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REPORT FROM THE COMMISSION TO THE COUNCIL

on consultations with a view to settlement of the banana disputes

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On the basis of the Commission Communication of 26 May 1999, the services have held numerous contacts with the complainants and other governments concerned, but also with many of the operators in the banana business.

I. Position of Parties to the dispute

Consultations with the «principal suppliers», the ACP and the US administration have continued on the options contained in the Communication and other possibilities.

The interlocutors were all in favour of a clearly defined WTO-compatible system.

The **ACP** underlined the EU's obligations under the Lomé Convention and its banana Protocol. They would prefer the preservation of the present regime and do not accept that the WTO Panel has made the application of Lomé Protocol n° 5 extremely difficult (none of the complainant countries seem to be ready to grant the necessary GATT article XIII waiver).

The **Latin American countries and operators** all want to protect their export earnings on the high value EU banana market through the maintenance of a TRQ system but disagree among themselves on the way it should be operated. Although in principal not questioning the preferential treatment for the ACP they underline their special situation as developing countries and the difficulties which they allege the EU has created for them on the banana markets. Most recognise that sending too many bananas to Europe would reduce the attractiveness and profitability of the European markets to them.

The **US administration** continues to insist on a pre-1993 reference period for the distribution of licences, an option which the EU cannot accept for technical and legal reasons and which as a matter of fact the WTO-Panel has not requested the EU to go for. However, the options for the distribution of licences which the Panel has mentioned as WTO-compatible e.g. the «First-come, first served principle» or «auctioning» are either not acceptable for the US or only acceptable in a very narrow interpretation which gives major advantages to the main US operators and constitutes an almost unbearable administrative burden for the EU custom authorities.

The US would in any event like to see the Community move eventually to a flat tariff and accept that we could also choose to do so immediately. However, although they are not a supplier of bananas, they have made it clear that they are keen to debate with us the level of such a tariff. Although they have not yet taken a final position, they have told us that, in their view, the figure of 275 €/t. referred to in the

Commission's previous communication is well above the level of protection provided by the present TRQ regime. However such an argument can only be made in the context of a TRQ, since the obligation to apply no prohibitive tariff only applies in that context. If there were no TRQ, but just a tariff, the level of this tariff can be set at any level the EC chooses, subject to the need to offer compensation under Article XXVIII.

An insufficient level of tariff would not only fail to meet our Lomé commitments but would also represent an additional burden for the EU budget as it would necessarily lead to the increase of direct aid for EU producers if the tariff were to be fixed at an inadequate level. The EC budgetary system does not allow compensation for such additional costs by the increase of own resources through a higher tariff for banana.

Ecuador seeks a tariff-rate quota system. This system should not be discriminatory and should include an increase of the quantity of Latin America banana exports to the EU. Ecuador prefers that the reference period for the distribution of licences should be as recent as possible and insists on a revised definition of importers (shippers/importers) as "Primary importers". It proposes a single tariff quota of e.g. 3.3 Mio t at a tariff level of EURO 75/t and to offer to the ACP operators licences on the basis of a different reference period, favourable for them (1994-1996). Caribbean operators agree with this approach. However the proposal of Ecuador seems to pose a specific problem to the African ACP. Furthermore since the US appears to insist that in any TRQ system the licence distribution be based on pre-1993, and Ecuador and most others insist on post-1993, the TRQ proposal does not offer an agreed solution at this time!

2. State of debate on EU options:

Despite continued and serious efforts to find an «agreed» solution, the situation remains unclear, in particular as far as an acceptable and WTO compatible EU option is concerned.

A clearly WTO-compatible solution, e.g. the «single-Tariff» approach, is rejected by almost all the operators as they are not interested in losing the substantial benefit from the «quota rent» which on average is estimated at an additional 200 EURO/ton for bananas imported into the EU. However, some accept the idea of a two stage approach, starting from a TRQ scenario which would lead, after negotiations e.g. in the framework of the next multilateral trade round in order to establish the appropriate new tariff rate, to a tariff only system and a tariff preference for the ACP countries. The US administration prefers a quick move towards a tariff only system whereas some operators would prefer a longer period of adaptation, e.g. until 2005.

