

EC – BANANAS III¹

(DS27)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>Ecuador, Guatemala, Honduras, Mexico, United States</i>	<i>GATT Arts. I, III, X, XIII</i>	Establishment of Panel	<i>8 May 1996</i>
		<i>GATS Arts. II, XVII</i>	Circulation of Panel Report	<i>22 May 1997</i>
Respondent	<i>European Communities</i>	<i>Licensing Ag Art. 1.3</i>	Circulation of AB Report	<i>9 September 1997</i>
		<i>Lomé Waiver</i>	Adoption	<i>25 September 1997</i>

1. MEASURE AND PRODUCT AT ISSUE

- Measures at issue: The European Communities' regime for the importation, distribution and sale of bananas, introduced on 1 July 1993 and established by EEC Council Reg. 404/93.
- Products at issue: Bananas imported from third countries.²

2. SUMMARY OF KEY PANEL/AB FINDINGS

- GATT Art. XIII: The Appellate Body upheld the Panel's finding that the allocation of tariff quota shares to some Members not having a substantial interest in supplying bananas, but not to others, was inconsistent with Art. XIII:1. The Appellate Body also agreed with the Panel that the BFA tariff quota reallocation rules³, under which a portion of a tariff quota share not used by one BFA country could be reallocated exclusively to other BFA countries, were inconsistent with Art. XIII:1 and XIII:2, chapeau.
- Lomé Waiver: The Appellate Body reversed the Panel's finding and found that the Lomé Waiver does not apply to (i.e. exempt) violations of GATT Art. XIII given that the Waiver refers only to Art. I:1 and that waivers must be narrowly interpreted and be subject to "strict disciplines".
- GATT Art. I: The Appellate Body upheld the Panel's finding that the activity function rules, which applied only to licence allocation rules for imports from other than traditional ACP countries, were inconsistent with Art. I:1. The Appellate Body also agreed with the Panel that the EC export certificate requirement accorded an advantage to some Members only, i.e. the BFA countries, in violation of Art. I:1. In an issue not appealed to the Appellate Body, the Panel found that tariff preferences for ACP countries were inconsistent with Art. I:1, but that they were justified by the Lomé Waiver.
- GATT Art. III:4: The Appellate Body agreed with the Panel that the EC procedures and requirements for the distribution of licences for importing bananas from non-traditional ACP suppliers were inconsistent with Art. III:4.
- GATT Art. X:3(a) and Licensing Agreement Art. 1.3: The Appellate Body reversed the Panel's findings of violations of GATT Art. X:3(a) and Licensing Agreement Art. 1.3, on the grounds that these provisions applied only to the administrative procedures for rules, not the rules themselves.
- GATS Arts. II and XVII: The Appellate Body upheld the Panel's finding that the EC measures were *inconsistent* with GATS Art. II and XVII because they were discriminatory, and clarified that the "aim and effect" of a measure is irrelevant under GATS Art. II and XVII.

3. OTHER ISSUES

- Private counsel: The Appellate Body ruled that private lawyers may appear on behalf of a government during an Appellate Body oral hearing. (c.f. the Panel did not allow them.)

¹ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*

² Third countries are those countries other than (i) 12 African, Caribbean and Pacific ("ACP") countries who have traditionally exported bananas to the EC and (ii) ACP countries that were not traditional suppliers of the EC market.

³ The Framework Agreement on Bananas ("BFA").

EC – BANANAS III (ARTICLE 21.5 – ECUADOR)^{1 2}

(DS27)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Ecuador	GATT Arts. I and XIII	Referred to the Original Panel	12 January 1999
			Circulation of Panel Report	12 April 1999
Respondent	European Communities	GATS Arts. II and XVII	Circulation of AB Report	NA
			Adoption	6 May 1999

1. MEASURES TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- EC Regulation No. 1637/98 which was adopted to amend Regulation (EEC) No. 404/93 – i.e. the measure at issue in the original dispute – together with Regulation (EC) No. 2362/98, which laid down implementing rules for the amended Regulation. The Regulation pertained to imports of bananas into the European Communities and access to the EC market for three categories of bananas.

2. SUMMARY OF KEY PANEL FINDINGS³

- GATT Art. XIII:1: The Panel found that the Regulation was inconsistent with Art. XIII:1 as it resulted in disparate treatment between the traditional ACP suppliers and other non-substantial suppliers and third countries by not being "similarly restricted" as required by the GATT.
- GATT Art. XIII:2: The Panel also found a violation of Art. XIII:2 as the EC Banana Regime provided for a large quota to ACP countries of which, collectively, they used only 80 per cent over a two-year period while the MFN quota had always been filled and even some out-of-quota imports had been made. Therefore, the Panel found that the Regime did not aim at a distribution of trade that would represent as closely as possible the market share that countries would have had in the absence of restrictions.
- GATT Art. XIII:2(d): In the case of the tariff quota allocated to Ecuador under the revised EC Regime, the Panel also found a violation of Art. XIII:2(d), as the EC regulations under which the base period was calculated to determine future quota allocations were WTO-inconsistent.
- GATT Art. I:1: The Panel found that a quota level more favourable for ACP countries was a requirement under the Lomé Convention. However, it found a violation of Art. I:1 in the collective allocation of the quota to the ACP countries, calculated on the basis of individual countries' pre-1991 best-ever export volume, since it could have resulted in some countries exporting more than their pre-1991 best-ever export volume, which would not have been justified under the Lomé Waiver. As for the preferential zero-tariff for non-traditional ACP countries' imports, the Panel found no violation since the Lomé Convention allows the European Communities to grant preferential treatment to ACP countries as well as discretion as to the form of that preferential treatment.
- GATS Arts. II and XVII: Having found that the European Communities had committed to accord no less favourable treatment within the meaning of Arts. II and XVII to the range of principle and subordinate "wholesale trade services", the Panel, after examining the design, architecture and revealing structure of the measure at issue, concluded that Ecuador's suppliers of wholesale services were *de facto* granted less favourable treatment than the EC and ACP suppliers, in violation of Arts. II and XVII. The Panel also found that the "newcomer" licences scheme and the "single-pot" licensing rules challenged by Ecuador violated Art. XVII, as both measures also resulted in *de facto* less favourable conditions of competition than to like EC service suppliers.

