

1 ARTICLE 1.....	1
1.1 Text of Article 1.....	1
1.2 Article 1.1: scope of the Licensing Agreement.....	2
1.2.1 Import licensing rules versus administration of import licensing regimes.....	2
1.2.2 Application of the Licensing Agreement to particular types of measures.....	3
1.2.2.1 Tariff-rate quota procedures.....	3
1.2.2.2 Advance Sworn Import Declaration Procedure.....	5
1.3 Article 1.2.....	5
1.4 Article 1.3.....	7
1.5 Article 1.4(a).....	7

1 ARTICLE 1

1.1 Text of Article 1

Article 1

General Provisions

1. For the purpose of this Agreement, import licensing is defined as administrative procedures¹ used for the operation of import licensing regimes requiring the submission of an application or other documentation (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member.

*(footnote original)*¹ Those procedures referred to as "licensing" as well as other similar administrative procedures.

2. Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures, taking into account the economic development purposes and financial and trade needs of developing country Members.²

*(footnote original)*² Nothing in this Agreement shall be taken as implying that the basis, scope or duration of a measure being implemented by a licensing procedure is subject to question under this Agreement.

3. The rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner.

4. (a) The rules and all information concerning procedures for the submission of applications, including the eligibility of persons, firms and institutions to make such applications, the administrative body(ies) to be approached, and the lists of products subject to the licensing requirement shall be published, in the sources notified to the Committee on Import Licensing provided for in Article 4 (referred to in this Agreement as "the Committee"), in such a manner as to enable governments³ and traders to become acquainted with them. Such publication shall take place, whenever practicable, 21 days prior to the effective date of the requirement but in all events not later than such effective date. Any exception, derogations or changes in or from the rules concerning licensing procedures or the list of products subject to import licensing shall also be published in the same manner and within the same time periods as specified above. Copies of these publications shall also be made available to the Secretariat.

(*footnote original*)³ For the purpose of this Agreement, the term "governments" is deemed to include the competent authorities of the European Communities.

(b) Members which wish to make comments in writing shall be provided the opportunity to discuss these comments upon request. The concerned Member shall give due consideration to these comments and results of discussion.

5. Application forms and, where applicable, renewal forms shall be as simple as possible. Such documents and information as are considered strictly necessary for the proper functioning of the licensing regime may be required on application.

6. Application procedures and, where applicable, renewal procedures shall be as simple as possible. Applicants shall be allowed a reasonable period for the submission of licence applications. Where there is a closing date, this period should be at least 21 days with provision for extension in circumstances where insufficient applications have been received within this period. Applicants shall have to approach only one administrative body in connection with an application. Where it is strictly indispensable to approach more than one administrative body, applicants shall not need to approach more than three administrative bodies.

7. No application shall be refused for minor documentation errors which do not alter basic data contained therein. No penalty greater than necessary to serve merely as a warning shall be imposed in respect of any omission or mistake in documentation or procedures which is obviously made without fraudulent intent or gross negligence.

8. Licensed imports shall not be refused for minor variations in value, quantity or weight from the amount designated on the licence due to differences occurring during shipment, differences incidental to bulk loading and other minor differences consistent with normal commercial practice.

9. The foreign exchange necessary to pay for licensed imports shall be made available to licence holders on the same basis as to importers of goods not requiring import licences.

10. With regard to security exceptions, the provisions of Article XXI of GATT 1994 apply.

11. The provisions of this Agreement shall not require any Member to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

1.2 Article 1.1: scope of the Licensing Agreement

1.2.1 Import licensing rules versus administration of import licensing regimes

1. In *EC – Bananas III*, the Appellate Body reversed the Panel's finding that Article 1.3 of the Licensing Agreement "preclude[s] the imposition of one system of import licensing procedures in respect of a product originating in certain Members and a different system of import licensing procedures on the same product originating in other Members."¹ In doing so, the Appellate Body drew a distinction between licensing rules *per se*, on the one hand, and their application and administration, on the other:

"By its very terms, Article 1.3 of the Licensing Agreement clearly applies to the *application* and *administration* of import licensing procedures, and requires that this application and administration be 'neutral ... fair and equitable'. Article 1.3 of the Licensing Agreement does not require the import licensing *rules*, as such, to be neutral, fair and equitable. Furthermore, the context of Article 1.3 – including the preamble, Article 1.1 and, in particular, Article 1.2 of the Licensing Agreement – supports the conclusion that Article 1.3 does not apply to import licensing *rules*. Article 1.2 provides, in relevant part, as follows:

¹ Panel Report, *EC – Bananas III*, para. 7.261.

