THE BANANA DISPUTE
CONFLICTS BETWEEN WTO LAW, EU LAW AND NATIONAL LAW

BY
MR. GEORG H. SCHLUETER

AN INDEPENDENT RESEARCH PAPER SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENT
FOR THE DEGREE OF MASTER OF LAWS
(IN BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

AUGUST 2006

THE BANANA DISPUTE

CONFLICTS BETWEEN WTO LAW, EU LAW AND NATIONAL LAW

BY

MR. GEORG H. SCHLUETER

AN INDEPENDENT RESEARCH PAPER SUBMITTED IN

PARTIAL FULFILLMENT OF THE REQUIREMENT

FOR THE DEGREE OF MASTER OF LAWS

(IN BUSINESS LAW)

GRADUATE SCHOOL OF LAW

ASSUMPTION UNIVERSITY

AUGUST 2006

Independent Research Title: The Banana Dispute - Conflicts between WTO Law, EU Law and National Law

Author: Mr. Georg Schlueter (Assessor Iuris)

Major: Business Law (International Program)

Advisor: Professor Dr. Dieter C. Umbach

Faculty of Law, Assumption University approves this Independent Research Paper as the partial fulfillment of the requirement for the Degree Master of Laws.

N. Posakabutra ..... Director of the Graduate School of Law.

(Assoc. Prof. Nattapong Posakabutra)

Committee.

N. Posakabutra ..... Chairman.

(Assoc. Prof. Nattapong Posakabutra)

..... Committee.

(Dr. Ioan Voicu)

D C Umbach ..... Advisor and Committee.

(Prof. Dr. Dieter C. Umbach)

Independent Research Title: The Banana Dispute - Conflicts between WTO Law, EU Law and National Law

Student Name: Mr. Georg Schlueter (Assessor Iuris)

Degree: Master of Law (International Program)

Academic Year: 2005/06

Advisor: Professor Dr. Dieter C. Umbach

Abstract

The so called "Banana Dispute", dealing with the set of rules and regulations for the import of bananas to the European Union, has been considered the "Trade Case of the Decade". It started in the context of the creation of the "Single European Market" in 1992 and has kept trade experts, lawyers and diplomats from both sides of the Atlantic hard at work. The "Banana Dispute" actually involves regulation systems on three different levels: the multilateral organization, WTO, the European Union and its Member States. It is a complex illustration of the interwoven framework or cogwheel-mechanism of overlapping legal systems and institutions. This research paper will review various landmark decisions of the relevant GATT/WTO organs, the European Court of Justice and several national Courts. It will selectively evalute their legal manoeuvring, in particular the functioning of the WTO dispute settlement and enforcement system, fundamental structural issues of European integration, the implementation of WTO law in the European legal system, and the protection of fundamental rights on the levels of German constitutional law and Community law.

Acknowledgements

I would like to express my deepest gratitude to all those who have assisted me, either directly or indirectly, in the successful completion of the Master of Law Program in International Business Law.

In particular, I wish to express sincere appreciation to Professor Dr. Dieter C. Umbach, Potsdam University/Germany, who was a classical Visiting Professor from Europe with considerable Asian experience in the year 2006 at Assumption University, Faculty of Law. As my advisor for this independent research paper, I am very grateful for his valuable input in the preparation of this manuscript, his kind inspiration and continuous encouragement.

I am highly indebted to Professor Pornchai Soonthornpan, Dean of the Faculty of Law, and Professor Nattapong Posakabutra, Director of the Graduate School of Law, Assumption University, who have successfully established an international law program in Thailand. They provided me the wonderful opportunity to further my studies in business law in an international and cordial environment and in close cooperation with various nations.

I would like to thank my classmates, all lecturers of the International Law Program and members of the Faculty of Law, especially Dr. Poom Moolsilpa, Chairman of the International Law Program, for his indispensable support in organizational and legal matters throughout the time at Assumption University, and also former Ambassador Dr. Ioan Voicu, whose commitment as lecturer in international economic law contributed very much to the success of this program.

Finally, I would like to express deepest gratitude to my wife, Shideh, for her patience and support during this very instructive academic year at Assumption University.

List of Abbreviations

ACP	African Caribbean Pacific
CMLRev	Common Market Law Review
COMB	Common Organization of the Market in Bananas
DSB	Dispute Settlement Body
DSP	Dispute Settlement Procedure
DSU	Dispute Settlement Understanding
EEC	European Economic Community
ECU	European Currency Unit
EC	European Community
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
ELJ	European Law Journal
EU	European Union
FCC	Federal Constitutional Court
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ITO	International Trade Organization
SEM	Single European Market
TEU	Treaty of the European Union
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

Table of Contents

Chapter 1

Introduction

"Legal progress is often secreted
in the interstices of legal procedure"
Oliver Wendell Holmes, Jr.

1.1 Historical Background

Today, bananas are the second most traded foodstuffs worldwide just after coffee.[1] This makes bananas a high profitable and disputed product to trade. Production of bananas comes to a large extent from three areas: the Caribbean, Central America and the Philippines.[2] The European Union – usually using the EC legal personality-[3] is the world's largest consumer and second largest importer of bananas. Prior to the establishment of the Single European Market (SEM) in 1993, banana import policies in the EC varied broadly between the different member countries. In some countries like Germany the import of bananas was duty-free whereas in other countries import duties of 20 % were imposed. After the birth of the SEM, which implied free circulation of goods throughout the territory of the EC, the different national arrangements have been replaced with a common tariff-quota import system.

---

[1] M. García, Banana III : European Communities - Regime for the Importation, Sale and Distribution of Bananas, http://www.ejil.org/journal/Vol9/No1/index.html, available on 20 July 2006.

[2] Ibid.

[3] For the theoretical background to the terminology see A. von Bogdandy, The Legal Case for Unity, Common Market Law Review, 1999, pp.887, 905.

1.1.1 History of the European Communities and the Way to the SEM

The European Communities came into existence in the aftermath of the Second World War.[4] The impetus for their creation, to large extent, came from a desire to foster integration and world peace after many decades of war, discort and resentment in Europe. As Germany has been at war with most of the European states only a few years earlier some visionary European politicians came up with the idea to establish a new political and economic alliance between several European states and Germany.[5] Already in 1951 the six European states Belgium, France Germany, Italy, Luxembourg and the Netherlands founded the European Coal and Steel Community (ECSC) in order to control the production of coal and steel as the two main components necessary to wage war. Besides the protective reason to supervise Germany´s heavy industry the economic and political rebuilding of Europe was still high on the agenda. These additional purposes were also mentioned in the Treaty of Paris which established the ECSC. In it the parties recorded that the creation of an economic community was regarded as "the basis for a broader and deeper community among peoples long divided by bloody conflicts."[6] As it was rather easier do make any progress at the economic than at the political level the next step of European integration was

---

[4] An overview of the history of the EC can be found in J. Fairhurst/Chr. Vincenzi, Law of the European Community, pp. 3 et seq.; Steiner, Josephine / Woods, Lorna, Textbook on EC Law, pp. 3 et seq.; European Union, http://encarta.msn.com/encyclopedia_761579567/ European_Union.html.

[5] Two outstanding prominent figures were the two French politicians Robert Schuman and Jean Monnet (Life history can be found at http://www.historiasiglo20.org/europe/biografias .htm).

[6] Treaty of Paris, http://www.unizar.es/euroconstitucion/library/historic%20documents/Paris /TRAITES_ 1951_CECA.pdf, p.3.

the establishment of the European Economic Community (EEC). The founding treaty was signed in Rome in 1957 alongside the European Atomic Energy Community. Inspired by the Benelux Customs Union the six founding states of the EEC – the same ones which already had established the ECSC - now intended to promote the convergence of national economies into a single European economy by establishing a common market in goods, labour, capital and services among the member states.[7] Despite these ambitious goals, national markets long remained fragmented for many goods.[8] An internal market could only be completed gradually. The free movement of persons, capitals and services continued to be subject to numerous limitations. Even the free circulation of goods which could make the most significant progress still remained fragmented for many goods.

The goal to complete the internal market by 1 January 1970 could not be achieved. Reason for this was a standstill due to general aversion to open the market for certain products and, essentially, the ponderous decision making process which was based on unanimity. It took almost thirty years when in 1986

[7] Initiators and pioneers of the EEC were Belgium, Netherlands and Luxembourg which had established the Benelux customs union several years earlier. These three neighbouring countries, all located between the big states France and Germany, agreed to remove all customs barriers for the trade of goods and established a common customs tariff between them and third countries from outside. Later on they also accepted a free flow of capital and free movement of labour. The convincing result of the Benelux customs union was a raise of internal trade by 50 % within the years 1948 and 1956 (Fairhurst J. / Vincenzi C., The Law of the European Community, p. 5/6.).

[8] As the EEC was in fact a customs union it was colloquially known as "Common Market (see: Nailman, Frederic Godlove, Fortress Europe versus Chateau Mondial, pp. 98 et seq.

the Single European Act tried to remedy this fragmentation by calling for the completion of an internal market in which goods, services, people and capital could move around freely by the end of 1992. One other major reform imposed by the Single European Act was the modified decision making process. The former requirement for unanimity was replaced by qualified majority voting. Henceforth no single state could block a decision alone. This important change directly applied to the outstanding legislation concerning the new date for completion of the internal market at the end of 1992. Almost 300 areas had been identified in which directives, or measures, were considered necessary to achieve the internal market.[9] By the end of 1992, when the internal market should be completed, all apart from 18 of the three hundred measures had been adopted by the Council. Finally the ambitious goal could be reached in time: The Treaty of the European Union (TEU) came into effect on 1 January 1993. Among other benefits, it covers the elimination of customs barriers, the liberalization of capital movements, the opening of public procurement markets, and the mutual recognition of professional qualifications.

1.1.2 Banana Import Arrangements before the Establishment of the SEM

One of the three hundred measures which had to be adopted as a preparation for the SEM in 1993 was a new banana import regime. Before 1993 the banana market was particularly fragmented, with each European member state selecting its own banana regime based on past imperial realtionships and present interests. Altogehter three distinct European import regimes existed: France, Italy, the UK,

---

[9] Hanlon, J., European Community Law, pp. 7-9.

Greece, Portugal and Spain operated special preferential access regimes in order to protect their domestic production and offered tariff protection for the sixty-nine African-Caribbean-Pacific (ACP) country producers of which most were former European colonies benefiting from special trade agreements through the Lomé Convention.[10] The Netherlands, Luxembourg, Denmark and Ireland had an across- the board 20 % tariff for banana imports. Germany could obtain a special arrangement, set out in the banana protocol of the Treaty of Rome, which allowed duty-free access for Central and Latin American bananas.

