

European Communities – Regime for the Importation, Sale and Distribution of Bananas; Recourse to Article 21.5 by the United States

Geneva, Tuesday, 06 November 2007, 10:00 - 12:00

Preliminary remarks by Chairman:

This is the very first hearing in front of a WTO panel where the public is permitted to attend the hearing from the public gallery in the same room as the panel and the parties. While this arrangement has been made with the express consent of the parties, the panel has no intent to set a precedent.

Furthermore, the panel reserves the right to suspend the meeting and continue in closed session (should there be any disruption caused by a member of the public.)

Yesterday afternoon, the panel received a request on the part of a number of NGOs to broadcast the hearings live over the internet. While the panel understands the NGOs' wish for greater transparency,

This panel has been established on 27 July 2007, WT/DS/27/83.

I. Opening statements

1. United States

(Written version distributed to members of the public.)

2. EC

(Written version distributed, but not to members of the public.)

Points raised by the EC

1. Legal effect of agreements between parties to a dispute

The EC considers the US-EC Understanding to constitute a mutually agreed solution within the meaning of Art. 3.6 (and 3.20) DSU to which Art. 31(3)(c) of the Vienna Convention on the Law of Treaties applies.

In addition, both international law in general and WTO law recognise the principle of good faith according to which the legal effects of the Understanding are to be assessed.

By denying the proposed legal effect to the US-EC Understanding, the US is in effect asking the panel to remove the legal certainty of agreements signed by WTO members.

2. While the EC's 2004/2005 import regime may be considered to constitute a "measure taken to comply", the EC's current tariff-only regime does not constitute a "measure taken to comply".

The EC, in view of the panel and AB decisions, is under no obligation to introduce a tariff only-regime. The tariff-only regime does not derive from the US-EC Understanding.

3. Maintenance of market access

The current EC banana import regime introduced on 1 January 2006 more than maintains market access for MFN countries. The EC is, however, not required to guarantee an actual volume of trade to MFN countries, which the current regime does not do.

The panel should take into consideration the export performance of MFN countries: increased volume of exports means that market access has been maintained.

4. The Doha waiver

It could be argued that the EC would never have accepted the waiver subject to the limitations brought forwarded by the US.

The EC Art. XIII waiver is still in force.

In any case, there is no need for a separate Art. XIII waiver if a waiver to Art. I justifying the use of a tariff rate quota has been made.

This is evidenced by GATT/WTO practice (also on the part of the US). There are a number of such Art. I waivers which are now incorporated in GATT 1994.

This consistent practice establishes a common understanding among WTO members.

5. The contested measure does not in any way affect the complaining party. The US has suffered no nullification or impairment.

In denying the need for nullification or impairment in order to bring a claim, the US is in effect asking the panel to delete Art. 3.8 from the DSU.

II. Questions & comments by parties or third parties

US delegation: No questions or comments.

EU delegation: No questions or comments.

Third parties may pose questions to parties but parties are under no obligation to respond.

Panama: Reserve right to pose questions tomorrow or later on today.

(Chairman: No need to ask floor for that.)

III. Questions by Panel

Eleven questions

1. Question to EU:

Footnote 4 of first written submission: Can the Cotonou Agreement be described as non-discriminatory or is its application limited to a certain geographical region?

Could MFN banana exporters benefit from C. agreement? Could US benefit from C. agreement? Could South American banana exporters such as Ecuador benefit from C. agreement?

EU: Developing countries may become members of C. agreement, but agreement will expire at the end of this year. Participation is not limited to any geographical area but rather to certain levels of development. If any developing country can show that it has the same structural, economic and development difficulties as the ACP countries, it can become a member of the C. agreement. New members have been accepted regularly (East Timor application).

Dominican Republic is part of the C. agreement. Belize participated.

US could not become member as no such needs. Other Latin American countries could.

2. Question to ACP (response may be given tomorrow; ACP chose to answer tomorrow)

Para. 55 of written statement: Are ACP countries arguing that if the US considers?

