

**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

**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

Reports of the Appellate Body

Note:

The Appellate Body issues the above two reports in the form of a single document constituting two separate Appellate Body Reports: WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA. The cover page, preliminary pages, Sections I to XII, and the annexes are common to the two Reports. The page header throughout the document bears two document symbols, WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA, with the exception of Section XIII on pages ECU-161 to ECU-163, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS27/AB/RW2/ECU, and with the exception of Section XIII on pages USA-161 and USA-162, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS27/AB/RW/USA.

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<i>Australia – Automotive Leather II</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather</i> , WT/DS126/R, adopted 16 June 1999, DSR 1999:III, 951
<i>Belgium – Family Allowances (allocations familiales)</i>	GATT Panel Report, <i>Belgian Family Allowances</i> , G/32, adopted 7 November 1952, BISD 1S/59
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
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<i>EEC – Bananas II</i>	GATT Panel Report, <i>EEC – Import Regime for Bananas</i> , DS38/R, 11 February 1994, unadopted
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EC Regulation 47/2007	Commission Regulation (EC) No. 47/2007 of 19 January 2007 amending Regulation (EC) No. 34/2007 fixing the allocation coefficient to be applied to applications for import licences for bananas originating in the ACP countries for the period to 31 December 2007
EC Regulation 1528/2007	Council Regulation (EC) No. 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, <i>Official Journal of the European Union</i> , L Series, No. 348 (31 December 2007) 1

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
ACP	African, Caribbean, Pacific
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
Bananas Framework Agreement	Annexed to both EC Schedule LXXX and EC Schedule CXL, originally negotiated in 1994 by the European Communities with Colombia, Costa Rica, Nicaragua, and Venezuela (reproduced in Annex VII to this Report)
Cotonou Agreement	Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part, signed in Cotonou, Benin on 23 June 2000
Doha Article I Waiver	Fourth Session of the Ministerial Conference held in Doha, European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/MIN(01)/15; WT/L/436 (Panel Exhibits US-3 and EC-2 (Ecuador)) (Annex V to this Report)
Doha Article XIII Waiver	Fourth Session of the Ministerial Conference held in Doha, European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001, WT/MIN(01)/16; WT/L/437 (Panel Exhibit US-5)
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
EC Bananas Import Regime	Bananas import regime the European Communities had in place between 1 January 2006 and 31 December 2007
EC/EEC Regulation []	<i>See list above</i>
Ecuador Panel Report	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW2/ECU
European Communities' Schedule of Concessions	Schedule LXXX of the European Communities, <i>Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations</i> , done at Marrakesh, 15 April 1994
First Ecuador Article 21.5 panel	Panel in <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by Ecuador</i>
GATS	<i>General Agreement on Trade in Services</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
ILC	International Law Commission

Abbreviation	Definition
Lomé Waiver	The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994; extended by EC – The Fourth ACP-EEC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996
MFN	Most-favoured nation
Modalities Paper	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
mt	Metric tonne
Original panel	Panel in <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas (Ecuador) (Guatemala and Honduras) (Mexico) and (US)</i>
Panel	Panels in <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> and <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i>
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
<i>TRIPS Agreement</i>	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
Understandings on Bananas	Understanding on Bananas between the European Communities and the United States signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1); and Understanding on Bananas between the European Communities and Ecuador signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2)
US Panel Report	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/RW/USA and Corr.1
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

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

European Communities, *Appellant/Appellee*
Ecuador, *Other Appellant/Appellee/Third Participant*
United States, *Appellee/Third Participant*

Present:

Baptista, Presiding Member
Oshima, Member
Unterhalter, Member

Belize, *Third Participant*
Brazil, *Third Participant*
Cameroon, *Third Participant*
Colombia, *Third Participant*
Côte d'Ivoire, *Third Participant*
Dominica, *Third Participant*
Dominican Republic, *Third Participant*
Ghana, *Third Participant*¹
Jamaica, *Third Participant*
Japan, *Third Participant*
Mexico, *Third Participant*²
Nicaragua, *Third Participant*
Panama, *Third Participant*
Saint Lucia, *Third Participant*
Saint Vincent and the Grenadines, *Third Participant*
Suriname, *Third Participant*

