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

*RECOURSE TO ARTICLE 21.5 OF THE DSU BY ECUADOR*

**(WT/DS27)**

**Oral Statement of the United States**
**at the Third Party Session with the Panel**

## Introduction

1. Thank you, Mr. Chairman, and members of the Panel. It is a pleasure to appear before you today to present the views of the United States in this proceeding. The United States believes that Ecuador is on solid legal ground in challenging the EC's revised banana regime. The United States will first address the preliminary objections raised by the EC in this proceeding before turning to our view on the merits.

## Preliminary Objections

2. The EC argues that Ecuador should be precluded from having recourse to DSU[1] Article 21.5 on two grounds: one, because the EC-Ecuador Understanding on Bananas constitutes a "mutually agreed solution" through which Ecuador has allegedly agreed to the current EC banana regime, including the preference granted to the ACP countries;[2] and, two, because a WTO Member cannot challenge a measure that was "suggested" by a WTO panel. These arguments are groundless and should be rejected.

## Mutually Agreed Solution

3. The EC-Ecuador Understanding on Bananas begins by saying that "The European Commission and Ecuador have identified the means by which the long-standing dispute over the

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[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[2] *See e.g.*, First Written Submission by the European Communities, paras. 61 - 65 and Second Written Submission by the European Communities, para. 8.

EC's banana import regime can be resolved." A similar understanding between the United States and the EC begins with the same words. In each case, the Understanding described a phased series of steps to be taken by the EC over several years, in combination with certain waivers, for the purpose of bringing itself into compliance with its WTO obligations. The series of steps would culminate with a "tariff only regime" by January 1, 2006, not a "tariff-rate-quota-only-for-some" regime. The EC and Ecuador disagree whether as a matter of fact their Understanding constitutes a mutually agreed solution for purposes of Article 3.6 of the DSU. But in the end this is irrelevant since the Understanding does not preclude this dispute, regardless of whether it is a mutually agreed solution.

4. Article 1.1 of the DSU restricts the application of the DSU to the "covered agreements" listed in Appendix 1 to the DSU. The Understanding is <u>not</u> a "covered agreement" – it is not listed in Appendix 1. Accordingly, the DSU cannot be used to settle a dispute as to the meaning or effect of the Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU. The EC itself has in fact conceded that there is no bar to proceeding with dispute settlement even in the face of a mutually agreed solution. It is worth noting that, during the *India – Autos* proceeding (which, like the negotiation of the Bananas Understandings, took place in the spring of 2001), the EC also held that view that a mutually agreed solution could not prevent recourse to the DSU: "Even if the 1997 [EC-India] Agreement had settled the matter in dispute in the present case, that would still not preclude the European Communities from bringing this dispute. The 1997 Agreement was not a 'covered agreement' in the sense of Article 1.1 of the DSU. Therefore, the rights and obligations of the

parties under the 1997 Agreement were not enforceable under the DSU."[3]

5. The panel in *India – Autos* noted that there is no provision in the DSU that expressly addresses the issue of whether parties to a mutually agreed solution are precluded from dispute settlement procedures. The panel recognized "that the right for any WTO Member to bring a dispute to the DSB is one of the fundamental tenets of the DSU, and that it could not be lightly assumed in what particular circumstances the drafters of the DSU might have intended such right to be foregone."[4] The panel ultimately did not find it necessary to issue a finding on this legal question.[5]

6. The EC argues that "using Article 21.5 . . . to question a mutually agreed solution between the Parties, goes against Article 3.7 and 3.10 of the DSU."[6] But nothing in those provisions bars recourse to dispute settlement where one party claims to have a mutually agreed solution with the other party.

7. Article 3.7 of the DSU provides in the third sentence that "[a] solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred." Article 3.7 expresses a clear preference for mutually agreed solutions. But, it does not prohibit recourse to procedures under Article 21.5 or any other provision of the DSU.

8. And the EC's proposed approach is directly contrary to Article 3.5 of the DSU. Article 3.5 specifically requires mutually agreed solutions to be consistent with the covered agreements.

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[3]Panel Report, *India - Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, adopted April 5, 2002, para. 4.38.

[4]Id., para. 7.115.

[5]Id, para. 7.134.

[6]First Written Submission by the European Communities, para. 64. See also, Second Written Submission by the European Communities, para. 18.

Yet the EC would bar the dispute settlement system from examining whether a measure alleged to be adopted pursuant to a mutually agreed solution is consistent with the covered agreements. For example, the Understanding sets out a number of steps that had to be taken by the EC in order to come into compliance. Under the EC's proposed approach, Ecuador would be barred from challenging anything that the EC does with respect to its bananas regime that is allegedly in accordance with the Understanding. Article 3.7 does not support the EC's position.

