

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

Recourse to Article 21.5 of the DSU by the United States

*Request for the Establishment of a Panel*

The following communication, dated 29 June 2007, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 25 September 1997, the Dispute Settlement Body ("DSB") adopted its recommendations and rulings in the dispute *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27) ("*Bananas III*").<sup>1</sup> The DSB ruled that the import regime of the European Communities ("EC") for bananas was inconsistent with the EC's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and *General Agreement on Trade in Services* ("GATS"). Accordingly, the DSB recommended that the EC bring its measure into conformity with those agreements.<sup>2</sup> An arbitrator appointed under Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") awarded the EC a "reasonable period of time" until 1 January 1999, to do so.<sup>3</sup>

The EC failed to bring its import regime for bananas into compliance with its WTO obligations by the end of the reasonable period of time, and the United States considers that the regime remains inconsistent today, nearly a decade after the DSB made its original recommendations and rulings. In particular, at the end of the reasonable period of time, the EC implemented a first set of changes to the banana import regime – through Regulation (EC) No. 1637/98<sup>4</sup> and Regulation (EC) No. 2362/98<sup>5</sup> – that were found to perpetuate a discriminatory tariff-rate quota ("TRQ") system and license-based system in breach of the GATT 1994 and the GATS.<sup>6</sup>

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<sup>1</sup> Dispute Settlement Body, Minutes of 25 September 1997 Meeting, WT/DSB/M/37 (circulated 4 November 1997).

<sup>2</sup> See Dispute Settlement Body, Minutes of 25 September 1997 Meeting, WT/DSB/M/37 (circulated 4 November 1997); *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, para. 9.2 (22 May 1997); *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 257 (9 September 1997).

<sup>3</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/15, para. 20 (7 January 1998).

<sup>4</sup> Published in the Official Journal of the European Communities (OJEC) L 120 of 28 July 1998.

<sup>5</sup> Published in the Official Journal of the European Communities (OJEC) L 293/32 of 31 October 1998.

<sup>6</sup> These findings were made by both a panel established under Article 21.5 of the DSU at the request of Ecuador as well as by an arbitrator appointed pursuant to Article 22.6 of the DSU to review a US request for authorization to suspend concessions. See *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/ECU, paras. 6.160-6.163 (12 April 1999) and *European Communities –*

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 [(African, Caribbean and Pacific)] countries, a flat tariff would be introduced."<sup>7</sup> The "transitional period" was to end no later than January 1, 2006.

Although the United States reluctantly permitted this lengthy delay in compliance until the end of the "transitional period,"<sup>8</sup> the EC never performed the second of the steps in the "two-stage process." Instead of adopting a "flat tariff" for bananas, on 29 November 2005, the EC adopted Regulation (EC) No. 1964/2005, which establishes a preferential (zero-duty) TRQ available only to bananas originating in African, Caribbean and Pacific ("ACP") countries.<sup>9</sup> Bananas of other origins have no access to this 775,000 ton TRQ. Under Regulation (EC) No. 1964/2005 such other bananas are subject instead to a duty of 176 euros/ton.<sup>10</sup> The regulation took effect as of 1 January 2006.

The United States considers that the EC has failed to implement the DSB's recommendations and rulings, including through the changes made to its banana regime on 1 January 2006. Therefore, the regime remains inconsistent with the EC's WTO obligations. The United States considers, *inter alia*, that the EC's banana import regime:

- (1) 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; and
- (2) 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 TRQ for imports of bananas originating in ACP countries and provides no access to this preferential TRQ to imports of bananas originating in non-ACP substantial or non-substantial supplying countries.

The United States understands the measures through which the EC maintains its current import regime for bananas to include:

- Regulation (EEC) 404/93 of 13 February 1993, as amended by Regulation (EC) 216/2001 of 29 January 2001;
- Regulation (EC) No. 1964/2005 of 29 November 2005; and

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*Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, paras. 5.96-5.98 (9 April 1999), respectively. The DSB adopted the report of the Article 21.5 panel on 6 May 1999, including, again, a recommendation that the EC bring its banana import regime into conformity with its obligations under the GATT 1994 and the GATS. See Dispute Settlement Body, Minutes of 6 May 1999 Meeting, WT/DSB/M/61 (circulated 30 June 1999) and *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/ECU, para. 7.2.

<sup>7</sup> Minutes of Meeting of the Dispute Settlement Body held on 19 November 1999, WT/DSB/M/71 (11 January 2000).

<sup>8</sup> In April 2001, the EC memorialized its "two stage" compliance proposal in separate understandings with the United States and Ecuador.

<sup>9</sup> Regulation (EC) No. 1964/2005, para. 2, published in the Official Journal of the European Communities (OJEC) L 316/1 of 12 December 2005 ("[e]ach year from 1 January, starting from 1 January 2006, an autonomous tariff quota of 775 000 tonnes net weight subject to a zero-duty rate shall be opened for imports of bananas (CN code 0803 00 19) originating in ACP countries.")

<sup>10</sup> Regulation (EC) No. 1964/2005, para. 1, published in the Official Journal of the European Communities (OJEC) L 316/1 of 12 December 2005.

- for each of the regulations listed above, any amendments, implementing measures, and other related measures.

As there is "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB between the United States and the EC, the United States respectfully seeks recourse to Article 21.5 of the DSU in this matter. The United States requests that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

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