

# Nested and overlapping regimes in the transatlantic banana trade dispute

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

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

## INTRODUCTION

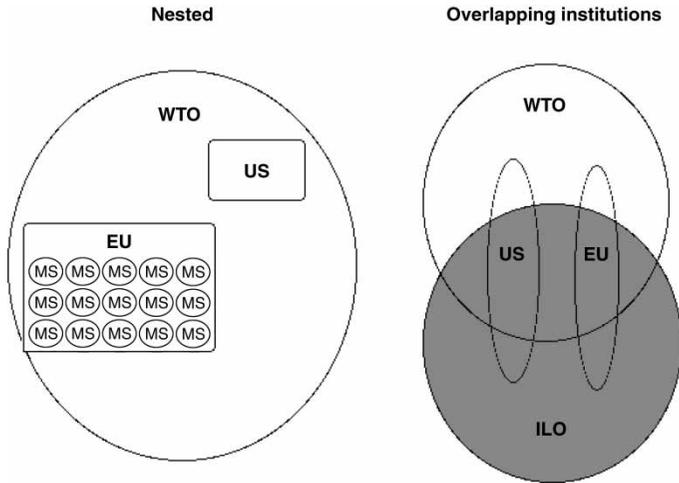
Advanced industrial democracies belong to a plethora of international institutions. Either individually or collectively, they are members of universal organizations (UN agencies), regional blocs (e.g. European Union (EU), North American Free Trade Agreement (NAFTA), Association of South East Asian Nations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

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

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

## 1. THE NESTING AND OVERLAPPING OF INTERNATIONAL COMMITMENTS

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



*Figure 1* Analytical difference between nested and overlapping contexts  
*Note:* MS = European Union member state (before last enlargement). Circle size is not to scale.

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

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

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

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

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

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

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

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

barriers to trade and the introduction of a common external tariff for imports from third countries. Despite the Treaty's ambitious goals, national markets long remained fragmented for many goods. The 1986 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.

### **The creation of the single European banana regime**

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

Unifying this regime, as required by the Single European Act, entailed reconciling the apparently irreconcilable pulls of multiple institutions and treaty obligations in contradiction with one another (Lyons 1994). How could a new banana regime simultaneously: be consistent with the Single Market; honor its Lomé Convention commitment to protect the banana exports of ACP countries; honor the 'Banana Protocol' in the Treaty of Rome guaranteeing Germany unimpeded access to bananas; and honor obligations under the General Agreement on Tariffs and Trade (GATT) to provide preferential access to imports from developing countries including non-ACP countries? The complex nesting of the EU's banana policy, as the dispute unfolded, is represented by Figure 2.

It took four years of intense negotiation for Europe to create its new regime involving a multilayered system of import rules, with strong preferences for EEC and ACP bananas. The import system was incredibly complex: supplies from the EEC (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; and imports from other countries (mostly from Central and Latin American producers) were allotted a yearly quota of two million tons with a 20 per cent tariff, and a 170 per cent tariff beyond this quota. The Commission kept track of this regime by issuing import licenses that allocated quotas among banana distributors: two-thirds to traditional European and ACP importers, and one-third to other importers.

The essential features of the new banana regime were adopted by a qualified majority vote in December 1992, as part of a package deal. The policy was

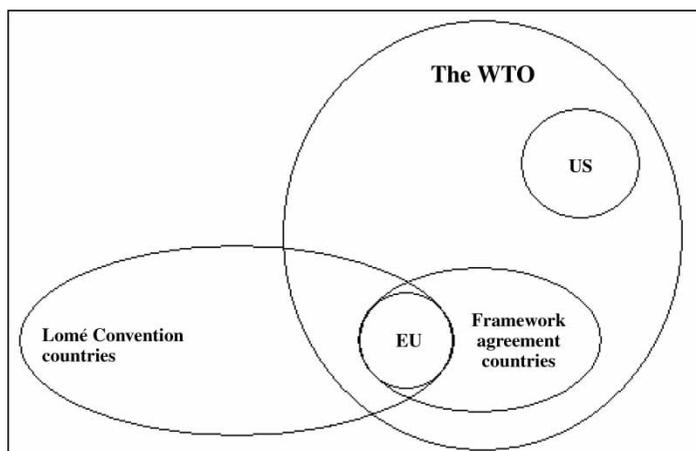


Figure 2 The complex nesting of the banana dispute

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

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

### Resolving the transatlantic banana dispute

The EU's controversial policy ran afoul of WTO rules because it allowed for preferential access for some banana imports and not others. The nested nature of the member states within the EU, and of the EU within the WTO, provided multiple avenues for banana producers and importers to challenge the contested policy – complicating the situation of European legal and political decision-makers who tried to figure out how each challenge would play out. All the layers of politics made finding a compromise much harder, allowing the relatively straightforward dispute to fester for ten years. (See Figure 2)

