

XIII. Findings and Conclusions in the Appellate Body Report WT/DS27/AB/RW2/ECU (Ecuador)

478. In the appeal of the Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/RW2/ECU), for the reasons set out in this Report, the Appellate Body:

- (a) with respect to procedural issues:
 - (i) finds that the Panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States; and
 - (ii) upholds the Panel's finding, albeit for different reasons, in paragraph 7.136 of the Ecuador Panel Report, that Ecuador was not barred by the Understanding on Bananas from initiating this compliance proceeding;

- (b) with respect to Article XIII of the GATT 1994:
 - (i) upholds the Panel's findings, in paragraphs 7.263 and 7.265 of the Ecuador Panel Report, that, to the extent that the European Communities argues that it has implemented a suggestion pursuant to Article 19.1 of the DSU, the Panel was not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador; and that, therefore, the Panel did not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador; and
 - (ii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.382 of the Ecuador Panel Report, that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994;

- (c) with respect to Article II of the GATT 1994:
- (i) reverses the Panel's finding, in paragraphs 7.456 and 7.492 of the Ecuador Panel Report, that the Doha Article I Waiver constituted a subsequent agreement between the parties extending the tariff quota concession for bananas listed in the European Communities' Schedule of Concessions beyond 31 December 2002, until the rebinding of the European Communities' tariff on bananas;
 - (ii) reverses the Panel's finding, in paragraph 7.436 of the Ecuador Panel Report, that the European Communities' tariff quota concession for bananas was intended to expire on 31 December 2002 on account of paragraph 9 of the Bananas Framework Agreement; and
 - (iii) upholds, albeit for different reasons, the Panel's findings, in paragraph 7.504 of the Ecuador Panel Report, that the tariff applied by the European Communities 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, is an ordinary customs duty in excess of that provided for in the European Communities' Schedule of Concessions, and thus inconsistent with Article II:1(b) of the GATT 1994; and
- (d) upholds the Panel's finding, in paragraph 8.4 of the Ecuador Panel Report, that the European Communities, by maintaining measures inconsistent with different provisions of the GATT 1994, including Article XIII, has nullified or impaired benefits accruing to Ecuador under that Agreement.

479. The Appellate Body recommends that the DSB request the European Communities to bring its measure, found in this Report and in the Ecuador Panel Report, as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 14th day of November 2008 by:

Luiz Olavo Baptista
Presiding Member

Shotaro Oshima
Member

David Unterhalter
Member

XIII. Findings and Conclusions in the Appellate Body Report WT/DS27/AB/RW/USA (United States)

478. In the appeal of the Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States* (WT/DS27/RW/USA), for the reasons set out in this Report, the Appellate Body:

- (a) with respect to procedural issues:
 - (i) finds that the Panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States;
 - (ii) upholds the Panel's finding, albeit for different reasons, in paragraph 7.165 of the US Panel Report, that the United States was not barred by the Understanding on Bananas from initiating this compliance proceeding;
 - (iii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.531 of the US Panel Report, that the EC Bananas Import Regime constituted a "measure taken to comply" within the meaning of Article 21.5 of the DSU and was therefore properly before the Panel;
 - (iv) finds 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
 - (v) finds that the deficiencies in the European Communities' Notice of Appeal do not lead to dismissal of the European Communities' appeal;
- (b) with respect to Article XIII of the GATT 1994:
 - upholds, albeit for different reasons, the Panel's finding, in paragraph 7.720 of the US Panel Report, that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994; and

- (c) upholds the Panel's finding, in paragraph 8.12 of the US Panel Report, that to the extent that the EC Bananas Import Regime contained measures inconsistent with various provisions of the GATT 1994, it nullified or impaired benefits accruing to the United States under that Agreement.

479. As the measure at issue in this dispute is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 14th day of November 2008 by:

Luiz Olavo Baptista
Presiding Member

Shotaro Oshima
Member

David Unterhalter
Member