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

WT/DS27

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SUBSTANTIVE MEETING OF THE PANEL

NOVEMBER 13, 2007

1. The United States thanks the members of the Panel for agreeing to serve on this Panel. In addition, we would like to thank the Panel for opening this meeting to all Members and to the public at the joint request of the United States and the EC. We appreciate your efforts and those of the Secretariat to provide notice of this meeting and to enable WTO Members and members of the public to witness this meeting first-hand. The United States believes that this open panel meeting can only make the WTO a stronger institution and heighten the credibility of the WTO dispute settlement system as WTO Members and the public see the professionalism and diligence that WTO panelists and the Secretariat bring to their work.

2. In its written submissions, the United States has established that the regime for the importation of bananas implemented by the European Communities on January 1, 2006, is in breach of GATT Articles I and XIII. The EC has raised a number of mostly procedural arguments in its own written submissions. We do not believe it is necessary to address all those arguments in this oral statement. In this statement, we will begin with a threshold point, namely that the bananas import regime implemented by the European Communities on January 1, 2006 is a "measure taken to comply with the recommendations and rulings" of the Dispute Settlement Body ("DSB") and is therefore properly before this Panel under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") . Next, the United States will summarize its arguments demonstrating that this regime is inconsistent with GATT 1994 Articles I and XIII. Finally, the United States will address two of the procedural arguments that have been raised by the European Communities in its written submissions.

3. **The EC's Bananas Import Regime Is a Measure Taken to Comply**: On January 1, 2006, the European Communities implemented a revised regime for the importation of bananas through Council Regulation (EC) No. 1964 of 2005. Article 1 of Regulation 1964 contains two elements. Paragraph 1 establishes that from January 1, 2006, the most-favored-nation, or MFN, tariff rate for bananas will be set at 176 euros per ton. Paragraph 2 creates an exception to this MFN rate by establishing a duty-free tariff rate quota of up to 775,000 tons per year available exclusively to bananas originating in the African, Caribbean and Pacific countries or ACP countries. MFN-origin bananas have no right to enter under the zero-duty ACP tariff rate quota.

4. In its written submissions, the European Communities argues that the current import

regime for bananas is not a "measure taken to comply" and therefore the U.S. complaint falls outside the scope of DSU Article 21.5. It is clear that an implementing Member's designation of a measure as one taken to comply, or not, is not determinative. The procedural history of this dispute clearly demonstrates that the regime for bananas implemented on January 1, 2006 is the latest in a long line of failed measures taken by the EC as a result of the recommendations and rulings of the DSB in *Bananas III*. The EC's arguments are without merit and should be rejected by the Panel.

5. On September 25, 1997, the DSB adopted the panel and Appellate Body reports in *Bananas III* and recommended that the EC bring its measures into compliance. The EC stated that it could not do so immediately, and an arbitrator acting under Article 21.3 of the DSU determined that the EC would have fifteen months and one week to bring itself into compliance - that is until January 1, 1999. By that date, the EC implemented two regulations, consisting of a discriminatory tariff rate quota and a license-based system. These two regulations were then found in breach of the GATT 1994 and the GATS by a compliance panel established at the request of Ecuador and by an arbitrator reviewing a U.S. request for authorization to suspend concessions. The DSB adopted the report of the Article 21.5 panel on May 6, 1999, again recommending that the EC bring itself into compliance. The DSB authorized the United States to suspend concessions on April 19, 1999.

6. In November of 1999, in its status report regarding implementation of the DSB's recommendations concerning its banana import regime, the EC representative announced a new compliance proposal. This proposal would include a "two-stage process" involving a transitional period with a preferential tariff rate quota system for ACP countries, followed by a flat tariff. At the meeting, many concerns were raised about the lack of details of the proposal and the perpetuation of discrimination between Latin American and ACP suppliers.

