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

Recourse to Article 21.5 of the DSU by the United States

(WT/DS27)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

September 10, 2007

I. INTRODUCTION

1. The United States is before this Panel to address the continued inconsistency of the European Communities' ("EC") import regime for bananas with its WTO obligations. Regrettably, this Panel proceeding is the tenth GATT/WTO proceeding since 1992. After almost ten years from the adoption by the DSB of its recommendations and rulings in *European Communities - Regime for the Importation, Sale and Distribution of Bananas* ("*Bananas III*"), and many opportunities for reform afforded to the EC by the United States and other affected Members, the EC has yet to implement the DSB's recommendations and rulings with a WTO compliant import regime for bananas. Repeated efforts at negotiating a WTO-consistent and mutually acceptable solution with the EC have been unsuccessful. The United States has reluctantly concluded that recourse to WTO dispute settlement under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") is warranted. The United States hopes that this will be the last proceeding necessary to secure compliance by the EC with its WTO obligations in this dispute.

2. On January 1, 2006, the EC implemented a new regime for importation of bananas through Council Regulation (EC) No. 1964/2005 ("Regulation 1964"). This latest regime continues to discriminate in favor of imports of bananas originating in African, Caribbean and Pacific ("ACP") countries and against imports of bananas from other countries. It establishes a duty-free tariff rate quota that is available exclusively to ACP bananas in amounts up to 775,000 metric tons. Bananas from all other countries – for example, from developing countries in Latin America heavily dependent on the banana trade – have no access to this duty-free tariff rate quota. Bananas from such countries are subject, instead, to a duty of 176 euro per ton. Even this tariff level is uncertain, as the EC has failed to re-bind its banana tariff rate.

3. The United States considers that these tariff and tariff rate quota measures fail to bring the EC into compliance with the *Bananas III* recommendations and rulings and its WTO obligations in the following respects:

(1) The preferential duty-free tariff rate quota applicable to bananas of ACP origin is not being accorded immediately and unconditionally to bananas originating in all other WTO Members in breach of Article I:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"); and

(2) The tariff rate quota reserved exclusively for bananas of ACP origin fails to restrict all banana imports in a similar manner in breach of Article XIII:1 of the GATT 1994 and does not aim at a distribution of trade in bananas approaching as closely as possible the shares that would have been achieved absent restrictions in breach of Article XIII:2 of the GATT 1994.

II. PROCEDURAL HISTORY

4. The original WTO panel proceeding in this dispute ("*Bananas III*") was initiated more than ten years ago – on May 8, 1996 – by Ecuador, Guatemala, Honduras, Mexico, and the United States. The panel in that proceeding found over a dozen breaches of the GATT 1994 and

the *General Agreement on Trade in Services* ("GATS"), which were overwhelmingly confirmed by the Appellate Body. On September 25, 1997, the DSB adopted the original panel and Appellate Body reports and recommended that the EC bring its banana import regime into conformity with its obligations under those agreements. Pursuant to arbitration under Article 21.3 of the DSU, the EC was given a "reasonable period of time" of more than 15 months (from September 25, 1997 to January 1, 1999) to implement the DSB's recommendations and rulings. The EC did not, however, implement the *Bananas III* recommendations and rulings by the end of that "reasonable period of time".

5. Instead of bringing its banana import regime into compliance with its WTO obligations by January 1, 1999, the EC implemented two regulations – Regulation (EC) No. 1637/98 and Regulation (EC) No. 2362/98 – that were found, within a short time of their implementation, to perpetuate a discriminatory tariff rate quota and license-based system in breach of the GATT 1994 and the GATS. As the EC had failed to redress the nullification or impairment found by the WTO, the DSB authorized the suspension of concessions or other obligations equivalent to the level of the nullification or impairment. With respect to the United States, the DSB authorized the suspension of concessions in the amount of US$191.4 million per year.

6. In November 1999, the EC announced a second attempt to reform its banana regime, which was allegedly to comprise a "two-stage process, namely, after a transitional period during which a tariff quota system would be applied with preferential access for ACP countries, a flat tariff would be introduced." The transitional period was to end no later than January 1, 2006.

