

TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| European Communities - Regime for the Importation, Sale and Distribution of Bananas, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States (WT/DS27) | |
| Report of the Panel (Complaint by Ecuador)..... | 3 |

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

(COMPLAINT BY ECUADOR)

Report of the Panel

WT/DS27/R/ECU

*Adopted by the Dispute Settlement Body on 25 September 1997
 as modified by the Appellate Body Report*

TABLE OF CONTENTS

| | | Page |
|------|---|------|
| I. | INTRODUCTION | 11 |
| | Terms of Reference | 11 |
| | Panel Composition | 12 |
| II. | PROCEDURAL ISSUES | 12 |
| | (a) Adequacy of the Consultations and Specificity of the Request for Panel Establishment | 12 |
| | (b) The Requirement of Legal Interest | 19 |
| | (c) Multiple Panel Reports | 25 |
| III. | FACTUAL ASPECTS | 27 |
| | (a) Banana Production and Trade | 27 |
| | (b) The EC's Common Organization of the Banana Market | 28 |
| | (i) Tariff Treatment | 29 |
| | (ii) Quantitative Aspects, Including Country Allocations | 30 |
| | (iii) Licensing Requirements | 33 |
| | (c) Trade Policy Developments Concerning Bananas..... | 37 |
| | (i) Disputes Relating to Bananas under the GATT ... | 37 |
| | (ii) Framework Agreement on Bananas | 37 |
| | (iii) Tariff Changes | 38 |
| | (iv) Lomé Waiver | 38 |
| | (v) Accession of Austria, Finland and Sweden to the EC | 39 |
| IV. | MAIN ARGUMENTS | 39 |
| | A. General | 39 |
| | B. Trade in Goods | 41 |

Report of the Panel

| | Page |
|---|------|
| 1. General Overview of the Case..... | 42 |
| (a) Overview of the Claims Presented by the Complaining Parties | 42 |
| (i) Tariff Issues | 42 |
| (ii) Allocation Issues..... | 42 |
| (iii) Import Licensing Issues..... | 43 |
| (b) Overview of the Responses Presented by the European Communities | 43 |
| (i) Separate Regimes..... | 44 |
| (ii) GATT Schedules and Articles I and XIII in the Context of the Agreement on Agriculture | 45 |
| (iii) The Non-Applicability of the Agreement on Import Licensing Procedures to Tariff Quotas..... | 46 |
| (iv) The Non-Applicability of Articles III:4 and X of GATT to Border Measures | 47 |
| (v) The Lomé Waiver | 47 |
| 2. Detailed Arguments..... | 49 |
| (a) Tariff Issues | 49 |
| (i) Tariff Preferences for Non- Traditional ACP Banana Imports..... | 49 |
| Arguments of the Complaining Parties..... | 49 |
| Arguments of the EC | 50 |
| The Lomé Waiver | 51 |
| Parties' Subsequent Arguments - Non-Traditional ACP Tariff Preferences..... | 72 |
| (ii) Third-Country Tariff Rates..... | 76 |
| (b) Allocation Issues..... | 81 |
| (i) General Allocations | 81 |
| Article XIII:2 of GATT | 82 |
| Arguments of the Complaining Parties | 82 |
| Arguments of the EC | 90 |
| Separate Regimes..... | 91 |

| | Page |
|---|------|
| GATT Schedules and Articles I and XIII in the Context of the Agreement on Agriculture | 97 |
| Parties' Arguments - Interpretive Issues | 107 |
| Article XIII:1 of GATT | 129 |
| Article I of GATT | 130 |
| The Lomé Waiver | 132 |
| (ii) Reallocation of Shortfalls | 136 |
| (c) Import Licensing Issues | 139 |
| (i) The Licensing Regime as a Whole | 140 |
| Arguments of the Complaining Parties | 140 |
| Arguments of the EC..... | 144 |
| The Non-Applicability of the Agreement on Import Licensing Procedures to Tariff Quotas..... | 144 |
| The Non-Applicability of Articles III:4 and X of GATT to Border Measures | 148 |
| Parties' Subsequent Arguments - the Licensing Regime as a Whole | 151 |
| Claims under the GATT | 157 |
| Claims under the Licensing Agreement | 171 |
| Claims under the Agreement on Agriculture | 186 |
| (ii) Operator Category Licence Allocation..... | 189 |
| Claims under the GATT | 191 |
| Claims under the Licensing Agreement | 206 |
| Claims under the Agreement on Trade Related Investment Measures | 215 |
| (iii) Activity Function Licence Allocation..... | 222 |
| Licence Distribution Issues | 222 |
| Claims under the GATT | 224 |

