

WTO Waiver for the Cotonou Agreement — Status Report

*by Peter Williams**

1. Under Lomé IV, the European Union accorded unilateral tariff preferences to imports from the ACP countries. As these preferences contravened the most-favoured-nation clause of GATT Article I, paragraph 1 and were not covered by the relevant exceptions to that provision in Article XXIV relating to customs unions and free trade areas, or the Enabling Clause relating to the Generalised System of Preferences, the EU obtained a waiver from Article I for the duration of the Lomé Agreement, i.e. until 29 February 2000.

2. The economic and trade provisions of the Cotonou Agreement are significantly different from those in Lomé IV as they aim at fostering the smooth and gradual integration of the ACP States into the world economy. However, the Cotonou Agreement provides for a preparatory period up to 31 December 2007 during which Lomé type preferences are continued while new WTO compatible arrangements are concluded. These are to remove progressively barriers to trade between the European Communities and the ACP countries and enhance co-operation in all areas relevant to trade.

3. A request for a further waiver of the provisions of Article I, paragraph 1 of the GATT 1994 until 31 December 2007 was presented to the WTO Council on Trade in Goods by the European Commission on behalf of the European Communities and by Tanzania and Jamaica on behalf of the ACP countries. The request, which was dated 29 February 2000 (the day that the Lomé IV waiver expired) and first considered by the CTG on 5 April 2000, is still under consideration in that body a year and a half later.

4. When the waiver request was first discussed in the CTG, Central and Latin American banana producing countries Ecuador, Honduras, Panama, Costa Rica and Guatemala

* The author is currently Special Adviser to the Pacific Islands Forum Secretariat in Geneva. The views expressed are not necessarily those of the Pacific Islands Government or the Commonwealth Secretariat.

made it clear that they would block the process until the banana dispute settlement case with the European Communities was settled to their satisfaction. In order to do so, these delegations argued that the documentation before the CTG was not complete because it did not contain the necessary information with respect to the EC preferences to be accorded to banana imports and that the request did not set out the reasons that prevented the EC from achieving its policy objectives by measures consistent with its obligations under GATT 1994 as required by paragraph 1 of the Uruguay Round Understanding in Respect of Waivers of Obligations under the GATT 1994. They therefore argued that the 90-day period for action on the waiver laid down in Article IX of the WTO Agreement had not yet begun.

5. These delegations have received support from other delegations which advance systemic concerns but which also have a trade interest in particular products. The most vocal of these was Paraguay, which is interested in beef. Among the other countries in this group is the Philippines, which has an interest in tuna. Among the other countries raising questions are Pakistan and India, which have referred to the possibility of trade distortion.

6. On 1 July 2001 a new EU Council Regulation (216/2001) came into force which lays down the outline rules for the new banana régime. It also provides for three tariff quotas, all open to imports from any origin. ACP countries have a tariff preference both within and out of quota. The quotas are a transitional measure leading to a flat tariff system in 2006. In connection with this, the EU will renegotiate its tariff binding on bananas.

7. The EU according to which the EU will allocate licences on the basis of historical references and the US will suspend its sanctions imposed on a number of EU exports. The tariff quotas will also be modified as part of this agreement and the third tariff quota will be exclusively reserved for bananas of ACP origin. This will require a waiver from Article XIII of GATT 1994 relating to the non-discriminatory administration of quantitative restrictions, as its paragraph 5 specifies that the provisions of the Article also apply to tariff quotas. The US has agreed to help to obtain this waiver and to remove its sanctions definitively when the waiver has been obtained.

8. Ecuador also had difficulties with the Council Regulation but also came to an understanding with the EU, which, *inter alia*, recognises Ecuador as the principal supplier in the renegotiation of its tariff binding.

9. The EU then informed WTO that it had reached a mutually agreed solution to its banana dispute with the United States and Ecuador. It also tabled a separate request for a waiver from the provisions of GATT Article XIII for its modified banana régime, requesting that it should be considered simultaneously with its original request for a waiver from GATT Article I. Some delegations have argued informally that this will complicate matters as there is no precedent for granting a waiver from Article XIII of GATT 1994. While this may be true, on the face of it nothing in Article IX of GATT 1994 makes it more difficult to grant a waiver from Article XIII than from Article I. If anything, it can be argued that the reverse is the case, as Article I is one of the basic provisions of GATT 1994, as demonstrated by the fact that it can only be amended by unanimity while Article XIII can be amended by a qualified majority vote.

10. In a separate development, at the end of June 2001 Ecuador tabled a proposed amendment to the EU's draft text of the waiver decision. This would grant a waiver from the provisions of both GATT Articles I and XIII, subject to somewhat more restrictive conditions than proposed by the EU.

11. The Cotonou waiver request was on the agenda of the CTG in July 2001. During the discussions, it became clear that while the EU had reached agreement with the United States and Ecuador, and while Paraguay has toned down its criticism, the Central American banana producers were still blocking acceptance of the waiver request. While the EU takes the position that it has supplied all the necessary documentation, the Central American banana producers still question whether the measures to be covered by the waiver are adequately defined and therefore whether the period for action on the waiver request had begun. They are also concerned that they have not yet seen the EU Regulation implementing the understanding that it has reached with the United States and Ecuador.

12. Member objected to the granting of tariff preferences for ACP countries and that all delegations with which he had consulted were - in principle - ready to grant a waiver at the appropriate time, some problems clearly still remain. However, no delegation has wished to dramatise the situation in the lead-up to the Doha Ministerial meeting and the Chairman of the CTG was able to conclude the July 2001 discussions in the committee by saying that he had been encouraged to continue his consultations as from the first days of September. He noted that if agreement could be reached with the Central American banana producers and the EU/ACP regarding the start of the examination period, all the delegations concerned would make their best efforts to complete the examination of the waiver request by the time of the Doha Ministerial meeting.

13. A final word about the procedure for granting waivers. The practice in GATT 1947 and the early days of WTO was for the text of waiver decisions to be approved by a consensus in the GATT Council or the WTO General Council and then ratified by a formal vote of the full membership, a postal ballot being used if enough votes were not cast in the meeting itself. Only in the rarest cases, such as the GATT waiver on German reunification, has a member forced the issue by demanding a vote before such a consensus was reached. However, it quickly became apparent in WTO that it was more difficult to obtain the necessary number of votes in WTO than it had been in GATT and this for two reasons: first, because the WTO requires a positive vote of three-quarters rather than the two-thirds that had been required in the GATT and, second, because the WTO membership is much larger than that of GATT and many Members do not have a presence in Geneva. This was demonstrated during the accession of Ecuador, where the same qualified majority is required as for waivers. The WTO General Council therefore agreed on 15 November 1995 that any Member that has a problem with a proposed decision regarding a request for a waiver or an accession should ensure its presence at the meeting at which this matter would be considered and that a decision could be taken if a consensus was reached on the matter in the General Council. This agreement also makes it clear that this procedure does not preclude a Member from requesting a vote at the time that the decision is taken.



Commonwealth **TRADE HOT TOPICS**

Produced by the Economic Affairs Division of the Commonwealth Secretariat.

For further information or copies, please contact:

Economic Affairs Division, Commonwealth Secretariat, Pall Mall, London SW1Y 5HX, UK

Tel: 020 7747 6231/6116 Fax: 020 7747 6235

Email: i.mbirimi@commonwealth.int or a.kahenya@commonwealth.int