ARTICLES

The WTO Bananas Decision: Cutting Through the Thicket

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Abstract: The *Bananas* decision demonstrated that WTO dispute settlement panels and the Appellate Body are capable of effectively and clearly analyzing whether extremely complex measures are consistent with WTO rules. The trade-liberalizing decision established the General Agreement on Trade in Services (GATS) as a meaningful constraint on discriminatory measures with an impact on both goods and services and clarified the nature of the GATS Most-Favoured Nation (MFN) obligation. The decision also severely constrained the ability of the EU to justify non-tariff discriminatory measures such as the quota allocation system at issue in *Bananas* based on the Lomé waiver.

1. INTRODUCTORY REMARKS

The World Trade Organization's (WTO) dispute settlement procedures had been called upon to resolve several disputes before the complaints brought by the United States, Mexico, Ecuador, Guatemala, and Honduras against the EC's regime for the importation, sale, and distribution of bananas, but none as involved and complex.[1] Among the numerous issues to be resolved by the Panel were fundamental questions of WTO jurisprudence such as whether a measure could be covered by the provisions of both the General Agreement on

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1. The Bananas Panel introduced its summary of findings with the statement that "[t]he complexity of this case, and the unprecedented number of claims, arguments and Agreements involved, has resulted in a long report with an unprecedented number of findings." The Panel began its findings with a list of numbers (six parties, one of which representing 15 Member States, 20 third parties, claims under five WTO Agreements, submissions totalling several thousand pages) and with the apology that "the organization and presentation of our work has not been easy." *See* Panel Report EC – Regime for the Import, Sale and Distribution of Bananas, adopted on 22 May 1997, WT/DS27, paras. 7.399 and 7.1.

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Tariffs and Trade (GATT)[2] and the General Agreement on Trade in Services (GATS);[3] whether Article II of the GATS covers *de facto* discrimination; whether the "aim and effects" of a measure are relevant to discrimination analysis under the GATS; and the role of trade effects in the determination of standing, discrimination, and nullification and impairment. Leaving aside the broad political consequences of a ruling against the EC, the Panel's report addressed legal questions with significant political overtones, such as the scope of the Lomé waiver[4] and whether a WTO member with no exports of a product may nevertheless bring a claim under the GATT. Threading its way through the substantive decisions of the Panel was the question of whether WTO Agreements such as the GATT, GATS, and Licensing Agreement[5] speak to the issue of whether and how a WTO panel may rule on a Member's allocation of quota rents.

2. FACTUAL BACKGROUND

The complaint against the EC's banana regime followed blocked findings by two GATT Panels that elements of that regime and of previous regimes of EC Member States were inconsistent with the GATT.[6] The regime under examination in the WTO *Bananas* Panel was established in 1993 to replace various national regimes.[7] It provides explicit preferences to ensure favourable access to the EC market for domestic bananas and bananas from former colonies of EC Member States through favourable tariff treatment, tariff quotas, and licensing procedures. These countries are parties to the 1989 Lomé Convention, an agreement between the EC and various African, Caribbean, and Pacific (ACP) countries.[8] The EC claimed that any favourable treatment of bananas from ACP countries is excused by the December 1994 Lomé waiver,[9] which the EC obtained for certain preferential treatment "required" by the Lomé Convention. A second agreement involved in the dispute was the 1994 Framework Agree-

2. 1994 General Agreement on Tariffs and Trade, 33 ILM 1 (1994).
3. 1994 General Agreement on Trade in Services, 33 ILM 44 (1994)
4. *See* on the Fourth ACP-EEC Convention of Lomé, Decision of the Contracting Parties of 9 December 1994, GATT Doc. L/7604; and EC – The Fourth ACP-EC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186.
5. 1994 Agreement on Import Licensing Procedures, *see* GATT Secretariat, The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts 255 (1994).
6. Panel Report EEC – Member States' Import Regimes for Bananas, 19 May 1993, WT/DS32/R (not adopted); and Panel Report EEC – Import Regime for Bananas, 18 January 1994, WT/DS38/R (not adopted).
7. EC Council Regulation 404/93 on the common organization of the market in bananas, OJEC 1993, L 47/1.
8. Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJEC 1991, L 229/34 (Lomé Convention).
9. *See* 1994 Lomé Waiver Decision, *supra* note 4.

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ment on Bananas (BFA),[10] which was concluded by the EC in March 1994 with four of the five complainants in the second *Bananas* case in return for their dropping the case.[11] The EC's Uruguay Round Schedule incorporates the BFA, and the EC argued that this immunized its terms from challenge. Against this, the complainants argued that the EC banana regime had become more, rather than less, discriminatory and trade-distorting in response to the earlier GATT panel reports.[12]

The elements of the EC banana regime on which the complainants focused included tariff treatment, allocations of import quotas, and licensing requirements. With respect to tariffs, EC legislation establishes three categories of imports:

1. traditional imports from 12 ACP countries;
2. non-traditional imports from ACP countries (quantities in excess of those traditionally supplied by ACP countries, or quantities supplied by ACP countries which had not traditionally supplied bananas); and
3. imports from third countries.[13]

Quotas are allocated on a country-specific basis for all but 5,000 of the 947,700 tons of bananas imported duty free from traditional and non-traditional ACP countries. Tariff quotas for third-country bananas are, in accordance with the BFA, allocated on a country-specific basis to Costa Rica, Colombia, Nicaragua, and Venezuela, and through an 'others' provision for other supplier countries.[14] In addition to supplemental amounts to meet supply needs, additional third-country or ACP bananas may be imported at in-quota tariff rate for third-

10. 1994 Framework Agreement on Bananas, Annex to Part I, Section I-B (tariff quotas) in Schedule LXXX of the European Communities.
11. The four were Colombia, Costa Rica, Venezuela, and Nicaragua. *See* Bananas Panel, *supra* note 1, para. 3.29. The EC blocked Guatemala's continued effort to have the second Bananas Panel adopted.
12. First Submission of the United States of America, 9 July 1996, *see* http//www.wto.org/wto/dispute/bananas.htm.
13. *See* Bananas Panel, *supra* note 1, para. 3.7. Traditional ACP bananas (totalling 857,700 tons) are entitled to duty free treatment, while non-traditional ACP bananas are entitled to duty free treatment up to 90,000 tons, and a tariff of ECU 693 for out-of-quota shipments. Third-country bananas are assessed a tariff of ECU 75 up to the quota limit of 2.11 million tons, and ECU 793 per ton for out-of-quota shipments.
14. The BFA also provides for the 90,000 ton allocation to ACP countries for non-traditional quantities. These quotas are allotted on the basis of percentages of the total tariff quota. Short-falls in filling quotas and supplemental amounts for "consumption and supply needs" are reallocated by the EC based on these percentage shares. However, unused quota shares will be divided among BFA countries with quota shares if they so request. *See* Bananas Panel, *supra* note 1, para. 3.13, citing BFA, *supra* note 10, para. 3.

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country bananas based on the issuance of "hurricane licenses", issued when ACP supplies have been disrupted due to hurricanes.[15]

Licensing procedures vary in important ways for traditional ACP bananas and for non-traditional and third country bananas. Applications for imports of traditional ACP bananas must state the quantity and origin from which operators intend to source their bananas, and must be accompanied by an ACP certificate of origin testifying to their status as traditional ACP bananas. Import licenses for third country and non-traditional ACP bananas are allocated in several steps, based on:

1. three operator categories;[16]
2. three activity functions;[17] and
3. export certificate requirements for imports from Costa Rica, Colombia, and Nicaragua.[18]

Hurricane licenses are granted on an *ad hoc* basis to operators who "include or directly represent" EC or ACP producers or organizations adversely affected by a tropical storm and are thus unable to supply the EC market.

The complainants submitted data and information indicating that most operators falling within Category A (those who had been importing third-country or non-traditional ACP bananas) are affiliated with banana distributors of complainants' origin, while most operators falling within Category B (those who had been importing EC or traditional ACP bananas) were EC banana distributors.

