

## EC-Bananas Case

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### A. Introduction

- 1 The so-called '*EC-Bananas Case*' comprises a series of rulings that were rendered, since the early 1990s, by panels established in the framework of the → *General Agreement on Tariffs and Trade (1947 and 1994)* ('GATT') and the → *World Trade Organization (WTO)*, by the WTO Appellate Body, by the European Court of Justice and several domestic, particularly German, tribunals (→ *European Communities, Court of Justice (ECJ) and Court of First Instance (CFI)*). Many of these rulings constitute landmark judgments in the fields of WTO and European Union ('EU') law. This contribution concentrates on issues of WTO law; the fundamental questions that were raised in ECJ and domestic court proceedings are briefly referred to in paras 22–23.

### B. Factual Background of the WTO Dispute

- 2 The *EC-Bananas Case* concerns the banana import regime that the → *European (Economic) Community* had established with the inception of the EC's Internal Market in 1993. Just as the earlier individual import regimes of several Member States, the EC's import regime had already been found to violate the GATT in GATT 1947 dispute settlement proceedings (see GATT EEC – *Member States' Import Regimes for Bananas – Report of the Panel ('Bananas I')*; and GATT EEC – *Import Regime for Bananas – Report of the Panel ('Bananas II')*). However, the EC was able to block the adoption of these panel reports due to the principle of → *consensus* that prevailed in GATT 1947 dispute settlement proceedings.
- 3 When the WTO came into force in 1995, the EC banana import regime was challenged again, this time by several Latin American banana exporting countries and the United States of America ('US'). The most important features of this complex regime are the following ones (on this and the following see also Figure 1). Basically, three 'types' of bananas were identified in the EC import regime. First, bananas originating in the EC enjoyed free movement within the EC. This also applied to bananas shipped from the overseas departments of EC Member States (→ *Overseas Territories, Australia, France, Netherlands, New Zealand, United Kingdom, United States of America*). Second, the EC also granted duty-free entry—within an overall annual quota of 857,000 tonnes—for bananas originating in 12 African, Caribbean, and Pacific ('ACP') countries which had traditionally supplied the EC with this fruit (→ *European Community, Association of Overseas Countries and Territories*). Within this quota, the EC had allocated specific shares for each of these 12 countries. They were named traditional ACP exporters; bananas imported from these countries within this quota were defined as 'traditional bananas' in the EC's import regime. 'Non-traditional bananas' therefore were bananas stemming from other ACP countries, as well as bananas shipped from the said 12 traditional ACP countries to the extent that such shipments exceeded these countries' specific shares. Third, there was a second quota of roughly 2.5 million tonnes. This quota, the second cornerstone of the EC import regime, was open for imports both from ACP countries as well as third countries. However, within this quota, several further qualifications—as opposed to the treatment of traditional bananas—applied. Crucially, under this quota, there was a distinction between non-traditional bananas (which always stem from ACP countries, see the definition above) on the one hand and other third-country bananas on the other hand: whereas no duty was charged under this quota on such 'non-traditional' bananas up to 90,000 tonnes, a duty of \$75

was imposed on every tonne of third country bananas. In other words, a trade preference of \$75 was granted to the ACP countries under this quota, in order to reflect these countries' special relation to the EC under the EEC – ACP Convention of Lomé ('Lomé Convention'; → *Lomé/Cotonou Conventions*). The amount of 90,000 tonnes was reserved to certain traditional ACP supplying countries, and individual shares were distributed to these countries. The rest of the quota was again allocated to four Latin American countries—Colombia, Costa Rica, Nicaragua, and Venezuela—and an 'others' category. This special treatment of the aforementioned four countries was a result of the *Bananas II* proceedings under GATT 1947, where they had acted as complainants: the aim was to offer them trade privileges in order to prevent them from further pursuing their case. Finally, for all imports out of these quotas, a (*de facto* prohibitive) tariff of originally \$850 per tonne was imposed. It was clear that the many distinctions made within this regime raised the question whether it conformed to the relevant WTO non-discrimination and market access requirements (Breuss 10–16; → *States, Equal Treatment and Non-Discrimination*).