I. Introduction

1. The European Communities and Ecuador each appeals certain issues of law and legal interpretations developed in the Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*³ (the "Ecuador Panel Report"). The European Communities appeals certain issues of law and legal interpretations developed in the Panel Report, *European Communities – Regime for the Importation,*

¹In the Ecuador case only.

²In the United States case only.

³WT/DS27/RW2/ECU, 7 April 2008.

*Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*⁴ (the "US Panel Report").

2. Two panels were established⁵ pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") to consider complaints by Ecuador⁶ and by the United States⁷ concerning the consistency with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") of certain measures taken by the European Communities introducing a new regime for the importation of bananas.⁸ The Ecuador Panel was established on 20 March 2007 and the United States Panel was established on 12 July 2007. Both Ecuador and the United States requested that the matter be referred, if possible, to the original panel in *EC – Bananas III*, pursuant to Article 21.5 of the DSU. Two of the three panelists from the original proceedings were available to serve in the present proceedings. As the final composition of both Panels was identical, in this Report we refer to both Panels collectively as the "Panel".

3. Taken together, the panel requests identified the following measures as being inconsistent with the European Communities' obligations under the GATT 1994: Council Regulation (EEC) No. 404/93 of 13 February 1993⁹ ("EEC Regulation 404/93"), as amended by Council Regulation (EC) No. 216/2001 of 29 January 2001¹⁰ ("EC Regulation 216/2001"); Council Regulation (EC) No. 1964/2005 of 29 November 2005¹¹ ("EC Regulation 1964/2005"); and any amendments, implementing measures, and other related measures.¹² EC Regulation 1964/2005 amended EEC Regulation 404/93 and introduced a new regime for the importation of bananas. The new system entered into force on 1 January 2006 and established: (i) a single tariff rate of €176 per metric

⁴WT/DS27/RW/USA and Corr.1, 19 May 2008.

⁵WT/DS27/82; WT/DS27/84.

⁶Request for the Establishment of a Panel by Ecuador, WT/DS27/80.

⁷Request for the Establishment of a Panel by the United States, WT/DS27/83.

⁸Ecuador Panel Report, para. 2.1; US Panel Report, para. 2.1. The recommendations and rulings of the DSB resulted from the adoption on 25 September 1997, by the DSB, of the Appellate Body Report, WT/DS27/AB/R, and the Panel Reports, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, and WT/DS27/R/USA, in *EC – Bananas III*. In this Report, we refer to the panel that considered the original complaint as the "original panel"; we refer to the panel that considered the first compliance proceedings brought by Ecuador as the "first Ecuador Article 21.5 panel"; and we refer to the panels in the two present Article 21.5 proceedings collectively as the "Panel".

⁹Council Regulation (EEC) No. 404/93 of 13 February 1993 on the common organisation of the market in bananas, *Official Journal of the European Communities*, L Series, No. 47 (25 February 1993) 1.

¹⁰Council Regulation (EC) No. 216/2001 of 29 January 2001 amending Regulation (EEC) No. 404/93 on the common organisation of the market in bananas, *Official Journal of the European Communities*, L Series, No. 31 (2 February 2001) 2.

¹¹Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rates for bananas, *Official Journal of the European Union*, L Series, No. 316 (2 December 2005) 1 (Panel Exhibits ECU-1 and US-1).

