

COMMUNICATION FROM NICARAGUA

The following communication, dated 30 November 2005, from the delegation of Nicaragua to the delegation of the European Communities, to the Chairman of the Dispute Settlement Body and to the Chairman of the General Council, is circulated at the request of Nicaragua.¹

EUROPEAN COMMUNITIES – BANANA IMPORT REGIME AND ACP-EC PARTNERSHIP AGREEMENT

Request for Consultations by Nicaragua pursuant to Article 21.5 of the DSU

Pursuant to the expedited compliance review procedures of Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Nicaragua hereby request that the European Communities (EC) engage promptly in consultations with my Government regarding the WTO-inconsistency of the EC Council Regulation governing the import regime for bananas adopted on 29 November 2005 (the "new Regulation").²

Background

On 25 September 1997, the Dispute Settlement Body (DSB) adopted the report of the Panel in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, as modified by the Appellate Body ("*EC – Bananas III*").³ The report's recommendations and rulings included, among others, the recommendation that the EC bring all measures found to be inconsistent with the GATT and GATS into conformity with its obligations under those agreements.

As a result of *EC – Bananas III*, the EC in April 2001 reached two "Understandings on Bananas", one between the EC and United States⁴, and the other between the EC and Ecuador.⁵ The other MFN banana supplying countries that were a party to, or had an interest in, *EC – Bananas III* were not bound by those Understandings.

¹ Note by the Secretariat: Circulation of this communication under the two document series referred to above is without prejudice to any Member's rights and obligations.

² Council of the European Union, Council Regulation on the tariff rates for bananas, 14441/05 AGRI 297 WTO 199 ACP 148 AMLAT 93 OC 832, 25 November 2005.

³ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R.

⁴ WT/DS27/59, 2 July 2001.

⁵ WT/DS27/60, 9 July 2001.

On 14 November 2001, the WTO adopted a Ministerial Decision entitled *European Communities – The ACP-EC Partnership Agreement* (the "Doha Waiver"), which requires with respect to bananas that any new EC "rebinding" installed as of 2006 must "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas".⁶ The Doha Waiver further authorizes two rounds of special arbitration to uphold its built-in legal standard governing bananas. It mandates that if both arbitrations determine that the EC's envisaged rebinding(s) fail that standard, the Waiver of GATT Article I will cease to apply to bananas upon entry into force of any new EC tariff regime. The Doha Waiver also requires that Article XXVIII negotiations be concluded before any new EC banana regime is implemented.

Two Arbitration Awards have now found against the EC's 2006 banana proposals. The first Award, issued on 1 August 2005, found that the EC's proposed increase in the MFN banana tariff to 230 €/mt would not satisfy the Doha Waiver standard.⁷ The second Award, issued on 27 October 2005, found that the EC's proposed 187 €/mt MFN tariff, ACP tariff rate quota (TRQ), and zero-duty/quota-free treatment for countries covered by "Everything But Arms" ("EBA") would fail to "rectify the matter".⁸ As required under the terms of the Doha Waiver, that second determination against the EC will cause the Waiver of GATT Article I on bananas to terminate upon implementation of any EC tariff-only regime.

As of 31 December 2005, the EC's waiver of GATT Article XIII for its ACP banana quota of 750,000 mt will terminate.⁹ On 11 October 2005, the EC circulated a request to extend that waiver through 31 December 2007 to cover an enlarged ACP TRQ of 775,000 mt.¹⁰ No WTO action has been taken on that request.

New EC Measures

On 29 November 2005, the Council of the European Union formally adopted the following new banana import measures to apply as of 1 January 2006:

Article 1

1. As from 1 January 2006 the tariff rate for bananas (CN code 0803 00 19) shall be EUR 176/tonne.
2. Each year from 1 January, starting from 1 January 2006, an autonomous tariff quota of 775 000 tons net weight subject to a zero-duty rate shall be opened for imports of bananas (CN code 0803 00 19) originating in ACP countries.¹¹

The new Regulation further authorizes the promulgation of implementing rules and "transitional measures necessary to facilitate the switch-over" to the new EC banana arrangement.¹²

⁶ WT/MIN(01)/15, WT/L/436.

⁷ *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001, Award of the Arbitrator*, WT/L/616, dated 1 August 2005.

⁸ *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001, Award of the Arbitrator*, WT/L/625, dated 27 October 2005.

⁹ *European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16, 14 November 2001; WT/L/437, 7 December 2001.

¹⁰ G/C/W/529, 11 October 2005.

¹¹ Council of the European Union, Council Regulation on the tariff rates for bananas, 14441/05 AGRI 297 WTO 199 ACP 148 AMLAT 93 OC 832, 25 November 2005.

¹² *Id.*

WTO Inconsistencies

Without prejudice to whether consultations are required under DSU Article 21.5, and to all rights under other provisions of the DSU, my Government requests the EC to engage in consultations without delay concerning the WTO-inconsistency of all fundamental features of this new Regulation, including:

- the inconsistency of the 176€/mt MFN rate with the Doha Waiver in all its parts, the Arbitration Awards of 1 August and 27 October 2005, GATT Article XXVIII, and *EC – Bananas III*; and
- the inconsistency of the zero-duty ACP tariff quota of 775,000 mt and over-quota ACP tariff of 176€/mt with the Doha Waiver in all its parts, the Arbitration Awards of 1 August and 27 October 2005, GATT Articles I and XIII, and *EC – Bananas III*.

These inconsistencies also nullify and impair benefits accruing to my country, directly and indirectly, under the GATT, and impede the objectives of the WTO Agreements and Doha Development Agenda.

My Government further reserves its rights to a review under Article 21.5 of other aspects of the new regime, including the licensing and other implementation and transitional provisions that are now in the form of discretionary authority.

Because the inconsistencies referenced above are to take effect on 1 January 2006 and will have a serious adverse impact on our developing economies, we respectfully ask the EC to advise my Government of the possible dates during the next week or two on which EC representatives would be available to engage in consultations on the measures described above. As required by DSU Article 21, this disagreement over the WTO-consistency of the EC's new banana regime must be resolved promptly in order to safeguard our developing-country interests.