Figure 1: EC Banana Import Regime - Outline (Breuss 11)

- 4 Furthermore, these quotas were distributed to individual traders by means of licensing procedures that differed for both quotas. While it was relatively easy to fulfil the procedural requirements to obtain licenses for imports under the first quota—applicants for licenses for imports of traditional ACP bananas under the 857,000 quota were basically required to state the quantity and origin from which they intended to import and to submit a certificate of origin testifying to the status as 'traditional' bananas—the procedures in respect of the second quota were substantially more burdensome and, inter alia, differentiated between categories of operators for non-traditional ACP and third-country bananas (on these notions see para. 3 above). These operators had different shares allocated to them: 66.5% went to operators that had marketed third-country bananas and/or non-traditional ACP bananas during a past three-year reference period ('category A operators'). However, 30% of this quota was allocated to operators that had marketed EC and/or traditional ACP bananas during this reference period ('category B operators'). The practical effect was that category B operators (which were mostly European undertakings) were given a share of almost 1/3 under this quota, ie in respect of bananas in which they in principle had not traded before, namely third-country bananas and/or non-traditional ACP bananas. It is clear that this transfer of market shares, which was effected by an EC legal act, provided further matter for the eventual dispute, as those companies that had almost exclusively imported third-country bananas (mostly US and German companies) lost import opportunities to these 'category B importers'. This was further exacerbated by the fact that import licenses were tradable among A and B operators. The economic effect of this system was that category A operators were required to buy back licenses from category B operators (who often were not interested in the whole amount allocated to them) in order to regain part of the market share they had retained before the introduction of the EC banana market organization. Obviously, this raised several questions, especially whether such 'cross-subsidization' of category B operators was compatible with WTO law (Breuss 17–19).
- 5 According to the EC's statements in the WTO *EC – Regime for The Importation, Sale and Distribution of Bananas – Report of the Panel* (22 May 1997; '*Bananas III*') proceedings, the design of this import regime was partially influenced by the EC's commitments under the Lomé Convention concluded by the EC with almost 80 ACP developing countries. The Lomé Convention aimed to ensure that products originating in the ACP countries were granted 'more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products' (Art. 168 (2) (a) (ii) Fourth EEC – ACP Convention of Lomé ('Fourth Lomé Convention'); → *Most-Favoured-Nation Clause*). In other words, trade preferences granted to imports of such ACP products were not to be extended to other countries supplying the EC with → *like products*. Additionally, a protocol on bananas attached to the Lomé Convention required the EC not to place any ACP State 'as regards access to its traditional [EC] markets and its advantages on those markets, in a less favourable situation than in the past or at present' ('Protocol 5 Fourth Lomé Convention'). In view of these commitments, the EC and the ACP countries that were contracting parties to the GATT requested a → *waiver* from GATT disciplines that would have allowed the EC to grant preferential treatment as 'foreseen' under the Lomé Convention. However, the waiver that was actually granted was drafted in a more restrictive way: it merely applied to Art. I GATT and did so only 'to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention' (GATT *The Fourth ACP-EEC Convention of Lomé – Decision of 9 December 1994*; 'GATT Waiver'). Therefore, the question of the interrelationship between the GATT Waiver and the Lomé Convention became a core issue of the WTO proceedings.

