

BANKING REGULATION AND WORLD TRADE LAW

GATS, EU AND PRUDENTIAL INSTITUTION BUILDING

LAZAROS E PANOURGIAS



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BANKING REGULATION AND WORLD TRADE LAW

Banking Regulation and World Trade Law concerns the legal aspects of the interaction between banking regulation and international trade in financial services. The author studies the internal banking market of the European Union, the liberalisation of financial services trade in the World Trade Organization, the accords of the Basel Committee on Banking Supervision and the European Central Bank.

The book focuses on the balancing between banking regulation and international trade law. It discusses discrimination and proportionality in national banking regulation, the allocation of prudential regulation and supervision between home and host country, and international financial law-making. The author questions decentralised/nation-based banking regulation and supervision as a foundation for a sustainable liberalisation of international trade in financial services.

The book considers various reforms of the international financial architecture, such as the incorporation of the Basel processes and accords into the WTO system, and the setting up of new international institutions by building on the Basel Committees or the IMF structures. The role of central banking in designing the international financial architecture is also explored: the book reviews the ECB's competence over foreign exchange policy and its function as lender of last resort, and treats price stability, banking soundness and representation as critical concepts. The analysis also reveals that the concept of 'prudential', despite its extensive use in banking regulation, has not been defined with adequate precision.

In seeking to delineate the interface between international economic law and banking regulation, Dr Panourgias builds on the rich European scholarship on institutional financial issues and the US interdisciplinary approach to world trade law. He also entertains the notion of international financial law as a distinct field.

The book will be of particular interest to those concerned with financial law and international banking.

Στους γονείς μου

To my parents

Foreword

Lazaros Panourgias' book on Banking Regulation and World Trade Law is an invaluable contribution to our understanding of the internationalisation of banking, and the liberalisation of world trade in financial services. The interplay between regulation in the various jurisdictions and the developing law relating to international trade in financial services is a fascinating subject for study.

The international financial system is a complex and evolving edifice. To ensure its stability and its positive welfare effects we need to comprehend the issues at stake and balance them efficiently. This book identifies the legal issues and proposes a scholarly roadmap for balancing banking regulation and trade.

Policy makers will benefit from the book's discussion of international financial structures. Dr Panourgias engages in a detailed review of WTO jurisprudence and an analysis of international financial institution building. He explains the relevance of the Basel committees for financial services liberalisation in the WTO, and their potential role as international financial supervisors. The author demonstrates the achievements of the EC internal banking market and leads his readers to draw lessons for international financial architecture. His discussion of the European Central Bank and bank supervision offers a fresh perspective on the relationship between price stability and banking soundness.

This is a book that comes at a most opportune time. As banking becomes more globalised, international financial architecture needs to be strengthened. It is a time for all of us who take an active part in international financial services to talk more with each other. This book will facilitate such discussion, as it brings together international economic law and banking law scholarship, central banking research and international economic policy issues. Moreover, Dr Panourgias uses his diverse – and impressive for his age – experience to produce an elegant mix of US and European discourse.

I am delighted to commend this book and I look forward to the debate on the issues it raises.

Rt Hon Lord Brittan of Spennithorne QC, DL

Preface

This book is a study on *balancing* international trade and banking regulation, and as such forms part of a quest for a governance system for international banking. The book discusses the financial services systems of the World Trade Organization and the European Union, the Basel committees and accords and the European Central Bank. Its themes include: dealing with barriers to financial services trade; regulating international banks; determining the competence of home and host bank supervisor; addressing financial stability; determining the relationship of monetary policy and bank supervision; and designing a new international financial architecture.

The book's themes have recently been the subject of a number of developments in financial regulation, and debates among financial-services stakeholders. For example, the World Trade Organization is currently carrying on negotiations about trade in financial services. The new Basel Capital Accord (Basel II) aims to make regulatory capital requirements more risk-sensitive and market-driven. The European Union has adopted legislation to deal with consolidated supervision of financial conglomerates and of cross-border banking, investment and insurance groups, and is moving towards more centralised supervision structures. The regulators are seeking to exercise their financial supervision competence in a way that is consistent with the business organisation of international financial institutions. Various countries have established a single financial regulator, while there is talk of the supervisory role of central banks. The BCCI dispute involved complex issues of cross-border bank supervision and depositors rights.

