

EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION OF BANANAS

Request for Consultations by Panama

The following communication, dated 22 June 2007, from the delegation of Panama to the delegation of the European Communities and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

Because the Government of Panama remains concerned about the WTO-inconsistency of the banana import regime of the European Communities ("EC") established under EC Council Regulation (EC) No 1964/2005 ("Regulation 1964")¹, and the continuing absence of access relief under that arrangement, it hereby requests that the EC consult on this matter pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), as the first step required under the procedures of the Decision of 5 April 1966 on Procedures Under Article XXIII (the "1966 Decision")² and DSU Article 3.12.

I. BACKGROUND

On 25 September 1997, the Panel and Appellate Body Reports in *European Communities – Regime for the Importation, Sale and Distribution of Bananas ("Bananas III")*³ were adopted by the Dispute Settlement Body ("DSB").⁴ Those reports found the EC banana tariff-quota and tariff-quota

¹ Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas, OJL 316/1, 2 December 2005 (hereinafter "Regulation 1964"). All references herein to Regulation 1964 also refer to its implementing regulations, which include, but are not limited to, Commission Regulation (EC) No 2014/2005, 9 December 2005, OJL 324/3; Commission Regulation (EC) No 2015/2005, 10 December 2005, OJL 324/5; Commission Regulation (EC) No 2149/2005, 24 December 2005, OJL 342/19; Commission Regulation (EC) No 219/2006, 9 February 2006, OJL 38/22; Commission Regulation (EC) No 325/2006, 23 February 2006, OJL 54/8; Commission Regulation (EC) No 566/2006, 6 April 2006, OJL 99/6; Commission Regulation (EC) No 966/2006, 29 June 2006, OJL 176/21; Commission Regulation (EC) No 1261/2006, 23 August 2006, OJL 230/3; Commission Regulation (EC) No 1789/2006, 5 December 2006, OJL 339/3; Commission Regulation (EC) No 34/2007, 16 January 2007, OJL 10/9; and Commission Regulation (EC) No 47/2007, 19 January 2007, OJL 14/4.

² GATT, *Decision of 5 April 1966 on Procedures Under Article XXIII*, BISD 14S/18.

³ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaints by Ecuador, Guatemala and Honduras, Mexico, and the United States*, WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R (hereafter "*Bananas III*-Panel Report"); Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997 (hereafter "*Bananas III*-Appellate Body Report").

⁴ Action by the Dispute Settlement Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/12, 10 October 1997.

licensing measures that were then in effect to be in violation of GATT Articles I, III, XIII:1, and XIII:2, and GATS Articles II and XVII.⁵

On 1 January 1999, the EC implemented "modified" banana tariff, tariff-quota, and licensing measures, which it claimed brought its banana regime into conformity with the *Bananas III* rulings. On 18 December 1998, the matter was referred by Ecuador to the original Panel under Article 21.5 of the DSU.⁶ On 14 January 1999, the United States sought authority under DSU Article 22.2 to suspend concessions against the EC for its continuing failure to comply.⁷

In separate, but consistent rulings, the Article 21.5 Panel and Article 22.6 Arbitrators found the EC's modified banana tariff-quota and licensing regime to be out of compliance with *Bananas III* and inconsistent with GATT Articles I, XIII:1, and XIII:2, as well as GATS Articles II and XVII.⁸

In April 2001, to comply with the rulings of *Bananas III*, the Article 21.5 Panel, and the Article 22.6 Arbitrators, the EC reached two settlement agreements - one with the United States⁹ and the other with Ecuador.¹⁰ The two agreements, each called the "*Understanding on Bananas*," contained substantially similar provisions. Both required the EC to take a phased series of steps over several years, beginning with "interim" tariff-quotas, to be followed by an EC "tariff-only" regime for imports of bananas no later than 1 January 2006.

Because elements of the *Understandings* were inconsistent with GATT Articles I and XIII, the agreements required that Ecuador and the United States "lift their reserves concerning the waiver of Article I of the GATT 1994" for the EC's preferential tariffs for ACP products and "actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994" for the ACP tariff quota on bananas.¹¹ Those provisions were intended to, and did, help the EC obtain temporary, conditional waivers from its WTO compliance obligations sufficient to permit the application of certain measures under the *Understandings* in violation of GATT Articles I and XIII. The conditional banana waivers were negotiated and granted at the Doha Ministerial in November 2001.

The GATT Article XIII waiver, which covered the EC's separate ACP tariff quota of 750,000 mt, was granted for a "transitional" period of four years and terminated on 31 December 2005.¹²

⁵*Bananas III-Panel Report*, para. 7.399; *Bananas III-Appellate Body Report*, para. 255.

⁶*European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/41, 18 December 1998.

⁷*European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse by the United States to Article 22.2 of the DSU*, WT/DS27/43, 14 January 1999.

⁸Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999 (hereafter "*Bananas-DSU Article 21.5 (Ecuador)*"), paras. 6.50, 6.160, 6.161, 6.163; Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999 (hereafter "*Bananas-DSU Article 22.6 (US)*"), paras. 5.96, 5.97.

⁹*European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and the United States*, WT/DS27/59, 2 July 2001 (hereafter "EC-US Understanding").

¹⁰*European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001 (hereafter "EC-Ecuador Understanding").

¹¹EC-US Understanding, para. E; EC-Ecuador Understanding, para. F.

¹²*European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16, 14 November 2001.