Europe's banana policy was first contested in GATT while the new protocol was still under negotiation. In 1992, a group of Central and Latin American producers known as the 'dollar zone' group – Costa Rica, Colombia, Guatemala, Nicaragua and Venezuela – tried to put pressure on the European negotiation process by requesting the establishment of a panel to examine the

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

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

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

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

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

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

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

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

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

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

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

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

### **3. UNPEELING THE LAYERS: NESTING/OVERLAPPING AND THE BANANA DISPUTE**

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

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

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

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

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

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

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

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

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

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

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

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

## **Scenario 2: No Lomé regime**

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

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

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

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

(Rodden 2001: 69)

Giving preference to very poor countries was, in itself, not the problem. The GATT had granted a waiver for the Lomé Convention in October 1994, which lasted until the end of Lomé IV (2000). This waiver became a focal point of developing countries. As the date of expiration approached, fifty-six ACP members of the WTO threatened to oppose new trade negotiations on non-related issues – such as environment, labor, and the 'Singapore issues' of investment and competition policy – in the upcoming Doha round of multilateral trade negotiations unless the waiver was extended. The WTO extended the waiver until 2008, covering the new Cotonou agreements that had replaced the Lomé Convention. The nesting of Lomé countries within WTO allowed ACP countries to leverage their political power. The EU could not play a two-level game telling the Lomé countries that the WTO prohibited the policy. Instead, ACP countries could play the WTO game to demand a waiver and pressure European countries to maintain their advantaged market access.

### **Scenario 3: No WTO regime**

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

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

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

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

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

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

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

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

## CONCLUSION

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

George Tsebelis reasoned from theory that ‘seemingly suboptimal choices indicate the presence of nested games’ (Tsebelis 1990: 248). We show specifically how nesting contributed to the choices made. In many respects the

banana dispute represents a 'typically' complicated example of the consequences of institutional nesting/overlapping in the international realm. The dispute was created by nesting, since the completion of the single European market produced a clash between the EU Lomé Convention obligations *vis-à-vis* its former colonies and its membership in the GATT/WTO trading system. The different layers of nesting help us understand the seemingly puzzling behaviors in the dispute – the adoption and then defense of the convoluted quota system, and the strategies of political and legal actors within the dispute.

The absence of clear hierarchy between all the layers involved – European member states, the EU, the Lomé countries, and WTO – makes the behavior of legal decision-makers more understandable. Legally and politically, the relationship of EU law to WTO law is ambiguous. EU member states have accepted unitary EU representation within the WTO, yet they still retain their individual memberships. The decision to replace member state participation with EU participation was never made because the issue of the Commission's authority over trade in services was too contentious (Meunier and Nicolaidis 1999; Bourgeois 2000: 73). Thus the problem of whether a state is obligated to the EU agreement over the WTO agreement (or vice versa) was left unresolved by political bodies. This ambiguity allowed for the internal opposition to the regime to be exploited in European member states' national courts, and to bubble over into the Uruguay Round negotiations. This ambiguity also made it hard for the ECJ to answer the question of whether WTO obligations are legally supreme to EU law. On the one hand, the ECJ's refusal to review the compatibility of EU law with WTO law is legally remarkable in that the hallmark of the legal method is the like application of reason and rules across cases. Yet here we find the ECJ refusing to do exactly what it asked national courts to do – enforce international rules at home – and we even find the ECJ interpreting similarly worded texts differently based on the political context (Bourgeois 2000). This inconsistency makes sense if we consider that the ECJ is acting like a supreme court nested in the international order. Almost all domestic courts avoid 'tying the hands' of governments, forcing them to comply with international agreements when other executive branches are not similarly bound. The ECJ tries when possible to interpret EU law consistently with WTO law. When the Council explicitly invokes international legal obligations or makes clear that the EU law is intended to bring the EU into compliance with an international obligation, the ECJ acts as the Council's enforcer, making sure that EU law and member state law comply with international legal obligations. However, it leaves the decision about whether or not to comply with WTO rules as an issue for political bodies to resolve.

