

***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)**

**THIRD PARTICIPANT SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**September 22, 2008**

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**SERVICE LIST**

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**THIRD PARTIES**

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1. The United States welcomes this opportunity to provide its views on certain issues raised in this appeal. The United States first incorporates by reference its appellee submission submitted this day with respect to the appeal in *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). In the remainder of this third participant submission, the United States will provide its views on Ecuador’s conditional appeal of the Panel’s finding that the tariff-rate quota bananas concession of the European Communities (“EC”) expired by operation of the first sentence of paragraph 9 of the Framework Agreement on Bananas (commonly known as the “BFA”).<sup>1</sup>

2. The United States agrees with Ecuador that, if the Appellate Body were to consider that it would need to reverse the Panel’s finding that the EC’s applied tariff of 176 Euros per ton is in breach of Article II:1(b) of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) on the basis of any of the reasons claimed by the EC in its appellant submission, the Appellate Body should review and reverse the Panel’s finding that the concession expired by operation of the first sentence of paragraph 9 of the BFA.<sup>2</sup> As a consequence, the Appellate Body should therefore conclude that the EC’s applied tariff is nonetheless in breach of the EC’s obligations under GATT 1994 Article II.

3. The United States agrees with Ecuador that 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.

4. In interpreting the EC concession for bananas, the Panel is correct in starting by considering the relevant terms contained in Part I, Section I.A and I.B of the EC schedule.<sup>3</sup> With respect to Section I.B and the bananas concession, the Panel was also correct in considering the terms of the BFA, as those were incorporated into the schedule through the notation “As indicated in the Annex” in column 7. The “Annex” is the BFA.<sup>4</sup>

5. The EC schedule contains a tariff quota concession of 2.2 million tons at an in-quota rate of 75 Euros per ton. The identical concession appears under column 3, the “initial quota”, and column 4, the “final quota”. In addition there is no notation under column 5, “Implementation Period From/To”. There is nothing in this text that suggests an expiration of the concession. This would be consistent with the scheduling of current access quotas during the Uruguay Round. As the Panel itself recognized in its use of the “Modalities Paper”<sup>5</sup> as supplementary means of interpretation, “as a result of the agricultural market access negotiations that took place in the Uruguay Round, Members undertook the commitment to maintain and increase current

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<sup>1</sup> See Exhibit EC-1 (Schedule CXL of the European Communities, including the Annex).

<sup>2</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/RW2/ECU), 7 April 2008, para. 7.427 (“Panel Report”).

<sup>3</sup> Panel Report, para. 7.420.

<sup>4</sup> Panel Report, para. 7.424.

<sup>5</sup> 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.

access opportunities as part of the so-called ‘tariffication’ process.”<sup>6</sup> Nothing in the Modalities Paper would accord with the approach of an agricultural market access commitment that expired and that would be replaced by less market access. Indeed, Article 20 of the *Agreement on Agriculture* makes clear that what was contemplated was “progressive reductions” in agricultural market access “protection.”

6. Column 7, “Other Terms and Conditions”, refers the reader to the BFA. Since the EC argued that like the BFA the concession was intended to expire on December 31, 2002, the Panel naturally looked at the text of the first sentence of paragraph 9 of the BFA.

7. 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.

8. The Panel considered that the first sentence of paragraph 9 of the BFA “automatically impl[ied]” that the bananas concession also expired on that date.<sup>7</sup> The Panel, in essence, equated the “agreement” with the “concession”. There are various problems with this.

9. The BFA was a plurilateral 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 those allocations, the 90,000 ton allocation for non-traditional ACP bananas, and export certificate requirements.<sup>8</sup> The EC’s measures implementing many of the provisions of the BFA were successfully challenged by the United States and Ecuador, among others, in what became this dispute - *Bananas III*.

10. 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.

11. Other WTO Members, when they were considering the EC’s draft WTO schedule, would have seen the tariff-rate quota commitment on bananas and noted the reference to “[a]s indicated in the Annex” under the Other Terms and Conditions column. In examining the annex relating to

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<sup>6</sup> Panel Report, para. 7.475.

<sup>7</sup> Panel Report, para. 7.427.

<sup>8</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, para. III.30.

bananas, they could have seen paragraph 9 and the statement that “[t]his agreement shall apply until 31 December 2002.” However, no WTO Member other than the BFA signatories were parties to that agreement, nor were they being asked to become parties to that agreement, and those other WTO Members would have been entitled to conclude that the term “agreement” applied to the BFA and not to the new concession the EC was entering into. It is an extremely troubling interpretation that would have a concession inscribed in a Member’s schedule extinguished in such an unclear manner through an unelaborated reference to an agreement between only a subset of WTO Members.