A politically controversial aspect of the case was the fact that the US had no exports of bananas, and a relatively low level of domestic production. However, two US multinationals, Dole and Chiquita, and a Mexican multinational, Del Monte, were heavily involved in the production and marketing of bananas

15. *See* Bananas Panel, *supra* note 1, para. 3.15.
16. Licenses are distributed among operator categories based on the volume of bananas marketed over a three year period. Category A operators (those who have marketed third-country and/or non-traditional ACP bananas) receive 66.5% of the operator licenses, Category B operators (those who have marketed EC and/or traditional ACP bananas) receive 30% of the licenses, and Category C operators ("newcomers") receive 3.5% of the licenses.
17. Operator Categories A and B are subdivided by activity functions of the economic entity: the annual entitlement of "primary importers" (who purchase from producers, or produce and consign, green bananas and sell them within the EU) is based on the number of bananas marketed over a three year period multiplied by 57%; the annual entitlement of a "secondary importer or customs clearer" (who supply and release green bananas for free circulation) is based on the number of bananas marketed over a three year period multiplied by 15%; and the annual entitlement of "ripeners" (who ripen green bananas and market them within the EC) is based on the number of bananas marketed over a three year period multiplied by 28%.
18. Export certificates issued by Costa Rica, Colombia, and Nicaragua are prerequisites to the granting of Category A and C licenses for importation of bananas from these countries. This requirement is based on the terms of the BFA.

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globally. The fact that the head of Chiquita Brands, Carl Lindner, had been a major contributor to both the Democratic and Republican parties fuelled domestic political controversy within the US. Journalists seized on the absence of US banana exports and the presidential election year contributions of Mr Lindner to suggest that the US government brought the case for political reasons.[19] Likewise, the EC banana regime had been politically controversial within the EC, as EC Member States Germany and Belgium, which had traditionally relied on Latin American bananas, raised objections in European courts.[20]

3. OVERVIEW

The Dispute Settlement Body (DSB) established a panel at its meeting on 8 May 1996 to examine the complaints of the United States, Mexico, Ecuador, Guatemala, and Honduras. Twenty-one members reserved their third-party rights in accordance with Article 10 of the Dispute Settlement Understanding (DSU), though one subsequently renounced these rights.[21] The Panel circulated its findings on 22 May 1997.[22] The EC notified the DSB on 11 June 1997 of its decision to appeal certain issues. The Appellate Body issued its report on 9 September 1997. The DSB adopted the Panel report and Appellate Body report on 25 September 1997.[23]

The Panel found that aspects of the EC banana regime are inconsistent with Articles I(1), III(4), X(3.a), and XIII of the GATT,[24] Article 1(2) and 1(3) of the Licensing Agreement,[25] and Articles II and XVII of the GATS.[26] All of these provisions relate to national treatment or Most-Favoured Nation (MFN)

19. *E.g.* M. Weisskopf, *The Busy Back-Door Men*, Time, 31 March 1997 at 40; and M. Isikoff & B. Larmer, *And Now, "Banana Gate"?*, Newsweek, April 1997, at 20.
20. *See, e.g.*, Joined Cases C-9/95, C-23/95, and C-156/95, Belgium and Germany *v.* the Commission, ECR 1997, at I-687. *See also* EC Commission Regulation 2791/94 on the exceptional allocation of a quantity additional to the tariff quota for imports of bananas in 1994 as a result of tropical storm Debbie, OJEC 1994, L 296/33.
21. 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted 15 April 1994, reproduced *in* 33 ILM 1226 (1994). These countries included Belize, Canada, Cameroon, Colombia, Costa Rica, Côte d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, India, Jamaica, Japan, Nicaragua, the Philippines, Saint Vincent and the Grenadines, Saint Lucia, Senegal, Suriname, Thailand, and Venezuela. Thailand subsequently renounced its third-party rights. *See* Bananas Panel, *supra* note 1, para. 1.3.
22. The Panel issued four separate reports in response to a request by the EC because the complainants did not, in every instance, argue with respect to the same WTO provisions. The Panel sought to avoid confusion by using the same paragraph numbering sequence for all four reports, indicating in each report where certain paragraphs had been reserved for use in other reports.
23. Appellate Body Report EC – Regime for the Importation, Sale and Distribution of Bananas, adopted 9 September 1997, AB-1997-3, WT/DS27/AB/R.
24. GATT, *supra* note 2.
25. Licensing Agreement, *supra* note 5.
26. GATS, *supra* note 3.

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treatment. The Panel also agreed with complainants that a measure can be subject to both the GATT and the GATS, and that there is no "legal right or interest" requirement in the GATT that would bar the US from bringing "goods" claims under the GATT because it has no banana exports.

The Panel's decision in favour of complainants on most issues was later upheld by the Appellate Body with respect to those issues. The Appellate Body reversed the Panel with respect to several issues in which the Panel had granted the EC a partial victory, including the scope of the Lomé waiver. This article focuses on the Panel decision, but also addresses the findings of the Appellate Body where these reverse or modify significant aspects of the Panel report.

4. Arguments of the Litigants and Panel Findings

The Panel organized its substantive findings into sections relating to quota allocation issues under GATT Article XIII, tariff issues, banana regime import licensing procedures, and GATS issues. The Panel considered the EC's claim of a requirement of legal interest as a preliminary issue.[27]

4.1. Requirement of legal interest

The EC argued that the United States could not raise claims under the GATT 1994 because it has no significant banana production, has no banana exports, and has unlikely prospects for exporting in the future. The EC argued that, with no effective remedy and in the absence of any WTO procedures for declaratory judgments or advisory opinions, the United States could not raise "goods" claims under the GATT 1994 because it has no "legal right or interest" in such claims.[28]

The Panel rejected these arguments, noting that the DSU contains no explicit requirement that a member have a "legal interest" as a prerequisite for requesting a Panel. In addition, the Panel emphasized past GATT Panel findings that GATT rules protect "competitive opportunities" rather than actual trade flows. Beyond the possibility that the US might export its production in the

27. Other preliminary issues considered by the Panel included the adequacy of consultations, the required level of specificity of the request for Panel establishment, and the number of panel reports. Findings with regard to these sections can be found in the Bananas Panel, *supra* note 1, paras. 7.13-7.60, and in the Appellate Body Report, *supra* note 23, paras. 132-144. The Panel also considered the organizational issues of participation by third parties and the presence in proceedings of private lawyers accredited by third-party members. With regard to the latter issue, while the Panel denied permission for the private lawyer accredited by Santa Lucia to attend panel meetings, the Appellate Body ruled that, with respect to its own proceedings, members could include private lawyers among their representatives to panel meetings. *See* Bananas Panel, *supra* note 1, para. 7.11; and Appellate Body Report, *supra* note 23, paras. 10-12.

28. *See* Bananas Panel, *supra* note 1, para. 7.47.

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future, the interdependence of the global economy means that the EC measures could nonetheless have trade and investment effects outside the EC that could affect US WTO rights, according to the Panel.[29]

4.2. Allocation issues and Article XIII

The complainants argued that the banana regime is inconsistent with GATT Article XIII because:

1. country-specific allocations were made based on political motives, and not based on trade in the absence of restrictions; and
2. BFA countries are entitled, upon request, to have unused quota shares for BFA countries reallocated among other BFA countries, to the exclusion of non-BFA countries.[30]

The EC denied it had acted inconsistently with GATT Article XIII and asserted that any inconsistency is excused based on:

1. the Lomé Convention;[31]
2. the fact that allocation preferences for traditional BFA-country bananas are included in the EC's Schedule through the BFA; and
3. the priority provisions of the WTO Agreement on Agriculture.[32]

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29. *Id.*, paras. 7.49-7.52, affirmed by the Appellate Body Report, *supra* note 23, paras. 132-138.
30. *Id.*, para. 7.65. The Panel rejected an additional claim by complainants that the EC had failed to allocate quota shares by agreement with certain members with a substantial interest in supplying bananas to the EC, while allocating by agreement with members with less of an interest; *id.*, para. 7.85. In addition, the Panel declined to rule on a claim that specific shares allocated to Colombia and Costa Rica were inconsistent with GATT Art. XIII(2.d), in light of revisions to the regime required by other panel findings; *id.*, paras. 7.87-7.88.
31. Lomé Convention, *supra* note 3.
32. 1994 Agreement on Agriculture, *see* GATT Secretariat, *supra* note 5, at 39. *See* Bananas Panel, *supra* note 1, para. 7.65. The EC also unsuccessfully argued that traditional ACP bananas and non-traditional/third country bananas are subject to *separate* regimes under EC law, and that Art. XIII's requirements should be applied separately to each; *id.*, para. 7.78. The Panel found that the non-discrimination requirements of Art. XIII apply to the market for a product, regardless of how a member subdivides the market for administrative purposes, and that the object and purpose of non-discrimination provisions such as Art. XIII would be defeated if members could avoid them through creation of multiple regimes; *id.*, paras. 7.79-7.81. The Panel responded with identical conclusions when the EC again raised this argument in connection with licensing requirements and GATT Arts. I and III, and Licensing Agreement Arts. 1(2) and 1(3); *id.*, paras. 7.164-7.167. The Panel's rulings on separate regimes were affirmed by the Appellate Body Report, *supra* note 23, paras. 189-191.

