**** CHECK AGAINST DELIVERY ****

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

(AB-2008-9)

EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS: SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY ECUADOR

(AB-2008-8)

ORAL STATEMENT OF THE UNITED STATES OF AMERICA

OCTOBER 16, 2008

1. Good morning, Mr. Chairman and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today.

2. We are honored to participate in today's hearing. We commend the Appellate Body for its decision to make this the second Appellate Body hearing open for observation by all WTO Members and the public, and we also commend the other participants and those third participants agreeing to make their statements publicly. We firmly believe that all WTO Members and the public should have the ability to observe these proceedings and that transparency in Appellate Body hearings promotes confidence in the WTO dispute settlement system overall and makes the WTO a stronger institution.

3. Mr. Chairman and members of the division, this is a simple dispute. The simple fact is that more than eleven years after the DSB adopted the recommendations and rulings in *Bananas III* the European Communities ("EC") has yet to bring itself into compliance. In 2007, as in 1996, the EC's import regime for bananas provided for preferential tariff treatment for ACP bananas and discriminatory allocation of tariff quota shares. It should not have been surprising to the EC that, just as in 1996, their regime was found to be inconsistent with Articles I and XIII of the GATT 1994. That may explain why in this dispute we find the EC spending so much time arguing that the Panel should not have reached the question of consistency with the covered agreements, or that it should have delayed doing so.

4. We begin by addressing the procedural claims raised by the EC.

The EC-U.S. Bananas Understanding Does not Bar the United States from Bringing this Compliance Proceeding

5. First, the EC alleges that the United States is barred from bringing this proceeding because of the EC-U.S. Bananas Understanding. According to the EC, the Panel erred in its

findings regarding the "legal effects" of the Understanding and its interpretation and application of the principle of "good faith" in WTO law. On both counts the EC is wrong.

6. The EC's arguments hinge on the factually incorrect allegation that the United States, by entering into the Understanding, agreed to accept the existence of the Cotonou Preference for ACP bananas until the end of 2007 and by extension agreed not to challenge the consistency of any EC measure with the WTO covered agreements. The EC insists this is what the United States did when it agreed, in paragraph E of the Understanding, to lift the U.S. reserve concerning the waiver of Article I of the GATT 1994. The Panel correctly found that as a matter of fact the United States did nothing of the sort.

7. The Panel's analysis of the EC-U.S. Bananas Understanding is firmly based where analysis of any agreement should be – the text of the agreement itself. The United States did exactly what it agreed to do in paragraph E of the Understanding – it lifted its reserve of the waiver of Article I of the GATT 1994 sought by the EC. The text of the Understanding simply sets out no further legal repercussions from this act. The EC's interpretation would lead to serious systemic consequences. Why would any WTO Member ever again agree to support a waiver request if such action would mean that it would be precluded from challenging a measure that a responding Member argues was taken under it or was in any way related to it?

8. In addition, contrary to the EC's allegations, the Panel did not define what a "mutually agreed solution" is and did not set out three conditions that every mutually agreed solution must meet. The Panel looked at the facts and, in light of the EC's arguments, determined that, as a

matter of fact, the EC-U.S. Bananas Understanding did not set out and could not have the effect the EC argued.

9. For the same reason, the EC's argument that the Panel's reasoning will create uncertainties regarding what types of other agreements are enforceable in the WTO legal system is without basis. Furthermore, the EC's alleged concern that this result will lead to legal uncertainty that terms agreed will not be respected rings hollow when one of the principal issues in this proceeding is the fact that the EC failed to fulfill the final step contemplated in the Understanding.

10. Despite this, the EC also alleges that the "principle of good faith" bars the United States from bringing this compliance proceeding and that the Panel erred in its application and interpretation of this principle. The EC is again wrong on the facts and the law.

11. The Panel correctly found that there is nothing in the Understanding that contains a commitment by the United States to forego its rights to challenge any EC bananas measure that may be WTO-inconsistent. Therefore, even if one accepted that the general principle of international law that a party to an agreement is to perform that agreement in good faith had any relevance to the issues being considered by the Panel (which the United States does not accept), it cannot transform the U.S. acceptance to lift its reserve into something else. The United States acted in good faith in fulfilling its commitment to lift its reserve. Unfortunately, the EC did not then carry out *its* commitments under the Understanding, which would have led to a mutually satisfactory solution to this dispute.

