), Singapore (1973), Slovakia (1993), South Africa (1948), Spain (1963), Sri Lanka (1948), Suriname (1978), Swaziland (1993), Sweden (1950), Switzerland (1966), Tanzania (1961), Thailand (1982), Togo (1964), Trinidad & Tobago (1962), Tunisia (1990), Turkey (1951), Uganda (1962), United Arab Emirates (1994), United Kingdom (1948), United States (1948), Uruguay (1953), Venezuela (1990), Yugoslavia (1966), Zaire (1971), Zambia (1982), Zimbabwe (1948). Two non-contracting parties who participated in the Uruguay Round are China and Algeria. Facsimile from the United States Trade Representative 2 (July 31, 1994) (on file with the *Fordham Law Review*).

27. The Council, not provided for in the General Agreement, was established by a decision of the CONTRACTING PARTIES on June 4, 1960. Long, *supra* note 14, at 47.

28. *See id.*

29. *Id.*

30. *See id.*

31. *Id.*

32. In the case of the European Community, both the Community and its member states were required to ratify the Uruguay Round accords because the Community and its member states shared competence. *See* Opinion 1/94 of the Court of Justice (Competence of the Community to conclude international agreements concerning services and the protection of intellectual property — Article 228(6) of the EC Treaty) at ¶ 106 (Nov. 15, 1994) (LEXIS, Eurcom library, CASES file).

cease to exist. A more in-depth examination of the WTO is crucial to understanding the banana trade dispute because the WTO provides the only forum for various nations to resolve the banana trade dispute.

A. *The Organization*

Essentially a newer version of the ITO,³³ the WTO clearly defines the obligations and duties of its members as laid out in multilateral trade agreements such as the General Agreement and the Multifibre Agreement.³⁴ The WTO consists of contracting parties to the General Agreement that ratified the Uruguay Round and will eventually include non-contracting parties who have applied for WTO membership, including Russia, China and Taiwan. Contracting parties who fail to approve the Uruguay Round remain part of "GATT 1947," a term coined by the WTO Agreement,³⁵ as opposed to approving parties who become "GATT 1994" members.³⁶

33. The WTO is a newer version of the ITO, and significant similarities exist between the two. The WTO Agreement specifically states its intention to cooperate, when appropriate, with the IMF and the World Bank. WTO Agreement, *supra* note 17, art. III(5). Thus, the WTO acts as the third pillar in the global economy by facilitating trade growth and assisting developing countries to compete in the global economy. The second similarity between the two bodies is the legalistic structure contained in their respective charters.

The WTO, like the ITO, contains provisions providing for developing countries in its day-to-day operations. First, article XI(2) of the WTO Agreement provides that U.N. designated "least-developed countries" can make adjustments in their commitments and concessions consistent with their "individual development, financial and trade needs or their administrative and institutional capabilities." WTO Agreement, *supra* note 17, art. XI(2). Another area where the new trade system makes concessions for developing countries is in article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, where WTO members are advised to pay "special attention to the particular problems and interests of developing country Members." Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* Proposal for a Council Decision Concerning the Conclusion of the Results of the Uruguay Round of Multilateral Trade Negotiations (1986-94), COM(94)143 final 353, art. 4(10).

If a dispute between a developing country member and a developed country member arises, the dispute panel shall, upon the request of the developing country, "include at least one panelist from a developing country Member." DSU, *supra*, art. 8(10). Also, in such a dispute, the panel's report must state explicitly how the status of the developing country member has been considered in the panel's report. Article 12(11) provides:

Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

DSU, *supra*, art. 12(11). Article 24 of the Understanding is devoted to special procedures involving least-developed country members.

34. See DSU, *supra* note 33, app. 1.

35. WTO Agreement, *supra* note 17, art. II(4).

36. *Id.*

The WTO contains a complex institutional structure carefully delineated in the WTO Agreement. At the top of the hierarchy is the Ministerial Conference, which is made up of the representatives of all WTO members. The Conference meets at least once every two years and carries out the executive decisions of the WTO.³⁷ The Ministerial Conference is the WTO equivalent of the GATT CONTRACTING PARTIES, so the Conference is made up of senior level officials. Beneath the Ministerial Conference is the General Council, the equivalent of the GATT Council. The General Council is made up of representatives of all WTO members, but of lower level representatives who meet more frequently to carry out tasks to ensure the WTO's effectiveness.³⁸ One of the General Council's most important jobs is to define the competence of the Dispute Settlement Body.³⁹ The General Council also determines the competence of the Trade Policy Review Body.⁴⁰ At a still lower level of the institutional structure are various councils: the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Property Rights.⁴¹ The WTO institution further includes various committees: the Committee on Trade and Development, the Committee on Balance-of-Payments Restrictions and the Committee on Budget, Finance and Administration.⁴²

B. *The WTO Agreement*

Aside from its institutional aspect, the WTO Agreement references an "Understanding on Rules and Procedures Governing the Settlement of Disputes" ("DSU"),⁴³ which details the requirements and time allowances of each step of WTO dispute resolution. The extensive dispute resolution procedures specifically call for legal and expert analysis through the appointment of legal and trade experts in panels. Moreover, a body of case law continues to grow through previous panel decisions.⁴⁴

Another major feature of the WTO is the diminished role of consensus voting under the WTO. On the one hand, the WTO Agreement specifically provides for the continuation of consensus voting

37. *Id.* art. IV(1).

38. *Id.* art. IV(2).

39. *Id.* art. IV(3).

40. *Id.* art. IV(4).

41. For the purposes of this discussion, it is sufficient to state that these Councils will facilitate further discussion of trade regulation in their respective fields, as well as assist the WTO in the enforcement of all the trade agreements. *Id.* art. IV(5).

42. *Id.* art. IV(7).

43. See *infra* notes 256-89 and accompanying text.

44. This is especially true because it appears that panel decisions adopted by the CONTRACTING PARTIES can be referenced by the WTO panels. See DSU, *supra* note 33, art. 3(1).

under the General Agreement.⁴⁵ On the other hand, the Agreement states that “[e]xcept as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.”⁴⁶ Thus, it seems that majority voting is the default rule, despite the continuing practice of decision making by consensus. The introduction of majority voting into the WTO significantly impacts political negotiation among WTO members. The allocation of votes is not weighted to allow for the varying economic powers of members.⁴⁷ Each country receives one vote, and, as a result, the WTO’s voting structure may shift the political balance.⁴⁸ The relationship between these two provisions remains unclear, and it is possible that the relationship between the two provisions will only be clarified after a period of activity under the WTO.

C. *The “Residual Clause” of the DSU*

The DSU contains a “residual clause,” which states that all disputes arising under the GATT before the enactment of the WTO must be settled according to the dispute resolution procedure of article XXIII of the General Agreement rather than the WTO.⁴⁹

The Understanding provides that the WTO procedures apply to *new* requests by a member for disputes under agreements made on or after the effective date of the WTO Agreement.⁵⁰ Dispute resolution procedures under articles XXII and XXIII of the General Agreement or a procedure separately agreed upon apply to requests made under “GATT 1947” or any agreement entered into before the effective date of the WTO Agreement.⁵¹ As the WTO Agreement notes:

With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.⁵²

The “residual clause” of the DSU seems straightforward on its face. If a GATT contracting party requests dispute resolution, either article XXII or XXIII of the General Agreement or a separately agreed upon dispute resolution procedure applies. If a WTO member re-

45. WTO Agreement, *supra* note 17, art. IX(1).

46. *Id.*

47. The provisions of the WTO Agreement regarding voting further provide the European Community with the number of votes equal to the number of its member states who also are members of the WTO. *Id.*

48. Traditional GATT practice avoids formal voting except for waivers, membership and treaty amendments. Jackson, *supra* note 10, at 22.

49. DSU, *supra* note 33, art. 3(11).

50. *Id.*

51. *Id.*

52. *Id.*

quests dispute resolution, the WTO dispute resolution procedures apply. A contracting party involved in a dispute that has already commenced in the GATT cannot, upon its ratification of the WTO, remove that dispute to the WTO. Some questions remain. For example, if a country sought dispute resolution under "GATT 1947," and a panel report is issued but not adopted, could that country request WTO dispute resolution based on the same trade dispute? Secondly, must the dispute arise under "GATT 1994" for the WTO dispute resolution procedures to apply?

If the answer to the first inquiry is yes, the banana trade dispute cannot be resolved under WTO procedures because the dispute is already the subject of two GATT panel reports. But article XXIII of the General Agreement suggests that WTO dispute resolution is appropriate. Article XXIII provides for dispute resolution "not only in [the] case of [a] violation of GATT obligations but also in [the] case of [a] nullification or impairment of economic benefits which could *bona fide* be 'reasonably expected' under GATT law."⁵³ The language of article XXIII loosely describes the circumstances under which dispute resolution can be requested and fails to limit a contracting party's ability to re-raise a trade issue in a subsequent dispute resolution proceeding. Thus, WTO members can request dispute resolution of trade issues already reviewed under "GATT 1947."

To qualify for WTO dispute resolution, it is further necessary that the dispute arise under "GATT 1994." Article 26 of the WTO Agreement deals specifically with non-violation complaints of the type described in article XXIII.⁵⁴ Thus, a Latin American country or the United States would need a separate cause of action under "GATT 1994" to claim that the banana dispute arises under the WTO.⁵⁵ Article 26(2) of the DSU states that for dispute resolutions regarding article XXIII⁵⁶ complaints, traditional GATT practice applies. Thus, the article XXIII cause of action cannot be used to interpret the residual clause of the Understanding.⁵⁷

In practice, the readings that provide that WTO procedures apply to new requests as opposed to new disputes will probably prevail. Thus, although the banana trade dispute has already been treated by the GATT panel reports, it is likely that a WTO member will still be able to seek WTO dispute resolution. In conclusion, the WTO Agreement can be interpreted as an attempt by the international community to legalize trade disputes and decrease the political aspect of these disputes. By functioning as a dispute resolution forum, the WTO will

53. *Application of GATT*, *supra* note 10, at 433.

54. *GATT*, *supra* note 6, art. XXIII(1)(b).

55. *See DSU*, *supra* note 33, art. 26.

56. *GATT*, *supra* note 6, art. XXIII(1)(b).

57. The "residual clause" is article 3(11) of the DSU, *supra* note 33.

function as an international tribunal with the power to enforce its judgments.⁵⁸

III. APPLYING FACTS TO THEORY: THE BANANA TRADE DISPUTE

The banana dispute is a complicated issue that involves world history, politics between developing and developed nations, and the case law of the European Court of Justice. It is necessary to examine each facet of the banana dispute independently and then consider how they interact with each other under the GATT system.

A. Background

The banana dispute has been an issue in international trade for many decades. The history of the dispute reveals that bananas have played an important role in the European Community since its creation. An examination of the development of the banana trade within the European Community further demonstrates that several important legal issues give rise to the difficulties involved in the dispute's resolution.

1. History

To better understand the controversy surrounding the banana trade, an examination of the European Community and the development of the banana trade is necessary. Attached to the Treaty Establishing the European Economic Community⁵⁹ is a Banana Protocol. The Protocol was the result of the Federal Republic of Germany's refusal to sign the EEC Treaty until Germany was given the right to import an adjustable amount of Latin bananas duty free.⁶⁰ While some perceived bananas as just a fruit, Germans viewed them as an important cultural icon.⁶¹ The Protocol in the EEC Treaty established a German free import ceiling to be adjusted by amendment to provide for the banana demand in the German market. Bananas, from the founding of the Community, could not be circulated freely in the Community because the Protocol applied only to Germany.⁶²

A tariff regime was introduced to provide preferential treatment to bananas from the ACP nations in 1993.⁶³ After the United Kingdom

58. See *infra* notes 250-304 and accompanying text.

59. Known as the European Community since 1993.

60. Treaty Establishing the European Economic Community [EEC Treaty] Protocol on Bananas (as in effect in 1958).

61. Sarah Lambert, *Germany: Commodities—Germans Fail to Repeal EC Banana Tariffs*, Independent, July 5, 1994, at 23.

62. EEC Treaty, Protocol on Bananas [as in effect in 1958].

63. Council Regulation 404/93 of 13 February 1993 on the Common Organization of the Market in Bananas, art. 18, 1993 O.J. (L 47) 1, 7 (providing that while traditional ACP banana producers may be imported into the Community tariff free, a tariff quota for non-traditional ACP bananas and third-country (e.g., Latin American) bananas is mandated). The quota on non-traditional ACP bananas can be seen as con-

joined the Community, the Commonwealth countries along with former French colonies joined to form the African, Caribbean and Pacific group. The ACP nations negotiated with the Community for a preferential trade agreement now known as Lomé I.⁶⁴

flicting with article 168(1) of the Lomé IV Convention, which provides that “[p]roducts originating in the ACP States shall be imported into the Community free of customs duties and charges having equivalent effect.” Fourth ACP-EEC Convention, 1989, art. 168(1), *reprinted in* The Courier, Mar.-Apr. 1990, at 46. Thus, facially it appears that the Community is violating article 168(1) by imposing a banana tariff, covering even bananas of ACP origin. Article 168(1), however, is limited by article 168(2) of the Fourth ACP-EEC Convention and article 1 of Protocol 5 on Bananas. See Fourth ACP-EEC Convention, 1989, art. 168(2), *reprinted in* The Courier, Mar.-Apr. 1990, at 46; Protocol 5 on Bananas, art. 1, *reprinted in* The Courier, Mar.-Apr. 1990, at 150. Thus, whether the Council Regulation on the banana tariff violates the Lomé IV Convention depends on how one interprets these different articles.

64. Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 Cal. W. Int'l L.J. 1, 26 (1991). The European Commission stated:

The Lomé Convention, which links 70 countries in Africa, the Caribbean and the Pacific to the 12 European Union Member States, remains the largest collective cooperation agreement in the history of relations between the countries of the North and those of the South: its foundation was laid in the Treaty of Rome itself (March 25, 1957) whose signatories confirmed the solidarity which links Europe and overseas countries. Then after the 1960's independances, there followed the two Yaoundé Conventions of 1963 and 1969 between the EC and 18 African States.

In 1975, the European Community signed the first Lomé Convention (Lomé, the capital of Togo, was where the signing ceremony took place) with a group of 46 independent States. 57 States signed the Lomé II Convention (1980-1985), 65 the Lomé III Convention (1985-1990) and 69 ACP countries the fourth Lomé Convention (1990-2000) in 1989. This number was taken to 70 in 1993 with the accession of Eritrea to independence. The Lomé Convention very soon became a model of cooperation for development and the amount of aid provided has continued to grow.

This financial aid is implemented via the European Development Fund (EDF) which receives direct, five-yearly contributions from EU Member States. ACP countries are also eligible for European Investment Bank (EIB) own resources.

As far as trade is concerned, the ACP countries benefit from a very generous regime, since almost all their exports have free access to the European market without the condition of a reciprocal arrangement.