Understanding on Bananas

7. In April 2001, after more than two years of non-compliance, the United States and the EC reached an *"Understanding on Bananas*", which established 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.

8. Under the terms of the EC-US Understanding, the EC was required to implement a "tariff only" regime by "no later than 1 January 2006." In the "interim", the EC would implement an import regime based on historical licensing which included a tariff rate quota system. Because certain aspects of the interim arrangement were not in conformity with the EC's WTO obligations, the EC-US Understanding required the United States to "lift its reserve concerning the waiver of Article I of the GATT 1994 that the EC has requested for preferential access to the EC of goods originating in ACP states signatory to the Cotonou Agreement; and will actively work towards promoting the acceptance of the EC request for a waiver of Article XIII of the GATT 1994" for the ACP tariff quota on bananas. That provision was intended to facilitate the subsequent negotiation and adoption of conditional waivers acceptable to the interested parties and the full WTO Membership.

GATT Article I Waiver and Arbitrations

9. Following the EC-US Understanding, the United States and other affected Members agreed to negotiate the waiver terms necessary to ensure an acceptable banana arrangement throughout the life of the Understanding. These terms were incorporated into the body of the Article I Waiver and its Annex, which contains additional provisions applicable to bananas. As a general matter, the waiver was set to expire on December 31, 2007 for products other than bananas.

10. With respect to bananas, the validity of the waiver was made subject to a special arbitration mechanism contained in the Annex. The EC, ACP countries and MFN suppliers of bananas to the European Union were to engage in negotiations under Article XXVIII of the GATT 1994 with respect to the terms of the tariff only regime to enter into force by January 1, 2006. The Annex required that within 60 days of an announcement by the EC of its intentions on rebinding of the tariff on bananas, any interested party could request arbitration. The mandate of the arbitrator was to determine "whether the envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers, taking into account" all of the "EC WTO market-access commitments relating to bananas." If a WTO arbitrator were to find that the proposed rebinding would not "result in at least maintaining total market access for MFN banana suppliers" the EC would have to "rectify the matter." Within 10 days of the notification of the arbitration award to the General Council, the EC would have to enter into consultations with the interested parties that requested the arbitration. If there was no mutually satisfactory solution, the same arbitrator would be asked to determine whether the EC had rectified the matter. If the EC had failed to rectify the matter, the waiver would "cease to apply to bananas upon entry into force of the new EC tariff regime." That is, if there were two negative arbitrator determinations against the EC, the waiver would terminate.

11. On October 27, 2004, the EC announced its intention to implement an MFN tariff of 230 euro per ton, a rate over three times higher than the 75 euro per ton MFN rate applicable at the time. The Commission formally notified that rate to the WTO on February 1, 2005, pursuant to the Annex to the Article I Waiver.

12. Between March 30 and April 1, 2005, nine Latin American supplying countries initiated arbitration pursuant to the terms of the Annex, seeking a determination that the EC's 230 euro per ton rate would not "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market access commitments," as required by the waiver.

13. The first Arbitration Award ("*AAI*"), issued on August 1, 2005, carefully defined the EC's market access commitment under the Annex to require that any "envisaged rebinding" must, at a minimum, preserve into the future "the totality of [MFN] opportunities afforded by the existing conditions of entry," both as between MFN and preferred suppliers, and MFN and domestic EC

producers. The Arbitrator determined that because the EC's proposed 230 euro per ton rate wrongly increased the ACP and Everything But Arms margin of preference, creating the opportunity for a positive ACP and EBA supply response, and overstated the level of price-gap protection for EC producers, the EC had not fulfilled its Annex commitments.

14. On September 12, 2005, the EC proposed a revised banana "tariff only" rate of 187 euro per ton for MFN suppliers, coupled with an enlarged ACP tariff rate quota of 775,000 tons (reflecting a 25,000 ton increase in the then existing ACP tariff rate quota volume), at zero duty.

15. On September 26, 2005, pursuant to the procedures set out in the Annex, the EC requested a second arbitration to determine whether the new proposed tariff and ACP tariff rate quota "rectified the matter." The second Arbitration Award ("*AAII*"), issued on October 27, 2005, determined that the EC's latest proposal "failed to rectify the matter."

