

**EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION,
SALE AND DISTRIBUTION OF BANANAS**

Recourse to Article 21.5 of the DSU by Ecuador

Request for the Establishment of a Panel

The following communication, dated 23 February 2007, from the delegation of Ecuador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

Upon the instructions of my authorities, I hereby convey the request of the Government of Ecuador for the establishment of a panel under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") with respect to *European Communities – Regime for the Importation, Sale, and Distribution of Bananas* (DS27).

Background

On 25 September 1997, the Dispute Settlement Body ("DSB") adopted the Panel and Appellate Body Reports of *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*Bananas III*")¹. The Panel Report, as modified by the Appellate Body and adopted by the DSB, found the tariff, tariff-rate quota, and licensing measures of the European Communities (EC) to be in violation, *inter alia*, of GATT Articles I, III, and XIII, and GATS Articles II and XVII, and recommended that the EC be requested to bring its banana regime into conformity with EC's obligations under the WTO.²

Among the EC measures found not to comply with the EC's obligations were the EC's tariff-rate quota regimes on banana imports, which excluded bananas of Ecuadorian (and other) origin completely from the most favorable tariff-rate quota, and which allocated shares of quotas in a way incompatible with the requirements of Article XIII, paragraph 2.

The measures also included measures for granting and allocating licenses for the importation, distribution and other banana-related activities. Those measures were found to infringe EC obligations under Article I of the GATT, and Article II and XVII of the GATS, because the EC measures discriminated against bananas, services and service suppliers of some WTO members relative to the treatment that the EC accorded to the bananas, services and service suppliers of the EC and of other WTO members.

¹ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, modified by the Appellate Body Report, WT/DS27/AB/R.

² Panel Report, *Bananas III*, para. 9.1; Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 255.

On 1 January 1999, in accordance with earlier EC announcements, the EC put into effect a revised regime pertaining to bananas. The EC claimed that its modified regime brought the EC into conformity with the EC's WTO obligations. On 18 December 1998, Ecuador requested the DSB to establish a panel, with the same composition as previously, under Article 21.5 of the DSU to examine the conformity of the measures taken by the EC with the EC's obligations under certain WTO rules. On 14 January 1999, the United States sought authority under Article 22.6 of the DSU to suspend concession against the EC for its failure to conform with the rulings and recommendations of the DSB.

The Article 21.5 Panel found that the EC's modified regime violated GATT Articles I and XIII, and GATS Articles II and XVII.³ In particular, the Article 21.5 panel found that:

The EC's 857,700 mt tariff quota disfavored Ecuadorian bananas in violation of GATT Article XIII:1, and failed to represent a distribution of trade that would have prevailed in the absence of restrictions in violation of GATT Article XIII:2.

The EC's quota-licensing treatment accorded more favorable treatment to EC and ACP services and service suppliers than to services and service suppliers of Ecuador and other countries, in breach of GATS Articles II and XVII.⁴

The EC's allocation of the tariff-rate quota for MFN suppliers did not conform with GATT Article XIII:2 in that it was based on an unrepresentative period and did not accord Ecuador (or other substantial suppliers) shares consistent with the requirements of Article XIII:2.

The EC's duty-free treatment for ACP countries was not covered by the EC's then existing Article I waiver insofar as it allowed duty free entry over the required minimum, and the EC was to that extent in violation of GATT Article I.⁵

As in *Bananas III*, the Article 21.5 Panel recommended that the DSB request the EC to bring its regime for bananas into conformity with its obligations under the GATT 1994 and the GATS.⁶ These rulings and recommendations were adopted by the DSB.

In April 2001, the EC reached two "Understandings on Bananas," one with the United States⁷ and the other with Ecuador.⁸ On 2 July 2001, the EC notified the Understandings to the WTO, characterizing both as covering "the implementation by the EC of the conclusions and recommendations adopted by the DSB in the dispute 'Regime for the Importation, Sale and

³ Panel Report, *European Communities – Regime for the Importation, Sale, and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW/ECU, adopted 6 May 1999 (hereafter "*Bananas – DSU Article 21.5 (Ecuador)*"), para. 7.1; The Arbitrators decision came to a similar conclusion. Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999 (hereafter "*Bananas – DSU Article 22.6 (US)*"), paras. 5.33, 5.80.

⁴ *Bananas – DSU Article 21.5 (Ecuador)*, paras. 6.160, 6.163; *Bananas – DSU Article 22.6 (US)*, paras. 5.96, 5.97.

⁵ *Id.*, para. 6.161.

⁶ *Id.*, para. 7.2.

⁷ *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and the United States*, WT/DS27/59, 2 July 2001 ("EC-US Understanding").

⁸ *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Understanding on Bananas between the European Communities and Ecuador*, WT/DS27/60, 9 July 2001 ("EC-Ecuador Understanding").

Distribution of Bananas."⁹ Ecuador (as well as the United States) communicated to the DSB that the Understandings were not a mutually satisfactory settlement under Article 3.6 of the DSU, but rather constituted agreement on a phased series of steps, including a "transitory" regime that would require the EC to take various steps supported by the collective action of the WTO membership, until the EC implemented the final definitive Tariff Only regime.¹⁰ The United States made a similar communication.