Report of the Panel

| | Page |
|--|------|
| Claims under the Licensing Agreement | 230 |
| Issues Concerning "over-filing" or "double-counting" | 236 |
| (iv) Export Certificates | 241 |
| Claims under the GATT | 242 |
| Claims under the Licensing Agreement | 247 |
| (v) Publication of Regulations and Timing of Licences | 250 |
| Claims under the GATT | 251 |
| Claims under the Licensing Agreement | 256 |
| (vi) Licences Provided to EC Banana Producers | 259 |
| (vii) Hurricane Licences | 260 |
| Claims under the GATT | 261 |
| Claims under the Licensing Agreement | 264 |
| C. General Agreement on Trade in Services (GATS) | 265 |
| Introduction | 265 |
| Issues of Scope | 271 |
| (a) The Relationship Between the GATS and the Multilateral Agreements on Trade in Goods..... | 271 |
| (b) Standard of Discrimination under the MFN and National Treatment Obligations | 276 |
| (i) Measures Affecting Trade in Services - Articles I:1 and XXVIII(c)..... | 276 |
| (ii) Measures Affecting Trade in Services - Article XVII:1 | 278 |
| iii) Standard of Discrimination: Article II..... | 282 |
| (c) Wholesale Trade Services | 285 |
| Operator Category Licence Allocation | 296 |
| (a) Article XVII..... | 296 |
| (b) Article II | 310 |
| Activity Function Licence Allocation - Articles II and XVII | 312 |
| Hurricane Licences - Articles II and XVII..... | 317 |

| | Page |
|--|------|
| Export Certificates - Articles II and XVII | 318 |
| V. ARGUMENTS PRESENTED BY THIRD PARTIES | 321 |
| ACP Third Parties | 321 |
| Introduction | 321 |
| Preliminary Matters | 325 |
| The Lomé Convention and the Lomé Waiver | 328 |
| Article I of GATT | 333 |
| Article XIII of GATT | 336 |
| Article X of GATT and the Licensing Agreement | 337 |
| The GATS | 338 |
| Conclusion | 341 |
| Canada | 341 |
| The Relationship Between Trade in Goods and Trade in Services | 341 |
| The Lomé Waiver | 342 |
| Conclusion | 344 |
| Colombia, Costa Rica, Nicaragua and Venezuela | 344 |
| Introduction | 344 |
| Principal Legal Arguments | 345 |
| Subsidiary Legal Arguments | 349 |
| Conclusions | 356 |
| India | 357 |
| The Lomé Convention and the Lomé Waiver | 357 |
| Conclusion | 358 |
| Japan | 358 |
| Non-Applicability of the Agreement on Import Licensing Procedures to Tariff Quota Systems | 359 |
| Conclusion | 359 |
| The Philippines | 360 |
| Preliminary Arguments | 360 |
| Specific Legal Arguments | 361 |
| Conclusion | 363 |
| VI. INTERIM REVIEW | 363 |
| VII. FINDINGS | 365 |
| A. Organizational Issues | 366 |
| 1. Participation of Third Parties | 366 |
| 2. Presence of Private Lawyers | 368 |