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4.2.1. Article XIII

The Panel found that Article XIII(1) establishes the principle that products under quantitative restriction regimes must be "similarly" restricted; as a result, a member may not restrict imports from some members using one means while using other means for imports from other members.[33] While Article XIII(2.d) permits allocations to be made based upon agreement with all countries "having a substantial interest" in supplying the product, the EC's allocation by agreement to some members without a "substantial interest" but not to other such members is therefore inconsistent with Article XIII(1), the Panel concluded.[34] Likewise, the Panel concluded that BFA rules providing BFA countries only with the right to request reallocation of unused quota shares are inconsistent with Article XIII(1).[35]

4.2.2. Lomé waiver

The Panel next addressed the Lomé waiver, which waives the provisions of paragraph 1 of Article I of the GATT 1994 "to the extent necessary" to permit the EC to provide preferential treatment to ACP countries as provided in the Lomé Convention.[36] The Panel addressed two issues: the preferential treatment "required" by the Lomé Convention; and whether the Lomé waiver encompasses a waiver of Article XIII obligations as well.[37]

With respect to the first issue, the Panel concluded that the granting of quotas to traditional ACP supplier countries in the amount of their best-ever pre-1991 export volumes was "required" by Article 1 of Protocol 5 of the Lomé Convention,[38] but that quotas in excess of these amounts were not required.[39]

33. *See* Bananas Panel, *supra* note 1, para. 7.69. Art. XIII(1) GATT, *supra* note 2, states: "[n]o prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."
34. *Id.*, paras. 7.69, 7.73, and 7.89-7.90.
35. *Id.*, paras. 7.89-7.90.
36. The Lomé Waiver Decision, *supra* note 4, provides that "[s]ubject to the terms and conditions set out hereunder, the provisions of paragraph 1 of Article I of the General Agreement shall be waived, until 29 February 2000, to the extent necessary to permit the European Communities to provide preferential treatment for products originating in ACP States as required by the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party".
37. *See* Bananas Panel, *supra* note 1, para. 7.96.
38. Art. 1 of Protocol 5 of the 1989 Lomé Convention, *supra* note 4 provides: "[i]n respect of its banana exports to the Community markets, no ACP State shall be placed as regards access to its tra-

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On the second point, the Panel found that the Lomé waiver waives any inconsistency with Article XIII(1) to the extent necessary to permit the granting of quotas to traditional ACP supplier countries in the amount of their best-ever pre-1991 export volumes.[40] The Panel reasoned that such a waiver is necessary because, in the absence of agreement between Members with a "substantial interest", Article XIII(2.d) requires shares to be based on a previous representative period, and the EC's allocation would be inconsistent with this provision if the best-ever year for a traditional ACP supplier were to fall in a different year than that for others, or in years outside the representative period.[41]

The Appellate Body reversed the Panel on this point and found that the Lomé waiver does not excuse violations of Article XIII. The Appellate Body emphasized the "clear and unambiguous" wording of the Lomé waiver, which makes no reference to Article XIII. The Appellate Body also noted the GATT practice of interpreting waivers narrowly, and that only one waiver of Article XIII had been granted between 1948 and 1994.[42] While the Appellate Body agreed with the Panel that the Lomé Convention requires the EC to grant quotas to traditional ACP supplier countries in the amount of their best-ever pre-1991 export volumes, the Appellate Body did not explicitly acknowledge the difficulty, if not impossibility, of doing this in a manner consistent with Article XIII. The Appellate Body did not address the Panel's reasoning with respect to Article XIII(2.d) because it was not appealed, and this reasoning therefore stands. It would apparently preclude allocations in the absence of agreement among countries with a "substantial interest". Thus, legally, if not practically, the solution for the EC would be to reach agreement on quota shares with all countries having a "substantial interest". Since most of these countries are either complainants or third-party participants in the case, an EU proposal which satisfies all parties will have gone a long way towards meeting this goal. Failing complete agreement, the issues raised by the Panel with respect to the representative period could only be avoided if, in fact, the "best-ever" years for traditional ACP countries fell within a particular representative period, a very unlikely result.

4.2.3. Inclusion of BFA quotas in the EC Schedule and the Agreement on Agriculture

The EC argued that inclusion of the tariff quota allocations under the banana regime in the EC Schedule excuse any inconsistency with GATT Article XIII,

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ditional markets and its advantages on those markets, in a less favourable situation than in the past or at present."

39. *See* Bananas Panel, *supra* note 1, paras. 7.101-7.102.
40. *Id.*, para. 7.110.
41. *Id.*, para. 7.101.
42. *See* Appellate Body Report, *supra* note 23, paras. 183-188.

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both in itself and by virtue of the Agreement on Agriculture's priority provisions.[43] The Panel rejected these arguments. The Panel relied on the reasoning of the *Sugar Headnote* case,[44] in which the Panel ruled that Article II(1.b)[45] of the GATT permitted Contracting Parties to yield rights under the GATT through their schedules, but not to diminish their obligations.[46] With respect to the Agreement on Agriculture, the Panel found that no relevant provisions applied. Agriculture Agreement Article 4(1), which states that market access concessions are found in Schedules, is merely descriptive, according to the Panel, and nothing in the Agreement on Agriculture absolves agriculture tariffs from compliance with other GATT rules.[47]

4.3. Tariff issues

The complainants argued that the tariff preferences granted non-traditional ACP bananas under the banana regime are inconsistent with Article I(1).[48] The Panel agreed, but found that these preferences are covered by the Lomé waiver.[49] This interpretation of the Lomé waiver was supported by the Appellate Body.[50]

4.4. Import licensing procedures

The complainants alleged that numerous aspects of the import licensing procedures for bananas including operator category rules, activity function rules, BFA export certificates, and hurricane licenses violated provisions of the

43. *See* Bananas Panel, *supra* note 1, paras. 7.112 and 7.120.
44. United States – Restrictions on Imports of Sugar, adopted on 22 June 1989, BISD 36S/331 (Sugar Headnote).
45. Art. II(1.b) GATT, *supra* note 2, provides: "[t]he products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date".
46. *See* Bananas Panel, *supra* note 1, paras. 7.113-7.118, citing Sugar Headnote, *supra* note 44, paras. 5.1-5.7.
47. *Id.*, paras. 7.123-7.127, affirmed by the Appellate Body Report, *supra* note 23, paras. 156-158.
48. *Id.*, para. 7.131.
49. *Id.*, paras. 7.134-7.136. In particular, the Panel noted that Art. 168(2.a.ii) of the Lomé Convention requires that ACP products receive more favourable treatment than that granted to third country products. Art. 168(2.a.ii) states: "[t]he Community shall take the necessary measures to ensure more favourable treatment than that granted to third countries benefiting from the most-favoured-nation clause for the same products".
50. *See* Appellate Body Report, *supra* note 23, paras. 173 and 178.

