WORLD TRADE ORGANIZATION

RESTRICTED

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Dispute Settlement Body
8 March 2007

MINUTES OF MEETING

Held in the Centre William Rappard
on 8 March 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 Ecuador: Request for the establishment of a panel (WT/DS27/80)

1. The Chairman drew attention to the communication from Ecuador contained in document WT/DS27/80, and invited the representative of Ecuador to speak.

2. The representative of Ecuador said that his country wished to thank the Chairman for accepting Ecuador's request to convene the present meeting. Ecuador regretted that the first meeting chaired by Mr. Gosper had to address the longest-running dispute in the history of the GATT and the WTO. Ecuador would not repeat either the background of its case or legal arguments since those were adequately explained in its panel request. He underlined that it was Ecuador's desire to seek a negotiated solution to its concerns with regard to the discrimination and illegalities that existed under the EC banana import regime. He recalled that over a year ago, his country had agreed to take part in the Good Offices process initiated at the Hong Kong Ministerial Conference, which had been presided over by the Norwegian Minister of Foreign Affairs. It was Ecuador's hope that a prompt solution to this long-standing impasse could be secured. In spite of the extended time-period, Ecuador had continued to seek further steps down the negotiating path, and had requested consultations with the EC, even though such consultations were not required under Article 21.5 of the DSU, with a view to providing a fresh opportunity for a negotiated solution. However, no immediate concrete proposal had been forthcoming from the EC in response to Ecuador's action.

3. Ecuador was seriously affected by the new EC banana import regime, which had been in place since 1 January 2006. According to EUROSTAT data; i.e. figures released by the EC, Ecuador's share of the EC market had contracted by 4 per cent in 2006 and its exports had declined by almost 3 per cent. At the same time, the ACP countries' exports had increased by more than 20 per cent and they had even exported more than 200,000 tonnes over and above the tariff-free quota of 775,000 tonnes from which they benefited. The EC represented a large market. That market needed clear rules, and it was necessary to remove discriminatory and distortionary measures in force under the EC regime. Ecuador's banana sector, on which more than one million people; i.e. 10 per cent of the population, depended was suffocated by the current situation as well as by the grim prospects that the situation could continue. This was understandable given the fact that since the implementation of the new EC banana import regime, and as a result of the new €176/tonne tariff, Ecuadorian producers and exporters had had to pay an additional US$131 million. Although this figure represented slightly less than half of the EC aid granted to Canary Island banana producers, such an amount had a huge impact on Ecuador's small economy. In light of the foregoing, Ecuador had been forced to request a

ruling by the DSB in respect of this situation, since it considered that its claims were fair and must, once again, be endorsed by the WTO, as had been done on countless previous occasions through Appellate Body rulings and arbitration proceedings. Ecuador had full faith in WTO institutions and urged the DSB to establish a panel at the present meeting. Ecuador, once again, reaffirmed its willingness to continue to seek, at all stages of the proceedings, a negotiated solution which, by means of real, concrete proposals for immediate implementation, would promptly settle this long-standing dispute once and for all. A definitive settlement would allow Ecuador to allocate its resources to the benefit of the banana sector and other national objectives.

4. The representative of the European Communities said that the EC wished to express its surprise and disappointment at Ecuador's action. Without prejudice to Ecuador's rights under the DSU, the constructive climate at the WTO consultations held in December 2006 as well as the statements made by Ecuador before the DSB had seemed to indicate the willingness of Ecuador and other WTO Members to pursue a negotiated solution in 2007 to the benefit of all. Instead, Ecuador had opted for bringing a case mostly focused on the preferential treatment offered to some of the most vulnerable WTO Members, which, in addition, had received multilateral consent. The EC was also obliged to strongly object to the invocation of Article 21.5 of DSU as the basis for Ecuador's request. The EC reiterated its position that the current EC banana import regime was not a "measure to comply" with the recommendations and rulings of the DSB in the Bananas III dispute, which had been adopted almost a decade ago. Those recommendations and rulings had already been implemented in 2001. The EC was committed to maintaining MFN access to its market. According to the statistics available thus far, such access had increased as compared to access in previous years (by almost 11 per cent as compared to 2005 and by 7 per cent as compared to the average 2002-2005). The EC commitments did not include a commitment to "guarantee specific market shares", but only equivalent market access. The EC must, therefore, object to Ecuador's request for the establishment of a panel.

