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Negotiating Group on Market Access

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MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS

Detrimental Effects on other WTO Members of the Measures and Laws Regulating the Economic, Commercial and Financial Blockade Imposed on Cuba by the United States

Communication from Cuba

The following communication, dated 15 January 2007, is being circulated at the request of the delegation of Cuba.

On 15 May 2006, Cuba presented document TN/MA/W/71 (*Non-Tariff Barriers Imposed by the United States Impeding and Prohibiting Cuba's Trade*), which demonstrated the inconsistency of the laws and measures regulating the blockade against Cuba with the principles and rules governing the Agreements of the World Trade Organization (WTO).

The blockade imposed by the United States is openly designed to crush the Cuban Revolution and to attempt to undermine the sovereignty of the Nation for interventionist purposes. In order to achieve its policy objectives, the United States unilaterally applies sanctions based on criteria that are neither commercial nor economic. The laws and measures governing the blockade do not only, directly or indirectly, impede Cuba's economic, trade and financial performance but also affect other WTO Members' trade because of their extraterritorial nature. This is a matter that deserves the Organization's attention.

Cuba submitted document TN/MA/W/71 in view of the fact that paragraph 14 of Annex B to the Decision adopted by the General Council on 1 August 2004 encourages all participants to make notifications on non-tariff barriers, and to proceed with identification, examination, categorization, and ultimately negotiations on non-tariff barriers.

In this document, Cuba denounced the blockade imposed by the United States and demonstrated both its inconsistency with the WTO principles, rules and obligations and its violation of Cuba's rights as a full Member of the Organization and the right of other Members to maintain normal trade relations with Cuba. The blockade therefore transcends the bilateral dimension and constitutes an issue of multilateral concern.

By using the term "embargo", the United States seeks to lend legitimacy to its policy and to minimize the extraterritorial implications of the blockade measures, while intensifying harassment and persecution of any foreign commercial or banking firm or institution that establishes or seeks to establish relations with Cuban institutions, thus affecting the interests of citizens and enterprises in third countries.

This extraterritorial policy prohibits:

- Subsidiaries of United States companies based in third countries from carrying out any form of transaction with companies in Cuba;

- third-country companies from exporting to the United States any product of Cuban origin or products containing Cuban inputs;

- third-country companies from selling to Cuba goods or services using technology that contains more than 10 per cent of United States components even where their owners are third-country nationals;

- ships carrying goods to or from Cuba from entering United States ports, irrespective of the country of registration;

- third-country banks from opening accounts in United States dollars for Cuban legal or natural persons or from carrying out financial transactions in that currency with Cuban entities or persons;

- third-country businessmen from making investments or doing business with Cuba in connection with property claimed by United States nationals or Cuban-born persons who have acquired United States citizenship.

Failure to comply with the above provisions entails severe penalties and sanctions on the part of the United States Government.

Examples of Detrimental Effects on Trade

On 31 January 2003, the British daily newspaper "The Times" published an article on the ban imposed by the United States, under the strict trade laws, on the marketing of a malt Scotch whisky matured in Cuban casks. According to U.S. officials, "Glenfiddich Havana Reserve", a luxury product priced at £60.00 a bottle, violated the legislation prohibiting all trade with Cuba, although the product is distilled in Dufftown, in the Highlands (United Kingdom), and output is limited to 1,800 crates per year. The article cites the manager of the company Grant and Sons, who explained that it was not a Cuban product but a Scotch whisky, any trace of anything Cuban being so small as to be negligible. The manager added that the U.S. action was taken "on principle", thus highlighting the extraterritorial nature of the Helms Burton Act.

In February 2003, the British firm ITS Caleb Brett, which had maintained trade links with the Cuban enterprise Servicios Internacionales de Supervisión CUBACONTROL S.A. for over 25 years, decided to suspend all relations with Cuba, pursuant to the U.S. Treasury Department's Cuban Assets Control Regulations. ITS Caleb Brett circulated instructions to its offices all over the world to disregard orders from Cuba and to refrain from handling any shipment to or from Cuba.

