

WORLD TRADE ORGANIZATION

RESTRICTED

WT/DSB/M/235

30 August 2007

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Dispute Settlement Body
12 July 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 12 July 2007

Chairman: Mr. Bruce Gosper (Australia)

1. European Communities – Regime for the importation, sale and distribution of bananas

- (a) Recourse to Article 21.5 of the DSU by the United States: Request for the establishment of a panel (WT/DS27/83)

1. The Chairman drew attention to the communication from the United States contained in document WT/DS27/83, and invited the representative of the United States to speak.

2. The representative of the United States said that the Bananas dispute was the longest-running dispute in the history of the WTO. Regrettably, more than a decade after this dispute had begun, the EC still appeared not to have come into compliance with the DSB's recommendations and rulings. The United States had been an original complaining party in the Bananas dispute and retained an ongoing, substantial interest in compliance by the EC with the DSB's recommendations and rulings. As it had stated before, the United States believed a negotiated settlement to this dispute would best serve the interests of all parties. The United States had delayed seeking establishment of a panel because it had thought this would help the EC and MFN suppliers to reach an agreement. However, the United States had reluctantly concluded that delay in seeking recourse to Article 21.5 of the DSU did not seem to have helped to resolve this issue, and it must request that a compliance panel be established at the present meeting.

3. The original panel, established on 11 April 1996, had found – and the Appellate Body had later confirmed – over a dozen breaches of the GATT 1994 and the GATS. The EC's reasonable period of time had expired on 1 January 1999. The EC's first modifications to its banana import regime had been found in breach shortly thereafter. The EC had then announced a second set of changes; namely, that after a five-year "transitional period", it would implement a tariff-only regime for bananas. The United States had considered that such a development would be a positive step towards resolving this dispute. And, despite the fact that this would entail a lengthy delay in compliance with the DSB's recommendations and rulings, it had agreed to give the EC the "transition" time that it had requested.

4. After exhausting the "transition" time, however, the EC had chosen not to implement a tariff-only banana import regime. Rather, it applied a zero duty to imports of bananas originating in African, Caribbean and Pacific (or "ACP") countries in any quantity up to 775,000 metric tons. For bananas originating in other countries, however, the EC applied a duty of 176 euros/metric ton. These "MFN" bananas had no access to the duty-free tariff-rate quota. The United States considered that, due to these features, the EC's banana import regime remained inconsistent with the EC's obligations

under the GATT 1994, and the EC had not come into compliance with the DSB's recommendations and rulings. Similar concerns had been raised by Members repeatedly in DSB meetings over the past year and a half. And the United States had heard repeatedly about the serious disadvantage to which the EC's banana import regime was putting MFN suppliers, including developing countries like Ecuador, Honduras, Panama, and Nicaragua, whose economies were heavily dependent on their bananas trade. The United States had called on the EC to engage in serious negotiations to put an end to this dispute.

5. Unfortunately, these efforts had been unsuccessful. The United States remained fully committed to a negotiated settlement to this dispute that was both mutually-acceptable and consistent with the EC's WTO obligations. Nonetheless, with over a decade of delay and the deteriorating market conditions for MFN suppliers, the United States now sought recourse to dispute settlement under Article 21.5 of the DSU to help secure the EC's compliance with the DSB's recommendations and rulings. The United States, therefore, requested that the DSB establish a panel pursuant to Article 21.5 of the DSU at the present meeting. The United States understood that the EC was prepared to accept the establishment of a panel at the present meeting.

6. The representative of the European Communities said that this unfortunate move by the United States disregarded the efforts that the EC continued to make in order to reach a negotiated solution, which would take into account the interests of all the banana exporting countries. The US move was even more regrettable, taking into consideration that the United States was not a producer or exporter of bananas, so its interest in this case was more than questionable. Furthermore, the US case, like Ecuador's case, was targeted against the long-standing preferential treatment for developing countries such as the ACP countries. The EC strongly objected to the US claims under Article 21.5 of the DSU. The EC had already implemented the old banana WTO dispute settlement ruling in 2001. In addition, the current regime was fully compatible with the EC's WTO commitments.

7. From a procedural point of view, the EC would first like to note that the US request for the establishment of a panel should have been preceded by consultations with the EC. Article 21.5 procedures were also subject to disciplines under Article 4 of DSU. Having said that, in order to facilitate the task of the Panel composed in the context of the case initiated by Ecuador in harmonizing both DS proceedings, as envisaged in Article 9.3 of the DSU, the EC had decided not to object to the US request.

8. The representative of Ecuador said that his country supported the US request for the establishment of a panel at the present meeting to determine whether the EC had complied with its obligations under the WTO Agreement, concerning its regime for the importation, sale and distribution of bananas. His delegation shared the legal concerns of the United States. The same concerns had led Ecuador to file a similar complaint before the DSB, which was now being carried out under Article 21.5 of the DSU. However, his delegation regretted that despite the willingness shown by Ecuador to reach a negotiated solution to this dispute, which meant delaying the legal process for almost three months in the hope that a serious and concrete proposal would be forthcoming, the EC had decided to exclude Ecuador from the negotiations it was currently holding with all MFN banana suppliers. The EC had taken its decision on the grounds that Ecuador exercised a legitimate legal right under the WTO Agreement.