5. The representative of Colombia said that her country had always advocated a negotiated solution to the bananas dispute and, therefore, welcomed Ecuador's insistence on seeking such a solution to this issue. During the consultations requested by Ecuador under Article 21.5 of the DSU, Colombia, as an interested third party, had stated that Council Regulation (EC) No. 1964/2005 regarding the importation of bananas into the EC was inconsistent with the following WTO provisions: (i) Article II:2 of the GATT 1994, given that the application of the €176/mt tariff to MFN banana imports was in excess of the rate undertaken by the EC in its Schedule of Concessions; (ii) Article I:1 of the GATT 1994, given that only bananas of ACP origin were eligible for the zero-tariff rate; and (iii) Articles XIII:1, XIII:2 and XIII:5 of the GATT 1994, given that the waiver granted to the EC with regard to preferential tariff-rate quota allocation had expired on 31 December 2005, and had not been extended. Unfortunately, almost three months had gone by since the initiation of the consultations in which Colombia had participated, but no further consultations had been scheduled. Given the importance of bananas to its economy, Colombia would seek third-party status in the proceedings.

6. The representative of Honduras said that, as a country that struggled against poverty and employed thousands of workers in the bananas sector, Honduras maintained a strong interest in securing full and fair access to the EC market. In Honduras' view, the current EC arrangement unfairly restricted access for Honduras' banana sector, which was an important sector of its economy. In 2006, Honduras' banana sector had sustained a 5 per cent decline in volume to the EC market, a 16 per cent reduction in its share of the EC market and a 37 per cent decline in imports value into the EC. Thus it was clear that it was necessary to improve market access. In order to help safeguard this vital sector of its economy, Honduras must, once again, make clear – as it had done in 2002 – that it reserved all its substantive and procedural rights to seek redress EC's non-compliance in this dispute.

7. The representative of Panama said that his country supported Ecuador's request for the establishment of a panel. Panama, like Ecuador, considered that the measures taken by the EC to comply with the recommendations in the Bananas III dispute and other related proceedings had failed to meet the EC's obligations. The EC was applying: (i) an ACP tariff quota, which violated Article XIII of the GATT 1994 and was not covered by a waiver; (ii) a huge ACP tariff preference, which violated Article I of the GATT 1994 and was not covered by a waiver; and (iii) an "autonomous" customs duty, which was in violation of the most basic rights in this area. Given that these illegal measures threatened one of the most important agricultural crops for Panama and its 8,000 banana workers, Panama intended to participate in these proceedings to the fullest extent possible in order to protect its best trade interests.

8. The representative of Jamaica said that the issue of bananas had had a long and difficult history. It was not until recently that there had been a glimmer of hope as there had seemed to be a strong commitment by the parties concerned to seek a negotiated solution. Jamaica had welcomed this and regretted that the consideration of this matter had evolved in such a manner that there was now a request before the DSB for the establishment of a panel. The likely impact of such a move on the banana industry in Jamaica, and indeed in the countries of the wider ACP Group, could not be overemphasized. In that regard, Jamaica continued to underscore the vital importance of preferences and the banana industry to the very survival of ACP economies, which also contributed to the fight of poverty. The objective was to ensure that the long-term interests of Jamaica and other ACP banana suppliers were preserved in this process. That was why Jamaica supported a constructive consultation process leading to a solution that would meet the interests of all parties. However, should a panel be established, Jamaica wished to signal its intention to participate as a third party in the panel's proceedings.

9. The representative of Cameroon said that his country shared the strong disappointment expressed by the EC and endorsed the statement that had just been made by Jamaica. In Cameroon's view, the objective of Ecuador was aimed at attacking the preferential treatment that had been granted to ACP countries. As stated by the EC, the door was open to negotiations. In Cameroon's view, only negotiations could bring about the best solution. He noted that Ecuador had referred to statistics and had stated that, in 2006, the ACP countries had increased their exports by 20 per cent and had referred to the figure of 200,000 tonnes. Ecuador had also stated that its bananas industry employed one million people. He believed that quoting statistics did not serve the right objective. Cameroon had suffered a decline in exports to the EC market, and its farmers questioned why Ecuador, which exported to the United States and to other North American countries as well as to Japan, sought the EC market so strongly and why it attacked the ACP preferential treatment. He said that Cameroon believed that the objective of the establishment of a panel was to attack the ACP preferential treatment and that the EC market was their market. However, it was not possible to force other countries to open markets since rules and regulations had to be respected.

