

# RJPP156023

## Queries

Karen J. Alter and Sophie Meunier

- Q1 Please add a mention to Figure 2 in the text.
- Q2 Please clarify phrase 'the like application...'
- Q3 Supply full details of Sander 1998 and include in references?
- Q4 See query 5 above.
- Q5 Please explain first ref, 'Yes, we have no profits'.
- Q6 Abbott and Sindal 2003: please provide chapter title and page nos.
- Q7 Bourgeois 2000: please provide chapter title
- Q8 Hathaway 2004: still in preparation?
- Q9 Josling 2003: please provide chapter title
- Q10 McCall Smith 2005: please update entry.
- Q11 Stovall and Hathaway 2003: please provide chapter title
- Q12 Tangermann 2003 ditto.
- Q13 Taylor 2003 ditto.

# Nested and overlapping regimes in the transatlantic banana trade dispute

Karen J. Alter and Sophie Meunier

**ABSTRACT** The decade-long transatlantic banana dispute was not a traditional trade conflict stemming from antagonistic producers' interests. Instead, this article argues that the banana dispute is one of the most complex illustrations of the legal and political difficulties created by the nesting and overlapping of international institutions and commitments. The contested Europe-wide banana policy was an artifact of nesting – the fruit of efforts to reconcile the single market with Lomé obligations which then ran afoul of WTO rules. Using counter-factual analysis, this article explores how the nesting of international commitments contributed to creating the dispute, provided forum shopping opportunities which themselves complicated the options of decision-makers, and hindered resolution of what would otherwise be a pretty straightforward trade dispute. We then draw out implications from this case for the EU, an institution increasingly nested within multilateral mechanisms, and for the issue of the nesting of international institutions in general.

**KEY WORDS** bananas; European Union; institutions; nesting; trade; WTO.

## INTRODUCTION

Advanced industrial democracies belong to a plethora of international institutions. Either individually or collectively, they are members of universal organizations (UN agencies), regional blocs (e.g. European Union (EU), North American Free Trade Agreement (NAFTA), Association of South East Asian Nations (ASEAN)) and issue-specific institutions (e.g. World Trade Organization (WTO), North Atlantic Treaty Organization (NATO), Organization for Economic Co-operation and Development (OECD), World Health Organization (WHO)). These international institutions can be nested within each other or overlap with each other, sometimes leading to conflicting commitments for their member states. How do the nesting and overlapping of international institutions complicate the strategies of national decision-makers? Does the nested/overlapping nature of international commitments in itself generate a distinct kind of politics?

46 This article is an inductive exploration of how nesting and overlapping  
 47 created distinctive political dynamics in the decade-long conflict over bananas  
 48 between the European Union (EU) and the United States (US). The eleven-  
 49 year dispute is puzzling because it involved neither significant factual disagree-  
 50 ments, nor disagreements over deep-seated values. Neither the US nor the EU  
 51 have significant banana industries, and bananas account for only .03 per cent of  
 52 transatlantic trade. In addition, many actors in Europe itself disliked the policy  
 53 from the beginning. Our analytical focus is on how the nesting of the banana  
 54 regime – within the EU, the Lomé Convention and the WTO – contributed  
 55 to the dispute by constraining decision-makers, thereby making a rather  
 56 straightforward dispute very difficult to resolve.

57 Section 1 develops the argument for how the nesting of institutions creates  
 58 shifting framing of issues by interest groups and contorted decision-making  
 59 by legal and political actors. Section 2 shows how the EC bananas regulation  
 60 was itself an artifact of nested and overlapping commitments, and how impor-  
 61 ters of Latin dollar bananas pursued multi-venue legal, constitutional, and  
 62 political techniques to challenge the policy within the different nested layers.  
 63 Section 3 uses counter-factual analysis that strips away each of the layered  
 64 institutional levels to reveal how the nesting/overlapping of international com-  
 65 mitments shaped actor decision-making. The analysis helps explain both the  
 66 convoluted European banana policy and the difficulty in resolving the banana  
 67 dispute. In conclusion, we reflect on the generalizability of our findings for  
 68 the increasingly complex international environment where countries have  
 69 enmeshed themselves in a variety of bi- and multilateral institutions.

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## 1. THE NESTING AND OVERLAPPING OF INTERNATIONAL COMMITMENTS

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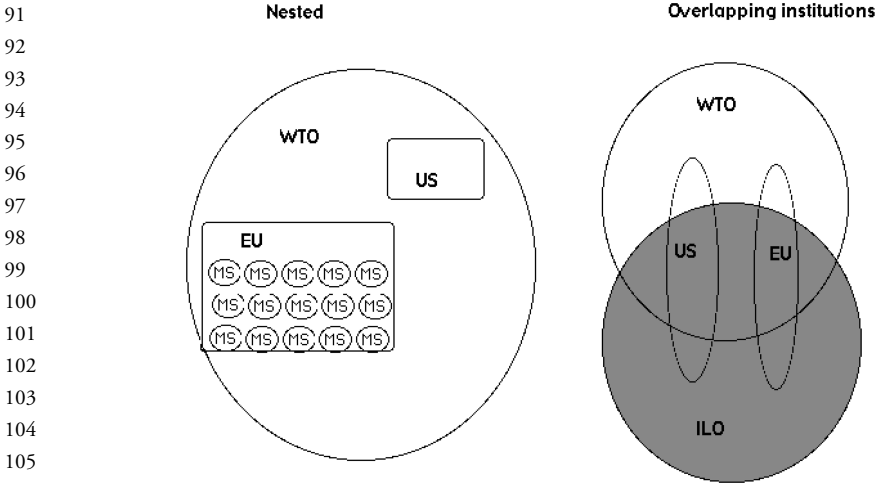
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‘Nesting’ refers to a situation where regional or issue-specific international institutions are themselves part of multilateral frameworks that involve multiple states or issues. Institutions are imbricated one within another, like Russian dolls. For instance, European states have formed the European Union, which is part of the World Trade Organization. International institutions need not be nested, however, to overlap in authority. With their multiple institutional commitments, member countries stand at the intersection of independent jurisdictions, as in the overlapping middle part of a Venn Diagram. For example, European states are members of the EU, but they also belong to the WTO and the ILO (International Labour Organization), they are part of many bilateral trade agreements with third countries, and some of them are constituting members of the G8 (see Figure 1). An overlapping context is theoretically distinct from a nested context, though in practice they may not differ much. In an overlapping jurisdiction context, a conflict across agreements does not per se mean that one rule is a violation of the other. When institutions are nested, however, conflicting policies of the subsumed regime constitute a violation of the more encompassing institution. As the banana dispute will



107 *Figure 1* Analytical difference between nested and overlapping contexts

108 *Note:* MS = European Union member state (before last enlargement). Circle size is  
109 not to scale

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111 show, however, the reality of international law is that there is no universally  
112 accepted hierarchy of international norms which may be used to resolve conflicts  
113 of law. Thus a conflict of international rules may be no more resolvable in a  
114 nested context than in an overlapping context.(Figure 2)

115 Even though all nations are increasingly entangled in multiple international  
116 commitments, the issue of institutional nesting has not yet been the object of  
117 many studies. Some scholars analyse how different types of institution (e.g.  
118 federal arrangements vs. multi-level governance arrangements) have different  
119 politics (Hooghe and Marks 2001:7; Shanks *et al.* 1996; Tsebelis 1990).  
120 Others analyze factors influencing what type of institutional forum is chosen  
121 (Abbott and Snidal 1998, 2000; McCall Smith 2000). Other scholars describe  
122 strategies to navigate or shift from one institutional forum to another (Abbott  
123 and Snidal 2003; Helfer 2004), or the factors shaping whether new challenges  
124 are dealt with through existing institutions or generate new institutions  
125 (Aggarwal 1998). While focusing on elements related to the politics of overlap-  
126 ping institutions, these works do not consider how nesting matters beyond their  
127 specific question or how nesting/overlapping is a source of a specific politics.