7. After two years of continued non-compliance, in April 2001 the EC reached the *Understanding on Bananas* with the United States, and a very similar one with Ecuador. Although we disagree with the legal consequences that the EC ascribes to the Understanding - we will deal with those later in this statement - we do not argue that the Panel should completely disregard the Understanding. Indeed, the Understanding is an important fact in the procedural history of this dispute, as it set out the roadmap through which the United States and Ecuador expected that the bananas dispute would be finally resolved. It is interesting that while the EC argues that the Understanding precludes the United States from bringing this claim at all using arguments not based on the text of the Understanding or any well-founded legal basis, it would ignore the plain meaning of the text.

8. The Understanding laid out a series of steps, over multiple years, through which the EC would bring itself into compliance. Paragraph A of the Understanding serves as the introduction for the steps that follow which "identified the means by which the long-standing dispute over the EC's banana import regime [could] be resolved."

9. Paragraph B states that the EC "will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006." Note that although chronologically this would have been the last step to be taken, it is the first step outlined in the Understanding. The EC's argument that this paragraph is just a "simple reference" to secondary legislation "which reflected the political decision of the European Communities to change its banana import regime" before the signing of the Understanding is an attempted *post hoc* rationale inconsistent with the plain text of the Understanding. It ignores the fact that this was a central element in the "means by which the long-standing dispute over the EC's banana import regime can be resolved," and cannot change the fact that there would be a continuum of actions to be taken, culminating with this step. This would have been the final action to be taken in bringing the EC regime into compliance.

10. Paragraph C begins with "in the interim". That is, before taking the final step set out in paragraph B, there were a series of other steps that needed to be taken. Paragraph C, in conjunction with Annex I, goes on to detail the interim licensing regime the EC would use between July 1, 2001, and December 31, 2005. These steps were "interim" because they still discriminated between WTO Members, as evidenced *inter alia* by the fact that the EC recognized that it would need waivers of Article I and XIII of the GATT 1994.

11. Paragraph D then deals with steps the United States would take, in response to the successful completion of interim steps by the EC, with respect to the U.S. suspension of concessions against EC exports.

12. Paragraph E provides that the United States would lift its reserve concerning the waiver of the EC's WTO obligations under GATT 1994 Article I for ACP-origin bananas. In addition, the United States would work towards promoting the acceptance by the WTO membership of the request for the Article XIII waiver that would be needed for the management of quota C until December 31, 2005.

13. It should be clear that, per the terms of the Understanding, the measures taken to comply with the DSB recommendations included a series of interim steps and a final step on January 1, 2006 - that is, the introduction of a tariff only regime. The interim regime between July 1, 2001, and December 31, 2005, was a measure taken to comply, and the regime that the EC introduced on January 1, 2006, which it claims to be a tariff-only regime, is also a "measure taken to comply."

14. The EC argues that the fact that the United States agreed to terminate its application of the authorized suspension of concessions and related obligations upon the completion of Phase II "confirms" that the implementation of that import regime was the agreed "measure taken to comply". As we have already explained, the Understanding sets out a series of steps. Two significant steps were to be achieved by July 1, 2001, and January 1, 2002. As incentive to ensure that the EC took those steps, the United States agreed to first provisionally suspend its

imposition of increased duties and then terminate the imposition of increased duties that the DSB had authorized the United States to apply. This only proves that both the United States and the EC complied with what is set out in paragraphs C and D of the Understanding. Up to that point, there had yet to be full compliance by the EC. Per the terms of the Understanding, there was an additional step to be taken.

15. The EC also argues that a regime that was to enter into force six years after the relevant DSB rulings could not be a "measure taken to comply." This argument must be soundly rejected. It would have been much welcomed if the EC had brought itself into compliance immediately upon adoption of the DSB's recommendations and rulings in 1997 or at the end of the reasonable period of time - that is, January 1, 1999. Instead, the EC chose to perpetuate a discriminatory system of tariff rate quotas. The United States, Ecuador, and the other original complaining parties recognized the importance that trade in bananas has for many of the ACP countries and were willing to recognize that an abrupt fix to the bananas problem could have a negative impact. That is why the United States, other original complaining parties, and other MFN banana suppliers were willing to allow for a lengthy transitional period of adjustment to a new, tariff-only regime by January 1, 2006. This forbearance, by the United States and the Latin American banana suppliers, has unfortunately been repaid by the EC with continued discrimination and noncompliance.