10. The representative of the Dominican Republic said that her country wished to express its disappointment and deep concern about Ecuador's decision to request the establishment of a panel under Article 21.5 of the DSU instead of trying to secure a negotiated solution, as had been the stated intention at the consultations held on 14 December 2006. Her country wished to reiterate that both the banana industry and the preferences granted to the ACP countries by the EC were vital to the survival of thousands of resource-poor producers. Her country hoped that there was still a possibility of reaching a satisfactory settlement of the matter without the need to have recourse to a dispute settlement panel and without jeopardizing the ACP banana industry. Her country, nevertheless, wished to reserve its rights in the proceedings, should Ecuador decide to continue to proceed with its panel request.

11. The representative of the United States said that, as his delegation had previously stated many times, the United States had looked forward to this dispute finally being resolved at the beginning of

2006, and to the EC shifting to a tariff-only regime as it had committed to do in 2001. Ecuador's request at the present meeting underscored the concerns of Members with the current EC regime, and only affirmed the need for the EC to work with interested Members to reach a resolution to this matter.

12. The representative of Côte d'Ivoire said that his country fully supported the statement made by the EC and believed that, at this stage, Ecuador's request should be rejected. He noted that Ecuador had not mentioned that bad weather conditions had prevented some countries from achieving high levels of production and, hence, high levels of exports. He did not wish to go into details regarding this matter at the present meeting. He only wished to reiterate that Ecuador's request should be rejected. In the context of its consultations, Ecuador had assured the parties that there would be no recourse to Article 21.5 of the DSU, but now Ecuador had recourse to WTO proceedings. This had caused dismay to his country and had obliged his authorities to send experts from capital. That meant expenses for a developing country such as Côte d'Ivoire. Therefore, his country was surprised and astonished at Ecuador's action. He noted that Côte d'Ivoire would maintain its interest to participate in all discussions to be carried out in the course of the proceedings.

13. The representative of Nicaragua said that her country supported Ecuador's request. The banana dispute had gone on for too long without any settlement. For Nicaragua, the continued absence of a solution meant that its banana industry was without any prospect of entering the EC banana market. As Ecuador's request made clear, this matter fell properly under Article 21.5 of the DSU. Consistent with the developing-country provisions under Article 21 of the DSU, Ecuador was entitled to a prompt and expeditious review of its request.

14. The representative of Costa Rica said that his country was one of the substantial suppliers to the EC banana market and had a strong interest in any discussions on this matter. According to the statistics for the first year during which the new regime had been in place; i.e. 2006, MFN exports had increased in overall terms. However, there were differences within MFN exporting countries. Costa Rica was one of those countries that had increased its exports while exports of other Latin American countries had declined. The increase for MFN countries was modest, while the ACP exports had increased enormously. Costa Rica was concerned about the excessively high rate of growth of those that benefited from the preferential regime. The WTO was about trade liberalization. Countries were engaged in multilateral trade negotiations aimed at eliminating or reducing distortions, including discrimination caused by preferences. Therefore, his country was extremely concerned that the new EC regime was generating ACP exports to the EC market at unprecedented levels. The new regime promoted a huge increase in preferential exports. That was the first conclusion to be drawn from the statistics for 2006 compared with previous years. Costa Rica's export growth in 2006 and in relation to the statistics for 2002 – 2005 was modest, and could never be compared with the annual growth rates of 22.5 per cent in case of the Dominican Republic and 24 per cent in case of Côte d'Ivoire. The Dominican Republic had stated that it wished to maintain the situation since it enjoyed 22.5 per cent growth under the preferences. Thus, these were not the weakest countries, as was stated a moment ago. Those countries had weather conditions as well as the potential for development of economies of scale similar to those in Latin American countries. The ACP countries paid a zero-tariff rate, while Latin American countries paid a tariff rate of €176. Costa Rica believed that the new regime had led to an abuse of preferences. This had not been foreseen by the EC. He recalled that when the EC had decided to establish a quota of 775,000 metric tonnes for the ACP countries, it had stated that if Latin American exporters had to pay a tariff rate of €176/mt and if that were to lead to an increase of ACP exports, the quota would guarantee that ACP exports did not create greater distortions. However, that had not worked. The quota was not sufficient because the tariff was too high for Latin American countries. The ACP countries had been able to experience unprecedented growth in one year under the preferential regime.