1.1.3 Banana Import Arrangements after the Establishment of the SEM

After the establishment of the SEM in 1993 the EC had to unify the import regime of bananas. To modify the existing banana regimes and to create a new system which had to be consistent with the SEM, the Lomé Convention commitment to protect the banana exports of ACP countries, the Banana Protocol in the Treaty of Rome guaranteeing Germany unhindered access to bananas and the obligations under the GATT to provide preferential access to imports from developing countries including non ACP-countries was equivalent to the squaring of the circle. It took four years of intense negotiations before, on 13 February 1993, the EC passed on a majority vote Regulation Nr. 404/93

[10] Signed in 1975 after Great Britain´s accession to the EEC (and renewed in 1979, 1984 and 1989), the Lomé Convention is the world´s largest financial and political framework for North-South co-operation. This special relationship is characterized by non-reciprocal trade benefits for ACP countries including unlimited entry to the EC market for 99 per cent of industrial goods and many other products. Of the sixty-nine ACP countries, at least eight are significant banana producers (see: http://ec.europa.eu/comm/development/body/cotonou/lome_ history_en.htm).

which created a Common Market Organization for Bananas (COMB) involving a multilayered system of import rules, with strong preferences for EC and ACP bananas.[11]

The COMB honoured the Lomé Convention of 1975 and extended to all its member states those protectionist policies that existed before the SEM was created. The highly disputed part of the convention which has been the substance of various proceedings is Part IV of the regulation dealing with the complicated import system of bananas. According to the COMB supplies from the EC (including overseas territories) were unrestricted. Imports from the ACP countries were tariff-free up to 857,000 tons, after which they were subjected to a 750 ECU (European Currency Unit) per ton tariff. Finally, imports from other countries (mostly from Central and Latin American producers) were allotted a yearly quota of two million tons with a 20 % tariff, and a 170 % tariff beyond this quota.

The implementation of the COMB in 1993 had an immediate impact on world banana trade. Whereas in the same year banana world exports expanded by 2.3%, imports to the EC fell from 3.4 in 1992 to 2.3 million tonnes in 1993. The banana surplus of 1993 affected prices within the EC and worldwide: the retail

[11] Council Regulation 404/93/EEC of 13 February 1993 on the common organization of the market in bananas, 1993 OJ L 047, 1; Commission Regulation 1442/93/EEC of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community, OJ 1993 L 142, 6.

prices in Germany increased by 8 % and decreased by 11 % in France and by 6% in the UK. In the USA retail prices fell by 7%.

According to this regime three kinds of bananas received a different treatment:

(i) Bananas from EU member states or overseas territories for which no tariffs had to be paid.

(ii) ACP bananas from countries which formerly have been colonies of different EU Member States. Up to a certain quantity (857.000 tons) ACP countries did not have to pay any tariff for imports of bananas into the EU.

(iii) Bananas imports from other countries than EC Member countries or ACP countries, mainly those from Central or South America (third country bananas): Tariffs for imports of third country bananas were graded and started with a certain levy for the first two million tons (in quota tariff of 20-30 % ad valorem) and a much higher one (250 %) for imports out of this quota.

In addition to the quotas and tariffs under the regime, the EC issued licenses which allocated the quotas among banana distributors. Import licenses were distributed to traditional importers from third countries (about two-thirds of the tariff-rate quota) and to European and ACP importers and new importers in the market since 1992 (about one-third of the tariff rate quota).

This EC regime of banana imports which created cross-subsidies favouring the less efficient EC and ACP bananas was the starting point of the so called banana dispute between the EC and different banana importing/exporting countries including the US. It has led to a series of landmark decisions on the levels of WTO, EC and the national states. In different decisions the WTO panel ruled that the EC's import regime for bananas was illegal, because it favoured imports from ACP countries and discriminated against growers and suppliers of Latin and Central American bananas.

The so-called banana war started later when WTO allowed the US to impose 191, 4 million dollars in trade sanctions against EC imports. A truce was called in 2001 when the EC reached an agreement with the US and Ecuador to implement a new one tariff only regime for imports of bananas regime by January 1, 2006. In the interim, bananas had been imported into the EC under a tariff quota system through import licences allocated on the basis of past trade.

1.2 Hypothesis

The hypothesis of this research paper are:

1.2.1 The long-standing Banana Dispute has highlighted the functioning, as well as systematic weaknesses, of the WTO dispute settlement and enforcement system.

1.2.2 There is still a distinct need for clarity as to how one can legally resolve the conflict between the supremacy of Community law and national legitimate objections derived from fundamental rights and violations by the Community of its comptetences.

1.2.3 There are still certain national competencies safeguarded by national Constitutional Courts (e.g. FCC of Germany)

1.3. Objectives of the Research

1.3.1 To study the history of the Banana Dispute and its impact on International Economic Law.

1.3.2 To study the framework of the GATT/WTO dispute settlement and enforcement system.

1.3.3 To study the decisions of the ECJ concerning the lawfulness of the COMB.

1.3.4 To study the applicability of GATT/WTO Law to EC Law.

1.3.5 To study the relation of fundamental rights protection between EC Law and German Constitutional Law.

1.4 Research Methodology

The methodology of this research is a documentary research. The different rules and regulations of the banana import regime with reference to the relevant WTO, EC and German constitutional laws will be studied, analysed and presented. This research will also survey on the different decisions of the relevant WTO organs, the rulings of the European Court of Justice (ECJ) and the German Federal

Constitutional Court (FCC), in short the interwoven framework or cogwheel-mechanisms. Furthermore, related books, articles in law journals and the internet will be studied.

1.5. Scope of the Research

This research will examine the effects of the COMB on three different levels: International Economic Law, European Law and National Law.

1.5.1 At first it will give a comprehensive analysis of the legal, economic and political background of the banana dispute as such and also of the GATT/WTO proceedings and the substantive Panel and Appellate Body decisions in the banana dispute as an example for the network of rules and principles.

1.5.2 In a second step another area of WTO law will be examined with regard to the banana dispute: this is the enforcement of WTO law and its implementation in the EC.

1.5.3 On the levels of the EC and the Member States different landmark court decisions concerning the banana dispute, especially those of the ECJ and the FCC, will be analyzed. It will be examined whether they have clarified the classical conflict on the relationship of supremacy of Community law and national fundamental rights protection and whether they have provided new considerations concerning the controversial status of GATT/WTO law in Community Law. As it would be out of proportion this research paper will concentrate on the decisions of the highest German court, the FCC, and it's famous "banana decision". The

FCC has had the most controversial dipute with the ECJ on the question of supremacy of EC law over national law and as the German banana importers have been most active in challenging the COMB, the FCC got a good occasion to update its attitude towards the supremacy of EC law and to state it more precisely.

1.6. Expectation of the Research

The expectations of the researchs are:

1.6.1 To find out the origins and the course of the banana dispute.

1.6.2 To find out the functioning and the structural flaws of the GATT/WTO dispute settlement and enforcement system.

1.6.3 To find out the attittude of the ECJ towards the applicablity of GATT/WTO Law in the framework of the European legal system.

1.6.4 To find out the status of fundamental rights protection on the levels of German constitutional law and Community law.

Chapter 2

The COMB in Conflict with WTO Law

2.1 Introduction

This part of the research deals with the banana dispute at the WTO level. In the beginning the history and objectives of the WTO as well as the dispute settlement system of the WTO will be presented. After that the dispute settlement proceedings concerning the COMB will be discussed.

2.2 History and Objectives of the WTO

The WTO is the successor to the General Agreement on Tariffs and Trade (GATT), which was created in 1947 in the expectation that it would soon be replaced by a specialized agency of the United Nations to be called the International Trade Organization (ITO). Although the ITO never materialized, the GATT proved remarkably successful in liberalizing world trade over the next five decades. By the late 1980s there were calls for a stronger multilateral organization to monitor trade and resolve trade disputes. Following the completion of the Uruguay Round (1986–94) of multilateral trade negotiations, the WTO began operations on 1 January 1995.

The WTO has six key objectives: (1) to set and enforce rules for international trade, (2) to provide a forum for negotiating and monitoring further trade liberalization, (3) to resolve trade disputes, (4) to increase the transparency of decision-making processes, (5) to cooperate with other major international

economic institutions involved in global economic management, and (6) to help developing countries benefit fully from the global trading system.[12]

The rules embodied in both the GATT and the WTO serve at least three purposes. First, they attempt to protect the interests of small and weak countries against discriminatory trade practices of large and powerful countries. The WTO's most-favoured-nation and national-treatment articles stipulate that each WTO member must grant equal market access to all other members and that both, domestic and foreign supplier must be treated equally. Second, the rules require members to limit trade only through tariffs and to provide market access not less favourable than that specified in their schedules. Third, the rules are designed to help governments resist lobbying efforts by domestic interest groups seeking special favours. Although some exceptions to the rules have been made, their presence and replication in the core WTO agreements were intended to ensure that the worst excesses would be avoided. By thus bringing greater certainty and predictability to international markets, it was thought that the WTO would enhance economic welfare and reduce political tensions.

2.3. The WTO Dispute Settlement Process

There is a long history of formal procedure for resolving trade disputes under GATT and WTO Law. Almost fifty years of experience with the GATT dispute settlement process reveals that the process changed from rather informal

[12] Pauwelyn, Joost, Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules Of International Law, Cambridge, Cambridge University Press, 2003.

procedures towards formal rules. The structural alterations to the dispute settlement system moved from "working parties" to a "panel", and shifted away from a diplomatic dispute settlement system towards a "legalistic" approach of interpretation of the treaty obligations. The Uruguay Round resulted in a new "Understanding on rules and Procedures Governing the Sttlement of Disputes" (DSU) and established a unified dispute settlement system for all parts of the GATT/WTO system. The creation of a new institutional architecture for the international trading system was probably the most interesting facet of the Uruguay Round.[13]

A very important and advantageous difference in comparison with the former GATT dispute settlement system is the change from the positive consensus principle to the negative consensus principle. Although Article XXV (4) Gatt´47 only required a simple majority among the contracting parties for the acceptance of panel reports it was well established within the GATT to decide only by consens, inclusive of the vote of the inferior party. This "right of veto" enabled the violating party to block the DSP and to prevent the adoption of a report. The so called "positive consensus" principle was the reason why the DSP was often reagarded as weak and ineffective.

---

[13] See: Guohua, Yang / Marcurio, Bryan, Yongjie, Li, WTO Dispute Settlement Understanding. A Detailed Interpretation, The Hague, Kluwer Law International, 2005; Jackson, The World Trade Organization. Constitution and Jurisprudence, London, The Royal Institute of International Affairs, 1999.

As a consequence to this the DSU reversed this requirement by establishing the negative consensus principle according to which panels will be established and reports will be adopted automatically unless there is an unanimous consensus voicing opposition against it. The reversal of the voting system has resulted in a kind of "approval automatism" as it is unlikely that there will be a majority rejecting the establishment of a panel. In so far it is regarded that the negative consensus requirement has converted the WTO dispute settlement into the most effective area of adjudicative dispute settlement in the entire area of public international law [14]

2.3.1 Consultations

Dispute resolution begins with bilateral consultations through the mediation, or "good offices," of the director-general.[15] Article 4 of the DSU, in which the course of consultations is laid down, requires in clause 5 that the complaining party has to "give the reasons for the request including identification of the measures at issue and an indication of the legal basis of the complaint." If the parties are able to reach an agreement at this first level their dipute will be settled without any formal requirements or recordings. A characteristic of the new DSP is that there are strict deadlines at all stages of the proceedings. Even in case of the otherwise informal consulations the party receiving the request must reply to the request within 10 days of receipt and must agree to consult within 30 days, or within a time frame mutually agreed (Article. 4.3 of the DSU).

---

[14] Palmeter/Mavroidism, Dispute Settlement in the World Trade Organization, p. 153.

[15] Ibid., p.64.

2.3.2 Panels

If the parties do not reach an agreement during their consultations an independent panel is created to hear the dispute and to draw up a report. The function of panels is to assist the DSB in performing the responsibilities under the DSU and the covered agreements (Art. 11 DSU). After several hearings and a lengthy drafting process the panel draws up a final report including a legal statement and a suggestion to the DSB which measure should be taken to restore conformity with WTO rules.