16. Having twice failed to meet the condition of the waiver that the new regime "result in at least maintaining total market access for MFN banana suppliers," taking into account "all EC WTO market access commitments," the Article I waiver for bananas expired upon entry into force of the January 1, 2006 regime by operation of the terms of the Annex.

Article XIII Waiver

17. On May 21, 2001, pursuant to its acknowledgment in the EC-US and EC-Ecuador Understandings that "[a] waiver of Article XIII of the GATT 1994 [is] needed for the management of quota C [the ACP quota]," the EC circulated among the MFN banana-supplying Members a draft XIII waiver request, which explained that:

> an additional protection should be maintained for imports of bananas originating in the ACP countries, under the form of a limited tariff rate quota set aside for them, for the duration of the interim period. This *requires* a waiver from the obligations established under Article XIII GATT.

18. On June 22, 2001, the EC submitted to the WTO its request and draft decision to waive GATT Article XIII obligations until December 31, 2005, "with respect to the EC's separate quota of 750,000 tonnes for bananas of ACP origin." Because the EC asked that its GATT Article I and GATT Article XIII waiver requests proceed in parallel, the GATT Article XIII waiver request was approved without amendment on November 14, 2001, the same day the GATT Article I waiver was approved. In accordance with paragraph 1 of the Article XIII Waiver, the waiver was scheduled to terminate on December 31, 2005.

19. On October 7, 2005, as the termination date of the Article XIII Waiver approached, the EC requested an extension "until 31 December 2007 [for] the existing waiver from paragraphs 1 and 2 of Article XIII of the GATT 1994, for a quantity of 775,000 tonnes of imports of bananas

originating in ACP countries." The EC's request for a waiver extension was made in conjunction with a September 12, 2005 proposal to replace its "interim" tariff-quota regime with a "tariff only" rate of 187 euro per ton for MFN suppliers and an enlarged ACP tariff rate quota of 775,000 tons (reflecting a 25,000 mt increase over the then existing ACP tariff rate quota volume). WTO Members did not agree to the EC's proposed extension.

20. On December 31, 2005, the Article XIII Waiver expired in accordance with its terms.

21. Citing "divergences" of opinion on how to proceed with the waiver request and a preference for a "negotiated solution to the banana problem", the EC "suspended" its request for an Article XIII waiver at the meeting of the Council for Trade in Goods held on March 19, 2007.

III. THE EC'S REVISED MEASURES

22. On November 29, 2005, without consultations with the *Bananas III* complainants and other MFN suppliers, the EC adopted Regulation 1964, which provides for the current regime for the importation of bananas into the EC market. Regulation 1964 entered into force on January 1, 2006.

23. Article 1 of Regulation 1964 establishes a duty-free tariff rate quota that is available exclusively to ACP bananas in amounts up to 775,000 tons. Bananas from all other countries have no access to this duty-free tariff-rate quota. Article 1 establishes that all other bananas are subject, instead, to a duty of 176 euro per ton. Article 2 of Regulation 1964 provides the necessary authority to promulgate implementing rules. Numerous additional regulations governing the licensing features of the tariff and ACP tariff rate quota measures have been enacted.

24. In accordance with these provisions, bananas of MFN origin enter the EC-27 market at a rate of 176 euros per ton (equating to $4.33/box, or 33% *ad valorem*), or 135% higher than the 75 euros per ton rate previously assessed on all MFN bananas entering the EC from January 1, 1995, to December 31, 2005. Under the 176 euro per ton rate, bananas from the developing countries of Latin America contributed 580 million euros, or approximately US$790 million, to the EC's 2006 customs revenues.

25. ACP-origin bananas that are not otherwise covered by the EC's "Everything But Arms" initiative ("EBA") enter the EC market duty-free for all volumes within the 775,000 ton ACP tariff rate quota (*i.e.,* a margin of preference of 176 euros per ton, or $4.33/box). Imports of ACP-origin bananas into the EC market in excess of 775,000 tons are dutiable at 176 euros per ton. MFN-origin bananas have no right to enter the zero-duty ACP tariff rate quota and receive no other market allocation.

