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Banana Wars: Challenges to the European Union's Banana Regime

In April 1999, a six-year-old dispute between the United States and the European Union over the latter's banana import policies erupted into a trade war. The European banana trade policies had been under attack since 1993, when the European Union instituted its first single-market agricultural regime. According to the European Union, the banana regime, which granted preferential treatment to fruit imported from former colonies, was necessary to honor existing trade obligations to the ex-colonies and to help them to compete against the cheaper Latin American bananas that dominated the world marketplace. But according to the United States and a group of Central and South American banana-producing countries, the complex import system discriminated against Latin American bananas and US and Latin American distribution companies in violation of international trade rules.

Latin American banana growers brought the first challenges against the regime. But by 1994, following a request by the US multinational Chiquita Brands International, Inc. and the Hawaii Banana Industry Association, the Office of the United States Trade Representative (USTR) had entered the fray, ultimately bringing the case before the recently formed World Trade Organization (WTO). The resultant WTO ruling favoring the United

Banana Wars: Challenges to the European Union's Banana Regime is an edited and revised version of the case with the same name originally written by Susan Rosegrant, a case writer at the Case Program at the John F. Kennedy School of Government. For copies or permission to reproduce the unabridged case please refer to www.ksgcase.harvard.edu or send a written request to Case Program, John F. Kennedy School of Government, Harvard University, 79 John F. Kennedy Street, Cambridge, MA 02138.

States and its Latin American allies did not end the dispute, however. When the European Union adopted a modified regime in 1998, US and Latin American critics insisted that the new version was no better than the old. The European Union's continued refusal to discuss further changes led to threats of US retaliation, followed by EU countercharges that US actions were themselves a violation of international trade rules. In April 1999, immediately after two simultaneous WTO rulings backing the US position, the United States brought punitive tariffs against almost $200 million in EU exports.

The sanctions did not bring a quick or easy resolution. Over the next two years, as the United States and the European Union struggled to reach a settlement, the banana dispute became intertwined with other trade disagreements, and political repercussions, both domestic and international, grew. The uproar raised questions about international obligations, interpretations of WTO dispute settlement mechanisms, and even whether the banana dispute was a case the United States ever should have fought at all.

A Fruit of Historic Importance

That policies regulating banana imports could be both so complex and apparently worth fighting for was actually not surprising, given the economic and political importance of the fruit within the European Union and throughout the developing world. Although each country had a different set of interests at stake, for most EU members, bananas had taken on a significance that went beyond a mere agricultural commodity.

The banana industry itself was unusual, having evolved to include just a handful of major companies that operated with a high degree of vertical integration. Because the fruit was so fragile, not only easily damaged by bad weather and disease while growing but also extremely perishable after harvest, the pioneers of the banana trade—particularly in Latin America—had become experts in the entire process, from preparing the land, managing the workers, and growing the fruit to transporting the time-sensitive cargo from equatorial growing regions to key consumer markets in Europe, the United States, and Asia. With banana landholdings in some cases dating back to the 1800s, capital-intensive communications and transportation networks already in place, and marketing relationships well-established, a mere six companies had come to dominate the industry. In addition to the US multinationals Chiquita Brands International and Dole Food Co., Inc., the industry's lead companies were Geest Ltd. of the United Kingdom and Fyffes Ltd. of Ireland, Ecuador's Noboa Group, and Fresh Del Monte Produce, Inc., also of the United States.

In contrast with the relatively straightforward framework supporting the production of bananas, the fruit's distribution and marketing in some instances had become intertwined with political and economic agendas.

Colonial powers such as Britain and France, for example, had encouraged banana production in certain of their Caribbean and African colonies for decades, in part so that they would not to have to rely on imports of the Latin American "dollar bananas" sold by the dominant US multinationals, Chiquita and Dole.[1] After the colonies became independent, they continued to get special access for their bananas under the Lomé Convention, an agreement forged in 1975 whereby what is now the European Union provided aid, duty-free access, and other forms of commercial assistance to its African, Caribbean, and Pacific (ACP) former colonies.[2] EU representatives say that such support was necessary, because the 12 traditional banana-producing ACP countries could not grow the fruit as cheaply as their Latin American counterparts or compete effectively in the open market.[3] The trade with ACP countries was substantial, making up about 20 percent of the EU banana market.

Other EU members had very different concerns, however. Some countries had their own banana production to protect, and did not want cheaper imports to harm domestic growers and traders. Such domestic production supplied almost another 20 percent of EU consumption. Still other countries wanted banana imports to be entirely free of restrictions. For example, Germany, one of the world's leaders in per capita banana consumption and the largest consumer of the fruit in the European Union, saw bananas as a symbol of postwar prosperity and rejected all barriers to its free trade.[4] By 1992, the strong demand for dollar bananas in Germany and other more northern European nations had given Latin American bananas a 60 percent share of the total EU market, thereby helping to propel them to a 67 percent share of the world market (see table 2.1 for banana exports by country in 1991 and 1992).

A jumble of trade measures had resulted from these varied priorities. Spain allowed no imports, relying on domestic production from the Canary Islands. France bought most of its bananas from its territories of Guadeloupe and Martinique, and also gave special preference to Côte d'Ivoire and Cameroon, its former colonies. The United Kingdom was essentially closed to Latin American bananas, buying instead from its former colonies, Jamaica, the Windward Islands, Belize, and Suriname. By

1. Central and South American bananas became known as "dollar bananas" because historically most were produced and marketed by US companies.

2. As of 1998, there were 70 ACP members. Between 1967 and 1993, the European Union (the name used here throughout, for convenience) was known as the European Community.

3. The main suppliers of ACP bananas to the European Union were Cameroon, Côte d'Ivoire, St. Lucia, Jamaica, Belize, and Dominica. Principal Latin American banana suppliers were Costa Rica, Ecuador, Colombia, Panama, and Honduras.

4. As chancellor, Helmut Kohl brought bunches of bananas with him to the former East Germany during the postreunification campaign as a sign of the wealth he pledged to bring to the recently united country.

Table 2.1 World trade in bananas: Exports, 1991–92

	Volume (thousands of metric tons)				**Value** (millions of dollars)			
Region	**1991**	**Percent of total**	**1992**	**Percent of total**	**1991**	**Percent of total**	**1992**	**Percent of total**
World	10,513	100	10,765	100	3,110	100	3,122	100
Latin America	8,036	77	8,188	76	2,132	69	2,089	69
Ecuador	2,714	26	2,557	24	716	23	655	21
Costa Rica	1,550	15	1,769	16	384	12	495	16
Colombia	1,473	14	1,500	14	405	13	400	13
Honduras	727	7	800	7	315	10	203	7
Panama	707	7	719	7	87	3	91	3
Guatemala	378	4	446	4	85	3	113	4
Mexico	238	2	180	2	81	3	84	3
Other	249	2	217	2	59	2	48	2
ACP	612	6	715	7	291	9	312	10
European Union	176	2	210	2	121	4	139	4
EU territories	241	2	301	3	117	4	165	5
United States	356	3	378	4	198	6	190	6
Asia (non-ACP)	1,087	10	970	9	250	8	226	7
All other	5	0	3	0	1	0	1	0

ACP = African, Caribbean, and Pacific countries

Note: Percentage figures may not add to 100 percent because of rounding.

Source: UNCTAD, *Commodity Yearbook*, 1994.

contrast, Germany, with no banana-producing former colonies and no domestic production, had no tariffs or restrictions on imports, and Belgium, Denmark, Luxembourg, Ireland, and the Netherlands imposed only a 20 percent tariff on Latin American bananas.

Strong consumer preferences that had developed over time further reinforced these historic trading patterns. Although most of the imports were the same species—Cavendish bananas—those from the Caribbean were generally more curved and smaller than dollar bananas, often half the size. Caribbean bananas were the favored fruit of the average British shopper, who claimed that their diminutive size made them cheaper on a per banana basis and easier to slip into a lunchbox. But German consumers preferred dollar bananas, and most German grocers stocked only the larger, more uniform fruit.

In 1992, as the European Union prepared to institute a single market for trade the following year, representatives of the 12 EU members met to transform the fragmented set of trade arrangements into a unified banana regime.[5] Because the banana trade system was so controversial, it was the last item addressed. Not surprisingly, given the mix of concerns involved, negotiations within the European Commission (the European Union's executive body and the lead agency in this effort) dragged on for months, with particular clashes between Germany's free trade position and the insistence of France and Britain on honoring the Lomé Convention—the agreement designed, in part, to increase trade between ACP countries and the European Union by providing preferential access to ACP products.

In fact, the Fourth Lomé Convention, signed in December 1989, had included a separate banana protocol providing a guarantee by the European Union on behalf of its member states that ACP banana exporters would not be harmed by the shift from member-state regimes to a single market regime. Countries such as France and Britain, though, claimed a sense of responsibility toward their former colonies that went beyond mere legal obligations to encompass an almost moral duty to protect them and ensure their economic stability.

As the debate in the European Union continued, Latin American and US interests closely followed the evolving negotiations. The European Union was the world's largest importer of bananas in 1992, purchasing about 48 percent of the more than $5 billion global total (for a breakdown of 1991–92 world banana imports by country, see table 2.2). If the European Union followed the German model, the new regime could be a bonanza for both the producers and the marketers of Latin American bananas, as significant new markets opened for trade. On the other hand, a system modeled on the British or French approach, imposing restrictive measures EU-wide, could prove devastating for the dollar banana industry.

Unfortunately for US and Latin American interests, the new regime announced in December 1992 favored the latter pattern. Known as Regulation 404 (in full, Regulation (EEC) 404/93), it created a complex system of quotas and licenses that, according to US and Latin American critics, constituted serious barriers to entry in violation of international trade regulations. As the different sides staked out their positions, it was clear that the trade policies would face serious opposition. Probably few predicted that six years later, the controversy over the EU banana regime would still be unresolved.

5. Since the end of World War II, the European Community had been gradually moving toward a single market that would allow the free movement of goods, services, people, and capital without regard to country borders. Agricultural policy was the final area to be negotiated.

Table 2.2 World trade in bananas: Imports, 1991–92

	Volume (thousands of metric tons)				**Value** (millions of dollars)			
Region	**1991**	**Percent of total**	**1992**	**Percent of total**	**1991**	**Percent of total**	**1992**	**Percent of total**
World	10,095	100	10,443	100	5,229	100	5,132	100
United States	3,382	34	3,690	35	1,234	24	1,339	26
European Union	3,798	37	3,976	38	2,571	48	2,487	48
Germany	1,355	13	1,378	13	853	16	784	15
United Kingdom	489	5	545	5	384	7	418	8
France	503	5	533	5	424	8	418	8
Italy	574	6	475	5	370	7	273	5
Belgium-Luxembourg	206	2	302	3	107	2	144	3
Netherlands	148	1	201	2	77	1	109	2
Other	523	5	542	5	356	7	341	7
Japan	803	8	777	7	466	9	523	10
Other Asia	687	7	618	6	347	7	249	5
Latin America	317	3	377	4	63	1	83	2
All other	1,108	11	1,005	10	548	10	451	9

Note: Percentage figures may not add to 100 percent because of rounding.

Source: UNCTAD, *Commodity Yearbook*, 1994.

Regulation 404

The European Union enacted Regulation 404 in July 1993, for the first time establishing a single European market for bananas. Within this extremely complex regulation, US and Latin American critics focused on certain key aspects.

To begin with, the regime broke the EU market into three distinct sectors: domestic production, ACP bananas from the former colonies, and "third country"—essentially Latin American—bananas.[6] The provisions on subsidies for domestic production were within reason, observers say,

6. The actual sector designations were slightly more complicated, including within the category of third-country bananas an allowance for "nontraditional" ACP bananas—that is, ACP bananas imported in excess of historical levels, as well as bananas imported from ACP members that were not traditional suppliers.

and did not spur significant external challenges.[7] But US and Latin American industry representatives charged that the regulations governing ACP and Latin American bananas were highly discriminatory. ACP bananas, like domestic bananas, faced no duty: The European Union gave each of the 12 countries its own duty-free tariff quota based on its best export year up to 1991. These individual quotas totaled 857,700 metric tons, US officials say, well above what the countries as a group had ever exported to the European Union in any given year.

