TRADE LAW BRIEF
Making Trade Law Simple

The Banana War at the GATT / WTO

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Agriculture has always been a primary source of economic differences between the European Union (EU) and the United States (US). Since 1993, these two major trading blocs along with some Latin American countries have been in confrontation over an agricultural product that neither of these two trading blocs produces themselves. The series of disputes at the General Agreement on Tariff s and Trade (GATT) and World Trade Organisation (WTO), popularly referred to as the banana trade disputes, largely revolve around the EU's preferential trade regime that provides preferential market access to imports of bananas from the African, Caribbean and Pacific (ACP) countries, which are former colonies of EU. While this favour is largely justified by EU on the grounds that these smaller 'economies' are utterly dependent on the export of bananas to the European market, many others consider this as legally unjustifiable.

This dispute has stretched the legal basis for a secure and predictable Multilateral Trading System (MTS) a number of times: in 1993 when the question before the Uruguay Round negotiators was whether to tighten the Dispute Settlement Mechanism (DSM) and again when the GATT panel reports came up for adoption; in 1999 when the US request for retaliation was being considered by the Dispute Settlement Body (DSB) and again when the EC's self inflicted embarrassment occurred by its Article 21.5 compliance report not being presented for adoption; in 2001 when the Doha Round was being launched; and in 2005 when the revised EC regime for bananas was notified.

There was a time when the banana dispute appeared to have snowballed into not only a major spat between the two biggest trading partners in the WTO, but also a potential threat to the credibility and viability of the MTS. This paper investigates the complexities of issues involved in the banana dispute and examines the vulnerability of those with less economic might when they face more powerful nations in trade disputes mediated through the WTO.

What was the Dispute?

The dispute revolves around the EU's regulatory regime for imported bananas commonly known as Common Market Organisation for Bananas (CMOB), enacted in 1993. It was an attempt to combine obligations to former colonies with the single European market. Prior to this enactment, each EU member states had its own banana import regime. The CMOB gave preferential entry to bananas from the overseas territories and former colonies of EU member countries, while restricting entry from other countries, including several in Latin America where US companies predominate, and Ecuador where they do not.

Under this multifaceted regime, banana imports were subject to a multilayered system of quotas based on their country of origin. The ACP banana producing countries being the former colonies of EU were allowed a duty-free entry up to 857 thousand tonnes and subject to 750 European Currency Unit (ECUs) per metric tonne above that amount. On the other hand, the non-ACP banana producing countries were subject to a duty of 100 ECUs per metric tonne on imports up to two million metric tonnes, and 850 ECUs on imports above that amount. Besides, more than 30 percent of these two million tonnes of non-ACP bananas were reserved for the European marketing firms, most of which historically had marketed only ACP bananas.

Phase-I: GATT Panels

Five Latin American banana producing countries (Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela) brought the first legal challenge against the European Economic Community's (EEC's) discriminatory banana import arrangements in the GATT dispute settlement proceedings in June 1992. This complaint was about various restrictions applied by several EC member states on banana imports. This first GATT Panel report was never adopted and was largely irrelevant because the EEC had already decided to replace the national restrictions by a common import regime and this in fact took place shortly after the report was issued in July 1993.

The same five Latin American countries requested for a second GATT Panel in February 1993. The complainants argued that the new regime violated; (a) Article I:1 of GATT – Most Favoured Nation (MFN) principle, as the EU discriminated against other contracting parties and in favour of ACP countries; and (b) Article III:4 of GATT – National Treatment principle, as the EU discriminated in favour of EU sources (reservation of 33.5 percent of EU's market

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access for EU producers). Also alleged were violations of Articles XI, XIII of GATT – prohibition of quantitative restrictions, since building of quotas is prohibited subject to exceptions.