128 The politics that nesting/overlapping institutions generates is as follows. At  
129 both the domestic and international levels, differentiation—an attempt to define  
130 the realms separately – is the first approach to resolving conflicts across rules.  
131 When differentiation fails, hierarchy becomes necessary. At the domestic  
132 level, federalism involves working out the division of authority between  
133 federal, state and local government, so that it is eventually clear which actors  
134 have final authority over a given policy issue. State and local politics often  
135 takes place in the shadow of federal politics, with all actors understanding

136 that disgruntled groups may appeal to federal entities, and federal actors may  
 137 invalidate state and local decisions or rule that state actors have final authority.  
 138 The key difference between the domestic and international context is that at the  
 139 international level it is not clear who has the final authority to resolve conflicts  
 140 across levels or agreements. In both the domestic and international contexts, the  
 141 existence of nesting/overlapping institutions creates the opportunity for policy  
 142 entrepreneurs and interest groups to choose the political forum that is both  
 143 willing to adopt their policy preference and is most authoritative. Policy entre-  
 144 preneurs will frame their issue to build political consensus within their chosen  
 145 decision-making institution and to fit the style of the decision-making forum,  
 146 with the policy outcome being a mixture of the preferences of the policy entre-  
 147 preneurs and existing repertoire of policy formula within the decision-making  
 148 regime.<sup>1</sup> Those actors wanting a different policy may respond, however, by  
 149 appealing to a different forum that has overlapping authority, seeking an author-  
 150 itative decision that contradicts or undermines the policy of the other insti-  
 151 tution. Thus for forum shoppers, the nested context can generate a shifting  
 152 ‘framing’ of the issue depending on the forum in use (with different framings  
 153 having substantive and political repercussions).

154 For decision-makers, the reality of forum shopping combined in the inter-  
 155 national context with no clear system to determine hierarchy creates dilemmas:  
 156 they try to avoid being gamed by forum shoppers, while keeping their options  
 157 open by adopting strategies to maximize international bargaining leverage.  
 158 Political decision-makers play across forums, creating a more complex politics  
 159 that includes playing multilateral institutions off against each other in addition  
 160 to the traditional two-level game involving domestic and international actors  
 161 (Putnam 1988). Judicial decision-makers in a nested/overlapped context may  
 162 be invited by forum shoppers to weigh in, but judges know their sub-level  
 163 policy decisions may be condemned, contradicted, or supplanted by the more  
 164 encompassing institution. In addition, the inherently fluid and political  
 165 nature of international politics makes judges far more hesitant to weigh in to  
 166 resolve disputes about the hierarchy of competing rules. Thus the nested/over-  
 167 lapped context in itself facilitates forum shopping and leads decision-makers,  
 168 legal and political, to positions on international issues that are quite different  
 169 from the ‘domestic’ position they might advocate, when it is clear where final  
 170 authority resides.

171 The single European banana regime, at the root of the US–EU banana  
 172 dispute, illustrates the legal and political complexities triggered by the nesting  
 173 and overlapping of international commitments, and how nesting complicates  
 174 dispute resolution.

## 176 **2. NESTING/OVERLAPPING AT THE ROOT OF THE BANANA** 177 **DISPUTE**

178  
 179 With the goal of a common market, the European Economic Community  
 180 (EEC)’s founding 1957 Treaty of Rome called for the removal of all internal

181 barriers to trade and the introduction of a common external tariff for imports  
182 from third countries. Despite the Treaty's ambitious goals, national markets  
183 long remained fragmented for many goods. The 1986 Single European Act  
184 tried to remedy this fragmentation by calling for the completion of an internal  
185 market in which goods, services, people and capital could move around freely by  
186 the end of 1992.

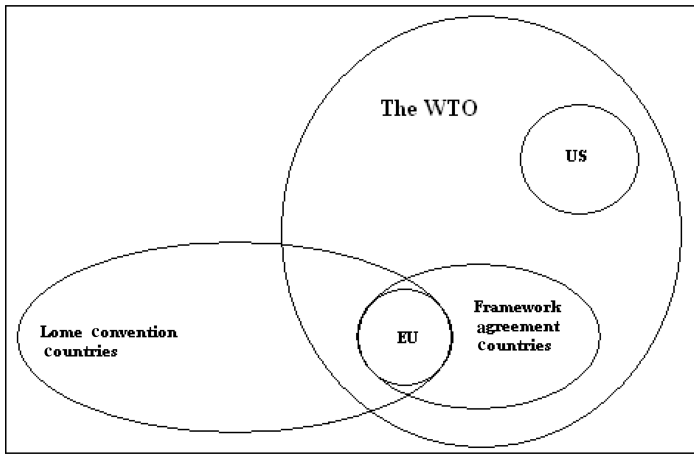
### 187 188 **The creation of the single European banana regime** 189

190 The banana market was particularly fragmented, with each European member  
191 state selecting its own banana regime based on past imperial relationships and  
192 present vested interests (Sutton 1997). In 1989 three distinct European  
193 banana import regimes existed. France, Italy, the UK, Greece, Portugal and  
194 Spain offered tariff protection for the sixty-nine African-Caribbean-Pacific  
195 (ACP) country producers, most of which were former European colonies benefiting  
196 from special trade agreements through the Lomé Convention.<sup>2</sup> Belgium,  
197 the Netherlands, Luxembourg, Denmark and Ireland had an across-the-board  
198 20 per cent tariff for banana imports. Germany relied on a special 'banana protocol'  
199 attached to the Treaty of Rome that allowed duty-free access for Central  
200 and Latin American bananas.

201 Unifying this regime, as required by the Single European Act, entailed  
202 reconciling the apparently irreconcilable pulls of multiple institutions and  
203 treaty obligations in contradiction with one another (Lyons 1994). How  
204 could a new banana regime simultaneously: be consistent with the Single  
205 Market; honor its Lomé Convention commitment to protect the banana  
206 exports of ACP countries; honor the 'Banana Protocol' in the Treaty of  
207 Rome guaranteeing Germany unimpeded access to bananas; and honor obligations  
208 under the General Agreement on Tariffs and Trade (GATT) to  
209 provide preferential access to imports from developing countries including  
210 non-ACP countries?