Even more troubling from the US and Latin American perspective were the tariff-rate quota (TRQ, the application of a reduced tariff rate for a specified quantity of imported goods) and the licensing restrictions imposed on third-country bananas. To limit the supply of Latin American bananas, the European Union set the TRQ at 2 million metric tons, with a tariff of 75 European currency units (ECU) per metric ton for bananas brought in under the main quota, and 822 ECU per metric ton for bananas in excess of the quota.[8] Because the tariff rate for bananas imported in excess of the quota was so high, the TRQ effectively limited imports to 2 million metric tons a year. According to US trade officials, this level would not only end the average 9 percent annual growth that Latin American banana imports to the European Union had enjoyed over the previous decade but would freeze imports at a level well below Latin America's existing 60 percent share of the EU market. In 1992, for example, Latin American countries had shipped more than 2.4 million metric tons of bananas to the European Union.

And the TRQ was just the beginning. The chunk of the EU market set aside for Latin American bananas was further segmented by a complex licensing system that created three categories of licensed importers and gave each group a specific percentage of the Latin American TRQ. Category A operators—historical traders of Latin American bananas, such as Chiquita, Dole, and Ecuador's Noboa Group—were assigned 66.5 percent of the volume. Category B operators—historical importers of ACP and EU bananas—got 30 percent, and Category C operators, the newcomers, received 3.5 percent.

According to EU representatives, the different importer categories worked hand in hand with the TRQ, providing a necessary cross-subsidy to ensure that ACP bananas made it to market. Caribbean bananas—in part because many were grown on small farms, as opposed to the large mechanized plantations common in Latin America—cost much more to harvest (up to $500 a ton versus $160 a ton in Latin America). But by

7. Domestic producers faced no tariffs and no access limitations, and they received some compensation for loss of income resulting from price reductions due to the banana regime.

8. To accommodate market growth, the European Union later increased the TRQ to 2.1 million metric tons in 1994 and 2.2 million metric tons in 1995.

granting Category B operators a guaranteed percentage of the cheaper Latin American production, the theory went, these operators could afford to sell the higher-cost ACP bananas. Without this edge, EU representatives argued, the quotas and tariff alone were not enough to make trade in ACP bananas profitable.

But according to US and Ecuadorian banana traders, who had historically dominated Latin American banana exports to the European Union, ACP farmers were not the sole—or necessarily even the principal—beneficiaries of the plan. For one thing, distributors of bananas grown in EU countries received half of the Category B licenses. Moreover, because most Category B operators were EU firms, such as Ireland's Fyffes and the United Kingdom's Geest, the licensing system effectively handed over to these EU firms almost a third of the Latin American volume previously marketed by US and Ecuadorian or other Latin American companies.[9] It therefore deprived US multinationals like Chiquita, which had already had their European access cut by the quota, of an additional share of the market. "The European Union just wrapped itself in the flag of the ACP," says one US trade official. "You'd never know that they were doing anything for their own farmers or for their own companies."

Moreover, the new licensing regime had yet another layer of classification. The Category A and B operators were divided into three further subfunctions. Within both A and B, 57 percent of licenses went to "primary importers" (companies such as Fyffes and Chiquita); 15 percent went to "secondary importers" (smaller companies handling customs clearance within the European Union that might or might not be affiliated with one of the primary importers); and 28 percent went to ripeners.[10] Typically, a country imposed a quota by distributing licenses to importers based on historical trading patterns. But in the view of US trade officials, the European Union's licensing regime created entirely new categories of operators with no historic precedents. The only justification for the new categories, critics said, was to build EU support for the regime, particularly in countries such as Germany that lacked primary operators or producers who could benefit from the other licensing controls. German ripeners who suddenly had been granted licenses to import bananas, for example, could either expand their businesses into importing or sell the licenses to a company like Chiquita.

According to US trade estimates, the licensing changes automatically transferred about 50 percent of US companies' EU business to EU and ACP firms that had never before distributed Latin American bananas. "There is

9. Geest later sold its banana business to a consortium that included Fyffes and the Windward Islands Banana Development and Exporting Companies.

10. In the United States, large supermarkets usually ripened their own bananas; in Europe, many stores relied on designated ripeners who stored the green bananas until they were ready for market.

the feeling," said one US trade specialist, "that the EU agriculture people are incapable of doing anything that isn't discriminatory." A chart prepared by the USTR comparing the tariff, quota, and licensing arrangements for EU, ACP, and Latin American bananas, appeared to support the claim (see appendix figure 2A.1).

A paper funded and published by the World Bank in December 1994 was almost equally critical, maintaining that the EU regime cost EU consumers an estimated $2.3 billion a year; shoppers in countries such as Germany, where trade had been unrestricted, were particularly hard-hit (Borrell 1994). Moreover, most of the so-called quota rents—the excess profits generated as the result of higher prices paid by consumers and others due to the restrictions on competition imposed by a quota system—were flowing not to the ACP banana producers but to the EU firms that were marketing ACP bananas. Either EU policymakers did not understand the impact of their policies, the report concluded, or they intended to "protect (and expand) the vested interests of EU-based marketing companies. This group is clearly the main beneficiary of the policy. EU consumers, other marketers and Latin American suppliers are clearly big losers" (Borrell 1994).

International Reactions

The international community did not accept the new EU regime without a fight. Just months before the European Union enacted Regulation 404, five banana-producing Latin American countries brought a challenge in the General Agreement on Tariffs and Trade (GATT) against the banana regimes of several individual EU member states, charging that they violated international trade rules. By bringing the GATT challenge when they did, Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela hoped to increase their chances of winning a subsequent case against the soon-to-be-implemented single-market regime. In fact, in June 1993, before the first GATT panel had even ruled on the original complaint, the same countries requested a second panel to evaluate the new regime going into effect the following month.

The Latin American countries were vindicated. In July, the first panel ruled that the former regimes were GATT-incompatible; a few months later, the second panel found that Regulation 404 violated the GATT by, among other things, giving a preferential tariff to ACP countries, imposing a tariff quota on Latin American producers whose overquota rate was above the tariff level that had been negotiated, and imposing licensing requirements that discriminated against new traders. But this victory for the Latin American complainants brought them little satisfaction, for the rulings had no teeth. Because GATT proceedings required a consensus, it was always possible for a losing party in a trade dispute (in this case the European Union) to block adoption of a panel report, a limitation—and in the minds of some, a flaw—that often transformed GATT rulings into diplomatic tools rather than legal proceedings.

US companies had not participated directly in the two GATT challenges. According to industry sources, the Latin American complainants had not wanted direct US involvement, fearing it would transform the case into a US versus EU fight. Instead, representatives of Chiquita and Dole had worked as advisors, providing assistance and support to their Latin American suppliers behind the scenes.

The US multinationals were also busy at home. In the months before Regulation 404 took effect, representatives of both companies met quietly with officials at the Office of the USTR, the government agency responsible for developing and coordinating US international trade policy, to discuss the possibility of filing a section 301 case. Section 301, created by Congress as part of the 1974 Trade Act, provided a formal mechanism by which companies that felt they were being harmed by discriminatory trade practices could ask the US government to intervene. If an investigation found that a country had imposed unfair trade measures, the USTR had the power under US law to retaliate in an amount equivalent to the damage estimated to have been done to US commerce. Either the USTR or a company could initiate a section 301 case, but a company typically would not ask for an investigation unless the USTR had indicated that it would accept the case.

According to one industry source, however, the USTR, which accepted only about 14 cases a year, made it clear that it was not interested. "You had the reality of a trade complaint that didn't necessarily strike one as being crucial to American interests," he admits. In particular, he says, the fact that the United States was not exporting bananas meant the complaint was not "automatically recognizable as something that needed the immediate attention and action of USTR."

The Framework Agreement

Although the USTR had not filed a formal complaint when the European Union first enacted Regulation 404, USTR Mickey Kantor began to speak out against the banana regime in January 1994. Kantor was particularly concerned by news that the European Union was trying to negotiate an agreement with the Latin American GATT complainants that would settle the banana dispute and make it unlikely that they would bring future complaints against the regime.

In March 1994, as the United States had feared, the European Union and four of the five Latin American countries announced a new framework agreement (of the original petitioners, only Guatemala refused to take part). The agreement, which the European Union was to institute in January 1995, provided two important concessions to the Latin American signatories.[11] First, each of the four received a set percentage of the third-country quota: 23.4 percent for Costa Rica, 21 percent for Colombia, 3 percent for Nicaragua, and 2 percent for Venezuela. Taken together, these new quotas represented almost half of the third-country market and, according to US trade officials, gave these countries a disproportionate share of the quota. In fact, US officials estimated that the non-framework Latin American countries—Ecuador, Guatemala, Honduras, and Mexico—lost 27 percent of their access to the EU market because of the double whammy of Regulation 404 and the agreement.

Second, the agreement created a system of export certificates that essentially mirrored the import certificates on the other side of the ocean. Category B operators—traders that sold ACP or EU bananas—did not need them. But Category A operators such as Chiquita now had to obtain these export licenses, usually buying them either from local producers or from government offices, in order to be eligible for import licenses for the EU market.

The agreement addressed many of the complaints of the framework countries. The quotas provided guaranteed access to the EU market, and the special export certificates provided a new form of revenue for local producers, since producers who had been granted more certificates than they needed could sell them to outside traders like Chiquita. "The EU was not willing to adopt the recommendations of the GATT panel, but they knew that they had to do something," explains Irene Arguedas, minister counselor for economic affairs at the Embassy of Costa Rica in Washington, DC. "The Framework Agreement was the something they were willing to do."[12]

For a multinational marketer like Chiquita, however, the Framework Agreement was anathema. Panama, Honduras, and Guatemala, countries where Chiquita produced bananas, were expected to lose EU market share because they had no guaranteed quotas. In addition, the country-specific quotas and need for export certificates made it impossible for Chiquita to optimize the performance of the larger shipping fleet it had recently launched by buying from whichever country was the lowest-cost provider at any given time. Finally, the company feared that independent producers in the framework countries would receive a disproportionate share of the licenses, forcing Chiquita to buy extra export certificates, just as it had had to invest in extra import licenses for Europe.

"What you have here is something that was discriminatory to begin with, and then each new level of discrimination gets added as the Euro-

11. Although no formal investigation was ever conducted, some US trade officials believed that the European Union had bribed Latin American representatives to ensure their cooperation with the agreement.

12. Unless otherwise noted, all quotes from Irene Arguedas are from a December 1998 interview with the author.

pean Union seeks to pay off another constituent," says a USTR official. "We realize it has difficult domestic problems, but they can't be handled at the expense of its WTO obligations." A US banana industry representative agrees. "The Framework Agreement obviously imposed an additional obligation in terms of coming up with the special export certificates that had to match the licenses granted in Europe," he notes. "To the extent that a company had lots of licenses in Europe and an imbalance in the amount of export certificates they obtained, they were terribly hurt by that. That's what happened with Chiquita."

US Section 301

Dole Food, like Chiquita, had opposed Regulation 404 from the start. Even as Dole spoke out against the new regime, though, it was positioning itself to operate within its constraints. After Regulation 404 was adopted, the company invested in banana production in Africa and the Canary Islands and formed joint ventures with EU importers, thereby qualifying as a Category B importer of ACP bananas and marketer of EU fruit. Dole also bought ripeners in Europe to qualify for an additional share of import licenses. Dole's preferred status thus allowed it to avoid many of the most restrictive aspects of the regime.

Chiquita, in contrast, was not well-positioned financially to undertake such diversification, despite its long history of industry leadership. The company's predecessor, United Fruit Company Limited (established in 1899), had been a dominant—and controversial—presence in Latin America throughout much of the twentieth century, with an unprecedented degree of economic and political clout that extended through Guatemala, Honduras, Costa Rica, Panama, Colombia, and Ecuador. By the middle of the century, United Fruit owned more than 1.7 million acres of land in Latin America. Its 1955 net profits of $33 million were greater than the central government revenues of Honduras, and it was bigger than any other single landowner, company, or corporate employer of labor in Guatemala, Honduras, or Costa Rica.[13]

The company's fortunes remained strong over the next few decades. A new owner had renamed the company United Brands in 1970 and multimillionaire businessman Carl Lindner bought a controlling share in 1984, changing the name to Chiquita Brands International five years later.[14] Chairman and CEO Lindner changed the company's direction as well, adopting a new, more aggressive strategy. During the 1980s, the company

13. For more information on Chiquita's history, see Mulligan (1999).

14. Lindner's holding company, American Financial Group, Inc., acquired a majority interest, and Lindner later moved the company to Cincinnati.

Table 2.3 World banana prices, 1985–92
(dollars per metric ton)

Year	Current	Constant, 1990
1985	378	551
1986	382	472
1987	393	442
1988	478	502
1989	547	578
1990	541	541
1991	560	548
1992	473	444

Note: Data refer to Central and South American first-class quality tropical pack of bananas, importer's price to jobber or processor, f.o.b. US ports.

