

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

Request for Consultations by Ecuador, Guatemala,
Honduras, Mexico and the United States

The following communication, dated 18 August 1998, from the Permanent Missions of Ecuador, Guatemala, Honduras, Mexico and the United States to the Permanent Mission of the European Communities, is circulated at their request.

Given the EC's obligation to comply with the DSB recommendations and rulings in the banana dispute by 1 January 1999, we regret that we have been unable to convince you that the interests of the WTO require resolving in a prompt and expeditious manner our current disagreement over the WTO-consistency of the EC's changes to its banana regime. And it is with further regret that we find ourselves writing to you to request unnecessary, hollow procedural steps that will needlessly consume the time and resources of all the parties.

As you know, on 25 September 1997 the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, including the recommendation that the European Communities (EC) bring the measures found to be inconsistent with the General Agreement on Tariffs and Trade 1994 ("GATT") and the General Agreement on Trade in Services ("GATS") into conformity with its obligations under those agreements. On 7 January 1998, by decision of Dr. El-Naggar, the arbitrator pursuant to Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), the EC was given the "reasonable period of time" until 1 January 1999 to comply with the DSB rulings and recommendations.

On 26 June 1998 the EC Council of Agriculture Ministers adopted, with few modifications, proposed amendments to the EC banana regime that had been approved by the European Commission on 14 January and took other measures, in particular concerning licensing. On 28 July 1998, amendments to Regulation 404 were published in the EC *Official Journal* (EC 1637/98).

As we have informed your delegation and the DSB on several occasions, we believe the central elements of the EC measures are inconsistent with the DSB rulings and recommendations, and it is clear that you disagree with that view. Following a discussion of the matter at the DSB meeting of 23 July 1998, our governments wrote to you on 31 July 1998, requesting a joint meeting with the Chairman of the Dispute Settlement Body to discuss resort to procedures under Article 21.5 of the DSU. At that meeting, which took place on 6 August 1998, the EC clarified its view that Article 21.5 requires parties to consult as a prior condition to the resort to the original panel to resolve the disagreement over the WTO-consistency of the EC measures taken to implement the DSB rulings and recommendations. Our governments disagree with that view.

Article 21.5 provides for a special expedited procedure for the resolution of a disagreement over the WTO-consistency of measures taken. Article 21.5 flows out of the DSB's obligations under

Article 21 to keep under surveillance the implementation of DSB recommendations and rulings. Thus, our recourse to Article 21.5 is not a "new" dispute, as the EC has claimed.

We do not agree that consultations are necessary before resorting to the original panel under Article 21.5. The EC's position taken for purposes of this dispute appears calculated to produce maximum delay and is unsupportable for the effective functioning of the dispute settlement system. Nonetheless, without prejudice to our rights under Article 21.5 or the fact that Article 21.5 does not require prior consultations, and in interest of avoiding any further delay, our governments, jointly and severally, request the EC to engage promptly in consultations concerning this matter.

These consultations would concern the issue of the EC's compliance with the DSB recommendations and rulings by 1 January 1999, including the following aspects:

- The consistency with GATT Article XIII of the regulation's allocation of its market among supplying countries, which discriminates against bananas from Latin American suppliers both in terms of quantities allocated and conditions of access;
- The consistency with GATS Articles II and XVII of the EC decision to distribute licenses to "actual importers on the basis of the presentation of a utilised import license and/or, in particular in the case of new Member States, equivalent proofs, where necessary" using a reference period in which a WTO-inconsistent regime was in effect;
- The consistency with GATT Article I and the WTO waiver¹ for certain requirements of the Lomé Convention of (1) the regulation's tariff of zero for unlimited quantities of bananas from ACP countries within the tariff quota of 2.53 million tonnes, which goes beyond the duty-free treatment for 90,000 tonnes of "non-traditional" ACP bananas found by the Appellate Body to be covered by the Lomé waiver; and (2) the regulation's margin of tariff preference in the amount of 200 ECU/tonne for ACP bananas entered over this tariff quota, which goes beyond the margin of tariff preference found by the Appellate Body to be covered by the Lomé waiver.

These inconsistencies also nullify and impair benefits accruing to our countries, directly or indirectly, under the GATT and GATS, and impede the objectives of the GATT.

This request is without prejudice to our right to request review under Article 21.5 procedures of other aspects of Regulation 1637/98 concerning licensing and quota allocations that are currently in the form of discretionary authority.

We appreciate the EC's recognition at the 6 August 1998 meeting of the expedited nature of Article 21.5 proceedings, its statement of willingness to facilitate those proceedings, and its pledge to respond within 10 days to any request for consultations. We would like to stress that our request to consult at this time and our invocation of procedures under Article 21.5 of the DSU is without prejudice to our rights under the DSU, including Article 22.

Consistent with the above-mentioned concerns and objectives, we request that you please advise us promptly of the possible dates during the next week or two on which EC representatives would be available to engage in consultations on the measures described above. Given that the EC is under an obligation to comply with the DSB recommendations and rulings by 1 January 1999, we trust you will understand the need for timely action.

¹ GATT document L/7604 of 19 December 1994; WT/L/186 of 18 October 1996.

It is in all parties' interest to resolve the disagreement over the WTO-consistency of the EC's measures as expeditiously as possible. Accordingly, we would also request your assurances that the EC will cooperate so as to enable recourse to the original panel under Article 21.5 at the next DSB meeting.