9. Nor does Article 3.10. That article states, in relevant part, that "use of the dispute settlement procedures should not be ... considered as contentious acts and that ... Members will engage in these procedures in good faith in an effort to resolve the dispute." The United States agrees with Ecuador's statement that Article 3.10 "contains nothing remotely prohibiting resort to dispute settlement procedures."[7]

10. The EC stretches its argument further by arguing that Ecuador is barred from challenging the ACP preference because "it is uncontested that bilateral agreements between two WTO members form part of the 'applicable rules of law' between the parties to the dispute, as defined by the Vienna Convention."[8] The EC is referring to Article 31.3(c) of the Vienna Convention. The EC has advanced this argument, as a responding party, in a number of recent disputes, and the United States is not aware that it has yet been successful. For example, this argument was raised by the EC in *EC – Biotech* and rejected by that panel. We urge this panel to do likewise.

11. Nothing in the customary rules of interpretation of public international law reflected in Article 31.3(c) of the Vienna Convention supports the EC's claim that the Understanding acts as

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[7] Second Written Submission of Ecuador, para. 10.
[8] Second Written Submission by the European Communities, para. 7.

a procedural defense for the EC. Article 31.3(c) of the VCLT deals with interpretation of the covered agreements. The EC is not arguing that the Understanding indicates a particular interpretation of any term in any covered agreement, rather the EC is claiming the Understanding is a jurisdictional bar to this dispute. Article 31.3(c) does not deal with jurisdiction.

12. Furthermore, even if the EC were attempting to use the Understanding to interpret a term in a covered agreement rather than as a jurisdictional bar, Article 31(3)(c) of the Vienna Convention provides for the taking into account, in the interpretation of a treaty, "any relevant rules of international law applicable in the relations between the parties." The *EC – Biotech* panel found that "the rules of international law" that are to be "taken into account" in the interpretation of the WTO Agreements "are those which are applicable in the relations between the WTO Members."[9] The panel expressly rejected the notion that the "rules of international law" could be those applicable only to the disputing parties. Since the EC-Ecuador Understanding on Bananas is a bilateral agreement between only the parties to this dispute, not all Members of the WTO, it cannot be considered part of any "applicable rules of law" that could inform the panel's interpretation of the covered agreements.

13. In sum, it is telling that the EC, as a complaining party, has taken the opposite view of the one it advances in this dispute. As mentioned, in *India – Autos*, "the European Communities argued that, not being a 'covered agreement' under the DSU, the [mutually agreed solution] cannot be invoked by India 'in order to justify the violation of its obligations under the GATT and the TRIMs Agreement.'"[10] For the same reason, even if the Understanding were a "mutually

[9] Panel Report, *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, circulated 29 September 2006, para. 7.68.

[10] *India – Autos*, para. 7.109 (footnote omitted).

agreed solution," it could not "be invoked by [the EC] 'in order to justify the violation of its obligations under the GATT.'"

**Suggestion by Panel**

14. The EC states that Ecuador is "in reality" challenging measures suggested by the *Bananas III* 21.5 panel, rather than measures "actually taken" by the EC. The EC argues that claims challenging the consistency of measures suggested by a panel cannot be brought before an Article 21.5 panel. It further argues that if Ecuador disagreed with the suggestions made by the panel, it should have filed an appeal. Not having done so, the EC argues that Ecuador is bound by "res judicata", pursuant to Article 19.1 and 17.14 of the DSU.[11]

15. These arguments are unavailing and completely miss the status of a panel "suggestion" as well as the scope of an Article 21.5 panel proceeding.

16. EC Regulation 1964, which implemented the latest regime for the importation of bananas, is a measure taken by the EC to come into compliance after *Bananas III*. The fact that this regime may fit the description of one of three suggestions made by the *Bananas III* 21.5 panel is irrelevant. Contrary to EC assertions,[12] implementation by a Member of suggestions made by panels does not have a *res judicata* effect, nor could it render that Member's measures *per se* compatible with WTO rules. Nothing in the DSU, in particular Article 19.1, can be interpreted to lead to that result. That a Member chooses to implement a suggestion made by a panel does not relieve the Member from ensuring that it does in a manner consistent with its WTO obligations.

17. Indeed, one of the main purposes of an Article 21.5 compliance proceeding is to

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[11] First Written Submission by the European Communities, paras. 84 and 85.
[12] *See* First Written Submission by the European Communities at para. 22.

determine if a measure taken to comply by the Member concerned is consistent with the covered agreements. The EC's proposed approach would mean that an Article 21.5 panel proceeding would not be available to answer the very question for which it is established.