12. The EC is also wrong that the Panel "err[ed] in its legal interpretation of the principle of good faith and Article 3.10 of the DSU."[1] Article 3.10 of the DSU, the only reference to good faith in the DSU, is not a general incorporation of "good faith" principles of public international law. Article 3.10 simply notes that when a dispute is initiated, "all Members will engage in these procedures in good faith in an effort to resolve the dispute." We cannot help but note the irony of the EC's approach in this dispute, an approach that would stand Article 3.10 on its head by arguing that a Member should be *precluded* from engaging in dispute settlement procedures in good faith in an effort to resolve the dispute. Aside from the facts that the EC is wrong on the merits, the EC is also wrong procedurally. If the EC is raising a claim that the United States has breached some obligation as a result of Article 3.10, then the EC is doing so in the wrong proceeding. This proceeding is about whether the EC, not the United States, is in compliance with its WTO obligations. Any such claim by the EC is not within the terms of reference of this dispute.

The Panel Did not Err in Finding that the Banana Import Regime Subject to this Proceeding was a "Measure Taken to Comply"

13. The EC tries to read out of the Understanding the final step that it agreed to take as part of the roadmap to resolve this dispute with the United States – the introduction of a tariff only regime by January 2006. It does so to argue that the bananas regime that was in effect as of January 1, 2006, is not a measure taken to comply.

[1] EC's Appellant Submission, para. 101.

14. The introduction of a tariff only regime by January 1, 2006, was set out prominently in paragraph B of the EC-U.S. Bananas Understanding, right after the statement that the United States and the EC "had identified the means by which the long-standing dispute over the EC's bananas import regime can be resolved." The Panel thoroughly analyzed the facts of this dispute and came to the correct conclusion that the banana regime implemented by the EC on January 1, 2006, was a measure taken to comply.

15. The EC's main argument on appeal is that the final measure taken to comply in the dispute between the United States and the EC was the tariff-quota-based regime described in paragraph C-2 of the Understanding because, according to the EC, the United States "accepted to have its retaliation rights terminated."[2] Once again the EC bases its arguments on false premises and fallacious logic.

16. The United States did not agree to terminate its right to retaliate; the text of the EC-U.S. Understanding nowhere speaks of the U.S. "right to retaliate". In paragraph D.1 the United States agreed to "provisionally suspend its imposition of the increased duties" and in paragraph D.2 the United States agreed to "terminate its imposition of increased duties" upon completion of certain interim steps by the EC. Termination of the "imposition of increased duties" is simply not the same as "termination of the right to impose increased duties". The Panel correctly understood this distinction.

[2] EC's Appellant Submission, para. 41.

17. The termination of the imposition of increased duties does not have the effect the EC argues. A Member can choose not to apply its WTO authorization, or not to apply it in full, for all sorts of reasons.

18. The Panel correctly noted the fact that in this dispute Ecuador obtained authorization to suspend concessions but chose not to apply measures as a result of such suspension. A Member may choose not to exercise its right to impose measures, or not to exercise it fully. Yes, the steps set out in paragraph C of the Understanding were important, and the United States was willing to provide incentives for performance by the EC. But those steps were clearly described as "interim" steps. It is clearly written that the United States and the EC agreed there would be a final step – a tariff only regime to be introduced by January 1, 2006. Therefore, there can be no doubt that the regime that the EC implemented on January 1, 2006, is a measure taken to comply for purposes of Article 21.5 of the DSU.

The Panel Did Not Err in Finding that the January 1, 2006, Banana Regime Was in Violation of GATT 1994 Article XIII

19. Despite the EC's attempt at casting these issues as matters of first impression[3] and characterizing the Panel's findings as "likely to create significant problems" for WTO Members offering trade preferences to developing country Members,[4] the legal issues related to GATT 1994 Article XIII are not novel at all. The Panel conducted a thorough analysis of the issues and

[3] EC's Appellant Submission, para. 111.