'Members shall ensure that the administrative procedures used to implement import licensing régimes are in conformity with the relevant provisions of GATT 1994 ... as interpreted by this Agreement, ...'

As a matter of fact, none of the provisions of the Licensing Agreement concerns import licensing *rules, per se*. As is made clear by the title of the Licensing Agreement, it concerns import licensing *procedures*. The preamble of the Licensing Agreement indicates clearly that this agreement relates to import licensing procedures and their administration, not to import licensing rules. Article 1.1 of the Licensing Agreement defines its scope as the *administrative procedures* used for the operation of import licensing régimes.

We conclude, therefore, that the Panel erred in finding that Article 1.3 of the Licensing Agreement precludes the imposition of different import licensing systems on like products when imported from different Members."²

2. In *Korea – Various Measures on Beef*, the Panel followed the distinction between licensing rules *per se* and their administration, set out in the finding of the Appellate Body referenced in paragraph 1 above. The Panel examined the United States' claim that Korea's regulatory regime was inconsistent with Article 3.2 of the Licensing Agreement by granting exclusive authority to the LPMO and the SBS system to import beef, holding:

"[T]he Panel notes that many of the US claims regarding alleged violations of the Licensing Agreement are concerned with the substantive provisions of Korea's import (and distribution) regime (by the LPMO or SBS super-groups). It has been said repeatedly that such substantive matters are of no relevance to the Licensing Agreement which is concerned with the administrative rules of import licensing systems."³

For these reasons, the Panel does not reach any general conclusion on the compatibility of Korea's import licensing system with the WTO Agreement."⁴

3. In *Indonesia – Chicken*, the panel found that certain of the challenged measures fell outside of the scope of the Licensing Agreement, stating:

"In our view, the positive list requirement and the intended use requirement are in the nature of an import licensing rule. The positive list refers to the products that can be imported. To that extent, it does not impose a requirement to submit a particular document or constitute a requirement for importation. Instead, it is a requirement that simply prohibits trade in respect of specific products not included therein. The intended use requirement is a substantive requirement that importers commit to respect when applying both for an MoA Import Recommendation and for an MoT Import Approval. Clearly such representation by the importers is made through the submission of a particular document, which in this case is the online application. Contrary to what Brazil argues, however, we do not consider that this makes the intended use requirement an administrative procedure used for the operation of an import licensing regime. We thus conclude that the positive list requirement and the intended use requirement do not fall under the purview of the Import Licensing Agreement."⁵

1.2.2 Application of the Licensing Agreement to particular types of measures

1.2.2.1 Tariff-rate quota procedures

4. In *EC – Bananas III*, the Appellate Body interpreted the definition of "import licensing procedures" set out in Article 1.1 and determined that procedures for tariff quotas that involve an

² Appellate Body Report, *EC – Bananas III*, paras. 197-198.

³ (*footnote original*) Appellate Body Report on *EC – Bananas III*, para. 197.

⁴ Panel Report, *Korea – Various Measures on Beef*, paras. 784-785.

⁵ Panel Report, *Indonesia – Chicken*, para. 7.360.

application for a license, such as the EC tariff quota procedures at issue, fell under the provisions of the Licensing Agreement:

"Although the precise terms of Article 1.1 do not say explicitly that licensing procedures for tariff quotas are within the scope of the Licensing Agreement, a careful reading of that provision leads inescapably to that conclusion. The EC import licensing procedures require 'the submission of an application' for import licences as 'a prior condition for importation' of a product at the lower, in-quota tariff rate. The fact that the importation of that product is possible at a high out-of-quota tariff rate without a licence does not alter the fact that a licence is required for importation at the lower in-quota tariff rate.