In February 1994, the second GATT Panel in its findings held that though the EU's preferential tariff was covered by the Lomé Convention between the EU and the ACP countries, this did not give the EU the right to apply preferential tariff rates on bananas. Hence, the GATT Panel concluded that the EEC's tariffs and the allocation of its tariff quota licences should be brought into conformity with the GATT rules.

However, given the weakness of GATT dispute settlement procedure, the EU was able to block the Panel ruling once again. In addition, the EU persuaded four of the five complaining countries (except Guatemala) to drop their multilateral efforts by introducing an arrangement known as the Framework Agreement on bananas. At the end of the Uruguay Round, the EU raised the non-ACP quota from 2 million tonnes to 2.1 million tonnes in 1994 and 2.2 million tonnes in 1995. Further, it also lowered the in-quota tariff of 100 ECUs on Latin American bananas to ECU 75 per metric tonnes and allocated specific export quotas to each of the four Latin American signatories.

Phase-II: WTO Panels on the Lome Waiver

The combined adverse economic impact of the banana regime and the Framework Agreement on US companies with operations in Latin America compelled US to join hands with Guatemala, Ecuador, Honduras, and Mexico to initiate another dispute in 1996. But this time the dispute was placed not before the less effective GATT dispute settlement procedure but before the WTO dispute settlement procedure that was newly formed and provided for reverse consensus for adoption of panel reports as well as retaliation authorisations. India participated in the dispute as a third party, and was very active at a later stage during the long and tortuous DSB meetings relating to the issue of sequencing, implementation and retaliation emanating through this dispute. The complainants argued that the EU's banana regime violated several of the trade agreements administered by the WTO, namely the GATT, the General Agreement on Trade in Services (GATS), and the Agreement on Import Licensing Procedures. Besides, the US complaint focused not on the preferential access accorded the ACP countries but on the licensing arrangements and on preferential tariffs provided to those Latin American countries who had signed banana trade agreements with the EU.

The WTO Panel report, issued on the May 22, 1997, found that the EU's banana import regime was discriminatory and inconsistent with the GATT, the WTO agreement on Import Licensing and the GATS. Subsequently, these findings were mostly upheld by the Appellate Body which found additional violations of the GATT. Appellate Body reversed the Panel's finding on violation of GATT Article X:3 (a) and Article 1.3 of the Import Licensing Agreement) on the ground that these provisions deal with 'administration' of the rules, and not the rules themselves; and reversed the finding that the Lome waiver justified EC's violation of GATT Article XIII. The Appellate Body report and the Panel report as modified by Appellate Body, was adopted by the WTO on September 25, 1997. The WTO then set the reasonable period of time for implementation at 15 months, until January 01, 1999 - the period for changes to be made in the EU import regime.

Interestingly, though India was a third party at the Panel stage, due to the then existing procedures, it did not stay a third party at the appeal stage because it never made a written submission (after the change in the Appellate Body working procedures later this is no longer a requirement to stay as a third party at the appeal stage). At the end of this period, Ecuador and the US took retaliatory action against the EC. The US directly proceeded under Article 22.2 of the DSU to seek authorisation to retaliate, and after an arbitration to set the level of retaliation, obtained the authorisation. It applied retaliatory tariffs immediately thereafter which continued until 2001. Ecuador, instead, sought a compliance panel under Article 21.5 of DSU, which found the EC non-compliant. Then only Ecuador sought authorisation to retaliate, and after arbitration on the amount, obtained; however, it did not impose sanctions.

Separately, the EC decided to take a compliance panel against its own measure. Since the other parties did not show up, and the report went against the EC, the report was never adopted. This is the only report that has not been adopted in the history of WTO. India was a third

Box 1: Bilateral Treaties Governing EU and ACP

The trade relations between the EU as a bloc on the one hand, and the ACP countries as a bloc on the other, have been based on a series of bilateral treaties designed to provide non-reciprocal preferential terms of access for the products of the ACP to the markets of the EU – from Lomé I (1975-1980), to Lomé II (1980-1985), to Lomé III (1985-1990), to Lomé IV (1990-1995, later revised and extended to last until 2000, known as Lomé IV bis), and finally to Cotonou (2000 to 2020). Prior to 1975 there had been a long history of tariff preferences granted by Britain, France and other countries to their colonies (dating back to 1900) and within the EEC such preferences were provided for in a Protocol to the Treaty of Rome (1957). During the 1960s the EC/6 signed the Yaoundé Convention with these African territories, and after 1973 and British accession the same treatment was extended to former colonies in ACP.