18. For all these reasons, the EC's preliminary objections must fail. We now turn to the merits of the case.

**Article I Waiver**

19. The EC does not contest that the granting of preferences to ACP bananas is in breach of Article I of the GATT 1994. Instead, it argues that the ACP Article I waiver is still valid with respect to bananas.

20. The question of the continued validity of the waiver boils down to this: there having been two negative determinations under the Annex to the waiver, did the EC have another chance per the terms of the Annex to "rectify the matter" and retain the waiver, or did the waiver expire under its own terms once the new EC tariff regime went into effect on January 1, 2006. The United States agrees with Ecuador's analysis that the Article I waiver terminated with respect to bananas once the EC implemented the new regime in January 1, 2006.

21. Under the express terms of the Annex, the EC had two opportunities to propose a regime that would "result in at least maintaining total market access for MFN suppliers." In 2005, pursuant to the Annex arbitration mechanism, two WTO arbitrators determined that the two proposals made by the EC did not meet those conditions. The phrase "[i]f the EC has failed to rectify the matter", at the beginning of the fifth sentence in tiret 5 of the Annex can only refer back to the determination made by the second arbitrator following the EC's effort to "rectify the matter." Therefore, as required by the fifth sentence, the waiver "shall cease to apply to bananas

upon entry into force of the new EC tariff regime."

22. The EC seems to be claiming that Members decided that, after the EC had twice failed to provide the type of regime required under the Annex, the EC was allowed to unilaterally institute any regime, whether it met the conditions of the Annex or not, and still retain the cover of the waiver. This approach finds no basis in the Annex.

**Article XIII**

23. The EC argues that its latest banana regime - with its exclusive duty-free tariff rate quota for ACP bananas - is not a quota regime and not inconsistent with Article XIII.[13] As before, the EC's arguments must be rejected. The *Bananas III* panel, Appellate Body and compliance panels found the EC's use of an exclusive ACP tariff rate quota for bananas inconsistent with GATT Articles XIII:1 and XIII:2. The regime subject to this proceeding may not be as complex as the earlier ones. The nonconformity with GATT Article XIII remains.

24. Article XIII applies with respect to the current tariff rate quota regime, just as it did with respect to the EC's prior banana import regimes. In *EC - Bananas III (21.5)(Ecuador)*, the panel explained that "by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate."[14]

25. GATT Article XIII:1 sets forth the basic GATT non-discrimination obligation governing the application of import restrictions. The Panel in *Bananas III* explained that this requires that "no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted."[15] According to the Appellate Body, the

[13] First Written Submission by the European Communities, para. 33.
[14] *Bananas III (21.5)(Ecuador)*, para. 6.20.
[15] *Bananas III(Panel)*, para. 7.69.

"essence" of GATT Article XIII, and therefore Article XIII:1, "is that like products should be treated equally, irrespective of origin."[16]

26. The EC is maintaining a tariff rate quota under which MFN-origin bananas are neither "treated equally" nor restricted "similarly" to "like" ACP-origin bananas. ACP bananas receive preferential, protected access under the EC's banana regime, entering the EC market duty-free up to a quantity of 775,000 tons. No MFN supplier receives any such tariff rate quota treatment. By using a tariff rate quota on ACP imports, and an entirely different means to restrict MFN imports, the EC is preventing "like" imports from being "treated equally, irrespective of origin" in violation of GATT Article XIII:1.

27. Furthermore, the *Bananas III* panel found that GATT Article XIII:2 requires that "[i]f quantitative restrictions are used ... they are to be used in the least trade-distorting manner possible."[17] Any tariff rate quota allocations must attempt to "approximate ... the trade shares that would have occurred in the absence of the regime."[18] In addition, if a Member allocates tariff rate quota shares to Members not having a substantial interest in supplying the product, then shares must be allocated to *all* suppliers. This is because "[o]therwise, imports from Members would not be similarly restricted as required by Article XIII:1."[19]

28. The EC's exclusive 775,000 ton ACP tariff rate quota fails to distribute *any* share whatsoever to MFN suppliers, let alone a share they would have expected to obtain in the absence of restrictions. This, despite the fact that many of the excluded MFN suppliers are

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[16] *Bananas III(AB)*, para. 190.
[17] *Bananas III (Panel)*, para. 7.68.
[18] *Id.*
[19] *Id.*, para. 7.73.

principal or substantial suppliers of bananas to the EC, and leading exporters of bananas to the world.

29. For all these reasons, we agree with Ecuador that the EC's tariff rate quota for ACP origin bananas established through Regulation 1964 is inconsistent with Articles XIII:1 and XIII:2. The EC has no Article XIII waiver currently in force - its last waiver having expired on its own terms on December 31, 2005.

**Conclusion**

30. Mr. Chairman, members of the Panel, this concludes our presentation. Thank you for your attention.