With regard to the origin of products exported by ACP countries to the European Union, the Lomé Convention authorizes exemptions from the basic “10% foreign components rule”: products imported from an ACP country, of which components up to 45% come from the EU or another ACP country are considered to be ACP products, and benefit from privileged access to the Single European Market. . . .

The fourth Lomé Convention also urged respect for human rights, including social, economic and cultural rights, the achievement of which is a fundamental development objective. The 70 ACP partners have accepted explicitly that the EDF shall finance activities initiated by ACP countries, that aim to promote these rights in the interests of constructing multi-party, civilian-oriented societies.

The fourth Lomé Convention also resolved to promote decentralized cooperation, calling on local public and private sector partners - companies and associations operating in the communities, Non Governmental Organi-

sation (NGOs) and trade unions, etc. - to bring about the "participatory development" of local populations.

Environmental protection in ACP countries is another integral part of the Convention. Long-term development aid has taken on a new dimension in making ecological concerns an area of cooperation in their own right. European Commission, EU-ACP Cooperation 7-8 (1994).

Currently, 70 ACP states are parties to the Lomé Convention: Angola*, Antigua and Barbuda*, Bahamas, Barbados*, Belize*, Benin*, Botswana*, Burkina Faso*, Burundi*, Cameroon*, Cape Verde, Central African Republic*, Chad*, Comoros, Congo*, Côte d'Ivoire*, Djibouti, Dominica*, Dominican Republic*, Eritrea, Ethiopia, Fiji*, Gabon*, Gambia*, Ghana*, Grenada*, Guinea, Guinea-Bissau*, Equatorial Guinea, Guyana*, Haiti*, Jamaica*, Kenya*, Kiribati, Lesotho*, Liberia, Madagascar*, Malawi*, Mali*, Mauritania*, Mauritius*, Mozambique*, Namibia*, Niger*, Nigeria*, Papua New Guinea, Rwanda*, Saint Kitts and Nevis*, Saint Lucia*, Saint Vincent and the Grenadines*, Western Samoa, Sao Tomé and Principe, Senegal*, Seychelles, Sierra Leone*, Solomon Islands, Somalia, Sudan, Suriname*, Swaziland*, Tanzania*, Togo*, Tonga, Trinidad and Tobago*, Tuvalu, Uganda*, Vanuatu, Zaire*, Zambia* and Zimbabwe*. An asterisk indicates GATT contracting party status. *The Fourth ACP-EEC Convention of Lomé, Decision of Dec. 9, 1994, L7604* at 3 (Dec. 19, 1994) (waiver of the Lomé IV Convention).

For a detailed analysis of the Lomé Conventions, including a discussion of the institutions the Conventions have created, see Matthews, *supra*, at 39-53.

The United States has a program similar to Lomé called the Caribbean Basin Initiative ("CBI"). The CBI is a program of trade and investment with 23 beneficiary countries in the Caribbean, Central America and northern South America, created by the Caribbean Basin Economic Recovery Act of 1983. William H. Cavitt, *Western Hemisphere Free Trade Initiatives*, 18 Wm. Mitchell L. Rev. 271, 286 n.50 (1992). It allows "the President to grant duty-free treatment to imports from qualified Caribbean Basin nations" and also permits duty-free importation of eligible goods from the Caribbean nations. Abelardo L. Valdez, *Expanding the Concept of Coproduction Beyond the Maquiladora: Toward a More Effective Partnership Between the United States and Mexico, and the Caribbean Basin Countries*, 22 Int'l Law. 393, 407 (1988). The CBI has received mixed reviews on its success. After the implementation of the CBI, the value of imports from the beneficiary states actually declined 23.7% from 1983 to 1985. *Id.* at 408-09. Moreover, approximately 87% of the exports from the Caribbean beneficiary states entered the United States duty-free under the GSP or the most-favored-nation requirements, so that the CBI was only addressing some 13% of the exports. *Developing North American Trade Relations: Canada, Mexico and the Caribbean Basin*, 80 Am. Soc'y Int'l L. Proc. 287, 290 (1986) (remarks of Harry Kopp). Others point out that non-traditional Caribbean exports to the United States increased 150% from 1983 to 1991, thus showing the CBI's success. Cavitt, *supra*, at 287. For a very detailed analysis of the CBI program, as well as a line-by-line analysis of the Caribbean Basin Economic Recovery Act, see Francis W. Foote, *The Caribbean Basin Initiative: Development, Implementation and Application of the Rules of Origin and Related Aspects of Duty-Free Treatment*, 19 Geo. Wash. J. Int'l L. & Econ. 245 (1985).

2. Some Legal Issues in the Banana Dispute

The tariff regime under the regulation⁶⁵ prejudices bananas from Latin America in favor of ACP producers.⁶⁶ Both Latin and ACP contracting parties are GATT contracting parties, and the Community, by discriminating between these two kinds of GATT contracting parties, strikes at the heart of the General Agreement, the Most-Favored-Nation clause in article I GATT.⁶⁷ The Most-Favored-Nation clause can be interpreted to mean that contracting parties such as the EC cannot discriminate between the GATT contracting parties and, in this case, between an ACP and a Latin American contracting party.

While the EC's tariff regime is incompatible with the General Agreement, the Community itself may also violate the General Agreement. Because all founding EC members were GATT contracting parties,⁶⁸ it was necessary that the EC Treaty be GATT compatible.⁶⁹ But while the EC was intended to be a "common customs

65. Council Regulation 404/93, 1993 O.J. (L 47) 1. See Tony Allen-Mills, *EC: France Dreads Banana Drama—European Single Market*, London Sunday Times, Jan. 3, 1993, available in LEXIS, World Library, ALLNWS File.

At the heart of the European Community is the Common Market. This concept of the common market should be differentiated from that of the internal market. Article 8a of the EEC Treaty, now known as article 7a of the EC Treaty, provides that an internal market is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." EC Treaty art. 7a. This concept of the internal market is enclosed in the idea of the common market, as mentioned in article 2. EC Treaty art. 2. Article 2 of the EC Treaty discusses the common market along with the approximation of the economic policies of the member states, the development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it. *Id.* Article 3 provides for a common customs tariff, a common commercial policy, the free movement of goods, services and capital, a common agricultural policy, a common transport policy, a system of ensuring competition and more. EC Treaty art. 3(a)-(k). Thus, the concept of the common market as discussed here involves not only the principle of the free movement of goods but the market vis à vis the world.

66. Council Regulation 404/93, 1993 O.J. (L 47) 1.

67. See *EEC-Import Regime for Bananas, Report of the Panel*, GATT Doc. DS38/R (Jan. 18, 1994) (restricted) 52 (copy on file with the *Fordham Law Review*). GATT, *supra* note 6, art. I(1) provides that "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 product originating in or destined for the territories of all other contracting parties." *Id.* art. I(1).

68. *The EEC as a GATT Member, supra* note 17, at 32.

69. See *id.* at 35. The entire article XXIV of the General Agreement defines a customs union, and a few major provisions of the article can be mentioned here. Article XXIV(2) of the GATT defines a customs territory as "any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories." GATT, *supra* note 6, art. XXIV. Article XXIV(4) states that the contracting parties "recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." *Id.* art. XXIV(4).

union" pursuant to article XXIV of the GATT, the issue of whether the European Community is compatible with the GATT remains unresolved.⁷⁰ The Community became an established fact in 1968,⁷¹ because the CONTRACTING PARTIES never determined whether the Community was structured in conformity with article XXIV⁷² of the General Agreement, which sets out the mandatory characteristics of a common customs union.

The banana dispute involves not only legal obligations but also serious economic concerns on all sides. At one time, the ACP nations were colonies of several EC member states, and commodities were the predominant articles of trade between Europe and her African colonies.⁷³ On the other hand, EC member states lacking a significant colonial presence such as Germany, prefer Latin bananas that are imported into the Community through German ports.⁷⁴ Important differences exist between ACP bananas and Latin American bananas. Latin bananas are called "dollar bananas" because they are grown by American multinational corporations such as Dole and Chiquita in

When one examines the EC Treaty, it is fairly obvious that the authors of the Treaty had in mind the General Agreement when they defined the common market and its functions. Article 2 of the EC Treaty establishes a "common market" with features delineated in article 3. EC Treaty art. 2. Article 3(a) eliminates customs duties, quantitative restrictions and measures having equivalent effect on intra-Community trade. *Id.* art. 3(a). Article 3(b) expressly states that the European Community would establish a common customs tariff and a common commercial policy. *Id.* art. 3(b).

70. See Legal System, *supra* note 11, at 214. Currently, the member states of the Community remain individual WTO members, *The EEC as a GATT Member*, *supra* note 17, at 36, and the Community represents the 15 nations as a group for nearly all the GATT and WTO activities. See *id.* at 37. In general, the Community is liable for the GATT and WTO obligations of all member states. EC Treaty art. 113. The member states, however, are responsible for the Finance and Balance of Payments Committee of the GATT, because the Community is not responsible for the financial contributions to the GATT. Ulrich Everling, *The Law of the External Economic Relations of the European Community*, in *The European Community and GATT* 85, 93 (Meinhard Hilf et al. eds., 1986). While each EC member state controls one vote, the member states vote as a bloc. *Id.* European Court of Justice case law has stipulated that the member states are responsible for taking into consideration Community interests in areas of international obligation where the Community does not act. See Opinion 1/94, *supra* note 32, at ¶¶ 108-109.

71. The Community declared the GATT article XXIV procedures closed in 1968. Legal System, *supra* note 11, at 212. The article XXIV procedures are a method by which the CONTRACTING PARTIES can determine whether a free trade agreement conforms to the requirements set out under article XXIV of the General Agreement. *Id.*

72. GATT, *supra* note 6, art. XXIV.

73. Matthews, *supra* note 64, at 23. France originally proposed during the negotiations of the EEC Treaty that her former colonies be incorporated into the Community. *Id.* at 24.

74. *Germany: T Port Only Allowed to Import 24,000 Tonnes of Bananas from Latin America in 1994*, Frankfurter Allgemeine Zeitung, Nov. 9, 1993, at 22, available in LEXIS, World Library, ALLNWS File.

Latin America on huge plantations.⁷⁵ ACP bananas, on the other hand, are grown by independent farmers. These bananas are twice as expensive as the Latin bananas.⁷⁶

Some commentators suggest that the economies of the ACP countries would collapse if their commodity, bananas, was forced to compete openly with dollar bananas in Europe.⁷⁷ In addition, the banana trade generates hundreds of millions of dollars for American firms in the Community,⁷⁸ and the dispute threatens thousands of jobs.⁷⁹ Furthermore, the result of the banana trade dispute will seriously limit job availability in the transport field for Germany.⁸⁰

Private parties such as fruit importers, as well as three member states (Germany, supported by intervenors Belgium and Denmark) sought judicial relief in the Court of Justice of the European Communities in an attempt to invalidate the Community's banana tariff regime, but all were unsuccessful. All private actions regarding the Council Regulation were rejected because the Court of Justice held that the fruit importers were not "individually concerned" as provided for in article 173 of the EC Treaty⁸¹ and thus lacked standing to chal-

75. See Petition of Chiquita Brands Int'l, Inc. and the Haw. Banana Indus. Assoc. Before the Section 301 Comm., Office of the U.S. Trade Representative 6 (Sept. 2, 1994) (on file with the *Fordham Law Review*) (indicating Chiquita, the world's largest banana company, has plantations primarily in Latin America).

76. The difference in prices between the two kinds of bananas is staggering. In the United States, where the amount of ACP bananas is negligible, the average price per box is \$9.00. *Panama-Commodities: Record Banana Exports for 1994*, Inter Press Service, Jan. 4, 1995, available in LEXIS, World Library, ALLNWS File. In the European Community, the average price per box is \$20.00. *Id.*

77. George Brock, *Germany Slips Up Over Europe's Great Banana Split*, The Times (London), Oct. 6, 1994, available in LEXIS, World Library, ALLNWS File.

78. Office of the U.S. Trade Representative, USTR Kantor Makes Preliminary Decision that EU Banana Regime Harms U.S. Interests; Initiates Section 301 Investigation of Colombian and Costa Rican Banana Export Practices (Jan. 9, 1995) (on file with the *Fordham Law Review*).

79. *T Port*, *supra* note 74, at 22 (stating that 1100 jobs will be cut at T Port alone); *Panama: Special Report—Economy Hit by EC Banana Quotas*, Lloyd's List, Sept. 7, 1993, available in LEXIS, World Library, ALLNWS File (stating that Panama will lose 1,300 jobs and \$22 million in export earnings).

80. See *T Port*, *supra* note 74, at 22.

81. See Case C-288/93, CO.MA.CO SRL v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-287/93, Simba SpA v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-286/93, Atlanta AG v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-283/93, Pacific Fruit Co. Italy SpA v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-282/93, Comafica SpA v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-276/93, Chiquita Banana Co. BV v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-262/93, Anton Durbeck GmbH v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-257/93, Leon Van Parijs e.a. v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file); Case C-256/93, Pacific Fruit Co. NV and Pacific Fruit Co. BV v. Council, (June 21, 1993) (LEXIS, Eurcom library, CJCE file).

lenge the Community act.⁸² Germany, despite its opposition to the regime, could not seek dispute resolution at the GATT because "the rules contained in GATT govern only the Community's relations with the other contracting parties and cannot be applied within the Community itself."⁸³ Germany instead brought an action against the Council of the European Union on the banana tariff regime pursuant to article 173 of the EC Treaty. Under article 173, the Court of Justice shall have competency in actions brought by a member state to review legal acts of the Community's institutions that infringe the EC Treaty or "any rule of law relating to its application."⁸⁴ Germany challenged that, *inter alia*, the tariff regime violated the GATT and, as such, the

82. This result is somewhat ironic because the Court of Justice in another case writes of the importance of individuals' pursuit of rights under the EC Treaty. As Mr. Petersmann pointed out, the Court in Case 26/62, *Van Gend en Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1, 2 C.M.L.R. 105 (1963), encouraged private individuals to safeguard their interests and stated that their challenges serve to supplement articles 169 and 170 of the EC Treaty. *Application of GATT, supra* note 10, at 436 (quoting Case 26/62, *Van Gend en Loos*, 1963 E.C.R. at 13, 2 C.M.L.R. at 130 ("The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by articles 169 and 170 to the diligence of the Commission and of the Member States.")).

German fruit importers have announced their intention to contest the violation of their property rights by the Community to the German Federal Constitutional Court. *EU: Court of Justice's Ruling Over Bananas Has Not Ended Internal and External Dispute Over Community Regime*, Agence Europe, Oct. 8, 1994, available in LEXIS, World Library, ALLNWS File. The German Constitutional Court has threatened to rule after the ECJ's ruling if the German Court considers that the ECJ failed to protect the fundamental rights guaranteed by the German Constitution. See George A. Bermann et al., *Cases and Materials on European Community Law 224* (1993) (citing Case 2 BvR 197/83, *In re* Application of Wünsche Handelsgesellschaft, 73 BvER 339, 3 C.M.L.R. 225 (1986) (Federal Constitutional Court (2d Senate))). If the German Constitutional Court should find that the Court of Justice in these banana cases failed to protect fundamental rights such as that of property, then it could issue a ruling contrary to the ECJ opinion. Such a ruling would lead to a constitutional crisis within the European Community.