The two disadvantages of the former DSP according to GATT '47 were besides the already mentioned positive-consensus principle, its slowness which resulted in ineffective proceedings. One goal of the Uruguay Round was to speed up dispute resolution proceedings. Consequently, the DSU imposes a number of time limits on the various stages of the process. According to Article 12.8 of the DSU a panel normally has to complete its work within six months and should not exceed a time limit of nine months.[16]

2.3.3 The Dispute Settlement Body

The Dispute Settlement Body (DSB) is the administrative body of the DSP and consists of representatives of every WTO Member State. According to Article 2

[16] Article 12.9 of the DSU: "In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the date that the composition and terms of reference of the panel have been agreed upon until the date the final report is issued to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to issue its report to the parties to the dispute within three months."

(1) of the DSU the DSB has the authority to accept or reject panel and appellate body reports, to maintain surveillance of the implementation of the rulings and recommendations it adopts, and has the power to authorize retaliation if its rulings and recommendations are not obeserved by members in a timely manner. Panel reports may be considered by the DSB for adoption 20 days after they are issued to Members. Within 60 days of their issuance, they will be adopted, unless the DSB decides by consensus not to adopt the report (negative consensus principle) or one of the parties notifies the DSB of its intention to appeal. Officially, the panel is helping the DSB in making rulings or recommendations. But because the panel's report can only be rejected by consensus in the DSB, its conclusions are difficult to overturn. The panel's findings have to be based on the agreements cited.

2.3.4 The Standing Appellate Body

The Standing Appellate Body (SAB) is another instiution which was implemented within the framework of the Uruguay Round. The establishment of an appellate body was an important step for judicial development of the legal system of the WTO as it separates the judicial power from the other organs of governance.[17] The right to appeal is also a replacement for the repeal of the positive consensus principle which, according to the former law, enabled the parties in dispute to preventing panel decisions unilaterally. Whereas the negative consensus principle has abolished the right to veto the parties have now

[17] Palmeter/Mavroidis, Dispute Settlement in the World Trade Organization, p. 147.

the right to lodge an appeal against the panel decision. Either side of the dispute has got the right to appeal.

2.3.5 Adoption and Implementation of the DSB Rulings

The provisions concerning adoption and implementation of reports are the most significant parts of the DSU and contrast starkly with the former GATT law. According to the latter, a consensus in favor of a report was required for its adoption. This positive-consensus principle allowed a discontented party to block the adoption of a report. The new law stipulates in Art. 21.1 of the DSU that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." According to Article 21.3 of the DSU the member concerned shall comply with the recommendations and rulings in a "reasonable time".

2.3.6 Sanctions

Like most international institutions, the WTO has no direct enforcement authority over its sovereign members. Its rulings are formally binding in international law, but the WTO has no direct ability to sanction offending states or to compel changes in domestic trade practices. The WTO can, however, authorize retaliatory sanctions by individual member states that claim to have suffered harm from the disputed policy measures. Because enforcement is decentralized and indirect, noncompliance with WTO rulings is a persistant risk. The threat of a boycott by member states is even more important because

governments informally retain the discretion to pursue grievances outside the WTO system.

2.3.7 Conclusion

The WTO's dispute settlement process was the cornerstone of the 1994 reform process providing a new level of security and predictability to the multilateral trading system. It commits WTO members not to take unilateral action against perceived violations of the trade rules. Instead, they are expected to seek recourse through the WTO's dispute-settlement system and to abide by its rules and findings. For this reason it makes the trading system more secure and predictable. An important factor is that the procedures are clearly structured, with clear timetables set for completing a case. First rulings are made by a panel and final rulings are endorsed of rejected by the WTO's full membership. Appeals that are based on points of law are possible. In contradiction to the former law no single country can block them. But as every legal system and procedural framework also the WTO system had to pass the acid test. The banana dispute was a good occasion to demonstrate its stability, effectiveness and acceptance.

2.4. Procedural Overview of the Banana Dispute

After the presentation of the reformed WTO dispute settlement procedure in the previous chapter, the goal of this part of the research is to present the litigation

history of the banana dispute within the framework of the GATT/WTO dispute settlement procedure.[18]

2.4.1 The Panels under GATT 1947

When on 10 February 1993 five Latin American banana exporting countries formally initiated dispute settlement proceedings under the GATT against the EC this was the starting point for various complicated procedural battles concerning the European Common Market organization. Whereas the first two panels were set up and decided under the old GATT 1947 dispute settlement rules the latter proceedings were carried out after the implementation of the new WTO law of 1994. The first panel just as the second one also have been initiated by the same five Latin American countries: Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela.

2.4.1.1 The First GATT Panel against various European Banana Regimes

The first panel was established before the birth of WTO but also before the introduction of the SEM in 1993 and the implementation of EC Regulation 404/93. With their challenge the requesting states tried to put pressure on the European negotiation process by requesting the establisment of a panel to

[18] M. Salas, J.H. Jackson, Procedural overview of the WTO EC – banana dispute, Journal of International Economic Law, p. 145 et seq., http://jiel.oxfordjournals.org/cgi/content/abstract/3/1/145; UNCTAD Info Com, The EC Banana Regime, GATT/WTO challenges, and the evolving policy framework, http://www.unctad.org/infocomm/anglais/banana/ecopolicies.htm.

examine the consistency of the various European national banana regimes with GATT.[19]

In June 1993, the GATT panel ruled in favour of the "dollar bananas" and held that the accused states violated the Most-Favoured-Nation Principle and the Quantitive-Restrictions Principle.[20] The COMB did not comply with these principles as it offered preferential tariffs to ACP countries. According to the still applicable GATT 1947 regulations the EC and the ACP countries could make use of the positive-consensus principle and blocked the adoption of the panel report.

2.4.1.2 The Second GATT Panel against Regulation 404/93

A second GATT panel was established only 13 days after the first one had submitted its report to the contracting parties. At that time the SEM was already established and Regulation 404/93 implemented. However, the consultations with the EC took place parallel to the proceeding of the first GATT panel and

[19] The request was namely directed against the import regimes of France, Italy, Portugal, Spain and the UK which offered previleges for ACP countries (see: M. García, Banana III: European Communities - Regime for the Importation, Sale and Distribution of Bananas, http://www.ejil.org/journal/Vol9/No1/index.html).

[20] GATT Unadopted Panel Report on European Economic Community – Member States´ Import Regimes for Bananas, 1993 GATTPD Lexis 11 / 2, DS32/R (3 June 1993) [Bananas I Panel Report]. The most-favoured-nation-principle establishes that countries must apply the same tariffs to all members that supply a given commodity. This principle shall achieve global efficiency by enforcing uniform tariffs and at the same time it shall discourage discriminatory tariffs that distort production efficiency by penalizing low-cost producers (see: L. Rivera-Batiz / O. Maria-Angeles, International Trade. Theory, Strategies and Evidence, p. 428).

were directed against the draft text of Regulation 404/93. As the EC refused any consultation arguing that the regualtion was still unadopted and therefore not a suitable subject to GATT regulations, the establishment of a panel was necessary. This panel again concluded in favor of the plaintiffs and held that the key aspects of Regulation 404/93, the tariff preferences to ACP countries and the import licensing scheme, were inconsistent with Art. II GATT (tariffs bindings). The Panel also pointed out that the regulation violated the most-favoured-nation principle and that the license allocation system infringed GATT Articles III.4 and I, since the attribution of 30 % of the licenses to mostly EC traders created an incentive to buy domestic or traditional ACP bananas to qualify for additional licenses which then allowed operators to import third-country bananas at in-quota tariffs.[21] The EC once again blocked the results of the second panel due to the positve-consensus principle.

2.4.2 The Framework Agreement between EC and Latin American States

Knowing that the new Uruguay agreement would make it impossible for the EC to block a WTO ruling, the EC offered a deal to the Latin American banana producers: In case they were willing to refrain from future actions against the EU banana regime and not to pursue the adoption of the soon expected report of the second Banana Panel, they would get a higher quota for their banana exports to Europe, would enjoy a lower tariff, and would have a revised system of export licenses. In March 1994, just a couple of days after the second GATT panel

[21] Matheuws, A. / Thaesen, R., The EU´s Common Banana Regime: An Initial Evaluation, Journal of Common Market Studies, 35 (1997) p. 619.

report was issued, four of claiming countries, except Guatemala, agreed to the compromise and concluded with the EC the Framework Agreement. It was then incorporated into the EC's Uruguay Round Schedule in March 1994 and came into force on 1 January 1994.

2.4.3 The 1994 Waiver Granted to Lomé IV

Just before the results of the Uruguay Round were implemented in 1994, the EC and ACP countries negotiated a five-year waiver concerning the Lomé Convention which was granted during a GATT General Council's meeting in 1994.[22] The waiver stipulated that the most-favoured-nation principle should be waived "to the extent necessary to permit the EC to provide preferential treatment for products originating in ACP states as required by the relevant provisions of the fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party."[23]

As a result of the accession of Austria, Finland and Sweden to the EC on 1 January 1995, the EC autonomously increased access under in-quota tariff conditions (75 ECU per ton) by 353,000 tons, to reflect the average yearly consumption of bananas in these three countries in the period 1991-93. The administration of these additional quantities was subject to the same procedures as the bound tariff quota.

---

[22] UNCTAD Info Com, The EC Banana Regime, GATT/WTO challenges, and the evolving policy framework, http://www.unctad.org/infocomm/ anglais/banana/ecopolicies.htm.

[23] GATT document L/7439 of 10 October 1994 and L/7539/Corr.1.

2.4.4 WTO Dispute Settlement Procedure against Regulation 404/93

With the birth of the WTO in 1995 and the establishment of new dispute settlement procedures, there have been various banana-related proceedings under the new DSU. The first dispute under the new WTO regulatory system was initiated in 1996 and was completed on 25 September 1997. This time the claimants were Guatemala, Honduras, Mexico, and the USA. The involvment of the United States resulted from the fact that several big and influential US-owned banana exporting companies were based in Central America. Ecuador, the world´s largest producer of bananas, joined the claimants in 1996 after it has become member of the WTO.

The panel report stated again that the EC did not comply with its international obligations, and that it would have to bring its banana regime in line until 1999. According to the report the banana regime was not per se discriminatory because the EC had secured a special waiver for the Lomé agreement. But the panel held that it did not comply with WTO rules in three aspects: the preferential import rights for bananas from the ACP countries was larger than the EC was allowed to grant to ACP countries under the exemptions permitted by the WTO; second, the distribution of the tariff quota among supplier countries in Latin America was based on out-of-date and non-representative reference quantities; third, the distribution of import licenses was still based on the old, discriminatory system. The EC was finally ordered to put its banana regime in conformity with WTO obligations. The panel ruling was reaffirmed by the WTO´s appellate body and adopted by the DSB on 25 September 1997.

Three weeks later, the EC informed the DSB that it would, in view of the complexity of the matter at issue, need a reasonable period of time in which it could examine all possible options in order to meet its international obligations. Unable to find a consensus via consultations, the WTO determined that the "reasonbale period of time" for the EC to implement the recommendations and rulings shall end by 1 January 1999.

2.4.5 The Amendment of the Banana Regime

After long and tough negotiations at all levels the EC drew up a document with amendments to the banana regime.[24] When this draft reached the complainants, they immediately had concerns about its content. They were of the opinion that also this revised regime essentially retained the GATT inconsistencies suffered by Reglulation 404/93. Nevertheless, the EC rejected all their complaints and on 20 July 1998 the European Agriculture Council approved the new Regulation 1637/98, which then entered into force on 1 January 1999.