This book provides an interface for the sensibilities involved. International economic law approaches these matters in terms of discrimination and proportionality of national banking regulation, while banking regulation is concerned with allocating prudential regulation and supervision between the home and the host country, and international financial law-making. In integrating the concerns of these two fields, I have relied on the rich European legal scholarship regarding institutional issues of banking regulation and the US interdisciplinary approach to international economic law, drawing especially on international relations, economics, law and economics and new institutional economics.

The book should be of value in various areas of financial services work. Financial law scholars will hopefully respond to the book's international focus and engage the internationalists. Financial services policy-makers should consider the international legal structures which are of relevance for the proposed banking rules. International economic lawyers can help with international banking if they have a good understanding of how

international banking works and how it may be impacted by their analysis. I have accordingly attempted to offer more precise definitions of key concepts. This conceptual approach should allow for more clarity in the sometimes obscure regulation of banking matters and unveil the risks of using broad concepts, such as the 'prudential', in legal texts. My discussion of the interdependence of price stability and banking soundness may contribute to a more informed treatment of the relationship of monetary policy and bank supervision. Knowledge of international banking norms and processes may be useful in the fine-tuning of regulatory requirements which is mandated by the increasingly discretionary approach to banking supervision. It should also improve legal advising and business planning in the financial services industry, as it enhances our understanding of the international financial environment and its long-term evolution.

The book also proposes a constitutional matrix for international financial architecture. The existence of international financial regulation cannot be taken for granted. There are national and regional laws, the content of which is affected by policy discussions and standard-setting at the international level (eg the Basel standards), as well as by the activity of international financial institutions. I have tried to locate international legal norms that derive from international processes and have an effect on national legal orders and financial institutions. This search is limited to the area of banking. The World Trade Organization and the General Agreement on Trade in Services regulate the trade aspects of financial services at the international level. The promulgations of the Basel committees produce international 'soft' law, which covers many of the prudential aspects of banking regulation, particularly regulatory capital. The interaction between the General Agreement on Trade in Services and the Basel process stands as a possible source of 'hard' international banking law addressing both trade and prudential aspects. The trade-off between international trade and banking regulation is at the centre of the book's analysis, and principles for operating such a trade-off may be another element of international banking law. We must also look at the EU edifice, as it has provided a comprehensive system of regional banking law. It is possible that this exercise will produce a template for building a system of international banking law.

The main themes of this book reflect my personal intellectual journey. It centers on the balancing of values. Exploring criteria for the conduct of trade-offs has been constant and sometimes intense. The function of money has come to add an interesting dimension. I have sought to make sense of money and finance problems, legal and other. The desire for a thorough understanding has made necessary the study of these problems in light of increased internationalisation.

Many people – and quite a few institutions – have been responsible for what good has come out of this journey. Mads Andenas, Director of the British Institute of International and Comparative Law, fired in me the

desire to write a legal book and shared much of his knowledge. I am most grateful to Professor Eva Lomnicka, my co-supervisor at King's College London, and Professors Joseph Norton, of Queen Mary College London and Ulf Bernitz, of the University of Stockholm. I am also very appreciative of Professors Charles Goodhart, of the London School of Economics (formerly member of the Monetary Policy Committee of the Bank of England), Jean-Victor Louis, of the European University Institute (formerly General Counsel of the Central Bank of Belgium), René Smits, of the University of Amsterdam (formerly General Counsel of the Central Bank of Netherlands) and Joanne Scott, of Cambridge University, for their comments on various parts of this work. Duncan Fairgrieve at Sciences Po and Eva Hüpkes, of the Swiss Federal Banking Commission, have also offered me their constructive comments and friendly advice. Since my time at Fletcher, I have found Joel Trachtman's work inspiring, particularly his thinking on the issue of balancing, and his comments on this work were invaluable. Philip Wellons gave good advice during my work at the Harvard Law School Program on International Financial Systems and kindly reviewed parts of this work. Arthur Dimopoulos at Georgetown and Taxiarchis Kokkores at the Center of Planning and Economic Research in Athens have provided invaluable guidance.

My colleagues at Herbert Smith have, over the last few years, offered me a congenial environment with constant stimulus and quality work. I am also thankful to the European Bank for Reconstruction and Development for an educative and supportive relationship.

The British Institute of International and Comparative Law provided a stimulating research environment. I would also like to thank the staff at the Williams Library at Georgetown, the Ginn Library at the Fletcher School, the ILS and Langdell Libraries at Harvard, the Dewey Library at MIT, the law libraries at NYU and Basel University, as well as the British Library of Political and Economic Sciences and the IALS and Maughan Libraries at the University of London.

A debt of gratitude is owed to the Greek State Scholarships Foundation (IKY) for the generous scholarship that supported my research and my postgraduate studies.

