***EUROPEAN COMMUNITIES – REGIME FOR THE IMPORT, SALE AND DISTRIBUTION OF BANANAS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY ECUADOR* (WT/DS27)**

Executive Summary of U.S. Oral Statement at the Third Party Session with the Panel

1. The United States believes that Ecuador is on solid legal ground in challenging the EC's revised banana regime. The United States will first address the preliminary objections raised by the EC in this proceeding before turning to our view on the merits.

2. Preliminary Objections: The EC argues that Ecuador should be precluded from having recourse to DSU Article 21.5 on two grounds: one, because the EC-Ecuador Understanding on Bananas constitutes a "mutually agreed solution" through which Ecuador has allegedly agreed to the current EC banana regime, including the preference granted to the ACP countries; and, two, because a WTO Member cannot challenge a measure that was "suggested" by a WTO panel. These arguments are groundless and should be rejected.

3. Mutually Agreed Solution: The EC-Ecuador Understanding on Bananas (and a similar understanding between the United States and the EC) described 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. The series of steps would culminate with a "tariff only regime" by January 1, 2006, not a "tariff-rate-quota-only-for-some" regime. The EC and Ecuador disagree whether as a matter of fact their Understanding constitutes a mutually agreed solution for purposes of Article 3.6 of the DSU. But in the end this is irrelevant since the Understanding in any event does not preclude this dispute.

4. Article 1.1 of the DSU restricts the application of the DSU to the "covered agreements" listed in Appendix 1 to the DSU. The Understanding is not a "covered agreement." Accordingly, the DSU cannot be used to settle a dispute as to the meaning or effect of the Understanding, and the DSU cannot enforce the Understanding by blocking a party to the Understanding from recourse to the DSU. It is worth noting that, during the *India – Autos* proceeding, the EC also held that view that a mutually agreed solution could not prevent recourse to the DSU: "Even if the 1997 [EC-India] Agreement had settled the matter in dispute in the present case, that would still not preclude the European Communities from bringing this dispute. The 1997 Agreement was not a 'covered agreement' in the sense of Article 1.1 of the DSU. Therefore, the rights and obligations of the parties under the 1997 Agreement were not enforceable under the DSU."

5. The EC argues that "using Article 21.5 . . . to question a mutually agreed solution between the Parties, goes against Article 3.7 and 3.10 of the DSU." But nothing in those provisions bars recourse to dispute settlement where one party claims to have a mutually agreed solution with the other party. Article 3.7 expresses a clear preference for mutually agreed solutions, but it does not prohibit recourse to procedures under Article 21.5 or any other provision of the DSU.

6. Further, the EC's proposed approach is directly contrary to Article 3.5 of the DSU. Article 3.5 specifically requires mutually agreed solutions to be consistent with the covered agreements. Yet the EC would bar the dispute settlement system from examining whether a

measure alleged to be adopted pursuant to a mutually agreed solution is consistent with the covered agreements. And the United States agrees with Ecuador's statement that Article 3.10 "contains nothing remotely prohibiting resort to dispute settlement procedures."

7. The EC stretches its argument further by arguing that Ecuador is barred from challenging the ACP preference because "it is uncontested that bilateral agreements between two WTO members form part of the 'applicable rules of law' between the parties to the dispute, as defined by the Vienna Convention." The EC is referring to Article 31.3(c) of the Vienna Convention. The EC has advanced this argument, as a responding party, in a number of recent disputes, and the United States is not aware that it has yet been successful. For example, this argument was raised by the EC in *EC – Biotech* and rejected by that panel. We urge this panel to do likewise.

8. Nothing in the customary rules of interpretation of public international law reflected in Article 31.3(c) of the Vienna Convention supports the EC's claim that the Understanding acts as a procedural defense for the EC. Article 31.3(c) of the VCLT deals with interpretation of the covered agreements. The EC is not arguing that the Understanding indicates a particular interpretation of any term in any covered agreement, rather the EC is claiming the Understanding is a jurisdictional bar to this dispute. Article 31.3(c) does not deal with jurisdiction.