[24] Council Regulation 1637/98/EC amending Commission Regulation 404/93/EEC on the Common Market Organisation for Bananas, 1998, OJ L 210, 28. Therein, the EC granted supply with bananas from the 12 traditional ACP exporting countries remained duty-free up to 857,000 tons per year. The country-specific allocations among these 12 countries were abolished. The bound tariff quota and the autonomous one remained unchanged as regards levels (2,200,000 and 353,000 respectively), while there were country specific allocations for Columbia, Costa Rica, Ecuador and Panama. Under both quotas, imports of third country bananas were subject to a duty of 75 ECU per ton, while imports of traditional and non-traditional ACP bananas were duty-free (see E. Vranes, From Bananas I to the 2001 Bananas Settlement: A Factual and Procedural Analysis of the WTO Proceedings, in: F. Breuss / S. Griller / E. Vranes (eds.), The Banana Dispute – An Economic and Legal, p. 23).

Even before the new regulation was implemented the US administration moved to publish a determination under section 301 of the Trade Act of 1974 and later on published a list of goods on which prohibitive 100 per cent ad valorem tariffs should be imposed. This reaction of the US administration triggered off the so called banana war. As a consequence to the revised bananas regime and the unilateral actions of the US administrations both sides, the EC and the different complaining parties, applied for the establishment of several WTO panels. The EC even requested an urgent meeting of the WTO General Council, in order to denounce the partial implementation of retaliatory tariffs.

2.4.6. Relationship between Articles 21.5 and 22 of the DSU

The conflict which arose after the implementation of the new banana regime led to several difficult questions as regards the WTO enforcement system of which the most contentious one was the correct interpretation of Article 21.5 and 22 DSU, and the relationship between these two articles. The EC requested a panel under Article 21.5 of the DSU which should find that its implementing measures must be presumed to be WTO consistent unless a panel under Article 21.5 of the DSU had found to the contrary under Article 21.5 of the DSU. As a countermove, the former complainants challenged again the conformity of the revised banana regime with WTO rules and applied for the authorization for retaliation forseen in Article 22 of the DSU.

Article 21.5 of the DSU states that "where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply

with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including whereever possible resort to the original panel…". In contrast, Article 22 of the DSU does not provide any express reference to Article 21.5 of the DSU allowing a member to request authorization for retaliatory action if the other party "fails to bring the measure found to be inconsistent with a covered agreement into compliance …"

Comparing both provisions, it is not apparent whether the recourse forseen in Article 21.5 of the DSU has to be exhausted before retaliatory action can be taken. The position of the EC was that an Article 21.5 of the DSU procedure was necessary before the provisions for unilateral action forseen in Article 22 of the DSU could be enforced and that even a revisiting of all stages of a dispute settlement procedure, starting with a standard request for consultations by the complaining parties. The complainants, on the other hand, were of the opinion that Article 21.5 of the DSU provides only for an expedited procedure, not a new procedure. The US insisted that retaliation under Article 22 of the DSU could be sought even in absence of an Article 21.5 of the DSU procedure.[25]

A WTO panel which, among others, had to examine the consistency of the revised banana regulation and the relation between Articles 21.5 and 22 of the DSU, announced the parties its final determinations on 6 April 1999.[26] In its report concerning the Article 21.5 request filed by Ecuador, the panel held that

[25] Ibid.

[26] There have been two Article 21.5 DSU requests, one filed by Ecuador and the other one by the EU, and an arbitration award requested by the EC, pursuant to Article 22.6 of the DSU.

key aspects of the 1998 EC banana regulation were again inconsistent with WTO rules.

In their Article 22.6 DSU arbitral award the panel presented its solution concerning the conflict between the procedures under Articles 21.5 and 22.6 of the DSU. Therein it confirmed the US right to retaliate, even before the finalization of an Article 21.5 panel procedure. Although it is basically an Article 21.5 matter, the arbitrators were of the opinion that they were allowed to study the WTO consistency of the banana regime under an Article 22.6 procedure, and so they found no reason to wait until an Article 21.5 panel determination was reached. The panel held that the determination of WTO compatibility through recourse to the original panel was only one possibility provided by the terms of Article 21.5 of the DSU. The EC later announced that it would not appeal, but would comply with the decision

2.4.6.1 Retaliatory Actions by the USA and Ecuador

One day after the announcement of the panel on 7 April 1999, the USA filed a request pursuant to Article 22.7 of the DSU requesting the DSB to authorize suspension of concessions under the terms of the Article 22.6 DSU arbitral award. The DSB authorized the suspension on 19 April 1999 and allowed the USA to impose tariffs of 100 per cent on $ 192 million-worth of EC imports into the US.[27]

[27] Hanrahan, Charles E., The U.S.-European Union Banana Dispute-CRS Report for Congress, http://www.nationalaglawcenter.org/assets/crs/RS20130.pdf.

On 19 November 1999 also Ecuador sought authorization to retaliate on obligations under the GATT 1994, the GATS, and the Trips Agreement, for an amount of 450 million US$.[28] Ecuador did not demand authorization to retaliate against trade in goods but in services, because the raising of tariff bariers could have a negative effect on the import sector, which would have worsened the present economic crisis in this country. The request made by Ecuador aimed towards distribution services under GATS (Sector 4 of the Services Sectoral Classification List), Article 14 of TRIPS (Protection of Performers, Producers of Phonograms and Broadcasting Organisations), as well as Sections 3 (Geographical Indications) and 4 (Industrial Designs).[29] The DSB referred the Ecuadorian request immediately to the members of the original panel, now reconvened as arbitrators. The EC objected to the level of proposed suspension, invoking Article 22.6 of the DSU, and argued that the general principle under Article 22.3 of the DSU provides that the suspension has to affect the same sector of trade as the originating dispute. On 17 March 2000, WTO arbitrators, dealing with the new WTO enforcement system of cross retaliations, for the first time, issued the decision that authorized Ecuador to retaliate against the EC as requested. The panel found that the revised scheme was again not compatible with the EC´s WTO obligations. Therefore, it granted authorization to Ecuador to suspend concession or other obligations under GATT 1994 (not including investment goods or primary goods used as inputs in manufacturing and processing industries), under GATS with respect to "wholesale trade services" in

[28] WT/DS27/52.

[29] Patterson, Eliza, The US-EU Banana Dispute, http://www.asil.org/insights/insigh63.htm.

the principal distribution services, and -to the extent that suspension requested under GATT 1994 and GATS was insufficient to reach the level of nullification and impairment determined by the arbitrators- under the TRIPS agreement.

2.4.7 The End of the Banana Dispute?

On 2 May 2001, after eight years of disputes that cost the EC millions of dollars of retaliatory duties, the EC approved a regulation that would implement a new banana regime.[30] The new regulation was a result of an understanding reached by the EC and the US. In accordance with this agreement the EC proposed in January 2005 an import duty of 230 €/metric ton valid as from January 1, 2006. This and also the following proposal (187 €/metric ton) from the Commission was rejected after a WTO arbitrator found that the proposed tariffs did not offer fair market access to Latin American banana producers. On November 29, 2005, the EC finally adopted Council Regulation 1964/2005 setting the import tariff for bananas from most-favoured-nation countries at 176 €/ton. The new import regime, which includes a duty-free annual import quota of 775,000 tons for ACP bananas, is effective as of January 1, 2006. Latin American suppliers pushed again for a tariff of 75 €/ton, which was the in-quota tariff before coming into force the current regime, and to end the zero-duty quota for ACP countries. The new tariff of 176 €/ton was in their opinion not significantly lower than the

---

[30] Council Regulation No 2587/2001/EC amending Regulation 404/93/EEC on the common organisation of the market in bananas, 2001 OJ L 345, 13; Council Regulation 216/2001/EC of 29 January 2001 amending Regulation; No 404/93/EEC on the common organisation of the market in bananas, 2001 OJ L 31, 2.

earlier proposals. On November 30, 2005, Honduras, Nicaragua and Panama requested consultations with the European Communities under Article 21.5 of the DSU. These petitioners argued that the new EC bananas import regime was inconsistent with the recommendations and rulings of the DSB in the EC-Bananas case, the Doha Waiver on the Cotonou Agreement adopted in 2001, the two arbitration awards issued in 2005 pursuant to that waiver, and Article XXVIII of the GATT. The dispute is still going on and it remains to be seen how the opponents come to a final and satisfying solution in this long standing trade conflict.

2.5. Conclusion

The banana dispute was the first transatlantic dispute to be adjudicated under the newly created WTO and can be regarded as a precedent for future proceedings. It is a very illustrative example of multilayered trade politics. It substantiates the fact that it is almost impossible to balance the different economical interests which obviously exist in a complex and diverse world economy.

The banana dispute reveals several strong points as well as flaws of the reformed DSP. A strong point is undoubtedly the fact, that it is practically impossible to block panel rulings. The former positive-consensus principle which was applied under the GATT regulations made the panel rulings very often useless. As seen in the banana dispute the first two panel decisions were blocked by the EC which could not happen in the subsequent WTO proceedings.

One flaw of the new DSP is that there are still ways to delay and prevent the effectiveness of the recommendations of the DSB. During the banana proceedings the EC was able to maintain its banana regime with certain modification for more than ten years. The EC could play for time by delaying the procedure in different ways: by amending the banana regulation in an unsufficient and inadequate way, by getting extensive periods of time to amend Regulation 404/93, by lodging appeals and taking counter actions against the complaining parties. And finally, the EC was able to stand delicate retaliations imposed by the USA. This all shows that there are still ways to circumvent a speedy and effective proceeding. On the other hand, it remains highly questionable whether small member states could refuse to comply with the outcome of a dispute settlement procedure in the same way.

With regard to retaliations there was always another imbalance between powerful states and smaller ones. Years of experiences have shown that retaliations are only effective if they are taken by powerful market players. On the part of developing countries they are mostly ineffective. They even can cause negative effects on the import sector and even worsen the economic situation in the retaliating country. The banana dispute gives a good example how a developing country like Ecuador could intimidate powerful member states by asking for retaliation to the amount of US$ 450 million. One of the most interesting aspects of this request lies not only in the fact that a developing country sought, for the first time in the history of GATT and the WTO, retaliatory action against a developed member state. It is even more noteworthy

that Ecuador argued that since the suspension of the concessions in the goods sector and in the services area was not effective, it would only be effective if it could take retaliatory action in the intellectual property area.[31] Although retaliations in the sector of intellectual property rights are not unobjectionable they are, at least, a deterrent and effective means for developing countries.

The WTO dispute settlement system revealed furthermore some substantial flaws: For the EC the banana dispute constituted an unsurmountable clash between the EC Lomé Convention obligation towards its former colonies and its membership in the GATT/WTO trading system. This decisive motive of the EC to prefer certain developing countries never played a key role during the proceedings. From this aspect the EC was punished as it chose to import its bananas from former colonies that often have nothing else to export than bananas (or drugs). Insofar it is up to a certain level comprehensible when anti-globalization groups discontently condemn the banana rulings as an unacceptable intrusion on national sovereignty in the name of economic liberalization and to the benefit of multinational undertakings, in particular American corporate power. The protest against the way of ignoring third world countries culminated in November 1999 where anti-globalization activists, some of them dressed as bananas, contributed to the failure of the launching of the new millenium round of multilateral trade negotiations in Seattle. On the other side, it has also to be noticed that many of the third-country producers from Latin and

[31] J.H. Jackson/P. Grane, The Saga Continues: An Update on the Banana Dispute and its Procedural Offspring, Journal of International Economic Law (2001), p. 581-595, 588.

Central America are also developing countries whose economies are also limited to banana cultivation.