15. At the present meeting, he did not wish to go into the reasons why Ecuador had taken a decision to request a panel after it had announced in December 2006 that it would engage in negotiations. A review of the figures, which had only recently become available to Ecuador when the EC's full-year import figures for 2006 had been published, must have made Ecuador realize that the disproportionate growth of the ACP countries was a trend that was just beginning to manifest itself and that the trend would be maintained and would cause serious injury to MFN countries and EC producers. Costa Rica believed that the parties should engage in dialogue and negotiations. In light of 2006 statistics, Costa Rica believed that MFN banana exporters, the EC and any other interested party should seek a negotiated settlement. Costa Rica favoured negotiations and had welcomed the Good Offices carried out by Norway in 2006, and the goodwill of the EC and Ecuador as well as others who had participated in that process, which had been open to all Latin American MFN banana exporters. Costa Rica believed that, at some point, the parties would have to return to negotiations, and reiterated its strong interest in participating in any such negotiations.

16. The representative of Suriname said that trade liberalization was not an "open gate" for crushing small and vulnerable economies, especially small producers and exporters of bananas in the Caribbean and Africa. Suriname was very disappointed by Ecuador's action for three reasons. First, Ecuador and other Latin American countries had a monopoly position in exporting to the United States. They exported a great deal of bananas to the United States. The ACP countries were not exporting to the United States. Second, Suriname had signed the ILO treaties on labour standards. However, Ecuador and some Latin American countries were not part of the ILO treaties. Suriname could not compete with Latin American exports and their way of production. Those countries produced at low cost. However, because of the ILO standards, Suriname could not produce at such low cost and this was why its exports to the EC amounted to only 45,000 tonnes. He asked why Ecuador was attacking small countries which produced small quantities, while Ecuador had a large market share in the United States. This was not fair. This was not the meaning of free trade and trade liberalization. Third, all figures and statistics in the EC showed clearly and undoubtedly that exports from Ecuador and other Latin American countries had increased in 2005 and 2006, and would continue to increase in 2007. It was not true that exports were decreasing. Suriname supported the statements made by the EC, Jamaica, Cameroon, the Dominican Republic, Côte d'Ivoire and other producing and exporting countries of the Caribbean and Africa.

17. The representative of Côte d'Ivoire said that he wished to respond to the statement made by Costa Rica regarding some statistics. He said that statistics could be construed in different ways; percentages were one thing and absolute values were another. In 2006, in terms of absolute values, Côte d'Ivoire had exported 227,000 tonnes while Costa Rica had exported 820,000 tonnes. Costa Rica's market share had increased by 31 per cent while Côte d'Ivoire's share had increased by 24 per cent. He said that those figures related to market shares, but the WTO did not deal with market shares. The objective was to remove tariff and non-tariff barriers to market access. According to the statistics available, MFN exporters had increased their exports by more than 10 million tonnes in total, while ACP countries had increased their exports by less than 1 million tonnes. The discussion at the present meeting had been taken out the context and should stop. The issue before the DSB was whether or Ecuador's request should be accepted. The banana exporting countries needed to meet outside of this forum. The ACP and Latin American countries must meet to see how to solve this issue. If not, statistics would be presented and interpreted in different ways and there would be no solution. Finally, Côte d'Ivoire wished to reiterate that it would like to see progress regarding this matter.

18. The representative of Costa Rica said that first he wished to clarify one issue with regard to the statement made by Côte d'Ivoire. If the 2006 figures for bananas imported by the EC from Costa Rica were compared to those in 2005, one could see that there had been a very large increase in exports. However, the reason for this was that there had been a drop in exports from Central American countries in 2005 as a result of natural disasters in the region at that time. In 2006, Costa

Rica had not managed to export as much as it had done in 2004. Therefore, there had been no increase in 2006 as compared to 2004. There had been an increase relative to 2005 because Costa Rica's production had been affected by natural disasters. There was no 30 per cent increase as referred to by Côte d'Ivoire. From a broader perspective, he wished to clarify a couple of points regarding the statement made by Suriname. First, Costa Rica did not attack small countries. Suriname with its surface of 163,000 km^2 was three times bigger than Costa Rica. It was bigger than Nicaragua, Guatemala, Honduras or Panama. These were very small countries with progressive labour legislations. It was, therefore, a serious matter to criticize labour legislations of other countries. Suriname should examine Costa Rica's legislation and its history regarding labour issues. Costa Rica had never tried to save on social costs in order to be able to become more competitive on international markets. The ACP countries questioned why some countries wanted to enter the EC market which the ACP countries tended to consider as their market. He wished to make it clear that the EC market was not exclusively reserved for ACP countries just as the US market was not only reserved for Latin American countries. Markets were open to any country that wished to compete and had the ability to compete. This was what the WTO stood for and not for preferential arrangements that resulted in situations like the one under discussion. This showed that 50 or 60 years of preferential treatment had led some countries to believe that no other country should attempt to penetrate the markets that they considered to be their market. These markets were not theirs. Although the issue before the DSB was whether or not a panel should be established, the discussion at the present meeting was related to the debate carried out in the context of the negotiations on preferences. It seemed that these negotiations would be complicated and there would be no simple solution.

