EUROPEAN COMMUNITIES – MEASURES FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS:

RECOURSE TO ARTICLE 21.5 OF THE DSU BY ECUADOR

WT/DS27

RESPONSE BY THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

October 4, 2007

Q93. (Both Parties and the US) Is there any particular reason why the Understandings on Bananas that the EC reached with Ecuador and the US respectively in April 2001 were only notified to the DSB more than two months later? Is there any reason why such agreements were not notified jointly to the DSB by both parties to the respective agreements?

1. The Understanding between the United States and the EC was not itself a mutually agreed solution, but only a step in the process that could have led to a mutually agreed solution. As a result, Article 3.6 of the DSU did not apply to the Understanding, and there was no need to notify the Understanding to the Dispute Settlement Body.

2. Without seeking the consent of the United States, in June 2001, the EC notified the EC-US Understanding to the DSB and, incorrectly, asserted that the Understanding was a "mutually agreed solution" for purposes of Article 3.6. In a communication to the DSB on June 26, 2001, the United States corrected the record by explaining that the EC-U.S. Understanding was not a mutually agreed solution for purposes of Article 3.6 of the DSU. The United States said:

> As we have explained to the EC during bilateral discussions last week and indicated at meetings of the DSB, the Understanding identifies the means by which the long-standing dispute over the EC's banana import regime can be resolved, but, as is obvious from its own text, it does not in itself constitute a mutually agreed solution pursuant to Article 3.6 of the DSU. In addition, in view of the steps yet to be taken by all parties, it would also be premature to take this item off the DSB agenda.[1]

Q94. (Both Parties and US) Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador of 30 April 2001 (documents WT/DS27/58 and WT/DS27/60), states that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute". In turn, the *Understanding on Bananas* reached between the EC and the US on 11 April 2001 (document WT/DS27/59), contain no equivalent statement. What value, if any, should be given to the statement contained in Paragraph G of the *Understanding on Bananas* reached between the EC and Ecuador? What value, if any, should be given to the different language contained in both understandings regarding this issue?

3. The United States would leave to Ecuador and the EC, as the negotiators and drafters of the Understanding between them, the question of what value to place on the language in Paragraph G of the Ecuador-EC Understanding. In this regard, the explanations expressed by Ecuador after the unilateral notification by the EC of both the Ecuador-EC Understanding and the EC- US Understanding, would appear helpful. In a communication to the DSB[2], Ecuador

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[1] WT/DS27/59, G/C/W/270, 2 July 2001, second paragraph.

[2] WT/DS27/60, G/C/W/274, 9 July 2001

emphasized that the Understanding "identified means by which the long-standing dispute" could be solved, but that the Understanding was comprised of phases and required implementation of several key features requiring collective WTO membership action.[3] Ecuador also noted that since "several steps" needed to be taken, "it would be premature to take this item off the DSB agenda which considers this issue at every regular meeting pursuant to Article 21.6 of the DSU."[4] Finally, Ecuador concluded that although it "sees the Understanding as an agreed solution that can *contribute* to an overall, definite and universally accepted solution, it must be made clear that the provisions of Article 3.6 of the DSU *are not applicable*."[5] (Emphasis added).

4. In any event, as the United States explained in its third party oral statement, whether the Understandings were a "mutually agreed solution" or not is irrelevant. Nothing in the Dispute Settlement Understanding (DSU) precludes a party to a mutually agreed solution from having recourse to the DSU. The U.S. arguments on this point are set out in paragraphs 3 through 13 of its third party oral statement.

> **Q101. (Ecuador, Nicaragua, Panama and the US) In paragraph 4 of its closing statement during the substantive meeting with the Panel, referring to the alleged termination of the Doha Waiver, the EC argues that "[i]f the Doha waiver wanted to say what Ecuador, Nicaragua and Panama are arguing, the text should have read that the waiver would terminate 'if the *Arbitrator concludes* that the EC has failed to rectify the matter'. The Doha waiver does not say so." Can Ecuador, Nicaragua and Panama provide a reasoned answer as to whether they agree with this statement. Could the US comment on the same, in the light of its argument in paragraph 21 of its statement during the substantive meeting with the Panel, reproduced in the previous question.**

5. The Annex clearly sets out a mechanism whereby once an arbitrator found twice that the EC had presented a tariff proposal that did not meet the conditions of the Annex, the waiver would automatically expire once the new EC tariff regime went into effect. The EC argument ignores the plain text of the waiver and the Annex. As the United States explained in paragraph 21 of its third party statement, 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 required to be made by the arbitrator pursuant to the third sentence of tiret 5. The fourth sentence requires that the arbitration award be notified to the General Council. The fifth sentence then provides the consequence arising from such a notified arbitration award where the arbitrator found that the EC failed to "rectify the matter" – the waiver shall cease to apply upon entry into force of the new EC tariff regime. There is no need to explain again in the fifth sentence that it

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[3] *Id*., para 1.

[4] *Id*., para. 3.

[5] *Id*.., paragraph after numbered para. 3.

was the arbitrator who had to conclude that the EC had failed, since the sentence and the actions therewith flow from the preceding two sentences. The EC's interpretation would "read" the role of the second arbitrator out of the Annex, allowing for a unilateral determination by the EC itself that its new regime met the conditions of the Annex.

6. The United States notes that recital 11 to the Article I waiver provides context supporting the above reading of the Annex. Recital 11 states:

> any re-binding of the EC tariff on bananas under the relevant GATT Article XXVIII procedures *should result in at least maintaining total market access for MFN banana suppliers* and their willingness to accept *a multilateral control on the implementation of this commitment*.[6]

The reference to "*multilateral control*"refers to the Annex arbitration procedures and argues against any EC interpretation that would allow the waiver to continue in effect in the face of the two negative arbitral determinations and a subsequent unilateral determination of "compliance," or unilateral choice of banana import regime, by the EC.