We note that Article 3.2 of the Licensing Agreement provides that:

'Non-automatic licensing shall not have trade-restrictive or -distortive effects on imports additional to those caused by the imposition of *the restriction*.' (emphasis added)

We note also that Article 3.3 of the Licensing Agreement reads:

'In the case of licensing requirements for purposes *other than the implementation of quantitative restrictions*, Members shall publish sufficient information for other Members and traders to know the basis for granting and/or allocating licences.' (emphasis added)

We see no reason to exclude import licensing procedures for the administration of tariff quotas from the scope of the Licensing Agreement on the basis of the use of the term 'restriction' in Article 3.2. We agree with the Panel that, in the light of the language of Article 3.3 of the Licensing Agreement and the introductory words of Article XI of the GATT 1994, the term 'restriction' as used in Article 3.2 should not be interpreted to encompass only quantitative restrictions, but should be read also to include tariff quotas.

For these reasons, we agree with the Panel that import licensing procedures for tariff quotas are within the scope of the Licensing Agreement."⁶

5. The dispute in *EC – Poultry* concerned two EC regulations: one that opened a tariff quota for frozen poultry meat and a second (Regulation 1434/94) that provided rules governing administration of the tariff quota, and applied only to in-quota trade in frozen poultry meat. The Panel had found that "the Licensing Agreement, as applied to this particular case, only relates to in-quota trade."⁷ Brazil argued that nothing in the text or context of Articles 1.2 and 3.2 of the Licensing Agreement limits to in-quota trade the requirement in Article 1.2 that licensing systems be implemented "with a view to preventing trade distortions" or the prohibition in Article 3.2 of additional trade-restrictive or trade-distortive effects. The Appellate Body stated as follows:

"The preamble to the Licensing Agreement stresses that the Agreement aims at ensuring that import licensing procedures 'are not utilized in a manner contrary to the principles and obligations of GATT 1994' and are 'implemented in a transparent and predictable manner'. Moreover, Articles 1.2 and 3.2 make it clear that the Licensing Agreement is also concerned, with, among other things, preventing trade distortions that may be caused by licensing procedures. It follows that wherever an import licensing regime is applied, these requirements must be observed. The requirement to prevent trade distortion found in Articles 1.2 and 3.2 of the Licensing Agreement refers to *any* trade distortion that may be caused by the introduction or operation of licensing procedures, and is not necessarily limited to that part of trade to which the licensing procedures themselves apply. There may be situations where the operation of licensing procedures, in fact, have restrictive or distortive effects on that part of trade that is not strictly subject to those procedures.

⁶ Appellate Body Report, *EC – Bananas III*, paras. 193-195.

⁷ Panel Report, *EC – Poultry*, para. 249.

In the case before us, the licensing procedure established in Article 1 of Regulation 1431/94 applies, by its terms, only to in-quota trade in frozen poultry meat. No licensing is required by Regulation 1431/94 for out-of-quota trade in frozen poultry meat. To the extent that the Panel intended merely to reflect the fairly obvious fact that this licensing procedure applies only to in-quota trade, we uphold the finding of the Panel that '[t]he Licensing Agreement, as applied to this particular case, only relates to in-quota trade'.⁸

1.2.2.2 Advance Sworn Import Declaration Procedure

6. In *Argentina – Import Measures*, one of the measures at issue was an Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*) (DJAI). No finding was made on whether the DJAI procedure fell within the scope of Article 1, but the Appellate Body stated that the measure had features "that arguably resemble import licensing procedures within the meaning of Article 1.1":

"We recall that the Panel made no findings as to whether the DJAI procedure qualifies as an 'import licensing procedure' within the meaning of the Import Licensing Agreement. In fact, the Panel concluded that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 'irrespective of whether it constitutes an import licence'. Given this finding of inconsistency, the Panel subsequently refrained from making any findings with respect to the complainants' claims under the provisions of the Import Licensing Agreement, including those under Articles 3.2 and 3.5(f) thereof.

