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

by

Aisha L. Joseph

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## COMMENT

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

Aisha L. Joseph\*

#### INTRODUCTION

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

The on-going banana trade war concerns U.S. and Latin American objections of the European Union's ("EU") preferential treatment towards banana exports received from developing, third world nations over Latin American-produced bananas.<sup>2</sup> The United States and Latin America see this preferential treatment as illegal and discriminatory.<sup>3</sup> The banana regime drew out conflicting opinions about the advancement of globalization, setting international economic development theory<sup>4</sup>

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

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

2. See Rodrigo Bustamante, *The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime*, 6 MINN. J. GLOBAL TRADE 533, 533 (1997) (remarking that preferential regime is being challenged on various institutional grounds including violations of General Agreement on Tariffs and Trade ("GATT") as well as infringement on European Community Member States' sovereignty as per Treaty on European Community).

3. *Id.*

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

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

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

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

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

7. See Michael Moore, *Challenges For the Global Trading System in the New Millennium*, Sept. 28, 1999, at [http://www.wto.org/english/news\\_e/pres99\\_e/PR139\\_e.htm](http://www.wto.org/english/news_e/pres99_e/PR139_e.htm) [hereinafter *Challenges*] (stating that WTO's central policy is to make prosperity that flows from globalization reachable to people; governments must cooperate in trade, investment, and financial arenas to secure maximum benefits from international specialization, while simultaneously leaving necessary space to address any fallout from change affecting certain groups).

8. EUROPEAN COMMISSION, GREEN PAPER ON RELATIONS BETWEEN THE EUROPEAN UNION AND THE ACP COUNTRIES ON THE EVE OF THE 21ST CENTURY—CHALLENGES AND OPTIONS FOR A NEW PARTNERSHIP, CHAPTER I—GLOBAL CHANGES AFFECTING ACP-EU RELATIONS (1996). See Michael Moore, *Trade, Poverty and the Human Face of Globalization*, June 16, 2000, at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm32\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm32_e.htm) [hereinafter *Human Face*] (acknowledging that globalization is controversial and critics believe problem with globalization is that it lacks human face); see also, Michael Moore, *The Backlash Against Globalization?*, Oct. 26, 2000, at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm39\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm39_e.htm) [hereinafter *Backlash*] (acknowledging backlash against liberalism).

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

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

This Comment examines the latest developments of the banana trade dispute, which threatens to disrupt the economies of Third World countries and international relations on a general scale. Part I reviews the background of the legal treaties and the international organizations involved in the dispute, as well as the parties involved, and the dispute's basic history. Part II examines the dispute's procedural history, as presented before the World Trade Organization<sup>16</sup> ("WTO"), and also highlights recent developments. Part III evaluates the WTO's legal rulings and analyzes key aspects of the banana dispute. Part III also suggests that while the system of preferential treatment, granted to

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

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

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

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

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

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

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

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

### I. THE WORLD TRADE ORGANIZATION AND THE BANANA REGIME

The principal body of law at the center of the banana dispute is the General Agreement on Tariffs and Trade<sup>17</sup> ("GATT"). GATT contains a commitment from its Member States to reduce tariffs and regulate government interference that constrains or misconstrues international trade.<sup>18</sup> GATT was improved upon by the establishment of the WTO during the Uruguay Round negotiations.<sup>19</sup> The creation of the WTO served as a turning point in GATT's history.<sup>20</sup> The WTO held that the primary responsibility for administering a dispute settlement system where Member State parties to GATT and to other agreements could seek to enforce their respective rights.<sup>21</sup> GATT provided preferential treatment to developing nations, in response to their desire to liberalize their market access.<sup>22</sup> GATT granted this preferential treatment in order to recruit developing coun-

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

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

19. *Id.*

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

21. *Id.* at 552.

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

tries as Member States.<sup>23</sup>

### A. *The WTO*

During the first half of the twentieth century, the world was in the middle of an ongoing depression.<sup>24</sup> The United States and the United Kingdom entered into discussions to set up the International Trade Organization<sup>25</sup> ("ITO") to alleviate the depression by advancing economic development through trade, investment, and business regulation.<sup>26</sup> At the same time, a number of countries negotiated a set of trade tariff concessions and regulations that became part of GATT.<sup>27</sup> The signatories drafted GATT as an interim trade liberalizing mechanism until the actualization of the ITO.<sup>28</sup> The ITO was never established leaving GATT as the only agreement to regulate international trade.<sup>29</sup>

#### 1. Former System

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

23. *Id.*

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

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

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

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

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

29. *Id.*

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

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

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

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

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

33. *Id.*

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

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

36. *Id.*

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

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

39. GATT art. XI. Article XI states

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

*Id.* para. 1.

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

The second set of rules is non-discrimination rules.<sup>41</sup> Article I, commonly known as the most-favored-nation<sup>42</sup> ("MFN") clause, bans discrimination against imported goods.<sup>43</sup> The MFN clause asserts that any advantage granted to the goods of one country must be given to like products imported from all other countries.<sup>44</sup> One important exception to this rule grants preferential tariff treatment to developing countries.<sup>45</sup> The Generalized System of Preferences<sup>46</sup> ("GSP") and the Lomé Conven-

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

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

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

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

*Id.*

43. *Id.*

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

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

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

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



tion<sup>47</sup> ("Lomé" or "Lomé waiver") first granted such preferential treatment to developing countries.<sup>48</sup> Article XXIV, another exception to Article I, provides for the formation of free trade areas and customs unions.<sup>49</sup> In part, Article XXIV permits free trade areas where the contracting parties have eliminated all trade restrictions.<sup>50</sup>

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

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

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

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

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

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

*Id.*

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

52. *See* Enabling Clause.

53. *See generally* GATT arts. VI, XII, XVI, XVIII(b), and XIX. Article VI(2) states:

In order to offset or prevent dumping, contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

## 2. Current System

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

### a. Functions of the WTO

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

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

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

*Id.*

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

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

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

57. COMMITTEE ON TRADE AND DEVELOPMENT, DEVELOPING COUNTRIES AND THE URUGUAY ROUND: AN OVERVIEW, NOTE BY THE SECRETARIAT, 77th Session, Nov. 21 and 25, (1994), available at [http://www.wto.org/wto/legal/lcdc2\\_512.htm](http://www.wto.org/wto/legal/lcdc2_512.htm) [hereinafter COMMITTEE ON TRADE AND DEVELOPMENT]. Members must assume the obligations pursuant to several agreements in the area of goods, services, and intellectual property. *Id.* Members must also submit concession schedules addressing goods and services. *Id.* This ideology is known as single undertaking approach to the Uruguay Round resolutions, meaning that membership to the WTO is contingent upon accepting all the resolutions to the 1994 Uruguay Round negotiations without exception. *Id.*

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

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

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

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

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

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

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

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

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

*Id.*

62. *Id.*

63. *Id.*

64. *Id.* para. 3.