[4] EC's Appellant Submission, para. 120.

its findings are anchored in the text of Article XIII, and indeed consistent with the reports of earlier panels, arbitrators, and the Appellate Body in this dispute.

20. First, the EC tries to argue, as it has done before, that a tariff quota is not a tariff quota. The EC repeats the same argument it has made in previous Bananas proceedings that a cap on a tariff preference is not a tariff quota subject to Article XIII and that the two regimes (the ACP tariff quota and the MFN tariff) must be examined separately. This "separate regimes" argument has been rejected some four times before and should be rejected again now.[5]

21. Article XIII:5 provides, in relevant part, that "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any [WTO Member]." Article XIII:5 brings into the ambit of Article XIII *any* tariff quota used by a WTO Member. Article XIII:5 does not condition the applicability of Article XIII to instances in which "all imports" of a product are subject to a tariff quota, as the EC would have.

22. A "tariff quota" is a "quantitative limit on the availability of a specific tariff rate."[6] The EC does not contest that its banana import regime introduced on January 1, 2006, contained a preferential zero-duty tariff quota of 775,000 mt per year reserved for ACP countries, combined with an out-of-quota rate and MFN applied duty of 176 Euros per ton.[7] The Panel was correct in

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[5] The original panel, the Appellate Body, the panel in the first Ecuador Article 21.5 proceeding and the arbitrator in the Article 22.6 arbitration.

[6] Panel Report, para. 7.646, citing *Bananas III (21.5)(Ecuador)*, para. 6.20; and *Bananas III (22.6) (U.S.)*, para. 5.9. *See also U.S. – Line Pipe (Panel)*, para. 7.18.

[7] Panel Report, para. 7.647.

concluding that because of this tariff quota, the EC's banana import regime is subject to the disciplines of Article XIII.[8]

23. Second, the EC claims that because there is no restriction on the quantity of bananas that MFN suppliers can supply, the non-discrimination obligation of Article XIII does not apply. The EC alleges this is a simple case of tariff discrimination and that the text of Article XIII:1 does not introduce an MFN rule.

24. The Panel did not introduce an "MFN rule" into Article XIII:1. It is clear from the text, and the Appellate Body has so confirmed, that Article XIII:1 itself contains a non-discrimination requirement when a tariff quota is used. In *Bananas III*, the Appellate Body stated that "Article XIII:1 sets out a basic principle of non-discrimination in the administration of both quantitative restrictions and tariff quotas."[9] The Appellate Body agreed with the original panel's conclusion that "the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the EC is inconsistent with the requirements of Article XIII:1 of the GATT 1994."[10]

25. Furthermore, the Appellate Body rejected the EC's "separate regime" argument by making clear that the non-discrimination provisions of Article XIII apply to all imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for

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[8] Panel Report, paras. 7.647 and 7.648.

[9] *Bananas III (AB)*, para. 160.

[10] *Bananas III (AB)*, para. 162.

administrative or other reasons. A Member cannot avoid the application of the non-discrimination provisions by choosing different legal bases for imposing import restrictions.[11]

26. The EC argues that Article XIII:1 can only apply if there is a restriction or prohibition on the "aggrieved Member". The EC does not explain where this condition appears in the text of Article XIII:1. The Appellate Body has noted that the "essence of the non-discrimination obligations is that like products should be treated equally, irrespective of origin."[12] It is clear that the EC's bananas regime subject to this proceeding treated bananas of ACP origin differently than bananas from other WTO Members. Only ACP bananas had access to the zero-duty tariff quota. This is inconsistent with the requirements of Article XIII:1.

27. Third, the EC claims that the Panel erred in applying Article XIII:2 because, according to the EC, Article XIII:2 applies solely to quantitative restrictions imposed on the aggrieved Member, and since the United States is not subject to a quantitative restriction, Article XIII: 2 does not apply. In addition, the EC argues that because the United States does not export bananas to the EC, the "ACP preference could not be considered inconsistent with the *chapeau* of Article XIII:2, because even in its *absence* the U.S. share of trade in bananas in the EC would *approach as closely as possible* the U.S. existing share of trade in bananas: zero."[13]

28. This is just another version of the EC's argument that the United States suffers no nullification or impairment from the EC's violations of Articles I and XIII of the GATT 1994 and

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[11] *Bananas III (AB)*, para. 190.

