

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

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

Award of the Arbitrator
Said El-Naggar

I. Introduction

1. On 25 September 1997, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report¹ and the Panel Reports², as modified, in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, complaint by Ecuador, Guatemala, Honduras, Mexico and the United States (the "Complaining Parties"). On 16 October 1997, the European Communities informed the DSB, pursuant to Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), that it would fully respect its international obligations with regard to this matter.³ At the same meeting, the European Communities stated that - - while intending to act expeditiously -- it would, in view of the complexity of the matter at issue, require a reasonable period of time in which to examine all the options to meet its international obligations.⁴

2. On 24 October 1997, the European Communities requested consultations with the Complaining Parties in order to reach agreement on a "reasonable period of time" for the implementation of the recommendations and rulings of the DSB adopted on 25 September 1997. These consultations, however, did not lead to an agreement. The Complaining Parties therefore requested, on 17 November 1997, that the "reasonable period of time" be determined by binding arbitration pursuant to Article 21.3(c) of the DSU.⁵

3. In the absence of an agreement between the parties on the appointment of an arbitrator within 10 days after referring the matter to arbitration, the Complaining Parties requested, on 1 December 1997, the Director-General of the World Trade Organization ("WTO") to appoint the arbitrator, as provided for in footnote 12 to Article 21.3(c) of the DSU. After consultation with the parties, the Director-General decided, on 8 December 1997, to appoint me as the Arbitrator.⁶ He indicated to the parties that, as a Member of the Appellate Body, I would consult with the other Members of the Appellate Body in accordance with its practice of collegiality.

¹WT/DS27/AB/R.

²Complaint 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.

³WT/DSB/M/38, p. 3.

⁴Ibid.

⁵WT/DS27/13, G/L/209, 20 November 1997.

⁶WT/DS27/14, 12 December 1997.

4. Written submissions were received from the European Communities and the Complaining Parties on 15 December 1997, and an oral hearing was held on 17 December 1997. Consultations with the other Members of the Appellate Body took place on 19 December 1997.

II. Arguments of the Parties

A. European Communities

5. In its written submission of 15 December 1997, the European Communities requests the Arbitrator to set a "reasonable period of time", under Article 21.3(c) of the DSU, which would not expire before 1 January 1999, i.e. a period of 15 months and one week. In justification of this request, the European Communities notes that amending the existing EC import regime for bananas, as required by the recommendations and rulings of the DSB, will be a difficult and complex task for a number of reasons.

6. First, the European Communities points out that in amending its import regime for bananas, it will have to strike a difficult balance between the co-existing international obligations under the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") and the Fourth ACP-EC Convention of Lomé (the "Lomé Convention")⁷ with the aim of respecting both. Furthermore, the European Communities notes that amending its import regime for bananas will re-open the lengthy discussion between the Member States of the European Union on many of the issues that had been agreed in 1993 when the different national banana markets were transformed into a single Community-wide market.

⁷Signed in Lomé, 15 December 1989, as revised by the Agreement signed in Mauritius, 4 November 1995.

7. Secondly, the European Communities explains that the amendment of its banana import regime will require setting in motion a complex legislative procedure involving: the European Commission, which has to submit a proposal for the necessary changes; the European Parliament, which will need to give its opinion on the proposed changes; and the Council of the European Union, which will decide on the changes, either by qualified majority or by unanimity, depending on whether or not it follows the proposal of the Commission. The European Communities also notes that once the amended basic legislation is adopted by the Council, the European Commission will still need to adopt implementing legislation to make the new import regime operational.

8. Thirdly, the European Communities refers to the fact that Article 12 of the Lomé Convention imposes a legal obligation on the European Communities to consult the ACP States⁸ "where [it] intends ... to take a measure which might affect the interests of the ACP States as far as this Convention's objectives are concerned". This obligation to consult certainly applies, in the view of the European Communities, to an amendment of the banana import regime. The European Communities maintains that its legislative procedure will therefore have to allow enough time to consider the observations made by the ACP States before any final decision on the new banana import regime is taken.

9. Fourthly, the European Communities notes that under its administrative practice, any change in legislation which directly affects the customs treatment of products in connection with importation or exportation, enters into force either on 1 January or 1 July of the relevant year. This practice reflects, according to the European Communities, internal management needs and the economic interests of the operators on the market to operate under orderly and predictable procedures.

10. Finally, the European Communities argues that an advance notice with a reasonable lead time of any major changes in legislation should be given to permit those involved in the banana supply chain to make the necessary adjustments to their planning and logistics.

11. The European Communities notes that, for all the above reasons, the "reasonable period of time" it proposes is already a tight schedule that will require a great deal of discipline and cooperation together with a constructive approach at all levels.

⁸The term "ACP States" refers to the African, Caribbean and Pacific States which are parties to the Lomé Convention.

12. At the oral hearing on 17 December 1997, the European Communities made it clear that the "reasonable period of time" it requests, i.e. until 1 January 1999, is for the purpose of implementing all the recommendations and rulings of the DSB adopted on 25 September 1997 in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*.