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

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

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

### b. Legal System

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

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

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

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

69. *Id.*

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

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

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

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

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

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

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

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

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

*Id.*

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

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

*Id.*

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

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

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

*Id.*

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

79. See Zsolt K. Bessko, *Going Bananas Over EEC Preferences?: A Look at the Banana Trade War and the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes*, 28 CASE W. RES. J. INT'L L. 265 (1996) (noting that prior to DSU panel report had to be adopted by consensus, therefore any contracting party could block adoption of report). DSU asserts that panel report is considered adopted unless either a disputant appeals report's findings or DSB decides, by consensus, not to adopt report. *Id.*

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

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

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

80. *Id.*

81. *Id.*

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

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

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

*Id.*

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

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

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

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

### c. Treatment of Developing and Least-Developed Countries

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

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

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

*Id.*

86. *Id.*

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

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

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

90. GATT art. XI.

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

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

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

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

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

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

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

95. *Id.*

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

97. *Id.*

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

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

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

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



### B. *The Banana Regime*

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

#### 1. Background

In 1957, the Treaty of Rome<sup>105</sup> established the European Economic Treaty among several European countries.<sup>106</sup> The European Economic Treaty granted several African colonies special status that allowed them economic and technical assistance, including tariff preferences for their exports to the EEC market.<sup>107</sup> In return, the African colonies gave reciprocal preferential treatment to imports from European Economic Community ("EEC") members.<sup>108</sup>

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

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

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

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

104. *Id.*

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

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

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

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

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

110. *Id.* at 105.

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

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

Meanwhile, in 1973, the Treaty of Accession<sup>116</sup> drew Denmark and the United Kingdom into the EEC.<sup>117</sup> Subsequently, Great Britain lobbied to bring its former colonies, which included several African, Caribbean, and Pacific nations, under EEC status.<sup>118</sup> Great Britain's lobbying efforts, and the overall desire for a new international economic regime, which would allow the EEC to engage in a partnership with their former colonies, resulted in the birth of Lomé.<sup>119</sup>

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

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

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

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

115. *Id.*

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

117. *Id.*

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

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

## 2. Regulations

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

### a. The Lomé Conventions

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

#### i. Lomé Conventions One Through Three

In 1975, the EEC, its Member States, and forty-six ACP countries signed the first Lomé Convention<sup>126</sup> ("Lomé I").<sup>127</sup>

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

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

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

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

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

125. *Id.*

126. Lomé I.

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

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

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

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

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

129. *Id.*

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

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

132. *Id.*

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

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

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

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

Lomé III in 1984, each having a five year term.<sup>137</sup>

## ii. Fourth Lomé Convention

Lomé IV, the most recent Lomé agreement, expired February 29, 2000.<sup>138</sup> Although Lomé IV encompassed provisions similar to the previous Lomé Conventions, it modified the Stabex system<sup>139</sup> and extended the range of recipients who would receive financial and technical assistance.<sup>140</sup> Lomé IV allocated more funding than Lomé III.<sup>141</sup> In addition, Lomé IV established a number of committees to further the cooperative efforts between the EU and the ACP nations.<sup>142</sup>

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

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

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

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

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

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

142. *Id.*

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

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

*Id.*

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

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

### iii. Overall Critiques of Lomé

The European Commission, presented a recent analysis concerning Lomé IV's impact.<sup>147</sup> According to this report, in 1997, the twelve ACP states used only 75% of their allocation, under Protocol Five, and generated about ECU400,000,000.<sup>148</sup> From 1988-97, total ACP exports grew by just under 4% in volume as compared to other developing countries that grew by 75%.<sup>149</sup> Only five of these ACP countries grew at a rate greater than other developing countries as a result of a margin of preference.<sup>150</sup> The ACPs under Lomé, as compared to the GSP regime, enjoy a preferential margin of 2%.<sup>151</sup>

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

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

*Id.*

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

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

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

149. *Id.*

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

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

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

#### iv. Overall Advantages of Lomé

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

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

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

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

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

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

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

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

serted in support of Lomé as well.<sup>158</sup>

b. EEC Regulation No. 404/93

Before 1993, the EU still had not achieved its goal of a single market.<sup>159</sup> Twelve regimes existed before 1993.<sup>160</sup> These regulations placed quantitative restrictions against non-ACP countries that also exported bananas to the EU.<sup>161</sup> Many countries called for a single and uniform trade policy to regulate banana imports.<sup>162</sup> After much negotiation, the EEC adopted Regulation 404/93 in February of 1993.<sup>163</sup>

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

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

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

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

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

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

162. Bessko, *supra* note 79.

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

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



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

## II. THE BANANA DISPUTE

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

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

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

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

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

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

### 1. Opponents

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

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

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

170. *Id.*

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

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

### a. Latin America

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

### b. The United States

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

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

174. *Id.*

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

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

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

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

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

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

On September 2, 1994, Chiquita and the Hawaii Banana Industry Association joined the banana dispute and filed a petition with the USTR.<sup>180</sup> They claimed that the present trade regimes under Regulation 404/93 and the Banana Framework Agreement<sup>181</sup> ("BFA"), which the EU, Colombia, Costa Rica, Venezuela, and Nicaragua adopted, discriminated against U.S. marketers importing Latin American produced bananas.<sup>182</sup> The USTR subsequently launched an investigation in October, 1994

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

*Id.*

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

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

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

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

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

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

## 2. Proponents: A Divided European Union

Countries within the EU disagree on how to handle the banana dispute.<sup>186</sup> Opponents to the banana regime include Belgium, Germany, Luxembourg, and the Netherlands.<sup>187</sup> Germany<sup>188</sup> leads the EU opposition against the banana regime. Germany asserts that the 2,000,000 ton quota and tariff regulations implemented by Regulation 404/93 will decrease the amount of bananas that Germany will be able to import from Latin America and raise the prices of the bananas in the long run.<sup>189</sup> In addition, Germany and other banana regime opponents believe that these restrictions may be detrimental to Latin American banana producing countries.<sup>190</sup> Opponents argue that the regime would cause a rise in unemployment and would compromise the trade relationships that certain EU countries have with Latin American countries.<sup>191</sup>

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

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183. Bessko, *supra* note 79.