9. Furthermore, Article 31.3(c) of the Vienna Convention provides for the taking into account, in the interpretation of a treaty, "any relevant rules of international law applicable in the relations between the parties." The *EC – Biotech* panel found that "the rules of international law" that are to be "taken into account" in the interpretation of the WTO Agreements "are those which are applicable in the relations between the WTO Members." The panel expressly rejected the notion that the "rules of international law" could be those applicable only to the disputing parties. Since the Understanding is a bilateral agreement between only the parties to this dispute, not all Members of the WTO, it cannot be considered part of any "applicable rules of law" that could inform the panel's interpretation of the covered agreements.

10. Suggestion by Panel: The EC argues that claims challenging the consistency of measures suggested by a panel cannot be brought before an Article 21.5 panel and that, Ecuador not having appealed those suggestions, it is supposedly bound by "res judicata", pursuant to Article 19.1 and 17.14 of the DSU. These arguments completely miss the status of a panel "suggestion" and the scope of an Article 21.5 panel proceeding. EC Regulation 1964, which implemented the latest import regime for bananas, is a measure taken by the EC to come into compliance after *Bananas III*. That this regime may fit the description of one of three suggestions made by the *Bananas III* 21.5 panel is irrelevant. Contrary to EC assertions, implementation by a Member of suggestions made by panels does not have a *res judicata* effect, nor could it render that Member's measures *per se* compatible with WTO rules. Nothing in the DSU, in particular Article 19.1, can be interpreted to lead to that result. That a Member chooses to implement a suggestion made by a panel does not relieve the Member from ensuring that it does in a manner consistent with its WTO obligations.

11. Article I Waiver: Turning to the merits, the EC does not contest that the granting of preferences to ACP bananas is in breach of Article I of the GATT 1994. Instead, it argues that the ACP Article I waiver is still valid with respect to bananas. The United States agrees with

Ecuador's analysis that the Article I waiver terminated with respect to bananas once the EC implemented the new regime in January 1, 2006.

12. Under the express terms of the Annex, the EC had two opportunities to propose a regime that would "result in at least maintaining total market access for MFN suppliers." In 2005, pursuant to the Annex arbitration mechanism, two WTO arbitrators determined that the two proposals made by the EC did not meet those conditions. 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 made by the second arbitrator following the EC's effort to "rectify the matter." Therefore, as required by the fifth sentence, the waiver "shall cease to apply to bananas upon entry into force of the new EC tariff regime."

13. The EC seems to be claiming that Members decided that, after the EC had twice failed to provide the type of regime required under the Annex, the EC was allowed to unilaterally institute any regime, whether it met the conditions of the Annex or not, and still retain the cover of the waiver. This approach finds no basis in the Annex.

14. Article XIII: 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 that "by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate." The Panel in *Bananas III* explained that GATT Article XIII:1 requires that "no import restriction shall be applied to one Member's products unless the importation of like products from other Members is similarly restricted." According to the Appellate Body, the "essence" of GATT Article XIII, and therefore Article XIII:1, "is that like products should be treated equally, irrespective of origin."

15. The EC is maintaining 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 in violation of GATT Article XIII:1.

16. Furthermore, the *Bananas III* panel found that GATT Article XIII:2 requires that "[i]f quantitative restrictions are used ... they are to be used in the least trade-distorting manner possible." Any tariff rate quota allocations must attempt to "approximate ... the trade shares that would have occurred in the absence of the regime." In addition, 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. 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, despite the fact that many of the excluded MFN suppliers are principal or substantial suppliers of bananas to the EC, and leading exporters of bananas to the world. For all these reasons, we agree with Ecuador that the EC's tariff rate quota for ACP origin bananas established through Regulation 1964 is inconsistent with Articles XIII:1 and XIII:2. The EC has no Article XIII waiver currently in force - its last waiver having expired on its own terms on December 31, 2005.