¹²Request for the Establishment of a Panel by Ecuador, WT/DS27/80, p. 4; Request for the Establishment of a Panel by the United States, WT/DS27/83, pp. 2-3.

tonne ("mt") for bananas of all origins (most-favoured nation ("MFN") bananas)¹³; and (ii) a tariff quota of 775,000 mt subject to a zero-duty rate for imports of bananas originating in African, Caribbean, and Pacific ("ACP") countries.¹⁴

4. In the original *EC – Bananas III* proceedings, Ecuador, Guatemala, Honduras, Mexico, and the United States challenged the European Communities' bananas import regime in force at that time. The original panel and the Appellate Body in the original dispute ruled that the allocation of tariff quota shares under EEC Regulation 404/93 was inconsistent with Article XIII of the GATT 1994 and was not justified by either the "Bananas Framework Agreement"¹⁵, annexed to the European Communities' Schedule, or the *Agreement on Agriculture*. The Appellate Body found that the "Lomé Waiver"¹⁶ did not apply to violations of Article XIII of the GATT 1994. The Appellate Body and the original panel also found that licence allocation procedures violated Articles I:1 and III:4 of the GATT 1994 and Articles II and XVII of the *General Agreement on Trade in Services* (the "GATS").¹⁷ On 25 September 1997, the Dispute Settlement Body (the "DSB") adopted the Panel and Appellate Body Reports in *EC – Bananas III* and recommended that the European Communities bring its measures into conformity with the covered agreements. On 20 July 1998, the European Communities adopted Council Regulation (EC) No. 1637/98¹⁸ ("EC Regulation 1637/98") amending EEC Regulation 404/93 and, on 28 October 1998, adopted Commission Regulation (EC) No. 2362/98¹⁹ ("EC Regulation 2362/98") repealing Commission Regulation (EEC) No. 1442/93 of 10 June 1993²⁰ ("EEC Regulation 1442/93").

¹³EC Regulation 1964/2005, Article 1.1.

¹⁴EC Regulation 1964/2005, Article 1.2.

¹⁵Framework Agreement on Bananas, annexed to both EC Schedule LXXX and EC Schedule CXL, originally negotiated in 1994 by the European Communities with Colombia, Costa Rica, Nicaragua, and Venezuela (reproduced in Annex VII attached to this Report).

¹⁶The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994 (the "Lomé Waiver"); extended by EC – The Fourth ACP-EEC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996.

¹⁷Appellate Body Report, *EC – Bananas III*, para. 225. The original panel and the Appellate Body found that this violation of Article I:1 was not justified by the Lomé Waiver from Article I, because it was not required by the *Lomé Convention*.

¹⁸Council Regulation (EC) No. 1637/98 of 20 July 1998 amending Council Regulation (EEC) No. 404/93 on the common organisation of the market in bananas, *Official Journal of the European Communities*, L Series, No. 210 (28 July 1998) 28.

¹⁹Commission Regulation (EC) No. 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Council Regulation (EEC) No. 404/93 regarding imports of bananas into the Community, *Official Journal of the European Communities*, L Series, No. 293 (28 October 1998) 32.

²⁰Commission Regulation (EEC) No. 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community, *Official Journal of the European Union*, L Series, No. 142 (12 June 1993) 6.

5. On 18 December 1998, Ecuador requested proceedings pursuant to Article 21.5 of the DSU, alleging that the measures taken by the European Communities failed to implement the DSB's recommendations and rulings. The first compliance panel requested by Ecuador (the "first Ecuador Article 21.5 panel") found that the measures taken by the European Communities to implement the DSB's recommendations and rulings were inconsistent with Articles I and XIII of the GATT 1994 and Articles II and XVII of the GATS. The first Ecuador Article 21.5 panel report was not appealed and was adopted by the DSB on 6 May 1999.²¹