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

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

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

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

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

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

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

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## NOTES

- 1 Bureaucracies tend to replicate policy formulas to create internal consistency and to ease implementation. The EU chose quotas because they boosted the price of bananas, decreasing the need for subsidies to make French and Spanish bananas competitive. The particular system of import licenses replicated existing mechanisms used to distribute quotas across individual importers. Since the quotas were designed to discriminate between ACP and dollar bananas, categories of quotas (A, B, and C) were created, resulting in an incredibly complicated licensing system that caused German importers to raise legal challenges and led the EU policy to be condemned by the WTO. The difficulty of changing this system was in no small part associated with the entrenchment of the policy repertoire which bureaucracies cling to.
- 2 Signed in 1975 after Great Britain's accession into 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 states 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. Lomé conventions: OJ 1976, L25/1; OJ 1980, L347/1; OJ 1986, L86/1; OJ 1991, L229/I.
- 3 Latin American bananas are often referred to as 'dollar bananas' because they are grown by American multinationals such as Chiquita and Dole on huge, efficient plantations in Latin America.
- 4 With 14.9 kg/capita compared to an average EU consumption of 9.3 kg/capita (Bessko 1996: 265).
- 5 In 1992, bananas cost \$1.3/kg in Germany, vs. \$2.07 in the UK (Sutton 1997).
- 6 *Germany v. Council*, ECJ C-280/93 [1994] ECR I-4973; see: par. 78. In a second case, the German government challenged the Commission's system for implementing the disputed regulation, but the ECJ dismissed this case on a technicality. Opinion 3/94 [1995] ECR I-4577.
- 7 Case 280/93, *Germany v. Council* [1994] ECR I-4973.
- 8 The ECJ ruled that it did not need to review the compatibility of the Framework agreement with WTO law because the Framework agreement had come into force with the Uruguay Round, and thus any assessment as to the agreement's legality raised under EEC Article 228 would be legally moot. Opinion 3/94 on the Framework agreement on bananas, decision of 13 December 1995 [1995] ECR I-4577.
- 9 *Firma T. Port v. Hauptzollamt Hamburg-Jonas*. (T. Port I, Banana I) BVerfG decisions of 25 January 1995. First Chamber of the Second Senate 2 BvR 2689/94 and 2 BvR 52/95 [1995] EuZW 126. Verwaltungsgerichtshof Hessen decision of 9 February 1995 [1995] EuZW 222.
- 10 1996 judgment of the German Federal Fiscal Court *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) 126-128, cited in Gerard G. Sander (1998).
- 11 *Firma T. Port v. Hauptzollamt Hamburg-Jonas*. (T. Port II) FG Hamburg order 19 May 1995 [1995] EuZW 413. BFH decision 22 August 1995. T. Port II, Second banana ruling. BVerfG decisions of 26 April 1995. First Chamber of the Second Senate 2 BvR 760/95, [1995] EuZW 412.

- 12 'Yes, we have no profits' (2001) *Fortune* 144 (11): 182–96.
- 13 USTR Charlene Barchefsky, quoted in 'USTR announces list of European products subject to increased tariffs.' Document 98–113, Office of the USTR.
- 14 The EU claimed that aiding the banana industry was preferable to providing direct aid. Caribbean bananas are grown on small, family-run farms, and bananas seem to be the only year-round crop that can recover quickly enough after storm or flood damage. Moreover, according to the defenders of the EU regime, the only alternative crop for these countries in the absence of markets for their banana exports would be drugs. Perhaps. But drug production is also a problem in Latin America, and Europe is also vulnerable to the effects of drug production in Latin America. In addition, a straight-up tariff on dollar bananas might have provided a sufficient benefit for ACP producers.
- 15 Firma T. Port v. Hauptzollamt Hamburg-Jonas. BVerfG decisions of 25 January 1995. First Chamber of the Second Senate 2 BvR 2689/94 and 2 BvR 52/95 [1995] EuZW 126. Firma T. Port v. Hauptzollamt Hamburg-Jonas Verwaltungsgerichtshof Hessen decision of 9 February 1995, [1995] EuZW 222. Discussed in Alter (2001).
- 16 'Yes, We have no Profits' (2001) *Fortune* 144 (11): 182–96; Taylor (2003).
- 17 Based on interviews with members of the European Commission, Brussels, September 7 and 8, 2004.
- 18 Hawaii produces bananas for domestic consumption. It was argued that by diminishing consumption for dollar bananas in Europe, the price of Hawaiian bananas could be adversely affected. This may be true, but most commentators explain US actions by focusing on Chiquita bananas' considerable efforts to lobby Congress rather than the Hawaiian banana industry.
- 19 'Ecuadorian banana growers request US base withdrawal due to new import scheme', in *World News Connection*, 26 April 2001.
- 20 Part of the delay was that decision-makers waited for legal and political challenges in the different layers to play themselves out, but European actors were also buying time.

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