83. Case 266/81, *Società Italiana per l'Oleodotto Transalpino v. Ministero delle Finanze*, 1983 E.C.R. 731, 776, [1983-85 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,001, at 14,031 (1983).

84. Article 173 of the EC Treaty states:

The Court of Justice shall review the legality . . . of acts of the Council, . . . other than recommendations and opinions . . .

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

EC Treaty art. 173.

Germany had lost an earlier application for a preliminary injunction against the Council to prevent the regulation from going into effect. Case 280/93 R, *Germany v. Council*, (June 29, 1993) (LEXIS, Eurcom library, CJCE file). An application for a preliminary injunction is necessary because article 185 of the EC Treaty states that an action contested before the Court of Justice is not suspended unless the Court orders the suspension of the act. EC Treaty art. 185.

act was invalid under article 173 of the EC Treaty. The Court rejected Germany's challenge in *Germany v. Council*.⁸⁵

B. *The Current Situation*

The GATT CONTRACTING PARTIES never definitively concluded whether the Lomé Conventions providing for the Community's non-reciprocal preferential treatment of ACP goods are compatible with the GATT.⁸⁶ As a result of the banana trade dispute,⁸⁷ the Community and the ACP countries applied to the GATT Council for a waiver of the Lomé IV Convention. The waiver was issued in December of 1994.⁸⁸

1. GATT's Waiver of the Lomé Convention

Article XXV(5) of the General Agreement provides the legal basis for a waiver:

In exceptional circumstances not elsewhere provided for in this Agreement, the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; *Provided* that any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties. The CONTRACTING PARTIES may also by such a vote

(i) define certain categories of exceptional circumstances to which other voting requirements shall apply for the waiver of obligations, and

(ii) prescribe such criteria as may be necessary for the application of this paragraph.⁸⁹

The article, however, gives no criteria as to how the CONTRACTING PARTIES should arrive at their conclusion. The article therefore effectively gives the CONTRACTING PARTIES the authority to make

85. Case C-280/93, *Germany v. Council* at ¶ 119 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file). This Note will not address the second lawsuit filed by Germany in the Court of Justice on July 25, 1994. In this second case, Germany asks the Court to determine whether the Commission's Framework Agreement of March 29, 1994, with the four Latin American countries regarding the banana tariff, is valid. *Belgium: Court to Rule on German EU Banana Case Wednesday*, Reuter Newswire, Oct. 4, 1994, available in LEXIS, World Library, ALLNWS File. In the second suit, Germany is asking the Court to strike down the Framework Agreement. The Latin American countries would then lose the Community's concessions and thus pursue the matter again with the GATT or WTO.

86. The Community has invoked article XXIV as its legal basis for concluding preferential trade agreements with more than 100 countries, including the ACP countries. *The EEC as a GATT Member*, *supra* note 17, at 42.

87. *EU/ACP: Caribbean and Commission Seek to Protect Lomé from GATT*, European Report, Oct. 5, 1994, available in LEXIS, World Library, ALLNWS File; Debra Percival, *Caribbean-Europe: EU urged to Protect Small Island Trade*, Inter Press Service, Oct. 3, 1994, available in LEXIS, World Library, ALLNWS File.

88. *Lomé waiver*, *supra* note 64, at 1.

89. GATT, *supra* note 6, art. XXV(5).

a purely political decision in granting or denying the waiver. While no legal argument is required in an article XXV(5) consideration, the Community and the ACP may have offered at least one legal argument during the GATT Council meeting of December 8, 1994.

Community and ACP contracting parties generally maintain that the Lomé Conventions create a customs union pursuant to article XXIV of the General Agreement. Where a proposed customs union does not fully conform with article XXIV(5) through (9), the agreement nevertheless can be approved if a two-thirds majority of the CONTRACTING PARTIES is in favor of such approval.⁹⁰ Such a waiver need not be limited in time, and a common customs union can be of infinite duration.⁹¹

The Community and the ACP nations rushed to obtain a waiver before the end of 1994 because the WTO began work on January 1, 1995. A waiver under the WTO is much harder to obtain and to maintain than a waiver under the General Agreement. Article IX(3) of the WTO Agreement provides:

In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that

90. *Id.* art. XXIV(10).

91. *See id.* art. XXIV. One arguable example of a customs union provided for under article XXIV GATT is the European Community. The Community had previously defended regional trade agreements, such as the Lomé Conventions, as preliminary steps to true regional free trade agreements provided for under article XXIV of the General Agreement. Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* 24 (1993) [hereinafter *Enforcing International Trade Law*]. Each time the agreements were challenged by another GATT contracting party, the Community won a pragmatic "wait-and-see" position from CONTRACTING PARTIES, and the issue was prolonged until it was no longer an issue. This strategy mirrors the Community's success in obtaining the de facto approval of the European Economic Community by the CONTRACTING PARTIES. *See id.* at 24. Despite the GATT's pragmatic "wait-and-see" approach, these preferential trade agreements have always been a source of friction between the United States and the Community, especially those entered into between the EC and most of the Mediterranean countries. *See id.* at 38-40.

All of these agreements were cast as preliminary versions of article XXIV regional agreements, some looking to full EC membership (Greece, Spain and Portugal) and others looking to eventual free trade areas (Malta, Cyprus, Turkey, Lebanon, Israel, Egypt, Tunisia, Algeria and Morocco). *Id.* at 39. As one commentator noted, all of these agreements did not satisfy the formal requirements of article XXIV in that they lacked a definite schedule, within a reasonable time, for the completion of the free trade area or the full common customs union membership. *Id.* The free trade area groups in particular were seen as blatant "preferential agreements designed to retain (and usually expand) various preferential arrangements that had existed before creation of the EC." *Id.* Needless to say, none of these agreements have had their legal status resolved by the CONTRACTING PARTIES. *Id.* For some of these agreements, such as the ones with Greece, Spain and Portugal, the issue is moot because these countries are now member states of the Community.

any such decision shall be taken by three fourths⁹² of the Members unless otherwise provided for in this paragraph.⁹³

Under the WTO, a waiver requires a three-fourths approval as opposed to the two-thirds required under the GATT. Article IX(4) states that the waiver is provisional, and any waiver granted for more than one year must be reviewed by the Ministerial Conference beginning no later than one year after the grant of the waiver and thereafter annually until the waiver expires.⁹⁴ During the review, the Ministerial Conference is required to examine whether the exceptional conditions justifying the waiver still exist and whether the waiver is still required.⁹⁵ In addition, the Ministerial Conference, based on the annual review, "may extend, modify or terminate the waiver."⁹⁶

The Lomé waiver that was granted, L/7604, provides for a derogation from the obligations of article I(1) of the General Agreement for the Community and the ACP nations as required by the relevant provisions of the Lomé IV Convention until February 29, 2000, when the convention expires. Although the Community has obtained this waiver, the banana dispute is not resolved. One of the reasons the waiver was granted was because one of Lomé's purposes is to benefit the ACP countries.⁹⁷ The waiver, however, provides that if the preferential treatment for products is being applied inconsistently with the reasons for the waiver, any contracting party may bring the matter before the CONTRACTING PARTIES.⁹⁸ Moreover, the "waiver shall not preclude the right of affected contracting parties to have recourse to articles XXII and XXIII of the General Agreement."⁹⁹

92. "A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus." WTO Agreement, *supra* note 17, art. IX(3) n.4.

93. *Id.* art. IX(3).

94. *Id.* art. IX(4).

95. *Id.*

96. *Id.*

97. *Lomé waiver, supra* note 64, at 1.

98. *See id.* at 2.

99. *Id.* Therefore, Guatemala and the United States will have an opportunity to raise the banana issue under the WTO because the Framework Agreement between the EC and the Latin countries that settled the dispute is inconsistent with the General Agreement. The United States issued a statement with the waiver that while the United States has always supported a Lomé waiver, the United States notes its objections to the Framework Agreement because it is "designed to protect the economic interests of certain EU firms at the expense of non-EU companies rather than to help Lomé [sic] banana exports." *Id.* at 4. The World Bank has just issued a study on the EC banana regime, stating that the extra cost of bananas in the Common Market is actually benefiting European companies that market bananas, not the ACP countries. *See* Guy de Jonquières, *EU Banana Policy "Perverse and Inefficient" Says World Bank*, *Fin. Times*, Jan. 20, 1995, at 4. The United States Trade Representative seems to believe Chiquita's claim that

the Framework Agreement gives to the signatory Latin Americans guaranteed inflated shares of the third country quota, and with that guarantee, the

2. Policy Arguments on the Waiver

A number of strong policy arguments exist for a Lomé waiver. First, as one commentator noted, "the drive to impose identical conditions of trade worldwide is misplaced because not all countries start out on an equal footing."¹⁰⁰ The theory argues that developing and under-developed countries must be treated differently if they are to function on an equal footing with developed countries.¹⁰¹ Developing countries will always be behind in economic development unless they are given time to stimulate their economies.

The counter argument to this theory, however, is that developing countries should not be made dependant upon preferential trade agreements. The European Community, by offering these benefits to developing countries, is only encouraging the ACP nations' dependency upon EC aid and upon the common market. Opponents of the waiver argue that the only way to encourage development in ACP nations is to place them in as close to a free market economy as possible, thereby forcing them to streamline their businesses and learn to compete with developed nations.

The second policy argument for a waiver is that "small island states, heavily dependant on one commodity[,] . . . always face trade inequalities."¹⁰² These states encounter difficulties in developing industries and factories to compete with the emerging markets in Asia. Instead such nations should improve the quality of their commodities or, in the alternative, diversify so that they are not dependant upon a single commodity. According to this argument, grants to developing countries of preferential market treatment only discourage efforts to improve quality and production.

authority to impose confiscatory export licensing fees and charges on U.S. banana marketing companies and similarly situated firms.

Petition, *supra* note 75, at 51. The United States and Guatemala can challenge the Framework Agreement because the assistance of European banana firms at the expense of the American multinational corporations is inconsistent with the principles of helping ACP nations develop their economies, which is mentioned in the recital of the waiver. *Id.* at 1.

The Framework Agreement is part of the Uruguay Round negotiations. See Corrigendum to the European Communities' Schedule of Concessions for Agricultural Products as Regards Bananas, Schedule LXXX (on file with the *Fordham Law Review*).

100. *EU/ACP: Caribbean and Commission Seek to Protect Lomé from GATT*, European Information Service, Oct. 5, 1994, available in LEXIS, World Library, ALLNWS File.

101. Preferential trade agreements such as the Lomé Conventions will be of less importance as international trade agreements move more and more towards liberalization. *Accord Matthews, supra* note 64, at 44. This does not include the extraordinary mechanisms of STABEX and SYSMIN under the Lomé Conventions. See George A. Bermann et al., *Cases and Materials on European Community Law* 949 (1993).

102. Debra Percival, *Caribbean—Europe: EU Urged to Protect Small Island Trade*, Inter Press Service, Oct. 3, 1994, available in LEXIS, World Library, ALLNWS File.

3. Political Arguments Regarding the Waiver

The most important argument in support of the waiver is not related to the needs of developing countries; it is merely politics. If the Latin GATT contracting parties and the United States refused to vote for the waiver, repercussions to the United States and the Latin American countries were certain to result. First, a refusal to vote for the waiver would have been foolish, in light of the fact that the European Community and the ACP contracting parties together had sufficient votes by themselves to satisfy the required majority under article XXIV.¹⁰³ Second, if the United States voted against the European Community, the Community could retaliate against the United States in another vote in another organization. Third, the number of GATT contracting parties in the Lomé Convention is quite large, and the United States and Latin America could not afford to antagonize such a large number of contracting parties. Finally, the relationship between the GATT and developing countries is not one of mutual admiration; many developing countries look unfavorably upon free trade agreements. The countries believe that a free trade system hinders their abilities to nurture their industries.¹⁰⁴

C. *European Court of Justice Case Law on GATT*

In addition to the GATT organization, the European Court of Justice is another forum for GATT disputes. The Court has issued at least eleven judgments regarding the current banana dispute.¹⁰⁵ ECJ case law includes a large number of judgments analyzing the General Agreement and explaining the Court's refusal to grant the General Agreement direct effect.¹⁰⁶ These cases conclude that the General Agreement is a flexible document that fails to confer legal rights on any party.¹⁰⁷ An examination of the Community legal order and the ECJ case law reveals many insights into the weaknesses of the General Agreement and the GATT system and furthers an understanding of why the GATT system is inadequate to resolve the banana dispute.

103. See *supra* notes 26 and 64.

104. See Bartram S. Brown, *Developing Countries in the International Trade Order*, 14 N. Ill. U. L. Rev. 347, 357 (1994). The General Agreement has never provided special provisions for developing countries, unlike the Havana Charter creating the ITO. See *id.* at 358. None of the ITO Charter's provisions for developing countries are in the General Agreement. See *id.* at 359.

105. See *supra* note 81.

106. See *infra* notes 163-87 and accompanying text.

107. But see *infra* notes 122-31 and accompanying text (discussing cases interpreting Regulation 2641/84).

1. The European Community Legal Order

European Community law is a new legal order imposed across frontiers.¹⁰⁸ Within this new legal order, the Court of Justice ensures "that in the interpretation and application of this Treaty[,] *the law is observed.*"¹⁰⁹ The EC Treaty also serves as a Constitution and stands supreme in the Community legal order, even to a member state's constitution.¹¹⁰ The treaty supremacy doctrine was enunciated when the Court of Justice was forced to address conflicts in which Community law provided for a remedy prohibited by British constitutional practice.¹¹¹ In strong words supporting Treaty supremacy, the Court of Justice explained that Community law must be interpreted as meaning that "a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule."¹¹² The Court of Justice also has jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of Community institutions when a court of a member state refers a question of Community law to the Court.¹¹³ The list of Community institutions in article 173 includes the Council of Ministers¹¹⁴ and the General Agreement is considered an act for article 173 purposes.¹¹⁵ From the time an agreement becomes effective, "the provisions of such an

108. See Case 6/64, *Costa v. Ente Nazionale Energia Elettrica*, 1964 E.C.R. 585, 593, C.M.L.R. 425, 455 (1964) ("The EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."); Case 26/62, *Van Gend en Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1, 12, C.M.L.R. 105, 129 (1963) ("[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights . . .").

109. EC Treaty art. 164 (emphasis added). Because the provisions of the GATT must be applied uniformly throughout the Community, it is the Court of Justice that must determine the scope and effect of the GATT and whether it has direct effect at all. Joined cases 267 to 269/81, *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA*, 1983 E.C.R. 801, 828, 1 C.M.L.R. 354, 378 (1984).