16. Finally, we note that in the related proceeding brought by Ecuador, the EC argues that the January 1, 2006 regime implements one of the suggestions made by the panel in the Ecuador 21.5 report. In that proceeding, the EC argues that therefore the measure cannot be challenged. The United States believes those arguments are completely unfounded. For purposes of this proceeding, however, the Panel should take the EC's argument that its current bananas regime implements a suggestion by the compliance panel in *Bananas III* as a concession by the EC that the measure taken by the EC on January 1, 2006 is directly linked to the DSB's recommendations and rulings. For all the foregoing reasons, the Panel should conclude that the EC's current bananas import regime is a "measure taken to comply".

17. **The EC's Regime Is in Breach of GATT 1994 Articles XIII and I**: The EC's main argumentation has been procedural. This is not surprising as most of the EC's substantive arguments are the same, unsuccessful arguments it has made in the prior proceedings in this dispute. The United States will now briefly demonstrate that the tariff rate quota regime implemented by the EC on January 1, 2006 is in breach of GATT Articles XIII and I.

18. The EC's Regime Is in Breach of GATT 1994 Article XIII: We begin with Article XIII of the GATT 1994. Article XIII:5 provides that Article XIII applies to "tariff quotas." The EC claims that Article XIII does not apply in this instance because MFN suppliers are "simply subject to a tariff" and, therefore, there is no quantitative restriction imposed on them. The EC made the same argument in the first Article 21.5 proceeding brought by Ecuador and in the Article 22.6 proceeding with the United States with respect to the then 857,700 ton tariff rate

quota for ACP origin bananas. The panel and arbitrator each rejected the EC's argument, explaining that "a tariff quota is a quantitative limit on the availability of a specific tariff rate" and therefore, Article XIII applied to the 857,700 ton limit. The 775,000 ton limit on the duty-free rate reserved for ACP countries is likewise a tariff rate quota subject to Article XIII. We note that there is no support in the text of Article XIII or in any WTO dispute settlement report that the Member making the claim has to be the one *subject* to the tariff rate quota, as the EC suggests.

19. As explained by the *Bananas III* panel, Article XIII:1 establishes that no import restrictions can be applied to one Member's products unless the importation of like products from other Members is similarly restricted. The panel also explained that "a Member may not restrict imports from some Members using one means and restrict them from another using another means." The Appellate Body confirmed that the "essence" of Article XIII "is that like products should be treated equally, irrespective of origin."

20. Using the reasoning of the panel and the Appellate Body in *Bananas III*, the panels in the prior compliance proceedings determined that the traditional ACP suppliers - which were non-substantial suppliers - were subject to different restrictions than other non-substantial suppliers. Therefore, the two groups were not "similarly restricted" as required by Article XIII:1.

21. Although the EC's January 1, 2006 regime is simpler than the regime subject to the prior compliance proceedings, the same result obtains. Only ACP suppliers benefit from access to the 775,000 ton in-quota quantity, while other non-substantial suppliers (and substantial suppliers) are excluded from the in-quota quantity and subject instead to the over-quota MFN tariff. Once again, the EC is choosing to divide its importation regime in breach of Article XIII:1 in a way that prevents like imports from being treated equally.

22. Article XIII:2 further requires that if quantitative restrictions are used, the Member imposing the restriction must "aim at a distribution of trade . . . approaching as closely as possible the shares which the various Members might be expected to obtain in the absence of such restrictions." The *Bananas III* panel explained that tariff rate quota allocations must "minimize the impact of a . . . tariff rate quota regime on trade flows by attempting to approximate . . . the trade shares that would have occurred in the absence of the regime."