## C. History of WTO Proceedings

### 1. Issues in Substantive Law

- 6 The EC's banana import regime was scrutinized by a WTO panel (*Bananas III*) and the Appellate Body in 1997 (WTO *EC – Regime for The Importation, Sale and Distribution of Bananas – AB-1997-3 – Report of the Appellate Body* ('*Bananas III Appellate*')). The regime raised not only numerous issues under central provisions of WTO law, but also several questions of a rather technical nature, such as the interplay between several of the various WTO agreements (→ *World Trade Organization, Dispute Settlement*). Due to the sheer number of issues (eg as regards the relevant EC licensing procedures alone, more than 40 claims, which alleged inconsistencies with WTO law, were brought), and in view of the fact that the points, which attracted most legal and economic interest in the EC-Bananas Case litigation, concerned the post-1997 enforcement impasses (→ *World Trade Organization, Enforcement System*), the present section concentrates on those issues in substantive law that appeared central in the legal assessment of the EC import regime. Both the *Bananas III* panel and the Appellate Body found that Art. XIII GATT, which calls for non-discriminatory application of quantitative restrictions, was violated by the EC import regime in particular since import shares were allocated by agreement to some members but not to others. Adopting a strict reading of the GATT Waiver, which explicitly referred to Art. I GATT only, the Appellate Body held that violations of Art. XIII GATT were not justified by the GATT Waiver. It was also found that the EC import regime violated Art. I GATT due to the in-quota and out-of-quota tariff preferences for traditional bananas (\$75 versus \$0, and \$793 versus \$693, respectively; cf figure 1). This violation was held to be justified under the GATT Waiver, however. Due to these findings already, it was clear that the plausible reform options for the EC were arguably confined to a 'tariff-only' system in conjunction with a new waiver. Furthermore, however, the EC import regime was found to violate Art. III:4 GATT (national treatment): the panel argued that the EC licensing scheme amounted to an illicit incentive to buy bananas from EC resources since 'category A operators' wishing to increase their market share were required to purchase EC bananas during relevant reference periods so as to qualify as 'category B operators' in the future and be allocated additional import licences (on the notions of 'category A operators' and 'category B operators' see para. 4 above).
- 7 The EC import regime was also examined under Arts II and XVII → *General Agreement on Trade in Services* (1994) ('GATS'), which were addressed, for the first time in WTO dispute settlement, in the 1997 *Bananas III* (→ *Services, Trade in*). WTO members are only bound by Art. XVII GATS (national treatment), when they have undertaken specific commitments in their individual schedules. Given that the EC had inscribed the sector of wholesale trade services without any limitations as regards the mode of supply through commercial presence, a central issue arose with respect to the 'commercial presence' concept of GATS: can operators that might only potentially provide services be protected by GATS? The latter question arose in the *Bananas III* context as many multinational vertically integrated companies perform all activities, which are necessary between the harvesting of bananas and their sale to end-consumers, 'in-house', ie without buying or supplying such services on the market. The *Bananas III* panel took a broad view, ruling that even vertically integrated companies are service suppliers for the purposes of GATS, when they have the capability and opportunity of entering into competition with existing services suppliers.
- 8 The panel also issued a broad reading of another central concept of the GATS national treatment principle, holding that any providers of 'like services' are to be seen as 'like service suppliers' under Art. XVII GATS (→ *National Treatment, Principle*). Having made this finding, the panel went on to hold that the aforementioned operator categories of the EC import regime constituted de facto discriminatory treatment under Art. XVII GATS: as was explained above, operators were categorized as type 'A' or 'B' depending on whether they had marketed, during a preceding reference period, EC and traditional ACP bananas on the one hand or third-country and non-traditional ACP bananas on the other hand. These operator categories served to distribute the aforementioned 2.5 million tonnes quota (comprising third-country and non-traditional ACP bananas) among operators. In this context, the panel concluded that there was de facto discrimination of foreign service suppliers, given that the conditions of competition had been modified by the EC import regime in such a way that they typically favoured EC service suppliers: most of the suppliers of complainants' origin were found to fall into category A for the vast majority of their past trading volumes, whereas most EC (just as ACP) suppliers came under category B for most of their past marketing volumes of bananas.
- 9 The panel also accepted that companies of complainants' origin had held 'by far the vast majority' of this market segment, namely Latin American bananas. Given that the EC operator category rules had attributed 30% of the licences allowing importation of such Latin American bananas to category B operators, a considerable market share was transferred, as explained before, from companies of complainants' origin to EC companies which typically qualified as category B operators. Moreover, the EC had explicitly envisaged cross-subsidization of operators that had been marketing EC and traditional ACP bananas (ie typically EC companies): as explained, according to the EC regime, import licences for Latin American bananas were tradable among A and B operators. As companies of EC origin had not traditionally traded in third-country bananas, they were willing to sell such licences, and category A operators were