3. Question to US

Has the legal and factual basis of the US-EC Understanding changed between the time it was signed and the time it was notified?

US: No. The US has never considered the Understanding to constitute a mutually accepted solution, but nevertheless as important.

Therefore, no joint notification to DSB under Art. 3(6).

4. Question to both parties and Ecuador

Why were the two Understandings not notified jointly to the DSB and why were they only notified with a delay of two months?

Ecuador: No specific reason.

US: Thought no need to notify, notification to DSB only after EC had notified DSB unilaterally.

Chairman: No change in legal and factual assumptions with respect to agreement.

US: No. Confirmed.

EC: No specific reason for delay.

EC and US were still discussing certain aspects after Understanding was signed.

Bureaucracy may have caused further delay.

When notified to DSB, EC surprised that US did not share the Understanding.

5. Question to both parties

Para. 39 of EC second written submission: question of nullification and impairment. What were benefits that US allegedly derived from US-EC Understanding?

EC: On the basis of the Understanding, the quantity of bananas from ACP countries was to be reduced, while the quantity of bananas from MNF countries was to be increased. US based trading companies obtained greater access and thus benefited (in January 2002).

US: Focus of interim EC steps only goes to one aspect of what was set out in Understanding. Understanding still contains requirement of tariff only regime. No need to demonstrate specific level of nullification or impairment at this stage of the

proceedings. As there is a violation of GATT, such nullification or impairment is presumed.

6. Question to Nicaragua and Panama

Para. 125 of submissions: Is there any proper threshold to establish the standing of a member to have access to dispute settlement proceedings? Would EC as net exporter of bananas have a similar standing?

Panama and Nicaragua choose to reply tomorrow.

7. Same question posed to US: No need for particular threshold/trade level under Art. 3 DSU to bring a claim.

8. Question to EC

Para. 25 of first written submissions. What is link between duration of preferences found in C. agreement and the preferences in the Doha waiver?

EC: C. agreement is much more than bananas. Main means of EC to exercise its development policy. Two main features: (1) financing/development (2) trade preferences.

The Doha waiver is relevant only to the second aspect.

Preparatory period: trade preferences to be in place till 31 December 2007.

Request for waiver for Art. 1 commensurate to trade preference system. Waiver granted.

This waiver covers all trade preferences for all products not just bananas.

9. Question to EC (and ACP)

Comment on chapeau of Annex to Doha waiver: “waiver to be without prejudice to rights and obligations under Art. 28”.

EC to answer tomorrow.

Surinam asks to take the floor: to answer tomorrow.

10. Question to US:

Para. 6 of its oral statement:

Was the US aware of the EC’s decision to move to a tariff-only regime when signing its Understanding with the EC?

US: US considered this part of Understanding. The latter included a sequence of events which would lead to a final resolution of the dispute.

11. Question to US:

Would you like to comment on para. 17 and 22 of EC oral statement?

US: Para. 22: US wants to note that the US previous requests for waivers included request for waiver for both Art. I and Art. XIII.

EC: Different facts of US previous waivers; different system of quantitative restrictions.

US: Reference to old waivers not helpful. US recent waivers show evolving thinking on this.

Panel will submit written questions to parties by 09 November 2007.

All third parties expressed request to speak tomorrow.

Wednesday, 07 November 2007

10.00 – 11.00: Confidential hearings.

Hearings open to the public: 11.00 – 17.45

I. Third party statements

A. ACP representatives

1. Minister of Cameroon

(Written version provided, but not to public.)

ACP countries make up for only under 1% of world trade.

The panel should bear in mind that its decision will have a direct and very significant impact on ACP producers for whom the EC constitutes the only market for the export of bananas. Banana trade is vital for ACP countries and it is dependent on the preferential trade regime of the EC which is essential for the continued life to ACP banana trade.

Not same economy of scale as MFN banana producers.