6. Pursuant to Article 19.1 of the DSU, the first Ecuador Article 21.5 panel suggested that the European Communities could bring its measures into conformity by: (i) applying a tariff-only system without a tariff quota that could include a preference for ACP countries covered by a waiver or a free trade agreement consistent with Article XXIV of the GATT 1994; (ii) applying a tariff-only system with a preferential tariff quota for ACP countries covered by a suitable waiver; or (iii) maintaining its bound and autonomous MFN tariff quotas, either without allocating country-specific shares or by allocating such shares by agreement with all substantive suppliers consistently with Article XIII:2 of the GATT 1994. The MFN tariff quota could be combined with the extension of duty-free treatment to ACP countries covered by the Lomé Waiver from Article I of the GATT 1994 or with a preferential tariff quota for ACP countries, provided a waiver from Article XIII of the GATT 1994 was obtained.²²

7. In an arbitration pursuant to Article 22.6 of the DSU involving the United States and the European Communities, the arbitrators determined, as a preliminary matter, that the revised bananas import regime of the European Communities was inconsistent with Articles I and XIII of the GATT 1994 and Articles II and XVII of the GATS.²³ Following the expiry of the reasonable period of time for the European Communities to comply with the DSB's recommendations and rulings in *EC – Bananas III*, the United States requested and obtained authorization to suspend concessions pursuant to Article 22 of the DSU. Pursuant to arbitrations on the level of suspension of concessions and other obligations in the years 1999 and 2000, the DSB authorized the United States to suspend concessions or other obligations up to an amount of US\$191.4 million per year, and Ecuador up to an amount of US\$201.6 million per year.²⁴ The United States suspended tariff concessions; Ecuador, however, did not exercise its rights to suspend concessions and other obligations under the GATT 1994, the GATS, or the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "*TRIPS Agreement*").

²¹Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, para. 7.1.

²²Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.156-6.158.

²³Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 4.8 and 5.96-5.98.

²⁴Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 8.1; Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 173(a).

8. On 11 April and 30 April 2001, the European Communities signed two separate Understandings on Bananas: one with the United States and one with Ecuador. On 22 June 2001, the European Communities notified both Understandings to the DSB as a "mutually agreed solution" within the meaning of Article 3.6 of the DSU.²⁵ On 2 and 9 July 2001, the United States and Ecuador issued separate communications stating that, while the Understandings identified the means by which the long-standing dispute over the European Communities' bananas import regime could be solved, the Understandings did not in themselves constitute a "mutually agreed solution" pursuant to Article 3.6 of the DSU.²⁶

9. Paragraphs B, C, F (United States) and G (Ecuador) of the Understandings on Bananas provide:

- B. In accordance with Article 16(1) of Regulation No. (EEC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006. [...²⁷]
- C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows :
1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.
 2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph F, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

[F./G.] The EC and [the United States and Ecuador] consider that [these] Understanding[s] constitute[] a mutually agreed solution to the banana dispute.

²⁵EC – *Bananas III*, Notification of Mutually Agreed Solution, WT/DS27/58.

²⁶EC – *Bananas III*, Communication from the United States, WT/DS27/59, G/C/W/270; EC – *Bananas III*, Understanding on Bananas between Ecuador and the EC, WT/DS27/60, G/C/W/274.

²⁷In the Understanding with Ecuador, paragraph B included the following sentence: "GATT Art XVIII negotiations shall be initiated in good time to that effect, recognizing Ecuador as the principal supplier in these negotiations."

10. On 14 November 2001, the Ministerial Conference meeting in Doha adopted two waivers concerning the European Communities' bananas import regime. The first waiver, from Article I:1 of the GATT 1994 (the "Doha Article I Waiver"²⁸), was necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP states as required by the relevant provisions of the so-called "Cotonou Agreement".²⁹ The second waiver, from Article XIII of the GATT 1994 (the "Doha Article XIII Waiver"³⁰), concerned the European Communities' separate tariff quota of 750,000 mt for bananas of ACP origin. The Doha Article XIII Waiver was granted until 31 December 2005, thus covering the period until the entry into force of the European Communities' tariff-only regime on 1 January 2006, as foreseen by the Understandings on Bananas.