211 It took four years of intense negotiation for Europe to create its new regime  
212 involving a multilayered system of import rules, with strong preferences for EEC  
213 and ACP bananas. The import system was incredibly complex: supplies from  
214 the EEC (including overseas territories) were unrestricted; imports from the  
215 ACP countries were tariff-free up to 857,000 tons, after which they were subjected  
216 to a 750 ECU (European Currency Unit) per ton tariff; and imports  
217 from other countries (mostly from Central and Latin American producers)  
218 were allotted a yearly quota of two million tons with a 20 per cent tariff, and  
219 a 170 per cent tariff beyond this quota. The Commission kept track of this  
220 regime by issuing import licenses that allocated quotas among banana distributors:  
221 two-thirds to traditional European and ACP importers, and one-third to  
222 other importers.

223 The essential features of the new banana regime were adopted by a qualified  
224 majority vote in December 1992, as part of a package deal. The policy was  
225 opposed by Germany, Denmark, and Portugal whose hostile reaction led to



241 *Figure 2* The complex nesting of the banana dispute

242 *Note:* Not all Lomé countries are in the WTO, but all EU countries are in the Lomé  
243 Convention. The Framework agreement is between the EU and other GATT/WTO  
244 states. The US was not party to any of these agreements or conventions.

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246  
247 the introduction of several changes in February 1993. These concessions were  
248 not enough for Germany who voted against it. Belgium and the Netherlands  
249 also voted against, breaking with precedent by reversing their previous position  
250 of support in December. However, the regulation was passed when Denmark,  
251 then EEC president, switched its vote. The single EEC-wide regime on  
252 banana imports (regulation 404/93) was implemented in July 1993 (Webber  
253 and Cadot 2002:26).

### 254 255 **Resolving the transatlantic banana dispute**

256  
257 The EU's controversial policy ran afoul of WTO rules because it allowed for  
258 preferential access for some banana imports and not others. The nested  
259 nature of the member states within the EU, and of the EU within the WTO,  
260 provided multiple avenues for banana producers and importers to challenge  
261 the contested policy – complicating the situation of European legal and political  
262 decision-makers who tried to figure out how each challenge would play out. All  
263 the layers of politics made finding a compromise much harder, allowing the relatively  
264 straightforward dispute to fester for ten years.

265 Europe's banana policy was first contested in GATT while the new protocol  
266 was still under negotiation. In 1992, a group of Central and Latin American  
267 producers known as the 'dollar zone' group – Costa Rica, Colombia, Guate-  
268 mala, Nicaragua and Venezuela – tried to put pressure on the European nego-  
269 tiation process by requesting the establishment of a panel to examine the  
270 consistency of the various European national banana regimes with GATT. In

271 June 1993, the GATT panel ruled in favor of the ‘dollar bananas.’<sup>3</sup> The GATT  
272 consensus rule allowed the EU and ACP countries to block the ruling so that the  
273 panel report was never officially adopted by the contracting parties (Bessko  
274 1996:4). This ruling became moot when the national regimes were replaced  
275 with the unified Euro-wide banana regime.

276 Once promulgated, the banana policy was immediately contested – first  
277 from within the European Community (as of 1993 the European Union  
278 (EU)). France supported the new regime above all because its ‘départements  
279 d’outre-mer’, especially Guadeloupe and Martinique, were banana producers.  
280 The UK also supported the regime because it offered protection to the Wind-  
281 ward Islands and preserved the interests of Geest, a major British agro-industrial  
282 company which provided shipping and support services for Windward bananas  
283 in Britain. By contrast, the member states who were forced to switch from low  
284 tariffs to the new EU system lost out in this arrangement.

285 Germany lost the most. The world’s highest per capita consumer of  
286 bananas, Germany imported 99.7 per cent of its bananas from ‘dollar zone’  
287 countries<sup>4</sup> and had the lowest banana prices in Europe in 1991.<sup>5</sup> The new  
288 EU-wide banana regime forced Germany to import more EU and ACP  
289 bananas and to go from tariff-free Latin American imports to high-tariff  
290 dollar bananas, resulting in a 63 per cent increase in the price of bananas  
291 in 1994. Given the symbolic resonance of wealth and prosperity embodied  
292 by bananas in Germany, this change hit Germans hard. When German  
293 Chancellor Konrad Adenauer had returned from his victorious negotiation  
294 resulting in a special ‘banana protocol’ attached to the Treaty of Rome in  
295 1957, he had brought a banana to the podium of the Bundestag and  
296 hailed the fruit for ‘represent[ing] the hope of many of us and a necessity  
297 for all of us’ that the days of past privation and humiliation were behind  
298 them. In Eastern Germany, political leaders had used bananas to ‘play  
299 Santa Claus of the nation’, blessing the officially atheist Eastern Germany  
300 with a special December treat. When the Berlin wall fell, East Germans  
301 had embraced capitalist bananas, consuming twice as many bananas as  
302 Western Germans – more than two per person per day (Rodden 2001:72).

303 Outvoted on the European banana regime, the German government took the  
304 unusual step of airing internal EU dirty laundry by adding a written reservation  
305 to the Uruguay Round accord, joined by Belgium, Denmark, Luxembourg and  
306 the Netherlands (Bessko 1996:8). It then twice challenged the EU policy in  
307 front of the European Court of Justice (ECJ).<sup>6</sup> In its first EU legal challenge  
308 Germany, joined by Belgium and the Netherlands, raised three arguments:  
309 the regulation violated fundamental rights granted by EU law; the regulation  
310 was not covered by the provisions of the common agricultural policy (CAP);  
311 and the regulation violated GATT law. The ECJ’s October 1994 ruling rejected  
312 the German arguments, declaring that the Council of Ministers had not  
313 overstepped its powers in establishing the regime and that the European  
314 judges did not have to take GATT provisions into consideration, except in  
315 special circumstances.<sup>7</sup>

316 Challenges within the GATT/WTO continued as well. After the EU  
317 implemented its new banana regime, the 'dollar bananas' producers asked for  
318 the establishment of another GATT panel. The January 1994 panel report  
319 concluded again in favor of the plaintiffs, but the Europeans once again  
320 blocked the results of the 'Bananas II' panel. Knowing that the new Uruguay  
321 Round agreement would make it impossible for the EU to block a WTO  
322 ruling, the EU offered a deal to the Latin American banana producers: if they  
323 were willing to forgo future action against the EU banana regime, they would  
324 get a higher quota for their banana exports to Europe, enjoy a lower tariff,  
325 and have a revised system of export licenses. In March 1994, four of these  
326 countries—Colombia, Costa Rica, Nicaragua and Venezuela—agreed to the  
327 compromise known as the 'Framework agreement' (Lyons 1994:3, Salas and  
328 Jackson 2000:149). The agreement was concluded despite the protests of  
329 Guatemala, the United States and Germany.