Sources: World Bank, *Price Prospects for Major Primary Commodities,* 1990–2005, including *Quarterly Review of Commodity Markets,* third and fourth quarters 1992; *Commodity Markets and the Developing Countries: A World Bank Quarterly,* May 1996; *Commodity Price Data,* July 1996 (see also www.worldbank.org/pink.html); and US Bureau of Labor Statistics.

divested its Caribbean holdings, decreased banana production, and diversified into other crops. Heading into the 1990s, however, Lindner instead increased Chiquita's land under cultivation and made major investments in new shipping capacity, apparently with the expectation that the European Union would adopt an open banana regime and that the emerging Eastern European market would greatly boost demand for the company's dollar bananas.

At first, Lindner's strategy looked sound. In 1990 and 1991, Chiquita's fresh food sales grew an impressive 18 percent. But in 1992, as a worldwide oversupply of fruit helped to precipitate a sudden drop in banana prices, Chiquita found itself with too many ships and bananas, as well as substantial debt (for world banana prices from 1985 through 1992, see table 2.3). Contributing to the company's problems was the growing economic chaos in the countries of the former Soviet Union—an area that Chiquita had targeted as a key new market. Indeed, critics of the company primarily faulted bad business decisions for its difficulties. Chiquita, however, blamed its faltering bottom line on changes in anticipation of the restrictive single-market EU regime. Either way, the results were dramatic. In 1992, the year before the regime took effect, the company reported net losses of $284 million—a stark contrast to the $128 million earned the previous year.

Chiquita's and Dole's initial talks with the USTR about bringing a case against the regime had not been productive, but the looming implementation of the Framework Agreement impelled Chiquita to further action.

Lindner had long given generously to Republican campaigns, and with the Framework Agreement looming, he stepped up his contributions to both parties. According to a study by the nonpartisan public interest group Common Cause, Lindner, his company, its subsidiaries, and their executives donated almost $1 million to the Democratic and Republican national party committees in 1993 and 1994, making him one of the nation's largest contributors of soft money during that election cycle.[15] "The signals were becoming pretty clear that USTR was not going to pursue this, and I think it was probably about that time when Chiquita realized that raising the interest in this case politically would have an effect on the reaction of USTR as an executive branch agency," says a banana industry representative. "The results speak for themselves."

In the summer of 1994, Chiquita's Washington, DC–based trade attorney and lobbyist, Carolyn Gleason, became a regular visitor and informal consultant to the USTR, providing policy recommendations as well as detailed trade information regarding Chiquita's estimates of damage done to US industry by the EU regime. Chiquita alone was estimated to have lost as much as 50 percent of its EU market share—falling from 40 percent of the total to less than 20 percent between 1992 and 1993. Gleason also began arranging meetings between Carl Lindner and key politicians and government officials. USTR Mickey Kantor held three meetings with Lindner, two of them hosted by Senate Majority Leader Bob Dole (R-KS).[16]

The effort was well spent. In August, a group of 12 senators, including Bob Dole, wrote Kantor urging that a formal investigation under section 301 be undertaken of both the banana regime and the Framework Agreement; in September, a coalition of 50 members of the House sent a similar letter. "The express intent of the new export quota and licensing authority is to inflict additional revenue and market share loss on American companies," the House letter read in part. "US companies have suffered a 50 percent decline in EU market share; a substantial loss of customers and associate growers; job losses; massive increases in operational costs, including transport costs; major additional reorganization costs; and significant price-depression in third country markets."

On September 2, the same day that the House letter went out, Chiquita and the Hawaii Banana Industry Association petitioned the Clinton administration to file a section 301 case against the European Union, as well as separate 301 cases against the four Latin American signatories to the Framework Agreement. As is customary with a 301 petition, the USTR had already informally indicated its willingness to take on the case and, in fact,

15. After giving no money to the Democrats in 1992, Lindner donated $525,000 to the party during the 1993–94 cycle. Soft money contributions, or donations to political parties, were not subject to the same restrictions as donations to individual candidates.

16. Brook Larmer with Michael Isikoff, "Brawl over Bananas," *Newsweek*, April 28, 1997, 43–44. Senator Dole had no family ties or affiliation with Dole Food.

had helped Chiquita to prepare the petition. According to the petition, the European Union's practices were "unreasonable and discriminatory," restricted US commerce, and threatened the "survivability" of US production.[17] It was Chiquita's hope, says a USTR official, that a fast USTR investigation followed by threats of retaliation could stop the Framework Agreement from going into effect in January.

On October 17, 1994, Mickey Kantor announced that the USTR would initiate a section 301 investigation against the European Union, claiming that Regulation 404 discriminated against Chiquita's ability to market and distribute Latin American bananas. The investigation triggered immediate protests on the part of Kantor's counterpart, EU Commissioner Sir Leon Brittan. Not surprisingly, the 13 Caribbean Community (Caricom) nations and the Caribbean Banana Exporters Association (CBEA) also decried the section 301 complaint. According to Caricom, the EU banana regime did not discriminate against US companies; instead, it simply guaranteed market access and adequate prices for the less efficiently produced Caribbean bananas in accordance with Lomé Convention obligations. The economies of such nations as Dominica and St. Lucia of the Windward Islands would be particularly devastated without Regulation 404, the groups argued, because their production expenses were so much higher than those of Latin American countries, and they had no other agricultural or industrial product to take the place of bananas. "Populations on the USA's own doorstep would be transformed from hard-working family farmers into mendicant unemployed," declared a Caricom release. Caribbean representatives also stressed the likelihood that a drop-off in banana production would lead directly to an increase in illegal drug trading.

In January 1995, as the Framework Agreement went into effect, the USTR brought similar 301 cases against Colombia and Costa Rica.[18] The US action raised alarm in the two countries, since if the United States decided to retaliate, it would likely withdraw concessions granted under such key programs as the Caribbean Basin Initiative and the Generalized System of Preferences. According to Irene Arguedas of the Costa Rican embassy, the politically and economically susceptible Latin American countries were caught in the middle. If they did not implement the Framework Agreement, their years of struggle to win better access to the EU market, including the two GATT cases, would be for naught. But if they did implement it, they faced the real threat of US retaliation. "It was ridiculous,"

17. According to data from the US government, Statistics of Hawaiian Agriculture, and the Puerto Rican Department of Agriculture, US production of bananas (in metric tons) was 63,143 in 1992, 59,684 in 1993, and 54,550 in 1994—all for domestic consumption. Because the restricted EU market had created a banana surplus outside of the European Union, the Hawaiian banana industry argued, prices in the US domestic market had been forced down.

18. The USTR did not challenge Nicaragua or Venezuela, as their banana exports were too small to affect Chiquita significantly.

declares Arguedas. "The US does not produce any bananas. It was very obvious that the US was enacting this case because of [Lindner]. There were not substantial interests involved."

Indeed, the USTR action, taken on the heels of Lindner's large campaign contributions, raised eyebrows in the United States as well as abroad. It was particularly suspect, critics claimed, because the USTR had rarely if ever taken on a case with so few US jobs at stake. Also significant, noted some observers, was the fact that Dole Food did not participate in the section 301 complaint.[19] "The driving force behind the case is Chiquita," says a US lawyer who backed the Caribbean cause. "Not the governments of any of the countries, but Chiquita, and Carl Lindner in particular."

Taking the Case to the WTO

Even as Kantor was launching the section 301 case, the arena for resolving international trade disputes was shifting dramatically. Since the GATT's drafting in 1948, members periodically had refined the agreement and made it more liberal through a series of negotiations known as trade rounds. In the Uruguay Round, the latest negotiation begun in 1986, members had taken up an ambitious and controversial roster of changes that resulted in the creation of the WTO on January 1, 1995. In contrast to the provisional GATT, the WTO was an official international body formed to help promote free trade, serve as a forum for trade negotiations, and settle international trade disputes. GATT rules were amended and incorporated into the new body, whose scope was considerably broader: The WTO's agreements covered not only trade in goods but also trade in services and intellectual property.

During January 1995, in the weeks after the WTO's founding, USTR Mickey Kantor pressed forward on the section 301 case, declaring that a preliminary investigation showed that the EU regime was costing US companies "hundreds of millions of dollars." Indeed, although Chiquita's banana sales were still far greater than those of any other marketer, the company had remained in the red in 1994, with a net loss of $72 million (see table 2.4 for total sales, banana sales, and net income in 1994 for the six major banana companies). But although Kantor wrote EU Commissioner Sir Leon Brittan to threaten retaliatory measures if the European Union and United States could not reach a compromise, several bilateral consultations between US and EU representatives made no headway. The European Union, one USTR official says, showed no interest in making changes.

19. A USTR staff member notes that Dole was extremely cooperative whenever the USTR requested technical support. However, the company had practical reasons for not taking part, since it had invested heavily in ACP and EU operations, and probably hoped to amortize its investments before the regime came to an end.

Table 2.4 Global banana companies, 1994 (thousands of dollars)

Company	Total sales	Sales of bananas	Net income
Chiquita	3,961,720	2,377,032	71,540
Dole	3,841,566	960,400	67,883
Fyffes	1,408,309	563,324	39,398
Geest	1,057,437	528,719	14,867
Noboa	700,000	280,000	21,000
Del Monte Produce	600,000	240,000	18,000

Source: Mulligan (1999); figures are drawn from company financial reports and own estimates.

Undoubtedly, playing a role in the European Union's unwillingness to craft a compromise were the deep divisions over Regulation 404 that still existed within the Community. As recently as October 1994, the European Court of Justice had upheld the regime against a challenge to the licensing provisions brought by Germany, the Netherlands, and Belgium. Indeed, seven EU members, including the recently acceded countries of Austria, Finland, and Sweden, openly opposed the regime. If the European Commission tried to revise Regulation 404, it would have to again engage with strong disagreements among members over the regulation's fundamental design.

Many EU members who backed the regime, moreover, believed that the European Union had already taken a necessary step toward coming into compliance with international agreements. In December 1994, during the last month of the GATT's existence, the EU and the ACP nations had requested—and been granted—a waiver from international trade rules covering some of the Lomé Convention trade preferences.[20] Specifically, the waiver covered the most favored nation clause of GATT Article I, which dealt, in part, with rules governing the imposition of tariffs. From the EU and ACP perspective, the Lomé waiver legitimized the preferential treatment of former colonies. But while USTR officials were willing to concede that the waiver sanctioned the tariff on Latin American imports, they insisted that it left many additional trade violations unresolved.

Finally, some EU representatives say they bristled at the idea of changing Regulation 404 just to satisfy Chiquita. "There was a perception that Chiquita's losses may not have been purely due to the restrictions of the regime," says Alison Mable of the United Kingdom's Trade Policy and Tropical Foods Division, Ministry of Agriculture, Fisheries and Food.[21] "Many people later came to feel, for example, that Dole, who bought into

20. The GATT panels that ruled against the EU regimes in 1993 had advised the European Union to obtain such a waiver.

21. Unless otherwise noted, all quotes from Alison Mable are from a January 1999 interview with the author.

the B license system and worked within the system, had done okay with the regime."

Although the deadline for the section 301 case was October 17, 1995, one year after the USTR initiated the investigation, at midsummer the EU Commission still could not agree on how to respond. Dole Food had been lobbying all sides for a compromise, but in July the Commission finally decided not to seek from member states the mandate it needed to negotiate with the United States. With the Commission at a standstill, the USTR faced two choices: forge ahead with a section 301 retaliation or bring the case instead to the fledgling WTO.

In some respects, a decision to go to the WTO might seem to have been preordained. After all, the two GATT panels had already set a precedent in finding the EU banana regime incompatible with international trade rules. Yet no one could be sure what proceedings under the WTO would be like. Historically, complainants had won most GATT cases. But under the WTO, dispute settlement rules were different. While most decisions still had to be reached by member consensus, panel reports could not be blocked unless there was a reverse consensus—in other words, unless all members voted against adoption. Now that rulings could no longer be blocked, it was possible that the WTO dispute panels would be more cautious about finding a country to be out of compliance.