To summarize, the establishment of the WTO dispute settlement procedure is a tremendous step to more legalized and harmonized international trade relations. The proceeding is in principle consistent and effective. Some improvements with regard to the legal enforcement, duration of the proceedings and the treatment of developing countries are nonetheless necessary.

Chapter 3

The COMB in Conflict with EC Law

3.1. Introduction

Just as on the WTO level, the banana dispute has led to a series of landmark decisions at the level of the ECJ. These cases throw light on the complex linkages between WTO law, the supranational legal system of the EC, and national constitutional law.[32]

The claims were brought in front of the ECJ, both by Member States and importers.[33] From an international trade law perspective, their most important subject was the controversial status of GATT/WTO law in the Community's legal order; i.e. its invocability before national courts and the ECJ. Another area touched by these cases is the classical conflict on the relationship of supremacy of Community law and national fundamental rights protection.

[32] von Bogdandy, Armin / Makatsch, Tilman, Collision, Co-existence or Co- operation? Prospects for the Relationship between WTO Law and European Union Law, in: The EU and the WTO. Legal and Constitutional Issues, ed. Gráinne de Búrca / Joanne Scott, p. 131 et seq.; Griller, Stefan, Enforcement and Implementation of WTO Law in the European Union, in: The Banana Dispute. An Economic and Legal Analysis, ed. Fritz Breuss/Stefan Griller/ Erich Vranes, p. 247 et Seq.

[33] Case C-465/93, Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesanstalt fuer Landwirtschaft [1995] ECR I-3761; Case C-466/93, Atlanta Fruchthandelsgesellschaft and Others (II) v Bundesanstalt fuer Landwirtschaft, ECR [1995] I-3799; Case C-68/95, T Port GmbH & Co. KG v Bundesanstalt fuer Landwirtschaft, ECR [1996] I-6065; Case C-104/97 P, Atlanta AG and Others v Commission of the European Communities and Council of the European Union, [1999] ECR I-6983.

3.2 The Banana Judgment of the ECJ

The first proceedings after the implementation of the COMB in 1993 were concentrated on the question whether the COMB did comply with the Treaty of the European Union (TEU) and its guiding principles. As the TEU and the common principles are the guideline for its organs which have passed the COMB the plaintiffs hoped that they still could prevent the unwelcome Regulation 404/93. With regard to the COMB it was the German Government which initiated the first important case before the EJC in 1993. It requested the Court to declare void the regulation according to Article 230 II TEU (ex Art. 173 II TEU) due to the fact that the COMB required Germany to restrict its previously liberal banana regime. Under Article 230 TEU (ex Art. 173 TEU) the ECJ may examine the activities of the institutions to determine the validity of their legislation.[34]

3.2.1 The Arguments of the Applicant

The positions of the EC Member States in this case were divided in two groups, according to their economic interests. Germany was supported by Belgium and the Netherlands in its claims and the European Council found the support of the European Commission and of countries whose patterns of trade benefited from the regulation, i.e. Spain and France.

In its action the German Government asked the ECJ to annul Regulation 404/93 and put forward a long list of arguments related to procedural flaws, general principles of law and infringement of the Lomé Convention and the GATT. For

[34] J. Hanlon, European Community Law, p. 138.

the purpose of this research, only the following positions against the lawfulness of regulation 404/93 will be treated:

(i) The COMB with its subdivision of the tariff quota constituted an unjustified discrimination against traditional importers of third-country bananas which now suffer a loss of market share.

(ii) The COMB impaired fundamental rights of traders in non-ACP bananas. Their losses of market share infringed their property rights and the freedom to freely pursue a trade or business. In any case the regulation violated the principle of proportionality. The agreement also contravened the principles of the protection of legitimate expectations and proportionality.

(iii) The COMB infringed several rules of GATT.

3.2.2 The Judgment of the ECJ

In its detailed judgment of 5 October 1994[35] the ECJ finally dismissed all Germany´s arguments as unfounded.

3.2.2.1 Alleged Discrimination against Traders in Third Country Bananas

With regard to traders in third country bananas the ECJ found that they are not discriminated by Regulation 404/93. The Court examined this point under Article 34 (2) of the TEU (ex Art 40 (3) EC-Treaty) which, within the framework of the agricultural policy, excludes "any discrimination between

[35] Case C-280/93, Germany v. Council, [1994] ECR I 4973.

producers or consumers within the Community."[36] In citing former decisions the ECJ held this article as being "only a specific expression of the general principle of equality which is one of the fundamental principles of Community law" and examined whether "comparable situations are not treated in a different manner" without objective justification.[37] As it regarded this principle as a part of the general principle of non-discrimination the Court applied it also to operators who were neither producers nor consumers. The ECJ refused the alleged discrimination by referring to the different situations in the Member States. Since some of the banana markets were open to any imports of third-country bananas, other markets were closed to protect EC or ACP-bananas, the regulationn necessarily affected all importers regardless under which system they have operating. The Court set out that such a difference in treatment appears to be inherent in the objective of integrating previously separated markets.

3.2.2.2 Alleged Violation of Basic Rights and the Principle of Proportionality

The ECJ also found that Regulation 404/93 did not infringe the right to property or similar rights as well as the right to free pursuit of one´s trade.[38] The Court confirmed that these rights are recognized as general principles of Community

---

[36] Article 34 (2) of the TEU: "...The common organisation shall be limited to pursuit of the objectives set out in Article 33 and shall exclude any discrimination between producers or consumers within the Community...".

[37] Case C-280/93, Germany v. Council, [1994] ECR I 4973, para 67, reprinted in: EuZW 1994, p.688 et seq.

[38] Umbach, Dieter C. / Clemens Thomas, Grundgesetz. Mitarbeiterkommentar und Handbuch, Articles 12, 14.

law. At the same time it emphasized that they are not absolute and might be restricted, "provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed."[39] As to the alleged violation of the right of property the Court also reasoned that no economic operator can claim property in a market share which he held before the regulation was passed. The Court argued that a market share constitutes "only a mementary economic position exposed to risks of changing circumstances."[40]

With regard to the basic right to pursue a trade or business the ECJ recoginzed that the competitive situation of the market players had changed upon the implementation of the COMB. Nontheless, it held that the very substance of the right was not impaired. The effects of the COMB were justified by the general Community interests to introduce the internal market by abolishing the different national regimes and to protect Community and ACP bananas.

Finally, the ECJ also refused any disregard of the principle of proportionality. As the EC institutions possess a broad dicretion in their respective legislative capacity a violation could only be assumed if the measure appeared obviously inappropriate in the light of information available at the time of their adoption.

---

[39] Case C-280/93, Germany v. Council, [1994] ECR I 4973, para 67, reprinted in: EuZW 1994, para 78.

[40] Ibid., para 80.

3.2.2.3 Alleged Violation of GATT Law

Concerning the alleged violation of GATT law the ECJ did not examine whether Regulation 404/93 was in conformity with the GATT. Instead, it directed its reasoning straight to the question whether Germany was, in principle, entitled to invoke the infringement of GATT law to contest the lawfulness of the COMB. It refered to its frequently confirmed case law and confirmed at first that "the provisions of GATT have the effect of binding the Community". In its ensuing reasoning the Court added that "in assessing the scope of GATT in the Community´s legal system the spirit, the general scheme and the terms of GATT must be considered."[41] From this the Court concluded that GATT law was still characterized by "the great flexibility of its provisions", so that it could confer rights to individuals or Member States. Therefore, the Court held that it was, in principal, precluded from taking provisions of GATT to assess the lawfulness of a regulation in an action brought by a Member State.[42]

3.2.3 Analysis of the Judgment

The judgment of the ECJ was the first significant decision concerning the COMB. In the following the three main pleas of the decision will be analysed.

---

[41] Ibid., para 105.

[42] Ibid., para 105 and 109. According to the Court an individual can only invoke GATT law if the Community intends to implement a particular obligation of the GATT, or if a Community act refers expressly to a special provision of the GATT.

3.2.3.1 Discrimination against Traders in Third Country Bananas

The ECJ was right when it pointed out that the groups of traditional traders of third-country bananas on the one hand and those of ACP/Community bananas on the other hand were in different situations when Regulation 404/93 was passed. It was therefore permissible to define different rules for the two groups of operators. Nontheless, the situation was in so far comparable for both groups as they were both competing on the same markets. Under equal conditions, a differentiation of treatment is regarded as a prohibited discrimination if it appears arbitrary, without sufficient justification and not founded on criteria of objective nature.[43] Regulation 404/93 is diregarding the principle of equality under the aspect that it introduced tariff quotas only for imports of third country bananas. The principle of non-discrimination demands that every operator in the EC must have access to quotas under equal conditions. Usual criterions of assessment are, inter alia, the order of arrival of application, the imports over a reference period, or the allocation of the applicants according to fixed criterion or percentage. The excessive high percentage of the quota to one group of operators who did not have any relations to third-country imports in the past is to be regarded as an unequal treatment. This allocation of the quota was therefore not appropriate to integrate the market. As banana imports, like other imports, are based on longterm relationships, those importers, who had their relations to third-country operators before, could not easily change to ACP traders. The latter already had longterm relationships to certain European importers and would not be willing to share their market with former third-country operators. The Court´s

[43] J. Hanlon, European Community Law, pp. 89 et seq.

argument that there was no discrimination due to the fact that it was not possible for the European Commission to forecast the economic development is incorrect. Since the transfer of licences was admitted, the European institutions could have known that the favoured group of operators would sell their licences to operators whose traditional imports were drastically cut. The allocation of quota was therefore not appropriate to integrate the market. It was discriminating, because it lead to a pure and arbitrary financial transfer from one group of operators to another.

3.2.3.2 Violation of Basic Rights and the Principle of Proportionality

With regard to both basic rights, the right to property and the right to pursue trade or business, the ECJ correctly acknowledged that they are general principles of Community law and that their very substance has to be guaranteed. It is also correct that no economic operator can claim a right to property in a market share and that no operator, in principle, may trust to the continuation of the existing rules. In contrast to this, the explanations of the ECJ concerning the application of the principle of proportionality are not appropriate. With regard to both cases the Court did not apply the principle of proportionality in the necessary way. The function of the principle of proportionality is to limit the measures taken by the institutions to the degree necessary. It is not sufficient, as the Court did, to only ask whether the measures are appropiate to achieve the objectives of the regulation. Likewise, it is wrong to refer to the broad discretion of the institution. With regard to fundamental rights, the Court has to consider each interest, the common one and that one of the persons affected, in this case

the operators of third-country bananas. Following, the Court has to balance the necessity of the measures and the disadvantages of the holder of the fundamental rights. The Court must not leave it to the EC to exercise its discretion. It has to consider objectively whether the Commission has included also the threatening disadvantages of the importers of third-country bananas and whether the objectives of the regulation are in a resonable proportional relationship to the substance of the fundamental rights.

By applying the principle of proportionality in this way the ECJ would have noticed that Regulation 404/93 violated both fundamental rights in their substance. With regard to the right to property the Court did not even consider that the economical existance of importers of third-country bananas was indeed endangered after the implementation of the COMB. Economic activities of banana traders in general require huge investments, in the producing countries as well as in the domestic ports and distribution networks. If these longlasting commercial relationships and trade channels are suddenly reduced or broken off the banana importing company is running the risk of going bankrupt. The consequnece is a lost of goods and rights, hence property rights.

Likewise, the ECJ did not take into consideration some important facts jeopardizing the fundamental right to pursue trade or business. Although no operator may trust to the continuation of the existing rules, the principle of proportionality demands at least transitional measures or hardship clauses if, as in this case, the COMB intervenes in current contractual relationships. As the

COMB was amended several times before it was passed importers of third country bananas were not in the position to forecast the concrete restrictions of the COMB. Summing up, the ECJ did not apply the principle of proportionality appropriately as it is indispensable if fundamental rights are at stake.

