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EC[1] – REGIME FOR THE IMPORTATION OF BANANAS (DS361) INITIATED BY COLOMBIA

EC[1] – REGIME FOR THE IMPORTATION OF BANANAS (DS364) INITIATED BY PANAMA

Report by the Director-General on the Use of His Good Offices
in the Above-Mentioned Disputes
(pursuant to Article 3.12 of the DSU)

The following communication, dated 21 December 2009, from the Director-General of the WTO to the Chairman of the Dispute Settlement Body, is circulated to Members for their information.

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1. This is my report to the Dispute Settlement Body (DSB) concerning the use of the good offices of the WTO Director-General in the above-mentioned disputes pursuant to Article 3.12 of the DSU and the Procedures under Article XXIII – Decision of 5 April 1966. As the parties have recently agreed on a way to settle these disputes, the use of my good offices as WTO Director-General in these disputes is no longer needed and resort to such good offices for this purpose is therefore deemed to have ended.

Introduction

2. In the dispute EC-Bananas III[2], certain aspects of the European Communities banana import regime in force at the time the dispute was initiated in 1996 were found to be inconsistent with WTO law. A number of proposals by the EC to modify its regime to bring it into compliance with the recommendations and rulings of the Dispute Settlement Body in this dispute were rejected by complaining countries. In April 2001, an agreement was reached between the EC, Ecuador and the United States that entailed, *inter alia*, the establishment by no later than 1 January 2006 by the EC of a tariff-only import regime for bananas as well as an interim arrangement consisting of: (1) a tariff rate quota scheme for MFN suppliers providing for an in quota tariff rate of 75 euros per tonne up to 2.2 million tons and an out of quota tariff rate of 680 euros per tonne thereafter; and (2) duty-free preferential tariff treatment to bananas for up to 750,000 tonnes originating in ACP countries. This interim arrangement would be made legally permissible under WTO rules through the adoption of several waivers agreed at the Doha Ministerial, as explained further below.

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[1] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

[2] *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27

3. A waiver from the application of Article I of the GATT was granted in Doha in November 2001 (the "Doha waiver") for the Cotonou Agreement trade preference, with a duration commensurate with these trade preferences, i.e., until 31 December 2007. This waiver also covered the trade preference for bananas. The waiver specified that the European Communities would rebind its WTO-bound import tariff of 680 euros per tonne on bananas at a level that "would result in at least maintaining total market access for MFN banana suppliers" comparable to that provided for under the interim arrangement. The waiver further provided for multilateral control over the implementation of this commitment through a two-stage arbitration procedure and specified that both the Article XXVIII negotiations and the arbitration procedures would have to be concluded before the entry into force of the new EC tariff-only regime. At the same time, a second waiver to cover the temporary duty-free allocation of 750,000 tonnes to ACP countries was granted until 31 December 2005.

4. During the course of 2005, the European Communities and interested MFN countries attempted but failed to reach agreement on the level of a new EC tariff rate that would maintain the MFN countries' "total market access" as set forth in the Doha waiver. Two arbitrations were held in accordance with the provisions of this waiver. These arbitrations concluded that the tariff levels proposed by the European Communities would not result in at least maintaining total market access for MFN banana suppliers comparable to that under the interim arrangement, taking into account all EC WTO market access commitments relating to bananas. The EC was therefore required to rectify the matter.

5. In response to the second arbitration award and without the prior agreement of MFN suppliers, the EC implemented a new banana import regime on 1 January 2006 (through Council Regulation 1964/2005). This was the EC banana regime in force when there was a subsequent request by several of the MFN suppliers for the DG to provide his good offices in this dispute as explained further below. Under this new EC regime, the MFN tariff applied to all bananas regardless of their origin was € 176 per ton and there were no quantitative restrictions. In addition, the European Communities offered until the end of 2007 a preference to bananas imported from countries that had signed the "Cotonou Agreement"[3]. This preference took the form of an annual quota of 775,000 tonnes of bananas free of duty from Cotonou participating countries (the "Cotonou Preference"). All bananas imported from Cotonou countries beyond this amount were also subject to the tariff of € 176 per ton.

6. In the meantime, at the Hong Kong Ministerial in December 2005, several Latin American countries had expressed serious concern over what they considered to be the EU's non-implementation of the earlier WTO's legal rulings and recommendations from the late 1990s in the banana dispute, particularly in the aftermath of the two arbitrations carried out earlier in 2005 under the Doha Waiver. To address these concerns, I nominated Mr Jonas Store, the Norwegian Foreign Minister, to act as a "Facilitator" to assist the parties in trying to find a solution and asked him to report to the General Council in due course. Minister Store conducted regular meetings for the next 18 months, assisting the parties and reporting periodically to the General Council on his efforts. During this process, the participants collected and shared data on imports/exports of bananas in the EU with a view to advancing the search for what should be the appropriate new EC tariff level within the framework of the agreements that had been reached in 2001.