required to buy them in order to regain the market share they had lost due to the EC regime. The panel referred to information from both sides of the dispute that large numbers of licences had in fact been traded this way. Consequently, the allocation to category B operators of 30% of the licences was found to constitute a *de facto* discrimination prohibited by Art. XVII GATS. Furthermore, relying on Art. II GATS (most-favoured-nation treatment), the complainants claimed that the EC's operator category rules conceded favourable treatment to service suppliers of ACP origin. The issues here were analogous to those under Art. XVII GATS, as the treatment accorded to suppliers of complainants' origin had to be compared to that accorded to service suppliers originating in ACP countries instead of EC countries. Given that the ACP suppliers, which were accorded treatment similar to that of suppliers of EC origin, were classified as category B operators, the panel found that there was *de facto* discrimination of service suppliers of complainants' origin under Art. II GATS.

## 2. Procedural Issues, Spin-Off Proceedings and Interrelated WTO Disputes

- 10 When the EC, in an effort to implement the WTO rulings, adopted the outlines of its new import regime in 1998, the original complaining parties claimed that most of the violations determined in the 1997 WTO rulings were perpetuated in the envisaged regime. When the US Administration announced that it would therefore take unilateral retaliatory action (→ *Unilateral Acts of States in International Law*; → *Unilateral Trade Measures*; → *Unilateralism/Multilateralism*), the EC in turn opened an additional WTO case by requesting consultations on the WTO consistency of a cornerstone of US trade law, namely Sections 301–310 Trade Act of 1974 ('Trade Act'; → *Consultation*). Whereas the EC essentially argued that these provisions forced the US to impose sanctions before the WTO itself had had a chance to rule on the legality of such a unilateral action, the WTO panel decided that the wording of Section 301 Trade Act gave the US Trade Representative enough discretion to go through WTO dispute settlement proceeding before imposing → *sanctions* and was thus in line with WTO law (WTO *United States – Sections 301–310 of the Trade Act 1974 – Report of the Panel* (22 December 1999) WT/DS152/R).
- 11 Still, in 1998 the US nonetheless affirmed publicly that it was not prepared to submit its own subjective determination as to whether the EC's implementing measures conformed to WTO law, to the multilateral scrutiny of a WTO panel, as required under Art. 21 (5) Understanding on Rules and Procedures Governing the Settlement of Disputes in Marrakesh Agreement Establishing the World Trade Organization ('DSU'). This led the EC to request the establishment of yet another WTO panel, this time under Art. 21 (5) DSU, requesting the panel to find that a WTO member's implementing measures must be presumed to be WTO consistent, unless a panel had found to the contrary. As a reaction to the EC's procedural move, Ecuador too applied for the establishment of a panel under Art. 21 (5) DSU, to likewise examine the alleged WTO-inconsistency of the EC's implementing measures (see WTO *EC – Regime for The Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador – Report of the Panel* (12 April 1999) WT/DS27/RW/EQU).
- 12 A few weeks later, however, the US applied for authorization to retaliate against the EC in line with the DSU (according to Art. 22 DSU, WTO members must not resort to retaliation without prior authorization by the WTO; if the defendant WTO member objects, the matter is referred to → *arbitration* proceedings in line with Art. 22 (6) DSU). This would have meant that an authorization by the WTO for the US to suspend tariff → *concessions* would have to be granted before the aforementioned panels, which were established under Art. 21 (5) DSU, had determined whether the EC implementing measures in fact again violated WTO law. This concurrence of proceedings led to several intricate questions regarding the WTO enforcement system, inter alia the relationship between panel proceedings under Art. 21 (5) DSU and arbitration proceedings under Art. 22 (6) DSU. The dispute is on the 'sequencing' of those provisions: is it mandatory to first settle a dispute under Art. 21 (5) DSU before it is possible to obtain an authorization for retaliation under Art. 22 DSU? The better reasons might strike for such interpretation in cases of a dispute on the existence or the consistency of measures with an agreement taken to comply with dispute settlement decisions (→ *Interpretation in International Law*). However, a series of procedural manoeuvres enabled the WTO Dispute Settlement Body ('DSB'), the panels established under Art. 21 (5) DSU and the arbitrators instituted under Art. 22 (6) DSU to circumvent these issues (on this issue see Vranes 205–236). As a consequence, the DSB was in a position, in April 1999, to authorize the US to retaliate against the EC, which constitutes the first instance in which retaliation was authorized in the WTO framework. A further precedent ruling was issued in November 1999, when Ecuador was authorized by the WTO to suspend concessions and other obligations under the GATT, the GATS and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods ((signed 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299), as this represents the first case in which a WTO member was permitted, under the auspices of the WTO, to resort to 'cross retaliation' (ie sanctions in a trade sector other than the sector in which the original violation of WTO law occurred).
- 13 During 1999 and 2000, the EC did not bring its import regime for bananas into conformity with WTO law. Meanwhile, however, the EC had negotiated the Partnership Agreement between the Members of the African, Caribbean and Pacific