3.2.3.3 Application of GATT Law

The arguments of the ECJ concerning the applicability of GATT regulations also have got flaws. In its reasoning the ECJ refers to previous cases in which it had already established that an individual within the EC may not invoke a breach of GATT law in order to challenge the lawfulness of a Community act. According to the Court there exist only two exceptions: the contested EC secondary measure refers to a GATT obligation or arguably intends to fulfill GATT obligations. As both exceptions were not relevant in this case, the Court denied the applicability of GATT regulations. It is surprising that the ECJ applied this reasoning to EC Member States without considering that they were themselves members of the GATT and, therefore, bound. For this reason the EC Member States, at least, must have the right to appeal against such an act.

In this case the Court was not consistent with its own jurisprudence, both as regards direct effect in general and the possibility to appeal to international treaties. In former cases, if the ECJ had to consider the direct effect of a provision, it generally looked at the concrete wording of the article concerned and not, as it did in its banana judgment, to the characteristic of the complete text of the agreement. On the contrary, when the ECJ had to consider in other cases

the compatibility of national law with international agreements signed by the EC, it obliged the Member States to comply with those agreements, including GATT.[44]

[44] G. de Burca / J. Scott, The Impact of the WTO on EU Decision-making, in: G. de Burca / J. Scott, The EU and the WTO – Legal and Constitutional Issues, pp. 5 et seq.

Chapter 4

The Banana Dispute at the Level of National Courts in the Framework of National Legislation and Jurisdiction

4.1 Introduction

The new banana regime has not only brought a considerable amount of cases to the ECJ, but also triggered a relevant number of parallel or following cases at the level of national courts.[45] For disadvantaged banana importers this was the only way to challenge the validity of Regulation 404/93, after the ECJ regarded their complaints at the EC level as inadmissible.[46] This, by the way, is a classical phenomenon of legal questions within the EC, which is identified as the concurring competence especially of the national constitutional courts, and the ECJ.

As it is impossible to examine the various legal problems of all different national courts in the context of this research paper, the purpose here can only be to evaluate the "Banana Decision" of the German FCC as an illustrious example of the involvement of national courts in the banana dispute. The so called "Banana Decision" of 2000 is noteworthy, because it is another pioneering decision of the

---

[45] Reich, Norbert, Judge-made `Europe à la carte': Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation, http://www.ejil.org/journal/Vol7 /No1/ art6.html, available on 25 July 2006.

[46] The Court argued that they lacked standing to sue, because they were not directly or indirectly concerned by the regulation (Case C-280/93, Germany v. Council, [1994] ECR I 4973, para 67, reprinted in: EuZW 1994, p.688 et seq.).

FCC within the classical dispute between the ECJ and the FCC regarding the relation between European law and national constitutional law.[47]

Before examining the FCC's "Banana Decision" concerning the protection of fundamental rights of banana importers it is at first appropriate to present in a nutshell the trail of decisions of both, the ECJ and the FCC, concerning the fundamental question of supremacy of EC Law over national constitutional law. Traditionally within the dogma and theory of the notion of "national sovereignty" it seems to be clear that the contrary must apply: the supremacy of national law. But here we have one of the really eminent features of the EC. This may be without relevant significance regarding consumer protection or environmental protection, but it comes to serious legal collisions as soon as fundamental rights of the relevant constitutional background are in question. Consequently the different quality of the protection of fundamental rights on the two levels has to be identified.

To understand this problem fully one has to go back to the underlying discussion concerning the European Integration Project. There are, in short, two different schools of thought. The first states that the EC is not qualified to have a constitution because it is not a state. This means that the state is both the object

[47] Scheuing, Dieter H., The Approach to European Law in German Jurisprudence, 5 German Law Journal No. 6, available at: http://www.germanlawjournal.com/ article.php?id=446, available on 10 July 2006.

and the prerequisite of a constitution.[48] Furthermore the EC lacks the possibility of the pouvoir constituant, because there is no European nation. The other view supports the vision that only the existence of a political community is a condition for a constitution. In this theory –which some writers call "post etatistic"- the state is defined and constructed by the constitution which in turn is identified as the legal order of a political system. Consequently these schools have a different approach to the notion of sovereignty. For the first view the legal sovereignty is bound to the classical nation-state. And the EC is seen as a supra-national institution with strict limits to further the interests of the nation-state. The second approach is a "post sovereignty" one and postulates that rights are not tied to territory or culture but to fundamental principles, their interpretation and elaboration. Therefore the question which law prevails -national or EC law- depends on the outcome of this dispute.

4.2 The Jurisprudence of the FCC and the ECJ on European Integration

The protection of fundamental rights at the Community level and the relationship between national constitutional law and EC law has understandably been a contentious topic in many decisions of the ECJ and the FCC for several decades.

[48] M. Aziz, Sovereignty Lost, Sovereignty Regained, Some Reflections on the Bundesverfassungsgericht's Banana Judgment, http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/ConWEBFiles/Filetoupload,5312,en.pdf.

4.2.1 Key Decisions of the ECJ on the Supremacy of Community Law

In the famous *Costa v ENEL* decision of 1964 the ECJ was asked if it could give a ruling in a situation where a national law seemed applicable in the particular case as against a Community law.[49] While the ECJ would not rule on the compatibility of national law with Community law, it held that: "... transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."

This fundamental concept of the supremacy of Community law was given further impetus in the case *Internationale Handelsgesellschaft* where the ECJ argued that "... the validity of a Community Measure or its effect within a Member State cannot be affected by allegations that it runs counter to ... the principles of a national constitutional measure."[50]

In its *Simmenthal* decision the ECJ went even further and ruled that "... any national court must ... apply Community law in its entirety ... and must

---

[49] Case 6/64, Flaminio Costa v E.N.E.L., [1964] ECR 585, available at: http://eur-lex.europa .eu/LexUriServ/LexUriServ.do?uri=CELEX: 61964J0006:EN:HTML.

[50] Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1972] ECR 1125, CMLR 244, available at: http://eur-lex.europa. eu/LexUriServ/LexUriServ.do ?uri=CELEX :61970J0011:EN:HTML.

accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."[51]

To sum up, the ECJ clearly stated the supremacy of EC law over national law including constitutional law, which would be part of the acquis communautaire in the form of general principles common to all Member States. Insofar the legal approach and the doctrine of the ECJ could not be mistaken, but the question remained, what was the legal view of the –especially- national Constitutional Courts seeing themselves restricted in a principally unrestricted field of nation final jurisdiction

4.2.2 Key Decisions of the FCC on the Supremacy of Community Law

German constitutional law, due to the high rate of decisions (until now about 115 volumes of cases) of the FCC, has over the years developed a detailed and close-meshed system of fundamental rights protection granted not only to individuals but also to business. German courts, especially the FCC, have viewed with some suspicion the increasing encroachment of EC law upon national constitutional law and have voiced its open distrust of the legal protection of fundamental rights offered by the ECJ.

The conflict was highlighted in the famous first "*As Long As*" decision (in German "Solange") of 29 May 1974, where the FCC criticized the EC Treaty for

[51] Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, CMLR 263.

not having a codified catalogue of fundamental rights. It ruled that not only German legislation, but also EC secondary law itself were subject to an unrestricted fundamental rights review by the FCC, subsequent and complementary to any fundamental rights review exercised by the ECJ. This would apply "as long as the integration process has not progressed so far that the Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the German Constitution."[52]

Later, the FCC revised this position in the second "*As Long As*" decision of 22 October 1986[53], after several ECJ rulings on fundamental rights (inter alia *Nold and Hauer* case[54]). In this decision the FCC declared that a standard of protection of fundamental rights had, in the time since the first "*As Long As*" decision, been established in the sphere of competence of the EC. The FCC concluded that the fundamental rights functioning in the Community system had to be deemed equal in substance to that provided by the German Constitution with regard to concept, contents and mode of operation., but it was clear to learned scholars that the FCC meant really "nearly equal". In view of this development the FCC ruled that it would no longer control the compatibility of Community law with German fundamental rights, as long as the European

---

[52] BVerfGE 37, 271; 2 CMLR 540 (1974) – "Solange I".

[53] BVerfGE 73, 339; 3 CMLR 225 (1987) – "Solange II"

[54] Judgment of the Court of 13 December 1979. - Liselotte Hauer v Land Rheinland-Pfalz. - Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. - Prohibition on new planting of vines, Case 44/79. http://eur-lex.europa.eu /LexUriServ/LexUriServ.do?uri=CELEX:61979J0044:EN:HTML.

Communities, and in particular the ECJ generally ensure an effective protection of fundamental rights against the sovereign power of the Communities."[55] However, even in this decision the FCC did not fully embrace a theory of supremacy of Community law over German constitutional law, but still reserved the right to uphold its claim judicial review in cases of doubt.

In its famous "*Maastricht*" decision of 12 October 1993, concerning the approval of the Maastricht Treaty, the FCC stressed that it shared with the ECJ the mission of effectively protecting the fundamental rights as stipulated in the Basic Law.[56] The FCC concluded that fundamental rights guaranteed and applied by the EC were substantially similar to the protection of fundamental rights provided by the Basic Law. Nevertheless the FCC insisted that it would review EC law if a German court asserts that the evolution of European law, including the rulings of the ECJ had fallen below the required standard of fundamental rights. The *Maastricht* decision was frequently interpreted in the way, that the FCC reaffirmed the position of the second "*As Long As*" decision, that is to say that the FCC would only look at general cases in the event of a decrease in the general level of fundamental rights protection.[57] This conflict arena, which the FCC set out in the *Maastricht* decision, came into existence in several litigations of German administrative and fiscal courts as well as the FCC concerning the

[55] BVerfGE 73, 339; 3 CMLR 225 (1987) – "Solange II".

[56] BVerfGE 89, 155; 1 CMLR 57 (1994) – "Maastricht" (A summary of the judgment can be found in: http://www.jura.uni-sb.de/Entscheidungen/abstracts/ maastricht.html).

[57] P. Kirchhof, The Balance of Powers Between National and European Institutions, 5 ELJ 225 (1999).

COMB. It is therefore understandable that before this background the banana case was a nearly classical object for a dispute on the divide of national constitutional law and EC law.

4.3 Early Litigations initiated by Banana Importers

To obtain additional import quotas the German importers sought redress before several German administrative and fiscal courts. Their main argument was that the Regulation violated their fundamental rights, i.e. the right to pursue trade or business (Article 14 (1) of the Basic Law)[58], the right to property (Article 12 (1) of the Basic Law)[59] and the equality provision (Article 3 (1) of the Basic Law)[60]. The plaintiffs argued that they could import only 50 % of the original amount they had imported into Germany before Regulation 404/93 came into force on 1 July 1993. In their opinion the absence of a transitory regime constituted an infringement of their fundamental rights. As they were facing the risk of bankruptcy they argued that the principle of proportionality required as a minimum an interim regulation for those importers who had done most of their business in third-country bananas. Furthermore, the importers insisted on the priority of GATT obligations over Community regulations under Article 234 of the TEU and charged the EC institutions, including the ECJ, with

---

[58] Article 14 (1) Basic Law provides that "Property and the right of inheritance are guaranteed. Their content and limits are determined by the laws."

[59] Article 12 (1) Basic Law provides that "All Germans have the right freely to choose their trade, occupation, or profession, their place of work, and their place of training. The practice of trades, occupations and professions may be regulated by or pursuant to a law."