ACP producers cannot accede to US market, EC market is only market open to ACP producers, thus preferential access vital. Further limitation of preferential access would have disastrous consequences.

Absence of any harm to US trade caused by EC import regime.

Surprising that US has pursued this case against the current EC import regime. Legitimacy of ACP preference regime as development tool has been recognised within the WTO framework.

Many WTO members, including the US itself, use preferential tariffs for development purposes.

C. Agreement and banana import regime should be seen within this context.

Decision by WTO to grant waiver for the ACP preference provides a recognition of this.

The US cannot challenge a preference which they have accepted in the US-EC Understanding. Doha waiver could thus be maintained till 31 December 2007.

Following the changes to the regime in accordance with the US-EC Understanding ACP banana producers have already suffered and some of them have disappeared. US operators have benefited from the concessions made by the EC within the context of the Understanding.

US challenge should be regarded as illegal as it has previously consented.

US ignored the fact that the new EC banana import regime has not only maintained but significantly increased market access for MFN bananas. Competitive position of MFN bananas has improved substantially and continuously in 2006/2007.

Most MFN suppliers have decreased their exports to the US market, while having increased their exports to the EC market. New tariff has not disrupted price structure of the MFN market.

Moreover, the liberalisation brought about by the abolition of the import licensing system has brought about new opportunities for MFN countries.

2. Minister for Agriculture of Surinam

(Written version provided but not to members of the public.)

EC's current banana regime not a "measure taken to comply" with the recommendations and rulings of panel and AB in the original proceedings as the EC measures are not directly connected with the rulings of the panel and the AB.

Radical change of legal background, and current regime constitutes tariff only regime not the quota regime considered by the panel in Bananas III.

Thus the US is prevented from bringing this case.

First ever dispute brought by a developed country against a preference given to developing countries.

US failed to request consultations, thus US claim should be dismissed.

US-EC Understanding constitutes mutually agreed solution, confirmed by USTR Zoellick. There thus cannot be any disagreement within the meaning of Art. 21.5 DSU.

The original Bananas III case has been resolved by the Understanding. Thus EC current regime cannot be considered as "measure taken to comply".

US argument based on India Auto dispute is misconceived.

ACP third parties do not argue that the existence of a mutually agreed solution would generally prevent the US from bringing proceedings, but it does prevent compliance proceedings. Both parties have to comply with the Understanding in good faith.

3. Minister Myers from St. Lucia

(Written version provided, but not to the public.)

In previous talks with the US government, his country received reassurances contrary to the statements now made by the US.

Banana exports are of great importance to his country.

The transfer of quota rent to some supplying countries led to the discontent of some MFN countries and the US, which constitutes one of the reasons for their claim.

Critique of the previous two arbitrations: ACP countries had not been allowed to participate and the arbitrator has failed to recognise the importance of quota rents.

The EC's compliance with the US-EC Understanding has already had disastrous consequences for St. Lucia.

The claim by the US before this panel has to be seen as historic: No country has ever challenged a preference given by another developed country to developing countries.

The US is acting purely in the interest of multilateral companies whose ambition it is to raise their current EC market share of 80% to 100%. It is not for the US to promote this interest.

The EC's current banana import regime is not in breach of Art. I and Art. XIII of GATT.

Is the US saying that any country who has been granted an Art. I waiver is automatically in breach of its GATT obligations?

4. Minister from St. Vincent & Grenadines

(Written version provided, but not to the public.)

St. Vincent is a traditional supplier of bananas to the EC and banana export constitutes its "spring of development".

St. Vincent already lost the benefit of country-specific quotas on the part of the EC and now has to face the competition with other ACP countries.

The US is not justified in setting aside its Understanding with the EC which the EC has faithfully implemented.

5. Belize

(Written version provided, but not to public.)

The US is not attempting to export bananas to the EC and thus suffers no nullification or impairment by the EC measure.

In its previous challenge, the US was evidently protecting the interests of its service suppliers, but this time no breach of GATS can be established.