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GATT, the Licensing Agreement, and the TRIMs Agreement.[51] The Panel focused its analysis on GATT 1994 Articles I, III, and X and Articles 1(2) and 1(3) of the Licensing Agreement. As in the case of allocation issues, the EU denied having violated these provisions and claimed that the Lomé waiver excused violations which the Panel might find with respect to preferences for ACP bananas. The EC also claimed that licensing rules were designed to address competition concerns and that, in any event, licenses do not serve as an impediment to imports from any specific source because they may be traded.[52]

4.4.1. Operator category rules, activity function rules, and GATT Article I(1)

The Panel found that the banana regime's operator category rules and activity function rules provide an "advantage" to traditional ACP over third country/non-traditional ACP bananas, and are therefore inconsistent with Article I(1), because they impose complex administrative and data reporting burdens for third country/non-traditional ACP bananas while exempting ACP bananas from these requirements, and because the allocation of 30% of non-traditional banana licenses to Category B operators based in part on their past imports of traditional ACP bananas provided an incentive to purchase traditional ACP bananas.[53] The Panel then found that the Lomé waiver did not require these rules, since the Lomé Convention requirement of more favourable treatment had already been met by granting duty-free access to ACP bananas, and since the Lomé Convention requirement of treatment no less favourable than in the past did not apply because the operator category and activity function rules did not exist in the past.[54]

4.4.2. Operator category rules, activity function rules, and GATT Article III(4)

The Panel first rejected the EC claim that, as import licensing measures, the operator category rules are border measures and thus not measures within the scope of Article III(4). In line with previous Panel reports, the Panel concluded that the use of the term "affecting" in Article III(4)[55] suggests broader coverage

51. 1994 Agreement on Trade Related Investment Measures, reproduced *in* GATT Secretariat, *supra* note 5, at 163.

52. *See* Bananas Panel, *supra* note 1, para. 7.188.

53. *Id.*, paras. 7.191-7.195 and 7.221. This was affirmed in part by the Appellate Body Report, *supra* note 23, para. 206. The Appellate Body only ruled on the EC's appeal of the Panel's Art. I(1) finding with respect to activity function rules.

54. *Id.*, paras. 7.198, 7.200, 7.204, and 7.222. This was affirmed by the Appellate Body Report, *supra* note 23, para. 177.

55. Art. III(4) GATT, *supra* note 2, provides, in relevant part: "[t]he products of the territory of any contracting party imported into the territory of any other contacting party shall be accorded treat-

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than legislation directly governing the sale of domestic and imported like products, and that border measures may also affect internal sale.[56]

The Panel then found the operator category rules to be inconsistent with Article III(4), adopting in its entirety the conclusions of the Second Bananas Panel Report, which found that:

1. the allocation of 30% of licenses for in-quota third-country/non-traditional ACP bananas to Category B operators based on their past marketing of EC or traditional ACP bananas encourages the current purchase of these bananas as a means to increase future licenses;
2. Article III(4) requires effective equality of opportunities for imported products; it is not relevant that import volumes of third-country/non-traditional ACP bananas would not currently be affected; and
3. a requirement an enterprise voluntarily accepts to obtain an advantage from the government, such as the requirement to purchase EC bananas in order to obtain an in-quota license, is within the scope of Article III(4).[57]

The Panel went beyond the Second Bananas Panel Report in examining Article III(1) (which prohibits a measure from affording protection to domestic production),[58] as a "general principle that informs the rest of Article III", a formulation drawn from the Appellate Body report in the *Japan Alcoholic Beverages* case.[59] The Panel reasoned that since "Article III(1) constitutes part of the context of Article III(4), it must be taken into account in our interpretation of the latter".[60] This reasoning reflects a misreading of the *Alcoholic Beverages* re-

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ment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

56. *See* Bananas Panel, *supra* note 1, paras. 7.174-7.177, citing United States – Section 337 of the Tariff Act of 1930, adopted 7 November 1989, BISD 36S/345, at 385, para. 5.10; Italian Discrimination Against Imported Agricultural Machinery, adopted 23 October 1958, BISD 7S/60, at 63-64, para. 11; and EEC – Regulation on Imports of Parts and Components, adopted 16 May 1990, BISD 37S/132, at 197, paras. 5.20-5.21. The Appellate Body affirmed the Panel's findings based on the conclusion that the operator category rules cross-subsidize distributors of EC and ACP bananas and therefore "affect" the internal sale of bananas within the meaning of Art. III(4); *see* Appellate Body Report, *supra* note 23, para. 211.
57. See Bananas Panel, *supra* note 1, paras. 7.179-7.180.
58. Art. III(1) GATT states: "[t]he contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production".
59. *See* Bananas Panel, *supra* note 1, para. 7.181, citing Japan – Taxes on Alcoholic Beverages, adopted 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, para. 6.10.
60. *Id.*, para. 7.181. The Panel concluded that operator category rules are applied "so as to afford protection" to EC producers.

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port, a point which the Appellate Body made even though the issue had not been raised by any party to the appeal.

The Appellate Body noted that, in addition to the statement cited by the Panel, the *Alcoholic Beverages* report also included the statement that Article III(1) "informs the first sentence and the second sentence of Article III(2) in different ways".[61] According to the Appellate Body, the absence of a specific reference to Article III(1) in the first sentence of Article III(2) indicates that there is no separate need to demonstrate that a measure found inconsistent with Article III(2), first sentence, is also inconsistent with Article III(1).[62] Explicitly stating an implied conclusion of the *Alcoholic Beverages* case, the Appellate Body stated that the same reasoning applies to Article III(4), which does not specifically refer to Article III(1). Therefore, "Article III(4) does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production'".[63]

Although not central to the determination of the banana regime's consistency with WTO rules, the Appellate Body's statements with regard to Article III(1), as well as its finding with respect to the "aim and effects" test in the context of GATS non-discrimination principles,[64] illustrates the Appellate Body's apparent desire to steer the interpretation of GATT Article III (and GATS non-discrimination rules) away from an examination of the purposes underlying a measure.[65] In so doing, the Appellate Body has explicitly or implicitly rejected the analysis of several GATT Panels.[66]

Guatemala and Honduras had also argued that the banana regime activity function rules, which allocate licenses among primary importers, secondary importers, and ripeners, are inconsistent with Article III(4). The Panel rejected this claim, concluding that the rules do not favour domestic bananas.[67]

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61. *See* Appellate Body Report, *supra* note 23, para. 126, citing Alcoholic Beverages Appellate Body Report, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, at 18.
62. *Id.*
63. *Id.*, para. 216.
64. *See* note 139 and accompanying text, *infra*.
65. The Appellate Body also reaffirmed this point in Appellate Body Report Canada – Certain Measures Concerning Periodicals, adopted 30 July 1997, WT/DS31/AB/R, at 20-21 (Section IV).
66. *See, e.g.*, Japan – Taxes on Alcoholic Beverages, *supra* note 59, para 29 (issue of whether measure applied "so as to afford protection" is not an issue of intent, but, rather, an issue of how the measure is applied). The Alcoholic Beverages Appellate Body Report also implicitly affirmed the rejection by the Panel of the "aims and effects test"; *see* Alcoholic Beverages Appellate Body Report, *supra* note 61, paras. 6.16-6.18 (rejecting the "aims and effects" analysis as applied in Automobile Taxes and Malt Beverages).
67. *See* Bananas Panel, *supra* note 1, paras. 7.216-7.219 (Guatemala-Honduras Report only).

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4.4.3. BFA export certificates and Article I

The Panel concluded that the requirement that import licenses only be granted to Category A and C operators having an export license in the case of imports from Colombia, Costa Rica, and Nicaragua is inconsistent with GATT Article I(1). The Panel reasoned that this requirement provides an "advantage" to bananas from these BFA countries within the scope of Article I, since it creates the *potential* for quota-rents associated with banana regime tariff-quotas to benefit producers of bananas from those countries, and thereby creates more favourable competitive opportunities *vis-à-vis* non-BFA third countries.[68] The EC argued that the shifting of quota-rents from EC importers to BFA exporters created an incentive to purchase *non*-BFA bananas, but the Panel noted in response that Article I(1) "does not permit balancing more favourable treatment under some procedure against a less favourable treatment under others".[69]

4.4.4. Hurricane licenses and Articles I and III

The Panel found the EC's procedures with respect to hurricane licenses inconsistent with both Article III(4) and Article I(1). As in its examination of BFA export certificates, the Panel focused on the impact of quota rents on competitive opportunities. The Panel concluded that by limiting the issuance of hurricane licenses to operators including or directly representing EC or traditional ACP banana producers or organizations, the EC created the possibility of passing on quota rents to EC and traditional ACP banana producers, a possibility which did not exist for third country banana producers. This created less favourable opportunities for third-country bananas.[70] In finding the EC's hurricane license procedures inconsistent with Articles III(4) and I(1), the Panel also noted that these licenses would not be issued to Category A operators, providing yet another incentive to import EC and traditional ACP bananas.[71]