184. *Id.*

185. *Id.*

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

187. *Id.* at 175.

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

189. *Id.* at 175.

190. *Id.*

191. *Id.*

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

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

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

### B. 1997 Controversy

Under the WTO, dispute settlement procedures became more stringent in order to make international trade laws more binding.<sup>197</sup> Article 23 of the DSU prohibits unilateral action that was once allowed under GATT.<sup>198</sup> As a signatory to GATT and a WTO Member, the United States must now seek redress through the DSB.<sup>199</sup> The United States, along with Ecuador, Guatemala, Honduras, and Mexico exercised its option to bring a claim under the newly established WTO in October, 1995.<sup>200</sup>

#### 1. WTO's Decision

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

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

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

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

197. Bessko, *supra* note 79.

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

199. *Id.*

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

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

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

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

Mexico's complaint, the Panel held that the measure was inconsistent with its obligations under GATT Article I(1) and XIII(1).<sup>207</sup> Concerning the Lomé Convention, the Panel held that the regime complied with GATT Articles I(1), III(4), X(3)

b. Appellate Body

On June 11, 1997, the EU requested the AB to appeal certain issues and interpretations of the Panel Report.<sup>209</sup> On appeal, the AB reversed the Panel's findings.<sup>210</sup> The AB reversed the Panel's findings with regards to the regime's compliance with the Lomé Convention.<sup>211</sup>

The AB upheld the Panel's finding that the Agreement on Agriculture<sup>212</sup> does not allow for the reform process stipulated under GATT Article XIII(1). The Agreement on Agriculture states that the Agreement is for the purposes of reforming the Agreement. Such a reform process will come within the scope of GATT rules and provisions.<sup>214</sup>

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be neutral in application and administered in accordance with the Agreement, art. 1(3).

207. *See id.* (finding inconsistencies under GATT Article XIII(1) and GATS Articles 2 and 17).

208. *Id.*

209. 1997 AB Report para. 3.

210. *Id.*

211. *See id.* para. 255 (upholding EU's measure within the scope of Licensing Agreement). The AB reversed the Panel's finding that the measure was inconsistent with Article 1.3 of Licensing Agreement. The AB also upheld the Panel's decision that the measure was inconsistent with GATS Articles 2 and 17. *Id.* paras. 255(s)-(t).

212. Agreement on Agriculture, Apr. 6, 1994, 1869 U.S.T.R. 1125, available at [http://www.wto.org/english/docs\\_e/legal\\_e/](http://www.wto.org/english/docs_e/legal_e/)

213. 1997 AB Report para. 158.

214. Agreement on Agriculture. The Appellate Body [Members] [having] decided to establish a reform process in the form of trade in agriculture in line with

quota shares to some Member  
rest in supplying the EU with ba-  
TT Article XIII obligations.<sup>217</sup> Al-  
not expressly mention Member  
antial interest, they too should be  
on-discrimination clause.<sup>218</sup>

non-discriminatory application of  
tariff quotas.<sup>219</sup> Specifically, Article  
ation and exportation of Member  
ly when the importation of a like  
y is similarly prohibited or re-  
(2), the distribution of a product  
bber States would have reasonably  
e absent the existence of the re-

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noting that all GATT provisions apply except  
(on Agriculture).

thing in Articles 4.1 and 4.2 of Agreement on  
otas and contracting parties would have been  
(this issue).

when implementing tariff quotas and import  
ere to Article XIII(2); even though Article  
ose Member States that do not have signifi-  
lved, these Members must still be subject to

According to the AB, to not apply Article  
not a contracting party has substantial inter-  
II(1). *Id.* GATT art. XIII(2). Article XIII(2)  
ny product, contracting parties shall aim at a  
proaching as closely as possible the shares  
e expected to obtain in the absence of such

(1) states:

applied by any contracting party on the  
territory or any other contracting party or  
stained for the territory of any other con-  
of the like product of all third countries  
t to all third countries is similarly prohib-



restrictions.<sup>221</sup>

The AB upheld the Panel's finding that the quota rules under the BFA are inconsistent with Article XIII(2).<sup>222</sup> The rule regarding the reallocation of unused shares is, in addition, these reallocation rules are inconsistent with the MFN principle, to prevent them from being applied to other shares.<sup>224</sup> As a result, the AB also found that the MFN rule similarly restricts the imports from the United States and is inconsistent with Article XIII(2). The AB reasoned that the re-allocation of unused shares to other BFA countries, at the expense of the United States, does not qualify as an allocation of shares that would be expected by a Member State. The MFN rule is, therefore, according to the AB, inconsistent with the quota rules are also inconsistent with Article XIII(2).

The AB held that under Lomé IV, the United States' free access to traditional ACP bananas is limited to 90,000 tons of non-traditional ACP bananas with a margin of tariff preference of 100% over the United States' non-traditional ACP bananas.<sup>225</sup> The United States' shares to the traditional ACP bananas are limited to the countries pre-1991 best-ever export levels. Lomé IV stipulated that no ACP country can be in a more favorable position than it is at the time of the Lomé IV regard to access in the traditional ACP market.

221. GATT art. XIII(2).

222. 1997 AB Report para. 163.

223. *See id.* (commenting that under BFA, the United States' shares that goes unused by BFA country assigned to the United States' unused portion to other BFA countries at the time of the Lomé IV (tries)).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See id.* at 173 (holding that duty-free

of traditional ACP bananas, covers the favorable treatment of reasonableness that even prior to the end of the traditional ACP countries enjoyed duty-free access for their bananas.<sup>234</sup> Thus, the AB reasoned that the treatment was within the parameters of the MFN standard of favorable treatment towards the ACP countries more favorable than in the past or at the

AB reasoned that any particular measure is not tantamount to granting preferential export treatment. Article 168(2)(a)(ii) does not stipulate what constitutes a MFN standard of treatment under Lomé IV.<sup>236</sup> The AB granted duty-free access to 90,000 tons of non-ACP bananas with a tariff preference of 100 ECU per ton under Lomé IV and ECU693 per ton.<sup>237</sup> Under MFN, the tariff for third country bananas<sup>238</sup> are more favorable than the quota imports is taxed at ECU793 per ton. Therefore, obviously, more favorable than the MFN standard under article 168(2)(a)(ii), which is applicable. Therefore, the AB reasoned that the

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Article 168(2)(a)(ii) states that concerning products other than those referred to under [subsequent] necessary measures to ensure more favourable treatment for countries benefiting from the most-favoured-nation

Article 168(2)(a)(ii); *see also* 1997 AB Report on Traditional ACP Bananas, Article 168(2)(a)(ii)

arguing that it was given rule that under Lomé IV, the duty-free access prior to EEC 404/93, therefore duty-free access required by tenets of Lomé IV).