Report of the Panel

| | Page |
|--|------|
| B. Preliminary Issues | 369 |
| 1. Adequacy of the Consultations..... | 370 |
| 2. Specificity of the Request for Panel Establishment..... | 371 |
| (a) Article 6.2 and the Request for Establishment of the Panel | 371 |
| (b) The Arguments of the Parties | 372 |
| (c) Analysis of the Article 6.2 Claim | 373 |
| (i) Ordinary Meaning of Treaty Terms | 374 |
| (ii) Context..... | 376 |
| (iii) Object and Purpose | 377 |
| (iv) Past Practice | 378 |
| (v) Cure..... | 380 |
| 3. Requirement of Legal Interest | 381 |
| 4. Number of Panel Reports | 383 |
| C. Substantive Issues..... | 385 |
| 1. The EC Market for Bananas: Article XIII of GATT | 386 |
| (a) Article XIII | 387 |
| (i) Separate regimes | 391 |
| (ii) Members with a Substantial Interest | 393 |
| (iii) Members without a Substantial Interest ... | 395 |
| (iv) New Members..... | 396 |
| (v) Other Arguments..... | 397 |
| (b) The Allocation of Tariff Quota Shares to ACP Countries: the Lomé Waiver | 398 |
| (i) Preferential Treatment Required by the Lomé Convention | 399 |
| (ii) Application of the Lomé Waiver to the EC's Article XIII Obligations | 401 |
| (c) The Allocation of Tariff Quota Shares to BFA Countries..... | 404 |
| (i) Inclusion of the BFA Tariff Quota Shares in the EC Schedule | 404 |
| (ii) Agreement on Agriculture | 408 |
| (d) Tariff Quota Share Allocations and Article I:1 | 411 |
| 2. Tariff Issues | 411 |

| | Page |
|--|------|
| 3. The EC Banana Import Licensing Procedures | 412 |
| (a) General Issues | 413 |
| (i) Scope of the Licensing Agreement | 413 |
| (ii) GATT 1994 and the Annex 1A Agreements | 417 |
| (iii) Separate Regimes | 418 |
| (iv) Examination of the Licensing Claims | 419 |
| (b) Operator Categories | 419 |
| (i) Article III:4 of GATT | 420 |
| (ii) Article 2 of the TRIMs Agreement | 426 |
| (iii) Article I of GATT | 427 |
| (iv) Application of the Lomé Waiver to the EC's Article I Obligations | 431 |
| (v) Article X:3(a) of GATT | 436 |
| (vi) Other Claims | 436 |
| (c) Activity Functions | 437 |
| (i) Article III:4 of GATT | 437 |
| (ii) Article I:1 of GATT | 437 |
| (iii) Article X:3(a) of GATT | 438 |
| (iv) Other Claims | 441 |
| (d) BFA Export Certificates | 441 |
| (i) Article I:1 of GATT | 442 |
| (ii) Other Claims | 444 |
| (e) Hurricane Licences | 445 |
| (i) Article III:4 of GATT | 446 |
| (ii) Article I:1 of GATT | 446 |
| (iii) Application of the Lomé Waiver | 446 |
| (iv) Article 1.3 of the Licensing Agreement ... | 446 |
| (v) Other Claims | 446 |
| (f) Other Claims | 446 |
| (i) General | 446 |
| (ii) Article 1.2 of the Licensing Agreement ... | 447 |
| 4. The EC Banana Import Licensing Procedures and the GATS | 448 |
| (a) Introduction | 448 |

Report of the Panel

| | Page |
|--|------|
| (b) General Issues | 449 |
| (i) Measures Affecting Trade in Services | 449 |
| (ii) Wholesale Trade Services | 453 |
| (iii) Modes of Supply | 455 |
| (iv) The Scope of the Article II Obligation | 457 |
| (v) The Scope of the Article XVII Commitment | 460 |
| (vi) Effective Date of GATS Obligations | 461 |
| (vii) Claims by Mexico | 462 |
| (c) Operator Categories | 462 |
| (i) Article XVII of GATS | 462 |
| (ii) Article II of GATS | 473 |
| (d) Activity Functions | 476 |
| (i) Article XVII of GATS | 476 |
| (ii) Article II of GATS | 481 |
| (e) Export Certificates | 481 |
| (i) Article XVII of GATS | 482 |
| (ii) Article II of GATS | 483 |
| (f) Hurricane Licences | 485 |
| (i) Article XVII of GATS | 485 |
| (ii) Article II of GATS | 487 |
| 5. Nullification or Impairment | 488 |
| D. Summary of Findings | 488 |
| 1. Preliminary Issues | 489 |
| 2. The EC Market for Bananas: Article XIII of GATT | 489 |
| 3. Tariff Issues | 490 |
| 4. The EC Banana Import Licensing Procedures | 490 |
| 5. The EC Banana Import Licensing Procedures and the GATS | 492 |
| VIII. FINAL REMARKS | 493 |
| IX. CONCLUSIONS | 494 |
| ATTACHMENT | 495 |