The *Bananas* Panel's findings with respect to Articles III and I are significant in that they affirm in the WTO context and extend to a new factual pattern the GATT panel practice of finding "voluntary" measures to be within the scope of these articles and of emphasizing effects on competitive opportunities, rather than actual trade flows, in the examination of whether measures are

68. *See* Bananas Panel, *supra* note 1, para. 7.239-7.241, affirmed by the Appellate Body Report, *supra* note 23, para. 207.
69. *See* Bananas Panel, *supra* note 1, para. 7.239, citing the Panel Report United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear, adopted 19 June 1992, BISD 39S/128, at 151, para. 6.10; and Panel Report United States – Section 337 of the Tariff Act of 1930, *supra* note 56, at 388, para. 5.16.
70. *See* Bananas Panel, *supra* note 1, paras. 7.246, 7.253.
71. *Id.*, paras. 7.247-7.258, 7.250, and 7.254-7.256. The Appellate Body affirmed with respect to Art. III(4); *see* Appellate Body Report, *supra* note 23, para. 213. The EC did not appeal the finding on Art. I(1).

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GATT-inconsistent. In finding that import licensing rules create incentives for operators to become involved in the importation of bananas from some countries but not others, and that these rules create the *potential* for quota rents to benefit production of products from some countries but not others, the Panel and Appellate Body demonstrated a willingness to analyse and challenge measures with complex, indirect effects on trade, even if these effects are not already evident.

4.4.5. Import licensing procedures, GATT Article X(3.a), and Licensing Agreement Articles 1(2) and 1(3)

As a preliminary matter, the Panel ruled that the Licensing Agreement applies to tariff-rate quota's (TRQs),[72] and that, because there are no conflicts among the Licensing Agreement, GATT, and TRIMs[73] provisions raised, claims could be made under each.[74] The application of the Licensing Agreement to TRQs had been vigorously opposed by the EC and Japan, and this finding could prove significant in future cases involving agricultural TRQs.

The Panel first applied GATT Article X(3.a)[75] to operator category rules. Following the reasoning in a 1968 Note by the GATT Director General,[76] the Panel found that the application of operator category rules to third country and non-traditional ACP bananas, but not to traditional ACP bananas, constituted the application of two different origin-based sets of import licensing procedures and was therefore inconsistent with Article X(3.a).[77] The Panel similarly found the banana regime activity function rules inconsistent with Article X(3.a) for the same reason.[78]

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72. *Id.*, paras. 7.149-7.153. Art. 1(1) of the Licensing Agreement, *supra* note 5, defines import licensing as "administrative measures used for the operation of import licensing regimes requiring the submission of an application [...] as a prior condition for importation". The Panel noted that Art. 1(1) imposes no restriction on the types of underlying measures covered, and that a banana import license is required for entry at the in-quota rate. The Panel noted that Art. 3(2) refers broadly to restrictions covered by the Agreement, and that Art. 3(3) refers to licensing requirements "other than the implementation of quantitative restrictions". The Appellate Body upheld the Panel's conclusions; *see* Appellate Body Report, *supra* note 23, paras. 193-195.
73. The Panel did not make a specific ruling on the complainants' TRIMs Art. 2 claim because it found that this provision does not add or detract from GATT 1994 Art. III obligations, but only clarifies that they apply; *see* Bananas Panel, *supra* note 1, paras. 7.185-7.187.
74. *Id.*, para. 7.159.
75. Art. X(3.a) GATT provides: "(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."
76. Note by the GATT Director-General of 29 November 1968, GATT Doc. L/3149.
77. *See* Bananas Panel, *supra* note 1, paras. 7.208-7.212.
78. *Id.*, paras. 7.224-7.231 which appear in the Ecuador, Guatemala-Honduras, and Mexico Reports. With respect to both the operator category rules and the activity function rules, the Panel found the Lomé waiver inapplicable for the reasons given in para. 7.204 in connection with Art. I(1). *See*, Section 4.4.1., *supra*.

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The Panel's analysis of hurricane licenses under Licensing Agreement Article 1(3), which requires that import licensing procedures be neutral in application and administered in a fair and equitable manner,[79] was identical to its analysis under GATT Article X(3.a), and its conclusion the same.[80]

The Panel found it unnecessary to rule on Licensing Agreement issues with respect to operator category rules and activity function rules, and on Article X(3.a) with respect to hurricane licenses, in light of the findings already reached.[81]

While agreeing with the Panel on the applicability of the Licensing Agreement to banana regime import licensing measures, the Appellate Body reversed the Panel's findings that the banana regime was inconsistent with GATT Article X(3.a) and Licensing Agreement Article 1(3) because it provided for two different, origin-based sets of licensing procedures.[82] The Appellate Body concluded that each of these provisions requires fair and neutral *application* and *administration* of rules and/or licensing procedures, but does not apply to the *rules* themselves:[83] "[t]o the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of GATT 1994."[84]

Finally, the Appellate Body agreed with the Panel that GATT Article X(3.a) and Licensing Agreement Article 1(3) have identical coverage,[85] but found that the Panel should have applied Article 1(3) first, since the Licensing Agreement deals more specifically with the issue at hand. Had the Panel done so, there would have been no need to address GATT Article X(3.a).[86]

4.5. GATS issues

The Panel and Appellate Body examined several issues, including the issue of whether a measure could be covered under both the GATS and the GATT 1994, the proper application of Article II of the GATS to a facially neutral measure, and whether the "aim and effects" of a measure are relevant in determining whether the measure is consistent with the non-discrimination provi-

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79. *See* Art. 1(3) Licensing Agreement, *supra* note 5.
80. *See* Bananas Panel, *supra* note 1, paras. 7.261 and 7.263.
81. *See* Bananas Panel, *supra* note 1, paras. 7.213, 7.232, and 7.264.
82. *See* Appellate Body Report, *supra* note 23, paras. 198 and 201.
83. *Id.*, paras. 197 and 200.
84. *Id.*, para. 200.
85. *Id.*, para. 203.
86. *Id.*, para. 204. *Cf.* United States – Standards for Reformulated and Conventional Gasoline, adopted 29 April 1996, AB-1996-1, WT/DS2/AB/R, (in which the Appellate Body made no comment on a Panel's decision to analyze the measures at issue under GATT 1994, but not the Agreement on Technical Barriers to Trade (TBT Agreement), even though the measures were arguably technical regulations and therefore were dealt with more specifically and in greater detail in the TBT Agreement, reproduced *in* GATT Secretariat, *supra* note 5, at 138).

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sions of the GATS. The Panel and Appellate Body also ruled on questions with implications for standards for meeting burdens of proof and the proper scope of Appellate Body review, such as whether the service suppliers experiencing less favourable treatment were complainants' service suppliers.

4.5.1. Application of the GATS

The EC argued that the measures in question regulated goods, not services, and that the GATS was therefore inapplicable, both because the objective of the GATS is to regulate trade in services as such, and because the GATT and GATS are mutually exclusive.[87]

The Panel rejected the EC's arguments, and found that the banana regime measures could be covered by the GATS as well the GATT 1994.[88] It noted that GATS Article I(1) states that the GATS "applies to measures by members affecting trade in services",[89] and found that both the ordinary meaning of the term "affecting" and GATT Panel practice interpreting this term broadly, of which the GATS drafters were aware, indicate that the GATS covers measures either directly or indirectly affecting the supply of a service.[90] The Panel also found no support in the text of the GATT or GATS in support of the EC's position that the two are mutually exclusive, and considered that the EC's position could lead to the circumvention of obligations under one or both agreements by the adoption of measures under one agreement having an indirect effect on trade covered by the other.[91]

In affirming the Panel's decision, the Appellate Body stated:

> [w]hile the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of a service or the service suppliers involved. Whether a certain measure affecting the supply of a

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87. *See* Bananas Panel, *supra* note 1, paras. 7.277-7.278. The EU contended that unless the GATT and GATS are mutually exclusive, exceptions or waivers under one would be rendered ineffectual; *id.*, para. 7.278.
88. *Id.*, para. 7.286, affirmed by the Appellate Body Report, *supra* note 23, para. 122. The Appellate Body anticipated this result in Appellate Body Report Canada – Certain Measures Concerning Periodicals, *supra* note 65. In that decision, the Appellate Body concluded that "obligations under GATT 1994 and GATS can co-exist and [...] one does not override the other," but "did not find it necessary to pronounce on the issue of whether there can be potential overlaps between the GATT 1994 and the GATS"; *id.*, para. 21.
89. *Id.*, para. 7.279.
90. *Id.*, paras. 7.280-7.281. The Panel cited Panel Report Italian Agricultural Machinery, *supra* note 56, as an example of how the term "affecting" has been interpreted broadly in the context of GATT Art. III.
91. *Id.*, paras. 7.282-7.283. The EU had also contended that unless the GATT and GATS are mutually exclusive, exceptions or waivers under one would be rendered ineffectual; *id.*, para. 7.278. The Panel found this issue to be a hypothetical concern that need not be addressed; *id.*, para. 7.284.

