

EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION OF BANANAS

Request for Consultations by Colombia

The following communication, dated 21 March 2007, from the delegation of Colombia 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.

My authorities have instructed me to request the European Communities ("EC") to consult with Colombia pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Paragraph 3 of the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994 on the regime for the importation of bananas that the EC has applied since 1 January 2006.

Background to the consultations requested by Colombia

In the dispute *EC – Bananas III*, certain aspects of the EC's previous banana import regime were found to be inconsistent with WTO law.¹ The EC reached Understandings with Ecuador² and the United States³ identifying means for the resolution of that dispute. According to these Understandings, the EC was to "introduce a Tariff Only regime for imports of bananas no later than 1 January 2006",⁴ to rebind its import tariff on bananas, and to initiate "GATT Article XXVIII negotiations ... in good time to that effect ..."⁵

Both Understandings provided for the application of three tariff-rate quotas until 31 December 2005, including a zero duty tariff-rate quota for bananas originating in ACP States ("ACP bananas") up to an annual quantity of 750,000 tonnes.⁶ To enable the EC to accord this tariff-

¹ See Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R; Panel 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; and 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/ECU, 24 March 2000.

² As contained in the document "European Communities – Regime for the Importation, Sale and Distribution of Bananas, Understanding on Bananas between Ecuador and the EC", WT/DS27/60, G/C/W/274.

³ As contained in the document "European Communities – Regime for the Importation, Sale and Distribution of Bananas, Communication from the United States", WT/DS27/59, G/C/W/270.

⁴ WT/DS27/59 and WT/DS27/60, para. B.

⁵ WT/DS27/60, para. B.

⁶ WT/DS27/59 and WT/DS27/60, Annex II, para. 3.

rate quota, the EC was granted a waiver from Articles XIII:1 and XIII:2 of the GATT 1994 until 31 December 2005 (the "Article XIII Doha Waiver").⁷ Furthermore, to enable the EC to provide preferential tariff treatment to products of ACP origin, as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement, the EC was granted a waiver from Article I of the GATT 1994 until 31 December 2007 (the "Article I Doha Waiver").⁸

In respect of bananas, the application of the Article I Doha Waiver beyond 31 December 2005 was made subject to a number of terms and conditions. The waiver specified that the EC shall rebind its import tariff on bananas at a level that "would result in at least maintaining total market access for MFN banana suppliers".⁹ It further provided for "multilateral control on the implementation of this commitment"¹⁰ through a two-stage arbitration procedure and specified that both the "Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006."¹¹

In a communication dated 31 January 2005, the EC stated that it envisaged rebinding its import tariff for bananas at the level of 230€/tonne.¹² Following the receipt of this communication, Colombia and other MFN banana suppliers (the "Interested Parties") initiated the arbitration procedure contemplated in the Article I Doha Waiver. The Arbitrator determined that the EC's "envisaged rebinding [of 230€/tonne] would not result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments relating to bananas".¹³

The Article I Doha Waiver required the EC to "rectify the matter" if the Arbitrator were to find that the rebinding initially proposed would not result in at least maintaining total market access for MFN banana suppliers.¹⁴ On 13 September 2005, the EC notified the Interested Parties that it intended to rectify the matter by setting its import tariff for bananas at the level of 187€/tonne and establishing a zero duty tariff-rate quota of 775,000 tonnes per year for ACP bananas. Subsequently, the EC initiated the second stage of the arbitration procedure to determine whether its proposal would at least maintain total market access for MFN banana suppliers. Once again, the Arbitrator determined that the EC proposal failed that standard and that, consequently, the EC had "failed to rectify the matter, in accordance with the fifth tiret of the Annex to the Doha Waiver."¹⁵ On 1 January 2006, the EC implemented a new regime for the importation of bananas under which the tariff levied on bananas of MFN origin ("MFN bananas") was set at 176€/tonne, and ACP bananas may be imported at zero duty up to an annual quantity of 775,000 tonnes (the "ACP TRQ").