19. The representative of Nicaragua said that her delegation did not wish to enter into an argument. It believed that the DSB was not the right place to do so. The only issue at the present meeting was whether or not Ecuador was entitled to the establishment of a compliance panel. Nicaragua believed that Ecuador was entitled to such a panel and the necessary authorization should be granted to it. With reference to the statement made by Suriname, her delegation wished to indicate that Nicaragua supported the signing of ILO Conventions. It had signed all conventions and only Convention 169 was still under discussion. Nicaragua had not only signed the core conventions, but it had also fully complied with them.

20. The representative of Guatemala said that her country had noted the request submitted by Ecuador for the establishment of a panel. As an original complainant in the EC – Bananas III case, Guatemala had a trade interest and a significant systemic interest in the bananas dispute and accordingly reserved its rights under the WTO Agreement. Guatemala was a constructive participant in the 2006 Good Offices process conducted by Norway. The Good Offices process had made considerable headway with regard to the negotiation of a "banana package". Guatemala was concerned that recourse to legal action would undermine the progress which had already been made during the discussions under the good offices process, in particular because her country was, and had always been, an advocate of a negotiated solution to this issue. Guatemala, therefore, called upon the EC to re-establish as soon as possible a negotiating process with all interested parties, aimed at addressing and resolving once and for all the concerns voiced by Latin American countries. A clear and effective signal from the EC was now required to prevent further rekindling of the banana saga.

21. The representative of Colombia said that her delegation wished to make two points. First, Colombia statement was a legal statement because it believed that the DSB was a forum to discuss legal matters and not to exchange accusations. Colombia did not think that the DSB was an appropriate forum to deal with statistics or to discuss market shares. Second, Colombia urged Members to maintain a minimum of respect and cordiality in the context of the banana dispute. The DSB should not deal with violations or accusations and urged all to be as calm as possible in dealing with the banana issue.

22. The representative of Panama said that, in its first statement, his country had raised points of law concerning what it understood to be the function of the DSB. Ecuador had proposed legal action. Panama had set forth the reasons why it supported Ecuador's legal action taken pursuant to the provisions of the WTO Agreements. This legal remedy must be pursued and Panama would take the necessary steps in that regard. With regard to the statement made by Suriname, he said that Panama subscribed to and respected all international obligations concerning labour rights. Banana trade unions in Panama were particularly vigilant and had one of the highest levels of membership of any industry in Panama. His delegation invited the representative of Suriname to familiarize himself, in the relevant Organization, with the fact that Panama accorded importance to labour rights as well as other Latin American countries that Suriname had referred to. Panama echoed Colombia's call for calm, and that this matter to be handled appropriately, within the rules which all must all abide by in the WTO.

23. The representative of Cameroon said that the statement that he had made previously was an executive summary, and that he had a document setting forth legal arguments which his delegation would submit to the Secretariat.[1] He noted that, as in the past, his country would not accept third-party status in the banana panel, but would be formally seeking the right to full-party status in the proceedings.

24. The representative of Ecuador said that it was not his country's intention to engage, before the DSB, in a legal debate, or to discuss facts or any statistics that should be brought before the Panel for consideration. The agenda item was clear and unambiguous. Accordingly, Ecuador insisted that a decision be made concerning its request for the establishment of a panel under Article 21.5 of the DSU. Ecuador strongly disagreed with the comments made by Suriname, who had accused some countries, including Ecuador of not complying with labour standards. Ecuador noted that, on the Swiss market, Ecuadorian bananas had the Max Havelaar Fair Trade label, which demonstrated that Ecuador complied with all labour and environmental legislations.

25. The representative of St. Kitts and Nevis, speaking also on behalf of St. Lucia, said that Saint Lucia and the other Windward Island producers of bananas had been encouraged by the expressions of conciliation made by Ecuador during the consultation which had taken place on 15 December 2006. It was their view then that an alternative route would be pursued in resolution of this issue. It was therefore against this backdrop that the countries in question regretted that this route had been chosen. They hoped that an alternative and a more amicable solution could be sought in resolution of this very important issue and that delegations would work in a cooperative way to ensure that the interests of all producers were taken into account. Finally, they also asked to be granted third-party rights to participate in the Panel's proceedings.

26. The DSB took note of the statements and agreed to revert to this matter.

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[1] Subsequently circulated in WT/DS27/81.