330 Germany then challenged the Framework agreement. Even though the ECJ  
331 had refused to consider the compatibility of the banana regulation with the  
332 GATT, Germany nonetheless asked the European Court of Justice to rule on  
333 the Framework agreement's compatibility with the rules of the WTO. The ECJ  
334 again refused to consider whether or not the regulation violated WTO rules.<sup>8</sup>

335 Banana importers also raised myriad direct legal challenges in national and  
336 EU courts. Their most successful legal venue was in Germany. German  
337 judges were concerned that the EU banana regime might violate the German  
338 Constitution and troubled by the ECJ's refusal to review the compatibility of  
339 the banana regulation with GATT requirements – after all, European law  
340 and GATT law are equally binding within Germany. The German Consti-  
341 tutional Court at first appeared willing to consider that the regulation violated  
342 the German Constitution, allowing a lower court to decide if compensation was  
343 required for German importers.<sup>9</sup> By providing for a separate national review,  
344 the Constitutional Court signalled that German courts could be a rival forum  
345 to question the banana regime. German courts thus repeatedly sent references  
346 to the ECJ asking the same questions their government had raised, and lost  
347 on (Alter 2001:110–15). Eventually the German courts backed off. The  
348 German Federal Fiscal Court found that national courts lost their competence  
349 to interpret GATT law when the EEC joined the GATT in 1968 and adopted  
350 its common customs tariffs and trade policy.<sup>10</sup> In addition, the German Con-  
351 stitutional Court refused to consider whether or not the regulation violated  
352 the German Constitution, arguing that so long as the ECJ is 'generally' ensuring  
353 respect for the Constitution, it would not consider whether specific European  
354 policies violate specific provisions of the German Constitution.<sup>11</sup>

355 In the fall of 1995, the United States joined in on the complaint, which could  
356 now be brought under the brand new dispute settlement procedure of the  
357 recently created World Trade Organization (WTO). This American involve-  
358 ment resulted from the intense lobbying efforts of Chiquita, a US-owned  
359 company operating in Latin America, which had made extensive investments  
360 based on their belief that the European banana market would be liberalized.<sup>12</sup>

361 In September 1994, Chiquita Brands Inc. filed a Section 301 petition with the  
 362 United States Trade Representative (USTR), claiming it was losing millions  
 363 because of the new restrictive EU regime. Dole Foods and Del Monte, Chiquita's  
 364 main competitors, did not join in the process, because they had fewer stakes  
 365 in the matter as a result of different planning (Stovall and Hathaway 2003;,  
 366 Webber and Cadot 2002). After intense lobbying by Chiquita, the USTR  
 367 filed a request for the establishment of a WTO dispute settlement panel.

368 The US was joined as a complainant by Guatemala, Honduras, Mexico, and  
 369 Ecuador (the world's largest producer of bananas, which had become a member  
 370 of the WTO in January 1996). They argued that the EU banana regime violated  
 371 the General Agreement on Tariffs and Trade (GATT), the General Agreement  
 372 on Trade in Services (GATS), and the Agreement on Import Licensing Pro-  
 373 cedures. The United States' complaint focused not on the preferential access  
 374 accorded the ACP countries but on the licensing arrangements and on preferen-  
 375 tial tariffs provided to the Latin American 'framework countries' who had signed  
 376 banana trade agreements with the EU (Hanrahan 1999).

377 The WTO issued the 'Bananas III' panel report in May 1997 finding that the  
 378 EU's preferential tariffs for ACP countries were not per se discriminatory  
 379 because the EU had secured a special waiver for the Lomé agreement, but the  
 380 three-tiered quota system was inconsistent with WTO rules. The panel ruling  
 381 was reaffirmed by the WTO's Appellate Body (AB) in September 1997, and  
 382 the EU was ordered to put its banana regime in conformity with WTO  
 383 obligations.

384 Beginning on 1 January 1999, the EU added, an additional 353,000 tons to  
 385 Latin America's quota of 75 ECU per ton tariffs (to take into account consump-  
 386 tion in its newest member states – Austria, Finland and Sweden), and replaced  
 387 its import licensing system with one it claimed was WTO-compatible (Hanra-  
 388 han, 1999), but the USTR complained again because Europe retained its  
 389 quotas. The WTO authorized retaliatory sanctions. The US imposed tariffs  
 390 of 100 per cent on \$192 million-worth of EU imports into the US (none of  
 391 which were agricultural products), keeping the political pressure on Germany  
 392 but exempting the Netherlands and Denmark 'in recognition of their voting  
 393 record against the adoption of the new banana regime.'<sup>13</sup> Ecuador was author-  
 394 ized to levy tariffs on European intellectual property (McCall Smith 2005). The  
 395 banana dispute was finally resolved in April 2001. The United States suspended  
 396 its retaliatory sanctions when the EU agreed to implement a new regime based  
 397 on a tariff-only system by 2006, after a transitory period during which bananas  
 398 would be imported into the EU through licenses distributed on the basis of past  
 399 trade (Josling 2003; Tangermann 2003).

### 401 3. UNPEELING THE LAYERS: NESTING/OVERLAPPING AND 402 THE BANANA DISPUTE 403

404 In a world of independent decisions and non-nested regimes, the conflict  
 405 over bananas makes little sense. The sums involved – at least for the US and

406 Europe – were very small, whereas the protracted dispute was costly for  
 407 European banana consumers, cumbersome for European importers, and very  
 408 disadvantageous to importers lacking favorable import quotas. When the US  
 409 retaliated by imposing tariffs on goods unrelated to bananas, additional  
 410 costs were created for European exporters of these goods—from bed linen to  
 411 coffee-makers. Ecuador’s strategy also established a new legal precedent for  
 412 cross-retaliation across WTO agreements (McCall Smith 2005).

413 As one of the first test cases of the new WTO dispute resolution system, the  
 414 dispute also generated non-negligible legitimacy costs for the WTO. The new  
 415 WTO system had made it practically impossible to block panel rulings, yet  
 416 Europe still refused to change its policy even in the face of negative legal  
 417 rulings and retaliation. Europe’s intransigence was evidence of the weakness  
 418 and unfairness of the WTO system where the powerful could ignore WTO  
 419 rulings and buy their way out of compliance, while poorer countries were con-  
 420 strained by retaliation to comply (Alter 2003: 787). Meanwhile the banana and  
 421 almost concomitant beef hormones rulings infuriated many in Europe who saw  
 422 the WTO decisions as rulings by an unelected multinational body at the behest  
 423 of the United States, punishing Europe because it chose to import its bananas  
 424 from poor former colonies (who seemingly had nothing else to export, short  
 425 of turning to drug production). Tapping into this discontent, nascent anti-  
 426 globalization groups trumpeted these rulings as an unacceptable intrusion on  
 427 national sovereignty in the name of economic liberalization run amok and  
 428 the protection of American corporate power (Gordon and Meunier 2001).  
 429 These arguments culminated in November 1999 where anti-globalization activ-  
 430 ists, some of them dressed as bananas, contributed to the derailment of the  
 431 launching of the new millennium round of multilateral trade negotiations in  
 432 Seattle, the first one undertaken under the new WTO.

433 This section uses counterfactual analysis to explore how the politics regarding  
 434 bananas would have been different if a layer of the nesting – EU, Lomé, WTO  
 435 – were removed. In thinking about what each layer added, we gain an insight  
 436 into the politics that the nesting of the dispute generated. Of course counterfac-  
 437 tual analysis always involves speculation, but it allows us to at least consider the  
 438 possibility that the costly choices made at various points in the dispute were the  
 439 result of the nesting/overlapping of institutions.