Measure at issue and legal basis of Colombia's complaint

The measure at issue is the EC's the new import regime for bananas set out in (i) Council Regulation (EC) No 1964/2005 of 29 November 2005 on the tariff rates for bananas and

⁷ As contained in document "European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001", WT/MIN(01)/16.

⁸ ⁸ As contained in the document "European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001", WT/MIN(01)/15.

⁹ Article I Doha Waiver, 11th preambular paragraph.

¹⁰ *Ibid.*

¹¹ Annex to the Article I Doha Waiver, 5th tiret.

¹² G/SECRET/22/Add.1.

¹³ 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.

¹⁴ Annex to the Article I Doha Waiver, 5th tiret.

¹⁵ 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.

(ii) Commission Regulation (EC) No 2014/2005 of 9 December 2005, as amended by Commission Regulation (EC) No 566/2006 of 6 April 2006, on licences under the arrangements for importing bananas into the Community in respect of bananas released into free circulation at the common customs tariff rate of duty, and (iii) all other legal instruments implementing, relating to, or amending any of the foregoing.

Colombia considers that the new import regime for bananas is inconsistent with the GATT 1994 for the following reasons:

1. The application of a tariff of 176€/tonne to imports of MFN bananas is inconsistent with Article II:1 of the GATT 1994 because it is in excess of the duties set forth under heading 08030019¹⁶ of the EC's Schedule of Concessions. That schedule provides for an in-quota duty of 75€/tonne within a tariff-rate quota of 2.2 million tonnes. The levying of import tariffs in excess of 75€/tonne for *all* imports of MFN bananas is inconsistent with this concession. For this reason, before applying to MFN bananas a tariff higher than 75€/tonne, the EC should have renegotiated its tariff concession on bananas in accordance with the procedures set out in Article XXVIII of the GATT 1994, as agreed to in its Understandings with Ecuador and the United States, and as contemplated under the Article I Doha Waiver.
2. Only ACP bananas benefit from the application of a zero tariff. The denial of this advantage to MFN bananas is inconsistent with Article I:1 of the GATT 1994. This inconsistency cannot be justified under the Article I Doha Waiver because that waiver ceased to apply to bananas as of 1 January 2006, given the Arbitrator's determination that the EC had failed to rectify the matter. In any case, the EC cannot invoke this waiver to justify the inconsistency with Article I:1 of the GATT 1994 because it does not observe the terms and conditions of the waiver. In particular, it has failed to rebind its import tariff on bananas and at a level that results in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market-access commitments.
3. The application of the ACP TRQ entails discrimination between ACP bananas and MFN bananas inconsistent with Articles XIII:1, XIII:2, and XIII:5 of the GATT 1994. This inconsistency cannot be justified under the Article XIII Doha Waiver because that waiver expired on 31 December 2005 and has not been extended.¹⁷

Procedural Aspects

The Understanding between the EC and Ecuador, the EC and the United States, and the Article I Doha Waiver envisaged a final resolution of a long-standing dispute by 1 January 2006. Regrettably, the EC has once again taken measures inconsistent with WTO law that seriously harm an important sector of Colombia's economy. As a developing country heavily dependent on its exports of bananas, Colombia can ill-afford yet another lengthy dispute settlement proceeding conducted according to standard time frames. Accordingly, Colombia requests the EC to hold consultations within the time frame set out in Article 4.8 of the DSU for cases of urgency, that is within 10 days after the date of receipt of this request. Should these consultations not lead to a satisfactory settlement, Colombia will consider referring the matter to the Director General pursuant to Article 3.12 of the DSU and the Decision of 5 April 1966 (BISD 14S/18) in the hope that his good

¹⁶ Bananas are classified under heading 08030019 in CN 99 and under heading 0803 00 12 in Schedule CXL.

¹⁷ The EC had submitted a request for an extension of this waiver (see "Request for the extension of Waiver under GATT Article XIII – Tariff Rate Quota for Bananas of ACP origin", G/C/W/529, 11 October 2005). However, that request has not been approved.

offices will facilitate a rapid solution to this dispute and, if necessary, request the establishment of a panel in accordance with applicable accelerated procedures.

I look forward to receiving your reply to this request for consultations. I suggest that the precise date of the consultations be discussed between our missions.