11. The Doha Article I Waiver contained a separate "Annex on Bananas", which set out a special procedure for the rebinding of the European Communities' tariff on bananas. This procedure included a special two-stage arbitration to determine whether the European Communities proposed rebinding would result "in at least maintaining total market access for MFN suppliers". The Annex on Bananas also provided that, subject to the fulfilment of the requirements of the special rebinding procedure, the Doha Article I Waiver applied in the case of bananas until 31 December 2007.

12. On 21 January 2002, the European Communities informed the DSB of the adoption of Council Regulation (EC) No. 2587/2001³¹ ("EC Regulation 2587/2001"). At the DSB meeting held on 1 February 2002, the European Communities requested that the agenda item relating to the implementation of the DSB's recommendations and rulings concerning the European Communities'

²⁸Fourth Session of the Ministerial Conference held in Doha, European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/MIN(01)/15; WT/L/436 (attached as Annex V to this Report; this document was also submitted as Panel Exhibits US-3 and EC-2 (Ecuador)). The Doha Article I Waiver expired on 31 December 2007 in respect of ACP products other than bananas.

²⁹The Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part, signed in Cotonou, Benin on 23 June 2000.

³⁰Fourth Session of the Ministerial Conference held in Doha, European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001, WT/MIN(01)/16; WT/L/437 (Panel Exhibit US-5). The Doha Article XIII Waiver expired on 31 December 2005.

³¹Council Regulation (EC) No. 2587/2001 of 19 December 2001 amending Regulation (EEC) No. 404/93 on the common organisation of the market in bananas, *Official Journal of the European Communities*, L Series, No. 345 (29 December 2001) 13.

Articles 18.1-18.4 of EC Regulation 2587/2001 changed the quotas in the following ways: (i) quota A of 2.2 million mt for imports from third countries was maintained; (ii) quota B was increased to 453,000 mt for imports from third countries; (iii) within quotas A and B, bananas from third countries were subject to a customs duty of €75/mt, while imports of products originating in the ACP countries were subject to a zero duty; and (iv) quota C, open to imports only from ACP countries and subject to a zero duty, was decreased to 750,000 mt. An out-of-quota tariff preference of €300/mt was established for bananas originating in ACP countries.

bananas import regime be withdrawn from the DSB agenda. At this DSB meeting, Ecuador stated that the Understanding on Bananas "constituted a sound basis for the EC to implement a transitional banana import regime so that by 1 January 2006, at the latest, a WTO-compatible tariff-only regime would be put into place."³² Ecuador also noted that this regime "contained various phases, stages and elements to be implemented."³³ Ecuador also stated that it reserved its rights under Article 21.5 of the DSU.

13. At the same DSB meeting, the United States stated that it "was pleased to note that the EC had increased the quota for Latin American banana exporting countries by 100,000 tonnes effective from 1 January 2002" and that "[t]he United States had, therefore, terminated the suspension of concessions in effect since 1999."³⁴ The United States also said it "would continue to work closely with the EC and other Members to address any issues that might arise as the EC moved to a tariff-based system for bananas and implemented the terms of the bilateral Understanding on Bananas."³⁵

14. On 31 January 2005, the European Communities notified the World Trade Organization (the "WTO") pursuant to Article XXVIII of the GATT 1994, that it intended to rebind its tariff concession for bananas included in EC Schedule CXL (item 0803 00 19) at the level of €230/mt.³⁶ In the same communication, the European Communities also specified that the notification constituted the announcement of the rebinding of its bananas tariff under the terms of the Annex on Bananas. On 30 March 2005, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, and Venezuela requested arbitration pursuant to the Annex on Bananas in respect of the European Communities' proposed rebinding of its tariff on bananas.

15. On 1 August 2005, the arbitrator determined that the rebinding of the European Communities' tariff for bananas at the level of €230/mt would not result in at least maintaining total market access for MFN banana suppliers, taking into account all WTO market-access commitments of the European Communities relating to bananas, as required under the Annex on Bananas.³⁷ On 27 October 2005, in a second arbitration pursuant to the same rules under the Annex, the arbitrator reached the same conclusion with respect to the European Communities' second proposed rebinding, consisting of a MFN tariff rate for bananas of €187/mt and a 775,000 mt duty-free tariff quota for imports of bananas

³²Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, para. 5.