68.

Footnote 540 (stating that third country bananas are from the Americas).

measures taken by the EU were the Lomé waiver.<sup>241</sup> In addition, the AB held that the EU could not allocate shares to ACPs exporting bananas, nor maintain import licenses for third countries and non-traditional ACPs.

The AB relied on the European Court of Justice's ruling in *Germany v. European Communities* that the EU's allocation of tariff quota shares to ACP supplier states was required under Article 168(2)(a)(ii). The AB held that the EU may permit a limited number of ACP bananas imported from traditional ACP countries in the best year prior to 1991. The AB held that the allocation of shares to certain ACP countries is based on their pre-1991 best-ever export volumes. The AB held that increases in future trading, as well as the possibility that future increases in trade will occur, are not factors that

Concerning the allocation of tariff quota shares to ACP countries, the AB simply applied the rule of Article 168(2)(a)(ii), which provides that the EU may allocate non-traditional ACP bananas countries a limited number of tariff quota shares.<sup>247</sup> C

241. See 1997 AB Report para. 173 (stating that the EU could not stipulate that only one specific kind of trade preference be granted to ACP bananas; EU could have devised other measures to provide more favorable treatment, but measures at issue were not more favorable than measures as prescribed under article 168(2)(a)(ii)).

242. *Id.* paras. 176, 178. See *id.* para. 177 (stating that Article 168(2)(a)(ii) applies to non-traditional ACP countries and not to traditional ACP countries; therefore, the EU could not allocate tariff quota shares; therefore, the EU's allocation of tariff quota shares to ACP countries is not more favorable than measures as prescribed under article 168(2)(a)(ii)).

243. *Id.* para. 174.

244. *Id.* at para. 174. See *Germany v. European Communities*, Case 49/73 (stating that under Article 1 of Protocol 1, the EU's allocation of tariff duty, only to bananas actually imported, and not to bananas produced in each ACP State that is traditional supplier, is not more favorable than measures as prescribed under article 168(2)(a)(ii)).

245. See *id.* para. 175 (holding that tariff quota shares are based on best-ever export volumes that reflect potential export volumes; the EU's allocation of tariff quota shares to ACP countries guarantees that traditional ACPs are not placed at a disadvantage. The AB holds that the only difference would be that their traditional markets would export more than the investment they made some time in the past).

... operators that market trade  
...ounted to cross-subsidization.<sup>249</sup>  
...-subsidization and, therefore, the  
...here were not required under

...l's ruling that Lomé IV allows in-  
... (1), allowing the EU to allocate  
...ates.<sup>251</sup> In its report, the AB rea-  
...pecifically applied to the provisions  
...ary to allow ACP states more pref-  
...s they produce.<sup>252</sup> The AB dis-  
...o create a real effect of Lomé IV  
...articles I and XIII of GATT.<sup>253</sup> On  
...to Article I and not to any other  
<sup>254</sup> Even where Article I and XIII  
...Lomé waiver does not extend to

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Timothy C. Brightbill, *Trade Law and Competi-*  
*7 L. & POL'Y IN INT'L BUS.* 937, 939 (1996)  
...allacious allotment of resources and leads to  
...een two companies). Cross-subsidization oc-  
...ducer utilizes supracompetitive profits from  
...nsufficient profits (or losses) of the subsidized  
...return on funds invested is inadequate, and  
...ness" mode. *Id.* See John Temple Lang, *Defin-*  
*ies to Supply Competitors and Access to Essential*  
(1994) (explaining that cross-subsidization is  
...ged during course of economic competition  
...charged during non-competitive period and

...holding that nothing in language of Lomé IV  
...d).

...that wording of Lomé IV is unambiguous). See

...t difficult to incorporate GATT Article XIII  
...rpreting waivers, strict regulations of waivers  
...omé waiver, and GATT's limited experience  
...er Article XIII).

Article XIII according to the AB.

The AB upheld the Panel's finding that the non-discrimination provisions in GATT Article XIII apply to relevant EU regimes, regardless of whether the regime is one that controls the importation, or whether it simply existed.<sup>256</sup> The AB reasoned that the fact that banana imports regardless of how they are controlled. Otherwise, the purpose of a non-discrimination provision is easily defeated if such a provision could be avoided simply by that a Member State created.<sup>257</sup> The AB found that Article I(1) and XIII apply to the provisions of the Lomé convention, regardless of whether bananas or the basis for imposing

## 2. EU REFORMS

Following the WTO's 1997 ruling, the EU proposed to modify its banana regime in conformity with the single European market goal. In 1998, the EU proposed to create a new regime that distinguished between the EU, the traditional ACP suppliers, and Latin America. The EU's 1998 proposal would increase the EU's quota to 857,700 tons and the Latin American quota to 2,200,000 tons. The EU's 1998 proposal would have a reduced tariff duty of 10% for the EU, a ECU765 per ton duty for every other country, and the EU's quota would now be for the EU. The EU, therefore, proposed EU

255. *See id.* (holding that although article XIII and article I(1) are separate provisions, their relationship does not necessarily preclude an automatic waiver from article XIII obligations).

256. *Id.* para. 191.

257. *See id.* para. 190 (commenting that the AB's interpretation of GATT's non-discrimination provisions and the fact that those provisions only applied within regimes created by the EU).

258. *Id.* para. 191.

259. *See* GODFREY, *supra* note 172 (commenting that the EU's reform is supported by proponents for Latin American countries).