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> service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case by case basis.[92]

The Panel's decision to examine the same measure under both the GATT and GATS contrasts with its findings elsewhere in *Bananas* that it was unnecessary to address numerous claims because it had already made findings requiring changes to banana regime measures.[93] The Panel had already found the import licensing procedures examined under the GATS (operator category rules, activity function rules, BFA export certificates, and hurricane licenses) inconsistent with various provisions of the GATT 1994, and thus might have chosen not to address the GATS claims at all, much as the *Reformulated Gasoline* Panel chose not to address claims under the Agreement on Technical Barriers to Trade (TBT Agreement)[94] upon a finding that the measures in question were inconsistent with GATT. On the other hand, while *Reformulated Gasoline* claims under the TBT Agreement were, like those under GATT 1994, directed at harm to trade in goods, the harms alleged in *Bananas* were directed not only at the goods of complainants, but also at the service providers of certain of the complainants. From this perspective, had the Panel failed to address GATS issues, it could, at least theoretically, have left open the possibility that the EC would conform the banana regime to panel findings under GATT 1994 while leaving in place aspects of the regime which would continue to harm complainants' service providers.

4.5.2. Wholesale trade services

The Panel rejected the EC argument that its GATS commitments on "wholesale trade services" did not apply to operators under the banana regime who, the EC claimed, buy and import green bananas rather than engaging in reselling services of ripe bananas.[95] Based on an examination of the "wholesale trade services" description in the United Nations Central Product Classification system (CPC),[96] on which the system used for scheduling GATS commitments is based, the Panel concluded that wholesale trade services encompass subordi-

92. *See* Appellate Body Report, *supra* note 23, para. 211.

93. *See, e.g.*, Bananas Panel, *supra* note 1, para. 7.94 (Art. XIII(2.d) finding unnecessary in light of Art. XIII(1) finding); and para. 7.242 (unnecessary to make findings regarding BFA export certificates under GATT 1994 Art. III and X and under Licensing Agreement in light of Article I(1) finding). In support of this approach, the Panel relied on the Appellate Body decision in United States – Measures Affecting Imports of Woven Wool Shirts and Blouses From India, adopted 25 April 1997, WT/DS33/AB/R, AB-1997-1, at 19.

94. TBT Agreement, *supra* note 86.

95. *See* Bananas Panel, *supra* note 1, paras. 7.287 and 7.293, affirmed by the Appellate Body Report, *supra* note 23, para. 225.

96. UN Department of International Economic & Social Affairs, Provisional Central Product Classification, UN Doc. ST/ESA/STAT/SER.M/77.

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nate activities which accompany reselling of merchandise such as maintaining inventories, and that the CPC descriptions do not distinguish between green and yellow bananas.[97] In upholding the Panel decision, the Appellate Body also noted that wholesalers must purchase, and in some cases import, goods before they can resell them.[98]

The Panel and Appellate Body also concluded that vertically integrated companies which perform wholesale trade services are service suppliers.[99]

4.5.3. Scope of Article II obligation

Article II of the GATS requires MFN treatment for services and service providers unless a measure is covered by an exemption.[100] The complainants argued that the Article II(1) requirement of "no less favourable" treatment[101] applies both to formally identical and to formally different treatment. They argued that Article II(1) should be interpreted in light of paragraphs 2 and 3 of Article XVII which, like Article II(1), requires "no less favourable treatment" in paragraph 1.[102] Paragraph 2 explicitly states that the national treatment commitment of Article XVII(1) applies to both formally identical or formally different treatment, while paragraph 3 defines "less favourable treatment" as modifying the conditions of competition in favour of the domestic services or service suppliers.[103] The EC countered that Article II applies only to formally identical treatment, since the GATS drafters did *not* include language in Article II corresponding to that in paragraphs 2 and 3 of Article XVII.[104]

The Panel agreed with complainants that Article II(1) applies both to formally identical and formally different treatment, and that it requires no less favourable conditions of competition.[105] The Panel reasoned that paragraphs 2 and 3 of Article XVII codify and clarify this interpretation of Article XVII(1), without adding new obligations, and that since the identical language "no less

97. *Id.*, paras. 7.291-7.293.

98. *See* Appellate Body Report, *supra* note 23, paras. 226 and 228.

99. *See* Bananas Panel, *supra* note 1, para. 7.320, affirmed by the Appellate Body Report, *supra* note 23, paras. 227-228.

100. The Panel noted that the EC did not list "wholesale trade services" in the Annex of Art. II Exemptions. *See* Bananas Panel, para. 7.298.

101. GATS Art. II(1), *supra* note 3, states: "[w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service suppliers of any other country."

102. GATS Art. XVII(1), *id.*, states: "[i]n the sectors inscribed in its schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

103. *See* Bananas Panel, *supra* note 1, para. 7.299; *see also* Art. XVII GATS.

104. *Id.*, para. 7.300.

105. *Id.*, paras. 7.301-7.304.

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favourable treatment" is used in both Article II(1) and Article XVII(1), the ordinary meaning of the term would be the same in both cases.[106] The Panel also noted that object and purpose of the two provisions are similar, and that the formulation "no less favourable treatment" is derived from GATT Article III, which has been consistently interpreted to be concerned with conditions of competition.[107]

While agreeing that Article II(1) applies to *de facto* as well as *de iure* discrimination, the Appellate Body disagreed with the analysis of the Panel in comparing the MFN obligation of Article II with the national treatment obligation of Article XVII.[108] Instead, the Appellate Body emphasized that the MFN obligations of Article I of GATT 1994 have been applied to cases of *de facto* discrimination, and that the obligation imposed by Article II is unqualified.[109] The Appellate Body left open the possibility that Articles II and XVII may not have exactly the same meaning, but did not seek to answer this question.[110] The Appellate Body did not address the Panel's observation that, unlike the MFN and national treatment provisions of the GATT 1994, those of the GATS do, indeed, use the same formulation, "treatment no less favourable." Moreover, it does not appear that the Appellate Body's analysis will change the Panel's conclusion that a "conditions of competition" analysis applies under Article II. The Appellate Body did not review the Panel's application of this analysis with respect to individual aspects of the banana regime. However, while the Appellate Body's ruling may not ultimately affect the interpretation of GATS Article II, it may have implications for the interpretation of other WTO provisions in which the same language is used in different contexts. For example, the term "like product" or "like domestic product" appears in several GATT provisions such as Articles I(1), II(2.a), III(2), III(4), VI(1.a), VI(1.b), IX(1), XI(2.c), XIII(1), and XVI(4), and the drafting history of this term suggests that it may have "different meanings in different contexts".[111]

4.5.4. *Application of Article II and Article XVII obligations to operator category rules and activity function rules*

The Panel's application of Articles II and XVII to operator category rules and activity function rules followed a similar pattern. The Panel first concluded that the measure in question fell within the scope of the Article II or Article XVII

106. *Id.*, para. 7.301.
107. *Id.*, para. 7.302.
108. *See* Appellate Body Report, *supra* note 23, para. 231.
109. *Id.*, paras. 232-233. The Appellate Body cited Panel Report EEC – Imports of Beef From Canada, adopted 10 March 1981, BISD 28S/92, paras. 4.2-4.3, as an example of the application of GATT Art. I to *de facto* discrimination.
110. Appellate Body Report, *supra* note 23, para. 233.
111. EPCT/C.II/65, at 2.