I am thankful to Richard Hart, Mel Hamill and the staff at Hart Publishing for turning this manuscript into an elegant book.

A number of friends have encouraged and enriched the writing of this work. Kostas Papadopoulos and Nikitas Hatzimihail have provided constant encouragement, and George Stephanakis eased my transition from the States to London. Thomas Varvitsiotis, Karim Makdisi, Yannick Mireur, Dimitris Keridis and Carlo Pozzi have provided priceless perspectives. Dimitris Pelekis, Stavros Papastavrou, Paris Anestis, Kostas Zaimis, Dora Papadopoulou and Michael Papadakis have all been around.

My most grateful thanks go to my family. They are unique. Their

approach to life has been a great source of inspiration and quality. My brothers Dimitris and George have taught me a lot. Long walks at Via Indipidenza and protracted coffee breaks at Piazza Delle Muse have been educative as well as invigorating. This book is dedicated to my parents Evangelos and Kiki Panourgias to whom I owe everything.

Lazaros E Panourgias
London 2005

Table of Cases, Reports and Opinions

EU

European Court of Justice and Court of First Instance

Case 25/62, <i>Plaumann & Co v Commission</i> [1963] ECR 95; [1964] CMLR 29	198
Case 22/70, <i>Commission v Council</i> [1971] ECR 263; [1971] CMLR 335	196-7
Case 76/72, <i>Michel</i> [1973] ECR 457	44
Case 152/73, <i>Giovanni Maria Sotgiu v Deutsche Bundespost</i> [1974] ECR 153	
Case 8/74, <i>Procureur du Roi v Benoit and Gustave Dassonville</i> [1974] ECR 837	33
Case 2/74, <i>Jean Reyners v Belgian State</i> [1974] ECR 631; [1974] 2 CMLR 305	32
Case 33/74, <i>Johannes Henricus Maria Van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid</i> [1974] ECR 1299; [1975] 1 CMLR 298	32
Case 30/77, <i>Regina v Pierre Bouchereau</i> [1977] ECR 1999; [1977] 2 CMLR 800	47
Case 120/78, <i>Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein</i> [1979] ECR 649	33
Case 96/80, <i>JP Jenkins v Kingsgate (Clothing Productions) Ltd</i> [1981] ECR 911	
Case 172/80, <i>Gerhard Züchner v Bayerische Vereinsbank AG</i> [1981] ECR 2021	203
Case 205/84, <i>Commission v Federal Republic of Germany</i> [1986] ECR 3755; [1987] 2 CMLR 69	45
Case 352/85, <i>Bond van Adverteerders and others v The Netherlands State</i> [1988] ECR 2085; [1989] 3 CMLR 113	47
Case 292/86, <i>Claude Gullung v Conseil de l'Ordre des Avocats du barreau de Colmar et de Saverne</i> [1988] ECR 111; [1988] 2 CMLR 57	34
Case 288/89, <i>Stichting Collectieve Antennevoorziening Gouda and Others v Commissariaat voor de Media</i> [1991] ECR I-4007 ...	47
Case 309/89, <i>Codorniu SA v Council</i> [1994] ECR I-1853; [1995] 2 CMLR 561	198