³³Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, para. 5.

³⁴Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, para. 8.

³⁵Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, para. 8.

³⁶Communication from the European Communities of 31 January 2005, Article XXVIII:5 Negotiations, Schedule CXL – European Communities, Addendum, G/SECRET/22/Add.1.

³⁷Award of the Arbitrator, *EC – The ACP Partnership Agreement*, WT/L/616, 1 August 2005.

of ACP origin. The arbitrator, therefore, found that the European Communities had failed to rectify the matter in accordance with the fifth tiret of the Annex on Bananas, which required that the rebinding result in at least maintaining total market access for MFN banana suppliers.³⁸

16. Following the second arbitration pursuant to the Annex on Bananas, the European Communities modified its regime for the importation of bananas and adopted, *inter alia*, EC Regulation 1964/2005, the measure at issue in the present dispute (hereinafter, the "EC Bananas Import Regime"). This Regulation established an MFN tariff rate of €176/mt for bananas. In addition, it established a preferential tariff quota of 775,000 mt for duty-free imports of bananas originating in ACP countries.³⁹ On 20 December 2007, the European Communities adopted Council Regulation (EC) No. 1528/2007⁴⁰ ("EC Regulation 1528/2007"), which repealed EEC Regulation 404/93 and modified EC Regulation 1964/2005, eliminating the preferential tariff quota of 775,000 mt at zero duty for ACP countries.

17. On 23 February 2007, Ecuador requested, for the second time, the establishment of a panel pursuant to Article 21.5 of the DSU concerning the alleged inconsistency of the measures adopted by the European Communities, in particular, EC Regulation 1964/2005 and related measures.⁴¹ On 29 June 2007, the United States requested the establishment of an Article 21.5 panel to examine the same measures taken by the European Communities.

³⁸Award of the Arbitrator, *EC – The ACP Partnership Agreement II*, WT/L/625, 27 October 2005.

³⁹See *supra*, footnote 29.

⁴⁰Council Regulation (EC) No. 1528/2007 of 20 December 2007 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, Economic Partnership Agreements, *Official Journal of the European Union*, L Series, No. 348 (31 December 2007) 1.

⁴¹Ecuador Panel Report, paras. 2.42-2.44; US Panel Report, paras. 2.39 and 2.40. The implementing regulations adopted by the European Communities pursuant to Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rates for bananas, *Official Journal of the European Union*, L Series, No. 316 (2 December 2005) 1, include the following:

- Commission Regulation (EC) No. 2014/2005 of 9 December 2005;
- Commission Regulation (EC) No. 2015/2005 of 9 December 2005;
- Commission Regulation (EC) No. 2149/2005 of 23 December 2005;
- Commission Regulation (EC) No. 219/2006 of 8 February 2006;
- Commission Regulation (EC) No. 325/2006 of 23 February 2006;
- Commission Regulation (EC) No. 566/2006 of 6 April 2006;
- Commission Regulation (EC) No. 966/2006 of 29 June 2006;
- Commission Regulation (EC) No. 1261/2006 of 23 August 2006;
- Commission Regulation (EC) No. 1789/2006 of 5 December 2006;
- Commission Regulation (EC) No. 34/2007 of 16 January 2007;
- Commission Regulation (EC) No. 47/2007 of 19 January 2007; as well as
- Commission Regulation (EC) No. 1549/2006 of 17 October 2006.