Contrary to the US, Belize is lacking the resources to bring a challenge in front of the DSB.

The panel should take into consideration that a US victory would not directly impact on the EC but on the economies of the ACP third parties.

The US obtained the benefit it hoped for from the US-EC Understanding: part of the ACP quota was transferred to MFN countries. Thus the US cannot now deny the legal effect of the Understanding.

6. Cote d'Ivoire

(Written version provided, but not to public.)

There is no substantial interest on the part of the US endangered by the EC regime. Rather the US is protecting the business interests of multilateral corporations.

Latin American countries are evidently improving their market share in the EC market, while their exports to the US market are declining.

Monitoring the EC market shows that MFN market access has not only maintained, but has in fact increased.

The ACP country market access, on the other hand, has only increased by 92 tons!

A further lowering of the tariff for MFN countries would lead to an oversupply of the EC market and would thus be also to the detriment of Latin American countries who would receive much lower prices for their bananas.

The US challenge will further upset the development of ACP countries which is so heavily based on trade.

7. Dominica

No statement. Full support of other statement.

8. Dominican Republic

(Written version provided, but not to public.)

The Dominican Republic has great difficulties due to the devastation caused by natural disasters in the region. This further increases the vulnerability and fragility of ACP economies.

“The EC preference keeps families in our countries alive.”

Without the preference, ACP banana trade cannot compete or survive.

The US on the contrary has no substantial interest.

And as opposed to the US, ACP countries lack the resources to bring a challenge before the DSB.

Furthermore, MFN market access to the EC market has substantially improved.

9. Jamaica

(Written version provided, but not to public.)

This is a historical case: It is the first time a developed country brings a claim based purely on a preferential rate of access provided by another developed country to some of the least developed countries.

Before having recourse to Art. 21.5 DSU proceedings, there is a need for previous consultations which the US has failed to request.

There is now unlimited MFN market access at a flat tariff rate.

The preference in favour of ACP countries does not in any way restrict MFN access.

There is no limitation to MFN access to the EC market, only a limitation on ACP duty free access.

Never before have MFN exporters experienced such an enabling environment as under the current EC banana import regime.

Lunch break until 15.00

B. Latin American countries

10. Nicaragua & Panama

(Written version distributed to the public.)

C. “None-party” countries

11. Colombia

(Written version provided, but not to public.)

Banana export constitutes the main source of employment in rural areas of Colombia.

The EC current banana import regime is in violation of Art. I GATT.

MFN countries would have never agreed to the Doha-waiver had it not been for its arbitration limitations.

Critique of the EC's current method of analysis of market access:

The EC has always rejected a volume-based analysis and advocated a test based on competitive opportunities.

The EC is now contradicting itself by linking the increase in MFN exports to the EC to competitive opportunities for MFN countries.

In reality, a trade balance has not been maintained.

The EC's Doha-waiver from Art. I GATT cannot justify the EC's preference scheme.

12. Ecuador

(Written version provided to public.)

13. Japan

Three points:

(1) Mutually agreed solutions

Art. 3.7 & 3.6 DSU

Art. 3.2, 3.3 and 3.5 DSU

India Autos case

The US-EC Understanding does not preclude the present dispute being brought before the DSU (Art. 3.6 DSU).

(2) The EC's current banana import regime constitutes a "measure taken to comply".

This becomes apparent from examining the closeness of the relationship between the EC measure and the findings and recommendations of the panel/AB in the original dispute.

II. Questions & comments by parties, third parties and panel

A. Questions & comments by parties

US: No questions or comments.

EC: Question to Panama/Nicaragua.

Para. 51 of their third party written submissions: EC discussion of tariff only regime started in 1999 – as evidence that EC measure did constitute a “measure taken to comply”.

In their oral statement, they said that the EC discussion of the tariff only regime started only in 2001.

EC does not agree with chronology.

Panama/Nicaragua:

A policy decision taken was by Regulation 216. First discussions in November 1999, but it did not become law before 2001.