Moreover, the GATT cases had been brought by banana producers, and many observers, including some in the United States, believed that the United States, as a banana marketer, did not have a strong GATT case. Instead, the United States would probably have to rely on a novel interpretation of the new, and still untested, General Agreement on Trade in Services (GATS). In addition, political pressure was building domestically for quick section 301 action, as Senate Majority Leader Bob Dole, among others, pushed for legislation that would threaten retaliation against Colombia and Costa Rica for their participation in the Framework Agreement.[22]

The USTR, however, was reluctant to launch a unilateral challenge right after the WTO had gone into effect. The international community had always hated section 301 for the ability it gave the United States to impose unilateral retaliations, even though the United States had done so in only 15 out of the 91 cases brought between 1974 and 1994 (Bayard and Elliott 1994, 66). Now, with the advent of the WTO and its new dispute settlement procedures, many critics of the policy asserted that section 301 was no longer a legitimate response in disputes involving WTO members. The USTR insisted it was, and, in fact, noted that the United States would never have approved the Uruguay Round leading up to the WTO if it had not believed its ability to bring 301 cases to be still intact. Nevertheless, to

22. During 1995, then-presidential candidate Dole flew a dozen times in planes made available by the Lindner family's corporate interests (as reported to the Federal Election Commission).

retaliate under section 301 when the ink on the WTO agreement was barely dry, USTR officials conceded, could make the United States appear to be thumbing its nose at the new international trade dispute mechanisms. "If we had gone with unilateral sanctions, all we would have done was raised the ire of all the other WTO members, including the member states in the European Community who favored our position," remarks one USTR official. "You can't have the Community and the Commission united by antipathy to the United States and their unilateral action. You always need some people on the inside helping to bring about change."

A final consideration clinched the decision. The Latin American countries that had not signed the Framework Agreement, such as Honduras and Guatemala, were facing the same set of restrictions that were affecting Chiquita. If these banana-producing nations became co-complainants, USTR officials reasoned, the case before the WTO would be stronger. Moreover, a possible ruling in their favor by the WTO panel would not only show that the United States was respecting and acting within the new dispute settlement process but also put pressure on the European Union to do the same. "Presumably," says one USTR official, "the EU would feel shamed into complying with its international obligations."

In September 1995, almost one year after first launching the section 301 investigation, USTR ended the section 301 case without a formal finding and, together with Mexico, Honduras, and Guatemala, initiated a WTO investigation of the EU regime.[23] "We have repeatedly sought changes in the European banana regime to address the discrimination against US companies, but unfortunately the EU has been inflexible," Kantor's statement announcing the action read in part. "We think it is appropriate at this time to resort to WTO dispute settlement procedures and we are pleased that other countries in our region that are also adversely affected by the regime are joining us."[24] In February 1996, Ecuador, which had just become a WTO member (and which had not been a party to the earlier GATT cases because it was not a GATT member), joined the challenge. Ecuador's involvement was particularly key since it was the only Latin American participant with substantial sales to the EU market.

There were reports that the United States had needed to persuade Honduras and Guatemala to participate in the WTO case. Ecuador, whose special circumstances made it perhaps the hardest hit of the Latin American countries, needed no such urging. Because it had refused to take part in the Framework Agreement, Ecuador had no specific country allocation, even though it had some 5,000 independent growers and was the world's largest banana exporter. Moreover, unlike Guatemala or Honduras, most of whose

23. The United States did not drop its separate 301 claims against Colombia and Costa Rica, however.

24. Kantor, quoted in "US Requests WTO Consultations on EU Banana Import Restrictions," *Inside US Trade*, September 29, 1995.

exports were handled by US multinationals, Ecuadorian traders—in particular the prominent Noboa Group—handled 80 percent of the country's exports. Yet because Noboa only sold Ecuadorian bananas, it—like Chiquita—could not qualify as a Category B operator, and therefore had to buy many of the licenses it needed to import into the EU market.[25] "I want to be very clear on this—we didn't join in this action because of the US," asserts Teodoro Maldonado, counselor for economic affairs at the embassy of Ecuador in Washington, and formerly secretary for trade responsible for the banana case in the WTO. "We had our own legitimate concerns."[26]

In January 1996, faced with the imminent threat of US retaliation, Colombia and Costa Rica signed a memorandum of understanding with the United States in exchange for an end to the section 301 case. As part of the agreement, the two countries pledged support for an open EU market for bananas and promised to begin distributing their export licenses in a manner more favorable to US multinationals. According to Irene Arguedas at the Costa Rican embassy, both Costa Rica and Colombia continued to be caught between the jockeying of the United States and the European Union, unable themselves to influence events. "The countries that suffered the most in the end were the small countries," she declares.

On February 5, 1996, the four complainants, along with new WTO member Ecuador, filed a fresh request for WTO consultations. In retrospect, one USTR official reflects, EU officials should have realized that if they had negotiated a compromise during the section 301 phase, the United States would have been willing to settle for less. "We wanted some improvement to help US companies out of the worst of it," he says. "That is what we were looking for—some quick relief."

The Case in the WTO

The WTO process got off to a slow and contentious start. The European Union wanted bilateral consultations in order to deal with each country's complaints individually and to isolate the United States—its most powerful adversary, but the one whose case appeared to be the weakest because it was not a banana exporter. The complainants, for their part, wanted one multilateral consultation to combine their charges and to ensure that the WTO would appoint only one dispute settlement panel rather than five.

25. While joining the Framework Agreement would have won Ecuador a quota, it would not have resolved the licensing issues that were critical to Ecuador as a major banana trader. Indeed, under the regime, the Ecuadorian government estimated that the country's traders were granted licenses for only about one-third of the bananas they imported into the European Union, forcing them to buy licenses for the other two-thirds.

26. Unless otherwise noted, all quotes from Teodoro Maldonado are from a December 1998 interview with the author.

In mid-March, a compromise was approved. The European Union got its bilateral meetings, but the challengers made the same presentations and posed nearly identical questions. In addition, the WTO convened only one panel, as the complainants had desired.

In a typical WTO case, the countries involved in the dispute selected the three panelists together, drawing from a permanent list of trade experts who served as individual consultants rather than country representatives. After the two sides were unable to agree on a panel, however, in June WTO Director-General Renato Ruggiero selected Stuart Harbinson, Hong Kong's permanent representative to the WTO; Kym Anderson, a University of Adelaide economist; and Christian Haeberli, an international trade expert from the Swiss economics ministry.[27] On July 9, the United States and the four Latin American countries submitted their first briefs laying out their challenges to the regime.

In an attempt to get maximum leverage, a USTR official says, the United States filed as many different claims against the EU regime as possible. While the Latin American countries, as banana producers, focused primarily on trade in goods, USTR claims covered both goods and services.[28] Under the GATT segment of the claims relating to goods, the USTR challenged both the quotas and the licensing systems imposed by Regulation 404 and the Framework Agreement. The services claims brought under the General Agreement on Trade in Services (GATS) concentrated on how the regime's licensing requirements had, in the words of the brief, "drastically reallocated, reconfigured, and restricted" the Latin American banana service market.

USTR officials say they felt fairly confident on the goods side, particularly on the issue of Category B licenses, since the GATT already had ruled twice on that issue. They were less certain about the services claims, however. Not only was this a new area of the regulations, but services traditionally had been construed as marketable activities such as legal or accounting services rather than the transfer of goods, and it was unclear if the WTO would accept the US interpretation.

In a July 30 panel submission, and again at the first dispute settlement panel meeting in mid-September 1996, the European Union attacked the US brief on several key points. The European Union argued that as a non–banana exporter, the United States not only had no right to bring a WTO case also should not be allowed to press claims on behalf of other nations.[29]

27. "Top WTO Official Picks Panel to Settle Dispute over EU Banana Regime," *Inside US Trade*, June 14, 1996.

28. Ecuador, as a banana marketer, also brought claims under services rules.

29. "Fortunately that was defeated," notes a USTR official. "They wanted us out because we were helping the other countries. They figured they might be able to buy out the other countries, I suppose."

The US argument that the regime had hurt the ability of its companies to supply services was also faulty, the European Union said, because the rules cited dealt with trade in goods, and trade in services was not intended to include the marketing of goods as a service. In addition, the European Union defended its preferential treatment of ACP countries, noting that the GATT waiver it had obtained protected precisely the policies that the complainants were challenging.

Because the ACP countries had not been designated as defending parties, representatives of the Caribbean banana-producing nations were relegated to third-party status in the WTO proceedings and thus could not participate fully in the debates. But they could make their wishes known in the United States, and supporters of preferential trade policies for the Caribbean became more vocal as the WTO process went forward. For example, a public relations campaign, organized on behalf of the CBEA, bombarded White House and Capitol Hill politicians with stories about Carl Lindner's large donations in an attempt to counterbalance the pressure that Chiquita was exerting. "From the ACP perspective, Chiquita made a bad corporate decision and didn't like the results, so it glommed on to a legal challenge to try to undo the damage," explains a lawyer involved with the effort.

In addition, representatives of the Caribbean nations spoke out whenever possible on the potentially tragic consequences of US efforts to end the preferential EU regime, including the likelihood that drug trafficking on the United States' southern flank would increase dramatically. Caribbean bananas were a small factor in world trade, accounting for only 3 percent of the world market and about 9 percent of the EU market, notes Dame Eugenia Charles, prime minister of the Windward Island of Dominica from 1980 to 1995. But for many fragile Caribbean economies, she says, bananas were key—accounting for 70 percent of Dominica's export earnings, for example. "With the little bit that we grow, we couldn't put any other country out of jobs," she says, "but it could make all the difference in the world to the Caribbean."[30]

Richard Bernal, Jamaica's ambassador to the United States, agrees. "Every country, including the United States, realizes that in a free market you make allowances for certain vulnerable participants," he argues. "It doesn't affect the operation of the market if a small percentage of the participants are given some kind of specialized treatment."[31] David Christy, senior associate in the Washington office of Winthrop, Stimson, Putnam & Roberts and a member of the CBEA's legal team assembled to fight the

30. Unless otherwise noted, all quotes from Eugenia Charles are from an April 1998 interview with the author.

31. Unless otherwise noted, all quotes from Richard Bernal are from a January 1999 interview with the author.

WTO case, adds: "The importance economically of banana trade to many of these countries cannot be overstated, because the boats coming in are bringing in supplies and taking out not just bananas but other goods, so it's really a lifeline. It's the core economic activity that allows all other economic activities to occur."[32]

Kantor tried to placate domestic critics, such as the Congressional Black Caucus, a group of about 40 African American representatives whose members often supported Caribbean causes. In a memo to Maxine Waters (D-CA) responding to her concerns over the US challenge to the EU regime, Kantor wrote in part, "I would also like to stress that the United States supports EU tariff preferences for products, like bananas, from African, Caribbean and Pacific (ACP) nations under the Lomé Convention." But he pointed out as well that "the Lomé Convention does not require the European Union to discriminate in favor of EU firms over US companies. The United States cannot tolerate the EU's licensing system which took away American business and gave it to a few EU firms."

Indeed, the USTR stayed firm in its stance that the EU regime was the wrong way to assist the struggling Caribbean economies. According to the agency, the European Union's discriminatory policies—supposedly put in place to help the 20 percent of bananas that came from ACP producers—in fact gave preferential treatment to almost 40 percent of bananas sold in the European Union, many of which came from relatively affluent EU territories, as well as from countries, such as Côte d'Ivoire and Belize, where production was almost as efficient as in Latin America. Moreover, American officials argued, while some ACP countries undoubtedly needed some form of support, research had shown that the EU regime was an extremely inefficient means of providing it. A World Bank study frequently cited by the USTR, for example, had found that the EU regime only returned 7.5 cents to ACP countries for every dollar it cost. In addition, the USTR noted, although import taxes on Latin American bananas had brought in more than $300 million annually, the European Union was spending only about $30 million a year to aid ACP banana production. "We really do believe that there are better ways to help the Caribbean and not hurt Latin America and not hurt our companies," says a USTR official. "That's the basis on which we're operating."

The WTO Panel Reports

On March 18, 1997, slightly more than a year after Ecuador had joined in asking for WTO consultations, the WTO dispute settlement panel issued a confidential report that represented a resounding victory for the United

32. Unless otherwise noted, all quotes from David Christy are from a December 1998 interview with the author.

States and its co-complainants (the public report was released on May 22, 1997). According to the interim decision, the European Union had violated WTO agreements—including the GATT, the GATS, and the Agreement on Import Licensing Procedures—on 16 counts. Among the specific EU measures ruled to be breaches of trade rules were the establishment of Category B operator licenses; the granting of individual country allocations to nonsubstantial suppliers, such as Nicaragua and Venezuela; and the requirement that export certificates from framework countries be matched with EU import licenses. Although the panel also found the country-specific quotas for ACP countries to be in contravention of the GATT, it concluded that the violation was covered by the European Union's Lomé Convention waiver.