### 441 **Scenario 1: No European Union regime**

442  
 443 The revamping of the EU banana policies and the creation of a single EU-wide  
 444 banana regime were part of the drive to complete the internal market. Without  
 445 supranational EU politics at play, the original practices would likely have con-  
 446 tinued: countries with historic ties to ACP countries would have continued to  
 447 apply tariffs to non-ACP bananas as historic agreements allowed, other  
 448 European countries would have continued with their uniform 20 per cent  
 449 tariff, and Germany would have kept its own policy of duty-free banana  
 450 imports. Thus, one concrete effect of the EU’s existence was a change in

451 German, Benelux, Danish and Irish policy that probably would not have  
452 occurred otherwise. The first GATT Banana ruling had only condemned the  
453 French, Italian, Portuguese, Spanish, and UK discriminatory tariff, and that  
454 was before the Lomé waiver. With the WTO Lomé waiver, the unharmonized  
455 GATT banana regime would not have violated any WTO rules.

456 The drive to complete the common market created pressure to harmonize the  
457 EU banana policy – but such pressure did not dictate *how* harmonization had to  
458 occur. The justification for the banana regime was that supporting ACP banana  
459 production was part of Europe's development aid policy. Cadot and Weber  
460 hypothesize that the EU could have accomplished its aid to ACP countries by  
461 levying a 17 per cent tariff on dollar bananas instead, distributing the tariff pro-  
462 ceeds to ACP countries.<sup>14</sup> Because the EU had a WTO waiver for the Lomé  
463 Convention, such a tariff would have been WTO legal. Instead, the EU  
464 crafted and then defended its banana policy, with a complex quota system  
465 that created inequalities among importers and required large amounts of admin-  
466 istrative resources to administer and adjudicate. Furthermore, the quota system  
467 created a vested group of favored importers who fought against any change in  
468 the rules. Given all the political, legal and administrative costs associated with  
469 the quota system, why choose the quota system? Internal EU politics made  
470 the particular form of harmonization, despite its many drawbacks, desirable  
471 nonetheless. The main disadvantage of the tariff system compared to the  
472 quota system was that EU budget rules do not allow for the earmarking of  
473 tariff revenue (Webber and Cadot 2002: 10) – probably because if the EU  
474 could earmark tariff revenue, it would generate an incentive to protect. Since  
475 tariffs revenues could not be earmarked, choosing direct aid would have  
476 meant consuming part of the EU budget for foreign aid. A 17 per cent  
477 across-the-board tariff on dollar bananas would also create import pressure  
478 for the few French and Spanish banana producers located in France's Dom  
479 Tom territories and in Spain's islands at a time when finance ministers were  
480 committed to trimming the common agricultural policy's budget. The EU  
481 ended up giving subsidies to local banana producers, but at the time the  
482 single EU banana regime was debated, negotiators thought that the subsidies  
483 would have been bigger without the quota system to boost the price of  
484 bananas overall, and that the Framework agreement would help Europe avoid  
485 any WTO costs for its policy. Indeed, perhaps the chief attraction of the  
486 Banana regulation was that it generated no budgetary costs – no immediate  
487 foreign aid requirement and no immediate subsidy requirement – while satisfy-  
488 ing those ACP and European banana importers seeking rents.

489 The existence of the EU layer also explains the legal and political imbroglio in  
490 which Germany found itself. German importers and consumers were the  
491 hardest hit by the changes. Past import levels were determinant in setting up  
492 import quotas for the new system. Having focused on Latin American  
493 bananas for so long, German importers lacked long-standing import relation-  
494 ships with ACP exporters, and thus they were disadvantaged by the EU  
495 system for allocating quotas. The distress of German importers was real

496 enough to encourage lower German courts to order an injunction in the appli-  
 497 cation of the EU banana regime, and to repeatedly ask the European Court of  
 498 Justice and the German Constitutional Court to (re)consider whether or not the  
 499 EU banana regime was legal, and whether it undermined the basic rights of  
 500 importers by denying them their ability to exist as commercial enterprises.<sup>15</sup>  
 501 Without Germany's overall commitment to the EU we might have expected  
 502 Germany to choose defection, and thus to refuse to enforce the quota regime.  
 503 With the EU, it appears that Germany accepted a deal for Bavarian farmers  
 504 in exchange for the banana regime (Webber and Cadot 2002: 26).

505 Finally, the move towards the single European market and the consolidation  
 506 of European integration were also a central reason for the involvement of the  
 507 United States in the dispute. Chiquita had bet that the Single European Act  
 508 would lead to a free market throughout Europe and, in the years prior to the  
 509 creation of the EU-wide banana regime, had invested heavily in banana planta-  
 510 tions in Latin America and in shipping equipment. When the EU finally  
 511 adopted its banana regime, Chiquita was in a real bind. With excess capacity  
 512 and huge debt, in a very real and personal way the fortunes of Chiquita's  
 513 CEO became tied to the policy adopted by the EU.<sup>16</sup> This explains why Chi-  
 514 quita gave expensive political donations to both the Republican and Democratic  
 515 political parties, and extensively lobbied Congress to become involved in the  
 516 dispute while its competitors Dole and Del Monte stayed out of the case.

517 Thus the EU layer created the need to harmonize European member states'  
 518 banana import rules; it led to the adoption of the convoluted quota system that  
 519 ran afoul of WTO rules; it created the economic stress and legal dilemmas for  
 520 Germany and its courts; and it created the incentive for Chiquita to invest in  
 521 expanding its export capacities, which then led Chiquita to work so hard to chal-  
 522 lenge the EU's banana regime.

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### **Scenario 2: No Lomé regime**

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A harmonized system of tariff-free bananas would have violated the Lomé Con-  
 vention's promise of preferential access to the European market for bananas,  
 forcing ACP countries to compete with Latin dollar bananas that are cheaper  
 to produce because the climate and terrain in Latin countries is superior for  
 bananas, and multinational corporations have invested in Latin banana pro-  
 duction in ways that small family producers in ACP countries cannot replicate.

The larger unstated issue, however, was that the Lomé conventions were  
 designed to help out current and former colonies of some European states.  
 The 1957 German banana protocol and the absence of a co-ordinated banana  
 regime for so many years was a symptom of the deep antipathy European  
 states without colonies felt towards the idea of preferences for former colonies.  
 The Lomé conventions offered a brilliant packaging to deal with this cleavage.  
 Europe could boast that the Lomé conventions represented the largest financial  
 and political framework to facilitate North–South aid and co-operation, while  
 member states wanting to aid former colonies (France, and then later the UK

541 and Spain) could offer preferential treatment and thus maintain their ‘special  
 542 relationship’ with former colonies. But the very specific Lomé promise of  
 543 preferential access for ACP bananas brought the old cleavage back to the fore.  
 544 John Rodden summarized the unsaid sentiment:

545 ‘The new EU import regulations aimed to help banana growers in European  
 546 tropical islands (e.g. France’s Martinique and Guadeloupe, Spain’s Canary  
 547 Island) and in former European colonies in Africa, the Caribbean, and the  
 548 Pacific. Germany, which lost all of its own colonies after World War I  
 549 balked: Why should its own interests be sacrificed to those of France and  
 550 Spain, whose banana growing former island colonies have been the benefi-  
 551 ciary of the 1993 (policy)?’  
 552

(Rodden 2001: 69)