> **Q116. (US) In paragraph 4 of its statement during the substantive meeting with the Panel, the US argues that the *Understanding on Bananas* reached between the EC and US on 11 April 2001 (document WT/DS27/59) "is not a 'covered agreement' – it is not listed in Appendix 1." Does the US argue that, under the DSU, a panel should attribute no legal consequences to a mutually agreed solution reached between the parties to a dispute? Does, in the view of the US, the fact that a particular agreement between WTO Members is not part of the list of "Agreements Covered by the Understanding" in Appendix 1 of the DSU, mean that a WTO Panel should attribute no legal consequences to such agreement in the context of a particular dispute?**

7. With respect to the first part of the Panel's question, in which the Panel inquires about the legal consequences of a mutually agreed solution, the United States wishes to begin by recalling that the EC-U.S. Understanding on Bananas is not a mutually agreed solution.

8. The United States recognizes that the EC-U.S. Understanding, as well as the Ecuador-EC Understanding, are important documents. Indeed, there was great expectation that the Understandings would serve as the path to the eventual resolution of the dispute. Nonetheless, the importance ascribed to the Understandings is a separate matter from the question of whether any legal consequences arise from them.

9. Turning to the question of the legal consequences of mutually agreed solutions in general,

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[6] Article I Waiver, Recital 11 (emphasis added).

the United States notes that the DSU does not itself provide for any legal consequences, with only three exceptions. Article 3.6 requires that mutually agreed solutions be notified to the DSB and the relevant Councils and Committees. Article 12.7 provides that the existence of a mutually satisfactory solution reached prior to the conclusion of a panel proceeding affects the form and content of the panel's report: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Article 22.8 provides that "the suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached." The fact that the legal consequences of a mutually agreed solution are spelled out in these three provisions is significant because it stands in stark contrast to the lack of any provision that assigns the legal consequences that the EC would now attribute to such solutions. There is therefore no basis in the DSU for attributing any legal consequences to a mutually agreed solution other than the limited ones specified in Articles 3.6, 12.7, and 22.8.

10. In particular, there is no basis in the DSU, or elsewhere in the covered agreements, for the EC argument that parties to a "mutually agreed solution" are precluded from having recourse to Article 21.5 proceedings. The U.S. arguments on this point are set out in paragraphs 6 through 13 of its third party oral statement. Indeed, and as noted in our third party oral statement, the EC agreed with this position in the *India - Autos* proceeding. There, the EC held the view that a mutually agreed solution could not prevent recourse to the DSU. The EC argued that the relevant 1997 EC-India Agreement was not a "covered agreement" in the sense of Article 1.1 of the DSU and therefore the rights and obligations of the parties under the 1997 Agreement were not enforceable under the DSU.[7]

11. Mutually agreed solutions are not "covered agreements" within the meaning of Article 1 of the DSU. Indeed, a mutually agreed solution may not take the form of a written agreement at all.[8] Since mutually agreed solutions are not "covered agreements," the dispute settlement mechanism of the WTO is not available to enforce the provisions of mutually agreed solutions that take the form of a written agreement. The EC position, if adopted by this Panel, would therefore lead to very unfortunate consequences: a responding Member that failed to comply with the terms of a mutually agreed solution would appear to be able to claim immunity both

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

[8] There is no requirement in the DSU that the "mutually agreed solution" be in writing or even "agreed" before the "solution" is accepted. For example, a responding Member may take an action on its own that is then considered acceptable by the complaining party. At that point, after the action has been taken, the complaining party may "agree" with the respondent that the action constitutes a "mutually agreed solution" that needs to be notified pursuant to Article 3.6.

from further proceedings on the original dispute (by virtue of the EC position on the legal effect of mutually agreed solutions) as well as from a claim under the mutually agreed solution (in view of the absence of mutually agreed solutions from the list of covered agreements in the DSU). Nothing in the DSU suggests that a complaining Member should lose its rights in such a way.

12. The second part of the Panel's question asks whether a WTO Panel should attribute no legal consequences to an agreement between the parties in the context of a particular dispute. To be clear, the United States has argued in this dispute that the alleged mutually agreed solution between the EC and Ecuador would not have the legal consequences suggested by the EC – that is, to bar Ecuador from bringing this proceeding. The United States has not advanced, and would not support, the proposition that any agreement between the parties is never entitled to legal consequences in WTO dispute settlement. To the contrary, some DSU provisions provide explicitly for certain agreements to have such consequences, for example, DSU Articles 4.3, 21.3(b), and 25. In addition, certain other WTO agreements provide for legal consequences of agreements between Members; free trade agreements meeting the requirements of Article XXIV of the GATT 1994 are one example. And, it has sometimes been necessary to examine the legal consequences of an agreement among Members in order to understand the meaning of a WTO legal obligation that makes reference to that agreement; for example, in the original *Bananas* proceeding it was necessary to examine the Lomé Convention in order to understand the waiver, adopted pursuant to Articles IX:3 and IX:4 of the Marrakesh Agreement, for the then-extant EC bananas regime. And as noted above, in Articles 3.6, 12.7, and 22.8, the DSU does assign certain legal consequences to mutually agreed solutions.

13. However, in each such situation, it is an identifiable provision of the covered agreements that forms the basis for ascribing legal consequences within WTO dispute settlement to an agreement other than a covered agreement. By contrast, in this proceeding, the EC has not identified – and cannot identify – any WTO provision that would give the Understanding the legal consequences that the EC claims. As a result, there is no basis for this Panel to ascribe any such legal consequences to the Understanding either.