Particularly significant was the panel's interpretation of the GATS, which agreed with the US argument: It allowed the services agreement to apply not only to marketable services, such as accounting, but also to service aspects of goods transactions, such as wholesale marketing. Thus a single trade measure could be found to be incompatible with both the GATT and the GATS. The panel also ruled that a country did not have to be an exporter in order to bring a case involving GATT violations. According to a USTR official, the WTO ruling was a striking validation of the US position. EU officials were reportedly stunned.

Although the European Union appealed most of the findings in June, the WTO Appellate Body report released in September 1997 was another win for the United States. Indeed, the appeals panel went beyond upholding most of the findings against the European Union and overruled the original panel's finding that the ACP country quotas were allowable under the European Union's Lomé Convention waiver.

While EU officials were disappointed by the WTO rulings, ACP representatives were shattered, according to a lawyer affiliated with the Caribbean defense: "What you have from the perspective of the ACP countries is a clash of two international obligations," he explains. "You have the treaty commitment between the EU and the ACP promising them no diminution in treatment from the past with regard to their banana exports, and then second, you have the arguably conflicting obligations that the EU and its member states have under the GATT and the WTO not to discriminate." He adds: "I think that the WTO—the panel and the appellate body—should have been, and could legally have been, more sensitive to the obligations flowing from the Lomé Convention. The focus that we are the WTO, we focus only on WTO issues and everything else is either irrelevant or of tertiary importance, I think that's wrong."

In the wake of the WTO Appellate Body report, USTR officials announced their intent to meet with Caribbean banana producers, and informally put forward a proposal for a new preferential regime. The European Union, the USTR suggested, could set a higher though not restrictive tariff on non-ACP bananas. For those most vulnerable ACP producers, meanwhile, the European Union could provide additional assistance—for example, in the form of income support, giving farmers the difference between the price they could get in the EU market and a targeted income level. But most Caribbean representatives flatly rejected the US suggestion. Christopher Parlin of Winthrop, Stimson, Putnam & Roberts, another member of the CBEA's legal team, points out that what the United States was suggesting was basically a welfare regime for the Caribbean, "which no government in its right mind wants." He says, "There is a recognition among the Caribbean elites that they will have to find alternatives to banana production, and that bananas are not the long-term solution. What you're talking about is the transition mechanism."[33]

The Road to Compliance

During the first few months after the appeal, the European Union continued to refuse to discuss plans for a new regime and the USTR kept up its constant prodding. By December, the only commitment the European Union had made was to comply by January 1, 1999, the end of the standard 15-month period allowed by the WTO, and to respect its "international obligations"—a statement the United States considered suspect, since it could be taken to refer not just to the WTO panel ruling but also to the European Union's Lomé Convention obligations. "We tried to go in there and say, 'Look, can we talk about the WTO-consistent alternatives, what the reports mean, what your options are?' " says one USTR official, "and they said, 'Oh no, we can't because it's internal, and we can't talk to any countries while it's still within the Commission because we haven't even talked to the member states yet.' " Although USTR officials met periodically with individual EU member states, the meetings appeared to have little impact.

The USTR was alarmed by preliminary reports about EU plans, but officials continued to harbor hopes about the makeup of new regulations. Best, says one official, would have been a tariff-only regime, which would have imposed duties on non-ACP countries but otherwise allowed an unrestricted market. If the European Union concluded that a TRQ was necessary to provide additional protection for ACP producers, the official continues, the European Union could have given the largest suppliers—Ecuador, Costa Rica, Colombia, and Panama—allocations of the entire market consistent with their shares in the past, and then allowed all the smaller providers—including Guatemala, Honduras, and ACP nations such as the Windward Islands—to compete for the rest. Licenses, meanwhile, could be distributed on the basis of importing practices in the period prior to Regu-

33. Unless otherwise noted, all quotes from Christopher Parlin are from a December 1998 interview with the author.

lation 404. While this system would not be ideal from Chiquita's point of view, the official says, it would at least be WTO-consistent.

But the first round of proposed regulations that the European Commission made public in January 1998 bore little resemblance to these speculations, and the United States and its Latin American co-complainants immediately protested at the WTO. The biggest EU concession, USTR officials say, was the promise to get rid of Category B and ripener licenses. The European Union would set up a new licensing system consistent with WTO rules, the Commission announced, but it declined to offer specifics, delaying that portion of the regime until later in the year. In addition, the European Union dropped individual country quotas for Venezuela, Nicaragua, and the ACP countries, since WTO regulations permitted the granting of such specific quotas to smaller countries only if it gave a quota to every single banana exporter. As substantial suppliers, Ecuador, Costa Rica, Colombia, and Panama would receive individual allotments of the Latin American quota, although the Commission had not yet said how those country quotas would be determined.[34]

Much to USTR's dismay, however, the Commission proposal kept its two-quota system, set at the same levels: a tariff-free quota of 857,700 metric tons for ACP countries and a tariff-rate quota for Latin American bananas of 2.2 million metric tons at 75 ECU per metric ton.[35] The USTR and its co-complainants charged in a joint statement issued February 5, 1998, that this system violated the WTO: By assigning two separate quotas based on the country of origin, the European Union had created restrictions for Latin American countries that were not "similar" to those faced by ACP countries. In addition, they claimed, the regime did not reflect trade in the absence of restrictions, since it gave ACP bananas a market share that was 40 percent higher than that justified by historic imports, at the expense of Latin American imports. "I think they decided at the outset that they simply didn't want to come into compliance," says a USTR official. "They tried to do the minimal amount."

The Commission proposal was almost as unpopular within the European Union as it was in the United States. In discussions leading up to a June 1998 vote by the Agriculture Council, whose approval was needed for the proposal to become law, Sweden, Germany, the Netherlands, Belgium, Luxembourg, and Italy all favored a system similar to that suggested by the United States, one that would rely on tariffs only, rather than on quotas. Denmark felt that the Latin American quota was too small, and

34. Such "substantial supplier" quotas were WTO-compatible as long as they were based on a reference period free of restrictions.

35. An additional allotment of 353,000 metric tons had been tacked on to the TRQ each year since 1995 to account for demand from the three new members that joined the European Union that year.

should be boosted to 3 million tons. For their part, France, Spain, and Portugal asserted that the proposal did not include enough protection for domestic growers, such as those in Martinique and the Canary Islands. Only the United Kingdom and Ireland seemed solidly behind the plan.[36]

Some US observers speculated that the Commission had postponed the licensing portion of the regime in order to delay USTR opposition. In June, with details on the licensing regulations still unknown, the new USTR, Charlene Barshefsky, sent out strongly worded letters to all EU trade ministers, warning that without changes in the proposal, "the United States will not hesitate to exercise its full rights under the WTO and take all available actions."[37] Barshefsky was under pressure herself from Senate Majority Leader Trent Lott (R-MS), who wanted the USTR—before the Agriculture Council vote—to publish a specific list of EU agricultural products that would be subject to retaliation if the European Union did not make changes to the proposed regime.

In fact, says one British official, the decision to break the proposal into two pieces had more to do with concerns about getting Agriculture Council approval than with thwarting the United States. Proposal supporters wanted to get the main structure of the regime through the Council in June while the United Kingdom, the plan's staunchest supporter, still held the rotating EU presidency. Passage of the first part of the regulations would bolster support for the licensing segment, which, since it directly affected the fate of many EU companies, was the most controversial portion of the regime domestically. In addition, under Council regulations, the licensing portion could be decided by a different committee, the Bananas Management Committee, whose rules made approval more likely.

At the end of June, the Agriculture Council finally approved the plan, and in October, the Commission announced its licensing proposal. Although the Commission abolished the categories of primary importer, secondary importer, and ripener, as promised, it announced that both licenses and country quotas would be based on imports during 1994 to 1996, a decision that the United States immediately denounced. Because the preferential regime giving licenses to ripeners and other new operators was already in effect during that time, USTR officials declared, the new system would simply perpetuate the wrongs of the previous preferential regime, including giving licenses to companies that had never imported in the past.[38] According to an EU Commission representative, however, winning

36. "EU Members Attack Commission Banana Proposal to Settle WTO Fight," *Inside US Trade*, February 13, 1998.

37. Letter from Barshefsky, quoted in "US, EU Set to Clash Over Banana Regime with Threats of Retaliation," *Inside US Trade*, June 19, 1998.

38. Had the Commission awarded licenses determined by a base period of 1990–92, a USTR official says, the United States would have accepted the licensing plan.

EU support would have been impossible without the reference period chosen. If the regime had been based on some span of years before 1993, she says, "you would have had endless litigation from all the [EU] companies that had been quite happily trading with legitimate expectations between 1993 and 1998."

The Battle Lines Are Drawn

As the EU proposal moved forward during the summer of 1998, Dole Food, which over the previous five years had increased its EU market share as Chiquita's share fell, continued to call for a negotiated solution. "What Dole was trying to do was to broker a solution, to find the common ground and build on that," explains Frank Samolis, a partner in the Washington law firm of Patton Boggs, which represented Dole on a variety of legal and regulatory issues. "A legal victory on paper in the WTO is one thing, but actually coming up with a change in the system is another, and we thought the chances of doing that were going to be far better under some sort of compromise proposal."[39]

No compromise appeared likely, however. The first part of the plan, approved in June 1998, had already led the USTR to conclude that the new EU regime was out of compliance. In July and September, the United States and its co-complainants sought an expedited WTO dispute settlement panel to rule on the validity of the plan, but the European Union blocked both requests, claiming that the regime could not be judged until the licensing portion was approved. Nor did the European Union respond to US calls to reconfigure the regime in accordance with the USTR's interpretation of the WTO ruling.

In July, USTR had warned the European Union that unless it brought the new regime into compliance, the United States planned to retaliate. According to Article 22 of the WTO's dispute settlement rules, the USTR maintained, the time frame during which a complainant could ask the WTO Dispute Settlement Body for permission to withdraw concessions was very limited. In this case, to make such a request and take advantage of the reverse consensus rule—which would prevent the EU and ACP countries from blocking the request unless all members were opposed—the United States would have had to act within 30 days of the new regime's implementation, or by January 31. The Dispute Settlement Body would then have to grant the US request within 30 days of the regime's implementation, or by February 1, 1999, unless the European Union requested

39. Unless otherwise noted, all quotes from Frank Samolis are from a December 1998 interview with the author.

arbitration to negotiate the amount of the retaliation. The 30 days allowed for that process would delay US retaliation until March 3, 1999.

On the other side, the European Union insisted that the US interpretation was dead wrong. Article 21.5 of the new regulations, EU officials said, clearly stated that for a complainant to withdraw concessions, the WTO first had to rule that a trade measure was out of compliance. Because the WTO had made no such ruling, they claimed, any US retaliation would constitute a unilateral action taken outside the jurisdiction of the WTO—an action that the European Union would then challenge in the WTO.

USTR officials countered that this reading of the rules was flawed because it could result in an endless loop of litigation, an eventuality that WTO members had never intended. If the European Union made only minor changes, for example, but refused an expedited panel, the entire dispute settlement process could start again, including consultations, panel hearings, rulings, appeals, and another 15 months in which to comply. At the end of the two to three years required to work through these stages, if the European Union instituted a third regime that was still out of compliance, the process might begin yet again.[40]

By October, the impasse had drawn Congress back into the fray, with several members calling for the USTR to publish for public comment a list of products that would be subject to retaliation if the United States decided to withdraw concessions—the first step toward such an action, as required by law. "We sold the Uruguay Round to Congress on the basis of our automatic ability to retaliate at the end," says one USTR official. "There's no way any business or exporter in the United States could consider the WTO an efficient process if all it is is endless litigation. Why should we do any trade agreements if nobody complies with them and all they do is use up US government resources?" A group including House Speaker Newt Gingrich (R-GA) met with Carl Lindner on October 2, and less than a week later Gingrich and Senate Majority Leader Lott wrote President Clinton to warn him of Congress's plan to pass legislation forcing the United States to withdraw concessions from the European Union unless the regime had been proven to be WTO-compatible.[41] The House debated such a bill on October 10, but chose not to take action after White House Chief of Staff Erskine Bowles delivered a letter to Congress pledging to retaliate under section 301 if the European Union did not meet its WTO obligations.

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40. At the time, WTO members were planning to take up the apparent contradiction between Articles 22 and 21.5 as part of a review of the Dispute Settlement Understanding to be initiated during 1999; as of late 2005, the controversy still had not been settled.

