

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

Recourse to Article 21.5 of the DSU by Ecuador

Request for Consultations

Revision

The following communication, dated 28 November 2006, from the delegation of Ecuador to the delegation of the European Communities and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

This letter supersedes my letter to you of 16 November, so as to avoid the unwarranted and unintended concern that my letter of 16 November, by its reference to Article XXIII of the GATT 1994, was intended to exclude participation by other interested parties in the consultations. This letter is identical to that of my letter of 16 November, except that this paragraph is additional and that the reference to Article XXIII of the GATT has been changed to Article XXII in what was the first paragraph of the letter of 16 November. This letter will also serve as a response to your letter to me of 24 November.

The Government of Ecuador considers that measures taken by the European Communities (EC) to comply with the recommendations and rulings of *European Communities – Regime for the Importation, Sale and Distribution of Bananas ("Bananas III")*¹ are inconsistent with the obligations of the EC under Articles I, II and XIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994). The measures are contained in EC Council Regulation No. 1964/2005 ("Regulation 1964")² and its associated implementing regulations. Without prejudice to Ecuador's position that consultations are not required to have recourse to Article 21.5 in these circumstances, Ecuador requests prompt consultations with the EC pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the GATT regarding the compliance of these EC measures with Articles I, II and XIII of the GATT 1994.

Background

On 25 September 1997, the Dispute Settlement Body ("DSB") adopted the recommendations and rulings of *Bananas III*, which found the EC's tariff, tariff quota, and licensing measures to be in

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 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.

violation of GATT Articles I, III, and XIII, and GATS Articles II and XVII.³ On 1 January 1999 the EC implemented a banana regime, which the EC claimed to remedy the regime that had been found inconsistent with its WTO obligations. On 18 December 1998, Ecuador requested a DSU Article 21.5 review of the modified regime, on grounds that it did not conform with EC obligations under the WTO Agreements. Shortly thereafter, on 14 January 1999, the United States sought authority under DSU Article 22.6 to suspend concession against the EC for its failure to conform with the rulings and recommendations of the DSB. In separate, but consistent findings, the Article 21.5 Panel and the Article 22.6 Arbitrator found that the EC's modified regime violated GATT Articles I and XIII, and GATS Articles II and XVII, and failed to comply with the recommendations and rulings of *Bananas III*.⁴

In April 2001, the EC reached two "Understandings on Bananas," one with the United States⁵ and the other with Ecuador.⁶ 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 Distribution of Bananas.'"⁷

The Understandings provided for the EC to implement a multi-stage/multi-year new regime for banana to comply with *Bananas III*. The final stage of that framework required the EC to introduce "a 'Tariff-Only regime for imports of bananas' no later than 1 January 2006."⁸

The Understandings further required that Ecuador and the United States "lift their reserves concerning the waiver of Article I of the GATT" needed 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" needed for the ACP tariff quota on bananas.⁹ Pursuant to these provisions, suitable GATT Article I and GATT Article XIII waiver conditions applicable to bananas were negotiated and granted at the Doha Ministerial in November 2001.

The Article I Waiver included an annex on bananas requiring that the EC's future 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."¹⁰ In the event of disagreement over whether the proposed regime met the conditions of the Annex, the Annex provide

³ *Bananas III*, Panel Report, 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.

⁴ 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, para. 7.1; 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, paras. 5.33, 5.80.

⁵ *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").

⁶ *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").

⁷ Notification of Mutually Agreed Solution, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58, 2 July 2001.

⁸ 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.

⁹ EC-US Understanding, para. E; EC-Ecuador Understanding, para. F.

¹⁰ *European Communities – The ACP-EC Partnership Agreement*, WT/MIN(01)/15, 14 November 2001, Annex, tiret 4.

for arbitration. If the EC were found by the Arbitrator twice to have failed to satisfy the terms of the Annex standard, the waiver of Article I with respect to bananas expired.

In 2005, two Arbitration Awards found that the EC's banana proposals failed the Annex standard, causing the Waiver of GATT Article I on bananas to terminate upon implementation of the EC's tariff-only regime on 1 January 2006.¹¹

As of 31 December 2005, the EC's waiver of GATT Article XIII for its ACP banana quota of 750,000 mt also terminated.¹²

The EC's Current Banana Regime

Regulation 1964 and its associated implementing regulations authorize significantly differentiated MFN and ACP access treatment through the following measures:

- A tariff-quota volume of 775,000 mt is exclusively reserved for bananas of ACP origin. ACP bananas within the quota enter duty-free (*i.e.*, at a 176 €/mt margin of preference), with unlimited ACP over-quota access authorized at a tariff of 176 €/mt. The 775,000 mt ACP tariff quota volume is subject to import licenses and allocation.
- An "autonomous" tariff of 176 €/mt (a rate more than double the previously-applicable rate of 75 €/mt) applies to all other bananas.

Without prejudice to whether consultations are required under DSU Article 21.5, or to any other WTO rights, Ecuador requests consultations regarding the consistency of the EC's banana regime with the EC's obligations under the WTO, in particular in the following respects:

- The consistency with GATT Article I of the different duties applied to ACP countries and to other countries;
- The consistency with GATT Article XIII:1 and 2 of the tariff rate quota system reserved exclusively for bananas of ACP origin; and
- The consistency with GATT Article II of the "autonomous" 176 €/mt tariff now applied to all countries and bananas not benefiting from the tariff rate quota.

Ecuador reserves its right to seek review of other aspects of the current regime under the authority of Article 21.5.

As the EC has itself acknowledged, Ecuador is a developing country that is heavily dependent on banana trade for export revenues, national income, and employment. Accordingly, Ecuador asks the EC to consult without delay on the measures described above and to work with our government to resolve this disagreement on the promptest possible basis.

¹¹ 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.

¹² *European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas*, WT/MIN(01)/16, 14 November 2001, para. 1.