The blockade has also impeded the delivery of Cuban exports, essentially health-related products, to their destinations. The Foreign Trade Standards (FTS) agency, a branch of ITS Caleb Brett (United Kindgom) in the United States, failed to respond to Cuba's request for its agents to act as representatives of the FTS in Cuba in providing urgently needed certification of a Cuban product to be delivered to a third country.

In manifestly extraterritorial application of the blockade policy against Cuba, the United States Department of the Treasury arbitrarily maintains on the list of "Specially Designated Nationals" from Cuba a group of Japanese companies which includes Kyoei International. As a result, firms such as Toyota and Mitsubishi cannot submit direct offers to Cuba, given the importance of their relations with the U.S. market, for fear of suffering the same fate.

Sales of Cuban nickel to Japan are also restricted because customer firms in Japan are required to register with the Japanese Ministry of Industry and International Trade and to undergo a lengthy and complex process aimed at identifying steel mills that export to the United States.

In early February 2003, "Fairplay Daily News" featured an online news item announcing that Ceres Terminals, Inc., a U.S. company operating the Fairview Cove container terminal in Halifax, Canada, refused to assess stowage costs for the Italian shipping line Costas because the latter puts into port at Havana.

In 2004, the Cuban Engineering and Projects Centre ordered software and related services from the German company IES GMBH. Although the operation took place in Germany and there were no U.S. citizens among the executives, the firm was compelled to withdraw its offer because the products contained components of U.S. origin.

Also in 2004, the company Quimimport sought to purchase an herbicide called Plateau through the German firm BASF, which had registered the product in Cuba. Although the herbicide is patented by a German company known to be a world leader in the agrochemical sector, Quimimport was unable to buy the product because its active ingredient is synthesized in Porto Rico.

As a shipment of hydrogen sulphide ordered by Quimimport in a third country in 2004 was being loaded, the U.S. manufacturer learnt that Cuba was the final destination of the product, and delivery to the intermediary was cancelled.

In October 2004, the representatives of the Japanese company Hitachi High-Technologies Corporation were requested to provide an electronic microscope costing approximately US$400,000 for a Cuban health institution. After protracted dealings between the parties, the Hitachi executives confirmed that it would not be possible to cooperate with Cuba because the company's policy was to observe the "embargo" imposed by the United States; the obstacle of after-sales service was put forward as the reason for their decision not to cooperate.

Imports of heat-resistant tiles for ovens used in cement production ceased when the Mexican company Refractarios Mexicanos, which ordinarily supplied Cuba with such tiles, was bought up by the U.S. company Harbison Walker Refractories, which broke off trade relations with Cuba. Although this firm in turn was bought up in 2000 by an Austrian company which declared that it would resume trade relations with Cuba, no contract has as yet been signed, mainly because of difficulties in accessing financing.

The Netherlands entity ePayment-Cuba, which acted as an e-commerce payment gateway, announced in June 2005 that it was withdrawing from the business, since it was prohibited under the blockade from continuing to provide those services to Cuba. As a result, transactions were halted for three months, affecting sales to the tune of US$10,000.

On 12 October 2005, the company Archer Daniels Midland (ADM) was fined US$13,750 for alleged violations of the rules governing the blockade against Cuba which were said to have occurred between February and March 2000. According to OFAC, the company Finora Canada Ltd., a Canada-based subsidiary of ADM, had signed contracts with a Cuban government entity and carried out various export transactions.

The negotiations conducted in January 2006 with the Canadian branch of one of the four leading independent U.S. record distributors at the MIDEM fair in Cannes, France, were suspended when the company's legal department stated that "a very costly investigation would be necessary to determine the legal mechanisms and aspects that would enable the company to sell the Cuban product in Canada, and especially in the United States".