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obligation.[112] It next undertook an examination of whether the measure in question modified the conditions of competition so as to provide less favourable treatment to complainant's service suppliers, notwithstanding the measures' formally identical treatment of service suppliers of complainants and those of EC and ACP countries.[113]

In addressing the latter issue, the Panel first found that complainants had submitted sufficient evidence that their service providers had a commercial presence in the EC.[114] There was no dispute that Chiquita and Dole are US companies, Del Monte is a Mexican company, and Noboa is an Ecuadorean company.[115] The complainants submitted a list of the EC companies "owned or controlled"[116] by these three companies, which the EC challenged as inadequate since it included no formal shareholder records or company registrations.[117] The Panel rejected this challenge, stating that the EC had not submitted information that would cast doubt on that submitted by complainants.[118]

The Panel thus appears to have established a fairly low threshold for meeting the initial burden of proof with respect to ownership of service providers. The EC's failure to attempt to rebut the evidence submitted (or even to deny its accuracy) settled the issue for the Panel.

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112. The analysis differed with respect to each article. Art. XVII is binding only with respect to sectors inscribed in a member's schedule, while Art. II applies to all measures in the absence of an exception listed in the member's Annex on Art. II Exemptions. Thus, the Panel found with respect to each measure that the EC had bound the wholesale trade service subsector with respect to supply through commercial presence; *see* Bananas Panel, *supra* note 1, paras. 7.306, 7.315-7.316, and 7.358. In its discussion of operator category rules, the Panel also clarified that "commercial presence" refers to the presence in the EC of complainant service suppliers that are juridical persons or are owned or controlled by such persons, and that entities providing "like" services are "like" service providers; *id.*, para. 7.318 and 7.322 respectively.

113. The Panel concluded that complainant's service suppliers receive treatment formally identical to that accorded EC and ACP service suppliers, because even though operator category rules and activity function rules are not applicable to service suppliers with respect to services provided for EC and traditional ACP bananas, complainant's service suppliers, like those of the EC or ACP countries, may provide services relating to EC and traditional ACP bananas; *id.*, paras. 7.324-7.326, 7.347, and 7.361.

114. *Id.*, paras. 7.329-7.331. The Panel rejected the EC argument that the nationality of the EC subsidiary was relevant, finding that the nationality of the parent company is dispositive; *id.*, para. 7.328.

115. *Id.*, para. 7.330.

116. Art. XXVIII(d) GATS provides that the maintenance of a juridical person constitutes "commercial presence", while Art. XXVIII(m) defines a "juridical person of another Member" as a juridical person which, in the case of commercial presence, is "owned or controlled" by persons of another Member.

117. *See* Bananas Panel, *supra* note 1, para. 7.331. Art. XXVIII(n) GATS provides that a juridical person is "owned" by persons of Member if more than 50 percent of the equity is owned by those persons, and that a juridical person is "controlled" by persons of a Member who have the power to name a majority of its directors or otherwise to legally direct its actions.

118. *Id.* The Panel also noted the complainants' argument that the information submitted was limited in part by confidentiality concerns, but the Panel did not rule on this basis.

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In affirming this decision, the Appellate Body stated that the Panel's decision was a factual conclusion, and declined to rule on that basis.[119] The Appellate Body declined to rule on several other issues for the same reason, including the question of whether data submitted by complainants demonstrated discrimination *after* the effective date of the GATS in 1995.[120] On the one hand, the Appellate Body's treatment of these issues can be viewed as required under the terms of the DSU, which limits appeals to "issues of law covered in the Panel report and legal interpretations developed by the Panel."[121] On the other hand, the question arises as to whether the sufficiency of evidence to meet an initial burden of proof may be characterized as a legal question, or whether, in this instance, the Panel had properly applied the *legal* standard set forth in Article XXVIII(n) for establishing that supplier organizations are "owned or controlled."[122]

The Panel began its analysis of the conditions of competition in the banana market by referencing several GATT Article III (national treatment) cases relating to this analysis in the context of formally identical treatment. Noting that the wording of Article XVII, paragraphs 2 and 3 is drawn from these cases,[123] the Panel cited them in footnotes for the proposition that trade effects are not relevant to this analysis,[124] and for the proposition that Article III requires effective equality of opportunities for imported products and covers laws and regulations which adversely modify the conditions of competition.[125]

In applying these general principles to operator category rules and activity function rules, the Panel focused on whether the ostensibly neutral categories established by these rules in fact categorized service suppliers by their origin, then examined whether the categories provided less favourable treatment to complainants' service suppliers. As described above, service suppliers fall into operator categories and activity functions based on past marketing and activity practices.

The Panel focused on "the relative share" of service suppliers in finding that most of complainants' service suppliers fell in Category A for "the vast majority" (around 95%) of their past marketing of bananas, and that most EC

119. *See* Appellate Body Report, *supra* note 23, para. 239.
120. *See, e.g.*, on the Panel's finding that the *de facto* discrimination existed after the entry into force of the GATS, Appellate Body Report, *supra* note 23, paras. 237, 239.
121. *See* Art. 17.6 DSU, *supra* note 21.
122. *See* note 117, *supra*.
123. *See* Bananas Panel, *supra* note 1, para. 7.327.
124. *Id.*, n. 495, citing Panel Report Canada – Administration of the Foreign Investment Review Act, adopted 7 February 1984, BISD 30S/140; Panel Report United States – Taxes on Petroleum and Certain Imported Substances, adopted 17 June 1987, BISD 34S/136 (Superfund); and Panel Report United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco, adopted 4 October 1994, DS 44/R.
125. Bananas Panel, *supra* note 1, nn. 496-497, citing Panel Report United States – Section 337, *supra* note 56; and Panel Report Italian Machinery, *supra* note 56.

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and ACP suppliers fell in Category B (only 6% to 28% of which was controlled by complainants' service suppliers).[126] Likewise, the Panel found that the "vast majority" of ripeners are EC suppliers.[127]

Working from the conclusion that Category B operators were largely EC and ACP suppliers, the Panel found that the EC's allocation of 30% of third country/non-traditional ACP banana licenses to Category B operators, regardless of whether they had traded in bananas from these sources in the past, modified the conditions of competition in favour of EC and ACP suppliers.[128] While licenses are tradeable, and non-EC/ACP suppliers were ultimately able to acquire licenses to import third-country bananas, Category B operators and ripeners (EC/ACP suppliers) were more often the sellers of licenses, and thus received the quota rents associated with the initial allocation of the licenses.[129] The Panel rejected evidence presented by the EC that the import market shares of the three major complainant service suppliers were not affected by the import licensing procedures, emphasizing that lack of significant change in market share does not demonstrate that there has not been a significant change in conditions of competition.[130]

The Panel therefore found that operator category rules created less favourable conditions of competition for complainants service suppliers *vis-à-vis* suppliers from EC and ACP countries, and are therefore inconsistent with GATS Articles XVII and II.[131] The Panel similarly found activity function rules inconsistent with Article XVII.[132]

The Panel's analysis diverged in important respects from that in another recent unadopted GATT panel decision which examined a formally identical measure, *Automobiles Taxes*.[133] Unlike the *Bananas* Panel, the Panel in *Automobile Taxes* went beyond statistical data demonstrating that EC automobiles were disproportionately represented among those subject to a US luxury tax on

126. Bananas Panel, supra note 1, paras. 7.333-7.334.

127. *Id.*, para. 7.362. In its appeal, the EU objected that the data submitted by complainants dated to 1992, and therefore did not prove *de facto* discrimination *after* the GATS entered into force in 1995. The Appellate Body claimed that the Panel had, in fact, found that discrimination continued to exist, although it cited a paragraph of the Panel Report (para. 7.308) which states only that the panel was examining whether discrimination continued after the GATS came into effect, and did not deal specifically with the age of the data actually examined. On this point, as well, the Appellate Body claimed that the panel's conclusion was a factual finding beyond the scope of its review; *see* Appellate Body Report, *supra* note 23, para. 237.

