

EUROPEAN COMMUNITIES - REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS

Report of the Appellate Body WT/DS27/AB/R

*Adopted by the Dispute Settlement Body
on 25 September 1997*

European Communities,
Appellant/Appellee

Ecuador, Guatemala, Honduras,
Mexico and the United States,
Appellants/Appellees

Belize, Cameroon, Colombia,
Costa Rica, Côte d'Ivoire, Do-
minica, Dominican Republic,
Ghana, Grenada, Jamaica, Japan,
Nicaragua, Saint Lucia, St. Vin-
cent and the Grenadines, Senegal,
Suriname and Venezuela,
Third Participants

Present:

Bacchus, Presiding Member

Beeby, Member

El-Naggar, Member

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	594
A. Procedural Matters.....	597
B. Oral Hearing	600
II. ARGUMENTS OF THE PARTICIPANTS	600
A. European Communities - Appellant	600
1. Preliminary Issues.....	600
(a) Right of the United States to Advance Claims under the GATT 1994	600
(b) Specificity of the Request for Establishment of the Panel.....	601

Report of the Appellate Body

	Page
2. Interpretation of the Agreement on Agriculture.....	602
3. Interpretation of Article XIII of the GATT 1994	603
4. Separate Regimes	604
5. Interpretation of the Lomé Convention and Scope and Coverage of the Lomé Waiver	605
6. Licensing Agreement.....	606
7. Articles I:1 and X:3(a) of the GATT 1994 and Article 1.3 of the Licensing Agreement.....	606
8. Interpretation of the Article III:4 of the GATT 1994	607
9. Interpretation of Article I:1 of the GATT 1994	608
10. Measures Affecting Trade in Services.....	609
11. Scope of Article II of the GATS.....	612
12. Effective Date of GATS Obligation	613
13. Burden of Proof.....	614
14. Definition of Wholesale Trade Services.....	615
15. Alleged Discrimination under Articles II and XVII of the GATS.....	615
(a) Operator Category Rules.....	615
(b) Activity Function Rules.....	616
(c) Hurricane Licences.....	617
16. Nullification or Impairment.....	617
B. Ecuador, Guatemala, Honduras, Mexico and the United States - Appellees.....	618
1. Trade in Goods.....	618
(a) Country Allocations	618
(b) Licensing Agreement.....	620
(c) Article III of the GATT 1994.....	620
(d) Article I:1 of the GATT 1994	621
(e) Article X of the GATT 1994.....	622
(f) Hurricane Licences.....	622
2. General Agreement on Trade in Services	623
(a) Threshold Legal Issues.....	623

	Page
(b) Application of GATS to the EC Licensing System.....	626
3. Procedural Issues	629
(a) Request for Establishment of a Panel	629
(b) Right of the United States to Advance Claims under the GATT 1994	629
(c) Nullification or Impairment	630
C. Ecuador, Guatemala, Honduras, Mexico and the United States - Appellants	631
1. Scope of the Lomé Waiver.....	631
2. Measures "required" by the Lomé Convention ..	632
3. GATS Claims of Guatemala, Honduras and Mexico	633
4. Scope of the Appeal.....	633
D. European Communities - Appellee.....	634
1. Lomé Waiver - Traditional ACP Bananas	634
2. Lomé Waiver - Preferential Treatment of Non-Traditional Bananas.....	635
3. GATS Claims of Guatemala, Honduras and Mexico	636
III. ARGUMENTS OF THE THIRD PARTICIPANTS	636
A. Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname	636
B. Colombia.....	640
C. Costa Rica and Venezuela.....	643
D. Nicaragua	645
E. Japan	646
IV. ISSUES RAISED IN THIS APPEAL	647
A. Preliminary Issues	650
1. Right of the United States to Bring Claims under the GATT 1994.....	650
2. Request for Establishment of the Panel.....	652
3. GATS Claims by Guatemala, Honduras and Mexico	654
4. Ecuador's Right to Invoke Article XIII of the GATT 1994	655