Ecuador noted the elimination of the ACP allotment for traditional bananas. It also noted there was no longer a quota allotted to non-traditional bananas. Ecuador can enter the EU duty-free regime without maintaining third country quotas; in fact, the quota for these bananas had been eliminated.<sup>267</sup> There were no longer country-specific quotas for non-traditional suppliers.<sup>268</sup>

### Proceedings

Ecuador, Guatemala, Honduras, Mexico and Costa Rica jointly and severally, requested the DSB to implement the DSB's recommendations under the current regime.<sup>269</sup> One month later the parties reached an impasse.<sup>270</sup> On October 1, 1998, Ecuador requested to renew consultations. Consultations were held ten days later and on October 11, 1998.<sup>271</sup> Finally, on December 18, 1998,

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*Panel Report for the Importation, Sale and Distribution of Bananas*, Report of the Panel, WT/DS27/RW/ECU (Panel Report) (stating revised regime in question 9 with regard to following amendments: EC Regulation 404/93 EEC Regulation 2362, which stipulates a quota of 240,748 tons (04/93).

for an increase in traditional ACP bananas allotment. Traditional bananas are limited to 240,748 tons or 240,748 metric tons (quota). Although the net weight of the Latin American and Caribbean (LAC) bananas in the EC, under Regulation 1637, allots an additional autonomous tariff quota. *Id.* at 3.

consultations were held on September 17, 1998).

consultations were held between EU and Ecuador on No-

Ecuador requested that the original panel be dissolved and the implementation of the DSU Panel convened on January 12, 1999. The Panel was convened on April 6, 1999.<sup>274</sup>

a. Arguments

Ecuador challenged the revised panel's findings of consistency with GATT Articles I and III. The original panel held that the AB's findings were modified by the AB.<sup>276</sup> Ecuador argued that the AB should provide the EU with more explanation of its findings. With its rulings and recommendations, the Panel rejected Ecuador's claim that the AB's findings complied with the Panel's 1997 ruling.

273. *See id.* (requesting examination of the panel's findings pursuant to article 21(5) of DSU); *see also* DSB Report, at 10.

5. Where there is disagreement as to the consistency of the agreed agreement of measures taken to comply with the dispute and rulings such dispute shall be decided by the dispute settlement procedures, including the use of a special panel.

The panel shall circulate its report within 90 days of the matter to it. When the panel circulates its report within this time frame, it shall also provide reasons for the delay together with an estimate of when it will submit its report.

*Id.*

274. *Id.* at 3 (noting that under DSU Article 4.2, any Member having a substantial interest in the matter shall have an opportunity to be heard by the panel. These submissions shall also be given due consideration and be reflected in the panel report.)

275. *See id.* at 10 (asserting that revised panel's findings violated GATS Articles 2 and 17). Ecuador argued that the AB's findings obtained import license on conditions as favorable as those of the EU.

276. *Id.* at 10.

amount as the total sum of the pre-ACP country allocations given before the revised system, the 857,700 ton was added to traditional ACP countries as a result. The Panel asserted that the allocation still remained at the same level before 1991 because, in the revised system, the supplier is allowed to ship 857,000 tons. Ecuador argued that, without individual allocations, the revised regime exceeded the scope of Article I.<sup>283</sup>

the non-traditional banana tariffs and the Lomé waiver.<sup>284</sup> Under the revised regime, the duty-free exports were eliminated and the tariff was increased to EUR200 per ton.<sup>285</sup> The Panel's decision that the EU was not providing a quota preference, did not bestow a more favorable treatment than the preferences under their previous regime. The EU's revised regime with the ACP countries was not more favorable than under the Lomé IV and according to previous DSB

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1 AB already ruled that allocations exceeded

inconsistencies could not be remedied by current allocations (to traditional suppliers). Ecuador noted that Lomé IV limited exports to that country's pre-1991 level. If the traditional suppliers would lose access to the market, they would be forced to buy from the more efficient and cheaper suppliers.

Justifiable to expand preferences from old system (Lomé IV and Lomé waiver justifies revised tariffs).

7 AB's rationale that other tariff preferences were not more favorable than Lomé IV to justify its insertion of similar, but more favorable (Lomé IV).



The EU argued that Protocol provide duty free access for all tra EU asserted the AB held that pre permitted traditional ACP bana quota.<sup>289</sup> Therefore, according 857,700 tons was within the Lomé

Concerning non-traditional that the AB never established a the EU could grant to non-tradit The AB only had to determine mented by the EU were necessar since the AB previously held 168(2) (a) (ii) of Lomé IV allowed from which to choose.<sup>292</sup> Article not prescribe a limit on volume products imported beyond the a the other Latin American countr its power, granted by Lomé IV, b cap on duty-free imports and the ence for imports above the quo elimination of the cap did not go Article 168 and that the increase was only done to balance what it ton cap.<sup>295</sup> According to the E

288. *Id.* at 11 (arguing that duty-free tr under Article 168(2)(a)(ii) and therefore, that Lomé prescribed).

289. *See id.* (arguing that it was justified tional ACP bananas based on AB Report).

290. *Id.* *See id.* at 81 (arguing that its 952,939 tons, due to an extra 100,000 tons f be factored into coming up with pre-1991 b volume, the EU still feels that the export vol

291. *See id.* at 14 (explaining that 92,0 indicate upper limit for non-traditional bana

292. *See id.* (stating that AB had to deter prescribed under Article 168(2) (a) (ii)).

293. *See id.* (arguing that Lomé cover

...a, duty free, to additional 10%  
... were allowed, preferentially, to  
... The revised regime maintained a  
... Ecuador felt offered more favorable  
... bananas.<sup>299</sup> Ecuador argued that  
... of a group of countries, even  
... such favoritism towards a single  
... Article XIII(1).<sup>300</sup> Ecuador argued  
... the original Panel, did not allow the  
... non-substantial suppliers, while not

... asserted that the EU violated Ar-  
... that trade distribution must ap-  
... the portion of shares that Member  
... of such trade preferences or  
... asserted that the EU banana re-  
... of Article XIII(2) (d), which stipu-  
... g suppliers of any product must be  
... d during a previous representative  
... ors that affected or are presently  
... e EU used the period of 1994 to

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...me aggravated problems with previous regime

... had not changed from previous regime).  
... Ecuador's allocation under revised regime was  
... trend of Ecuador's exports and that Ecuador  
... (which is beyond EU market).