The Brazilian supplier Orion had to withdraw from the contract for the repair of Turbogenerator No. 1 at the Moa Nickel S.A. factory, because the firm is a subsidiary of a U.S. company, which impeded the operation, with threats of reprisals and dismissal of those in Brazil who had been involved in negotiating the contract with Cuba.

The refusal of Cytec Canada, a company originating in the United States, to supply the solvent extraction reagent Cyanex 272, which it had been decided to use in the new technology for the expansion of the cobalt refinery COREFCO5, delayed the project for the expansion of the refinery by about seven months and increased refining costs by about US$2.20/lb of nickel and cobalt.

The company Dresser-Rand Group Inc., which is based in New York and manufactures turbines and compressors for the energy industry, publicly announced in April 2006 that it would most likely face U.S. Government sanctions because of its Brazil-based subsidiary's business dealings with the Canadian-Cuban joint venture company, Moa Nickel S.A., which operates in the mining sector. In July 2005, Dresser-Rand instructed its subsidiary to suspend negotiations with the company. In September 2006, the Office of Foreign Assets Control of the U.S. Treasury Department (OFAC) stated that it had imposed a fine amounting to US$171,305.87.

The ALCOA company in Spain has been unable to process an order for 2,000 tonnes of aluminium sections because its corporate headquarters are in the United States.

The purchase of an air traffic control simulator ordered for Cuba by the International Civil Aviation Organization (ICAO) from the Canadian firm ADACEL proved impossible because the General Manager and the Chief Financial Officer, who are U.S. nationals, said that it was against their country's laws to enter into any kind of contract with Cuba. This firm produces simulators using Canadian technology and therefore does not require authorization from the U.S. Department of the Treasury. Since it does not have a simulator, the Empresa Cubana Aeroportuaria y Servicios Aeronáuticos (ECASA) has to spend approximately US$250,000 a year on the retraining of air traffic controllers abroad.

On 4 May 2006, U.S. Congresswoman Ileana Ros-Lehtinen (Republican-Florida) introduced Bill H.R. 5292 "To exclude from admission to the United States aliens who have made investments contributing to the enhancement of the ability of Cuba to develop its petroleum resources, and for other purposes". This bill proposes the prohibition of bank loans, specific licences or export permits and the denial of loans to foreign companies making related investments evaluated at US$1 million or more. A week later, Representative Mel Martínez (Republican-Florida) introduced Bill S. 2795, which had the same title as and a text similar to the bill introduced by Ms Ros-Lehtinen.

The blockade not only affects trade in goods but also has an impact on trade in services and on banking transactions in particular. Because of the blockade, Cuba is subject to the conditions which its country risk rating imposes in financial terms. There are also other detrimental effects stemming from the extraterritorial application of the blockade measures, which are particularly stringent against Cuban payments and assets.

For example, new OFAC regulations on the system of fines applicable to banking institutions violating U.S. laws on sanctions against various countries, including Cuba, entered into force on 13 February 2006. Violators may be subject to civil investigation or criminal investigation and indictment, which further increases the pressure on third-country banks to comply with the blockade measures.

In recent years, these measures have been extended to other countries and to the U.S. business sector as well. The above examples reveal the inconsistency of the position of the United States Government, which seeks to present the blockade against Cuba as a "bilateral matter" and an "embargo" that applies solely to individuals and entities under the country's jurisdiction.

The core operational principle of the World Trade Organization is non-discrimination. Consequently, Cuba sees this as the appropriate forum to rule on the illegitimacy of the laws and measures regulating the blockade imposed on it by the United States, since they violate the rights of a full Member of this Organization and those of third countries.

In view of the Members' commitment to create and develop an organization founded on binding rules, operating on the basis of reciprocity and mutual benefit, and capable of ensuring the elimination of discriminatory treatment in international trade relations, the absence of a multilateral reaction in the face of this situation would imperil the system's ability to demonstrate its effectiveness and its credibility.

It is for this Negotiating Group, whose mandate it is to eliminate non-tariff barriers to trade, to consider the detrimental effects of the blockade policy which the United States Government imposes on Cuba and other WTO Members.