554 Giving preference to very poor countries was, in itself, not the problem. The  
 555 GATT had granted a waiver for the Lomé Convention in October 1994, which  
 556 lasted until the end of Lomé IV (2000). This waiver became a focal point of  
 557 developing countries. As the date of expiration approached, fifty-six ACP  
 558 members of the WTO threatened to oppose new trade negotiations on non-  
 559 related issues – such as environment, labor, and the ‘Singapore issues’ of invest-  
 560 ment and competition policy – in the upcoming Doha round of multilateral  
 561 trade negotiations unless the waiver was extended. The WTO extended the  
 562 waiver until 2008, covering the new Cotonou agreements that had replaced  
 563 the Lomé Convention. The nesting of Lomé countries within WTO allowed  
 564 ACP countries to leverage their political power. The EU could not play a  
 565 two-level game telling the Lomé countries that the WTO prohibited the  
 566 policy. Instead, ACP countries could play the WTO game to demand a  
 567 waiver and pressure European countries to maintain their advantaged market  
 568 access.  
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### 570 **Scenario 3: No WTO regime**

571  
 572 The WTO system differs from its predecessor, the GATT dispute resolution  
 573 system, in the inability of states to block adoption of adverse panel decisions.  
 574 The creation of the WTO led to an immediate change in EU behavior,  
 575 though still unsatisfactory from the perspective of the US and Ecuador. Antici-  
 576 pating a challenge to the banana regime under the new WTO system, the EU  
 577 offered a deal to the Latin American countries that were parties to the GATT  
 578 case: according to the 1994 ‘Framework agreement,’ the EU would raise the  
 579 global quota to 100,000 tons and reallocate unused import licenses, in exchange  
 580 for the signatories dropping their claims to future GATT cases. Latin American  
 581 countries started to disagree among themselves over the allocation of the quota  
 582 within their group, leading the EU to drop its offer of a deal and to then block  
 583 the panel report. However, soon after, Colombia, Costa Rica, Nicaragua and  
 584 Venezuela accepted a reduction in the EU tariff and an increase in their tariff  
 585 quota to 2.2 million tons, leading to an arrangement that was similar to the

586 status quo ante of the old EU banana regime. In exchange, these countries  
 587 promised not to challenge the banana regime until its expiration in December  
 588 2000 (Sutton 1997). This was exactly what was supposed to happen – the new  
 589 enforceability of WTO law was expected to encourage settlements in the direction  
 590 of greater compliance with the law. (Ecuador, which was not a member of  
 591 GATT at the time, was not part of this arrangement; nor was the US.)

592 European diplomats saw the quota system as an expensive pay-off scheme to  
 593 compensate the ‘losers’ of the banana regime. Preferential import quotas were  
 594 the equivalent of cash in the pockets of importers – they could buy dollar  
 595 bananas at a low price, and pocket the profit reaped by selling these bananas  
 596 on the price-inflated European market. Since banana companies themselves  
 597 owned many European fruit-importing companies, quota profits went directly  
 598 into their pockets. Every increase in the preferential quotas of Latin American  
 599 producers was akin to direct compensation for firms hurt by Europe’s policy.  
 600 Because those most impacted by the agreement were compensated, Europeans  
 601 were upset that the Framework agreement was being challenged by the US,  
 602 which had far less at stake.<sup>17</sup>

603 Without the WTO layer, it is unlikely that the US would have been involved  
 604 at all in the dispute. Before the WTO, the US had its Section 301 system to uni-  
 605 laterally retaliate against unfair trade practices, but it is not clear whether the EU  
 606 would be in violation of any trade agreement *vis-à-vis* the US. Since the problem  
 607 was a EU policy towards third countries, and the US is not a significant produ-  
 608 cer of bananas,<sup>18</sup> it is doubtful that the US would have pressed the case under  
 609 Section 301 – especially in the absence of a means to enforce compliance. The  
 610 WTO layer created a mechanism to challenge a WTO illegal policy, even if the  
 611 impact in the US was only indirect. Chiquita lobbied Congressmen who in turn  
 612 put pressure on the United States Trade Representative (USTR) – an executive  
 613 agency that serves at the pleasure and behest of Congress. Because of the corpor-  
 614 ate interests of Chiquita and its strong lobbying power, the USTR put its  
 615 negotiators under considerable pressure to aggressively pursue the banana case  
 616 in the WTO (Hanrahan 1999; Stovall and Hathaway 2003; Webber and  
 617 Cadot 2002).

618 While only Chiquita had direct interests at stake in the dispute, many US  
 619 interest groups beyond Chiquita were concerned about the precedents that  
 620 might be established in the banana case. For them the banana dispute was a  
 621 perfect test case precisely because few American and European interests were  
 622 directly at stake. US beef producers and the producers of genetically modified  
 623 foods saw the case as a harbinger of what might happen when the issues of  
 624 beef hormones and genetically modified foods would be litigated, and thus  
 625 they wanted WTO rules enforced.

626 Ecuador, the world’s largest exporter of bananas, was the one country with a  
 627 big stake that was not compensated in the Framework agreement because it was  
 628 not part of GATT at the time. The United States was keen to have Ecuador on  
 629 its side because Ecuador had a clear interest in the case (where the US did not)  
 630 and because Ecuador’s interests were domestic, since its industry was not owned

631 by American multinationals. According to James McCall Smith, 'officials in  
632 Ecuador decided that the case was of such paramount concern that they  
633 rushed their negotiations to gain entry to the WTO in order to ensure their  
634 status as a complainant' (McCall Smith 2005: 10). Two weeks after its accession  
635 to the WTO, Ecuador joined the US suit (McCall Smith 2005). Without US  
636 support in the form of the joint suit, it is questionable whether Ecuador  
637 would have joined the WTO until later in time. In the end Ecuador was disap-  
638 pointed by the dispute's outcome. While it had won the right to retaliation,  
639 Ecuador found itself unable to levy fines without harming itself more than  
640 Europe. Ecuador was so upset with the US–EU settlement that the Foreign  
641 Minister threatened to demand the United States withdraw a military base  
642 from Ecuador.<sup>19</sup> Still, according to Smith, Ecuador got more from the settle-  
643 ment than it might have, had it not joined the WTO and been party to the  
644 dispute (McCall Smith 2005: 32).

645 On the one hand, the WTO layer 'resolved' the dispute. The threat of WTO  
646 litigation led the EU to craft the 'framework agreement' and to ultimately  
647 change its quota system of import license allocation. On the other hand, the  
648 WTO layer exacerbated the conflict by turning it into a transatlantic battle  
649 and, ironically, by creating the incentives for political bargaining where the  
650 general public seems to be the greatest loser. The public loses twice in  
651 the case – bananas are more expensive in Europe than they would be otherwise,  
652 and banana importers get to extract rents instead of either the EU or the ACP  
653 banana producers collecting revenue to distribute. Indeed in some respects,  
654 more layers means more actors that have to be bought off and compensated.  
655 Even if the EU really does convert the system to a tariff-based system with a  
656 lower tariff for ACP bananas and an across-the-board tariff for dollar  
657 bananas, banana consumers will continue to pay 'rents'; thus one can question  
658 how much the WTO has led to a more free-trade-oriented system, or shifted the  
659 balance of power in favor of free traders over protectionist interests.