9. The EC's attitude set a negative precedent for any future dispute, since it disregarded the DSU provisions that encouraged the parties to a dispute to seek a negotiated solution at any stage of the process. Ecuador wondered how the EC would have reacted if the situation were the other way around; i.e. if the EC were ready to negotiate, while exercising its legal rights, and met with the opposite attitude from the other party. This precedent is even more contradictory since this was a dispute between a developed Member and a developing Member. Notwithstanding the foregoing, Ecuador reiterated its readiness to seek a negotiated solution that would put an end to this long-

standing dispute. As the world's first exporter of bananas and a principal supplier to the EC's market, Ecuador would not accept any agreement to be negotiated without its participation. Ecuador reiterated its support for the US request and hoped that the DSB would establish a panel at the present meeting.

10. The representative of Jamaica said that her country had always been supportive of the attempts made in the past by the parties concerned to seek a negotiated solution in respect of the Bananas dispute; a negotiated solution which should aim at preserving the long-term interests of Jamaica and other ACP banana suppliers. Jamaica, therefore, regretted that the United States had now joined this already complex dispute and was now requesting that the DSB establish a panel. The adverse implications of this new development for her country's already scarce human and financial resources and for its wider economic development should not be underestimated. Nevertheless, Jamaica wished to signal its intention to request enhanced third-party participation in the panel's proceedings.

11. The representative of Nicaragua said that her country joined others in endorsing the US request for an Article 21.5 panel to review the measures taken by the EC to comply with the recommendations in the Bananas III dispute. Nicaragua, too, regretted the EC's continuing discrimination and the absence of a mutually satisfactory solution. Nicaragua had been seeking relief from that discrimination for over 19 months, since the EC's regime had first been announced. While the EC had consistently expressed a preference for negotiations, rather than litigation, no meaningful immediate relief had yet been offered. Nicaragua's banana industry had no prospect of returning to the EC's market under the burden of a US\$4.30/box tariff at the border, especially when other competitive supplying countries were entering duty-free. Unless that discriminatory burden was substantially lifted, quickly and on an enforceable basis, Nicaragua's industry would face permanent exclusion from the EC's market. Nicaragua was, therefore, grateful for the United States' decision to use the DSU expedited enforcement procedures, along with others in Latin America, to try to facilitate a solution. Nicaragua looked forward to working in close coordination with the United States and other concerned MFN parties as these efforts progressed.

12. The representative of Panama said that his country fully supported the US request for the establishment of a panel. Panama believed that the request was properly raised under Article 21.5 of the DSU and encouraged its approval at the present meeting. When the EC had announced its regime 19 months ago, it had called its new measures the EC's final "compliance" step in the Bananas III dispute. While the EC was right to relate the current regime to the Bananas III dispute, it was wrong to claim compliance. The inconsistencies in these tariff and tariff-quota arrangements had been discussed in many previous meetings of the DSB: (i) the current tariff treatment violated Article I of the GATT 1994 by granting ACP bananas far better treatment than MFN bananas; (ii) the EC's 775,000 mt ACP tariff quota violated Article XIII of the GATT 1994 by denying MFN suppliers access to that quota or comparable treatment; and (iii) the EC's "autonomous" 176 €/mt rate violated Articles II and XXVIII of the GATT 1994 by breaching the EC's schedule commitments and compensatory obligations.

13. The unusually large number of WTO proceedings that had been brought against these violations in recent months should make clear how troublesome the EC's banana regime had become. For Panama, this arrangement had been particularly concerning, striking at the heart of its economy. Bananas constituted Panama's most important agricultural crop and represented nearly 60 per cent of its total agricultural exports. Most of Panama's bananas were exported to the EC, making Panama a "primary supplier" to the EC's market. Since January 2006, the EC's 135 per cent increase in ACP preferences had led to trade and investment shifts in favour of the ACP countries, to the competitive detriment of Panama and other MFN suppliers. Panama needed relief and stood ready to negotiate a solution that provided immediate, substantial, and enforceable access improvements. Until that solution could be found, Panama joined Ecuador's Article 21.5 case as a third party, and had requested

its own separate 1966 procedures on this matter. Panama would join the dispute initiated by the United States under Article 21.5 of the DSU as a third party to make clear its commitment to secure an acceptable solution through all means necessary.

14. The representative of Cameroon said that first he wished to ask whether the United States exported bananas to the EC's market. In previous meetings, Members had had the opportunity to listen to the US delegation which emphasized the need for a negotiated solution for all the parties concerned; i.e. the EC, the Latin American and ACP banana suppliers. As the EC had rightly stated, the US request for a panel at this stage disregarded and disrupted the efforts the EC continuously tried to make to reach a negotiated solution, which would take into consideration and into account the interests of all the banana exporting countries. The panel would put additional pressure on the EC to depart from negotiations of a solution amongst the parties concerned. Cameroon strongly supported the negotiations. Like Jamaica, if and when such a panel were to be established, Cameroon would seek enhanced third-party participation in the panel's proceedings.

15. The DSB took note of the statements and agreed, pursuant to Article 21.5 of the DSU, to refer to the original Panel, if possible, the matter raised by the United States in document WT/DS27/83. The Panel would have standard terms of reference.

16. The representatives of Brazil, Cameroon, Colombia, Dominican Republic, Ecuador, Jamaica, Japan, Nicaragua and Panama reserved their third-party rights to participate in the Panel's proceedings.