41. Lindner's generous contributions to both parties had continued. Lindner and his wife were fourth on the *Mother Jones* magazine's 1998 list of top contributors to political parties, having donated $536,000 from January 1997 through August 1998.

According to a Republican House staff member who helped to draft the bill, while Lindner's involvement was clearly key, the case's significance went beyond Chiquita.[42] "Considering that the administration is supposed to submit a report on the WTO to Congress in the year 2000, and that there's an opportunity for Congress to vote to back out of the WTO," she says, "it's pretty important to make sure that we are on record as having not only won cases, but gotten a fair implementation as a result." More immediately, the aide notes, the outcome of the banana dispute was viewed as likely to affect EU behavior concerning a second WTO decision that favored the United States, a ruling against the European Union's ban on beef raised with growth hormones. The USTR needed to set a strong precedent in bananas, officials believed, to ensure that the European Union would comply in the beef hormones case, a dispute that had a direct impact on the United States as a major beef exporter.

In mid-December, the European Union requested a new WTO panel, in essence to judge whether the United States would be violating trade rules if it retaliated against the European Union without the WTO having found the banana regime to be out of compliance. However, no such panel was immediately convened. At the same time, USTR officials were keeping a close eye on Ecuador, fearing that the country might strike a side deal with the European Union for a larger share of the Latin American market, thereby hurting Chiquita and splintering the complainants' united front.[43] On December 21 the USTR published a retaliation list that would place tariffs on about $520 million worth of EU imports, concentrating on goods that would not disrupt American commercial interests, that would have a minimal impact on US consumers, and that originated in those countries most supportive of the regime. Products that would be subjected to a 100 percent tariff, effectively doubling the price of the goods, included pecorino cheese, sweet biscuits, handbags, cashmere sweaters, and Christmas ornaments. "Everyone loves to rail against the US's so-called unilateralism," says a USTR official. "But you know what? We didn't get the EU's attention until we put that list up. How many years has it been? It's unfortunate, but that's the way it works."

42. It had not been an easy year for Chiquita. On May 3, 1998, the *Cincinnati Enquirer* ran a damning 18-page series outlining a number of improper business practices and questionable dealings on the part of Chiquita in Latin America. However, after learning that the lead reporter had allegedly stolen voice mail messages from Chiquita while researching the series, and facing a likely Chiquita lawsuit, the *Enquirer* ran front-page apologies repudiating the articles for three consecutive days (beginning June 28). In addition to firing the reporter, whom Chiquita also sued, the *Enquirer* paid the company a sum reportedly in excess of $10 million. Despite the *Enquirer* retraction, the Securities and Exchange Commission continued its investigation of some Chiquita practices.

43. Although the European Union had given Ecuador 26.17 percent of the TRQ, the largest share, Ecuador considered the allotment restrictive and unrepresentative of its actual imports to the EU market over the previous three years.

The $520 million figure, meant to represent the annual export revenues lost by Chiquita and Dole because of the regime, was well below what Chiquita alone had sought, but it was at the high end of estimates prepared by an interagency team of government economists charged with the unenviable task of assessing damages in the highly complex case. Among the factors complicating the calculations were the many different ways in which the European Union could conceivably make its regime legal, as well as the lack of any recent period during which a free market had existed in the European Union to use as a basis for comparison. According to a staff economist at the Council of Economic Advisers who helped to come up with the damage estimate, the USTR and the team were also constrained by political pressures. If the estimate was much higher than what the WTO ultimately approved, US companies would probably feel let down by USTR's performance. If, on the other hand, the estimate was too low, Congress might question the usefulness of the WTO or press for more direct involvement in international trade disputes. "One of the things we were very aware of throughout the whole process was whether this was going to be okay for the people who were putting the political heat on in the first place," the economist recalls.

Retaliation Begins

As the new year began, observers were mystified as to how the dispute would ultimately end. On January 12, 1999, the WTO Dispute Settlement Body convened a new panel, in response to requests by Ecuador and the European Union, to determine whether the new EU banana regime complied with the WTO judgment, but a ruling was not expected until April.[44] On January 20, the United States, Honduras, Mexico, Guatemala, and Panama requested consultations with the European Union to discuss a last-minute compromise, but no immediate date was set.[45] Meanwhile, the two Windward Islands of St. Lucia and Dominica—claiming their economies would be devastated if the EU regime ended—blocked the agenda for the WTO Dispute Settlement Body's planned January 25 meeting, thus temporarily stopping the United States from requesting permis-

44. The United States opposed the panel, fearing that the European Union could use an ongoing evaluation of the banana regime's WTO consistency as an additional argument against US retaliation. It was also unclear whether the European Union would try to use the panel to evaluate compliance, or to rule on the legitimacy of the planned US retaliation. But Ecuador, hoping to protect its relationship with the European Union, was apparently trying to avoid further escalation of the dispute ("US to Request WTO Consultations with EU to Resolve Banana Fight," *Inside US Trade*, January 15, 1999).

45. Panama, which joined the WTO in September 1997, was not a member when the original complaint was filed. Ecuador asked to join the consultations a few days later.

sion to retaliate against the European Union for noncompliance. The meeting took place on the 29th, however, and the United States made its official request. An official says, the USTR "was not budging on our right to go and get a reverse consensus on the request for retaliation. That was fundamental to us."

When the European Union asked for arbitration on the amount of retaliation, the WTO sent the question to the same three-member panel that was already considering the request of Ecuador and the European Union to rule on whether the regime was WTO-compliant. Although the compliance decision was not due until April, the United States still hoped that the WTO would deliver a report on March 2 authorizing it to begin imposing sanctions on EU products a day later.

As the dispute dragged on and a trade war appeared increasingly likely, some critics of US policy began to question why the trade wrangle had ever begun. "On one hand, I concede that there's a legal case here," says a lawyer who supported the Caribbean position. "I just don't believe that every legal case was meant to be brought. This is a case study in the abuse of the WTO process by private interests, namely Chiquita. And I think the United States and the system are going to pay dearly for it."

US trade and government representatives could not disagree more. "There was a discriminatory regime, and the US went to the WTO—as it should have—and won," says one banana company representative. "It's hard to argue with the judgment that this was a case worth taking on." Peter Scher, USTR's chief negotiator on agricultural issues, agrees. "What's at stake here is the credibility of the World Trade Organization," Scher declared after the USTR published its retaliation list in December. "This is the first case in which any country has essentially refused to comply with rulings of the WTO."[46] Indeed, another USTR official notes, a US failure to insist that the European Union comply on the banana regime would not only weaken all US trade agreements but also call into question the power and legitimacy of the entire WTO. "We've got something big on the line," the official says. "It's way beyond bananas."

In early 1999, the protracted case finally moved a significant step closer to resolution. In lieu of a negotiated settlement, USTR had hoped to begin imposing sanctions against the European Union on March 3. But to the disappointment of US government and industry officials, the WTO did not determine the figure in time. Instead, on March 2, the WTO arbitrator reported that it could not address the amount of US retaliation until it had ruled on the consistency of the regime.[47]

46. Scher, quoted in David Sanger, "U.S.-Europe Trade War Looms Over Bananas," *The New York Times*, December 22, 1998, A1.

47. The United States immediately suspended liquidation on a list of EU products worth $520 million, meaning that the US Customs Service refrained from assessing final tariffs and left open the possibility of punitive tariff increases if the WTO later approved retaliation. The

But the European Union had been given only a temporary reprieve. On April 6, the three-member WTO group announced two important rulings. In its role as a dispute settlement panel, the three WTO representatives found the EU banana regime to be out of compliance with WTO rules. At the same time, having concluded that the regime was inconsistent, the group as arbitrator delivered the WTO's first retaliation decision, allowing the United States to impose against the European Union sanctions worth $191.4 million, the panel's estimate of the EU banana regime's impact on the import of US goods and services.[48] "This is the fifth time in six years that an international trade panel has found the EU's banana policies to be in violation of international trade rules," USTR Charlene Barshefsky declared in a triumphant statement.[49]

Although the almost $200 million in sanctions was the highest retaliation ever approved by an international organization in a trade dispute, it was far below the United States' original $520 million request. EU representatives quickly trumpeted the reduced damages as proof that the United States had been overstating the regime's harm to US companies all along.[50] But one US economist who had helped calculate the original damage estimate says that simply getting a decision at that time was a major victory for the United States. He points out that a delay by the WTO in addressing the entire question of retaliation until after it had reached a ruling on compliance could have stalled the sanctions process for at least months, if not more than a year, allowing the European Union to continue its discriminatory practices without international reprisal and exacerbating tensions within the United States over how to manage trade disputes.

On April 9, the United States published a new pared-down retaliation list of European products that would be subjected to 100 percent tariffs. While pecorino cheese and cashmere sweaters had been dropped from the list, items slated for retaliation still included French high-fashion handbags, English bed linens, and German coffeemakers, as well as more pedestrian items such as lead-acid storage batteries and felt paper. Products from England and France, the two countries seen as most supportive of the discredited regime, were hit hardest, while the Netherlands and

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European Union challenged the move, insisting that sanctions should not have begun until retaliation became official. One year later, a WTO panel ruled against the United States, concluding that its action constituted an illegal trade restriction.

48. The banana ruling failed to resolve the debate between the United States and the European Union over the contradictory language in Articles 21.5 and 22 of the WTO's dispute settlement rules regarding the time frame during which a country can ask to impose sanctions, and the need for the WTO to reevaluate any new trade regime before approving a retaliation amount.

49. Barshefsky, quoted in David E. Sanger, "Ruling Allows Tariffs by US over Bananas," *The New York Times*, April 7, 1999, C1.

50. The WTO used a different and more conservative set of assumptions to calculate damages, including a smaller quota for non-ACP bananas under a hypothetical free market.

Denmark, opponents of the regime, escaped all sanctions. "The United States has paid the cost of the EU's discrimination for six years," said Peter Scher. "Now the EU must pay the price."[51] Ecuador was likely to make its own demand for compensation, which had the potential to be larger than the claim won by the United States.

As the US retaliation began, Scher announced the willingness of the United States to end sanctions as soon as the European Union implemented acceptable changes in its banana regime, and on April 20, Roderick Abbott, EU trade ambassador, declared the European Union's intention to "comply fully" with the WTO ruling. The WTO panel had suggested three ways in which the European Union might comply: a tariff-only regime that would not require special import licenses, a TRQ that would need a waiver from WTO rules, or a quota that did not rely on country-specific limits or that was done with the support of banana suppliers.

An Elusive Resolution

Many in the United States saw the WTO ruling as a critical breakthrough in addressing unfair EU trade policies. But early efforts to settle the banana regime impasse proved futile, as the European Union failed to make substantive alterations in its built-in protections for European marketers and ACP banana producers, and the United States continued to push for a new system that would comply with WTO rules and restore much of Chiquita's lost European market share. As the dispute remained unresolved, international and domestic developments ratcheted up the pressure on the USTR to settle the issue at the same time that they heightened the difficulty of negotiating an agreement.

In July 1999 the United States imposed WTO-approved sanctions of $117 million a year against EU products in a long-running case against the European Union's ban on imports of hormone-treated beef. This second trade retaliation only worsened cross-Atlantic relations. At the same time, the European Union had been pursuing a case in the WTO against the US foreign sales corporation (FSC) provision, a component of US tax law that allowed US companies with foreign subsidiaries to shield part of their income from US income taxes. USTR officials claimed the European Union brought the case in large part to retaliate against the United States for its successful beef and banana cases; previously, European countries had accepted the FSC provision as part of a 1981 understanding among GATT members regarding tax policies. In any event, a WTO panel ruled in 1999 that the FSC tax provision constituted an illegal export subsidy; in Febru-

51. Scher, quoted in Michael M. Phillips, "WTO Supports US in Dispute over Bananas," *The Wall Street Journal*, April 7, 1999, A3.

ary 2000, a WTO Appellate Body upheld that ruling, opening the way for the European Union to impose punitive sanctions against the United States that could top $2.5 billion.

The ruling stirred immediate fears among representatives of US banana and beef companies that USTR officials might compromise in the two cases affecting those industries to gain a satisfactory resolution of the potentially costly FSC case. Senate Majority Leader Trent Lott, who had backed strong retaliation against the European Union for its banana and beef trade policies all along, asked for and got reassurance from USTR Barshefsky that the cases would be kept separate.