110. Case C-213/89, *The Queen v. Secretary of State for Transp. ex parte: Factortame Ltd*, 1990 E.C.R. I-2433, I-2474, 3 C.M.L.R. 1, 30 (1990). The Court of Justice in that case held that Community law prevails over member state constitutions. See *id.* at I-2473, 3 C.M.L.R. at 29. In the particular case, the member state involved, the United Kingdom, does not have a written constitution. Thus, the wording of the judgment focused on "judicial practice" rather than on the written constitution. See *id.* The case firmly established that the primacy of the EC Treaty is indisputable. *Id.*

111. *Id.* at I-2450, 3 C.M.L.R. at 6.

112. *Id.* at I-2473, 3 C.M.L.R. at 30.

113. EC Treaty art. 177(b).

114. EC Treaty art. 173.

115. International agreements established between the Community through its institutions and a non-member state constitute an act for the purposes of EC Treaty article 177(b), which gives the Court competence to hear questions referred to it by a court or a tribunal of a member state. Case 181/73, *Haegeman v. Belgium*, 1974 E.C.R. 449, 459, 1 C.M.L.R. 515, 530 (1975). Provisions of agreements qualifying as

agreement form an integral part of the Community legal system; within the framework of that system the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement."¹¹⁶

Article 173 provides that the Court of Justice, for the purpose of reviewing the legality of acts adopted by the institutions of the Community, shall "have jurisdiction in actions brought by . . . Member State[s] . . . on grounds of . . . infringement of this Treaty or of any rule of law relating to its application, or misuse of powers."¹¹⁷ For a party to have standing to sue under EC Treaty article 173, an act, other than an opinion or recommendation, must be intended to produce legal effects *vis à vis* the parties.¹¹⁸

The first inquiry when approaching ECJ case law on the GATT is: What is the legal effect of treaties to which the Community belongs, and where do such treaties stand in relation to other legal tiers of Community law? In other words, can the GATT overrule a piece of Community legislation? This is the question that Germany wanted the Court to answer in its favor when it instituted an action against the Council under article 173 of the EC Treaty.¹¹⁹

Public international law allows the Community and a non-member state to agree upon the domestic legal effect of international agreements.¹²⁰ A line of ECJ GATT cases has developed where the legal basis for legislation was the General Agreement and through which the internal effect of the General Agreement was thus accepted.¹²¹

acts under article 177(b) "form an integral part of Community law," *id.* at 460, 1 C.M.L.R. at 530, and would thus constitute an act for article 173 purposes.

116. Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, 1987 E.C.R. 3719, 3750, 1 C.M.L.R. 421, 436-37 (1989). It should be stated that this discussion makes no assumption of whether the Community legal system is dualistic, meaning that international treaties such as the GATT do not have legal effect in the Community unless the Community specifically invokes them or relies on them. A discussion of whether the Community legal system is a monistic or dualistic system is beyond the scope of this Note. For an analysis of this issue, see Pieter VerLoren van Themaat, *The Impact of the Case Law of the Court of Justice of the European Communities on the Economic World Order*, 82 Mich. L. Rev. 1422, 1435-37 (1984).

117. EC Treaty art. 173. In public international law, the date on which the contested domestic legislation is adopted in reference to the international treaty can determine whether the treaty will have domestic effect. See EC Treaty art. 234.

118. EC Treaty art. 173.

119. Case C-280/93, *Germany v. Council* at ¶ 103 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file).

120. Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, 1982 E.C.R. 3641, 3663, 1 C.M.L.R. 1, 21 (1983).

121. In *Germany v. Council*, the Court recognized that the General Agreement can have direct effect "only if the Community intended to implement a particular obligation entered into within the framework of GATT, or if the Community act expressly refers to specific provisions of GATT, that the Court can review the lawfulness of the Community act in question from the point of view of the GATT rules." Case C-280/93, *Germany v. Council* at ¶ 111 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file) (citations omitted).

2. ECJ Case Law

One of the few cases where the Court of Justice has recognized the direct effect of the General Agreement in the Community legal order is *Fédération de l'industrie de l'huilerie de la CEE (FEDIOL) v. Commission*.¹²² *FEDIOL* involved Council Regulation 2641/84, which strengthened the common commercial policy and enhanced protections against illicit commercial practices, including anti-dumping acts.¹²³ Advocate General¹²⁴ Van Gerven argued that where the international agreement, in that case the General Agreement, is used as the legal basis for the legislation and as "the assessment criterion for declaring unlawful certain conduct of non-member countries," the General Agreement is "substantially incorporated" into the legislation.¹²⁵ The Court of Justice in *FEDIOL* agreed with the Advocate General, holding that the Community legislation in dispute entitled "the economic agents concerned to rely on the GATT provisions" by the regulation's reference to the General Agreement in its text.¹²⁶ Thus, where Community legislation directly refers to the General Agreement, the Agreement will have direct effect, and private parties may challenge a violation of the Community's obligations under the referenced General Agreement provision.¹²⁷

Another case where the Court recognized the direct effect of the General Agreement is *N.T.N. Toyo Bearing Co. v. Council*.¹²⁸ While the judgment failed to address whether or not the General Agreement had internal effect, Advocate General Mancini analyzed the plaintiff's complaint on the merits by referencing the General Agreement and Community law.¹²⁹ The ECJ seemed to agree with the Advocate General.¹³⁰ The anti-dumping cases establish that under EC law, if Community legislation is specifically adopted to comply with the

122. Case 70/87, 1989 E.C.R. 1781, 2 C.M.L.R. 489 (1991).

123. See Council Regulation 2641/84 on the Strengthening of the Common Commercial Policy with Regard in Particular to Protection Against Illicit Commercial Practices, 1984 O.J. (L 252) 1; Council Regulation 522/94, 1994 O.J. (L 66) 10.

124. An advocate general is a full member of the Court of Justice, who delivers a reasoned opinion before the Court issues its judgment. K.P.E. Lasok, *The European Court of Justice: Practice and Procedure* 87 (2d ed. 1994). The advocate general does not participate in the deliberations of the judgment, but the judges do consider his opinion in the drafting of the judgment. *Id.* Currently, all the advocates general at the European Court of Justice are men.

125. 1989 E.C.R. at 1805, 2 C.M.L.R. at 501-02.

126. *Id.* at 1831, 2 C.M.L.R. at 525.

127. For example, the Commission recently issued a large number of proposals to implement the results of the Uruguay Round. Uruguay Round Implementing Legislation, COM(94)414 final. If these acts were challenged in the Community, the direct effect of the GATT regarding these acts should not be questioned.

128. Case 240/84, 1987 E.C.R. 1809, 2 C.M.L.R. 76 (1989).

129. *Id.* at 1836, 2 C.M.L.R. at 90.

130. *Id.* at 1858, 2 C.M.L.R. at 112 (analyzing the case on substantive law). In *Mionta Camera Co. v. Council*, the internal effect of the GATT was not an issue because the Court was ready to analyze the complaint on its merits, but the complaint was

Community's obligations under the General Agreement, the Community must ensure that such legislation does not violate the General Agreement.¹³¹

3. The Concept of "Direct Effects"

In the banana trade dispute, the regulation setting forth the tariff regime is not intended to implement the General Agreement.¹³² German banana importers, however, can still challenge the validity of the regime based on the General Agreement only if the General Agreement had direct effect.

"Direct effects" is a legal doctrine created by the Court of Justice that determines the internal effect of an international treaty.¹³³ The term "direct effects" refers to whether a particular provision of Community law confers rights upon individuals so that they may challenge a Community act on that basis.¹³⁴ The Court of Justice applies a two prong test in its determination of whether the Community is bound by the General Agreement.

a. *The First Prong of the "Direct Effects" Doctrine*

The first prong of the doctrine questions whether the Community is bound by the particular provision of the General Agreement at issue.¹³⁵ The Community is bound by the General Agreement, and the EC Treaty supports this position.¹³⁶

Two EC Treaty articles in particular support this position: article 110,¹³⁷ which declares the Community's interest in a growing world

defeated on other grounds. Case C-178/87, *Minolta Camera Co. v. Council*, 1992 E.C.R. I-1577, I-1630.

131. Case 69/89, *Nakajima All Precision Co. v. Council*, 1991 E.C.R. I-2069, I-2178 (citing Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, 1982 E.C.R. 3641, 3662, 1 C.M.L.R. 1, 20 (1983)).

132. See Council Regulation 404/93, 1993 O.J. (L 47) 1.

133. Case C-280/93, *Germany v. Council* at ¶ 110 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file) (stating that the test is whether GATT contains unconditional, clear and precise obligations so as to be directly applicable in the Community); see also Case 26/62, *Van Gend en Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1, 13, C.M.L.R. 105, 130 (1963) (stating that the test is whether the Treaty contained a clear and unconditional prohibition "not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects . . .").

134. The term also means whether the General Agreement has any internal effect so that an individual could challenge a Community act as a violation of the General Agreement. See Case C-280/93, *Germany v. Council*, Opinion of Advocate General Gulmann at ¶¶ 125-26 (June 8, 1994) (LEXIS, Eurcom library, CASES file).

135. Joined cases 21 to 24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1226, 2 C.M.L.R. 1, 20-21 (1975).

136. *Id.* at 1226, 2 C.M.L.R. at 21.

137. EEC Treaty art. 110 [as in effect in 1987] provides:

By establishing a customs union between themselves Member States aim to contribute, in the common interest, to the harmonious development of world

economy, and article 234, which provides that agreements entered into before the effective date of the EC Treaty are not affected by the EC Treaty.¹³⁸ The Community is bound because it assumed the tasks relating to tariff and trade policy by virtue of articles 111 and 113 of the EC Treaty.¹³⁹ Article 113 gives the Community competence in the area of negotiating tariff and trade agreements, naturally including the General Agreement. The Community's Common Customs Tariff replaced the national customs tariffs of the Community member states on July 1, 1968. Thus, from that date forward, the Court of Justice recognized the Community as a common customs union, as defined under article XXIV of the General Agreement, and revealed that "Community authorities alone have jurisdiction to interpret and determine the legal effect" of the General Agreement.¹⁴⁰ The Court of Justice further noted that the CONTRACTING PARTIES have recognized the Community as the entity representing the member states.¹⁴¹ Given all of these reasons, the first prong of the test is satisfied.¹⁴²

b. *The Second Prong of the "Direct Effects" Doctrine*

The second prong of the test is that a challenged regulation must be capable of producing "direct effects" in the Community.¹⁴³ The Court created the doctrine of "direct effects" in *Van Gend en Loos*.¹⁴⁴ The

trade, the progressive abolition of restrictions on international trade and the lowering of customs barriers.

The common commercial policy shall take into account the favourable effect which the abolition of customs duties between Member States may have on the increase in the competitive strength of undertakings in those States.

Id.

138. EC Treaty art. 234.

139. 1972 E.C.R. at 1227, 2 C.M.L.R. at 21; *accord* Case 38/75, *Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen*, 1975 E.C.R. 1439, 1450, 1 C.M.L.R. 167, 178 (1976). The Treaty on European Union has repealed article 111, because the common market objectives have already been achieved. EEC Treaty art. 111 (as in effect in 1987) set forth provisions during the transitional period of the completion of the common market. EEC Treaty art. 111 (as in effect in 1987).

The Court of Justice recently issued Opinion 1/94, in which it explains that where the external trade affairs of the Community fall outside of article 113, both the Community and the member states have shared competence. Opinion 1/94, *supra* note 32, at ¶¶ 106-10. While they share competence, they are nonetheless bound by the treaty to cooperate. *Id.*

140. 1975 E.C.R. at 1449, 1 C.M.L.R. at 177; *see also* Joined Cases 290 and 291/81, *Compagnia Singer SpA v. Amministrazione delle Finanze dello Stato*, 1983 E.C.R. 847, 862 (holding that "interpretation is a matter exclusively for the courts of the Member States").

141. *See* Joined Cases 21 to 24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1227, 2 C.M.L.R. 1, 21 (1975).

142. *See id.* at 1227, 2 C.M.L.R. at 22.

143. *See infra* notes 162-87 and accompanying text.

144. Case 26/62, *Van Gend en Loos v. Nederlandse administratie der belastingen*, 1963 E.C.R. 1, 13, C.M.L.R. 105, 130-31 (1963).

question before the Court was whether a private party could rely on an EC Treaty article in its complaint.¹⁴⁵ To determine whether the EC Treaty article produced "direct effects," the Court first considered the spirit, the general scheme and the wording of the provisions of the EC Treaty.¹⁴⁶ The second relevant inquiry was whether the treaty article contained a negative obligation unqualified "by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law."¹⁴⁷ The ECJ concluded that the article in question produced "direct effects" in that its provisions provided individuals with rights upon which they could rely.¹⁴⁸

While the discussion of this Note involves the direct effect of the General Agreement and not the EC Treaty, the test remains the same.¹⁴⁹ For a provision in an international agreement involving the Community to produce direct effects, the wording of the provision, along with the purpose and the nature of the agreement, must illustrate the existence of a "clear and precise" duty. Such duty need not be implemented by the Community for it to have direct effect.¹⁵⁰ Relevant considerations are the spirit, the general scheme and the wording of the General Agreement, whether the particular provision of the General Agreement contains a negative obligation that is unconditional and whether implementation requires an affirmative act by the Community.

c. *The ECJ's Surprise Ruling on the EC Treaty Article 173*

In *Germany v. Council*, "direct effect" should have been irrelevant because a member state is a "privileged plaintiff" who can challenge the validity of the acts of Community institutions.¹⁵¹ Private plaintiffs, however, are limited by the second paragraph of article 173 when they bring actions to challenge Community acts.¹⁵² Many commentators

145. *Id.* at 11, C.M.L.R. at 129.

146. *Id.* at 12, C.M.L.R. at 129.

147. *Id.* at 13, C.M.L.R. at 130.

148. See 1963 E.C.R. at 13, C.M.L.R. at 130. The Court of Justice always requires that the international agreement being used as the basis for challenging a Community act must first be "capable of creating rights of which interested parties may avail themselves in a court of law." Case 9/73, *Schlüter v. Hauptzollamt Lörrach*, 1973 E.C.R. 1135, 1157, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8233, at 9143-15 (1974); Joined Cases 21 to 24/72, *International Fruit Co. NV v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1226, 2 C.M.L.R. 1, 21 (1975). The Court sees this as a justified criterion under public international law principles where private parties seek to "invoke violations of rules of international law," especially because most international treaties do not provide for private rights. *Impact of the Case Law*, *supra* note 116, at 1432.

149. See 1972 E.C.R. at 1226-27, 2 C.M.L.R. at 20-22.

150. Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, 1987 E.C.R. 3719, 3752, 1 C.M.L.R. 421, 438 (1989).