[12] *Bananas III (AB)*, para. 190.

[13] EC's Appellant Submission, para. 153 (emphasis in original).

is therefore, according to the EC, precluded from having recourse to dispute settlement. We will address that issue below, but would make the following points regarding Article XIII:2.

29. The chapeau to Article XIII:2 reads "in applying import restrictions *to any product*". It does not read "in applying import restrictions on a Member". The EC does not cite to any authority that would support its proposition that "[t]he words '*in applying import restrictions'* establish that paragraph 2 is solely concerned with quantitative restrictions imposed on the aggrieved Member."[14]

30. Article XIII:2 is logically concerned with the market for the product and what restrictions may be applied to that market. It is undeniable that the EC measures subject to this proceeding contain an import restriction in the form of the preferential tariff quota for ACP bananas. Therefore, the EC was required to follow the allocation rules set forth in Article XIII:2. The Panel correctly concluded that the shares accorded to the ACP countries (100 percent) were not consistent with the allocation rules in Article XIII:2.

The Panel Did not Err in its Finding Related to Nullification or Impairment

31. This leads us to the EC's argument that the United States does not suffer nullification or impairment of benefits as a result of the EC's GATT violations and that the Panel erred in its findings. This precise issue has been decided in this dispute several times already. The Appellate Body has made clear that an Article 21.5 panel "conduct[s] its work against the background of the original proceedings, and with full cognizance of the reasons provided by the

[14] EC's Appellant Submission, para. 149 (emphasis in original).

original panel."[15] It is also well established that adopted panel and Appellate Body reports "are treated as a final resolution to a dispute between the parties to that dispute."[16] The EC's arguments in this regard have been rejected by the original panel in this dispute and by the Appellate Body. The EC has presented no reason why the Appellate Body should deviate from the clear findings that the United States suffers nullification or impairment as a result of the EC's breaches of Articles I and XIII of the GATT 1994.

The Panel Did not Err in its Handling of the Repeal of the EC Regulation Subject to this Proceeding

32. We move now to the EC's allegations that the Panel erred in refusing to take into account the repeal of the measure that contained the preferential tariff quota which is the subject of this proceeding[17] and that the Panel erred in making a recommendation regarding a repealed measure. While this element is new to this dispute, it is not new to WTO dispute settlement; the EC's arguments have been dealt with, and rejected, numerous times before. We have the following brief comments.

33. First, the EC is wrong in asserting that "it is settled law" that a panel cannot make a recommendation with respect to a measure that has ceased to exist following panel

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[15] *Mexico – HFCS (21.5)(AB)*, para. 121.

[16] *EC – Bed Linen (21.5)(AB)*, paras. 91 - 93. *See also U.S. – Shrimp (21.5)(AB)*, para. 97.

[17] EC's Appellant Submission, paras. 179 - 186.

establishment.[18]

34. The EC relies on the report of the Appellate Body in *United States – Import Measures on Certain Products from the European Communities* for its proposition. However, the measure at issue in that dispute had ceased to exist prior to the establishment of the panel's terms of reference.[19] The situation in this dispute stands at the opposite extreme where the alleged repeal of the measure has arisen almost at the end of the proceeding. The fact is that various panels and the Appellate Body have made recommendations on modified or expired measures.[20]

35. In any case, this is a 21.5 compliance proceeding. A compliance panel is tasked with determining whether measures taken to comply exist, and, when such measures exist, whether they comply with the recommendations and rulings of the DSB. If the compliance panel answers either of those questions in the negative, the implementing Member will not have implemented the DSB's recommendations and rulings. Therefore, it suffices for the Panel to conclude that the EC has failed to implement the recommendations and rulings of the DSB, as the Panel did in paragraph 8.4.[21]

36. In our written submission we have explained why the EC's attempt to introduce evidence about the alleged repeal of EC Regulation 1964/2007 during the interim review stage is contrary

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[18] EC's Appellant Submission, para. 187.