Even in the context of a two-stage approach, the first phase requires a WTO-compatible and generally acceptable TRQ solution. Such a TRQ phase poses major problems despite all efforts to find common ground, notably with the complainants. There are two major difficulties: the definition of the appropriate TRQ and the system of distribution of licences. To the extent that any proposed change leads to increase

imports at lower prices than at present, there would be budgetary complications as outlined in the Commission Communication of the month of May.

3. Definition of the options:

In its present regime, the EU applies a TRQ of 2.2 Mio/tons with an in-quota tariff of 75 EURO/ton in accordance with its WTO schedule. In addition it applies autonomously a further TRQ of 0.353 Mio tons also at 75 EURO/ton to cover increased demand for bananas within the EU following accession to the EFTA countries. All ACP suppliers benefit from duty-free access within these two quotas and in addition the present regime allows duty-free access of 0.857 Mio tons outside these TRQ's for traditional ACP supplies.

The Community regarded this access as a volume limited tariff preference and hence covered the existing article I waiver. However, the WTO concluded that a tariff preference, which is limited in size, is by definition a tariff quota. Unless such a quota respects article XIII GATT rules in terms in particular of erga omnes access and distribution, it requires a derogation (waiver) from that article. In GATT history, a waiver based on article XIII has only been granted once. Our numerous contacts have made it clear that complainants and parties involved are either not ready to grant such a waiver or only at a very high price.

On the other hand, the suggestion (made in the so-called "counterfactual" from the WTO arbitrators) that the EU should just lift the limitation in size and grant an unlimited preference for the ACP is strongly contested by the US administration and the third countries suppliers. They claim that this solution would even increase the discrimination against LA banana producers in offering additional market opportunities for the ACP which could, through massive investments in the more competitive ACP, lead to serious market disruptions for LA traders.

This situation limits the range of options decisively. From the numerous proposals the central scenarios under active discussion remain:

- a) to create a **second, autonomous in-tariff quota of a quantity which exceeds 0.857 Mio t** with mechanisms to ensure that some of this quota is filled by sales from Latin America while ACP exports are maintained.
- b) to create **one single tariff quota** of 3.2 Mio to. at the tariff level of EURO 75/t, with a zero tariff preference for the ACP. Licences would only be available to "primary importers" as originally defined in Reg 1442/93. This leaves the central question of what reference period should be used for licence distribution unresolved. Moreover, it remains to be shown that such an approach can maintain all traditional ACP entitlements.
- c) the establishment of a **«tariff only » system**. This option would require the deconsolidation of the present bound tariffs and the negotiation of a new rate on the basis of GATT article XXVIII.

4. System for the distribution of licences

The WTO has condemned the present system of licence distribution. It indicated that the distribution could be based on for example a «First come, first served» procedure or through auctioning. This would not preclude a historic system which did not perpetuate the aspects of the previous system which were condemned.

Work has continued on all these options with the aim of reaching a fair, balanced and administratively manageable solution.

As to the **historical reference period**, the US continues to insist on the more distant reference period (pre-1993) whereas Ecuador wants the most recent period available. Various attempts to compromise between these two positions have failed to bear fruit. Apart from this system, other methods of distribution have also been examined.

The first come first served system has very limited support and constitutes a particular heavy administrative burden for the EC. At the same time, smaller operators which are not “primary importers” could be eliminated from the markets.

Auctioning continues to be questioned as to its WTO-compatibility. No operators were in favour of this system. Other conventional systems appear unlikely to provide a resolution of this issue.

However, modalities and instruments of WTO for quota management and in particular licences distribution are under active discussion in the WTO Committee on agriculture and there is so far no clear consensus on how such WTO rules that exist should be interpreted. Continued disputes among WTO-members on what should be WTO compatible in this area may lead to the gradual reduction of the options available and applied so far, with far-reaching implications for agricultural trade in general.

5. Conclusions

A Commission proposal needs to guarantee the end of the banana disputes with the US and Ecuador. It should also ensure the respect of the EU's international obligations vis-à-vis the ACP countries and, insofar as possible, that no new international disputes will arise in this sector. At present no TRQ solution has been found which would meet those objectives. Since at present no agreement with the complainants can be reached on a tariff rate quota system the Commission is not in a position to make such a proposal to the Council.

If this situation continues in spite of the efforts that have been made, there would be little other option than a tariff-only solution including negotiations under GATT Article XXVIII.