## 661 CONCLUSION

662  
663 The banana dispute was the first transatlantic dispute to be adjudicated under  
664 the newly created WTO and, as such, it created a precedent for dealing with  
665 a lack of a hierarchy of norms in the post-Cold War era. This complicated  
666 case is an example of the new trade politics – multilayered, multi-venue, with  
667 provisions imbricated within and across multiple international agreements. As  
668 the number of international commitments proliferates, the nesting and overlap-  
669 ping of institutional regimes will become increasingly prevalent. How will this  
670 shape international politics? Can we derive any insights from the banana case  
671 that may be generalized to future conflicts created by nested/overlapping inter-  
672 national regimes?

673 George Tsebelis reasoned from theory that 'seemingly suboptimal choices  
674 indicate the presence of nested games' (Tsebelis 1990: 248). We show specifi-  
675 cally how nesting contributed to the choices made. In many respects the

676 banana dispute represents a ‘typically’ complicated example of the consequences  
 677 of institutional nesting/overlapping in the international realm. The dispute was  
 678 created by nesting, since the completion of the single European market pro-  
 679 duced a clash between the EU Lomé Convention obligations *vis-à-vis* its  
 680 former colonies and its membership in the GATT/WTO trading system.  
 681 The different layers of nesting help us understand the seemingly puzzling beha-  
 682 viors in the dispute – the adoption and then defense of the convoluted quota  
 683 system, and the strategies of political and legal actors within the dispute.

684 The absence of clear hierarchy between all the layers involved – European  
 685 member states, the EU, the Lomé countries, and WTO – makes the behavior  
 686 of legal decision-makers more understandable. Legally and politically, the  
 687 relationship of EU law to WTO law is ambiguous. EU member states have  
 688 accepted unitary EU representation within the WTO, yet they still retain  
 689 their individual memberships. The decision to replace member state partici-  
 690 pation with EU participation was never made because the issue of the Commis-  
 691 sion’s authority over trade in services was too contentious (Meunier and  
 692 Nicolaidis 1999; Bourgeois 2000: 73). Thus the problem of whether a state is  
 693 obligated to the EU agreement over the WTO agreement (or vice versa) was  
 694 left unresolved by political bodies. This ambiguity allowed for the internal  
 695 opposition to the regime to be exploited in European member states’ national  
 696 courts, and to bubble over into the Uruguay Round negotiations. This ambigu-  
 697 ity also made it hard for the ECJ to answer the question of whether WTO obli-  
 698 gations are legally supreme to EU law. On the one hand, the ECJ’s refusal to  
 699 review the compatibility of EU law with WTO law is legally remarkable in  
 700 that the hallmark of the legal method is the like application of reason and  
 701 rules across cases. Yet here we find the ECJ refusing to do exactly what it  
 702 asked national courts to do – enforce international rules at home – and we  
 703 even find the ECJ interpreting similarly worded texts differently based on the  
 704 political context (Bourgeois 2000). This inconsistency makes sense if we con-  
 705 sider that the ECJ is acting like a supreme court nested in the international  
 706 order. Almost all domestic courts avoid ‘tying the hands’ of governments,  
 707 forcing them to comply with international agreements when other executive  
 708 branches are not similarly bound. The ECJ tries when possible to interpret  
 709 EU law consistently with WTO law. When the Council explicitly invokes inter-  
 710 national legal obligations or makes clear that the EU law is intended to bring the  
 711 EU into compliance with an international obligation, the ECJ acts as the Coun-  
 712 cil’s enforcer, making sure that EU law and member state law comply with inter-  
 713 national legal obligations. However, it leaves out any decision about whether or  
 714 not the EU should comply with political bodies.

715 The nested nature of the dispute also helps us understand Europe’s behavior.  
 716 Not only did it take an extremely long time for Europe to change its policy;  
 717 Europe’s banana policy remains significantly more costly than necessary if the  
 718 goal was simply to aid Lomé countries.<sup>20</sup> The politically and financially expen-  
 719 sive, administratively convoluted European banana policy and the legal rulings  
 720 by European courts only make sense if we considered the nested context of

721 Europe's banana policy. Otherwise Europe would have gone with preferential  
722 tariffs that would have satisfied the WTO and Germany alike.

723 With the ECJ position now defined through its banana and other rulings,  
724 European domestic actors may decide it is not worth trying to challenge  
725 common policies in European courts on the basis of conflicts with international  
726 treaties. How long national courts will stay out of resolving conflicts across inter-  
727 national commitments, however, is yet to be seen. As long as conflicts of inter-  
728 national rules represent complicated political bargains among competing  
729 interests, national courts are likely to presume that they could do no better at  
730 resolving the issue than the political or international judicial bodies. But it is  
731 hard to imagine that the German Constitutional Court would be willing to  
732 hold to its current position should an ECJ ruling create a serious and politically  
733 unpopular violation of its constitution, even if the ECJ 'generally' respects the  
734 rights of European citizens.

735 Can findings from this study be generalized beyond the case of the EU to  
736 analyze the conditions under which nesting/overlapping is likely to result in  
737 conflictual outcomes? We can expect to find contortions and inconsistencies  
738 when actors that enforce hierarchy in the domestic realm are confronted with  
739 issues related to the international realm. This finding is significant because a  
740 number of scholars place their hope for international law in domestic courts  
741 which can become enforcers of international rules at home (Hathaway 2004;  
742 Slaughter 2004). This study suggests that the goal of domestically enforced  
743 international law may remain elusive unless political actors declare some hierar-  
744 chy among the conflicting obligations they create. In addition, given the inher-  
745 ently nested nature of the EU, in which every deal represents a complex bargain  
746 among states and European institutions made in the shadow of the WTO,  
747 we can expect trade-related EU policy to be complicated to decipher. Where  
748 most observers blame Europe's technocratic nature for its Byzantine policies,  
749 this study suggests that the real problem is the EU's nested nature in the  
750 international system. With the number of 'regional trade block' exceptions pro-  
751 liferating in the WTO, we may well find that other regional organizations face  
752 similar realities. These regions may also follow Europe in the public being put  
753 off by the complicated nature of the region's supranational politics and policies.

754 How these political contortions ultimately influence international politics is  
755 not entirely clear. The banana dispute was a specific dispute about a specific  
756 policy, but it was not an 'old-style' trade dispute about protecting the domestic  
757 losers from international competition. Ecuador had direct interests at stake, but  
758 there were no powerful European or American banana producers to protect.  
759 Rather the European protection of the Lomé guarantees was about development  
760 aid through off-budget measures. The symbolic goal of maintaining the viability  
761 of Third World producers also resonated domestically. Moreover, it was not  
762 an 'old-style' dispute because the banana politics spilled over into other  
763 international arenas: Lomé countries linked their case to the unrelated  
764 'Singapore issues' of investment and competition policy; Caribbean countries  
765 (unsuccessfully) lobbied the US to drop its banana case during the 1994

766 Summit of the Americas; and anger over the banana and beef hormones cases  
 767 contributed to the EU's decision to pick up again its challenge to the US  
 768 export subsidy regime (the FSC case). For the ongoing dispute over genetically  
 769 modified crops, the likelihood of political spill-over is even greater since it  
 770 touches on the delicate issue of how regulators deal with scientific uncertainty,  
 771 an issue that is relevant in environment, food safety, and nuclear technology  
 772 politics. Because there is no clear hierarchy of international agreements, a  
 773 legal victory or loss in one venue is highly likely to stir politics in another  
 774 venue to try to undercut the authority of the settlement. Raustiala and  
 775 Victor's discussion of the 'regime complex' seems to exemplify such politics,  
 776 showing actors and countries rushing to use different forums to create different  
 777 sources of authority for their preferred policy (Raustiala and Victor 2004). Raustiala and Victor hypothesize a spread of 'regime complexes,' and the politics such complexes engender. Our study reinforces this finding by suggesting that the absence of hierarchy itself can be an intentional strategy, which drives a demand for international agreements that enshrine different perspectives on hotly contested issues.