7. Concurrently, implementation of the EC's new import regime for bananas on 1 January 2006 also triggered a number of legal complaints in the WTO by various MFN suppliers in late 2006, including legal proceedings initiated by Ecuador and the United States under the compliance panel

[3] The Cotonou Agreement obliged the European Communities to accept the importation of products originating from Cotonou beneficiary developing countries free of custom duties and charges having equivalent effect or, at least, at preferential terms, until 31 December 2007.

procedures of Article 21.5 (c) of the DSU. The reports of the two compliance panels and the Appellate Body in these two proceedings, which were adopted by the DSB in late 2008[4], confirmed that the new EC regime on banana introduced on 1 January 2006 was still inconsistent with the EU's WTO obligations.

Use of the Good Offices of the WTO Director-General

8. On 21 March and 22 June 2007, Colombia and Panama, respectively, requested new consultations under the DSU with the EC regarding its new banana regime of 1 January 2006 as set out in EC Council regulation (EC) No. 1964/2005[5]. When these consultations failed to lead to a satisfactory settlement, pursuant to Article 3.12 of the DSU and the Procedures under Article XXIII – Decision of 5 April 1966, Colombia and Panama, referred the matter to me on 2 November and 14 December 2007, respectively, with the request that, acting in my ex-officio capacity, I use my good offices with a view to facilitating a solution to their dispute with the EC.

9. Initially, Colombia and the EC had requested that their good offices process not include any third parties. They foresaw, however, that if they were to make progress, subsequent phases of the process could then involve other principal suppliers and parties in the dispute. In the meantime, however, Panama requested me to carry out a separate good offices procedure for its dispute with the EC. Colombia, Panama, and the EC then agreed that the two good offices procedures should run in parallel, although it was envisaged that at a later stage the two processes could be merged if there were sufficient progress toward a solution in both processes.

10. As this was the first time that the provisions of Article 3.12 of the DSU and the Procedures under Article XXIII – Decision of 5 April 1966 were used since the inception of the WTO, I initially sought from the parties their expectations as to what should result from the good offices process. In this regard and in accordance with paragraph 2 of the 1966 procedures, parties were requested to furnish me with all relevant information relating to the matter, including written explanations. I also requested the parties' views on which other Members or inter-governmental organisations they believed appropriate for me to consult with a view to promoting a mutually acceptable solution.

11. The parties stated their preference for a negotiated settlement as opposed to a purely legal process. The parties also agreed in both good offices processes to adhere to confidentiality with respect to the content of the proceedings. It was in this spirit that the two good offices processes were conducted.

12. I held four formal meetings in the Colombia-EC good offices process. There were also several informal bilateral/plurilateral meetings and contacts between the parties and the parties and myself. I also held two formal meetings in the Panama-EC process, with several informal bilateral/plurilateral contacts and meetings between the parties and the parties and myself.[6] During these two processes, with a view to assisting the parties in recording in text their apparent points of agreement and possible agreement, I put forward a series of written options as to what might be considered by the parties as an acceptable EC import tariff for bananas and under what conditions.

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[4] See See *EC – Bananas III (Article 21.5 – Ecuador II)*, WT/DS27/RW2/ECU and WT/DS27AB/RW2/ECU adopted on 11 December 2008; and *EC – Bananas III (Article 21.5 – US)*, WT/DS27/RW/USA, and WT/DS27/AB/RW/USA and Corr.1,adopted on 22 December 2008.

[5] Colombia's request for consultation available in documents WT/DS361/1 and G/L/818. Panama's request is available in documents WT/DS364/1 and G/L/822.

[6] Formal meetings of the Colombia-EC good offices were held on 6/12/2007; 17/01/2008; 4/02/2008; and, 7/02/2008. Formal meetings of the Panama-EC good offices were held on 26/02/2008 and 10/03/2008.

13. In parallel to these two formal good offices processes, and in the interest of transparency - which could contribute to an agreement among the parties that would be acceptable to all WTO Members – I also held a number of formal[7] and informal meetings with other WTO Members, including other MFN suppliers, ACP banana producers, other banana producers and importers.[8]

14. The good offices processes intensified in the first part of July 2008. In attempting to reflect the evolving positions of the parties and in an effort to lead them towards a balanced result, I then put forward in writing the elements of a draft comprehensive banana agreement on 12 July 2009. I informed the parties that these elements were my best effort at helping them find a solution to their disputes. I reiterated that I remained available should the parties need my assistance.

15. Consultations then continued directly between the parties during the latter half of July 2008 and through 2009. These direct consultations finally resulted in two agreements between the EC and its MFN bananas suppliers – one with all Latin MFN suppliers and the other with the United States. These two agreements were initialled by the parties on 15 December 2009. The text of the agreement between the EC and its Latin MFN suppliers - the "Geneva Agreement on Trade in Bananas" was then circulated to the General Council for its information (WT/L/784). At its meeting of 17-18 December 2009, the General Council took note of this agreement.

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[7] Three formal meetings were held with a group of ACP countries on 14/05/2008; 26/06/2008; and, 09/07/2008. A meeting was also held with a group of MFN suppliers/producers/importers on 9/July/2008.

[8] Countries involved in these consultations were: China, Costa Rica, Ecuador, Guatemala, Honduras, India, Indonesia, Malaysia, Nicaragua, Peru, Philippines, Thailand, United States and Vietnam. On occasions I held informal meetings with representatives of the ACPs, including with Amb Hiwat from Suriname, as head of the ACP working group on bananas.