But in early 2000, many members of Congress remained frustrated that almost a full year after the United States had first imposed sanctions, the European Union still had not proposed a nondiscriminatory trade regime for bananas. For months, Congress had been debating trade legislation—known as the carousel provision—that would mandate regular rotation of products subject to retaliation in trade disputes, in order to increase pressure on those countries out of compliance. The USTR, which already had the ability to change sanctioned products when it deemed such action prudent, opposed the legislation as weakening its ability to manage trade disputes. Nevertheless, in May 2000 the House and Senate approved the carousel provision as part of a larger trade bill expanding certain trade benefits to sub-Saharan Africa and the Caribbean. Under the provision, the USTR was to rotate retaliation lists every six months once a list had been in place for 120 days.[52] EU representatives immediately declared that such a unilateral change in the retaliation list, without the approval of a WTO Dispute Settlement Body, would violate WTO rules.

Over the next few months, the trade tumult continued. EU member states, sharply divided over proposed revisions to the European Union's banana trade regime, were unable to come to any agreement. The USTR, for its part, while still denying any linkage between the beef and banana settlements and the FSC tax case, delayed rotating the retaliation lists for fear of upsetting ongoing talks with the European Union regarding the trade disputes. Moreover, the Clinton administration still hoped to resolve either the beef or the banana case before leaving office in January 2001, and the imminence of a settlement could justify the deferral of product changes.

In October Senator Lott proposed legislation requiring industry petitioners in trade cases such as the banana dispute to approve US-negotiated trade deals before punitive sanctions could be lifted, as well as mandating fast implementation of the carousel provision. Lott eventually dropped the amendment after critics in the administration and both houses of Con-

52. The rotation was not required if a settlement was pending or if the USTR and the industry that sought the action agreed it was not needed ("House Approves Africa-CBI Conference Report with Carousel," *Inside US Trade*, May 5, 2000).

gress claimed it would give industry undue control over trade policy generally, and would specifically grant Chiquita veto power over any potential resolution of the banana dispute. Meanwhile, although some administration officials believed that the carousel law required the USTR to rotate products subject to punitive tariffs within six months of the law's passing—in this case, by November 18—the USTR ignored that deadline in the face of European Union warnings that any unilateral rotation could trigger aggressive retaliatory measures against the United States in the FSC case.[53]

At a US-EU trade summit in December 2000, the European Union finally put forward a tentative banana trade policy that it had been debating for months. The system would retain TRQs, but they would be administered on a first-come, first-served basis rather than under a licensing scheme, an approach that many trade experts agreed would be WTO-compatible. Dole and Noboa of Ecuador quickly announced their support for the scheme since both, as relative newcomers to the EU market, were likely to fare poorly under most historical licensing plans.

But the Clinton administration declared that this approach, which ignored historical licensing data and gave no preference to traditional importers, would be too complex to manage fairly and would benefit new marketing firms at the expense of companies like Chiquita. The USTR argued instead for a larger Latin American quota and for a system that would base its allocation of licenses on an agreed-on reference period—ideally a time before the 1993 regime took effect. In addition, the USTR said the European Union should give most of those licenses to major importers rather than reserving a significant share for ripeners and other smaller companies that the current regime had allowed into the market.

In mid-January 2001, pressure on the USTR to resolve the trade dispute only increased. Financially ailing Chiquita—declaring that the European Union's discriminatory regime had cost it $200 million a year since 1992—announced that it could not meet its payments on its outstanding public debt of $862 million and would likely file for bankruptcy. While industry analysts noted other causes for Chiquita's fiscal woes—its earlier overambitious expansion; the devastation of 1998's Hurricane Mitch, which had leveled company plantations in Honduras and Guatemala; rising interest rates; and the devaluation of the euro—the company held the banana regime primarily culpable. "The direct blame for today's actions should be put on the bureaucrats in Brussels who have manifested this ongoing illegality," declared Steven Warshaw, Chiquita's president and chief operating

53. Although the US House of Representatives had passed a bill that fashioned an alternative to the FSC on November 14, and US and EU officials had negotiated a procedural agreement to delay possible EU trade sanctions until the following year, the European Union threatened to suspend that agreement if the United States changed the products subject to retaliation.

officer. "If not for the European Union, we wouldn't be going through this today."[54] About a week later, Chiquita sued the European Commission for $525 million in damages, the amount the company claimed that the latest EU banana regime had cost it since taking effect in January 1999.[55]

Striking a Deal

As the new administration of President George W. Bush settled in, banana industry representatives and members of Congress lost no time in bringing their concerns forward. A source close to Chiquita said that sponsors of the still-to-be-implemented carousel provision saw it as the "law of the land and it must be honored."[56] Senator Lott, meanwhile, called on the new USTR, Robert Zoellick, to aggressively enforce US laws, including the carousel law, or to expect congressional action. "I do not think our trading partners are dealing with us fairly right now," Lott declared.[57]

During March, staff officials under Zoellick and European Trade Commissioner Pascal Lamy held a flurry of meetings to resolve the banana standoff. Lamy, like Zoellick, was feeling pressure to settle. The European Union had to implement a WTO-compatible regime by July 1—and thus the plan had to be circulated by late April to allow banana producers and marketers sufficient time to conform to the new rules. But if the European Union planned to implement its proposed first-come, first-served approach in defiance of US wishes, Zoellick warned, an impatient Congress would probably insist that the USTR rotate the European products subject to sanctions, a move that would spur additional discord and likely set off EU retaliations against US exports that could reach $4 billion. And the position of Ecuador—which had favored first-come, first-served—also had to be considered, or trade officials there might initiate a new WTO challenge.

On April 11, after officials had worked through the night, Zoellick and Lamy finally announced a compromise acceptable to both sides. To satisfy the United States, the European Union dropped the first-come, first-served approach and agreed instead to award licenses according to import levels from 1994 to 1996. The European Union also abandoned the country-

54. Warshaw, quoted in Anthony DePalma, "Citing European Banana Quotas, Chiquita Says Bankruptcy Looms," *The New York Times*, January 17, 2001, A1.

55. Dole Food had already brought a number of similar suits against the European Commission, and even some European governments had challenged the regime in court.

56. Source quoted in "Chiquita Vows to Fight on Against EU Rules Despite Financial Trouble," *Inside US Trade*, January 19, 2001.

57. Lott, quoted in "Lott Warns Zoellick to Take a Tough Stance on Trading Partners," *Inside US Trade*, February 9, 2001.

specific allocations that had further segmented the Latin American quota under the previous regime. The European Union would keep a TRQ system in place temporarily, but 83 percent of licenses for Latin American banana imports would go to primary importers—companies such as Chiquita and Noboa that owned or bought bananas in the country of origin and brought them to the first point of sale in Europe. In addition, the European Union promised soon to increase the Latin American quota by 100,000 tons while reducing the ACP quota by the same amount.[58]

The United States also made significant concessions to win EU support. Although the USTR had earlier argued that 88—rather than 83—percent of licenses should go to primary importers, it agreed to let the European Union set aside 17 percent of licenses for a "newcomers" category. Along with encompassing actual new entrants, the category would allow European ripeners and other companies that were not traditional importers to continue to market bananas. Though the United States had originally asked for an immediate end to quotas, TRQ would remain in effect for a four-and-a-half-year transition period, finally switching to tariff-only in 2006. When the new regime took effect July 1, the United States would suspend its retaliatory tariffs. At the same time, the United States promised to support a waiver for the European Union from GATT Article XIII, to allow the European Union to offer an exclusive quota for ACP bananas.[59] Once that waiver was granted, the punitive sanctions would officially end.

Although some critics charged that the agreement failed to meet acceptable free trade standards, Zoellick defended the compromise as the best possible deal that both the United States and European Union could accept. "The banana disputes of the past nine years have been disruptive for all the parties involved," Zoellick, Lamy, and European Agriculture Commissioner Franz Fischler said in a joint statement. The new agreement, they declared, "will end the past friction and move us toward a better basis for the banana trade."[60]

For Chiquita, which had continued to make generous donations to both Democrats and Republicans throughout the trade war, the banana agreement's new quota and licensing provisions promised an immediate improvement in EU market share.[61] Given allocations based on the 1994 to 1996 reference period, Chiquita and Dole would receive import licenses for

58. The quota change would not go into effect until its approval by the Council of Ministers and the European Parliament, which was to occur sometime before January 1, 2002.

59. Article XIII banned discrimination in the use of import or export quotas, and also required that any quota applied should roughly match the expected share that a supplier country would have if no quota existed.

60. Joint statement, quoted in Anthony DePalma, "U.S. and Europeans Agree on Deal to End Banana Trade War," *The New York Times*, April 12, 2001, C1.

about 44 percent of Latin American bananas, industry experts predicted, with two-thirds of that share going to Chiquita.[62] Although Chiquita had lobbied for the European Union to use a pre-1993 period when its market share was even higher, in awarding licenses, the company still praised the accord. "We are pleased with this positive development for Chiquita and Latin American banana interests," company president Steven Warshaw said in a prepared statement.[63]

Dole, however, whose total contributions to both political parties during the recent campaign cycle totaled only $159,750, came away from the agreement a loser, according to company officials.[64] David Murdock, chairman and chief executive of Dole, described the plan as "inconsistent with the American free enterprise system." He added, "All American agriculture exporters will be deeply disappointed by the action."[65] Because Dole had not had a strong European presence during the two-year period beginning in 1994, it would not benefit from the historical licensing approach. Moreover, Dole's entire strategy over the previous nine years, unlike Chiquita's, had been to operate within the restrictions of the European Union's single-market banana regime. Thus, Dole had built up its European business primarily by buying or establishing joint ventures with smaller European and Ecuadorian companies—the kinds of firms that were now excluded from the 83 percent of licenses designated for primary importers. According to one Dole official, USTR's actions showed that "the real issue was simply to get a system that would take care of Chiquita."[66]

With the long-running banana war finally at an end, US trade officials breathed a sigh of relief. Yet other trade issues still remained unresolved, including the battle over the European Union's ban on imports of hormone-treated beef and a fight over EU approval of US genetically modified crops

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61. Chiquita had donated $1.7 million to the two parties during the previous election cycle—$1.03 million to Republicans and $676,750 to Democrats (Helene Cooper, "Dole Fails to Find Much Appeal in Accord to End Banana War," *The Wall Street Journal*, April 13, 2001, A12).

62. "Banana Deal Effectively Locks in U.S. Share of EU Market," *Inside US Trade*, April 13, 2001.

63. Warshaw, quoted in Paul Blustein, "US, EU Reach Pact on Bananas," *The Washington Post*, April 12, 2001, E1.

64. Ecuador also questioned the accord, but the country's concerns appeared to have been met in late April, after the European Union granted more access to Ecuador's companies and growers within the 17 percent "newcomer" category, which favored operators in producing countries over banana marketers in the European Union.

65. Murdock, quoted in Anthony DePalma, "Dole Says Trade Accord on Bananas Favors Rival," *The New York Times,* April 14, 2001, C2.

66. Dole official, quoted in Cooper, "Dole Fails to Find Much Appeal in Accord to End Banana War," A12.

that also appeared headed for the WTO. Indeed, the clashes over bananas and beef exemplified the increasingly complex nature of international trade disputes, involving not just the United States and the European Union but most nations, as simple quota and tariff conflicts were joined by murkier and less easily resolved disagreements encompassing social policies as well as medical and environmental concerns. In the eyes of many observers, such issues merely underscored the importance of supporting a strong and effective WTO, as it appeared almost certain that the organization's dispute settlement mechanisms would be called on and tested with increasing frequency in the years to come.

Case Analysis

This case concerns the operation of a traditional border barrier—the European quota system for imported bananas. At its heart, it describes a clash between a multilateral trading system based on principles of nondiscrimination and selective preferential arrangements in which certain trading partners are treated differently. The case demonstrates how complex the political economy of trade policy can become, and it reveals the barriers to resolving disputes that such complexity can create. The case also explores issues in the enforceability of the rulings of the WTO. In particular, the banana dispute highlights problems in determining compliance and authorizing retaliation.

In the 1980s, as the European Union implemented its initiative to complete a single-market regime by 1992, some expressed concerns that it might use the opportunity to become more protectionist—concerns encapsulated in the phrase "fortress Europe." For the most part, these fears proved to be misplaced—but not in the case of bananas. European countries had come to the table with distinctly different regimes on the fruit. They ranged from the liberal in Germany (no tariffs), to fairly liberal regimes in other northern European countries, to highly regulated systems in Spain, France, and the United Kingdom that reflected a desire to protect producers in the Canary Islands (on the part of Spain) and in Africa and the Caribbean (on the part of the United Kingdom and France, wishing to give special consideration to their former colonies, collectively known as the ACP, or African, Caribbean, and Pacific, countries). When Europe finally came together in a single system in 1993, the more protectionist countries gained the upper hand. The result was a new distribution of winners and losers.