Prior to Lomé a number of ACP countries had granted reverse preferences to the EEC. Thus the Lomé process was not just about the creation of preferential market access for the products of ACP countries to the EC, but also about dismantling those pre-Lomé reverse preferences for EC products to access ACP markets, thereby establishing non-reciprocity as the core and distinctive principle of the *Lomé acquis* on trade matters.

party in this dispute. Having failed to comply and to get the retaliatory duties imposed by the US lifted, the EC deployed some other legal makeovers to resolve the matter, using the opportunity of the upcoming new round of negotiations in the WTO in 2001.

Phase-III: Arbitrations Pursuant to the Doha Waiver

On November 14, 2001, the WTO adopted two bananas related Ministerial Decisions: the decision on EC – The ACP-EC Partnership Agreement (the "Doha Waiver") and the Decision on EC Transitional Regime for Banana Imports. The first waived EC's obligations to permit preferential treatment for the ACP for a further period, and the second waived EC's obligations related to the application of tariff quotas and the associated licensing regime for imported bananas. The principal basis for the MFN banana suppliers to agree to the waivers was the EC agreement to apply a tariff only regime to bananas by 2006, and its acceptance of an obligation that the renegotiation of the bound tariff on bananas would "result in at least maintaining total market access for MFN banana suppliers, taking into account all EC WTO market access commitments relating to bananas". This was to prove a key element in further negotiations and disagreements between the EU, the ACP and Latin/ Central American supplying countries.

In the light of the Doha Waiver the EU proposed to modify, one more time, the CMOB regulation. It pledged to replace its complex quota and licence system with a tariff-only regime by January 2006, in return for being allowed to maintain its ACP trade preferences for the intervening five years. Following this the US agreed to suspend the retaliatory sanctions it had imposed on EU imports in 1999. However, after proving unable to negotiate the level of this tariff with its trading partners, the EU unilaterally notified the current system in 2005.

The Doha Waiver authorises two rounds of special arbitration to resolve any disputes. It mandates that if both arbitrations determine that the EC has failed to meet its obligations, the Waiver of GATT Article I will cease to apply. However, the two Arbitration Awards have gone against the EC's 2006 banana regime. The first Award, issued on August 01, 2005, found that the EC's proposed increase in the MFN banana tariff to 230 Euro (US$352) per tonne would not satisfy the minimum market access obligation. The second Award, issued on October 27, 2005, found that the EC's new proposed 187 Euro (US$286) per tonne MFN tariff would also fail to meet the obligation.

Phase-IV: Recent Developments

Having exhausted the litigation opportunities available under the Doha waiver, the parties are now again at it under the DSM. Initially the new EC banana regime was challenged by Ecuador in late 2006/early 2007, followed by Colombia, and much later by the US and Panama.

Ecuador argued that new rules fail to comply (DS 27/80)

In a compliance panel requested in March 2007, Ecuador argues that the EU's new import regime is still not in compliance with the 1997 ruling. It disputes the WTO consistency of a preferential tariff rate (not MFN, Article I) as well as the current tariff of EUR 176 per tonne (above the bound rate, Article II), as well as the tariff rate quota system reserved for ACP suppliers (Article XIII). On December 10, 2007, an interim ruling by the WTO dispute panel was pronounced in favour of Ecuador based on the finding that the EU had failed to bring its import regime into compliance with the former WTO ruling. The confidential final report was transmitted to the parties on December 10, 2007. This report should be circulated to the WTO members in March 2008.