... J allocated individual shares to Costa Rica and  
... d to Nicaragua and Venezuela, both non-sub-  
... have specific allocation and was relegated into

... respective share is very limited to what it would  
... r cited proof that its share of the EU market  
... d what it is presently allocated under the EU

Article 13(2) (d) states:

...ated among supplying countries the con-

1996 to devise its allocations to the traditional banana category.<sup>304</sup> As the BFA and the licensing system period; thus 1994 to 1996 was not Article XIII(2)(d).<sup>305</sup> Since using mine best ever allocation could Ecuador argued the older the in tive that information would be o nana markets.<sup>306</sup>

In an answer to Ecuador's a XIII, the EU asserted several def under Article XIII, the 857,700 exports falls outside of the MFN Ecuador should not have a stake in traditional ACP quota was an upp erences for this kind of import.<sup>306</sup> elimination of the allotments t

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tracting party applying the restriction to the allocation of shares in the qu having a substantial interest in supp in which this method is not reasona concerned shall allot to contracting supplying the product shares based such contracting parties during a p total quantity or value of imports of of any special factors which may h trade in the product. No conditi which would prevent any contracti of any such total quantity or value w importation being made within any may relate.

*Id.*

304. *Id.*

305. *Id.* at 23 (arguing that allocation b high, it could not be justified under GATT a Ecuador and other countries was applied to would get lower share whereas respective sha tries would increase). Ecuador reasoned tha share allotment could be formulated based tion to a general conformity under article X

306. *See id.* at 23 (noting that because pr

Article XIII is prohibited based on the  
aimed, therefore, to be justified in  
n.<sup>313</sup> In addition, the EU claimed  
collective allocation on the years 1994  
this time period was the most recent  
<sup>314</sup>

## Holding

Article XIII claims, the Panel ruled  
permit on traditional ACP exports ap-  
proportion, the Panel held that there  
quotas to count against the tariff  
clause.<sup>316</sup> Based on prior rulings,  
fundamental principle, under Article  
products be treated equally, regardless of  
Member States classified the im-  
port rulings that Lomé IV did not ex-  
istencies that existed under Arti-  
cle Lomé.<sup>318</sup> The Panel held that

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import mandates it to provide collective allocation

1994-1996 period was most favorable to Ecuador  
and that data from 1997 was available, but it was  
(drafted).

because tariff quota is generally defined as quan-  
tity). Panel also held that GATT article XIII  
III(5). Article XIII(5) states that "[t]he provi-  
sion of a tariff quota instituted or maintained by any con-  
tracting party, the principles of this Article shall also extend

Member state could avoid non-discrimination  
requirements for implanting import restrictions or  
measures for non-discrimination provisions).

ACP suppliers had access to another quota once they exhausted their quota, non-substantial suppliers had no access to another quota once they depleted their MFA quota. This is unfair.<sup>319</sup>

According to the Panel, countries with substantial suppliers were inconsistent with Article XIII(2). The Panel held that although the use of quotas is generally prohibited, the EU should be allowed to impose restrictions, where it is prohibited, if the measure is that is least disruptive to trade.<sup>321</sup> The Panel allocated quotas based on the amount of exports that would have been expected in the absence of the restrictions.<sup>322</sup> The Panel required the use of a period that is recent and undistorted by the measure to determine the proper allocation of quotas. A representative period of 1994-1996 was used. When this was in effect, the Panel held this was a representative period upon which to base the tenets of Article XIII.<sup>324</sup>

Under Article I, the 857,700 tons of Lomé IV were covered within the scope of the Lomé IV agreement based on pre-1991 best ever export performance. Lomé IV agreement asserting that Lomé IV requirement that Lomé IV requirement that the 857,700 tons was not within

319. *See id.* at 73 (arguing that non-substantial suppliers had access to another tariff quota once they used up their allocated quota, but that non-substantial suppliers do not exist).

320. *Id.* at 74.

321. *Id.* at 75.

322. GATT art. XIII(2).

323. 1999 Panel Report, at 75. *See id.* at 75 (arguing that where relevant market is restricted, data are used, where relevant market is restricted, Article XIII(2)(d)).

324. *Id.* at 77-78 (holding that before 1994 port regimes where some states applied import or duty-free systems; therefore anytime before 1994 period). Under Article XIII, even where import

R200 per ton.<sup>328</sup>

the allocations, the Panel believed the allocation of shared to traditional 1991 best ever volumes, but it did not allow ACP suppliers to exceed that volume.<sup>329</sup> The Panel held that the existing allocation would allow more substantial and consistent allocations to exceed the pre-1991 best ever volumes, an advantage over the less substantial allocation of shared to traditional collective allocation went beyond the MFN allocation. It frequently violate Article I(1).<sup>331</sup>

For traditional imports, the Panel looked to the MFN allocation. The Panel reasoned that the language of Article I(1) requires favorable treatment for all ACP suppliers. The MFN allocation given to third country bananas was more favorable than the MFN allocation to ACP bananas.<sup>333</sup> According to the Panel, the MFN allocation of 100 tons of non-traditional ACP bananas per ton tariff charged to be more favorable than the MFN allocation of the statute.<sup>334</sup>

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All violations nullify or impair benefits allowed under the MFN allocation must be brought into conformity within tenets of Article I(1).

The AB's opinion that Lomé specifically refers to Article I(1) (MFN allocation).

Article 168(2)(a)(ii).

The Panel had to determine whether this allocation was consistent with the AB holding that Article 168 did not require favorable treatment. *Id.* at 83. Because the Panel found that 90,000 tons without any duty was inconsistent with the MFN allocation, the EU should be allowed some leeway to create a more favorable allocation. *Id.* at 83-84. The idea that non-traditional allocations within the "other" category under the MFN allocation is inconsistent with Article 168 according to the Panel. *Id.* at 84. Therefore, the Lomé IV. *Id.*

The Panel also ruled on Ecu tariff of non-traditional ACP imports beyond the scope of Lomé IV.<sup>335</sup> Definition of what constitutes a necessary treatment for all ACP bananas, the quota tariff to EUR200 per ton and elimination of the 90,000 ton volume conceivable.<sup>336</sup> With the 1999 Panel the United States permission toatory sanction against the EU.<sup>337</sup>

## 2. EU R

In November of 1999, the U rejected another EU proposal.<sup>338</sup> EU to move into a tariff-only Under this proposed tariff qu 2,553,000 ton quota with a tariff be open to all suppliers.<sup>340</sup> Under waiver, the ACP suppliers would EU market.<sup>341</sup>

## 3. Recent D

On, May 3, 2000 and May Council approved a series of measures both developing countries and le measures call for meetings to find economic concerns of these unde meetings and any resulting resolu

335. *Id.* at 85.

336. *Id.* at 84. *See id.* at 104 (holding violated GATS Article 2 and 17).