12. Statements and actions by the EC prior to this proceeding demonstrate that it believed the bananas tariff quota extended beyond 2002. As noted by Ecuador in its other appellant submission, in August 2004 and February 2005 the EC filed Article XXVIII:5 notifications explicitly referring to its intention to withdraw “concessions” on bananas.<sup>9</sup> That could not have referred to what it now claims is its only concession, a prohibitive 680 Euro per ton tariff rate. In addition, the EC’s own submission in May 2005 in the first Doha Waiver arbitration described its “Current WTO Commitments” as follows:

9. The EC’s current [13 May 2005] WTO commitments, which it is proposing to modify, are as follows. Under tariff heading 0803.12 the EC has a bound duty of €680/t. Under that heading, it has the possibility to apply a special safeguard measure pursuant to Article 5 of the *Agreement on Agriculture*. The EC also has a bound tariff rate quota of 2,200,000 tonnes, with an in-quota rate of 75 €/t.

10. The EC has no other WTO commitments for bananas. Until 31 December 2002, the EC was also bound by the Framework Agreement on Bananas which had been incorporated into the EC’s Schedule. It [the Agreement] is no longer in force.<sup>10</sup>

13. As a textual matter, the term “agreement” in paragraph 9 of the BFA is not interchangeable with the bananas concession in the EC’s Schedule. Paragraph 1 of the BFA provides additional context for a different interpretation than the Panel’s. Paragraph 1 provides that the quota shall be fixed at 2,200,000 tons “for 1995 and the *following years*, subject to any increase resulting from the enlargement of the Community” (emphasis added). The use of “following years” does not seem to include an endpoint. If the tariff quota was intended to only be bound through 2002, it would have been natural to specify that limitation here, e.g., through text that read “for 1995 through 2002.”

14. None of this supports the notion that the EC’s WTO concession would terminate; having been inscribed in the EC Schedule with a “Final quota quantity and in-quota tariff rate” of

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<sup>9</sup> Other Appellant Submission by Ecuador, para. 34, fourth bullet.

<sup>10</sup> Exhibit ECU-4 (Communication by the European Communities, *Arbitration under the Annex to the Doha Ministerial Decision on the ACP-EC Partnership Agreement*, paras. 9-10 (13 May 2005) (underlining added)).

“2,200,000 t” and “75 ECU/t”, the concession has a life independent of the agreement that perhaps motivated the EC to inscribe it. The United States further notes that the BFA was incorporated in the schedule under the “*other* terms and conditions”. The quota allocation rules and related procedures were these “*other*” terms and conditions, consistent with the EC’s own explanation during the Doha Waiver arbitration quoted above.

15. The United States believes that the supplementary means of interpretation used by the Panel indeed provide context to support this interpretation. In particular, the Ecuador - EC Bananas Understanding (as well as the U.S. - EC Bananas Understanding) and the Doha waiver provide supplementary means for supporting the conclusion that the concession did not expire along with the BFA.

16. Paragraph 1 of Annex 1 of the Ecuador - EC Bananas Understanding provides that “[a] *bound* tariff-rate quota (TRQ) designated as quota ‘A’ will be set at 2,200,000 tonnes” (emphasis added).<sup>11</sup> Paragraph 1 of Annex II of the Understanding provides that “[d]uring Phase II, the provisions applying to Phase I will continue.” Therefore, the “*bound*” tariff quota would remain in effect until introduction of the tariff only regime on January 2006. In addition, paragraph B of the Ecuador - EC Understanding provided that “GATT Article XXVIII negotiations shall be initiated in good time to that effect [introduction of a tariff only regime].” These provisions read together support the conclusion that the tariff quota was to be bound beyond December 2002 and at least until renegotiations under GATT Article XXVIII.

17. The text of the Doha waiver likewise supports this interpretation. In particular, the 11<sup>th</sup> clause of the preamble to the waiver notes “the assurances from the Parties to the Agreement [the ACP-EC Partnership Agreement] that 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” (emphasis added). In addition, the Annex on bananas attached to the waiver set out a procedure whereby the EC would engage in Article XXVIII negotiations for purposes of rebinding the EC tariff on bananas. The Annex required that “all EC WTO market-access commitments relating to bananas should be taken into account.”<sup>12</sup> This appears to be a recognition that the tariff quota inscribed in the EC schedule was part of those commitments. This requirement would not make sense if the premise underlying it were that the EC’s only “commitment” was a 680 euro per ton tariff, i.e., a prohibitive tariff.

18. For these reasons, the United States believes that an interpretation of the EC Schedule in accordance with the customary rules of interpretation of public international law leads to the conclusion that the tariff quota for bananas inscribed in the EC Schedule did not automatically expire upon expiration of the BFA.

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<sup>11</sup> Panel Report, Annex B-3. This provision is also contained in the US - EC Bananas Understanding (Panel Report, Annex B-2).

<sup>12</sup> Panel Report, Annex B-4 (Doha Waiver, Annex, second tiret).

19. Thus, the United States agrees that, should the condition in Ecuador's other appeal be fulfilled, the Appellate Body should reverse the Panel's finding that the EC's bananas concession expired by operation of the first sentence of paragraph 9 of the BFA, and the Appellate Body should therefore conclude that the EC's applied tariff is nonetheless in breach of the EC's obligations under Article II of the GATT 1994.