Group of States of the one Part, and the European Community and its Member States, of the other Part ('Cotonou Agreement') as a successor agreement to the aforementioned Lomé Convention. Given that the Cotonou Agreement, like its predecessor, anticipated preferential treatment of a series of products originating in ACP countries, the EC needed to obtain a new waiver from GATT disciplines, which had to be granted by a 3/4 majority of WTO members according to Art. IX (3) Marrakesh Agreement Establishing the World Trade Organization. Due to the enforcement impasses in the *EC-Bananas Case* and another long-standing transatlantic trade dispute, the → *EC-Hormones Case* (see WTO EC – *Measures Concerning Meat and Meat Products (Hormones)*—AB-1997-4—*Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R, and related WTO documents), the outlook for obtaining such a waiver seemed quite uncertain.

- 14 This is where a parallel development comes into play, namely the fact that, in 2001, the EC was able to secure a victory in yet another high-profile EC-US trade dispute before the WTO. This case concerned the US system of foreign sales corporations, which allowed American-based undertakings to avoid taxation by channelling foreign income through offshore tax havens (see WTO *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Article 21.5 of the DSU by the European Communities – Report of the Panel* (20 August 2001) WT/DS108/RW, as modified by WTO *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Article 21.5 of the DSU by the European Communities – AB-2001-8 – Report of the Appellate Body* (14 January 2002) WT/DS108/AB/RW; 'FSC Case'). When it became clear that the US was not able to comply with the WTO ruling in time and when the EC was authorized by the WTO to impose sanctions in the amount of roughly US\$4 billion in this case, this provided the EC with considerable bargaining leverage to achieve a settlement with the US and several other of the original complainants in the *EC-Bananas Case*, and to also obtain US support for the Cotonou Waiver (WTO EC – *Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas – Decision of 14 November 2001* (7 December 2001) WT/L/437), which was eventually granted in the WTO Ministerial Conference at Doha in December 2001 (→ *Doha Round*).