Case 358/89, <i>Extramet Industrie SA v Council</i> [1991] ECR I-2501; [1993] 2 CMLR 619	198
Case 76/90, <i>Manfred Säger v Dennemeyer & Co Ltd</i> [1991] ECR I-4221; [1993] 3 CMLR 639	34
Case C-204/90, <i>Bachmann</i> [1992] ECR I-249	96
Case 106/91, <i>Claus Ramrath v Ministre de la Justice, and l'Institut des reviseurs d'entreprises</i> [1992] ECR I-03351	96
Cases 267-268/91, <i>Criminal Proceedings against Bernard Keck and Daniel Mithuard</i> [1993] ECR I-6097	34
Case 19/92, <i>Kraus v Land Baden-Württemberg</i> [1993] ECR I-1663 ..	34
Case 275/92, <i>Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler</i> [1994] ECR I-1039; [1995] 1 CMLR 4	34
Case 384/93, <i>Alpine Investments BV v Minister van Financie</i> [1995] ECR I-1141; [1995] 2 CMLR 209	34, 38, 45
Case 415/93, <i>Union Royale Belge des Sociétés de Football Association and others v Jean-Marc Bosman and others</i> [1995] ECR I-492 ..	34
Case 412/93, <i>Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA</i> . [1995] ECR I-0179	97
Case 484/93, <i>Peter Svensson et Lena Gustavsson v Ministre du Logement et de l'Urbanisme</i> [1995] ECR I-3955	47, 96
Case 55/94, <i>Reinhard Gebhard v Consiglio dell' Ordine degli Avvocati e Procuratori di Milano</i> [1995] ECR I-4165	34
Case 233/94, <i>Federal Republic of Germany v European Parliament and Council of the European Union</i> [1997] ECR I-2405	47-8, 150
Case 3/95, <i>Reisebüro Broede v Gerd Sandker</i> [1996] ECR I-6511; [1997] 1 CMLR 224	45
Case 53/95, <i>INASTI v Kemmler</i> [1996] ECR I-704	34
Case 120/95, <i>Nicolas Decker v Caisse de maladie des employés privés</i> [1998] ECR I-01831	96
Case 222/95, <i>Société civile immobilière Parodi v Banque H Albert de Bary et Cie</i> [1997] ECR I-03899	32
Case 158/96, <i>Raymond Kohll v union des caisses de maladie</i> , [1998] ECR I-01931	96
Case 350/96, <i>Clean Car Autoservice GesmbH v Landershauptmann von Wien</i> [1988] ECR I-02521	96
Case 212/97, <i>Centros Ltd v Erhvervs- og Selskabsstyrelsen</i> [1999] ECR I-1459; [1999] 2 CMLR 551	37
Case 150/99, <i>(Swedish State) v Stockholm Lindöpark Aktiebolag and Stockholm Lindöpark Aktiebolag v Svenska Staten (Swedish State)</i> , [2001] ECR I-493	121
Case 177/01, <i>Jégo-Quéré & Cie SA v Commission</i> , ECR (Ct First Instance 2002), available at http://europa.eu.int	181, 198
Case 442/02, <i>CaixaBank France v Ministère de l'Economie, des Finances et de l'Industrie</i> [2004] ECR I-08961	35, 150-1

Case 222/02, *Peter Paul, Cornelia Sonnen-Lütte and Christel Mörkens v Bundesrepublik Deutschland* [2004] ECR I-09425

Opinions

Opinion 1/91, Opinion of the Court of 14 December 1991 delivered pursuant to the second subparagraph of article 228(1) of the Treaty [1991] ECR I-6079	179
Opinion 1/94, Opinion of the Court delivered pursuant to article 228(6) of the EC Treaty [1994] ECR 5267	196–7
Opinion 2/94, Opinion of the Court of 28 March 26 delivered pursuant to article 228 of the EC Treaty [1996] ECR I-1759	175, 196

WTO

GATT

GATT Panel Report: United States – Section 337 of the Tariff Act of 1930, BISD 36S/345 (Nov 7, 1989)	71, 78, 84
GATT Panel Report: Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes, DS10/R BISD 37S/200 (Nov 7, 1990)	84
GATT Panel Report: United States – Measures Affecting Alcoholic and Malt Beverages, DS23/R – 39S/206 (June 19, 1992)	72
GATT Panel Report: United States – Taxes on Automobiles, DS31/R (Oct 11, 1994, unadopted)	72
GATT Working Party Report, Border Tax Adjustments, (Dec 2, 1970) BISD (18th Supp.) 97 (1972)	72

WTO

Reports of the WTO panels and Appellate Body are available at
http://www.wto.org/english/tratop_eldispu_eldistabase_e.htm

WTO Panel Report: United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/R (96-0326) (Jan 29, 1996) ...	71
WTO Appellate Body Report: United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (96-1597) (Apr 29, 1996)	73, 87
WTO Panel Report: Japan – Taxes on Alcoholic Beverages, WT/DS8/R, WT/DS10/R, WT/DS11/R (96-2651) (July 11, 1996)	73