Report of the Appellate Body

	Page
B. Multilateral Agreements on Trade in Goods.....	656
1. Agreement on Agriculture	656
2. Article XIII of the GATT 1994	658
3. The Scope of the Lomé Waiver	660
(a) What is "required" by the Lomé Convention?	661
(b) What is covered by the Lomé Waiver? ..	667
4. The "Separate Regimes" Argument	669
5. Licensing Agreement.....	670
6. Article X:3(a) of the GATT 1994.....	672
7. Article I:1 of the GATT 1994.....	674
8. Article III of the GATT 1994	675
C. General Agreement on Trade in Services	678
1. Application of the GATS.....	678
2. Whether Operators are Service Suppliers Engaged in Wholesale Trade Services	680
3. Article II of the GATS.....	682
4. Effective Date of the GATS Obligations	684
5. Burden of Proof.....	685
6. Whether the EC Licensing Procedures are Discriminatory under Articles II and XVII of the GATS	685
(a) Operator Category Rules	686
(b) Activity Function Rules.....	687
(c) Hurricane Licences.....	688
D. Nullification or Impairment	689
V. FINDINGS AND CONCLUSIONS.....	690

I. INTRODUCTION

1. The European Communities and Ecuador, Guatemala, Honduras, Mexico and the United States (the "Complaining Parties") appeal from certain issues of law and legal interpretations in the Panel Reports, *European Communities - Re-*

*gime for the Importation, Sale and Distribution of Bananas*¹ (the "Panel Reports"). The Panel was established on 8 May 1996 to consider a complaint by the Complaining Parties against the European Communities concerning the regime for the importation, sale and distribution of bananas established by Council Regulation (EEC) No. 404/93 of 13 February 1993 on the common organization of the market in bananas ("Regulation 404/93")², and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on Bananas (the "BFA"), which implement, supplement and amend that regime. The relevant factual aspects of the EC common market organization for bananas are described fully at paragraphs 3.1 to 3.36 of the Panel Reports.³

2. The Panel issued four Panel Reports that were circulated to the Members of the World Trade Organization (the "WTO") on 22 May 1997. The Panel Reports contain the following conclusions:

With respect to Ecuador, in paragraph 9.1 of the Report, WT/DS27/R/ECU, the Panel concluded:

... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.2 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

¹ Complaint by Ecuador, WT/DS27/R/ECU; Complaint by Guatemala and Honduras, WT/DS27/R/GTM, WT/DS27/R/HND; Complaint by Mexico, WT/DS27/R/MEX; Complaint by the United States, WT/DS27/R/USA, 22 May 1997.

² Official Journal, No. L 47, 25 February 1993, p. 1.

³ The following terms are used throughout this Report:

- "ACP States" refers to the African, Caribbean and Pacific States which are parties to the Fourth ACP-EC Convention of Lomé (the "Lomé Convention"), signed in Lomé, 15 December 1989, as revised by the Agreement signed in Mauritius, 4 November 1995;
- "traditional ACP States" refers to the 12 ACP States, listed in the Annex to Regulation 404/93, which have traditionally exported bananas to the European Communities; these are Côte d'Ivoire, Cameroon, Suriname, Somalia, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Dominica, Belize, Cape Verde, Grenada and Madagascar;
- "traditional ACP bananas" refers to the quantities of bananas, exported by the traditional ACP States, up to the quantities of bananas set out in the Annex to Regulation 404/93;
- "non-traditional ACP bananas" refers to the quantities of bananas exported by the traditional ACP States in excess of the quantities of bananas set out in the Annex to Regulation 404/93, and to the quantities of bananas exported by banana-producing ACP States other than traditional ACP States;
- "third-country bananas" refers to the quantities of bananas exported by non-ACP States to the European Communities.

Report of the Appellate Body

With respect to Guatemala and Honduras, in paragraph 9.1 of the Reports, WT/DS27/R/GTM and WT/DS27/R/HND, the Panel concluded:

... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT and Article 1.3 of the Licensing Agreement. These conclusions are also described briefly in the summary of findings.

With respect to Mexico, in paragraph 9.1 of the Report, WT/DS27/R/MEX, the Panel concluded:

... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Articles 1.2 and 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

With respect to the United States, in paragraph 9.1 of the Report, WT/DS27/R/USA, the Panel concluded:

... that for the reasons outlined in this Report aspects of the European Communities' import regime for bananas are inconsistent with its obligations under Articles I:1, III:4, X:3 and XIII:1 of GATT, Article 1.3 of the Licensing Agreement and Articles II and XVII of the GATS. These conclusions are also described briefly in the summary of findings.

In each of the Panel Reports, the Panel made the following recommendation:

... that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under GATT, the Licensing Agreement and the GATS.

3. On 11 June 1997, the European Communities notified the Dispute Settlement Body⁴ (the "DSB") of its decision to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 23 June 1997, the European Communities filed an appellant's submission pursuant to Rule 21 of the *Working Procedures*. On 26 June 1997, the Complaining Parties filed an appellant's submission pursuant to Rule 23(1) of the *Working Procedures*. In accordance with Rule 16(2) of the *Working Procedures*, and at the request of the Complaining

⁴ WT/DS27/9, 13 June 1997.

