

WTO Waiver for the Cotonou Agreement

*by Peter Williams**

STATUS REPORT

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 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 more than a year later.

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4. Central and Latin American banana producing countries Ecuador, Honduras, Panama, Costa Rica and Guatemala have been blocking the process until the banana dispute settlement case with the European Communities is settled to their satisfaction. In order to do so, these delegations have 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 argue that the 90 day period for action on the waiver laid down in Article IX of the WTO Agreement has 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 being 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. It now appears that the banana dispute has been settled.

7. The new EU Council Regulation laying down the outline rules for the new banana régime which was published on 2 February 2001 and which comes into force on 1 July next 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.

8. The United States was not satisfied with this arrangement but has recently reached a bilateral agreement with 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.

9. Ecuador also had difficulties with the Council Regulation but has also come to an understanding with the EU, which does not appear to modify the arrangements significantly.

10. The EU and the ACP now have to decide on their strategy for the next steps. They will need, for example to decide, whether their request for a waiver from the provisions of GATT Article XIII for the banana régime should be included in its Cotonou waiver request or in a separate request. The addition of the request for a waiver from Article XIII will complicate matters as some delegations are already saying that there is no precedent for granting a waiver from the provisions of Article XIII of GATT 1994. While this may be true, on the face of it, nothing in Article IX of WTO makes it more difficult to grant a

waiver from the provisions of Article XIII of GATT 1994 than from those of its Article I. If anything, it may 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 among the Members while Article XIII can be amended by a qualified majority vote.

11. The EU and the ACP will also have to present complete documentation to support their waiver request. Before this can be done, the EU will have to approve the regulations implementing the agreements reached with the USA and other WTO Members and is expected to do so during the month of June. The full documentation will need to be distributed to WTO Members in English, French and Spanish, the three official languages of WTO, which are also official languages of the EU. This must be distributed ten days before the meeting of the Council on Trade in Goods at which it is to be considered. The next meetings of this body are scheduled for 5 July and 5 October 2001. As noted above, the 90 day period for action on the request will only begin when this documentation has been received.

12. Even though the Chairman of the CTG said in his statement to the General Council of July 2000 that no 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, the EU and the ACP will need to decide how they are to deal with the other WTO Members that have raised the problems referred to in paragraph 5 above. The Ambassador of the EU in Geneva has been quoted in the press as saying that, now that the banana issue has been settled, he expects no difficulty in obtaining the waiver, but the EU will probably have to discuss either the terms on which the waiver is granted or compensation for countries which claim to be adversely affected by the preferences granted to the ACP countries, or both.

13. A final word about the procedure for granting waivers. The practice in GATT 1947 and in the very early days of WTO has been for the text of waiver decisions to be approved by consensus in the GATT Council or in 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 it was more difficult to obtain the necessary number of votes in the WTO than it had been in the GATT, and this for two reasons, first, because the WTO requires a positive vote of three quarters of a much enlarged membership, rather than the two-thirds that had been required in the GATT and, second, because the WTO membership is much larger than that of the 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 in 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 the decision is taken.



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