Challenge put forth by Colombia (DS 361)

The EU is facing another new contender to its banana import rules when Colombia initiated a separate dispute. Till that date, Colombia was involved only as a third party. Colombia's request for consultations on March 21, 2007 came a day after a Panel was created to adjudicate Ecuador's separate complaint against the EU's new banana import regime. Further it sought to accelerate the procedures for this case since it argued that the product at issue was perishable. It has also invoked Director General WTO's Good Office procedures available through a 1966 Decision of the Contracting Parties of GATT and incorporated by reference in Article 3.12 of the Dispute Settlement Understanding (DSU) in the WTO for prompt settlement of the dispute.

US requested Panel to investigate (DS 27/83)

In July 2007, the US followed the Ecuador approach and requested another Panel to investigate whether the EU has complied with the 1997 verdict against it. The US claimed that the EU has failed to implement the WTO rulings and that its banana regime discriminates against bananas originating in Latin American countries. The target of the US challenge is the preferential tariff and the tariff rate quota that is allocated exclusively to bananas from ACP countries.

As per recent news reports, the WTO has backed US once again in this dispute and has declared on February 08, 2008 that the import tariff imposed by EU on bananas are illegal. This ruling is the latest debacle for EU. As per the reports, trade officials consider the latest ruling closely following the findings of the Ecuador Panel. However, the decision remains confidential and is only expected to be released in the coming months.

Consultation with Panama (DS 364)

On June 22, 2007, Panama followed Colombia's move and requested the WTO consultations. Like Colombia, Panama also invokes recourse to the GATT Decision of 1966. Bilateral consultations were held on July 13, 2007

Box 2: Some Ongoing Major Disputes between EU and US

Byrd amendment (DS 217)

The Continued Dumping and Subsidy Offset Act (CDSOA) or Byrd Amendment as it is better known, mandates the distribution of antidumping and countervailing duties collected from foreign companies to those US companies harmed by dumping. This has been found in violation of the WTO rules. But the US is unhappy with the rulings, which it believes have been handed down by the Panel and Appellate Body despite the absence of specific provisions prohibiting such conduct. They claim that the decision was based on an overly broad interpretation of the provisions of GATT Article VI. The US maintains that the WTO, if it finds certain conduct impermissible, should create a rule that explicitly prohibits such conduct.

Hormones (DS 26)

A case brought by the US and Canada against the EC wherein the WTO ruled that the EC ban on imports of hormone-treated beef violated the Agreement on Sanitary and Phyto-sanitary (SPS) measures. The ban was just a measure implemented because of worries about cancer. However, the EC, which believes that scientific proof is not the only thing that matters and tends to be sensitive to consumer anxieties, is sceptical of the SPS agreement *per se*. Other than these, many more cases are still ongoing between the two major trading blocs including the Foreign Sales Corporations" (FSC) case (DS 108), Zeroing Case (DS294), Measures affecting the approval and marketing of biotech products (DS 291), Aircraft – Airbus (DS 316 and DS347) and the Steel case (DS248).

in Geneva. On December 14, 2007, Panama requested the good offices of the WTO DG. By letter of February 01, 2008, Pascal Lamy accepted to provide good offices to Panama and the EC. Those good offices will run in parallel to the good offices provided for Colombia and the EC. First consultations are scheduled for the end of February.

Significance

The series of bananas disputes are remarkable in many senses. First, they related to non-discrimination (MFN), a pillar of the MTS, ignoring which could rock the system. Yet, here was EC providing trade benefits to developing countries (although former colonies) and the MFN rule was coming against the move. Second, these disputes remained an important backdrop for the new negotiations launched in the WTO at Doha; the agreement on bananas was a pre-requisite for EC and the ACP to agree to the launch. Third, it shows the difficulties for developing countries to achieve their market access goals even with the 'law' on their side unless a powerful trading partner is backing them.