[19] *U.S. – Import Measures (AB)*, paras. 60-82.

[20] *See, e.g.*, *EC – Biotech*, paras. 8.16 & 8.36; *EC – Customs (AB)*, para. 310; *Dominican Republic – Cigarettes (AB)*, paras. 129-130.

[21] *See*, *e.g.*, *U.S. – FSC (Second Article 21.5)(AB)*, para. 100(b).

to both the DSU and the Working Procedures for the Panel. Several panel and Appellate Body reports have previously reached the same conclusion as the Panel did here. We will not belabor the point here.

The Panel Did not Err in not Harmonizing the Timetable

37. Finally, the EC seeks reversal of the Panel's failure to harmonize the timetables of the procedures in this proceeding and in the similar proceeding brought by Ecuador.

38. The United States has explained in its appellee submission why the EC appeal fails both as a misreading of Article 9.3 of the DSU and on procedural grounds, and we will not repeat those arguments here.

The Panel Incorrectly Interpreted the Bananas Concession as Expiring Despite Absence of Any Text Saying Concession Would Expire

39. We take this opportunity to make a few remarks as a third participant in the appeal in Ecuador's proceeding. The United States agrees with Ecuador's cross-appeal concerning the Panel's erroneous finding that the concession expired by operation of the first sentence of paragraph 9 of the Bananas Framework Agreement ("BFA").

40. The Panel did not correctly interpret the EC's tariff concession for bananas, including the first sentence of paragraph 9 within the context of the BFA, the EC Schedule, and the broader context of the bananas dispute.

41. The BFA was incorporated into the EC schedule through the notation in column 7 of the schedule. The BFA was an agreement entered into by several of the complaining parties in the GATT 1947 *Bananas II* dispute and the EC. The BFA contained provisions concerning the size

of the basic tariff quota, the in-quota tariff, country-specific allocations and transferability of allocations, the allocation for non-traditional ACP bananas, and export certificate requirements.[22]

42. The first sentence of paragraph 9 of the BFA provides that "[t]his agreement shall apply until 31 December 2002." The text does not say that "this agreement, *and any resulting WTO concession,* shall apply until 31 December 2002." That is, even though the tariff concession was subject to the "other terms and conditions" indicated in the agreement, the text of the agreement did not set out, according to the plain meaning of its terms, that the concession with which the agreement was associated would be limited in duration.

43. Although a tariff rate quota for bananas is mentioned in the text of the BFA, a tariff rate quota concession is also expressly set out in the EC's schedule. As a concession set out in the EC's Schedule, it applies to all WTO Members, not just the signatories to the BFA. That is, it does not exist only because it is included in the BFA. We do not consider correct an interpretation not based on the express terms of the text of the concession and would find deeply troubling that a concession inscribed in a Member's Schedule could be extinguished in such an unclear manner through a reference to an agreement between a small subset of WTO Members.

44. In addition, the "Modalities Paper"[23] provides supplementary means of interpretation, supporting the notion that an agricultural market access commitment that expired and that would

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[22] *Bananas III (Panel)*, para. III.30.

[23] Negotiating Group on Market Access, Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group (MTN.GNG/MA/W/24), 20 December 1993.

be replaced by less market access would be inconsistent with the goal of the agricultural market access negotiations during the Uruguay Round. The Panel correctly acknowledged this in part of its analysis.

45. Furthermore, the United States believes that the EC' own statements after the supposed expiration of the concession, to the effect that its commitments included the tariff rate quota, are evidence that the concession did not expire in 2002.

46. For these, and the additional reasons set out in our third participant submission, the United States believes that the correct interpretation of the EC Schedule leads to the conclusion that the tariff quota for bananas inscribed in the EC Schedule did not automatically expire upon expiration of the BFA. Rather, expiry of the BFA resulted in expiry of the "other terms and conditions" to the EC's bananas concession, not to the concession itself.

Conclusion

47. This concludes our statement. We welcome the opportunity to answer any questions you may have.