B. Yesterday’s deferred questions from panel to third parties

Panama: Whether there is any threshold level of trade required for standing?

No necessary trade threshold required to establish standing.

Broad discretion on part of WTO members.

Mexico: Written reply will be provided.

Ecuador: (1) Why delay in notification? (2) Why no joint notification?

Support for US answer.

Amply explained in Ecuador's notification of Understanding to DSB:

Parties could not agree on a joint notification because Ecuador did not agree that the Understanding constituted a "mutually agreed solution".

Surinam (on behalf of ACP countries): Para. 54 of ACP third party written submission: Mutually agreed solution contains elements leading up to solution.

An agreement which sets out a number of steps to be taken in the future already constitutes itself a mutually agreed solution.

The fact that one of the parties to the agreement does not implement the steps set out in the agreement (in this case the US), does not mean that the agreement does no longer constitute a mutually agreed solution.

Once the agreement was concluded, there was a mutually agreed solution.

C. Today's questions by panel

General question to both parties and third parties and in particular to Ecuador:

How should the panel deal with the fact that we have two similar cases before us?

May Ecuador's submissions in the dispute to which it is a party be taken into consideration in these proceedings?

Ecuador: Answer will be provided in writing.

Both panels have their own merits.

US: Written response will be provided.

EC: Written response will be provided.

The EC considers both cases to be separate:

Claims and defences raised are different. The facts are different too.

Art. 11 DSU.

Claims and arguments used in one of the proceedings should not be taken up in the other proceedings.

Subissue: Is the panel authorised to use annexes/exhibits provided in one case for the purposes of the other case?

Panel will pose a question in writing.

Questions in respect of statements made this morning

Question to Japan: Para. 13 of oral statement – Japan considers that the question of nullification and impairment may be reviewed by the panel subject to the appropriate allocation of the burden of proof.

Japan: Reference to Art. 3.8 DSU: presumption to be rebutted by defending party.

Question to Jamaica: Para. 8 – MFN banana exporters have never before experienced such enabling environment. A fact which they have emphasised in various fora. Can you provide some examples, evidence

Jamaica: Response in writing.

Question to Cote d'Ivoire: Could you give us information about the Ivorian share of production taken up at present by North American companies?

Cote d'Ivoire: Response in writing.

Question to St. Lucia: Para. 12: Arbitrator did not recognise importance of quota rent.

Do you have any figures to share with us about the magnitude of such quota rent and do you have information about the beneficiaries (companies or countries)?

St. Lucia: Response in writing.

Question to Cameroon: Para. 27 and 28: Main beneficiaries of new regime are small producers in MFN countries.

Are only the MFN suppliers which have benefited from the abolition of import licences by the EC or have ACP countries not also benefited from this?

Cameroon: Response in writing.

Question to Brazil from yesterday: Para. 14: single tariff based system = single tariff system?

Brazil: Answer in writing.

Question to Mexico from yesterday:

Mexico: Answer in writing.

Written questions by panel will be provided by this Friday.

III. Parties' concluding statements

United States:

- importance of principle of non-discrimination in WTO framework
- quotation from Mr. Mandelson: EC discriminates between equally needing countries
- thanks for permitting open hearing

EC:

- impact of the Understanding on the rights and obligations of the US: pacta sunt servanda
- EC's current banana import regime does not constitute a "measure taken to comply" ; current regime is radically different from 2004/2005 system which did constitute a "measure taken to comply"
- Doha-waiver: MFN countries have increased their exports to the EC and new countries have entered the EC market. This is evidence that the EC has complied with the obligations of the Doha-waiver.
- Interpretation of Art. XIII GATT

- Nullification & impairment: cannot simply be presumed once a violation of GATT has been established. This would require the amendment or abolition of Art. III.8 GATT.

Chairman explains next steps:

- written questions will be sent to parties by panel until 5 pm this Friday
- replies by parties are due by Friday, 16th November
- descriptive part of report will be issued by panel by 11th January 2008