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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL**

**on the consultations undertaken by the Commission  
with the aim of resolving the banana dispute**

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#### **I. BACKGROUND**

The new Community arrangements for banana imports which the Commission has to introduce following the ruling in 1997 by the Dispute Settlement Body of the World Trade Organisation (WTO) must be compatible with the Community's obligations vis-à-vis the WTO while at the same addressing the key concerns of the Community and ACP banana producers and the need to keep within the strict Community budget limits.

It must also afford effective protection for the Community against any current or future dispute in the WTO and lead to the lifting of sanctions.

Against this background, the Commission put forward a proposal on 10 November 1999 to amend the present banana import arrangements. It advocated a two-stage approach. A tariff-only system would enter into force at the end of a transitional period during which a system of tariff quotas would apply, accompanied by a tariff preference for the ACP countries. The flat tariff would be implemented following negotiations under GATT Article XXVIII. The flat tariff system should be introduced not later than 1 January 2006.

Under the proposed transitional system there would be three tariff quotas. The first is a quota of 2.2 million tonnes at a rate of EUR 75/t, bound under the WTO. A second quantity of 353 000 tonnes at the same rate would be added to the 2.2 million tonnes. A third tariff quota of 850 000 tonnes would also be opened.

A tariff preference of EUR 275/tonne would apply to the ACP countries.

This proposal is based on the principle of maintaining tariff quotas during a transitional period. Of course a system based on tariff quotas requires a method of allocating import licences. That is why, given the substantial risk of disputes, it is desirable to obtain the agreement of all the parties legitimately concerned with the issue in the WTO. In the case of the method based on traditional flows, this is essential. The Commission has conducted the consultations with this in mind.

#### **II. CONTENT OF THE CONSULTATIONS**

Consultations have been held with all the parties concerned with the banana issue. Many meetings have taken place with the government authorities of the third countries concerned. This demonstrates the effort the Commission has been making to resolve the dispute.

In the consultations the Commission has taken into account the views expressed by the Member States and the debates held in Parliament.

Various methods for managing the tariff quotas are set out in the Commission's proposal: the method based on traditional trade patterns, the "first come, first served" method and an

auction system. It should be stressed that the method receiving the greatest support from operators and the authorities in the countries concerned has been licence allocation based on historical references.

## **1. Management of tariffs according to the traditional trade pattern method**

Given the general preference shown for this method, the Commission quite naturally concentrated initially on the method based on historical references. It discussed at length the various elements on which agreement might be reached, the main stumbling block being the choice of the reference period.

The United States and the majority of the Latin American countries want a reference period before 1993, i.e. prior to the single market. The European Union cannot accept this, not only for **technical** reasons (there are no reliable figures that establish beyond any doubt the potential rights of traditional operators since, before 1993, the single market had not been formed and import arrangements differed greatly from one Member State to another) but also for **legal** reasons: under Community law there would be too high a risk of the legality of a system based on a reference period pre-dating the single market being successfully contested in the Court of Justice of the European Communities. A pre-1993 reference period is also too far back to be regarded as representative of the market. The WTO panel set up at the request of Ecuador said categorically that the period before 1993 was not representative for the allocation of tariff quotas to the countries concerned (point 6.42 of its report<sup>1</sup>). The same could be said by analogy of the distribution of licences. Lastly, this pre-1993 approach is unacceptable to Ecuador, which has successfully contested the compatibility with the WTO rules of our existing regime and which would stand to lose if such a reference period were selected. Ecuador might again contest such arrangements.

### **The Commission's search for an alternative solution**

To break the deadlock, the Commission has tried to find a formula for establishing a reference period compatible with the conclusions of the WTO panel concerning the "drag-on" effect from the previous regime.

To that end the Commission has analysed the key elements contained in the so-called "**Caribbean**" proposal as set out in the letter of 1 December 1999 from the Prime Minister of Dominica.

The "Caribbean" proposal left quite a few questions unanswered. The United States put its interpretation on them and incorporated them into the ideas it had already put forward. In the Community's view, this proposal would very likely lead to action before the Court of Justice of the European Communities as it provides for a pre-1993 reference period for the first two tariff quotas (and for the period 1995-97 for the third quota).

The Commission has, however, pinpointed one possible source of a compromise solution in the discussions, namely the allocation of licences to **primary operators**<sup>2</sup>, which would mean redefining which operators would have access to quotas.

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<sup>1</sup> WT/DS27/RW/ECU

<sup>2</sup> Primary operators are defined as economic agents, whether physical or legal persons, whether individual agents or producer groups, established and registered in the Community, having, on their own account, purchased green bananas originating in third countries from producers, or, as the case

In this scenario, the reference period for allocating licences in 2001 would be 1994 to 1996 in order to determine which operators among the primary operators can be designated traditional importers. The Commission does not have figures concerning the quantities actually marketed per function beyond 1996 (following the reform of the common organisation of the market in bananas in 1998, the reference period selected for allocating licences in 1999 was 1994 to 1996). The Commission officially asked the Member States (letter of 24 May) whether they could supply figures for 1997 and 1998 so that it could establish whether a more recent reference period could be taken, as requested by Ecuador and the majority of the ACP countries.

A harmonised concept of primary operator for all three tariff quotas and both categories of operators — traditional and non-traditional — necessarily implies granting suitable access to operators who want to perform that function in the future.

Assuming the definition of primary operator is used, and given the specific features of the banana market, the Commission suggested distributing tariff quotas as follows: 80% of licences would go to “traditional primary operators” and the remaining 20% to “non-traditional primary operators”.