151. EC Treaty art. 173.

152. *Id.*

believe that Community institutions and member states have standing to challenge *any* Community infringements of the General Agreement.¹⁵³ The Court of Justice, however, in *Germany v. Council*,¹⁵⁴ placed the burdens of a private plaintiff on Germany, a member state.¹⁵⁵ Without providing a detailed explanation, the Court of Justice ignored the language in article 173 and placed Germany in the position of a private individual.

Advocate General Gulmann¹⁵⁶ similarly failed to expand on this astounding holding. Advocate General Gulmann stated that "GATT belongs to the majority of international agreements which do not demand a special internal guarantee of respect for their rules."¹⁵⁷ The Advocate General stated that regardless of article 173, member states and private plaintiffs cannot base a challenge on an agreement that does not have direct effect.¹⁵⁸

The Court of Justice appeared to agree with the Advocate General's arguments. After noting the "particularities" of the GATT, the Court explained:

Those features of GATT, from which the Court concluded that an individual within the Community cannot invoke it in a court to challenge the lawfulness of a Community act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State under the first paragraph of Article 173 of the Treaty. The special features noted above show that the GATT rules are not uncondi-

153. Commentators cited as support EC Treaty articles 169, 170, the first or second paragraphs of art. 173 and art. 175 of the Treaty. See Everling, *supra* note 70, at 98; Marc Maresceau, *The GATT in the Case-law of the European Court of Justice, in The European Community and GATT* 107, 114 (Meinhard Hilf et al. eds., 1986) ("Member States, Council or Commission could, although the case has never arisen, initiate proceedings under art. 173 § 1 if they consider that a Community act was taken in conflict with obligations which stem from the GATT."); *Impact of the Case Law*, *supra* note 116, at 1433 ("[A] Member State could attack a Community measure for violation of international obligations under article 173, even if such obligations were not self-executing."); *Application of GATT*, *supra* note 10, at 421 ("Individual Member States may likewise invoke international GATT obligations as a means of resisting protectionist pressures within the Community or from national interest groups.").

Article 169 is implicated when a member state fails to fulfill its part of the Community's obligation under the General Agreement. See EC Treaty art. 169. The only distinction between articles 169 and 170 is that under article 170, it is another member state who believes that a member state has failed to fulfill its obligation. EC Treaty art. 170. But article 175 involves a situation where a Community institution has failed to act, thereby permitting a private right of action for those individually concerned or an action by another institution or a member state to be brought before the Court of Justice. See EC Treaty art. 175.

154. Case C-280/93, *Germany v. Council* (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file).

155. *Id.* at ¶ 109.

156. Mr. Gulmann is now a judge of the Court of Justice.

157. Case C-280/93, *Germany v. Council*, Opinion of Advocate General Gulmann at ¶ 129 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file).

158. *Id.* at ¶ 135.

tional and that an obligation to recognize them as rules of international law which are directly applicable in the domestic legal systems of the contracting parties cannot be based on the spirit, general scheme or terms of GATT.¹⁵⁹

While the Court failed to address the issue of a privileged plaintiff under article 173, one textual reading could explain the Court's interpretation. The fourth paragraph of article 173 establishes the requirements for a private plaintiff to challenge a Community act. One of the requirements is that the proceeding be instituted "under the same conditions."¹⁶⁰ A possible argument is that the Court interpreted this phrase to mean that a member state and a private plaintiff can only sustain an action under the same conditions.

Thus, member states may not challenge Community violations of the General Agreement or any other international treaties that bind the Community if those agreements do not have direct effect.

Germany v. Council is significant because a member state is restrained from challenging an act in the Court of Justice. Within the Community's Council of Ministers, consensus is no longer required in the field of common commercial policy. If a member state loses the qualified majority vote in the Council, the state may be unable to challenge the action under article 173.¹⁶¹

4. How the ECJ's Reasoning Accurately Reflects the GATT System

The European Court's perceptions make clearer the differing characteristics of the GATT system and the WTO, and the WTO's capacity to change the regulation and enforcement of international trade. In a survey of Court of Justice case law, both policy and doctrinal reasons exist as to why the General Agreement has no direct effect: (1) the General Agreement has a pragmatic nature and scheme; (2) the General Agreement does not have as much effect in the Community legal order as compared to agreements preparing European nations for Community membership; and (3) GATT's dispute resolution procedure is ineffective and not binding on the contracting parties.

The Court of Justice in *International Fruit Co. NV v. Produktschap voor Groenten en Fruit* determined the direct effect of the General Agreement by examining: (1) the nature of the General Agreement;

159. *Id.* at ¶¶ 109-10.

160. EC Treaty art. 173.

161. Ulrich Everling proposed that consensus would be necessary in EC external relations because the member states are still fighting for influence in this area. Everling, *supra* note 70, at 105. This observation was made before the Maastricht Treaty and *Germany v. Council*, and hence the strength of this statement is questionable.

(2) the general scheme of the Agreement; and (3) GATT's dispute resolution procedure.¹⁶²

a. *The Nature of the General Agreement*

In determining the nature of the General Agreement and whether it has direct effect, the Court looked to the spirit of the General Agreement and noted that the General Agreement was written with a flexibility in its provisions. The Court of Justice explained that the "flexibility" of the provisions is illustrated in articles XIX, XXII and XXIII of the General Agreement.¹⁶³ Article XIX of GATT is entitled "Emergency Action on Imports of Particular Products." The provision gives a contracting party the right to suspend an obligation in whole or in part when "serious injury" is likely to result to the domestic producers of the contracting party facing this harm.¹⁶⁴ Before any contracting party can take action, it must give notice in writing to the CONTRACTING PARTIES and allow sufficient time for consultation.¹⁶⁵ The contracting party in question may nevertheless suspend its obligation pursuant to the provisions of article XIX(3).¹⁶⁶ Thus, while article XIX provides for "self-help" by a contracting party, it nonetheless imposes certain requirements before a contracting party can take advantage of the remedy.¹⁶⁷

Some commentators agree with the Court of Justice and recognize the General Agreement as a set of guidelines for international trade policy, not as a set of clear unconditional obligations on contracting parties.¹⁶⁸ Provisions of the General Agreement are described as "norms of aspiration" not "norms of obligation,"¹⁶⁹ and the ECJ seems to agree. The Court of Justice characterizes the General Agreement as a flexible document because of its text and the manner in which the document is applied. While a flexible document may be effective in trade negotiations, it lacks the strict definition and obligation of an agreement with direct effect in the Community legal order.

162. See Joined Cases 21 to 24/72, *International Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1226-28, 2 C.M.L.R. 1, 20-22 (1975).

163. *Application of GATT*, *supra* note 10, at 429. For an analysis of articles XXII and XXIII of GATT regarding dispute resolution see *infra* notes 223-57 and accompanying text.

164. GATT, *supra* note 6, art. XIX(1)(a).

165. *Id.* art. XIX(2)

166. *Id.* art. XIX(3) (giving contracting parties the power to suspend obligations unilaterally).

167. Articles XXII and XXIII deal with the dispute resolution procedure and will be treated more thoroughly later. See *infra* notes 218-49 and accompanying text.

Interestingly, articles XIX and XXII have been used as model language in free-trade agreements between the Community and other nations and later held to have direct effect. See *Application of GATT*, *supra* note 10, at 431.

168. Paul J. G. Kapteyn, *The "Domestic" Law Effect of Rules of International Law Within the European Community System of Law and the Question of the Self-Executing Character of GATT Rules*, 8 *Int'l Law* 74, 81 (1974).

169. *Id.*

b. *The Scheme of the General Agreement*

The Court of Justice also examined the General Agreement's general scheme in its determination of the Agreement's direct effect. The Court explained that the General Agreement is conciliatory in nature and its terms are not subject to legal interpretation. The analysis seemed to focus on the Agreement's enforcement and application rather than the language of the Agreement itself.¹⁷⁰ In *International Fruit*, the Court noted:

[T]he principle of negotiations undertaken on the basis of 'reciprocal and mutually advantageous arrangements' is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the measures to be taken when confronted with exceptional difficulties and the settlement of conflicts between the contracting parties.¹⁷¹

In *Schlüter v. Hauptzollamt Lörrach*,¹⁷² the Court of Justice focused on the entire scheme of the General Agreement, examining not only the language of the provisions of the Agreement but also the overall structure and purpose of the Agreement in determining direct effect.¹⁷³ In *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiane SpA*, the Court of Justice again referred to the "general scheme of GATT" and emphasized the importance of the flexibility of the provisions, and the possibility of derogation.¹⁷⁴

c. *Other International Agreements*

To understand better what the ECJ means by the "general scheme" and why the General Agreement fails to provide individuals and member states particular rights, it is helpful to examine the Court's judgments regarding the direct effects of other international agreements within the Community legal order. In a case regarding the

170. The Court of Justice stated:

In deciding whether the applicant can rely on certain provisions of GATT to challenge the lawfulness of the Regulation, it should be noted that the Court has held that the provisions of GATT have the effect of binding the Community. However, it has also held that in assessing the scope of GATT in the Community legal system, the spirit, the general scheme and the terms of GATT must be considered.

Case C-280/93, *Germany v. Council* at ¶ 105 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file).

171. Joined Cases 21 to 24/72, *International Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1227, 2 C.M.L.R. 1, 22 (1975).

172. Case 9/73, 1973 E.C.R. 1135, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8233 (1974).

173. *Id.* at 1157, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8233, at 9143-15.

174. Joined Cases 267 to 269/81, *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiane SpA*, 1983 E.C.R. 801, 830, 1 C.M.L.R. 354, 379 (1984); *accord* Case C-280/93, *Germany v. Council* at ¶ 106 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file).

Community's free trade agreement with Portugal, the Court of Justice first noted that the EC Treaty gives the Community institutions the power to adopt legislation in the Community. The institutions also possess the power to form agreements with non-member state countries and international organizations.¹⁷⁵ Under article 228(2), these types of agreements are binding on the Community institutions as well as the member states.¹⁷⁶ Therefore, "it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements."¹⁷⁷

C.A. Kupferberg & Cie. illustrates the distinction between the EEC-Portugal agreement and the General Agreement that the Portugal agreement was a deep agreement and created obligations that extended into diverse areas,¹⁷⁸ thereby requiring uniform application of the law. The EEC-Portugal agreement was of a very intimate nature designed to prepare Portugal for eventual EC membership.¹⁷⁹ The Agreement provided for harmonization of legislation, and the Court reasoned that the requirement of uniform application of Community law necessarily created an unconditional obligation sufficient to have direct effects in the Community legal order.¹⁸⁰ Unlike the EEC-Portugal Agreement, the General Agreement regulates international trade and is not designed to integrate the whole world into one free trading bloc. By its very purpose and effect, the EEC-Portugal Agreement differs from the General Agreement.¹⁸¹

175. Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, 1982 E.C.R. 3641, 3662, 1 C.M.L.R. 1, 20 (1983). EEC Treaty art. 228 (as in effect in 1987) provides:

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the European Parliament where required by this Treaty. . . .

2. Agreements concluded under these conditions shall be binding on the institutions of the Community and on Member States.

Id.

176. 1982 E.C.R. at 3662, 1 C.M.L.R. at 20.

177. *Id.*; see EC Treaty art. 182.

178. See 1982 E.C.R. at 3665, 1 C.M.L.R. at 22.

179. In *Polydor*, the Court of Justice noted that the purpose of the EEC-Portugal Agreement was to pave the way for Portugal to enter the Community by eventually eliminating all trade barriers between the Community and Portugal. Case 270/80, *Polydor Ltd. v. Harlequin Record Shops Ltd.*, 1982 E.C.R. 329, 347, 1 C.M.L.R. 677, 692 (1982); *supra* note 65.

The most striking difference between the General Agreement and the EEC-Portugal Agreement was that the EEC-Portugal free trade agreement contained an unconditional rule against discrimination and eliminated trade barriers between the Community and Portugal. Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, 1982 E.C.R. 3641, 3660, 1 C.M.L.R. 1, 18 (1983).

180. See 1982 E.C.R. at 3662, 1 C.M.L.R. at 20.

181. See *Impact of the Case Law*, *supra* note 116, at 1436 ("The Court always interprets international agreements on their own terms; it never attempts to interpret such

The Court will always consider the context in which an agreement was reached in determining whether the stipulation is “unconditional and sufficiently precise to have direct effect.”¹⁸² The interpretation of international agreements requires an analysis of the agreements’ purposes. The Court in the *EEA Opinion* supported this proposition by citing article 31 of the Vienna Convention of May 23, 1969 on the Law of Treaties.¹⁸³ The Court held that article 31 of the Convention mandates a good faith interpretation of an international agreement by considering the text of the agreement, in its ordinary meaning, in conjunction with its context in the agreement and in light of the agreement’s objective.¹⁸⁴

d. *GATT’s Dispute Resolution Procedure*

A third important area examined by the Court of Justice in determining whether the General Agreement has direct effect is GATT’s dispute resolution procedure. As the Court of Justice recognized, article XXIII of the General Agreement governs most disputes involving contracting parties.¹⁸⁵ Article XXIII of the General Agreement is an often cited example of the General Agreement’s flexibility and looseness.¹⁸⁶ The Court also emphasized the “self help” aspect of the General Agreement by stating how contracting parties may unilaterally impose sanctions.¹⁸⁷ An agreement providing for unilateral actions generally cannot impose clear and precise obligations on the Community and thus lacks direct effect in the Community legal order. Such factors weigh against the General Agreement having direct effect.

e. *Other Reasons for Denying the General Agreement Direct Effect*

Several other reasons unmentioned in the judgments support the Court’s finding that the General Agreement does not have direct effect. First, while the Court has a duty to maintain objectivity and ensure that the law is applied, it also must enforce the purpose of the Treaty. As one of the institutions of the Community, the Court is responsible for the Community’s interest and welfare. As an example of this concern, one commentator noted, “[w]hether international legal obligations of the EEC as considered “clear” and “unconditional” enough in order to be “directly applicable” by EC citizens and EC

agreements according to the significance of certain terms within the Community law.”).

182. 1982 E.C.R. at 3665, 1 C.M.L.R. at 22.

183. Opinion 1/91, *Re the Draft Treaty on a European Economic Area*, 1991 E.C.R. I-6079, I-6101, 1 C.M.L.R. 245, 268 (1992); Vienna Convention, *supra* note 21, art. 31.

184. 1991 E.C.R. at I-6101, 1 C.M.L.R. at 268.

185. Joined cases 21 to 24/72, *International Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1228, 2 C.M.L.R. 1, 22 (1975).

186. Case 9/73, *Schlüter v. Hauptzollamt Lörrach*, 1973 E.C.R. 1135, 1157, [1974 Transfer Binder] Common Mkt Rep. (CCH) ¶ 8233, at 9143-15.