The waiver of Article I authorized the EC to maintain tariff preferences for two years after 1 January 2006 subject to the special additional conditions set forth in an "Annex" to the waiver.¹³ The banana Annex specifically required that the EC's future "tariff-only" regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas."¹⁴ To enforce that requirement, the Annex provided for special arbitration procedures to be invoked in advance of "tariff-only". The Annex guaranteed that in the event of two arbitration rulings against the EC, the Article I waiver as to bananas would automatically "cease to apply" upon implementation of the EC's "tariff-only" regime. The Annex also required that the EC conclude its GATT Article XXVIII negotiations "before the entry into force of the new EC tariff-only regime on 1 January 2006."

On 31 January 2005, the EC announced a proposed MFN tariff-only rate of 230 €/mt.¹⁵ Following a request for Arbitration by Panama and other Latin American supplying countries, the Arbitrator on 1 August 2005 found that the 230 €/mt rate failed the Annex standard.¹⁶

On 12 September 2005, the EC announced a revised "tariff-only" proposal, under which MFN suppliers would be subject to a tariff of 187 €/mt, and ACP suppliers would be subject to a zero-duty tariff quota of 775,000 mt.¹⁷ On 27 October 2005, following an EC request for renewed Arbitration, the Arbitrator issued its second ruling against the EC, finding the EC's revised proposal "failed to rectify the matter."¹⁸

As required by the Waiver Annex, the second negative Arbitration ruling caused the EC's waiver of GATT Article I to terminate upon entry into force of the EC's "tariff-only" regime as of 1 January 2006.

The EC's "tariff-only" Article XXVIII negotiations have not been concluded with Panama, which is a principal supplier in this matter,¹⁹ or with any of the other eligible MFN supplying countries.

II. THE EC MEASURES COVERED BY THIS REQUEST

On 29 November 2005, the EC approved a new banana "tariff-only" regime under the authority of Regulation 1964.²⁰ On 1 January 2006, that new regime took effect.

¹³ *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, Annex; see also Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, para. 64.

¹⁴ *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, Annex, tirets 2, 4.

¹⁵ *Article XXVIII:5 Negotiations: Schedule CXL – European Communities – Addendum*, G/SECRET/22/Add.1, 1 February 2005.

¹⁶ Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, para. 94.

¹⁷ "Commission presents revised banana tariff proposal," *EC Press Release*, IP/05/1127, 12 September 2005.

¹⁸ Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005, para.127.

¹⁹ Regulation 1964 Whereas clause 3, which identifies Panama as having a principal supplying interest in the context of the EC's withdrawal of its bananas concessions under Article XXVIII.

²⁰ *Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas*, OJL 316/1, 2 December 2005.

The measures under Regulation 1964 and its associated implementing regulations accord significantly differentiated access treatment to ACP and MFN bananas, and create new restrictions on MFN access, as follows:

- Bananas from Panama and other MFN origins are subject to an "autonomous" tariff of 176 €/mt, while ACP bananas enter duty-free within the 775,000 mt quota (i.e., at a 176 €/mt margin of preference over MFN suppliers) and at the 176 €/mt rate for all over-quota volumes.
- The "autonomous" MFN tariff of 176 €/mt is more than double the EC's previously applicable rate of 75 €/mt (which is bound in the EC's Uruguay Round Schedule and, from 1 January 1995 to 31 December 2005, was the only rate under which all MFN bananas entered).
- ACP bananas are accorded an enlarged, "autonomous" annual zero-duty tariff-quota reserve of 775,000 mt subject to import licensing rules.²¹ Panama gets no share of this tariff-quota and related measures, and receives no other quota allocation under the current arrangement.

Panama seeks to consult with the EC regarding the WTO-consistency of the above measures, particularly with regard to:

- the consistency with GATT Article I:1 of the different tariff treatment applicable to ACP and MFN banana-supplying countries;
- the consistency with GATT Articles II and XXVIII of the "autonomous" 176 €/mt tariff now applicable to MFN bananas and certain other bananas not benefiting from the tariff rate quota; and
- the consistency with GATT Article XIII:1 and XIII:2 of the tariff rate quota reserved exclusively for bananas of ACP origin.

This consultation request is without prejudice to Ecuador's pending DSU Article 21.5 action to determine whether the above measures, taken to comply with *Bananas III*,²² are consistent with the EC's compliance obligations, or to Panama's third-party rights in that proceeding.

Panama's single most important agricultural crop is bananas. Bananas represent approximately 16% of its agricultural output and 58% of its total agricultural exports. Nearly all of Panama's banana exports are shipped to the EC market. Panama's banana sector is one of the country's most important sources of employment, especially in the poorest rural regions of the country.

Panama accordingly urges the EC to accept early consultations, and to work with Panama on achieving a prompt and full resolution of this disagreement, taking properly into account Panama's developing-country interests as required by DSU Article 4.10, DSU Article 3.12, and the 1966 Decision.

²¹The 775,000 mt exclusive ACP reserve excludes bananas from ACP countries that are also beneficiaries of the EC's Everything But Arms ("EBA") legislation. EBA-origin bananas have been entitled to unlimited duty-free/quota-free access since 1 January 2006.

²²*European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador, Request for the Establishment of a Panel*, WT/DS27/80, 26 February 2007. The Article 21.5 panel was established at the 20 March 2007 DSB meeting.

I respectfully ask that you advise me of the possible dates in the next week or two when EC representatives would be available to engage in consultations with my Government.