337. *See* Joseph Kahn, *U.S. Wins Round* 23, 1999, at C2 (noting sanction as compensation in Latin America as consequence of banana

338. *U.S., Latin America Reject EU Banan* 17, 1999, at <http://www.sluonestop.com/news>

339. *See id.* (noting that this move would

er members, will create and imple-  
quota free measures that will be  
treaty regulations and domestic  
an LDC origin.<sup>346</sup>

European Commission proposed a  
ting banana regime.<sup>347</sup> The new  
would allocate import licenses on a

The new system would be tempo-  
2001, Chiquita filed suit, against  
ana regime is illegal.<sup>350</sup> Chiquita  
001 that it may have to seek Chap-  
as a result of the on-going banana

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s War, 31 McGEORGE L. REV. 839, 950 (2000)  
inton signed into law Trade and Development  
ending GSP to extend duty-free treatment to  
rican countries); *see also* Trade and Develop-  
114 Stat. 251

n Much Better Shape with New Agreements, May 3,  
ws\_e/spmm\_e/spmm28\_e.htm (commenting

poses Compromise in Dispute With Washington Over  
, at A21.

sitory system would be replaced by tariff-only  
April 2001. *Id.*

astock, *Chiquita Sues EC Over Limitations on Ba-*  
01, at B5 (stating that Chiquita has filed suit  
ana imports). The case has been filed in the  
S.\$525,000,000 and reserves the right to seek  
ana regime's existence. *Id.*

resident and Chief Operating Officer, Steven G.  
for the money. *Id.* Chiquita wanted the Euro-  
a WTO-compatible regime. *Id.* *But see id.* (ex-  
's view that Chiquita's financial woes are not  
ven that Chiquita's competitors like Dole and  
ancial shape). Dole also has filed seven sepa-  
irst Instance seeking damages because of the



Neither side to the banana decision has proposed a solution that will serve to please all. A number of alternative regimes have been proposed. In addition, alternative regimes have been proposed to the aforementioned proposal to maintain the quota regime pending the completion of a trade liberalization scheme.<sup>353</sup> These options include: (1) the status quo;<sup>354</sup> (2) the removal of Lomé trade preferences; (3) a financial aid package only;<sup>355</sup> (4) to extend reciprocity of open market access to Lomé after a specified amount of time; and (5) to maintain Lomé.<sup>357</sup>

352. See generally Bhala, *supra* note 345, for a discussion of the various options that have not yet been reached in dispute).

353. See generally U.S., *Latin America Rejection of the WTO Dispute Settlement Body's Decision*, NEWS, Nov. 17, 1999, at <http://www.sluones.com> (reporting the U.S. move to tariff-only system by 2006).

354. See Sheppard, *supra* note 14, at 92. See also *RELATIONS BETWEEN THE EUROPEAN UNION AND THE CARIBBEAN COUNTRIES IN THE 21ST CENTURY—CHALLENGES AND OPTIONS FOR A PARTNERSHIP TOWARDS A NEW PARTNERSHIP* (1996) [hereinafter "Sheppard"] (discussing that one obvious option would be to maintain the status quo). A renewable waiver would still be needed to maintain the status quo for countries differentiated treatment. GREEN I. (discussing the advantages and disadvantages to the status quo have been discussed in the parties' arguments. *Id.*

355. See Sheppard, *supra* note 14, at 92. See also *RELATIONS BETWEEN THE EUROPEAN UNION AND THE CARIBBEAN COUNTRIES IN THE 21ST CENTURY—CHALLENGES AND OPTIONS FOR A PARTNERSHIP TOWARDS A NEW PARTNERSHIP* (1996) [hereinafter "Sheppard"] (discussing that one obvious option would be to maintain the status quo). A renewable waiver would still be needed to maintain the status quo for countries differentiated treatment. GREEN I. (discussing the advantages and disadvantages to the status quo have been discussed in the parties' arguments. *Id.*

356. See Sheppard, *supra* note 14, at 93. See also *RELATIONS BETWEEN THE EUROPEAN UNION AND THE CARIBBEAN COUNTRIES IN THE 21ST CENTURY—CHALLENGES AND OPTIONS FOR A PARTNERSHIP TOWARDS A NEW PARTNERSHIP* (1996) [hereinafter "Sheppard"] (discussing that one obvious option would be to maintain the status quo). A renewable waiver would still be needed to maintain the status quo for countries differentiated treatment. GREEN I. (discussing the advantages and disadvantages to the status quo have been discussed in the parties' arguments. *Id.*

357. See Sheppard, *supra* note 14, at 93. See also *RELATIONS BETWEEN THE EUROPEAN UNION AND THE CARIBBEAN COUNTRIES IN THE 21ST CENTURY—CHALLENGES AND OPTIONS FOR A PARTNERSHIP TOWARDS A NEW PARTNERSHIP* (1996) [hereinafter "Sheppard"] (discussing that one obvious option would be to maintain the status quo). A renewable waiver would still be needed to maintain the status quo for countries differentiated treatment. GREEN I. (discussing the advantages and disadvantages to the status quo have been discussed in the parties' arguments. *Id.*

er Article I *only*, it cannot be ap-  
nder Article XIII exist.<sup>358</sup> Article  
reatment of *all* contracting parties,  
l, with regard to the allocation of  
ducts.<sup>359</sup> Based on the Panel's ra-  
ime's non-conformity with GATT  
not mean that the EU's goals and  
ound. The problem with this dis-  
and, it appears, has been ignored

### *Restrictions versus Tariffs*

ed in their 1997 and 1999 rulings,  
uncomfortable with the idea of  
use of quantitative restrictions as  
an important sub-issue to this dis-  
orms of import restrictions, GATT

a licensing system and a tariff sys-  
to GATT, quantitative restrictions  
g system.<sup>361</sup> As a result, the use of  
erally prohibited under GATT Ar-

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ll as, focus and strengthen their political com-  
e, *supra* (noting that regionalism carries risks;  
multilateralism will weaken as governments  
m alone, without complementary multilateral  
system, where rich countries are in the sphere  
n the periphery. Moore, *supra*. While region-  
cally and economically, and complement the  
for a multilateral system. *Id.*

ompanying text (explaining reason that Lomé

GATT Article XIII).

nying text (explaining advantages and disad-

disadvantages of quantitative restrictions).

ticle XI with explicit exceptions.