187. 1972 E.C.R. at 1228, 2 C.M.L.R. at 22-23.

courts depends to some extent also on the "value" which one attributes to the obligation.¹⁸⁸ The above statement is a criticism of the Court's granting of direct effect to an agreement such as the one between the European Community and Portugal, while denying that effect to the General Agreement. The Court of Justice, however, has never been shy about weighing Community welfare against objectivity in determining direct effect. This "purpose" aspect is quite apparent in the banana dispute. The European Community has a strong interest in the performance of the Lomé Convention and in the ACP nations' continued receipt of aid to promote future development. If the Court granted the General Agreement direct effect, the Community tariff regime probably would have been struck down. By denying the General Agreement direct effect, the Court preserved the Community's interest in helping developing areas.

Another reason weighing against General Agreement direct effect in the Community is that even if the Court recognized the Agreement's direct effect, the conclusion may not be the same in another contracting party's internal legal order, such as the United States.¹⁸⁹ While the Court stated that this fear of non-reciprocity is not enough to warrant the denial of direct effect,¹⁹⁰ it certainly is a relevant consideration.

Under the general rule of international law, however, the bona fide performance of every agreement is required.¹⁹¹ As the Court of Justice stated, the existence of an institutional structure for the resolution of disputes does not suggest that the Court should deny the General Agreement direct effect.¹⁹² Thus, other factors must come into play in the Court's denial of General Agreement direct effect.

First, the ECJ is troubled, not by the fact that GATT has a dispute resolution procedure, but because the procedure does not seem to resolve conflicts and instead only stimulates discussion. A prime example is the banana trade dispute and the Framework Agreement negotiated months after the issuance of the unadopted Panel Report and adopted by most of the Latin contracting parties.¹⁹³ The Framework Agreement was a political resolution reached at the conclusion

188. *The EEC as a GATT Member*, *supra* note 17, at 59.

189. *See* *Mississippi Poultry Assoc. v. Madigan*, 992 F.2d 1359, 1365-66 (5th Cir. 1993); *Calnetics Corp. v. Volkswagen of America, Inc.*, 353 F. Supp. 1219, 1222 (C.D. Cal. 1973).

190. Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, 1982 E.C.R. 3641, 3663-64, 1 C.M.L.R. 1, 21 (1983).

191. 1982 E.C.R. at 3663-64, 1 C.M.L.R. at 21.

192. Case 70/87, *Fédération de l'industrie de l'huilerie de la CEE (FEDIOL) v. Commission*, 1989 E.C.R. 1781, 1831, 2 C.M.L.R. 489, 525 (1991).

193. Corrigendum to the European Communities' schedule of concessions for agricultural products as regards bananas, Schedule LXXX (on file with the Fordham Law Review).

of the Uruguay Round negotiations as opposed to a legal resolution resulting under the GATT dispute resolution procedure.¹⁹⁴

f. *Avoiding Multiple "GATT Forums" and the Opinions on the EEA*

The Court also is concerned about the creation of multiple fora to resolve GATT disputes. It is important "to avoid a situation in which the rights and obligations of the GATT member countries could be differently interpreted and applied in different bodies."¹⁹⁵

Professor Miquel Montaña i Mora responded to the concern of multiple GATT forums by pointing to the Court of Justice's Opinion 1/91¹⁹⁶ regarding the European Economic Area.¹⁹⁷ In his interpretation of the ECJ's decision, Professor Montaña i Mora explained, "when an international treaty to which the EC is a party, sets up a court to settle the disputes and, consequently, to interpret the treaty, the decisions of such court bind community institutions, including the Court of Justice."¹⁹⁸ Professor Montaña i Mora noted that such decisions also bind the Court of Justice in its interpretation of the treaty in preliminary rulings or annulment actions, so long as the agreement is a part of the Community legal order.¹⁹⁹ Professor Montaña i Mora continued that under the Court's reasoning, the ECJ would be bound by WTO dispute settlement proceedings, meaning panel reports and Appellate Body rulings.²⁰⁰ Professor Montaña i Mora believed that his conclusions were accurate regardless of the General Agreement's direct effect in Community law because the General Agreement is generally accepted as "an integral part of the Community legal order."²⁰¹

Professor Montaña i Mora's argument demonstrates the need for caution in extrapolating dicta from Opinion 1/91 when interpreting the General Agreement's direct effect in the Community. First, the EEA is a far more comprehensive agreement than is the General Agreement. The EEA agreement provides for the free movement of goods, persons, services and capital, sets up a system of monitoring competition or anti-trust activities and fosters cooperation in fields such as research and development, the environment, education and

194. *Id.* at 4 ("This agreement represents a settlement of the dispute between Colombia, Costa Rica, Venezuela, Nicaragua and the Community on the Community's banana regime. The parties to this agreement will not pursue the adoption of the GATT panel report on this issue.").

195. Long, *supra* note 14, at 27.

196. EC Treaty art. 228 authorizes the Court of Justice to give an Opinion, as opposed to a Judgment, on the legality of an agreement entered into by the Community pursuant to that article. See EC Treaty art. 228(1).

197. See Montaña i Mora, *supra* note 17, at 175-76.

198. *Id.* at 175.

199. *Id.*

200. *Id.*

201. *Id.* at 176.

social policy.²⁰² Second, the WTO Agreement does not create a judicial system exactly like the European Economic Area because the membership of the WTO is worldwide and does not involve a regional free trade area.²⁰³ Third, Professor Montaña i Mora correctly points out that the ECJ explained that an international agreement between the Community and other nations may provide for its own judicial system empowered to settle disputes between the Community and a non-member state.²⁰⁴ Decisions from such courts would be binding on the Court of Justice.²⁰⁵ But the Court limited this statement by noting that such an international agreement may not interfere with the internal legal order of the Community, including the Community's secondary legislation.²⁰⁶ Professor Montaña i Mora failed to mention this proviso, although it is a major reason why the Court of Justice struck down the first draft of the Agreement establishing the EEA.²⁰⁷

The Court of Justice noted many other problems with the draft EEA Agreement. The proposed EEA Agreement would have affected the secondary legislation of the Community and non-member states in the EEA.²⁰⁸ In addition, the EEA Court would not have been bound by Court of Justice decisions after the signature of the EEA Agreement.²⁰⁹ While the proposed EEA Agreement provided that non-EC member states who were parties to the EEA Agreement could authorize their courts to refer questions to the ECJ, it failed to guarantee that resulting ECJ decisions would have binding effect.²¹⁰ The Court found this particular provision to be especially unacceptable.²¹¹ As the Court of Justice summarized, "Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with article 164 of the EEC Treaty."²¹²

202. See Agreement Establishing the European Economic Area art. 1(2), *reprinted in* 1994 O.J. (L 1) 1.

203. See Opinion 1/91, *Re the Draft Treaty on a European Economic Area*, 1991 E.C.R. I-6084, I-6101-02, 1 C.M.L.R. 245, 268-69 (1992).

204. Montaña i Mora, *supra* note 17, at 175.

205. *Id.* Those decisions will bind the Court of Justice if it is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, "in so far as that agreement is an integral part of the Community legal order." 1991 E.C.R. at I-6106, 1 C.M.L.R. at 271; Montaña i Mora, *supra* note 17, at 175.

206. The Court considers the Community's secondary legislation to be the fundamental provisions of the Community legal system. 1991 E.C.R. at I-6106, 1 C.M.L.R. at 271.

207. *Id.*

208. *Id.*

209. *Id.* at I-6107, 1 C.M.L.R. at 272.

210. *Id.* at I-6109, 1 C.M.L.R. at 273.

211. *Id.*

212. *Id.* at I-6111, 1 C.M.L.R. at 275. The EEC Treaty provides:

The Community may conclude with a third State, a union of States or an international organization agreements establishing an association involving reciprocal rights and obligations, common action and special procedures. . . .

Furthermore, the Court of Justice certainly would not find itself bound by the WTO dispute settlement bodies, despite Professor Montaña i Mora's claims.²¹³ WTO panels and the Appellate Body are not bound by Court of Justice case law. No provision in the WTO Agreement provides that the WTO is bound by the Court's case law. Moreover, no provision states that a panel or the Appellate Body must refer a question regarding Community law to the Court of Justice.

A second ECJ opinion regarding the EEA addressed the above issues.²¹⁴ The Court of Justice accepted a revised text of the EEA Agreement based on the following reasons: (1) the proposed EEA Court would not be created;²¹⁵ (2) national courts of non-EC EEA members that refer questions to the Court of Justice would be bound by the Court's answers;²¹⁶ and (3) the Court of Justice would not be required to "pay due account to decisions of other courts."²¹⁷ Thus, where the Community enters into an international agreement that affects the Community's internal legal order, but also creates a system of courts not bound by ECJ decisions and case law, the agreement is in violation of article 164 of the EC Treaty.

IV. GATT DISPUTE RESOLUTION THROUGH ARTICLES XXII AND XXIII²¹⁸

The Court of Justice has an accurate perception of the GATT dispute resolution system, especially its lax provisions and pragmatic approach. The most effective way to illustrate how GATT differs from the WTO is to examine the workings of both models of world trade in the context of the current banana trade dispute. An examination of

Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236.

EEC Treaty art. 238 (as in effect in 1991).

Although the Court of Justice states that an amendment of the EC Treaty would be required for the EEA Agreement to be compatible with the Treaty, the Court also is hinting that some aspects of the Treaty, namely article 164 and its provision that the Court of Justice shall ensure that the law is observed, may not be amendable. 1991 E.C.R. at I-6111, 1 C.M.L.R. at 275. This sounds like the German constitutional theory that certain fundamental Constitutional principles may not be amended. The Hon. Joseph M. McLaughlin, *The Unification of Germany: What Would Jhering Say?*, 17 *Fordham Int'l L.J.* 277, 284 (1994).

213. Montaña i Mora, *supra* note 17, at 176.

214. Opinion 1/92, 1992 O.J. (C 136) 1, 12, 2 C.M.L.R. 217 (1992) (holding that the reworded draft agreement establishing the EEA passes muster).

215. *Id.* at 8, 2 C.M.L.R. at 237.

216. *Id.* at 10, 2 C.M.L.R. at 238-40.

217. *Id.* at 10, 2 C.M.L.R. at 238.

218. The dispute resolution process that is discussed in this Note refers to articles XXII and XXIII of the General Agreement and does not include the special dispute resolution processes like the one provided for in the Multilateral Trade Negotiations Subsidies Code Agreement. Enforcing International Trade Law, *supra* note 91, at 55.

the effectiveness of the dispute resolution procedures of both models is necessary.

The dispute resolution procedure under the General Agreement is outlined in four main legal texts: GATT articles XXII and XXIII, supplemented by the "Understanding regarding notification, consultation, dispute settlement and surveillance" and by the "Decision of the CONTRACTING PARTIES dated November 10, 1958 in regards to article XXII procedures."²¹⁹ Although consensus decision making is no longer required at every step of the procedure,²²⁰ the ability of a defending contracting party to delay the dispute resolution procedure is still insurmountable.

A. *Informality and Pragmatism of GATT Dispute Resolution*

The General Agreement's dispute resolution procedures, in accordance with the Court's opinion, are so informal and loosely constructed that they cannot possibly satisfy the *Van Gend en Loos's* "clear and unconditional" test.²²¹ A laxity pervades the whole procedure, which results from the practice of the CONTRACTING PARTIES.²²² One of the best examples of this laxity is the legal status of the European Community under the General Agreement. While it is true that the "wait-and-see" approach adopted by the CONTRACTING PARTIES was a success for the Community, the approach created a precedent that the CONTRACTING PARTIES should have avoided. This pragmatic approach soon threatened to appear in areas outside the EC GATT-legality issue, including agriculture and international development agreements.²²³ Arguably, the principle of pragmatism basically "governed the interpretation and administration of the General Agreement by the GATT Secretariat and by some of the most influential contracting parties."²²⁴ Examples of this pragmatic behavior include the status of the European Community as a customs union and

219. Long, *supra* note 14, at 72.

220. See DSU, *supra* note 33, art. 6.

221. Case C-280/93, Germany v. Council at ¶ 110 (Oct. 5, 1994) (LEXIS, Eurcom library, CASES file) (stating that the test is whether GATT contains unconditional, clear and precise obligations so as to be directly applicable in the Community); see also Case 26/62, Van Gend en Loos v. Nederlandse administratie der belastingen, 1963 E.C.R. 1, 13, C.M.L.R. 105, 130 (1963) (stating that the test is whether the Treaty contained a clear and unconditional prohibition "not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects . . .").

222. The General Agreement has weaker sources of regulatory authority than what the ITO would have provided because GATT was intended to be provisional. Legal System, *supra* note 11, at 58.

223. *Id.* at 212.

224. Kelé Onyejekwe, *GATT, Agriculture, and Developing Countries*, 17 Hamline L. Rev. 77, 122 (1993).

all of the trade agreements concluded between the Community and other nations.

An important reason exists for the pragmatic approach of the GATT dispute resolution procedure. The CONTRACTING PARTIES are lax in enforcing the General Agreement because GATT started off with a cohesive membership. The dispute resolution process was not necessarily legalistic and could afford to be informal; the early legal disputes were easily resolved.²²⁵ Regardless of whether pragmatism is a principle contained in the General Agreement,²²⁶ however, commentators believe that a system regulating global trade could have survived only by adopting such a pragmatic and political approach to the resolution of disputes as opposed to a strict legalistic approach.²²⁷

B. *The Actual Process*

The process begins when a legal claim is referred to a panel of either three or five independent people selected by the GATT Secretariat with the consent of the parties.²²⁸ The most frequent problems in the dispute resolution process involve delays by the defending contracting party, including hindering of the panel's creation.²²⁹ Once created, however, the panel receives oral and written legal arguments from the parties, as well as intervenors.²³⁰ The panel, after hearing the arguments, deliberates with the assistance of the GATT Secretariat and produces a report that should contain a well-reasoned legal opinion settling the dispute.²³¹ The panel report has no legal force unless the CONTRACTING PARTIES adopt it.²³² If a panel decision is not adopted, it is as if the report was never written. Thus, many contracting parties refuse to accept panel rulings, thereby denying the panel decisions legal effect.²³³ Under certain circumstances, the Com-

225. Enforcing International Trade Law, *supra* note 91, at 29.

226. Long, *supra* note 14, at 61.

227. *Id.* at 62. Besides the pragmatism, the most damaging aspect of the GATT dispute resolution process is the consensus requirement of contracting parties. "Decision-making in the various GATT organs is characterized by the practice of consensus (notwithstanding the general rule of voting by majority provided for in art. XXV) . . ." *The EEC as a GATT Member*, *supra* note 17, at 37. During the early years of GATT, consensus was required at every stage of the resolution procedure, thereby giving the defending contracting party the ability to block the creation of a panel to adjudicate on the dispute as well as giving the losing contracting party the ability to prevent the adoption of the report. Enforcing International Trade Law, *supra* note 91, at 9.

228. Enforcing International Trade Law, *supra* note 91, at 9.

229. *Id.* at 54.

230. *Id.* at 9.