IV. LEGAL ARGUMENTS

26. The fact that this Panel has been established under Article 21.5 of the DSU carries with it certain consequences. Of most immediate relevance to the legal arguments of the parties is the consequence that, as the Appellate Body has made clear, 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 original panel. The original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5, form part of a continuum of events." It is well established that adopted panel and Appellate Body reports "are treated as a final resolution to a dispute between the parties to that dispute."

27. As discussed in detail below, the EC's revised measures are in breach of GATT Article I and GATT Article XIII.

A. THE EC'S REVISED MEASURES ARE INCONSISTENT WITH ARTICLE I OF THE GATT 1994

28. GATT Article I:1 provides, in relevant part, that:

> [w]ith respect to customs duties and charges of any kind imposed on or in connection with importation . . . and with respect to all rules and formalities in connection with importation . . . any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

29. To establish a violation of Article I:1, a Member must show: (i) an advantage, favour, privilege or immunity, (ii) of the type covered by Article I, (iii) that is not accorded immediately and unconditionally to all "like products" of all WTO Members. All three of these conditions are present in the EC's current tariff arrangement.

30. First, the EC is providing an "advantage, favour, privilege or immunity" to ACP Members by according ACP bananas duty-free access within the 775,000 ton tariff rate quota, while subjecting all MFN bananas to a 176 euros per ton duty. The duty-free treatment, amounting to a tariff savings of $4.33 per box, is only available to bananas of ACP origin.

31. Second, the measure by which the EC is granting the " advantage, favour, privilege or immunity" to ACP Members is in relation to a "customs dut[y]" within the meaning of Article I:1. Bananas of ACP origin up to an amount of 775,000 tons receive a customs preference of 176 euros per ton over all other bananas, by entering duty-free.

32. Third, the EC is failing to accord the ACP tariff advantage "immediately and unconditionally" to the "like product" of other WTO Members. Although MFN bananas and

ACP origin bananas are "like product" imports, MFN bananas are being denied the same duty-free tariff rate quota treatment as bananas of ACP origin.

33. Therefore, Regulation 1964 is in violation of GATT Article I:1.

Termination of GATT Article I Waiver

34. The fifth "whereas"clause of Regulation 1964, asserts that in light of the two negative arbitration determinations under the Annex to the Article I Waiver, the Commission has "further modified its proposal in order to rectify the matter." Although at this stage in these proceedings the United States does not need to rebut the EC's legal arguments in its defense, an assertion that the Article I Waiver is still in effect can be expected.

35. Whether the EC "rectified the matter" the third time around is irrelevant with respect to the continued validity of the GATT Article I Waiver. Under the express terms of the Annex, the EC had two opportunities to propose a regime that met the conditions set out in the waiver. In 2005, pursuant to the Annex arbitration mechanism, two WTO arbitrators determined that the two proposals made by the EC did not "result in at least maintaining total market access for MFN suppliers." Therefore, as required by the fifth sentence in tiret 5 of the Annex to the Article I Waiver, the waiver "cease[d] to apply upon entry into force of the new EC tariff regime." The "new EC tariff regime" is the measure that is the subject of these proceedings, Regulation 1964, which entered into force on January 1, 2006.

B. THE EC'S REVISED MEASURES ARE INCONSISTENT WITH ARTICLE XIII OF THE GATT 1994

36. GATT Article XIII provides, in relevant part, that:

> 1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.
>
> 2. In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

…

> (*d*) In cases in which a quota is allocated among supplying countries the Member applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other Members having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the Member concerned shall allot to Members having a substantial interest in supplying the product shares based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product. No conditions or formalities shall be imposed which would prevent any Member from utilizing fully the share of any such total quantity or value which has been allotted to it, subject to importation being made within any prescribed period to which the quota may relate.
>
> ...
>
> 5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any Member, and, in so far as applicable, the principles of this Article shall also extend to export restrictions."

37. Under the terms of the EC-US Understanding, the EC- Ecuador Understanding and the Article I Waiver, the EC was supposed to introduce a tariff only regime for bananas by January 1, 2006. Instead, the EC introduced a regime containing an exclusive tariff rate quota for bananas of ACP origin. 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. While the current regime may be a simplified version of earlier ones, the nonconformity with GATT Article XIII remains.