### 3. The New EC Import Regime and Further Developments

- 15 According to the settlement just mentioned, the new EC import regime introduced a transitional period based on import quotas until 2006. As of 2006, a tariff-only system was to be established. Under WTO law, the new system necessitated two waivers, one from Art. XIII GATT so as to make it possible for the EC to reserve a quota to ACP bananas until 2006. A second waiver from Art. I GATT was needed for the time after 2006, since in the Cotonou Convention the EC had undertaken to give preferential access to bananas from ACP countries. In addition to the aforementioned Cotonou Waiver, these two 'banana-specific' waivers were granted by the WTO not least due to the support which the US had promised in the 2001 settlement with the EC. As a direct consequence of these agreements, the sanctions which the US had imposed in the bananas dispute were lifted in 2001.
- 16 Nonetheless, at the time of writing, the *EC-Bananas Case* seems not to have been fully resolved: when the EC announced in 2005 that it would introduce a tariff of \$230 per tonne when switching over to the aforementioned tariff-only system, several Latin-American banana exporting countries initiated arbitration proceedings against the EC on the basis of a special dispute settlement clause that had been inserted into the waiver from Art. I GATT (see para. 15). The WTO Arbitrator concluded, inter alia, that the EC's envisaged import regime infringed WTO law, as it did not maintain the existing market access volumes held by the complainants (see WTO EC – *The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001 – Award of the Arbitrator* (1 August 2005) WT/L/616; in a second round of arbitration proceedings, the EC's revised proposal was condemned as well, see the WTO EC – *The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001 – Award of the Arbitrator* (27 October 2005) WT/L/625). As a reaction to these arbitration awards, the EC adopted Council Regulation No 1964/2005 of 29 November 2005 on the Tariff Rates for Bananas ((2005) OJ L316/1): this regulation introduced a tariff rate of \$176 to be applied as of 1 January 2006 as well as an autonomous tariff quota (subject to a zero-duty) for ACP bananas in the amount of 775,000 tonnes (roughly the amount supplied by ACP countries that had traditionally exported bananas to the EC). In 2007, the EC's measure triggered further WTO complaints by Ecuador and the US, which led to condemnations of the EC under Articles I, II and XII GATT (see WTO EC – *Regime for The Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador – Request for the Establishment of a Panel* (26 February 2007) WT/DS27/80; WTO EC – *Regime for The Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States – Request for the Establishment of a Panel* (2 July 2007) WT/DS27/83). At the joint request of Ecuador and the EC (WTO EC – *Regime for The Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador – Joint Request by Ecuador and the European Communities for a Decision by the DSB* (23 May 2008) WT/DS27/87), the DSB agreed to extend the time limit for the adoption of the first-mentioned panel report until 29 August 2008.

## D. Assessment

- 17 The importance of the many WTO rulings rendered in the *EC-Bananas Case* so far lies in the area of procedural WTO law much more than in substantive WTO law (→ *International Courts and Tribunals, Procedure*). In the latter field, even though the *Bananas III* panel and appellate body reports were the first to interpret several provisions of the GATT, some of the more specific WTO agreements on trade in goods and the GATS (see paras 6–9 above), most of these findings are rather ‘unspectacular’, and thus very few have given rise to in-depth debates among trade law specialists.
- 18 This assessment has to be more nuanced regarding procedural law, where it is necessary to distinguish two sets of issues. A first set of questions arose within the ‘regular’ panel phase of WTO proceedings and has led to findings concerning the legal interest required to bring claims before WTO panels, the adequacy of the instrument of consultations (foreseen, in the DSU, as an obligatory phase preceding panel proceedings, see Art. 4 DSU), the definition of the matter in dispute (commonly referred to, in WTO parlance, as the ‘specificity of the request for the establishment’ of WTO panels, see Art. 6 (2) DSU), and the presence of outside counsel, such as private lawyers, within WTO proceedings. Most of these issues have been re-addressed and further developed in subsequent WTO case law. By contrast, a second set of issues concerns the novel enforcement phase, in which the measures taken by WTO members in order to implement panel and Appellate Body rulings are subjected to multilateral review and dealt with in specific panel, Appellate Body and arbitration proceedings under Arts 21 and 22 DSU (on this see paras 10–14 above). Even though the WTO dispute settlement fora, as indicated, evaded several of the legal issues that arose in the enforcement proceedings in the *EC-Bananas Case* decisions rendered in 1999, these rulings have nonetheless partly contributed to clarifying the functioning, and the inherent limits, of the enforcement phase of the WTO dispute settlement system, and consequently also informed the debate on the reform of the DSU.