Parties, the Appellate Body granted a two-day extension for the filing of appellees' and third participants' submissions. On 9 July 1997, the Complaining Parties filed an appellee's submission pursuant to Rule 22 of the *Working Procedures*, and the European Communities filed an appellee's submission pursuant to Rule 23(3) of the *Working Procedures*. Ecuador also filed a separate appellee's submission on that date. A joint third participants' submission was filed by Belize, Cameroon, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, Saint Lucia, St. Vincent and the Grenadines, Senegal and Suriname (the "ACP third participants") on 9 July 1997 pursuant to Rule 24 of the *Working Procedures*. That same day, Colombia, Nicaragua and Japan filed third participants' submissions and a joint third participants' submission was filed by Costa Rica and Venezuela.

A. *Procedural Matters*

4. On 10 July 1997, pursuant to Rule 16(2) of the *Working Procedures*, the Government of Jamaica asked the Appellate Body to postpone the dates of the oral hearing, set out in the working schedule for 21 and 22 July 1997, to 4 and 5 August 1997. This request was not granted as the Appellate Body was not persuaded that there were exceptional circumstances resulting in manifest unfairness to any participant or third participant that justified the postponement of the oral hearing in this appeal.

5. By letter of 9 July 1997, the Government of Saint Lucia submitted reasons justifying the participation of two specialist legal advisers, who are not full-time government employees of Saint Lucia, in the Appellate Body oral hearing. Saint Lucia argued that there are two separate issues concerning rights of representation in WTO dispute settlement proceedings. The first issue is whether a state may have its case presented before a panel or the Appellate Body by private lawyers. The second issue deals with the sovereign right of a state to decide who constitutes its official government representatives or delegation. On the second, and more fundamental issue, Saint Lucia submitted that as a matter of customary international law, no international organization has the right to interfere with a government's sovereign right to decide whom it may accredit as officials and members of its delegation. Furthermore, Saint Lucia noted that neither the DSU nor the *Working Procedures* deal with the issue of a sovereign state's entitlement to appoint its delegation or accredit persons as full and proper representatives of its government. Saint Lucia maintained that to do so would go beyond the powers of a panel, the Appellate Body or the WTO under customary international law. Saint Lucia also observed that there is no provision in the DSU or in the *Working Procedures* requiring governments to nominate only government employees as their counsel in WTO panel or Appellate Body proceedings.

6. The Governments of Canada and Jamaica supported the request by Saint Lucia. In a letter of 14 July 1997, Canada stated its concurrence with the proposition advanced by Saint Lucia that the composition of a WTO Member's delegation, in the absence of any rules to the contrary, is a matter internal to the Mem-

Report of the Appellate Body

ber itself. Canada argued that it is the Member's right to authorize those individuals it considers necessary or appropriate to represent its interests. Canada maintained that it is not appropriate for a panel or the Appellate Body to verify the credentials of individuals that a Member has authorized to participate in its delegation. By letter of 14 July 1997, Jamaica also submitted that a government has the right to determine the composition of its own delegation within the context of international law and practice.

7. On 14 July 1997, the Complaining Parties filed a written submission opposing the request of Saint Lucia for permission to allow non-governmental employees to participate in the Appellate Body's oral hearing in this appeal. The Complaining Parties pointed out that the Panel ruled, in its first substantive meeting with the parties on 10 September 1996, that the private counsel seeking to represent Saint Lucia were not entitled to attend the Panel's meetings in this case. The Complaining Parties noted that "the Panel's ruling is not specifically appealed in this appeal".

8. With respect to Saint Lucia's request that its legal advisers be granted an opportunity to participate in the Appellate Body's oral hearing, the Complaining Parties argued that there is no basis for the WTO to change its established practice in this area, and that such a change would entail a fundamental change in the premises underlying the WTO dispute settlement system. The Complaining Parties maintained that the rules of international law governing diplomatic relations, particularly those codified in the *Vienna Convention on Diplomatic Relations*⁵, do not support the proposition that a government can name whomever it wants as a member of its delegation to represent it in a foreign international body. The Complaining Parties also argued that the *Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character*⁶ has never come into force and has not been ratified by any of the major host states, including Switzerland and the United States, and as such is not applicable to the WTO. The Complaining Parties argued that the law of diplomatic representation does not give states *carte blanche* as to whom they may appoint to their delegations. Furthermore, with respect to the practice of other international organizations and international tribunals, the Complaining Parties argued that where participation of outside counsel is permitted, it is done so in accordance with specific written rules which have been negotiated and agreed to by parties to that organization or treaty.