WTO Appellate Body Report: Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (96-3951) (Oct 4, 1996) `	73–4, 87
WTO Appellate Body Report: Canada – Certain Measures Concerning Periodicals, AB-1997-2, WT/DS31/AB/R (97-2653) (July 30, 1997)	23
WTO Panel Report: European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R (97-2077) (May 22, 1997)	76
WTO Appellate Body Report: European Communities – Regime for the Importation, Sale and Distribution of Bananas, AB-1997-3, WT/DS27/AB/R (97-3593) (Sept 9, 1997)	23, 49
WTO Appellate Body Report: EC Measures concerning Meat and Meat Products (Hormones), AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/ (98-0099) (Jan 16, 1998)	87
WTO Panel Report: Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (98-0886) (Mar 31, 1998)	83
WTO Appellate Body Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R (98-3899) (Oct 12, 1998)	86, 116
WTO Panel Report: Chile – Taxes on Alcoholic Beverages, AB-1999-6, WT/DS/87/R, WT/DS/110/R (99-2313) (June 15, 1999)	
WTO Appellate Body Report: Chile – Taxes on Alcoholic Beverages, AB-1999-6, WT/DS/87/AB/R, WT/DS/110/AB/R (99-5414) (Dec 13, 1999)	74
WTO Appellate Body Report: Canada – Certain Measures Affecting the Automotive Industry, AB-2000-2, WT/DS139/AB/R, WT/DS142/AB/R (00-2170) (May 31, 2000)	49, 61
WTO Appellate Body Report: European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (01-1157) (Mar 12, 2001)	72–4, 77, 84–5
WTO Panel Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/RW (01-2854) (June 15, 2001)	116
WTO Appellate Body Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW (01-5166) (Oct 22, 2001)	116
WTO Appellate Body Report: Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R (00-5347) (Dec 11, 2001)	71, 84–7
WTO Panel Report: United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, WT/DS285/R (04-2687) (Nov 10, 2004)	84

WTO Appellate Body Report: United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, WT/DS285/AB/R (05-1426) (Apr 7, 2005)	84
---	----

UNITED KINGDOM

<i>Alconbury Developments Ltd v Secretary of State for the Environment and the Regions</i> [2001] 2 WLR 1389	69
<i>R (Daly) v Secretary of State for the Home Department</i> [2001] 2 WLR 1622	69
<i>Three Rivers District Council and Others v Governor and Company of the Bank of England</i> [2000] 2 WLR 1220	121, 130, 222
<i>Three Rivers District Council v Governor and Company of the Bank of England</i> [2001] UKHL 16	122

INTERNATIONAL

<i>Barcelona Traction Company (Belgium v Spain)</i> [1970] ICJ 3	27
--	----

Table of Legislation

EU

Treaties

Treaty Establishing the European Economic Community (EEC Treaty)	
1957, 298 UNTS 3	6-7, 31, 137
arts 52-73g	31
Single European Act, 1987 OJ (L 169) 1, 3 Common Mkt Rep (CCH)	
P 21,000	32-3, 173
Treaty on European Union 1992 OJ (C 191) 1	
art 48	179
Treaty of Amsterdam 1997 OJ (C 340) 125	
Treaty establishing the European Community (consolidated text)(EC Treaty), 2002 OJ (C 325) 33 [EC Treaty]	32, 137, 147, 160,
	183, 210, 225-6
art 4(2)	138, 195
art 5	155, 172-3, 175
art 7(1)	175
art 8	7, 48, 136, 138, 176
art 30	85, 96
art 43	35, 92, 150
43-60	139
art 45	49
art 46	47, 96
art 49	34
arts 52-73g	31
art 55	47, 96
art 58	150
art 87	203
art 87(3)(c)	203
art 105(1)	161
art 105(2)	48, 136, 145, 155, 160, 173, 175, 193-5, 197, 200
art 105(4)	145
art 105(4)-(5)	136
art 105(5)	10, 15, 48, 136, 138, 145, 172-7, 200, 206
art 105(6)	7, 10, 16, 48, 136, 146, 170-1, 200, 206
art 107(1)	136
art 107(2)	136
art 107(3)	136

art 108	162, 179, 195
art 111	192-4
art 111(1)	192-4
art 111(2)	193-6
art 111(3)	192, 194
art 112	136
art 113(2)	181
art 113(3)	180
art 114	148
art 122	208
arts 122(3), (5)	193
art 123	136
art 123(3)	136
arts 182-88	209
art 202	124
art 213(3)	162
art 230	181, 198
art 233	181
art 234	121, 181
art 235	181
art 237(d)	181
art 241	181
art 248	33
art 288	181
art 300	192
art 300(2)-(3)	197
art 311	7, 138

Protocols

Treaty on European Union – Protocol on the Statute of the European System of Central Banks and of the European Central Bank, 1992	
OJ (C 191) 68 [ESCB Statute]	10, 137-8
art 1(1)	136
art 2	138, 161, 204
art 3	208
art 3(1)	48, 136, 145, 155, 160, 173, 195, 200
art 3(3)	10, 15, 48, 136, 138, 145, 173-4, 200, 206
art 4	136, 145, 155
art 4(1)	145
art 4(2)	145
art 5	170, 178
art 5(3)	170