## E. Relevance

### 1. Relevance for the WTO System

- 19 Beside the issues just referred to, the *EC-Bananas Case* has underlined some broader, structural short-comings of the WTO system. It is particularly striking that, under the DSU, there is no co-defendant status enabling other WTO members—like the group of 77 ACP countries that were more or less directly affected by the outcome of the *EC-Bananas Case*—to join the respondent in a dispute in which they take an interest. This creates an imbalance, given that interested parties can join the complainant and bring claims of their own, even when they merely have a minimal or potential trade interest. Furthermore, in view of the EC’s problems of obtaining waivers not only for its banana import regime, but also for the Cotonou Convention, the question arises whether the 3/4 majority required for a waiver is not too rigid a threshold in view of the systemic importance of waivers. Finally, there is the question of whether WTO ‘sanctions’ constitute a ‘credible threat’ in cases where a respondent is not prepared to implement WTO decisions. This has been illustrated not only by the sanctions imposed by the US vis-à-vis the EC in the *EC-Bananas Case*, but also by the problems faced by Ecuador, when it tried to retaliate against the EC in the wake of the 1997 WTO rulings: Ecuador found it virtually impossible to impose sanctions in the goods and services sectors, since such measures risked disproportionately hurting the Ecuadorian economy.
- 20 The last mentioned point touches upon the most fundamental issue at stake, still not entirely settled: that of the binding nature of WTO law as such, or at least the binding force of a WTO dispute settlement decision. The reluctance of the EC over many years to adjust the banana market order according to the findings of the DSB can be seen as a violation of WTO law. However, an alternative reading—defended in academic writing, and fuelled by the reasoning of the ECJ in Case C–149/96 *Portuguese Republic v Council of the European Union* ((1999) ECR I-8395; → *Portugal v Council Case*) and subsequent rulings (see para. 22 below)—is that WTO law obligations are not categorically binding. Allegedly this is due to the important role of ‘negotiated arrangements’ and of → *reciprocity* in WTO law (see also → *Non-Binding Agreements*). Seen from this angle, WTO law offers an alternative to immediate → *compliance* with adopted reports, namely, to negotiate compensations, and eventually to accept retaliatory measures. Opposed to such an interpretation is the view that adopted panel reports produce an international law obligation to perform the recommendations of the report. In this vein, the respective provisions of the DSU (especially Arts 19, 21, 22 DSU) do not offer an alternative to compliance. Instead, the overall objective of → *compensation* as well as the suspension of concessions is to ‘induce compliance’ (see WTO *EC – Regime for The Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU – Decision by the Arbitrators* (9 April 1999) WT/DS27/ARB para. 6.3). To put it differently: the suspension of concessions is a sanction, accepting the suspension and living with a sanction for violating WTO law is not a law-abiding alternative to compliance.
- 21 The ‘mini-trade war’ on bananas—together with other transatlantic trade conflicts, notably in the *EC-Hormones Case* and the *FSC Case*, and GATT/WTO rulings in notorious ‘trade and environment’ cases like the → *US-Shrimp Case* (→

*Trade and Environment*)—have drawn the WTO to the centre of public and academic attention in the 1990s, causing not only lawyers, but also economists, political scientists, and specialists in international relations to study the world trading regime. Several treatises that resulted from this increased interest have focused on the enforcement impasses in the *EC-Bananas Case*, *EC-Hormones Case* and the *FSC Case* and have led to a questioning of the adequacy and efficacy of the WTO dispute settlement and enforcement system. Other writings have underlined the perceived negative spill-overs onto other policy fields—such as the purported negative effects on transatlantic relations when the aforementioned disputes culminated in the late 1990s—which were caused in part by these long-standing trade disputes, arguing that these developments were fostered, to some extent at least, by shortcomings of the WTO dispute settlement system. Nonetheless, it must be pointed out in this respect that the overall record of implementation of WTO rulings since the WTO's inception indicates a high degree of compliance with WTO rulings, which tends to show that the aforementioned transatlantic trade disputes, including notably the *EC-Bananas Case*, arguably represent exceptions to the rule, ie 'pathological' cases from which generalizing conclusions should only be drawn with caution.