128. *Id.*, paras. 7.335 and 7.362.

129. *Id.*, paras. 7.336 and 7.362-7.363. The Panel also cited in support of its findings statements by EC sources that the allocation of these quota rents was intended to cross-subsidize Category B operators and ripeners; *id.*, paras. 7.339-7.340 and 7.367.

130. *Id.*, para. 7.337.

131. *Id.*, paras. 7.341 and 7.353.

132. *Id.*, para. 7.368. The Panel rejected a claim by Mexico that the activity function rules also were inconsistent with Art. II; *id.*, para. 7.369-7.372 (to be found exclusively in Mexico's Report).

133. Panel Report United States – Taxes on Automobiles, 11 October 1994, DS31/R (not adopted).

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automobiles, and focused instead on whether the $30,000 cut-off for the tax *inherently* disadvantaged EC automobiles.[134] It undertook this analysis in the context of an examination of the "aim and effects" of the luxury tax.[135] The Panel concluded that the $30,000 cut-off did not inherently disadvantage the EC, based on the fact that EC manufacturers produced cars valued both above and below $30,000, and could therefore change the mix of cars sold in the US.[136]

The *Bananas* Panel, by contrast, found the fact that complainants' service suppliers could also market EC and ACP bananas, and thereby avoid operator category rules and activity function rules altogether, relevant only to the finding that EC, ACP, and non-ACP suppliers receive formally identical treatment under the import licensing rules.[137] With regard to the more important issue of the impact of licensing rules on the conditions of competition, the *Bananas* Panel explicitly rejected as irrelevant claims by the EC that, for example, primary importers who wish to maintain market share could invest in or enter into contractual relationships with ripeners in order to qualify for ripener licenses.[138] The lesson of *Bananas* would thus appear to be that *de facto* discrimination may be demonstrated based largely on statistical data, without an examination of whether this data reflects inherent or permanent discrimination.

The Appellate Body took further aim at the "aim and effects" test in response to the EC's claims that the test should be applied in the GATS.[139] The Appellate Body found "no specific authority" in GATS Articles XVII or II for the aim and effects theory, noting that no GATS provision corresponds to the GATT Article III(1) principle out of which this theory developed, that regulations must not "afford protection" to domestic products. As it did in its consideration of import licensing rules under GATT Article III(4),[140] the Panel went out of its way to note that it had, in *Alcoholic Beverages*, rejected the aim and effects test in the context of Article III(2), and suggested that *Automobile Taxes* is inconsistent with its ruling in *Alcoholic Beverages*.[141]

The ability of WTO Members to defend measures which discriminate against or among foreign service suppliers – or foreign products – has thus been severely undercut by the *Bananas* decision. Any such defense will of necessity rely more heavily than it has in the past on the exceptions set forth in GATT Article XX and GATS Articles XIV and XV.

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134. *Id.*, paras. 5.11-5.15.
135. *Id.*, para. 5.10.
136. *Id.*, para. 5.14.
137. *See* Bananas Panel, *supra* note 1, paras. 7.325-7.326, 7.347, and 7.361.
138. *Id.*, para. 7.364.
139. *See* Appellate Body Report, *supra* note 23, para. 241.
140. *See* Section 4.4.2, *supra*, especially the text accompanying notes 64-66.
141. *Id.*

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4.5.5. Application of Article II and Article XVII obligations to BFA export certificates and hurricane licenses

The Panel's legal and factual analysis of BFA export certificate requirements closely tracks that relating to operator category rules and activity function rules. The Panel found that the EC provided more favourable treatment to Category B operators by exempting them from the requirement to match import licenses with BFA export certificates, since this meant that Category B operators did not have to share quota rents with the exporters. Since the Panel found that "most" Category B operators were of EC or ACP origin, while "most" Category A operators were from complainant countries, the Panel found the BFA export certificate requirements inconsistent with GATS Articles XVII and II.[142]

Likewise, with respect to hurricane licenses, the Panel found that since the "vast majority" of operators eligible for hurricane licenses (those which include or directly represent EC or ACP producers or producer organizations) are service suppliers of EC or ACP origin, the hurricane licensing system favoured these suppliers by providing them with quota rents, inconsistent with GATS Articles XVII and II.[143]

4.6. Nullification or impairment

The Panel found that the EC's infringement of obligations under numerous WTO Agreements constituted a *prima facie* case of nullification or impairment of benefits under Article 3(8) of the DSU, and that the EC had failed to rebut this presumption with respect to breaches of GATT, GATS, and Licensing Agreement rules.[144] Consistent with both the Panel's and its own decisions on the standing of the US to raise claims under the GATT 1994 and on the application of the non-discrimination provisions of the GATT 1994 and the GATS, the Appellate Body rejected EC claims that the failure of the US to export any bananas meant that the US could not have suffered any trade damage, and that the US had therefore not suffered any nullification or impairment of benefits.[145]

The Appellate Body recalled the Panel's finding that the US had a potential export interest, and that the US internal market could be affected by the EC ba-

142. *See* Bananas Panel, *supra* note 1, paras. 7.378-7.380 and 7.383-7.385.
143. *Id.*, paras. 7.392-7.393 and 7.396-7.397.
144. *Id.*, para. 7.398.
145. *See* Appellate Body Report, *supra* note 23, para. 250-254. The Appellate Body found that since the EC argued only with respect to the United States and the GATT, the Panel had erred in finding that the EC had failed to rebut the presumption of nullification or impairment with respect to other complainants and other WTO Agreements; *id.*, para. 250. The Appellate Body also suggested that the Panel had failed to provide an adequate rationale for its findings, but then proceeded to provide one; *id.*, para. 251.

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nana regime's effects on world markets.[146] Moreover, the Appellate Body affirmed the more general applicability in the *Bananas* case of the reasoning of the Panel in *Superfund*.[147] That Panel had concluded that a change in the competitive relationship contrary to Article III(2) must be regarded *ipso facto* as a nullification or impairment of benefits, and that a demonstration of no or insignificant trade effects is not a sufficient rebuttal.[148]

5. CONCLUSIONS

Undaunted by the complexity and volume of the issues it faced, the *Bananas* Panel established a broad, trade-liberalizing precedent. The Panel and Appellate Body reports reaffirmed and extended to the GATS the GATT principles that the non-discrimination provisions of the WTO protect competitive opportunities and relationships, and that actual trade effects are not relevant to this analysis. Likewise, the Panel and Appellate Body found these principles applicable in the context of standing and nullification and impairment.

In dicta, the Appellate Body again displayed its aversion to the "aim and effects" test as previously applied by GATT Panels to the analysis of GATT Article III, and sought to prevent its introduction in the context of the GATS. The Appellate Body also displayed its continued interest in providing guidance on these issues, even when they are not directly in dispute.

Bananas also firmly established the GATS as a meaningful tool in the arsenal of WTO Members wishing to challenge measures with an impact on both goods and services, and provided important clarification that GATS Article II applies to *de facto* discrimination, even if the Appellate Body's ruling leaves some doubt as to the nature of the *de facto* analysis.

The Appellate Body defined a narrowly prescribed GATT Article X, and explained its relationship to Licensing Agreement Article 1(3), while overruling the Panel's findings that origin-based licensing rules necessarily violate Article X. Moreover, the application of the Licensing Agreement to TRQs could prove significant in future cases involving agricultural TRQs.

In a decision which could well have repercussions extending far beyond the banana regime, the Appellate Body also reversed the limited victory granted by the Panel when it found that the Lomé waiver excused violations of GATT Article XIII. The Appellate Body's textual interpretation of the Lomé waiver as applicable to Article I only could severely limit the means by which the EC may provide benefits to ACP producers of agricultural products.

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146. *Id.*, para. 251.
147. *See* Panel Report Superfund, *supra* note 124, at para. 5.1.9.
148. *Id.*, para. 252.

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While the specific findings of the Panel and Appellate Body will have an important impact on future dispute settlement proceedings, equally or more important was the willingness and ability of these bodies to address the massively complex issues before them in an organized, well-reasoned manner. This, as much as anything else, will send an important signal that mere complexity and bulk will not shelter measures from careful scrutiny against the terms of the commitments WTO members have made. The credibility of the WTO dispute settlement system has been significantly enhanced by this decision.

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