38. There can be no doubt that 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:

> Article XIII:5 provides that the provisions of Article XIII apply to "tariff quotas". The European Communities essentially argues that the amount of 857,700 tonnes for traditional imports from ACP States constitutes an upper limit on a tariff preference and is not a tariff quota subject to Article XIII. However, by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate. Thus, Article XIII applies to the 857,700 tonne limit.

39. Regulation 1964 establishes an exclusive duty-free tariff rate quota for ACP countries in the amount of 775,000 tons. Just as in *EC - Bananas III (21.5)(Ecuador)*, this is a quantitative limit on the availability of the duty-free rate to non-ACP bananas.

1. The EC's Import Regime for Bananas is Inconsistent with GATT Article XIII:1

40. GATT Article XIII:1 sets forth the basic GATT non-discrimination obligation governing the application of import restrictions. As explained by the Panel in *Bananas III*:

> Article XIII:1 establishes the basic principle that no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted. ... [A]s indicated by terms of Article XIII (and even its title, "Non-discriminatory Administration of Quantitative Restrictions"), the non-discrimination obligation extends further. The imported products at issue must be "similarly" restricted. A Member may not restrict imports from some Members using one means and restrict them from another Member using another means.

41. The Appellate Body added that the "essence" of GATT Article XIII, and therefore Article XIII:1, "is that like products should be treated equally, irrespective of origin." It further determined that "[a]s no participant disputes that all bananas are like products, the non-discrimination provisions apply to all imports of bananas . . . ."

42. In disregard of GATT Article XIII:1 and the *Bananas III* findings, the EC has chosen to maintain 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.

2. The EC's Import Regime for Bananas is Inconsistent with GATT Article XIII:2

43. The chapeau to GATT Article XIII:2 requires, in relevant part, that:

> In applying import restrictions to any product, Members shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions . . . .

44. As the *Bananas III* panel found, "[i]f quantitative restrictions are used ... they are to be used in the least trade-distorting manner possible." The panel emphasized that, as required by the chapeau, any tariff rate quota allocations must "minimize the impact of a quota or tariff quota regime on trade flows by attempting to approximate ... the trade shares that would have occurred in the absence of the regime."

45. The *Bananas III* panel further explained that Article XIII:2(d) provides for the possibility to allocate tariff rate quota shares to supplying countries and the treatment that must be given to Members with a "substantial interest" in supplying the product. The Member allocating shares of a tariff rate quota may seek agreement with all Members having a substantial interest in supplying the product, or, if that is not reasonably practicable, allot to Members having a substantial interest in supplying the product based on criteria specified in Article XIII:2(d), second sentence. The *Bananas III* panel determined that 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."

46. 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 is so even though many of the excluded MFN suppliers are principal or substantial suppliers of bananas to the EC, and leading exporters of bananas to the world market. Therefore, the ACP tariff rate quota established through Regulation 1964, like prior ACP tariff rate quotas, is inconsistent with Article XIII:2.

47. The EC has no Article XIII waiver currently in force - its last waiver having expired on its own terms on December 31, 2005.

48. For the reasons stated above, the ACP tariff rate quota is in violation of GATT Articles XIII:1 and XIII:2.

V. CONCLUSION

49. For the foregoing reasons, the United States respectfully requests that the Panel find that:

(1) the EC's import regime for bananas implemented through Regulation 1964 is inconsistent with Article I of the GATT 1994 because it applies a zero tariff rate to imports of bananas originating in ACP countries in a quantity up to 775,000 tons but does not accord the same duty-free treatment to imports of bananas originating in all other WTO Members;

(2) the EC's import regime for bananas implemented through Regulation 1964 is inconsistent with Article XIII of the GATT 1994 - including Articles XIII:1 and XIII:2 - because it reserves the 775,000 ton zero-duty tariff rate quota for imports of bananas originating in ACP countries and provides no access to this preferential tariff rate quota to imports of bananas originating in non-ACP substantial or non-substantial supplying countries; and,

(3) the EC has failed to comply with the recommendations and ruling of the DSB.