231. *Id.*

232. *Id.*

233. *See id.* at 54.

munity, like other contracting parties, blocks adverse panel decisions.²³⁴

Even if a panel decision was adopted, the legal effect of the ruling was tenuous for two reasons. First, panel reports were originally drafted in ambiguous language for political reasons.²³⁵ As a result, the body of legal rulings interpreting the General Agreement did not truly develop until the mid 1980s.²³⁶ Second, panels originally had no right to review government actions,²³⁷ thereby severely limiting their abilities.

Occasionally a panel issues a report on the merits of the case even when the dispute is moot. Panels do so because the same issue or similar questions later may arise in a different context.²³⁸ These decisions seem to be an effort by panels to create a body of "law" to be used for reference in the future.²³⁹ Moreover, the flexible rules of the General Agreement can be difficult to interpret and apply.

The GATT dispute resolution procedure functions more as a catalyst to facilitate dialogue and to enable debating contracting parties to reach a mutually agreeable resolution rather than to force one contracting party to admit its guilt.²⁴⁰ Perhaps the GATT never envisioned a dispute resolution process that could quickly adjudicate each contracting party's legal obligations and faults. Rather, the GATT may see its prime objective as ensuring that violations of the General Agreement are only temporary and resolved as quickly as possible.²⁴¹ The "Understanding regarding notification, consultation, dispute settlement and surveillance" codified the customary practice of GATT dispute resolution and singles out four essential elements of dispute resolution, two of which are, "recourse to bilateral and multilateral consultations in order, as a first priority, to reach an amicable settlement; [and] settlement of disputes, not as a result of a quasi-judicial decision, but through recommendations conducive to re-establishment of a balance of concessions and advantage between the parties to the dispute."²⁴²

The only remedy available to a contracting party is retaliation, but, "neither punitive action nor direct coercion by the Contracting Parties

234. *Id.* at 201.

235. *Id.* at 12.

236. *Id.* at 258.

237. *Id.* at 259.

238. *Id.* at 262.

239. *Id.* at 262. Nonetheless, the issue of stare decisis from previous panel decisions remains ambiguous. *Id.* at 263.

240. An example of this would be the association agreements entered into by the Community and the issue of the GATT-compatibility of those agreements that were never resolved. The United States agreed to cease challenging the Community's various article XXIV agreements, the association pacts, in exchange for Community concessions on the Generalized System of Preferences. *Id.* at 39.

241. Long, *supra* note 14, at 71.

242. *Id.* at 72-73 (emphasis omitted).

[sic] is provided for in the General Agreement against a member country in breach of its obligations."²⁴³ Feuding contracting parties cannot be forced to come to a settlement, nor can the panel quickly make a determination of who is right or wrong. In addition, the party at fault cannot be punished for its violation of its obligations under the General Agreement.²⁴⁴ According to this text, therefore, the only force available to a contracting party to remedy its violations of the General Agreement, other than the complaining contracting party's unilateral trade retaliations, is "moral pressure" on the defending contracting party to adhere to its duties under the Agreement.²⁴⁵

In the banana trade dispute, a panel issued a report specifically addressing the EC banana tariff regime's GATT-compatibility.²⁴⁶ The panel decided that the regime violated the General Agreement,²⁴⁷ but the Community blocked the adoption of the report by the Council. Thus, most of the Latin banana exporters entered into the Framework Agreement.²⁴⁸ Guatemala, the only Latin GATT contracting party that did not agree to the settlement offered by the Community, intends to pursue dispute resolution in the World Trade Organization.²⁴⁹

V. WTO DISPUTE RESOLUTION

One of the goals of the Uruguay Round discussions was to address the common dissatisfaction with the dispute resolution procedures of GATT.²⁵⁰ The negotiating group responsible for revising the dispute resolution procedure was given the following charge:

In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate ar-

243. *Id.* at 66.

244. *Id.* at 76.

245. *Id.* at 85.

246. *Panel Report, supra* note 67, at 52.

247. *Id.* The Panel Report found the Community's tariff regime to be inconsistent with a number of General Agreement articles: (1) the duties levied on banana imports are inconsistent with article II; (2) the tariff preference accorded to ACP bananas over Latin bananas are inconsistent with article I and cannot be justified by article XXIV or article XX(h); and (3) the system of allocating import licenses is inconsistent with articles I and III and could not be justified by article XXIV nor by article XX(h). *Id.*

248. *See supra* notes 193-94 and accompanying text.

249. Deborah Hargreaves, *Brussels in a Banana Split*, *Fin. Times*, Oct. 31, 1994, at 16; *Belgium: Guatemala Vows to Keep Fighting EU Banana Regime*, *Reuter Newswire*, Oct. 6, 1994, available in LEXIS, World Library, ALLNWS File.

250. James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 *Case W. Res. J. Int'l L.* 531, 536 (1993).

rangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations.²⁵¹

The WTO stands up to this charge by clearly defining the dispute resolution procedure.²⁵²

A. *Basis for a WTO Dispute Resolution*

WTO dispute resolution makes some important changes in international trade relations. The "settlement of disputes between Members concerning their rights and obligations under the provisions" of the WTO Agreement is under the DSU.²⁵³ As a general matter, the default rule for the WTO is that the Organization is "guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."²⁵⁴ The rule provides for continuity in decision making, the continued creation of panels and encouragement of dispute resolution through negotiation.²⁵⁵

B. *The Actual Process*²⁵⁶

It is understood that at all times during the dispute resolution, until a panel report is issued, the WTO members continue negotiations.²⁵⁷ If a member requests consultation pursuant to an agreement covered under the DSU, the defending member must: (1) reply within ten days after receiving the request; and (2) enter into good faith negotiations within thirty days after receiving the request.²⁵⁸ If the defending member fails to fulfill either of the two requirements, the complaining member may directly request the establishment of a panel.²⁵⁹ If there is no settlement within sixty days following receipt of the request by the defending party, the panel is established.²⁶⁰ Third-party members who have a significant interest in the dispute, such as the United

251. Jackson, *supra* note 10, at 3-4.

252. The United States was always one of the more vocal contracting parties seeking to strengthen the dispute resolution process, although in practice its record of accepting various panel reports is spotty. *Id.* at 49. While the European Community "has been one of the most ardent opponents of improvement in the GATT dispute settlement process during the last 15 years," *id.*, the issue of sovereignty did not play as big of a role in the ratification process in the various EC member states as it did in the United States. Some commentators suggest that Congress does not realize how much power it has given to the WTO, mainly because of the WTO's stringent dispute resolution procedure. David E. Sanger, *After Years of Talk, Trade Pact Now Awaits Congressional Fate*, N.Y. Times, Nov. 27, 1994 at 1, 34.

253. DSU, *supra* note 33, art. 1(1).

254. WTO Agreement, *supra* note 17, art. XVI(1).

255. DSU, *supra* note 33, art. 11.

256. For the purposes of this discussion, assume that a WTO Member, such as Guatemala, raises a complaint against the regime.

257. *See* DSU, *supra* note 33, art. 3(6).

258. *Id.* art. 4(3).

259. *Id.* art. 4(3).

260. *Id.* art. 4(7).

States, will also be involved in consultations.²⁶¹ A panel is then established according to the DSU, unless the Dispute Settlement Board²⁶² "decides by consensus not to establish a panel."²⁶³

Once the panel is established, arguments from all sides are reviewed, including third parties. The United States, for example, would intervene²⁶⁴ and express its views when the panel convenes.

261. *Id.* art. 4(11). The DSU also provides for cases of urgency, but they will not be discussed here. *See id.* art. 4(8).

262. The Dispute Settlement Board ("DSB") administers the rules and procedures laid out in the Understanding. *Id.* art. 2(1). It has authority "to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreements." *Id.* art. 2(1). Significantly, all Board decisions shall be done by consensus. *Id.* art. 2(4). Whether this consensus requirement will impair the dispute resolution process is unclear. Perhaps the DSB can maintain the strictest independence from the members and judge objectively each request for a panel.

263. *Id.* art. 6(1). The Panels will have complete independence from the members. For the elaborate provisions regarding the selection of panel members, see article 8 of the DSU.

264. *Id.* art. 10(2). This is because of the section 301 weapon, a provision of the United States Trade Act that requires the President to impose unilateral sanctions where a vital United States trade interest is at stake. *See* 19 U.S.C. § 2411 (1988). Section 301 provides for private parties to submit petitions to the United States Trade Representative's office to seek relief. *See* 19 U.S.C. § 2412(a) (1988). After a period of investigation, if the Trade Representative determines that rights of the United States under any trade agreement are being violated or that any act, policy, or practice of a foreign country "denies benefits" to the United States, 19 U.S.C. § 2411(a)(2)(A) (1988), then the Trade Representative may suspend or withdraw obligations, impose duties, or enter into binding agreements to ensure elimination of the act or policy. 19 U.S.C. § 2411(c) (1988). Section 301 was enacted so that the United States administration would take strong action against foreign trade barriers through GATT when the General Agreement was insufficient for stronger acts. Enforcing International Trade Law, *supra* note 91, at 43. One commentator has suggested that certain GATT legal complaints would not have been filed by the United States if it were not for section 301. *Id.* at 44, 47. Section 301 has been a very successful tool for the United States in fighting foreign trade barriers. *Id.* at 51. This Note does not address the issue of Super 301 that deals with intellectual property.

Article 23 of the DSU seems directed at section 301 and would not permit unilateral action by a WTO member outside the WTO forum. Article 23 provides in part:

1. When Members seek the redress of a violation of obligations or other nullification or impairment of benefit under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.
2. In such cases, Members shall:
 - (a) not make a determination to the effect that a violation has occurred . . . 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.

DSU, *supra* note 33, art. 23.

An interesting topic would be whether article 23 of the DSU would have direct effect in the Community.

The Understanding instructs the panel to objectively assess the debate before it, draw conclusions of fact as well as conclusions of law, and make any other findings that will assist the DSB in making the proper recommendation or appropriate ruling.²⁶⁵ If one or more of the parties involved in the dispute resolution is a developing country member, the panel must indicate in its panel report how it took account of that fact in arriving at its conclusion.²⁶⁶

The Panel first issues to the parties involved an interim report that includes the descriptive sections of its draft report.²⁶⁷ The Panel then meets with each party to discuss issues on the interim report.²⁶⁸ If the panel does not receive any comments, the interim report becomes final and will be circulated to all the members.²⁶⁹ By placing the burden of proof on the defending member,²⁷⁰ the DSU makes it more attractive for the defending member to come to some sort of resolution before the panel report is issued.

The European Community has a similar measure, Council Regulation 2641/84 on the Strengthening of the Common Commercial Policy with Regard in Particular to Protection Against Illicit Commercial Practices, 1984 O.J. (L 252) 1, modified by Council Regulation 522/94, 1994 O.J. (L 66) 10. Regulation 2641/84 permits "[a]ny natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of illicit commercial practices" to lodge a complaint. Council Regulation 2641/84, 1984 O.J. (L 252) 1, art. 3. If the Commission determines, after a lengthy procedure, that action is necessary to protect the Community's interests, the Community must first seek to address the issue through any dispute settlement procedure and if that fails then seek to suspend or withdraw any concessions that are compatible with the existing international obligations. See Council Regulation 2641/84, 1984 O.J. (L 252) 1, arts. 10, 11, 12.

These two pieces of legislation fall under the international law doctrine of "diplomatic protection," where individuals who wish to complain against another nation must raise this complaint within their domestic legal system. See Jackson, *supra* note 10, at 69. The principle behind this theory is that a nation may weigh whether other interests outweigh the private individual's complaint against the particular country. *Id.* at 70. The issue of standing for private individuals will continue as business executives have already started calling for private access to the WTO dispute settlement procedure. See *Australia: ABB Chief Wants Complaints Procedures at WTO*, Reuter Textline, Bangkok Post, Dec. 8, 1994, available in LEXIS, World Library, ALLNWS File. David de Pury, co-chair of ABB Asean Brown Boveri, raised his concern that "[i]n an era where a growing number of companies represent not only national, but global interests as well, it no longer makes sense to limit direct access to GATT/WTO procedures only to national governments." *Id.* For the present time there seem to be no plans to provide private access.

Regulation 2641/84 may be amended once again as the Commission proposes to add a third method by which private individuals may file a complaint. The proposed amendment permits affected Community exporters outside the Community to ask the Commission to take up their case at the WTO.

265. DSU, *supra* note 33, art. 11.

266. *Id.* art. 12(11).

267. *Id.* art. 15(2).

268. *Id.*

269. *Id.*

270. *Id.* art. 3(8).

The DSU states that the aim of the dispute resolution is not to determine guilt, but "to secure a positive solution to a dispute."²⁷¹ If no resolution results, "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."²⁷² In this respect the WTO dispute resolution process resembles the GATT 1947 process, because the aim is to end quickly any potential violations and to seek an equitable solution rather than to determine who is right or wrong.²⁷³

The Understanding states that the DSB's actions must aim at reaching a mutually satisfying solution according to the pertinent agreement.²⁷⁴ While the Understanding contains provisions regarding compensation, they are to be strictly controlled in application.²⁷⁵ Assume, however, that a Panel report is issued, holding that the Community's tariff regime is incompatible with many articles of the General Agreement.²⁷⁶ If the parties in conflict at this time still have not reached a solution, the panel submits its written report to the DSB for discussion.²⁷⁷ Parties objecting to a panel report must give a written explanation and circulate it at least ten days before the discussion of the panel report.²⁷⁸ The DSB cannot deliberate to adopt a panel decision until at least twenty days after the report has been circulated to all the members.²⁷⁹ But adoption of the panel's conclusions must be made within sixty days of the circulation of the panel report to all the members unless a party notifies the DSB of its intention to appeal, in which case the report will not be adopted pending the appeal.²⁸⁰

The most significant change to the current trade dispute resolution process is the WTO's creation of the Appellate Body, a unique and unprecedented institution in international trade.²⁸¹ The Appellate Body "has all the characteristics of an international tribunal [and] represents the most radical innovation introduced in GATT dispute settlement since the generalization of the panel procedure in 1952."²⁸² A standing Appellate Body is established by the DSB when a party ap-

271. *Id.* art. 3(7).

272. *Id.*

273. Montaña i Mora, *supra* note 17, at 129.

274. DSU, *supra* note 33, art. 3(4).

275. *Id.* art. 3(7). A member may also be fined, *see id.*, but it remains to be seen how this provision will have effect in application.

276. This assumption is not meant to reflect any conclusions on the banana tariff regime. *Panel Report, supra* note 67, at 52.

277. DSU, *supra* note 33, art. 12(7).

278. *Id.* art. 16(2).

279. *Id.* art. 16(1).

280. *Id.* art. 16(4).

281. Jeffrey M. Lang, *Full Committee Hearing on the World Trade Organization*, Federal News Service, June 10, 1994, available in LEXIS, World Library, ALLNWS File.