With a view once more to avoiding closing the market to operators fulfilling the conditions in the above definition, the Commission introduced a “**passerelle**”. This would allow “non-traditional operators” to switch to the “traditional primary operator” category after a three-year period. At the same time, the quantities available to “non-traditional operators” would be reduced and those for “traditional primary operators” would be increased accordingly, though the percentage allocated to “non-traditional operators” will not be less than 3.5%–5% of the total (in order to keep the market open to new operators to some extent). By means of this detailed description of the “passerelle” the Commission was able to show that there was no risk that the share allocated to “traditional operators” would gradually be eroded away, a concern originally raised by the US authorities.

### **Results of consultations**

Even if it is based on the most remote reference period possible (1994-96), to date this offer has not been accepted by the United States and certain Latin American countries. Various reasons have been given for this. The chief contention is that the quantity set aside for “non-traditional operators” is too large and the first two quotas are insufficient. They also continue to object to a post-1993 reference period.

The main argument put forward by the United States is that US operators are entitled to obtain the pre-1993 market shares in terms of volume which they claim to have achieved. They fail to see that the market shares held by a brand of bananas cannot serve as a basis for allocating licences to operators.

The alternative proposed by the Commission, which is based on the definition of a primary importer, meets the criteria of the WTO Panel as regards non-discrimination against third-country operators and would therefore substantially increase the licences allocated to that category of operators, including US operators who perform that function. The increase could amount to 70% compared with the present situation.

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may be, having produced, dispatched and sold bananas for entry into free circulation in the Community (category A, function a operators).

The US position is all the more surprising in economic terms when one considers that market shares achieved under a quota system are not comparable in value with those obtained under a flat-tariff system ("quota rent").

Ecuador, **on the other hand**, tends to favour the compromise solution restricting tariff quota access to primary importers, provided that at least 20% was allocated to 'non-traditional operators'. Ecuador would also prefer a more recent reference period than 1994-96.

In the light of these various and highly conflicting viewpoints, the Commission feels, after several months of intensive contacts, that consultations on a solution based on historical references are getting nowhere.

## **2. Auctioning licences**

At this stage, the licence auctioning method outlined in the Commission's proposal of 10 November 1999 ("striking price auctioning") does not meet with much favour among the various parties concerned.

## **3. "first come, first served" approach to quota management**

Since talks on managing tariff quotas by a historical method are currently stalled, the possibility of allocating licences on a "first come, first served" basis was looked into again.

In its November 1999 proposal, the Commission referred to such a method whereby access to reduced duties would be determined at the time of the customs declaration.

In the course of the consultations, the United States proposed a modified version of this system involving a pre-allocation procedure based on intentions to declare imports and very short quota periods.

The method proposed by the United States:

- incorporates a procedure for pre-allocating quantities on the basis of operators' intentions to declare imports,
- establishes a close link between vessel, cargo and release for free circulation of the product,
- provides for a high security to ensure that the system is reliable.

A system of this sort could be implemented if the practical and administrative problems stemming from the complexity of the procedure can be avoided. In that event, the idea that all vessels are to arrive on the first day of opening of the subquota could also be dropped, so that arrivals can be staggered over the whole period during which the subquota is open. But the proposed system would be difficult to manage for both national customs services and importers.

If the three tariff quotas were managed in the same way, this would provide better protection against any appeals to the WTO. Accordingly, if the "first come, first served" system were to apply, the tariff preference would have to be sufficiently high to grant ACP countries access to the Community market under the system.

Lastly, Ecuador is reluctant to accept a "first come, first served" system for managing quotas on account of its geographical handicap as compared with its competitors in Latin America (Ecuadorian operators lose considerable time by having to send exports via the Panama Canal). But the proposed variants should make the system more acceptable to Ecuador.

### **III. POSSIBLE OPTIONS**

Following eight months of intensive discussions and despite the Commission's strenuous efforts to reach agreement on this matter, it has not proved possible to reach a compromise at this stage. In addition, discussions on the Lomé waiver have constituted a further serious complication.

Since a negotiated solution based on a historical reference period is in an impasse, the only remaining possibility seems to be management with a pre-allocation on a "first come, first served" basis.

The two options to be considered at this stage, which appeared in the Commission's proposal of 10 November 1999, are:

1. a transitional system of tariff quotas on a "first come, first served" basis for the three tariff quotas (with a preference for the ACP countries of EUR 275/t in the third tariff quota of 850 000 tonnes). To strike a balance between the various interests within the Community, the Commission would retain its proposal for an automatic transition, on 1 January 2006, to a system based on tariffs alone.
2. beginning negotiations under Article XXVIII of the GATT. As regards this it should be remembered that a negotiation under article XXVIII which would take place with a reduced number of suppliers of bananas (excluding the US) does not cover the level of the rights consolidated but the eventual compensation which the Community offers on these rights, in the case where such a measure or such compensation is necessary.

### **IV. THE COMMISSION'S CONCLUSIONS**

1. Since the negotiations on a method of managing tariff quotas on a historical basis have reached an impasse, the Commission will conclude its examination of the "first come, first served" method as soon as possible, in consultation with interested third parties, in order to seek a solution to the administrative and technical problems inherent in such a method.
2. The Commission will ask the Council to authorise it, already at this stage, in case it finds that the problems inherent in the "first come, first served" method are insurmountable, to begin negotiations with the main suppliers on setting up a tariff-only system, in accordance with the GATT Article XXVIII procedure.
3. The Commission will send the Council a report on its conclusions concerning the technical and administrative implications of the "first come, first served" method.
4. The Commission requests the Council to take a decision as soon as possible on the approach described in this communication.