23. Article XIII:2(d) provides rules on the allocation of quota shares among Members supplying the product. First, the Member allocating a quota or tariff rate quota must try to reach agreement with the Members having a substantial interest. If that fails, the allocating Member must allocate shares to supplying Members having a substantial interest based on criteria specified in Article XIII:2(d), second sentence. Furthermore, 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 not having a substantial interest. Otherwise, "imports from Members would not be similarly restricted as required by

Article XIII:1."

24. In the instant case, the EC has failed to distribute *any share whatsoever* to non-ACP countries, whether substantial or non-substantial suppliers. This despite the fact that the excluded MFN suppliers are principal or substantial suppliers of bananas to the EC. Therefore, the ACP tariff rate quota is not allocated in a way that approximates the trade shares that would have occurred in the absence of the tariff rate quota and is therefore inconsistent with Article XIII:2.

25. It is undisputed that the Article XIII waiver which the EC sought and obtained for the administration of its previous tariff rate quota regime expired on December 31, 2005. The date of expiration of that waiver was to coincide with the expected move to a tariff only regime on January 1, 2006 - a regime which if properly implemented, would not have required a waiver from Article XIII.

26. The EC argues that this is a case about tariff discrimination under GATT Article I:1 and suggests that it is not possible to bring an Article XIII claim simply because a "tariff preference is subject to a 'cap'." It is precisely because of that "cap" that this case is not just about different rates of duty, and Article I, but also about discriminatory tariff rate quotas, and Article XIII. As already noted, a "cap", or quantitative limit on the availability of a specific tariff rate, is a tariff rate quota. We note that in *Bananas III*, the Appellate Body found that the EC was in breach of its obligations under both GATT Articles I and XIII, and that the Lomé waiver only covered the breach of Article I. There is no support for the proposition that a measure cannot be subject to multiple disciplines within the GATT 1994 and within the WTO Agreement itself.

27. <u>The EC's Regime is in Breach of Article I, and the Article I Waiver Has Ceased to Apply</u>: It has been established, and the EC does not dispute, that the zero duty tariff accorded exclusively to ACP banana suppliers is in breach of Article I:1. The EC's defense is entirely based on its assertion that the Article I waiver agreed by WTO Members at the Doha Ministerial has not expired with respect to bananas. The United States has demonstrated in its written submissions that the text of the Annex on bananas to the Article I waiver can only support an interpretation that the waiver expired when the new EC bananas regime went into effect, after arbitrators found twice that the EC had presented a tariff proposal that did not meet the conditions of the Annex.

28. Article 3*bis* of the waiver makes clear that the provisions of the Annex apply with respect to bananas. The chapeau to the Annex then makes clear that with respect to bananas, the waiver will apply until December 31, 2007, subject to the conditions and procedures that are set out in the Annex.

29. Tiret one requires the initiation of Article XXVIII negotiations with respect to the rebinding of the EC tariff on bananas with enough time to finalize the process before the entry into force of the tariff only regime. Tiret two requires that interested parties be informed of the

EC's intentions regarding the rebinding and sets out other conditions for the negotiations.

30. Tirets three through five set out the arbitration mechanism which is the focus of our discussions. Tiret three provided that interested parties could invoke the arbitration mechanism within 60 days of the announcement regarding the proposed rebinding. Tiret four sets forth the terms of the first arbitration proceeding, with a mandate 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 EC WTO market-access commitments relating to bananas." The Arbitrator in the first arbitration concluded that the EC's "envisaged rebinding" of 230 euros per ton would not fulfill the EC's MFN market access commitment.

31. Following a negative determination in the first arbitration, the EC had to "rectify the matter." According to tiret five, the EC could do so in two ways. The EC could reach a "mutually satisfactory solution" with the parties that requested the arbitration. Failing that, the third sentence of tiret five provided for a second arbitration, where the same arbitrator would be asked to determine whether the EC had "rectified" the matter.