¹ *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*

² A report was circulated on 12 April 1999 in respect of *EC – Bananas III (Article 21.5 – EC)*, however as it was not put on the agenda of the DSB, it remains unadopted.

³ Other issues addressed: DSU Arts. 7, 21.5 and 19; GATS Arts II and XVII.

EC – BANANAS III (ARTICLE 21.5 – ECUADOR II)
EC – BANANAS (ARTICLE 21.5 – US)¹
(DS27)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	<i>Ecuador United States</i>	<i>GATT Arts I, II² and XIII DSU Arts 19 and 21.5</i>	Referred to the Original Panels	<i>20 March 2007 (Ecuador) 12 July 2007 (US)</i>
			Circulation of Panel Reports	<i>7 April 2008 (Ecuador) 19 May 2008 (US)</i>
Respondent	<i>European Communities</i>		Circulation of AB Reports	<i>26 November 2008</i>
			Adoption	<i>11 December 2008 (Ecuador) 22 December 2008 (US)</i>

1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- The European Communities' (EC) bananas import regime, contained in Council Regulation (EC) No. 1964/2005 of 24 November 2005. The regime consisted of a duty-free quota of 775,000 mt for bananas from ACP countries and a tariff rate of €176/mt for all other imported bananas.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- DSU Art. 19 and GATT Art XIII: In the case initiated by Ecuador, the Appellate Body upheld the Panel's finding that, to the extent that the EC argued that it had implemented a suggestion pursuant to DSU Art. 19.1, the Panel was not prevented from conducting the assessment requested by Ecuador under DSU Art. 21.5. In both cases, the Appellate Body upheld, albeit for different reasons, the Panel's finding that the EC bananas import regime, in particular its duty-free tariff quota reserved for ACP countries, was inconsistent with GATT Arts. XIII:1 and XIII:2.
- GATT Art II: The Appellate Body reversed the Panel's finding that the waiver approved in November 2001 by the Ministerial Conference in Doha constituted a subsequent agreement between the parties extending the tariff quota concession for bananas listed in the EC's Schedule of Concessions beyond 31 December 2002, until the rebinding of the EC's tariff on bananas. The Appellate Body also reversed the Panel's finding that the EC's tariff quota concession for bananas was intended to expire on 31 December 2002 on account of paragraph 9 of the Framework Agreement on Bananas and found that it remained in force until the rebinding process had been completed, and the resulting tariff rate had been consolidated into the EC's Schedule. Finally, the Appellate Body upheld, albeit for different reasons, the Panel's finding that the tariff applied by the EC to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of 75€/mt, was an ordinary customs duty in excess of that provided for in the EC's Schedule of Concessions, and thus was inconsistent with GATT Art. II:1(b).
- GATT Art I: In an issue not appealed to the Appellate Body, both Panels found that the preference granted by the EC of an annual duty-free tariff quota of 775,000 mt of imported bananas originating in ACP countries constituted an advantage, which was not accorded to like bananas originating in non-ACP WTO Members, and was therefore inconsistent with Art. I:1. The Panel also found that the European Communities had failed to demonstrate the existence of a waiver from Art. I:1 for the time after the expiration of the Doha Waiver to cover the preference granted by the European Communities to the duty-free tariff quota of bananas from ACP countries.

3. OTHER ISSUES

- The Appellate Body found that the Panels did not act inconsistently with DSU Art. 9.3 by maintaining different timetables in the two Art. 21.5 proceedings. The Appellate Body upheld, albeit for different reasons, the Panel's finding that Ecuador and the United States were not barred by the Understanding on Bananas, signed in April 2001, from initiating the compliance proceedings. In the case initiated by the United States, the Appellate Body upheld, albeit for different reasons, the Panel's finding that the EC bananas import regime constituted a "measure taken to comply" within the meaning of DSU Art. 21.5 and was therefore properly before the Panel. In that case, the Appellate Body also found that the Panel did not err in making findings with respect to a measure that had ceased to exist subsequent to the establishment of the Panel, but before the Panel issued its report, and that deficiencies in the EC Notice of Appeal did not lead to the dismissal of the appeal.

¹ *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador; and European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*

² Article II was invoked only by Ecuador.