[60] Article 3 (1) Basic Law provides that "All persons shall be equal before the law."

"transgressing" jurisdiction in not considering the obligations of the German Government under GATT.

Several importers first submitted their request to the insofar competent German administrative courts to grant them in interim proceedings supplementary licences above the quota allocated under Regulation 404/93. In the case of the importing company Altana, a German subsidiary of a big US-undertaking, the Higher Administrative Court Kassel rejected the demand for interim measures in relation to the upcoming years in accordance with the Banana Judgment of the ECJ. Atlanta appealed against this decision by a constitutional complaint to the FCC. By decision of 25 January 1995 the FCC annulled the ruling of the Higher Administrative Court and insisted in its order that German courts have to protect the property rights of the claiming importer if he risks going bankrupt because of an EC regulation.[61] The FCC based its ruling on Article 19 (4) of the German constitution (Basic Law), which demands effective judicial protection including provisional measures, particularly if the plaintiff is in danger of bankruptcy. The Court ruled that interim measures have to be granted even before the EJC has ruled on the case of hardship and the legal status of hardship clauses contained in the COMB, if the fundamental rights of the plaintiff are endangered. The FCC demanded a careful balancing of the interests of the plaintiffs and the general interest, and referred to the governments the obligation to use the possibilities in the Regulation itself to seek for an increase of the quota. In the case at stake the

[61] Cf BVerfG, Beschl v 25.1.1995 – 2 BvR 2689 /94 u 2 BvR 52/95, reprinted in EuZW 1995, 126.

FCC was of the opinion that the right to property was endangered -and that meant the violation of a fundamental right-, because the plaintiff had maintained that it was on the verge of bankruptcy due to the new COMB. After receiving the ruling of the FCC the Higher Administrative Court of Hesse decided in an interlocutory order or so-called temporary injunction of 9 February 1995, that the applicant would obtain special import licences. This was clearly a contradiction to the EC-level on the national scale. The FCC added in a similar case that the competent courts even might temporarily suspend the application of provisions of the Regulation 404/93 in summary proceedings if new arguments are presented.[62]

Another bananas importer appealed to the Fiscal Court of Hamburg, requesting provisional measures against the rejection of further demands to import third-country bananas without licences and free of duties.[63] The Fiscal Court issued the requested interim order and voiced serious concerns about the conformity of Regulation 404/93 with GATT. It argued that since the German Government is bound by GATT henceforth the Community must respect this obligation according to Article 307 of the TEU (ex Article 234 of the EC Treaty). This decision was later upheld by the Federal Fiscal Court, which accepted the doubts of the Fiscal Court of Hamburg.[64] It added that, even if the Banana Regulation were declared valid under Community law, the question would arise whether it is applicable without reserve in Germany.

---

[62] BVerfG decision of 26 April 1995 (EuZW (1995), p. 222).

[63] Fiscal Court Hamburg, Decision of 19 May 1995 – IV/119/95 H – EuZW 1995, p 413.

[64] Decision of 9 January 1996 – EuZW 1996, p. 126.

All these decisions give an impression of a legal battlefield and the resistance of German courts, which were deeply concerned about the negative effects of the banana regulation on importers of third country bananas and the insufficient control of fundamental rights by the ECJ. These decisions of the German courts caused great confusion as to the consistency of European law and national law. They also demonstrate the problematic effects of the *Maastricht* judgment of the FCC and its meaning for the relation between Community Law and national law. The question arises how this open conflict could be solved. In this –as some legal scholars name it "never ending legal story " the FCC had another occasion to find a common line when it had again to decide a case concerning the banana importing regime.

4.4 The 2000 Banana Decision of the FCC

In 1996 the Administrative Court Frankfurt stopped its proceedings and asked the FCC for a binding opinion on whether the banana regulation can be applied in Germany in spite of its violation of German constitutional law -the crucial central legal question. In its request the Administrative Court referred to the *Maastricht* decision and claimed that it was not necessary to make extensive explanations to obtain FCC review of applicability of EC Law because the Maastricht decision had reasserted the FCC´s authority to review EC Law.

Almost four years after filing the case, the FCC finally rendered its long awaited judgment.[65]

---

[65] http://www.bundesverfassungsgericht.de/entscheidungen/ls20000607_2bvl000197en.html.

In its reasoning the FCC uprightly preserved its case law regarding the protection of fundamental rights against the legal regulation of the Community. The Court argued that submissions of cases to the FCC for constitutional review under Article 100 (1) of the Basic Law which refer to rules that are part of secondary European Community law are "only admissible if their grounds show in detail that the present evolution of law concerning the protection of fundamental rights in European Community law, especially in case law of the ECJ, does not generally ensure the protection of fundamental rights required unconditionally in the respective case."[66] This means, that everyone who intends to assert before the FCC the violation of a fundamental right through secondary Community law, must demonstrate that European law development including the case-law of the ECJ after the pronouncement of the "*As Long As II*" decision declined according to the necessary standard of fundamental rights. The reasoning of a submission or a constitutional complaint must proof in detail that in each case the inalienably required protection of fundamental rights is in general not guaranteed. This requires a confrontation of the protection of fundamental rights at the national and community level in a manner such as carried out by the FCC in its "*As Long As - II*" decision. After this decision it will be very difficult to meet the qualifying term "general decline" in EC fundamental rights protection that the FCC has upheld since *Solange II* and that it imposes as the essential precondition for the exercise of its jurisdiction.

---

[66] Ibid.

Nevertheless, the outcome and the essence are of this decision are in line with the prior jurisdiction: The FCC makes it clear that it still claims a "reserve" control for itself, as it again emphasizes that the decision is based on the present state of fundamental rights protection in the EC. This means in the end that this national reservation will exist "as long as" there is no European Constitution with an adequate protection of fundamental rights on a not lower level than the national one. This also means that in the end international economic law can be perforated and weakened by national European constitutional law.

Chapter 5

Conclusion and Recommendations

5.1 Conclusion

The banana dispute has led to a series of precedent cases on the levels of WTO, EC and national (in particular German) constitutional law. The analyse in this research paper shed light on various legal issues which occurred during this long-standing trade dispute, among others, the WTO dispute settlement system and its novel enforcement system, fundamental legal issues in European integration, such as the human rights protection within the EC and the relation between the ECJ and national constitutional courts, here the German FCC.

The banana dispute can be considered a landmark case in WTO jurisprudence. The longlasting quarrel has provided all parties to provoke almost all procedural devices forseen in the DSU. As it started under the old GATT dispute settlement system the banana dispute also serves as good example to compare both dispute settlement systems. As Bananas I and Bananas II panel reports questioned the credibility of the dispute settlement system by "blocking", the Bananas III panel report under the new WTO dispute settlement system has proven that the reform has entered into a new phase of international trade relations.

One of the goals of the Uruguay Round discussions was to address the common dissatisfaction with the dispute resolution procedures of GATT. Whereas the GATT Agreement intended to cover new areas of trade and trade related

disciplines, the WTO acted to enforce these obligations against Member States within the WTO system itself. In contrast to the former one the WTO system is now manageable, legalistic and is a credible substitute for unilateral measures including retaliation. The WTO dispute settlement system has been a great achievement, but it is still a long way until there will be a liberalized world market with fair conditions for all market players from different economical backgrounds.

Just as on the WTO level, the banana dispute has led to a series of landmark decisions by European and national courts. These cases have in part clarified the classical conflict on the relationship of supremacy of Community law and national fundamental rights protection.

In its Banana Decision the FCC still claims a "reserve" control competence for itself as regards violations of national fundamental rights by EC secondary law. From this decision it ensues that the German FCC will declare constitutional complaints and submissions by lower courts as inadmissible from the outset if their grounds do not state theat the evolution of European law, including the decisions of the ECJ, has resulted in a decline below the indispensable standard of fundamental rights protection after the *As Long As II* decision. These hurdles that the FCC introduced for the exercise of their jurisdiction are regarded as quite insurmountable in German academic writing.[67]

[67] See e.g. C. D. Classen, Annotation to the 2000 Banana Decision of the German Constitutional Court, JZ (2000) p. 1158.

In reaffirming its "*As long As II*" decision, the FCC outlined its understanding of the co-operation relationship with the ECJ which it first referred to in its *Maastricht* decision. The proceedings have shown that there is a distinct need for clarity as to how one can legally resolve the conflict between the supremacy of Community law and national legitimate objections derived from fundamental rights and violations by the Community of its competences.

5.2 Recommendations

5.2.1 The WTO Sanctions and Enforcement System

Although the DSU has worked well in many regards, there remain questions about the ways to delay the WTO sanction and enforcement system. In cases like the banana dispute in which explosive economic and political issues were at stake, the respondants were successful in taking different procedural steps to delay or avert compliance with unfavorable decisions. It is crucial for the continued success of the WTO dispute settlement system to have credible implementation provisions. These provisions have to balance the needs of complainants seeking prompt redress, with the interests of the respondents.

With this regard the WTO dispute resolution system needs further clarification, at least in what pertains to the relationship between Article 21.5 and Article 22 of the DSU.

Another point is the present sanctions practice of the WTO DSB, which allows complainants to impose tariff measures. This leads to trade wars which can only be won by large and powerful countries or trading blocks. Because of the budgetary constraints the adoption of countermeasures is not an appropriate option for the poorer WTO members. As in the case of Ecuador, they do not offer the relief hoped for. On the other hand, nobody is controlling whether the sanctioning country really collects exactly the amount allowed, or more. A much easier and more effective way would be direct transfers from the government of the non complying country to the government of the country having got the authorization of compensation by WTO. The latter government could then easily redistribute the received transfers to the companies suffering the concrete loss.

5.2.2 Recommendations Concerning Fundamental Rights Protection

Even after the *Banana* decision of the FCC, there persist uncertainties and doubts as to how ne should exactly construe the qualifying term "general" decline in EC fundamental rights protection that the FCC has upheld since its "*As Long As II*" decision and that it imposes as the essential precondition for the exercise of its jurisdiction. The banana dsipute has shown that the unclarity concerning this issue has triggered off intense litigation in Germany and induced even lower courts to openly contest EC law. However, it is all the more important to clearly define the borderline at which the supremacy of Community law can, or must be called into question by national courts under EC law and national constitutional law. At the final stage it would be the best if the EC could

eventually reach a compromise for a European Constitution which would clearly set a standard for a fundamental rights protection at the EC level.

As one can see the bananas complex can be analysed under national, European and International Law and it is easy to foresee that it will have a secure place on the judicial agenda even in the future.

BIBLIOGRAPHY

a) Books

Fairhurst, John / Vincenzi, Christopher, Law of the European Community, 4th ed., Harlow/England, Pearson Education Ltd., 2003.

Hanlon, James, European Community Law, London, Sweet & Maxwell, 2003.

Guohua, Yang / Marcurio, Bryan, Yongjie, Li, WTO Dispute Settlement Understanding. A Detailed Interpretation, The Hague, Kluwer Law International, 2005.

Jackson, The World Trade Organization. Constitution and Jurisprudence, London, The Royal Institute of International Affairs, 1999.

Nailman, Frederic Godlove, Fortress Europe versus Chateau Mondial, Greifswald, 2005.

Palmeter, David / Mavroidis, Petros C., Dispute Settlement in the World Trade Organization, The Hague, Kluwer Law International, 1999.

Pauwelyn, Joost, Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules Of International Law, Cambridge, Cambridge University Press, 2003.

Rivera-Batiz, Luis A. / Maria- Angeles, Oliva, International Trade. Theory, Strategies and Evidence, Oxford, Oxford University Press, 2003.