18. In the course of the proceedings, the European Communities requested the Panel to harmonize the timetable of the two cases. The Panel decided not to modify the timetable it had adopted and stated that harmonization of the timetables "would have most likely involved a delay in the proceedings requested by Ecuador"⁴², and that harmonizing the timetables for the panel process was particularly difficult because of the two-month gap between the dates on which the two panels had begun their respective work. The Panel noted that the WTO Director-General composed the panel requested by Ecuador on 18 June 2007 and the panel requested by the United States on 13 August 2007. The Panel further stated that it had taken into account in its decision the fact that Ecuador, "as the complaining party in those proceedings, strongly objected to any changes in the timetable that would result in extending the proceedings further beyond the 90-day period envisaged in Article 21.5 of the DSU."⁴³ However, in the Ecuador Panel Report, the panel noted that "issuance of the interim report was delayed by the Panel in order to ensure that replies to questions and comments on replies in the proceedings requested by the United States had been received by that panel, before the interim report in the current proceedings was issued."⁴⁴

19. The Ecuador Panel Report was circulated to WTO Members on 7 April 2008; the US Panel Report was circulated to WTO Members on 19 May 2008. At the joint requests of the parties in both cases, the DSB agreed: at the DSB meeting held on 2 June 2008, to extend the date for the adoption of the Ecuador Panel Report to 29 August 2008; and at the DSB meeting held on 24 June 2008, to extend the date for adoption of the US Panel Report also to 29 August 2008.⁴⁵

20. The following findings and conclusions of the Ecuador Panel are relevant for this appeal:

In light of the findings above, the Panel rejects the preliminary issue raised by the European Communities that Ecuador is prevented from challenging the European Communities' current import regime for bananas, including the preference for ACP countries, because of the Understanding on Bananas, signed by both Members in April 2001.⁴⁶

(c) The European Communities' current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is inconsistent with Article XIII:1, with the chapeau of Article XIII:2, and with Article XIII:2(d) of the GATT 1994;

⁴²US Panel Report, para. 7.7.

⁴³US Panel Report, para. 7.9.

⁴⁴Ecuador Panel Report, footnote 298 to para. 7.10.

⁴⁵WT/DS27/87; Minutes of the DSB meeting held on 2 June 2008, WT/DSB/M/251, para. 5; WT/DS27/88; Minutes of the DSB meeting held on 24 June 2008, WT/DSB/M/253, para. 51.

⁴⁶Ecuador Panel Report, para. 8.1.

(d) The tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, is an ordinary customs duty in excess of that set forth and provided for in Part I of the European Communities' Schedule. This tariff is therefore inconsistent with the first sentence of Article II:1(b) of the GATT 1994; ...⁴⁷

The Panel recommends that the Dispute Settlement Body request the European Communities to bring the inconsistent measures into conformity with its obligations under the GATT 1994.⁴⁸

21. The following findings and recommendations in the US Panel Report are relevant for this appeal:

(b) The European Communities has not succeeded in making a prima facie case that the United States is prevented from challenging the European Communities' current import regime for bananas, including the preference for ACP countries, because of the Bananas Understanding, signed between the United States and the European Communities in April 2001; and

(c) The European Communities has failed in making a case that the United States' complaint under Article 21.5 of the DSU should be rejected, because the European Communities' current import regime for bananas, including the preference for ACP countries, is not a "measure taken to comply" with the recommendations and rulings of the DSB in the original proceedings.⁴⁹

(c) The European Communities' current banana import regime, in particular its preferential tariff quota reserved for ACP countries, is also inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994.⁵⁰

[T]he Panel concludes that, to the extent that the current European Communities bananas import regime contains measures inconsistent with various provisions of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that Agreement.⁵¹

Since the original DSB recommendations and rulings in this dispute remain operative through the results of the current compliance proceedings, the Panel makes no new recommendation.⁵²

⁴⁷Ecuador Panel Report, para. 8.2(c) and (d).

⁴⁸Ecuador Panel Report, para. 8.5.

⁴⁹US Panel Report, para. 8.1(b) and (c).

⁵⁰US Panel Report, para. 8.3(c).

⁵¹US Panel Report, para. 8.12.

⁵²US Panel Report, para. 8.13.