## 2. Links to EC Law

- 22 The *EC-Bananas Case* moreover comprises a large number of rulings and decisions rendered by the ECJ, the CFI, and national, particularly German, courts and tribunals. These decisions revolve around three main legal questions: the status of WTO law within the EC (involving the issue of the binding nature of dispute settlement decisions under international law, see para. 20 above); the EC's liability for infringements of WTO law; and the system of EU fundamental rights protection. Obviously, the decisions on the WTO, the EC, and the national levels have partially influenced each other (→ *International Law and Domestic (Municipal) Law, Law and Decisions of International Organizations and Courts*). Thus, the proceedings at the WTO level have arguably been motivated also by the fact that the ECJ, in standing jurisprudence, denies the invocation by individuals of GATT/WTO provisions to the extent that WTO law falls within EC competence (→ *European Community and Union Law and International Law*). In the context of the litigation over the EC's banana import regime, the ECJ has extended this jurisprudence, as regards the GATT 1947, from actions by individuals to annulment actions brought by EU Member States (see Case C-280/93 *Federal Republic of Germany v Council of the European Union* (1994) ECR I-4973 paras 105, 109). This stance has been confirmed, as respects WTO law, in the *Portugal v Council Case*. Still in this line of jurisprudence, the ECJ found, in 2000, that WTO law, too, lacks direct effect in principle (see Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH v Wilhelm Layher GmbH & CoKG* (2000) ECR I-11307 para. 45). Moreover, given that the ECJ decided that WTO law cannot serve as a yardstick for the legality of EC legal acts within the EC legal order, it additionally concluded in the *EC-Bananas Case* context that contraventions of WTO law by EC institutions do not incur the EC's extra-contractual liability (see Case C-104/97 P *Atlanta AG v Commission of the European Communities and Council of the European Union* (1999) ECR I-6983 para. 66). There appears to be only one major exception to this standing jurisprudence, namely that WTO law is judicially enforceable within the EC legal order, when the EC has intended to implement a specific WTO obligation through the adoption of secondary law or when EC secondary law refers expressly to provisions of WTO law (see Case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities* (1989) ECR 1781 paras. 19–22; Case C-69/89 *Nakajima All Precision Co Ltd v Council of the European Communities* (1991) ECR I-2069 para. 31). Nonetheless, it is to be noted that this exception may have been further restricted in the ECJ's aforementioned ruling in the *Portugal v Council Case*. This jurisprudence and its various facets have been severely criticized in several academic writings.
- 23 Finally, it should be noted that the *EC-Bananas Case* has also produced a considerable number of rulings concerning human rights protection in the EU. This is due to the fact that banana importers mainly established in Germany tried to rely on the German Federal Constitutional Court's decisions in *Solange I* (Bundesverfassungsgericht [German Constitutional Court 2nd Senate] (29 May 1974) 14 CMLR 540); *Solange II* (Bundesverfassungsgericht [German Constitutional Court 2nd Senate] (22 October 1986) 3 CMLR 225); and *Maastricht* (Bundesverfassungsgericht [German Federal Constitutional Court 2nd Senate] (12 October 1993) 89 BVerfGE 155), in which the German Federal Constitutional Court had indicated that it would continue scrutinizing EC secondary law against the yardstick of German fundamental rights standards, the precise details of this jurisprudence having remained controversial, however. When, on this basis, several German administrative and tax tribunals began questioning the supremacy and unity of EC law, this led to a series of judgments by the ECJ and the German Federal Constitutional Court, which contributed to elucidating the relationship between the supremacy of EC law and national fundamental rights protection. These judgments culminated, in 2000, in the German Constitutional Court's decision in the case *Bananenmarktordnung* (Bundesverfassungsgericht [German Federal Constitutional Court 2nd Senate] (7 June 2000) 102 BVerfGE 147), which softens German judicial reservations against the supremacy of EC law.

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