The ACP continued to receive preferential market access despite many Latin American countries litigating and winning disputes because the EC was backing them. And once the US entered the fray due to the interest of its banana companies, the Latin American countries also found success in the form of dismantling of the CMOB and shift to a tariff only regime. Fourth, this dispute tested the dispute settlement mechanism time and again: non-adoption of the dispute reports during GATT days; sequencing of the steps for confirming compliance with retaliation rights; compelling the US to cease retaliation despite disagreement on compliance in the face of the need to launch a trade round, and now a series of new disputes that move away from the legalities associated with the Lome Waiver to EC's preferences to ACP under bilateral agreements. This new set of disputes is now précised by many as a test case for possible future action within the WTO.

To look at the positive side, this dispute can be considered as the best example to highlight the rational difference between the effectiveness of the GATT and WTO dispute settlement mechanisms. As stated above, during the first two banana cases conducted under the GATT dispute rules, the EU had no compunctions in ignoring the rulings of the Panels. However, when the dispute was re-submitted before the WTO, the EU was forced to make necessary amendments in its trade regime to make it complaint with the WTO rules, albeit those changes are still challenged by different parties to the dispute.

Livelihood Aspects

For ACP countries

This ongoing dispute between the EU and the US since 1993 has now escalated to amazing proportions threatening the livelihood of some smaller ACP countries. The ACP banana group had issued a statement on November 07, 2007 criticising the US decision to become a party to the WTO banana dispute. Their main contention was that the US action threatens the livelihood of millions of poor people by attempting to eliminate a measure essential for the development of the ACP countries.

Their claim can be justified to some extent since bananas are the only year round crop that can be produced easily in ACP countries where there is frequent damage by storms, floods or hurricane. Their farmers only sell bananas to the EU because of the special arrangements which the EU have provided to these traditional suppliers. As the WTO has consistently ruled against these arrangements predictions are there that ACP countries might lose their market gradually.

For Latin American Countries

If the decision by the WTO goes against the EU, then the Latin American Countries and some US MNC distributors would soon find the EU banana market more

open. But how much open the market would become is something that remains to be seen. Speculations abound that the benefits which US and other Latin American countries would achieve by winning this dispute might be restricted to those Latin American countries who had accepted the EU Framework Agreement that allowed for partial increases in the amount of bananas from these countries to be exported to the EU.

Conclusion

Such never ending disputes within the multilateral framework have not only become spiteful but have even questioned the viability of DSB as trade resolution body. Largely because of the fact that the recommendations of Panel and Appellate Body are often being delayed on one pretext or the other and have many times not been implemented particularly by the majors

Such a scenario of non-implementation is not only witnessed in this dispute but also in many other cases. For instance, in the case of the Byrd Amendment, opinions differed over what would constitute a satisfactory remedy. The US maintained that the situation could be remedied by amending the CDSOA, whereas complainant countries such as Japan and the EC demanded that the US scrap the law. Likewise in the beef hormone dispute that still remains unresolved, the EC insists that it has implemented the ruling by reassessing the risk of hormone treated beef whereas the US and Canada demand that the EC should repeal the import ban. Again, in the *US-Gambling* dispute, the US is clearly in no mood to comply and Antigua and Barbuda, the winning but small developing countries, do not know what pressures can work.

However the situation is totally different when it comes to developing countries. Till date developing countries have maintained the good faith by suitably implementing recommendations as required by the Panels or the Appellate Body. Hence the time has come wherein the developed countries need to consider about the impact they are creating on the credibility and legitimacy of the WTO by not implementing their obligations. Else it may seriously undermine the WTO regime. Also the ongoing stalemate in rule making due to lack of any development in the Doha negotiations makes it even more vital for the WTO members to maintain the organisation's *raison d'etre* by rightly implementing the existing rules. So, as days goes on, this ever greening controversy is increasingly challenging the mechanisms of the WTO in pursuit of the competing goals.

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