Winners and Losers

The WTO is an intergovernmental association in which each member is treated as a single actor. In reality, however, as the banana case illustrates, the costs and benefits in WTO disputes may not neatly accrue to those directly involved in the conflicts. Here, the United States, which brought the case, was primarily defending the interests of a US multinational that was not producing bananas in the United States. And while the offending measure was European and the main defendant was Europe, those whose interests were most involved were Caribbean nations that could participate only as third parties. The European framing of the issue highlighted the benefits to these poor, disadvantaged producers. But the system that the European Union implemented conferred new benefits on major European distributors such as Geest and Fyffe, as well as other local distributors and ripeners, and dealt losses to poor developing countries in the Western Hemisphere.

Gains and losses occurred within the parties to the dispute, too. Northern European consuming countries were major losers, and Germany actually challenged the measure in European courts. When we talk of winners and losers in trade we often think only of producers and consumers, but this case reminds us that distributors may have significant interests. European distributors were big winners; Chiquita and Dole, both American, and Noboa, from Ecuador, stood to lose a great deal.

The case is also notable for showcasing how relatively small players in the trading system can have disproportionate impacts if they focus their energy and organize to create alliances. Deciding that its interests were being prejudiced, Chiquita successfully put bananas on the agenda of the Office of the USTR and built the coalitions necessary to launch a section 301 investigation against the European Union—that is, an intervention by the US government on the grounds that companies were being harmed by discriminatory trade practices.

Moreover, the banana dispute underscores that firms do not all respond in the same way—even when facing similar challenges. Dole was better able than Chiquita to mitigate the damage caused by the EU Framework deal. It therefore preferred a nonconfrontational strategy of accommodation, positioning itself to take advantage of the new system. Here, too, we see how zero-sum issues and complex institutional dynamics—in this case, competition among firms within a domestic industry—can act as barriers to agreement, or even as drivers of international trade disputes.

The case also exposes underlying strengths and weaknesses in the WTO dispute settlement system. The strengths lie in its ability to channel conflict into a multilateral setting and produce findings. For example, rather than acting unilaterally under its own section 301, the United States brought the dispute to the WTO. Both the GATT and WTO panels found that Europe had clearly violated the agreements. (More violations were found by the latter, including breaches of the GATS.) At the same time, however, the banana wars reveal some weaknesses of the WTO system, especially concerning compliance. Under the GATT, the European Union had been able to simply veto implementation, an outcome that the WTO no longer allowed. But implementation remained problematic. Despite losing the case, the European Union moved very slowly and then adopted measures that failed to bring it into compliance.

Determining Compliance

The United States sought authorization to retaliate before the European Union actually implemented its measures and before the WTO had a chance to rule whether the new measures remained noncompliant. In pressing its case, the United States invoked Article 22.6 of the Dispute Settlement Understanding (DSU) which states that if a member fails to come into compliance within a reasonable period, the Dispute Settlement Body will grant authorization to suspend concessions within 30 days or—if there are objections to its action—will refer the matter to arbitration, to be completed within 60 days. For its part, the European Union argued that the United States needed to resubmit its case and that a new finding of noncompliance had to be made prior to authorizing retaliation. In making this claim, the European Union invoked Article 21.5–6: "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures." This conflict exposes contradictions in the DSU that have become the subject of negotiations in the Doha Round. Eventually, the United States received the necessary authorization to retaliate. But the case shows that retaliation does not always work well: Retaliatory tariffs remained in place for a long time before a settlement was reached.

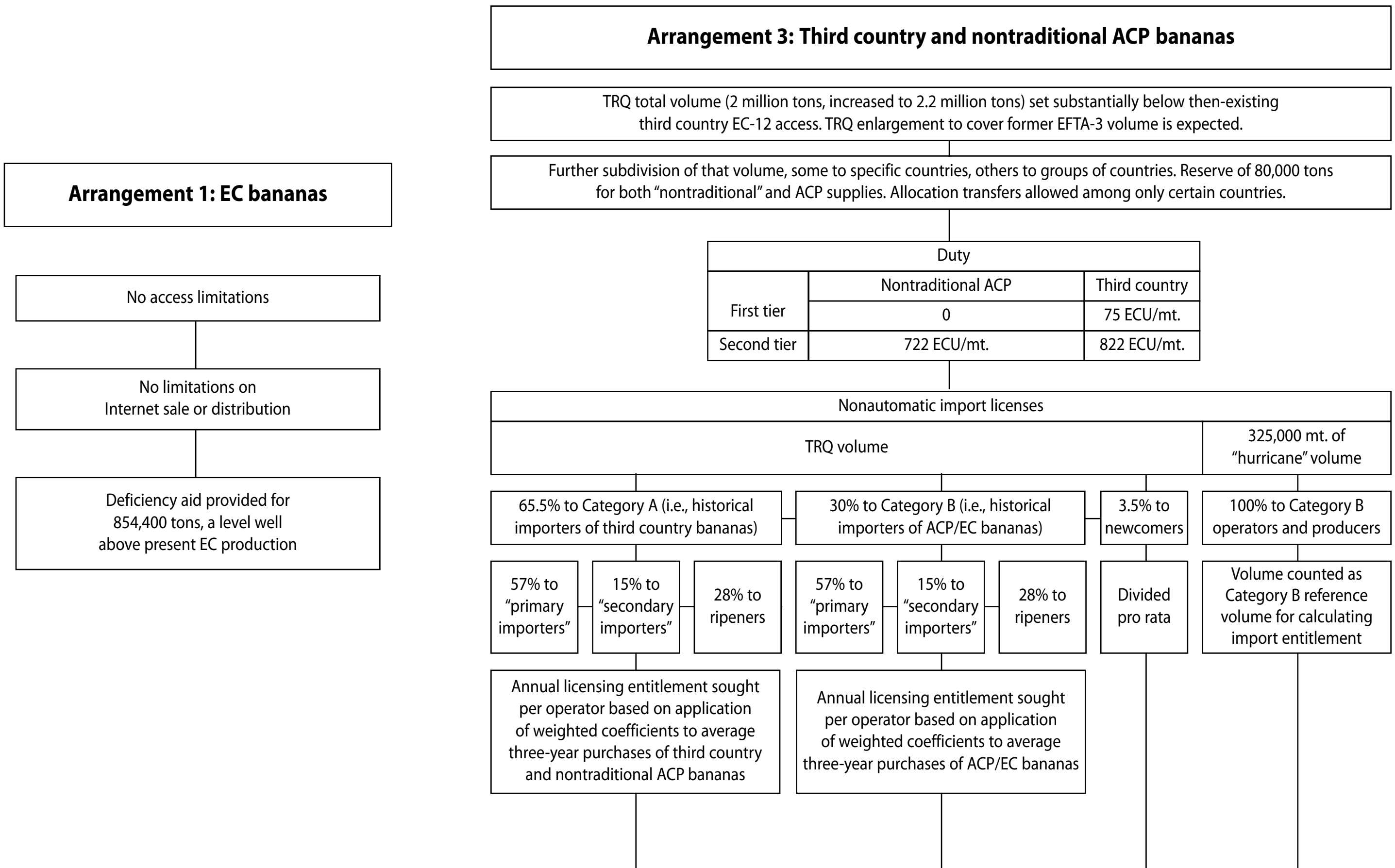
Article 3.7 of the DSU states that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." In this particular case, that goal was never fully achieved. Viewed narrowly, the proceedings were successful, in that they averted a full-blown trade war. However, the European Union was provoked by its losses into making an effort to get even: It brought a case to the WTO against the foreign sales corporation provision of US tax law.

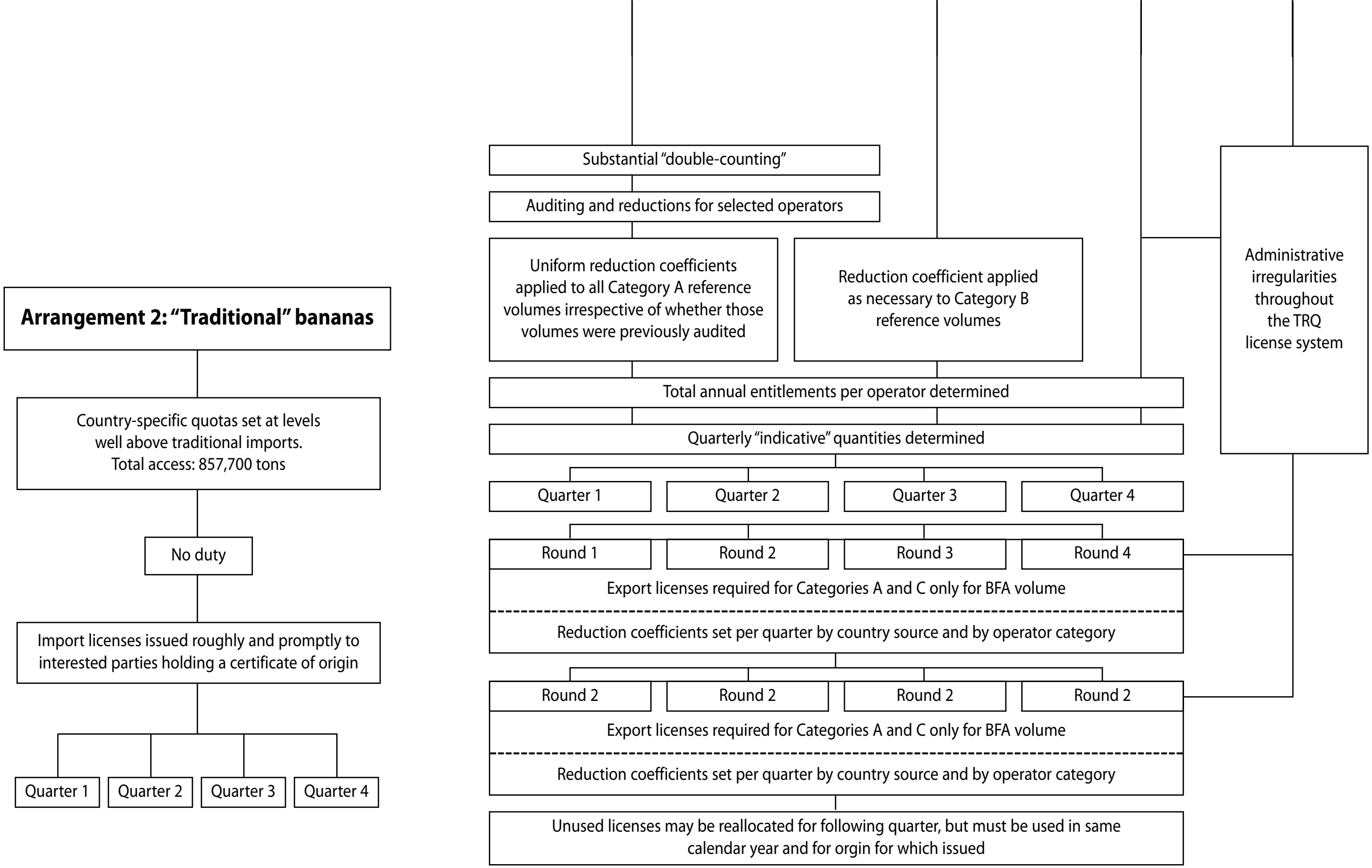
Postscript

At Doha, the WTO granted the European Union the Cotonou Waiver. This allowed the European Union to extend nonreciprocal preferences to the ACP group until December 31, 2007, when the two sides are scheduled to move toward WTO-consistent economic partnership agreements based on mutual concessions. At the time, it was believed that the European Union would replace its quota- and license-based banana import regime with a system relying on tariffs in 2006. But as of late 2005, negotiations for such a regime had yet to bear fruit. The beneficiaries of the current system have insisted on a high most favored nation (MFN) tariff to preserve their preferences. Latin and Central American producers, by contrast, want much lower tariffs. In September 2005, the European Union proposed giving ACP countries a quota of 775,000 tons—a reversal of its commitment for a tariff-only regime. The issue was submitted for arbitration at the WTO. If the EU proposal is rejected by the WTO, the Cotonou Waiver will cease to apply to bananas as of January 1, 2006. And so the conflict continues.

Appendix 2A

Figure 2A.1 Regulation 404





BFA = Banana Framework Agreement
EFTA = European Free Trade Association
TRQ = tariff-rate quota
ECU/mt = European currency units per metric tons