783 This study has highlighted an important question worthy of further investigation and systematic reflection: Under what conditions are nesting and overlapping more likely to result in conflictual outcomes? In a way, the banana dispute may be a unique case. The multiple layers of international commitments not only created the conflict, but also made it much harder to resolve. With perhaps the exception of international disputes on hormones and biosafety, most other nested issues in world politics do not explode. Understanding why in some cases the dog barks and in others it does not might usefully prevent the emergence of other protracted, potentially costly inter-institutional conflicts.

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 815 dispute, and freely acknowledge that the interpretation of the motives of  
 816 actors involved is our own.

## 817 818 819 NOTES

- 820
- 821 1 Bureaucracies tend to replicate policy formulas to create internal consistency and to  
 822 ease implementation. The EU chose quotas because they boosted the price of  
 823 bananas, decreasing the need for subsidies to make French and Spanish bananas  
 824 competitive. The particular system of import licenses replicated existing mechan-  
 825 isms used to distribute quotas across individual importers. Since the quotas were  
 826 designed to discriminate between ACP and dollar bananas, categories of quotas  
 827 (A, B, and C) were created, resulting in an incredibly complicated licensing  
 828 system that caused German importers to raise legal challenges and led the EU  
 829 policy to be condemned by the WTO. The difficulty of changing this system was  
 830 in no small part associated with the entrenchment of the policy repertoire which  
 831 bureaucracies cling to.
  - 832 2 Signed in 1975 after Great Britain's accession into the EEC (and renewed in 1979,  
 833 1984 and 1989), the Lomé Convention is the world's largest financial and political  
 834 framework for North–South co-operation. This special relationship is characterized  
 835 by non-reciprocal trade benefits for ACP states including unlimited entry to the EC  
 836 market for 99 per cent of industrial goods and many other products. Of the sixty-  
 837 nine ACP countries, at least eight are significant banana producers. Lomé conven-  
 838 tions: OJ 1976, L25/1; OJ 1980, L347/1; OJ 1986, L86/1; OJ 1991, L229/I.
  - 839 3 Latin American bananas are often referred to as “dollar bananas” because they are  
 840 grown by American multinationals such as Chiquita and Dole on huge, efficient  
 841 plantations in Latin America.
  - 842 4 With 14.9 kg/capita compared to an average EU consumption of 9.3 kg/capita  
 843 (Bessko 1996:265).
  - 844 5 In 1992, bananas cost \$1.3/kg in Germany, vs. \$2.07 in the UK (Sutton 1997).
  - 845 6 *Germany v. Council*, ECJ C-280/93 [1994] ECR I-4973; see: par. 78. In a second  
 846 case, the German government challenged the Commission's system for implement-  
 847 ing the disputed regulation, but the ECJ dismissed this case on a technicality.  
 848 *Opinion 3/94* [1995] ECR I-4577.
  - 849 7 *Case 280/93, Germany v. Council* [1994] ECR I-4973.
  - 850 8 The ECJ ruled that it did not need to review the compatibility of the Framework  
 851 agreement with WTO law because the Framework agreement had come into  
 852 force with the Uruguay Round, and thus any assessment as to the agreement's leg-  
 853 ality raised under EEC Article 228 would be legally moot. *Opinion 3/94 on the Fram-  
 854 ework agreement on bananas*, decision of 13 December 1995 [1995] ECR I-4577.
  - 855 9 *Firma T. Port v. Hauptzollamt Hamburg-Jonas*. (T. Port I, Banana I) BVerfG  
 decisions of 25 January 1995. First Chamber of the Second Senate 2 BvR 2689/  
 94 and 2 BvR 52/95 [1995] EuZW 126. Verwaltungsgerichtshof Hessen decision  
 of 9 February 1995 [1995] EuZW 222.
  - 10 1996 judgment of the German Federal Fiscal Court *Europäische Zeitschrift  
 für Wirtschaftsrecht* (EuZW) 126-128, cited in Gerard G. Sander (1998) *The EC  
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 857 May 1995 [1995] EuZW 413. BFH decision 22 August 1995. T. Port II, Second  
 858 banana ruling. BVerfG decisions of 26 April 1995. First Chamber of the Second  
 859 Senate 2 BvR 760/95, [1995] EuZW 412.
- 860 12 'Yes, we have no profits' (2001) *Fortune* 144 (11):182–96.
- 861 13 USTR Charlene Barchefsky, quoted in "USTR announces list of European  
 862 products subject to increased tariffs." Document 98–113, Office of the USTR.
- 863 14 The EU claimed that aiding the banana industry was preferable to providing direct  
 864 aid. Caribbean bananas are grown on small, family-run farms, and bananas seem to  
 865 be the only year-round crop that can recover quickly enough after storm or flood  
 866 damage. Moreover, according to the defenders of the EU regime, the only alterna-  
 867 tive crop for these countries in the absence of markets for their banana exports  
 868 would be drugs. Perhaps. But drug production is also a problem in Latin  
 869 America, and Europe is also vulnerable to the effects of drug production in Latin  
 870 America. In addition, a straight-up tariff on dollar bananas might have provided  
 871 a sufficient benefit for ACP producers.
- 872 15 Firma T. Port v. Hauptzollamt Hamburg-Jonas. BVerfG decisions of 25 January  
 873 1995. First Chamber of the Second Senate 2 BvR 2689/94 and 2 BvR 52/95  
 874 [1995] EuZW 126. Firma T. Port v. Hauptzollamt Hamburg-Jonas Verwaltungs-  
 875 gerichtshof Hessen decision of 9 February 1995, [1995] EuZW 222. Discussed in  
 876 Alter (2001).
- 877 16 'Yes, We have no Profits' (2001) *Fortune* 144 (11): 182–96; Taylor (2003). Q4
- 878 17 Based on interviews with members of the European Commission, Brussels,  
 879 September 7 and 8, 2004.
- 880 18 Hawaii produces bananas for domestic consumption. It was argued that by dimin-  
 881 ishing consumption for dollar bananas in Europe, the price of Hawaiian bananas  
 882 could be adversely affected. This may be true, but most commentators explain  
 883 US actions by focusing on Chiquita banana's considerable efforts to lobby Congress  
 884 rather than the Hawaiian banana industry.
- 885 19 'Ecuadorian banana growers request US base withdrawal due to new import  
 886 scheme', in *World News Connection*, 26 April 2001.
- 887 20 Part of the delay was that decision-makers waited for legal and political challenges in  
 888 the different layers to play themselves out, but European actors were also buying time.  
 889  
 890

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