Steiner, Josephine / Woods, Lorna, Textbook on EC Law, 7th ed., London/UK, Blackstone Press Limited, 2000.

Umbach, Dieter C. / Clemens Thomas, Grundgesetz. Mitarbeiterkommentar und Handbuch, Heidelberg, C.F. Müller, 2002.

b) Articles in Books

von Bogdandy, Armin / Makatsch, Tilman, Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law, in: The EU and the WTO. Legal and Constitutional Issues, ed. Gráinne de Búrca / Joanne Scott, Oxford-Portland Oregon, Hart Publishing, 2001, p. 131 et seq.

de Búrca, Gráinne / Scott, Joanne, The Impact of the WTO on EU Decision-making, in: The EU and the WTO. Legal and Constitutional Issues, ed. Gráinne de Búrca / Joanne Scott, Oxford-Portland Oregon, Hart Publishing, 2001, p. 1 et seq.

Griller, Stefan, Enforcement and Implementation of WTO Law in the European Union, in: The Banana Dispute. An Economic and Legal Analysis, ed. Fritz Breuss/Stefan Griller/Erich Vranes, Wien/New York, Springer-Verlag Wien, 2003, p. 247 et Seq.

Vranes, Erich, From Bananas I to the 2001 Bananas Settlement: A Factual and Procedural Analysis of the WTO Proceedings, in: The Banana Dispute. An Economic and Legal Analysis, ed. Fritz Breuss/Stefan Griller/Erich Vranes, Wien/New York, Springer-Verlag Wien, 2003, p. 1 et seq.

Vranes, Erich, The Banana Dispute: Fundamental Issues under WTO Law, in: The Banana Dispute. An Economic and Legal Analysis, ed. Fritz Breuss/Stefan Griller/Erich Vranes Wien/New York, Springer-Verlag Wien, 2003, p. 39 et seq.

c) Articles

Besse, Dirk, Die Bananenmarktordnung im Lichte deutscher Grundrechte und das Kooperationsverhältnis zwischen BVerfG und EuGH, Neue Juristische Wochenschau, 1996, p. 397 et seq.

von Bogdandy, Armin, The Legal Case for Unity, Common Market Law Review, 1999, pp. 887 et seq.

Classen, Claus D., Annotation to the 2000 Banana Decision of the German Constitutional Court, JZ, 2000, p. 1158.

Everling, U., Will Europe Slip on Bananas? The Bananas Judgment of the Court of Justice and National Courts, Common Market Law Review 1996, pp. 401 et seq.

Hirsch, Günter, Europäischer Gerichtshof und das Bundesverfassungsgericht – Kooperation oder Konfrontation, Neue Juristische Wochenschau, 1996, p. 2457 et seq.

Limbach, Jutta, Das Bundesverfassungsgericht und der Grundrechtsschutz in Europa, Neue Juristische Wochenschau, 2001, 2913 et seq.

Matheuws, A. / Thaesen, R., The EU´s Common Banana Regime: An Initial Evaluation, Journal of Common Market Studies, 35 (1997), p. 615.

d) Internet Network

Aziz, Miriam, Sovereignty Lost, Sovereignty Regained? Some Reflections on the Bundesverfassungsgericht's Banana Judgment, Constitutionalism Web-Papers, ConWEB No.3/2003, http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/ConWEBFiles/Filetoupload,5312,en.pdf, available on 30 June 2006.

García, Mercedes, Banana III : European Communities - Regime for the Importation, Sale and Distribution of Bananas, http://www.ejil.org/journal/Vol9/No1/index.html, available on 20 July 2006.

Hanrahan, Charles E., The U.S.-European Union Banana Dispute - CRS Report for Congress, http://www.nationalaglawcenter.org/assets/crs/RS20130.pdf, available on 20 July 2006.

Jackson J.H./Grane, P., The Saga Continues: An Update on the Banana Dispute and its Procedural Offspring, Journal of International Economic Law (2001), p. 581-595, 588, http://jiel.oxfordjournals.org/cgi/content/abstract/4/3/581.

Patterson, Eliza, The US-EU Banana Dispute, http://www.asil.org/insights/insigh63.htm.

Reich, Norbert, Judge-made `Europe à la carte': Some Remarks on Recent Conflicts betweenEuropean and German Constitutional Law Provoked by the Banana Litigation, http://www.ejil.org/journal/Vol7/No1/ art6.html, available on 25 July 2006.

Salas, M. / Jackson, J. H., Procedural overview of the WTO EC – banana dispute, Journal of International Economic Law, p. 145 et seq., http://jiel.oxfordjournals.org/cgi/content/abstract/3/1/145, available on 02 July 2006.

Scheuing, Dieter H., The Approach to European Law in German Jurisprudence, 5 German Law Journal No. 6 (1 June 2004), http://www.germanlawjournal.com/ article.php?id=446, available on 10 July 2006.

European Union, http://encarta.msn.com/encyclopedia_761579567/ European_Union.html, available in 10 July 2006.

From Lomé I – IV, http://ec.europa.eu/comm/development/body/cotonou/ lome_history_ en.htm, available on 19 July 2006.

The EC Banana Regime, GATT/WTO challenges, and the evolving policy framework http://www.unctad.org/infocomm/anglais/banana/ ecopolicies.htm, UNCTAD Info Com, available 0n 05 July 2006.

Treaty of Paris, http://www.unizar.es/euroconstitucion/library/historic% 20documents/Paris/TRAITES_1951_CECA.pdf, available on 13 July 2006.

Life history of Robert Schuman and Jean Monnet, http://www.historiasiglo 20.org/europe/biografias.htm, available on 23 July 2006.

e) Legal Sources – WTO

EEC – Member States´ Import Regimes for Bananas (Bananas I), DS32/R, unadopted, dated 3 June 1993.

EEC – Import Regime for Bananas (Bananas II), DS38/R, unadopted, dated 11 February 1994.

EC- The Fourth ACP/EEC Convention of Lomé, Waiver Decision of 9 December 1994, L/7604, 19 December 1994; Extension of the Waiver, Decision of 14 October 1996, WT/L/186.

EC – Regime for the Importation, Sale and Distribution of Bananas (Bananas III), WT/DS27/R/ECU/GUA/HON/MEX/USA, adopted on 25 September 1997

EC- Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted on 25 September 1997

f) Legal Sources – EC

Council Regulation 404/93/EEC of 13 February 1993 on the common organization of the market in bananas, 1993 OJ L 047, 1.

Commission Regulation 1442/93/EEC of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community, OJ 1993 L 142, 6.

Council Regulation 1637/98/EC amending Commission Regulation

404/93/EEC on the Common Market Organisation for Bananas, 1998 OJ L 210,28.

Council Regulation No 2587/2001/EC amending Regulation 404/93/EEC on the common organisation of the market in bananas, 2001 OJ L 345, 13.

Council Regulation 216/2001/EC of 29 January 2001 amending Regulation No 404/93/EEC on the common organisation of the market in bananas, 2001 OJ L 31,2.

Case C-280/93, Germany/Council, [1994] ECR–4973, reprinted in EuZW 1994, 688.

Case C-465/93, Atlanta Fruchthandelsgesellschaft and Others (I) v Bundesanstalt fuer Landwirtschaft [1995] ECR I-3761

Case C-466/93, Atlanta Fruchthandelsgesellschaft and Others (II) v Bundesanstalt fuer Landwirtschaft, ECR [1995] I-3799.

Case C-68/95, T Port GmbH & Co. KG v Bundesanstalt fuer Landwirtschaft, ECR [1996] I-6065.

Case C-104/97 P, Atlanta AG and Others v Commission of the European Communities and Council of the European Union, [1999] ECR I-6983.

Case 6/64, Costa v E.N.E.L., [1964] ECR 585, CMLR 425.

Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- u. Vorrats-stelle für Getreide und Futtermittel, [1972] ECR 1125, CMLR 244.

Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, CMLR 263.

g) Legal Sources – German Courts

BVerfG, order of 29 May 1974, 2 BvL 52/1, As Long As I [Solange I], reprinted in Neue Juristische Wochenschau, 1974, pp. 1697 et seq.; English translation in Common Market Law Review 1974, p. 540 et seq.

BVerfG, order of 22 October 1986, 2 BvR 197/83, As Long AS II [Solange II], reprinted in NJW 1987, pp. 577 et seq.; English translation in Common Market Law Review 1987, pp. 225 et seq.

BVerfG, judgment of 12 October 1993, 2 BvR 2134/92 und 2 BvR 2159/92; Maastricht reprinted in Neu Juristische Wochenschau 1993, pp. 3047 et seq.; English translation in Common Market Law Review 1994, pp. 251 et seq.

BVerfG, order of 7 June 2000, 2 BvL 1/97, Bananas Decision; English translation by the FCC available at www.bundesverfassungsgericht.de (on 14 July 2006).

Appendix: Timeline of European Integration

Timeline of European Integration

For many centuries, Europe was the scene of frequent and bloody wars. In the period between 1870 and 1945, France and Germany fought each other three times, with terrible loss of life. Several European leaders became convinced that the only way to secure a lasting peace between their countries was to unite them economically and politically.

1946: The British Prime Minister Winston Churchill calls for a "kind of United States of Europe" in a speech he gives at the Zurich University.

1950: In a speech inspired by Jean Monnet, Robert Schuman, the French Foreign Minister, proposes that France and Germany and any other European country wishing to join them pool their Coal and Steel resources ("Schuman Declaration).

1951: Belgium, France, Germany, Italy, Luxembourg and the Netherlands sign the Treaty of Paris establishing the European Coal and Steel Community (ECSC).

1952: The ECSC Treaty enters into force.

1957: The Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) are signed by the Six (Belgium, France, Germany, Italy, Luxembourg, Netherlands) in Rome –(Treaties of Rome).

1973: Denmark, Ireland and the UK join the European Communities.

1978: Establishment of the European Monetary System based on a European currency unit (the ECU).

1979: First elections to the European Parliament by direct universal suffrage.

1981: Greece becomes the 10th member of the European Community.

1984: The draft Treaty on the establishment of the European Union (Spinelli draft) is passed by the European Parliament by a large majority.

1986: Spain and Portugal join the European Communities. The Single European Act modifying the Treaty of Rome is signed in Luxembourg and The Hague.

1989: The President of the Commission Jacques Delors presents the report on the economic and monetary union.

1990: Germany is unified. The Lander of former East Germany become part of the EU.

1992: The Treaty on the European Union is signed in Maastricht by the Foreign and Finance Ministers of the Member States.

1993: The Single European Market and the Treaty on the European Union enter into force.

1995: Austria, Finland and Sweden join the Union, bringing membership up to 15. The Schengen Agreement comes into force between Belgium, France, Germany, Luxembourg, the Netherlands, Portugal and Spain. EU citizens can now leave their passports at home as there is no border control.

1997: Establishment of the European Central Bank.

1999: The Amsterdam Treaty enters into force. The Euro is officially launched. Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, The Netherlands, Portugal and Spain adopt the euro as their official currency.

2001: A new Treaty amending the Treaty on European Union and the Treaties establishing the European Communities, is signed (Treaty of Nice). Greece becomes the 12th member of the euro zone.

2002: The Euro coins and notes enter into circulation in the twelve participating Member States: Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain. The Treaty establishing the European Coal and Steel Community (ECSC) expires after fifty years in force.

2004: European Union's biggest enlargement ever in terms of scope and diversity becomes a reality with 10 new countries - Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia.

2005: French voters vote no to ratification of the European Constitutional Treaty. The voters in Netherlands reject on a referendum the ratification of the European Constitutional Treaty.