B. Complaining Parties

13. The Complaining Parties note that their request to determine the "reasonable period of time" through binding arbitration followed extensive attempts to reach an agreement with the European Communities on this matter, and that these attempts failed because the European Communities was unwilling to confirm that it intends to use the "reasonable period" in order to fully implement the recommendations and rulings of the DSB. The Complaining Parties argue that a "reasonable period of time", within the meaning of Article 21.3(c), is a limited right that arises only for the purpose of implementation. In their opinion, a defending Member which refuses to state its intention to implement the relevant DSB recommendations and rulings should not be entitled to a "reasonable period of time". The Complaining Parties believe that of all the "particular circumstances" which an arbitrator should consider when deciding on a "reasonable period of time", the most important must be whether a Member has stated its intention to comply with the recommendations and rulings of the DSB. Accordingly, the Complaining Parties argue that the Arbitrator should conclude that the European Communities is not entitled to the "reasonable period of time", provided for in Article 21.3(c), since it has not clearly indicated its intention to fully implement the recommendations and rulings of the DSB.

14. In their written submission of 15 December 1997, the Complaining Parties argue, in the alternative, that even if in the course of the arbitration proceedings the European Communities would state its intention to implement the recommendations and rulings of the DSB, the "reasonable period of time" of 15 months and one week, requested by the European Communities, is excessive. They submit that the European Communities overstates the period of time needed to implement the recommendations and rulings of the DSB. The Complaining Parties note that most banana measures found to be WTO-inconsistent were implemented through Commission regulations, which can be amended through simple and rapid procedures, separate from the amendment of Regulation 404/93 on the common organization of the market in bananas, which requires action by the Council. Furthermore, the Complaining Parties note that it took the European Communities less than six months to adopt Council Regulation 404/93 after the European Commission had submitted its proposal to the Council. According to them, the current task of amending Regulation 404/93 to make it WTO-consistent is far less challenging than it was to adopt that Regulation in 1993 in the first place. Finally, the Complaining Parties submit that the European Commission often prepares implementing legislation while its proposal for basic legislation is still pending before the Council.

Thus, the adoption of implementing legislation by the Commission, they argue, can be carried out shortly after the adoption of the basic legislation by the Council.

15. The Complaining Parties submit that the assertion by the European Communities that the "controversial" nature of the issue requires a more prolonged procedure should be disregarded. In their opinion, an arbitrator's enquiry must avoid the issue of what implementation period would be acceptable to domestic political constituencies, and examine instead the "practicable" time needed to accomplish the legislative and regulatory changes involved. Under the circumstances of this case, the Complaining Parties argue that full implementation of the recommendations and rulings of the DSB is "practicable" by 1 July 1998, i.e. within nine months.

16. Ecuador, Guatemala, Honduras and Mexico also argue that Articles 21.2, 21.7 and 21.8 of the DSU require that special attention be paid to matters affecting the interests of complaining developing country Members with respect to measures that have been subject to dispute settlement. In their reply to my question, whether the interests of other developing countries, and in particular the banana producing ACP States, were not also affected, Ecuador, Guatemala, Honduras and Mexico maintained that their interests carry greater weight since they are requesting the implementation of a WTO-consistent import regime. Finally, the developing country Complaining Parties point out that the country allocations and export certificates provided for in the Framework Agreement on Bananas⁹ were implemented by Commission, not Council, regulation and could, therefore, be amended easily.

17. In its closing remarks at the oral hearing, the United States, speaking on behalf of the Complaining Parties, noted the statement made by the European Communities during the oral hearing that it intends to implement all the recommendations and rulings of the DSB within the "reasonable period of time" it has requested, i.e. by 1 January 1999.

III. Award

⁹Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, Schedule LXXX - European Communities, pp. 16373-16377.

18. Article 21.1 of the DSU stipulates that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members". This obligation is further elaborated in Article 21.3 of the DSU, where it is provided that "[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so". When the "reasonable period of time" is determined through binding arbitration, as provided for under Article 21.3(c) of the DSU, this provision states that a "guideline" for the arbitrator should be that the "reasonable period of time" should not exceed 15 months from the date of the adoption of a panel or Appellate Body report. Article 21.3(c) of the DSU also provides, however, that the "reasonable period of time" may be shorter or longer than 15 months, depending upon the "particular circumstances".

19. The Complaining Parties have not persuaded me that there are "particular circumstances" in this case to justify a shorter period of time than stipulated by the guideline in Article 21.3(c) of the DSU. At the same time, the complexity of the implementation process, demonstrated by the European Communities, would suggest adherence to the guideline, with a slight modification, so that the "reasonable period" of time for implementation would expire by 1 January 1999.

20. Therefore, I conclude that, pursuant to Article 21.3(c), the "reasonable period of time" for the European Communities to implement the recommendations and rulings of the DSB adopted on 25 September 1997 in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, shall be the period from 25 September 1997 to 1 January 1999.

Signed in the original, at Geneva, this 23rd day of December 1997 by:

Said El-Naggar