9. The Complaining Parties submitted that from the earliest years of the General Agreement on Tariffs and Trade (the "GATT"), presentations by governments in dispute settlement proceedings have been made exclusively by government lawyers or government trade experts. With respect to developing countries, the Complaining Parties argued that, unlike the practice before other inter-

⁵ Done at Vienna, 16 April 1961, 500 UNTS 95.

⁶ Done at Vienna, 14 March 1975, AJIL 1975, p. 730.

national tribunals, under the provisions of Article 27.2 of the DSU, developing countries are entitled to legal assistance from the WTO Secretariat. The Complaining Parties also cited certain policy reasons in support of their position. WTO dispute settlement, they argued, is dispute settlement among governments, and it is for this reason that the DSU safeguards the privacy of the parties during recourse to dispute settlement procedures. Furthermore, the Complaining Parties asserted that if private lawyers were allowed to participate in panel meetings and Appellate Body oral hearings, a number of questions concerning lawyers' ethics, conflicts of interest, representation of multiple governments and confidentiality would need to be resolved.

10. On 15 July 1997, the Appellate Body notified the participants and third participants in this appeal of its ruling that the request by Saint Lucia would be allowed. The Appellate Body said the following:

... we can find nothing in the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"), the DSU or the *Working Procedures*, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings. Having carefully considered the request made by the government of Saint Lucia, and the responses dated 14 July 1997 received from Canada; Jamaica; Ecuador, Guatemala, Honduras, Mexico and the United States, we rule that it is for a WTO Member to decide who should represent it as members of its delegation in an oral hearing of the Appellate Body.

11. In providing additional reasons for our ruling in this Report, it is important to note first to what this ruling does and does not apply. A request was received from the Government of Saint Lucia to allow the participation of two legal counsel, who are not government employees of Saint Lucia, in the oral hearing of the Appellate Body in this appeal. This is not an appeal of the Panel's ruling concerning the participation of the same counsel in the panel meetings with the parties in this case. The Panel's ruling was not appealed by a party to the dispute⁷, and thus that ruling is not before us in this appeal. Second, it is well-known that in WTO dispute settlement proceedings, many governments seek and obtain extensive assistance from private counsel, who are not employees of the governments concerned, in advising on legal issues; preparing written submissions to panels as well as to the Appellate Body; preparing written responses to questions from panels and from other parties as well as from the Appellate Body; and other preparatory work relating to panel and Appellate Body proceedings. These practices are not at issue before us. The sole issue before us is whether Saint Lucia is

⁷ Pursuant to Articles 16.4 and 17.4 of the DSU, only parties to a dispute, and not third parties, may appeal a panel report.

Report of the Appellate Body

entitled to be represented by counsel of its own choice in the Appellate Body's oral hearing.

12. We note that there are no provisions in the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), in the DSU or in the *Working Procedures* that specify who can represent a government in making its representations in an oral hearing of the Appellate Body. With respect to GATT practice, we can find no previous panel report which speaks specifically to this issue in the context of panel meetings with the parties. We also note that representation by counsel of a government's own choice may well be a matter of particular significance - especially for developing-country Members - to enable them to participate fully in dispute settlement proceedings. Moreover, given the Appellate Body's mandate to review only issues of law or legal interpretation in panel reports, it is particularly important that governments be represented by qualified counsel in Appellate Body proceedings.

B. Oral Hearing

13. The oral hearing was held on 21, 22 and 23 July 1997. In his opening statement, the Presiding Member of the Division reminded the participants and third participants that the purpose of the oral hearing was to clarify and distil the legal issues raised in this appeal. The participants and third participants presented oral arguments, were questioned by the Members of the Division hearing this appeal, and made concluding statements. The third participants participated fully in all aspects of the oral hearing.

II. ARGUMENTS OF THE PARTICIPANTS

A. European Communities - Appellant

14. The European Communities appeals from certain of the Panel's legal findings and conclusions as well as from certain legal interpretations developed by the Panel.

1. Preliminary Issues

(a) Right of the United States to Advance Claims under the GATT 1994

15. The European Communities argues that the Panel infringed Article 3.2 of the DSU by finding that the United States has a right to advance claims under the GATT 1994. The European Communities asserts that, as a general principle, in any system of law, including international law, a claimant must normally have a legal right or interest in the claim it is pursuing. The European Communities refers to judgments of the Permanent Court of International Justice (the "PCIJ") and the International Court of Justice (the "ICJ") as support for its argument that