282. Montaña i Mora, *supra* note 17, at 144.

peals a panel case. With respect to the banana trade dispute, either Guatemala or the European Community could appeal the findings,²⁸³ but the United States, as a third party, could not.²⁸⁴ A party may appeal only issues of law and the panel's legal interpretations; findings of fact are not subject to Appellate body review.²⁸⁵

This creation of the Appellate Body is seen as a dramatic shift toward legalism.²⁸⁶ An Appellate Body report is adopted by the DSB and accepted in its entirety by the parties involved in the dispute, unless the DSB decides *by consensus* not to adopt the report within thirty days following its circulation to the members.²⁸⁷ If the Appellate Body concludes that a measure is inconsistent with a covered agreement, "it shall recommend that the Member concerned bring the measure into conformity with that agreement."²⁸⁸ But, "the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."²⁸⁹

C. *The WTO's Stricter Rules on Dispute Resolution*

The WTO is the only forum to resolve trade disputes and enforce the General Agreement upon all WTO members, including the United States and the European Community.²⁹⁰ Through its rules on unilateral action, binding effect, time limits and general clarification of member duties and obligations, the WTO functions as the only forum for resolving trade disputes such as the banana conflict.

A WTO member's unilateral trade retaliation is strictly controlled. Article 22 of the Understanding provides that the DSB must authorize the suspension by one member of concessions or other obligations under the covered agreements.²⁹¹ The Understanding also provides a long list of factors to consider in deciding what concessions or other obligations to suspend. First, the complaining member should seek to suspend concessions within the same sector "as that in which the panel or Appellate Body has found a violation or other nullification or im-

283. DSU, *supra* note 33, art. 17(1).

284. *Id.* art. 17(4).

285. *See id.* art. 17(6).

286. Montaña i Mora, *supra* note 17, at 151.

287. Interestingly, the requirement of consensus here actually serves as a catalyst for the parties to reach a solution, whether through the WTO or through negotiations. DSU, *supra* note 33, art. 17(14).

288. *Id.* art. 19(1).

289. *Id.* art. 19(2).

290. The WTO is the only forum for resolving trade disputes between contracting parties. While Jan Tumlir stated that GATT should be adopted by contracting parties into domestic legislation because of the lack of an "external power-balance compelling . . . observance," the WTO is this external power-balance. Jan Tumlir, *GATT Rules and Community Law*, in *The European Community and GATT* 1, 21 (Meinhard Hilf et al. eds., 1986).

291. DSU, *supra* note 33, art. 22(2).

pairment."²⁹² If the first option is not available, the complaining party should seek to suspend concessions and other obligations in other sectors under the same agreement.²⁹³ Thus, for example, because the banana dispute arose under the General Agreement, Guatemala would seek to suspend concessions in an area covered by the General Agreement, such as another agricultural product. As a last resort, the complaining party should seek to suspend concessions and other obligations under another agreement.²⁹⁴

The DSB grants authorization to suspend a concession or other obligations unless a consensus decides to the contrary.²⁹⁵ If the defending member protests the level of suspension proposed or claims that the procedure laid out in article 22(3) was not followed, the matter is referred to arbitration by the original panel, if possible, or by an arbitrator appointed by the Director-General.²⁹⁶ The concessions and other obligations are not to be suspended pending the outcome of the arbitration.²⁹⁷ Rather, the arbitration decision is final.²⁹⁸ Suspension of concessions and other obligations only lasts until the DSB's surveillance mechanism finds that the violating measure is removed.²⁹⁹

One aspect of the WTO dispute procedure that is dramatically different from the GATT 1947 procedure is the strict time limit on each step of the process.³⁰⁰ The European Community cannot use its heavy economic clout as a weapon to force the Latin American countries to negotiate a resolution before the panel report, because WTO members no longer have the ability to prolong and postpone the dispute resolution process. Instead, the EC must negotiate with the Latin American countries, because the panel may find against the EC, and they will be compelled to take action. If the EC refuses to change the banana regime and does not wish to pay compensation, the Community's only other option would be to withdraw from the WTO.³⁰¹

If the defending member, here the European Community, agrees to take steps to conform with the General Agreement, the WTO process

292. *Id.* art. 22(3)(a).

293. *Id.* art. 22(3)(b).

294. *Id.* art. 22(3)(c). Article 22(3)(d) also lists some other factors to consider before retaliation. *Id.* art. 22(3)(d).

295. *Id.* art. 22(6).

296. *Id.*

297. *Id.*

298. *Id.* art. 22(7).

299. *Id.* art. 22(8).

300. *Id.* art. 3(3) (stating that "[t]he prompt settlement of situations . . . is essential to the effective functioning of the WTO"). See also *id.* art. 12(5) ("Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines."); *id.* art. 12(9) ("In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.").

301. Article XV(1) of the WTO Agreement provides that "Any Member may withdraw from this Agreement." WTO Agreement, *supra* note 17, art. XV(1). Such a withdrawal applies to both the WTO Agreement as well as the Multilateral Trade Agreements. *Id.*

is not yet completed. Article 21 of the Understanding provides for WTO surveillance of compliance with DSB recommendations or rulings.³⁰² The Understanding provides that the DSB keep the defending member's implementation of adopted recommendations or rulings under surveillance.³⁰³

Many other strong arguments exist for using the WTO as the single forum for trade disputes in addition to its cohesive and integrated dispute resolution process. Use of the WTO procedures, among other things, avoids having multiple fora interpreting the General Agreement and other trade agreements. For example, what would happen if the General Agreement had direct effect in the Community, and yet the Court of Justice's interpretation conflicted with the panel's conclusion?³⁰⁴

D. *Limitations*

As with any organization, the WTO also has its limitations. Only countries that sign on to the Uruguay Round may utilize the WTO; countries such as Russia, China and Taiwan, which are three of the largest economies outside of the GATT System, are not yet subject to WTO rules. Moreover, in this banana dispute, countries like Ecuador, which are not GATT contracting parties but who suffer the effects of the banana tariff, have no recourse.

VI. CONCLUSION AND FUTURE ISSUES

The WTO is the only body to adequately enforce the General Agreement and give the Agreement legal effect throughout the world. The CONTRACTING PARTIES, who are now becoming WTO members, recognize the incredible potential of this new international trade regulation body. The WTO members must not apply the WTO Agreement in such a loose way so as to make its rules ineffective.

WTO members such as the European Community, the United States and Japan may find the strict guidelines of the WTO confining, because they no longer can politically finesse their GATT violations by blocking the adoption of panel reports. But these members simply must adapt to this new and better standard of international trade reg-

302. DSU, *supra* note 33, art. 21.

303. *Id.* art. 21(6).

304. The Banana Panel Report concluded that the regime violated article I of the General Agreement, the Most-Favoured-Nation Clause, and that the violation could not be justified under article XXIV because the Lomé Convention did not create a free trade area. *Panel Report, supra* note 67, at 52. The Court of Justice could have accepted the General Agreement's direct effect and held that while the tariff regime was inconsistent with article I of the Agreement, the Lomé Convention was a free trade area and therefore deviation from the General Agreement was justified. Such a scenario would cause a crisis because the duties and obligations of the European Community to the General Agreement would conflict with the Community's internal legal order.

ulation; otherwise, the world will revert back to the ineffective GATT system.³⁰⁵

Some future issues still lurk regarding the banana trade dispute and the WTO. While these issues are beyond the scope of this Note, they are worthy of attention because it is likely that they will surface in the public debate over the next few years.

First, the European Community is currently growing with the addition of Austria, Finland and Sweden on January 1, 1995. All three countries are big Latin banana consumers.³⁰⁶ Therefore, the Latin bananas supporters may have enough votes within the Council of Ministers to change the banana tariff regime. Even if they do not have the qualified majority vote, however, the banana dispute will continue because Lomé V will be up for discussion in the near future, and the six European Community member states that prefer Latin bananas surely will introduce the issue.

Second, many unsettled issues remain regarding the implementation of the WTO. For example, one of the most crucial questions is what happens if a "GATT 1947" contracting party who does not ratify the WTO Agreement has a dispute with a WTO member. Does the WTO dispute process apply or does the "GATT 1947" procedure apply? If a conflict arises, there is pressure for the "GATT 1947" party to ratify the WTO Agreement so that it can benefit from the stricter rules. But what if a WTO member has a complaint against a "GATT 1947" contracting party? In that situation no incentive exists for the "GATT 1947" party to ratify the WTO Agreement, because it would then be subject to stricter rules.³⁰⁷ With respect to ACP nations, what if only a portion of the ACP GATT contracting parties ratify the WTO Agreement? Will that portion need to apply for a waiver under the WTO?

305. As one commentator noted, "[t]here may, in other words, be something to the belief, long held by the 'old GATT hands,' that it is better to have a flexible, imperfect system that protects the major principles than a system so disciplined that it provokes violation and defiance." Andreas F. Lowenfeld, *Remedies Along with Rights: Institutional Reform in the New GATT*, 88 Am. J. Int'l L. 477, 481 (1994).

306. Debra Percival, *Trade: Germany Vows to Continue Attacks on EU Banana Regime*, Inter Press Service, Oct. 5, 1994, available in LEXIS, World Library, ALLNWS File. Sweden is a most important market for American banana firms because Sweden has the highest per capita consumption of bananas in the world, at 17.5 kg. per capita. Petition, *supra* note 75, at 30.

Austria's accession to the European Community generally means lower prices for the Austrian consumer, for example: pasta (25% lower), dairy products (20% lower for butter), cattle feed (20% lower). *EU: Austria Names its Candidates for EU Legal Institutions*, Reuter Textline, Agence Europe, Jan. 4, 1995, available in LEXIS, World Library, ALLNWS File. On the other hand, banana prices may go up by as much as 50%. *Id.*

307. For discussion of GATT procedures see *supra* notes 223-57 and accompanying text. For discussion of WTO procedures see *supra* notes 250-304 and accompanying text.

Third, the issue of standing for private individuals must be addressed by the WTO. American firms such as the Chiquita Banana Company and private individuals can currently seek relief through section 301 actions. Section 301 actions, however, might be prohibited under the WTO.³⁰⁸ While public international law does not allow for private standing, the WTO should nonetheless consider permitting private individuals access to its dispute resolution procedure.³⁰⁹

308. Creating the WTO as the single forum for the regulation of world trade may eliminate different national measures, such as the section 301 action. See *supra* note 264. The United States Trade Representative, Mickey Kantor, initiated investigations on the trade practices of the European Community, Colombia and Costa Rica pursuant to 19 U.S.C. § 2412(a)(2). See *Commission to Discuss Banana Trade Probe with U.S.*, The Reuter European Community Report, Oct. 18, 1994, available in LEXIS, World Library, ALLNWS File. Chiquita first submitted a petition to the United States Trade Representative pursuant to 19 U.S.C. § 2412(a).

The procedure for petitions under 19 U.S.C. § 2412(a) is as follows. After the Trade Representative decides to initiate an investigation pursuant to 19 U.S.C. § 2412(a)(2) (1988), he must then consult with the foreign country concerned, or in this case the European Community, pursuant to 19 U.S.C. § 2413(a) (1988). Under 19 U.S.C. § 2411(b)(1) (1988), the Trade Representative must then determine whether "the rights to which the United States is entitled under any trade agreement are being denied." If the Trade Representative determines there has been a § 2414 violation, under § 2411(b)(1) he is authorized to take appropriate action. 19 U.S.C. § 2411(b)(1) (1988). The Trade Representative is required to monitor foreign compliance, 19 U.S.C. § 2416 (1988) and modify or terminate the adopted actions when the burden on the United States has decreased or ceased. 19 U.S.C. § 2417 (1988).

The petition for the section 301 investigation was filed by Chiquita Brands International. According to the Chiquita Petition, the Framework Agreement reached between the Latin American countries and the European Community will allow the Latin American nations to impose "onerous export licensing fees" on the United States banana marketing companies while privileged European firms will be exempt. Petition, *supra* note 75, at 22. The petition quotes the EC Farm Commissioner, René Steichen, as saying that the Framework Agreement's arrangement of export licenses was "necessary in order to enable Latin America to protect themselves against American multinationals." *Id.* (emphasis omitted). Chiquita claims that the Framework Agreement aims to improve the market share of the European banana marketing interests at the detriment of the American firms. *Id.* Chiquita claims in its petition that

the most egregious and injurious feature of the new organization for U.S. banana companies has been the import license allocation scheme applicable to all bananas entering under the third country quota. The new licensing rules have resulted in the material expropriation of established business from U.S. banana marketing companies and the arbitrary transfer of that business to a select group of privileged EU firms, who have in no way contributed to the development of the business they have been given.

Id. at 35. The petition goes on to claim that the past American entitlement of exporting roughly 600,000 tons of bananas is now in European hands. *Id.* at 36. Under the Framework Agreement, United States companies in Latin America must obtain export certificates for the Community while privileged European firms need not do so. *Id.* at 53.

309. From 1987 to 1988 there was a surge in the number of United States complaints filed with GATT, because during this time the administration was seeking Congressional authority for the Uruguay Round. During times when Congress is involved in trade matters the administration is always pressured to take an active role in eliminating foreign trade barriers through section 301 actions. Enforcing International

Clearly, the number of legal and political issues regarding the banana dispute is endless. Nonetheless, the WTO is the only vehicle to resolve this trade debate. More importantly, the WTO members, in the application of the Dispute Settlement Understanding and the WTO Agreement, must enforce the spirit of these documents. The WTO must ensure that members involved in a dispute adhere to the strict time schedule. If the dispute resolution process is exhausted, the WTO must ensure compliance and perhaps the payment of a monetary amount. Some will find this approach rigid, difficult to manage and unworkable. But, the possibility of an adverse panel decision that is final and binding encourages the amicable resolution of disputes outside the formal process. In conclusion, the WTO is an excellent forum for nations to assert their legal rights in trade disputes and to seek a just resolution to their problems.

Trade Law, *supra* note 91, at 209. Removing such barriers will deprive private parties of standing. While this is not a novel idea under international law, it nonetheless raises significant questions because of the pervasiveness of the Uruguay Round accords dealing with financial services and intellectual property. All of these issues are significant for multinational corporations and for practicing attorneys. It is very important to seek some sort of recourse for clients who have been wronged.

The frustrations that multinational corporations will soon face is voiced by Chiquita in its section 301 Petition:

In a real sense, Petitioners have no recourse left other than Section 301 to protect their vital interests. For the past few years, extraordinary resources have been dedicated to GATT challenges, to ECJ challenges, and to company representations throughout the world. The U.S. Government has made numerous informal representations as well. Through it all, no relief has been achieved, and, with the signing of the Framework Agreement, the banana policy has become more unreasonable, discriminatory and burdensome by many orders of magnitude. Unless Section 301 is activated to block the Framework Agreement and reform [EC] Regulation 404[93], irreparable harm to Petitioners' interests is inevitable.

Petition, *supra* note 75, at 90.