As explained above, none of the parties sought to separate and distinguish the different elements that compose the DJAI procedure, including any of those possibly relating to import licensing procedures. Even though aspects of the DJAI procedure may resemble an import licensing procedure, it was not these characteristics of the DJAI procedure that were the target of the complainants' claims under Article XI:1 of the GATT 1994. Rather, the main focus of their claims was the discretionary elements involved in the entering and lifting of observations. Moreover, as further explained below, the Panel's finding that the attainment of a DJAI in 'exit' status is not 'automatic' did not address the features of the DJAI procedure that arguably resemble import licensing procedures within the meaning of Article 1.1 of the Import Licensing Agreement."⁹

1.3 Article 1.2

7. The Panel in *EC – Bananas III* addressed the issue of whether Article 1.2 in itself creates obligations additional to those arising from the GATT 1994. The Panel considered the provisions of the Agreement, the 1979 Agreement and the GATT 1947, and concluded that "Article 1.2 of the WTO Licensing Agreement has become largely duplicative of the obligations already provided for in GATT, except for the reference to developing country Members. Given the context, Article 1.2 of the WTO Licensing Agreement has lost most of its legal significance."¹⁰ Relying on the principle of effective treaty interpretation,¹¹ the Panel found:

"[T]o the extent that we find that specific aspects of the EC licensing procedures are not in conformity with Articles I, III or X of GATT, we necessarily also find an inconsistency with the requirements of Article 1.2 of the Licensing Agreement."¹²

8. Although this particular finding was not appealed, the Appellate Body, in reviewing the Panel's findings on Article 1.3 of the Import Licensing Agreement, clarified that "none of the provisions of the Licensing Agreement concerns import licensing *rules, per se*. As is made clear by

⁸ Appellate Body Report, *EC – Poultry*, paras. 121-122.

⁹ Appellate Body Reports, *Argentina – Import Measures*, paras. 5.278-5.279.

¹⁰ Panel Report, *EC – Bananas III*, paras. 7.268-7.269.

¹¹ (*footnote original*) Appellate Body Report on *US – Gasoline*, p. 23.

¹² Panel Report, *EC – Bananas III*, paras. 7.270-7.271.

the title of the Licensing Agreement, it concerns import licensing *procedures*.¹³ See paragraph 1 above.

9. The Panel in *EC – Bananas III* also addressed the legal significance of the reference in Article 1.2 to developing country Members:

"With respect to Article 1.2's requirement that account should be taken of 'economic development purposes and financial and trade needs of developing country Members', the Licensing Agreement does not give guidance as to how that obligation should be applied in specific cases. We believe that this provision could be interpreted as a recognition of the difficulties that might arise for developing country Members, in imposing licensing procedures, to comply fully with the provisions of GATT and the Licensing Agreement. In the alternative, Article 1.2 could also be read to authorize, but not to require, developed country Members to apply preferential licensing procedures to imports from developing country Members. In any event, even if we accept the latter interpretation, we have not been presented with evidence suggesting that, in its licensing procedures, there were factors that the EC should have but did not take into account under Article 1.2.

Therefore, we do not make a finding on whether the EC failed to take into account the needs of developing countries in a manner inconsistent with the requirements of Article 1.2 of the Licensing Agreement."¹⁴

10. In *EC – Poultry*, Brazil argued that the European Communities had violated the prohibition of trade distortion contained in Articles 1.2 and 3.2 of the Licensing Agreement. The Panel rejected Brazil's claim. On appeal, Brazil argued that the Panel had failed to address or examine properly certain evidence, including evidence concerning Brazil's falling share of the poultry market in the European Communities, and had not examined whether this falling market share was caused by the introduction of the European Communities licensing procedures for the tariff-rate quota for frozen poultry meat. The Appellate Body upheld the Panel. It noted that the EC Regulation at issue gave Brazil a 45 per cent share of the total tariff-rate quota (the same as Brazil's share of exports of the product to the EC during the preceding three years); because the licences were fully utilized, Brazil's share of the tariff-rate quota remained at 45 per cent and Brazil's volume of exports of the product to the EC had risen since imposition of the tariff rate quota.¹⁵ The Appellate Body found that Brazil had failed to establish a causal link between the decline in market share and other indicators, on the one hand, and the licensing requirements at issue, on the other:

"Brazil has not, in our view, clearly explained, either before the Panel or before us, how the licensing procedure *caused* the decline in market share. Brazil has not offered any persuasive evidence that its falling market share could, in this particular case – with a constant percentage share of the tariff-rate quota, full utilization of the tariff-rate quota and a growing total volume of exports – be viewed as constituting trade distortion attributable to the licensing procedure. In other words, Brazil has not proven a violation of the prohibition of trade distortion in Articles 1.2 and 3.2 of the Licensing Agreement by the European Communities.