The Understandings required that the EC implement a tariff-only regime effective 1 January 2006, and that it takes interim or "transitory" measures in the meantime. Essentially, the EC would adjust its measures in two initial "phases", in a way that would ease the trade problems for Ecuador and others, even though these initial phases did not involve full conformity with the EC's obligations. The Understandings required that Ecuador and the United States "lift their reserves concerning the waiver of Article I of the GATT" for the EC's preferential tariffs for ACP products and "actively work towards promoting the acceptance of an EC request for a waiver of Article XIII of the GATT 1994" for the ACP tariff quota on bananas so as to allow for a temporary period preferences inconsistent with Articles I and XIII of the GATT.¹¹ These provisions were intended to and did help the EC to obtain waivers from its WTO obligations sufficient to temporarily and conditionally permit measures that would otherwise violate Articles I and XIII of the GATT but which were provided for in the measures to be taken in Phase I and Phase II. At the end of Phase II, the EC was to establish a Tariff Only system that would not require further waivers to conform with EC obligations.

Pursuant to these provisions, suitable GATT Article I and GATT Article XIII waiver conditions applicable to bananas were negotiated and the waivers were granted at the Doha Ministerial in November 2001. The final stage of the Understandings required the EC to introduce "a 'Tariff-Only regime for imports of bananas' no later than 1 January 2006. The waiver of Article I would allow the EC to maintain tariff preferences for two years after 1 January 2006, provided that a suitable MFN duty on bananas had been established by January 1 2006 in accordance with the conditions of the waiver and the provisions of Article XXVIII of the GATT and other WTO obligations."¹² The waiver of Article XIII expired on 31 December 2005, because at that point no more tariff-rate quotas were supposed to be employed.

The Article I Waiver included an annex on bananas requiring that the EC's tariff-only regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market-access commitments relating to bananas."¹³ In the event of disagreement over whether the proposed regime met the conditions of the Annex, the Annex provided for arbitration in accordance with the terms of the Annex. If the EC were found by the Arbitrator twice to have failed to satisfy the terms of the Annex standard for the tariff-only regime, the waiver of Article I expired with respect to bananas.

In 2005, the EC twice proposed a final MFN rate of duty, which Ecuador and other countries challenged under the Annex dispute settlement procedures as not meeting the standard of the Article I waiver. In each arbitration, the arbitrators found that the EC's banana proposals failed the standard of

⁹ Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.

¹⁰ WT/DS27/60, 3 July 2001.

¹¹ EC-US Understanding, para. E; EC-Ecuador Understanding, para. F.

¹² See Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, paras. 1 and 2.

¹³ *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, Annex, tiret 4.

the Annex. As a result the Waiver of GATT Article I with respect to the EC's imports of bananas terminated for the EC on 1 January 2006.¹⁴

As of 31 December 2005, the EC's waiver of GATT Article XIII for its ACP banana quota of 750,000 mt also expired.¹⁵

The Measures of the EC that are subject to this Challenge

The challenged EC measures are contained in EC Council Regulation No. 1964/2005 ("Regulation 1964")¹⁶ and its associated implementing regulations, including the EC's autonomous tariff provisions. These measures include:

- A tariff-rate quota, with a current volume of 775,000 mt, exclusively reserved for bananas of ACP origin. ACP bananas within the quota enter duty-free, quantities above the TRQ paying a current duty of 176 €/mt. The 775,000 mt ACP tariff quota volume is subject to import licenses and allocation. Ecuador does not get any share of this tariff rate quota or related measures, let alone receive the share required under Article XIII.
- An EC tariff, currently at 176 €/mt to EC imports of bananas, that applies to all bananas of Ecuadorian origin and to all other bananas except those benefiting from access to the zero-duty TRQ.

These measures are not justified under the Understandings or any agreed settlement, and are not covered by any waiver of EC obligations.

Ecuador considers that the EC measures are inconsistent with the following obligations of the WTO Agreements:

- Article I of the GATT 1994, in that the EC applies different and more favorable duties to bananas originating in ACP countries than the EC applies to bananas originating in Ecuador and most or all other WTO members.
- Article II of the GATT in that the EC applies a tariff (currently 176€/mt) on import of bananas originating in Ecuador (and other WTO member countries) that is above the EC bound rate of duty under Article II, which is 75€/mt.
- Article XIII:1 and 2 of the GATT, in that the EC continues to provide a tariff rate quota system reserved exclusively for bananas of ACP origin, while Ecuador is denied any share of the preferential quota, let alone the share to which it is entitled under Article XIII.

¹⁴ Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/616, 1 August 2005, para. 94; Award of the Arbitrator, *European Communities – The ACP-EC Partnership Agreement – Second Recourse to Arbitration Pursuant to the Decision of 14 November 2001*, WT/L/625, 27 October 2005, para. 127.

¹⁵ *European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16, 14 November 2001, para. 1.

¹⁶ Council of the European Union, *Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rate for bananas*, OJL 316/1, 2 December 2005.

REQUEST FOR THE ESTABLISHMENT OF A PANEL

On 28 November 2006, Ecuador requested consultations on the foregoing matter under DSU Article 4 and Article XXII of the GATT.¹⁷ Consultations were held on 14 December 2006, but failed to resolve the disagreement between the parties.

As there continues to be a disagreement between Ecuador and the EC over the WTO-consistency of the EC banana measures taken to comply with *Bananas III* and *Bananas-DSU Article 21.5 (Ecuador)* and subsequent related rulings, Ecuador respectfully requests that this matter be referred to a Panel, if possible the original panel, in accordance with Article 21.5 of the DSU.

Ecuador further asks pursuant to DSU Article 6.1, fn. 5, that a special meeting of the DSB be convened within 15 days for the purpose of considering Ecuador's request for the establishment of a panel.

¹⁷ *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/65/Rev.1, 29 November 2006.