32. The fifth sentence of tiret five specified the automatic consequence of a second, negative arbitration determination against the EC. It states that: "[i]f the EC *has failed to rectify the matter, this waiver shall cease to apply to bananas upon entry into force of the new EC tariff regime*." The phrase "[i]f the EC has failed to rectify the matter", can only refer back to the determination required to be made by the arbitrator pursuant to the third sentence. The fourth sentence then simply required that this second award be notified to the General Council. The fifth sentence provides the consequence arising from such a notified arbitration award where the arbitrator found that the EC failed to rectify the matter - the waiver ceases to apply "*upon entry into force* of the new EC tariff regime." There is no need for that fifth sentence to have to refer back to the Arbitrator, as the EC argues. The EC's interpretation would read the role of the arbitrators out of the Annex.

33. In addition, the EC argues that "the new EC tariff regime" could only refer to the regime that was found to be inconsistent with the conditions of the Annex by the arbitrator and that as long as it introduced a different regime and that regime "did indeed" maintain the total market access of the MFN suppliers, the waiver would apply until the end of 2007. The text of the Annex does not support that interpretation. Furthermore, the context of the waiver and the Annex with respect to bananas does not support such an interpretation either. The arbitration procedures contained in the Annex were intended to provide multilateral control over the rebinding of the EC tariff. The Annex subjected such rebinding to the condition of "at least maintaining total market access for MFN banana suppliers". The MFN suppliers were willing to accept an arbitral decision on this, and even willing to allow the EC two opportunities to present a proposal that met the condition. It would be absurd that after setting out such procedures, the MFN suppliers would then be required to accept the unilateral determination of the EC that whatever regime it put into place would meet the conditions of the Annex and entitle the EC to

keep the protection of the waiver for the new regime.

34. For these reasons, the Article I waiver expired with respect to bananas as of January 1, 2006.

35. **The Panel Should Reject the EC's Preliminary Objections Regarding the Understanding and Nullification or Impairment**: The United States has set out in detail in its rebuttal submission the reasons the Panel should reject the EC's preliminary objections. We would now like to address further two issues raised by the EC.

36. The EC-US Understanding Was not a "Mutually Agreed Solution" and Even if it Were It Would Not Preclude this Proceeding: We begin with the Understanding. The United States acknowledges that the Understanding is an important document in the long history of this dispute. It sets out what the United States and the EC, back in 2001, considered to be means to resolve the bananas dispute. As part of the procedural history of this dispute, it provides evidence that there was a continuum of actions that the EC would take to bring itself into compliance, culminating in the adoption, it was hoped, of a tariff only regime on January 1, 2006. Nonetheless, as a matter of fact and law, the Understanding does not have the legal effect that the EC argues.

37. First, the EC argues that the United States is barred from pursuing this proceeding because by accepting the Understanding, the United States has accepted that the Article I waiver would continue to exist until the end of 2007. Of course, the EC does not and cannot point to where in the Understanding the United States supposedly agreed to this, as the Understanding does not contain any statement to that effect. As it committed to do in the Understanding, the United States lifted its reserve to the Article I waiver, and that waiver was eventually granted. The waiver is due to terminate for products other than bananas on December 31, 2007. Nonetheless, the waiver also contains the Annex that sets out the arbitration mechanism, providing for the possibility of the waiver being terminated for bananas prior to December 31, 2007. The conditions for the termination of the waiver with respect to bananas were met with the introduction of the new EC regime for bananas on January 1, 2006.

38. Second, the EC argues that the Understanding is a "mutually agreed solution" and that as a result the United States is barred from bringing this proceeding. As we have explained in our written submissions, the United States did not and does not consider that the Understanding was a "mutually agreed solution" for purposes of Article 3.6. The United States made this clear immediately after the EC unilaterally notified the Understanding to the DSB as a "mutually agreed solution" in June of 2001. It would have been impossible in 2001 to say that the dispute was "solved". As the United States made clear to the EC and all Members in 2001, the Understanding identified "the means by which the long-standing dispute . . . 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."