Brazil argues that the Panel did not consider a number of other arguments in its examination of the existence of trade distortion: that licences have been apportioned in non-economic quantities; that there have been frequent changes to the licensing rules; that licence entitlement has been based on export performance; and that there has been speculation in licences. These arguments, however, do not address the problem of establishing a causal relationship between imposition of the EC licensing procedure and the claimed trade distortion. Even if conceded *arguendo*, these arguments do not provide proof of the essential element of causation.

¹³ Appellate Body Report, *EC – Bananas III*, para. 197.

¹⁴ Panel Report, *EC – Bananas III*, paras. 7.272-7.273.

¹⁵ Appellate Body Report, *EC – Poultry*, para. 125.

For these reasons, we uphold the finding of the Panel that Brazil has not established that the European Communities has acted inconsistently with either Article 1.2 or Article 3.2 of the Licensing Agreement."¹⁶

1.4 Article 1.3

11. In *EC – Poultry*, the Panel examined Brazil's claim that the EC's allocation of import licences on the basis of export performance was inconsistent with Articles 1.3 and 3.5(j) of the Licensing Agreement. The Panel noted:

"The requirement of export performance for the issuance of import licences on its face does seem unusual. However, Brazil has not elaborated on how the export performance requirement was administered and how it has affected the in-quota exports of poultry products from Brazil."¹⁷

12. Recalling the Appellate Body's finding in *Bananas III* (referred to in paragraph 1 above), that Article 1.3 applies to the administration of import licensing procedures, not to import licensing rules as such, the Panel further found: "In our view, the issue of licence entitlement based on export performance is clearly that of rules, not that of application or administration of import licensing procedures. Thus, Article 1.3 is not applicable on this specific issue."¹⁸

1.5 Article 1.4(a)

13. In *EC – Poultry*, the Panel examined a claim that the European Communities had failed to notify the Committee on Import Licensing of the sources where the information on its poultry tariff quota was published, as required by Article 1.4(a). The European Communities responded that it had not made such a notification because prior to the Appellate Body report in the *EC – Bananas III* case, it was not clear whether the Licensing Agreement applied to tariff rate quotas ("TRQs"). The Panel rejected the EC's defence:

"While we note the EC's explanation for non-notification, we find this omission to be inconsistent with Article 1.4(a) of the Licensing Agreement. The fact that all the relevant information is published and that the administration of all agricultural TRQs in the EC has been notified to the WTO Committee on Agriculture does not in our view excuse the EC from notifying the sources of publication pursuant to this subparagraph."¹⁹

14. The Panel in *EC – Poultry* also rejected Brazil's claim that frequent changes to the licensing rules and procedures regarding the poultry TRQ had made it difficult for governments and traders to become familiar with the rules, contrary to the provisions of Articles 1.4, 3.3, 3.5(b), 3.5(c) and 3.5(d):

"We note that the transparency requirement under the cited provisions is limited to publication of rules and other relevant information. While we have sympathy for Brazil regarding the difficulties caused by frequent changes to the rules, we find that changes in rules *per se* do not constitute a violation of Article 1.4, 3.3, 3.5(b), 3.5(c) or 3.5(d)."²⁰

Current as of: December 2020

¹⁶ Appellate Body Report, *EC – Poultry*, paras. 126-128.

¹⁷ Panel Report, *EC – Poultry*, para. 253.

¹⁸ Panel Report, *EC – Poultry*, para. 254.

¹⁹ Panel Report, *EC – Poultry*, para. 244.

²⁰ Panel Report, *EC – Poultry*, para. 246.