The problem with prohibiting quantitative restrictions in the EU banana regime is that ACP farmers are not self-sufficient enough to produce their own quota tem.<sup>363</sup> With a quota cap, the ACPs cannot export into the market. A tariff-only system would be more consistent with bananas—more so with Latin American bananas. As a result, banana prices would decrease. Latin American bananas are produced by small farmers and exporters and the United States and other developed countries quickly and thus benefit from a tariff-only system. Independent ACP farmers, meanwhile, would be forced to sell at a greater expense and thus, export at lower banana prices.<sup>365</sup> Although preferential tariff treatment of quantitative restrictions is generally more consistent with quantitative restrictions allow ACPs to export all. Since the ACPs stand to lose their market share to producers because of the ACPs' high production costs, quantitative restrictions allow ACPs the opportunity to realize normal profits.<sup>366</sup>

#### B. *The Impact of*

Statistically, Lomé IV has been shown to be a success. The evidence is still warranted.<sup>367</sup> Many critics believe that the developing countries have benefited from Lomé IV, while various European countries serve their individual interests, and the EU as a whole community.<sup>368</sup> Critics believe that the Lomé IV is based upon the EU and the EU comm

362. *Id.*

363. See *supra* note 172 and accompanying text (discussing quantitative restrictions under EU bananas regime).

364. See *supra* note 176 and accompanying text (discussing banana production advantages).

365. See *supra* note 175 (stating that ACPs have higher production costs as Latin American production costs).

366. *Id.*

and so.

al evidence that points to the ac-  
Lomé IV, critics attribute several ab-  
decline.<sup>372</sup> Although there are  
tiveness, adverse sociological, po-  
nences will follow if the EU elimi-  
t.<sup>373</sup> These adverse consequences  
would lead to imminent, major,  
the tourism industry, another ma-  
of the Caribbean countries, would  
rse consequences include the in-  
bts, the ACPs' inability to pay off  
the drug trade by displaced, un-  
gration, which many U.S. oppo-  
S. economy.<sup>376</sup> Suggestions have  
y their exports in order to acquire  
ge. Many ACPs cannot simply di-  
to have a competitive advantage  
pective climate, terrain, and land

ppear to justify its necessity in a  
es of international development  
ally developed as a law of coexis-

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ompanying text (stating that ACPs should diver-  
velop market comparative advantage).

ompanying text (stating reasons for Lomé's

ompanying text (explaining ACPs' view of conse-  
of Lomé preferences).

why Caribbean nations cannot diversify their  
principle commodity).

ing text (explaining concept of international

tence between separate, but equal reciprocity.<sup>379</sup> With the devastation of cooperation among European nations, the development of international organizations would foster the gradual formation of a new law of international cooperation, and states would act on a multilateral level.<sup>381</sup> States would adhere to rules based on a common interest of the international community, and the interests of the state's citizens.<sup>382</sup> Lomé IV advances a new development law, which evolved from a concern about the state's affairs to a concern about the state's citizens to attain a higher standard of living and development.

Not every Member State is equally affected, especially speaking. Therefore, a state's interests under the law may not be as easily satisfied. For countries that were former European colonies, their independence with the last few decades, and the countries are still in the process of development, they are participants in the process of development. They adjust their economies in order to be able to competitively compete with countries that have developed in the past century. In order to attain a higher standard of living, such as elements found in the Lomé IV, it is very necessary. Lomé IV and its successor provide developing countries a chance to participate in the global sphere at some reasonable level.

Detractors against the EU ban on the MFN clause argue that the EU ban on the MFN clause is essential treatment under Lomé IV and its successor. The MFN clause and only fosters a higher standard of living. They also argue that the EU ban on the MFN clause is essential treatment under Lomé IV and its successor.

379. See *supra* note 5 and accompanying text (discussing the MFN clause in international law).

380. See *supra* notes 102-04 and accompanying text (discussing the MFN clause in the revitalization plan).

381. See *supra* note 4 and accompanying text (discussing the MFN clause in international law).

certainty to compete effectively. The right in competitive trade still exists, but it is not absolute. States are expected to grant different rights and obligations to other States based on that state's development progress thus far.<sup>384</sup> International law should cooperate with one another to promote economic growth, especially for less

every country has the right to develop its own economic system whether through free trade or some other form of equal treatment. The MFN clause is not legally obligatory under international law. The MFN clause is a general rule, but the MFN clause is a general rule and not a rule under international law, which supports the principle of equality in the treatment of all countries. The MFN clause does not override the principles espoused in the MFN clause. In the 21st century, preferential trade agreements where it seeks to rectify and balance the trade situation. Therefore, the principle of MFN is appropriate in the case at bar and in the case of MFN. However valid the MFN principle of trade relations among more developed countries, indeed, it is not valid for less developed countries of vastly disparate eco-

logical resolution to the banana dispute. The Lomé waiver for another five years to the ACPs are ready to enter into re-

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ing text (discussing how international law applies under international development law).  
ing text (explaining basic concept of MFN

gionalized, cooperative FTAs with each region would tailor a unique plan for the ACPs, while establishing a system in the language of GATT.<sup>387</sup> The request for a Lomé waiver until a transition to a system not *every* ACP nation is ready to accept a transition based on that country's particular political scheme.<sup>388</sup>

#### CONCLUSION

The banana dispute has evolved into a controversial issue that may or may not have a resolution. Or, does such a resolution exist? Or, do we want to ignore it in order to pursue other goals? Social development and cooperation require patience, and understanding—terms that are often used to dissect complex issues in international economics. But in fact, this type of dispute is a bar. Given the predicted consequences, this is an example of the most complex dispute brought to the forefront. Although the developments in the dispute only suggest progress, it must be remembered that a guarantee that economic change will benefit third-world nations will be immediate.

Much of the world embraces globalization. In the wake of globalization and development, the explicit rules of the popular Western economics show a willingness to assist those countries that are developing and not advanced, but, at one point, it is vital to the reality of globalization that the world's present economic superpowers...

Was there ever a true or false globalization? Or is globalization a fumbled attempt at a remorseful...

ions, regionalism, perhaps under the best way to go. Countries can either because of their shared geo-interests, while perhaps, compete the trading bloc, on a less intense this a more profound degree of will be preserved, but that degree of the micro-economic level. There is but one must be found soon.

not be predicted at this point—if the banana war. The real losers is to this dispute. The EU, the WTO should be criticized for letting The developing and least developed much stuck in the middle of this fight, out of all parties involved, become or a genuine advocate to champion. We have some choices here: let everyone has a chance to walk away; sectionalize the trading field to compete with their respective equals to make competitors too much; or reduce economic headache and embarrassment will be gained from such non-coop-