39. Even if the Understanding were a "mutually agreed solution", nothing in the DSU permits the legal consequence that the EC proposes. The DSU provides three limited consequences for "mutually agreed solutions". 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. And Article 22.8 provides that the suspension of concessions or other obligations shall only be applied until, *inter alia*, 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.

40. In particular, there is no basis in Article 22.8 of the DSU, elsewhere 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. As we noted in our second written submission, the EC took this very same position in the *India - Autos* proceeding. There, the EC argued that "[e]ven if the [1997 Agreement] had settled the matter in dispute . . ., that would still not preclude the European Communities from bringing this dispute."

41. Third, the United States disagrees with the EC's assertion that, pursuant to the customary rules of interpretation reflected in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* ("Vienna Convention"), the Understanding must be taken into consideration to determine the parties' rights and obligations under the GATT 1994 and the DSU.

42. Nothing in the customary rules of interpretation of public international law, as reflected in Article 31(3)(c) of the Vienna Convention, supports the EC's assertion that the Understanding acts as a procedural defense for the EC. Article 31(3)(c) of the Vienna Convention deals with <u>interpretation</u> of the covered agreements. The EC is not arguing that the Understanding indicates a particular interpretation of any term in any covered agreement; the EC appears to be arguing that the Understanding has altered the covered agreements. Article 31(3)(c) does not deal with this issue. We refer the Panel to our discussion of this issue in our Second Written Submission.

43. There is one significant aspect to the EC's claims regarding the Understanding to note. Since the EC in this proceeding claims to view the Understanding as a mutually agreed solution to the dispute, the EC itself then is acknowledging that the steps in the Understanding are relevant to responding to the DSB's recommendations and rulings in the dispute. Accordingly, the EC claims with respect to the nature of the Understanding contradict its claim that its new regime is not a "measure taken to comply" with those recommendations and rulings.

44. <u>The Panel Must Reject the EC's Arguments Regarding Nullification or Impairment</u>: Finally, the Panel must reject the EC arguments that in order to resolve this dispute the Panel must determine whether the United States has standing and what is the level of nullification or

impairment suffered by the United States. Both these issues were settled by the Appellate Body in *Bananas III*.

45. The Appellate Body upheld the panel's finding that the United States had a right to bring the claims under the GATT 1994 against the EC's bananas regime. The Appellate Body explained that Members have broad discretion in bringing claims. In addition to noting the potential export interest of the United States and the potential impact on the U.S. market for bananas of the EC's regime, it quoted from the panel that "with the increased interdependence of the global economy . . . Members have a greater stake in enforcing WTO rules than in the past since any deviation from the negotiated balance of rights and obligations is more likely to affect them."

46. In *Bananas III*, the Appellate Body also determined that a showing of trade effects is unnecessary for purposes of demonstrating that there has been a breach of a GATT provision. The Appellate Body based its reasoning on the *US – Superfund* panel report. This reasoning should likewise apply here.

47. By focusing on nullification or impairment, the EC's argument seems to presume that the ultimate outcome of dispute settlement is the suspension of concessions by the complaining Member in order to achieve compliance by the responding Member. There are, of course, two other preferred outcomes set out in Article 3.7 of the DSU: a mutually agreed solution consistent with the covered agreements and withdrawal of WTO-inconsistent measures. In addition, there is resort to compensation. Indeed, Article 3.7 of the DSU characterizes suspension of concessions as a "last resort."

48. In that regard, the United States found troubling the EC's assertion in its rebuttal submission that a finding by this Panel of WTO-inconsistency would prolong the dispute and would likely lead to the suspension of concessions by the United States. The United States disagrees. Rather, once this Panel finds the EC's current regime to be WTO-inconsistent, and the WTO adopts the report, the United States expects the EC to fully respect its WTO obligations and to reach a mutually agreed solution consistent with the covered agreements or withdraw its current bananas regime.