

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

### Recourse by Ecuador to Article 22.2 of the DSU

The following communication, dated 8 November 1999, from the Permanent Mission of Ecuador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 22.2 of the DSU.

#### **Request for authorization of suspension of concessions or other obligations**

Pursuant to Article 22:2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), and having regard to the content of paragraph 3(c) of that Article, Ecuador requests authorization from the DSB to suspend the application to the European Communities (EC), and member States thereof, of concessions or other related obligations under the *General Agreement on Tariffs and Trade 1994 (GATT)*, the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, and the *General Agreement on Trade in Services (GATS)* and annexes thereto.

Ecuador's aim through this suspension is the practicable or effective withdrawal of concessions so as to match the level of nullification or impairment of benefits accruing to Ecuador, amounting to a value of US\$450 million, as a result of the EC's failure, as from 1 January 1999, to bring its regime for the import, sale and distribution of bananas into conformity with the *GATT* and the *GATS*, or otherwise comply with the recommendations and rulings of the DSB in *European Communities - Regime for the import, sale and distribution of bananas*, either in the case of the original panel or in the case arising from Ecuador's recourse to Article 21:5 of the DSU.

To this date the EC has not offered a satisfactory response to Ecuador's request for compensation, despite having recognized, in consultations, Ecuador's rights under Article 22 of the DSU. Ecuador does not rule out the possibility that progress may be made in the coming days in bilateral consultations on this subject, which in turn would have a decisive effect on the request put forward in this communication.

#### **Background**

On 8 May 1996, the DSB established a panel at the request of Ecuador, Guatemala, Honduras, Mexico and the United States to examine the EC banana import regime. Both that panel and the Appellate Body found the EC regime in violation of the *GATT* and the *GATS*. On 25 September 1997, the DSB adopted the report of the panel, as modified by the Appellate Body. The resulting DSB recommendations and rulings included the recommendation that the EC bring the measures found to be incompatible with the *GATT* and the *GATS* into conformity with its obligations

under the agreements (WT/DS27/AB/R, paragraph 257; WT/DS27/R, paragraph 9.2). An arbitrator appointed by the WTO subsequently determined that the "reasonable period of time" for the EC to implement the DSB recommendations and rulings would expire by 1 January 1999.

On 20 July 1998, the EC Council of Ministers of Agriculture formally approved amendments to the banana regime and on 28 July the amendments were published in the EC Official Journal (Regulation (EC) No. 1637/98; "Regulation 1637"). On 31 October 1998, the European Commission published additional implementing provisions concerning the administration of banana import licences (Regulation (EC) No. 2362/98; "Regulation 2362"). Regulations 1637 and 2362 became effective on 1 January 1999. These regulations perpetuate discriminatory aspects already condemned in the previous EC banana import regime that the DSB had ruled to be incompatible with the WTO Agreements.

On 12 January 1999, Ecuador requested the DSB to establish a panel under Article 21:5 of the DSU to examine whether the EC had complied with its recommendations and rulings. On 6 May the DSB adopted the report of the panel, which found that the EC not only continued to fail to fulfil its implementation obligations but also had committed further violations of the *GATT 1994* and the *GATS*. The EC should have brought its regime for the import, sale and distribution of bananas into conformity with its WTO obligations on 1 January 1999, but instead had preferred to grant itself an indefinite period for reforming its regime.

The continuing nullification or impairment of benefits accruing to Ecuador under the *GATT 1994* and *GATS* has been recognized by the Panel in its report contained in document WT/DS27/RW/ECU. Ecuador is thus entitled to redress under Article 22 of the DSU.

#### **Withdrawal of concessions under Article 22:3(c)**

Ecuador is a developing country whose economy is heavily dependent on exports, chief among which is bananas (30 per cent of total exports). The main export market for bananas is the EC, and therefore the illegal restrictions that have been maintained with the European banana import regime have had extremely serious economic repercussions for Ecuador's economy.

Ecuador is currently facing the worst economic crisis in its history, considerably aggravated by the occurrence of natural disasters. Its economy is expected to shrink by between 8 and 11 per cent of GDP in 1999; this has a very severe impact on output, on its population in general, and on the banana sector in particular, on which over a million people depend.

The EC's non-compliance forces Ecuador to proceed in the manner requested despite the difference in level of development with the EC; notwithstanding the tremendous imbalance in their trade relations; and despite the serious economic situation of the country which places severe constraints on its ability to exercise its rights under Article 22. Ecuador is obliged to effect the withdrawal of concessions in other sectors in order to lessen significantly the adverse economic impact which the country cannot and should not have to bear, since it is the European Communities that have failed to comply with their obligations and commitments to the detriment of Ecuador.

The economic cost of withdrawal of concessions in the goods sector alone would have a greater impact on Ecuador than on the EC, and in proceeding in that way Ecuador would only succeed in further accentuating the imbalance in their trade relations, already seriously injured by the nullification and impairment of benefits for which the European Communities alone are responsible. This nullification or impairment of benefits amounts to over 50 per cent of all exports of goods by the EC to Ecuador. The great majority of these exports consist of capital goods and raw materials that are essential for the Ecuadorian economy.

Since the withdrawal of concessions in the goods sector is at present not practicable or effective, and the circumstances are sufficiently serious to justify fully Ecuador exercising its rights under Article 22, Ecuador requests authorization to suspend concessions and other obligations under the GATS and TRIPS Agreements.

For the reasons given above, Ecuador proposes to suspend concessions or obligations stemming from the trade-related intellectual property rights in the following categories set out in Part II of the TRIPS Agreement:

- Section 1: Copyright and related rights, *Article 14: Protection of performers, producers of phonograms (sound recordings) and broadcasting organizations*
- Section 3: Geographical indications
- Section 4: Industrial designs

Ecuador also proposes to suspend concessions and obligations in the following subsector in its Schedule of specific commitments:

4. Distribution services

B. Wholesale trade services (CPC 622)

In addition, Ecuador reserves the right to suspend tariff concessions or other tariff obligations granted in the framework of the GATT 1994 in the event that these may be applied in a practicable and effective manner.

The suspension of concessions or other obligations will apply to the following EC member States: Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden and the United Kingdom.

**Ecuador's request complies with Article 22:4**

The suspension of the above concessions or other obligations is fully justified in the sense that the economic impact of the suspension proposed by Ecuador is much smaller than the economic value of the nullification and impairment of benefits against Ecuador. Consequently, the suspension proposed by Ecuador does not exceed the level that may be considered equivalent to the level of the nullification or impairment.

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