22. On 28 August 2008, the European Communities notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law and legal interpretations covered in the Ecuador and the US Panel Reports and filed two Notices of Appeal⁵³, pursuant to Rule 20 of the *Working Procedures for Appellate Review*⁵⁴ (the "*Working Procedures*").

23. In a letter to the participants and third participants dated 1 September 2008, the Appellate Body Division hearing these appeals stated that, in the interests of "fairness and orderly procedure", as referred to in Rule 16(1) of the *Working Procedures*, and after consultations with the participants, the appellate proceedings in respect of the European Communities' appeals of the Ecuador and US Panel Reports would be consolidated due to the substantial overlap in the content of the disputes. A single Division would hear and decide the appeals, and a single oral hearing would be held by the Division. The Division invited all third parties in both cases to attend the single oral hearing in the consolidated appeals. However, it emphasized that, in their written submissions and oral statements, the third participants were to address only the issues appealed in the dispute(s) to which they were a third party in the panel proceedings. The United States and Ecuador requested the Appellate Body to issue separate reports, either in the form of two separate documents, or one document with separate conclusions pages.

24. On 4 September 2008, the European Communities filed an appellant's submission in each of the appeals.⁵⁵ On 9 September 2008, Ecuador notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law and legal interpretations covered in the Ecuador Panel Report and filed a Notice of Other Appeal⁵⁶, pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 15 September 2008, Ecuador filed an other appellant's submission.⁵⁷ On 22 September 2008, Ecuador, the United States, and the European Communities each filed an appellee's submission.⁵⁸

25. On 22 September 2008, Belize, Cameroon, Cote d'Ivoire, Dominica, the Dominican Republic, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Suriname filed a joint third participants' submission in the United States case; Belize, Dominica, the Dominican Republic, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Suriname filed a joint third participants' submission in the Ecuador case; Cameroon, Cote d'Ivoire, and Ghana filed a joint third participants' submission in

⁵³WT/DS27/89 (attached as Annex I to this Report); WT/DS27/90 (attached as Annex II to this Report).

⁵⁴WT/AB/WP/5, 4 January 2005.

⁵⁵Pursuant to Rule 21 of the *Working Procedures*.

⁵⁶WT/DS27/91 (attached as Annex III to this Report).

⁵⁷Pursuant to Rule 23(3) of the *Working Procedures*.

⁵⁸Pursuant to Rules 22 and 23(4) of the *Working Procedures*.

the Ecuador case; Colombia filed a third participant's submission in the Ecuador case; Japan filed a third participant's submission in each case; Panama and Nicaragua filed a joint third participants' submission in each case; Ecuador filed a third participant's submission in the United States case; and the United States filed a third participant's submission in the Ecuador case.⁵⁹ On the same day, Brazil and Mexico each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.⁶⁰

26. Ecuador, the European Communities, and the United States requested, on 29 August 2008, that the Division authorize public observation of the oral hearing. They submitted that public observation of the oral hearing is not precluded by the DSU, the *Working Procedures*, or the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*.⁶¹ The participants expressed a preference for simultaneous closed-circuit television broadcast to a separate room.

27. On 1 September 2008, the Division invited the third participants to comment in writing on the participants' request to open the hearing to public observation. The Division asked the third participants to provide their views on, in particular, the permissibility of opening the hearing for public observation under the DSU and the *Working Procedures*, and, if they so wished, on the specific logistical arrangements proposed in the requests. Comments were received on 5 September 2008 from Colombia, on 9 September 2008 from Panama and Nicaragua, and on 10 September 2008 from Brazil, Jamaica, and Japan. Colombia, Jamaica, Japan, Nicaragua, and Panama raised no objection to the request of the participants. Brazil conveyed the view that the DSU expressly disallows public hearings at the appellate stage: according to Brazil, opening the oral hearing in these proceedings to public observation would run counter to the obligation of confidentiality imposed by Article 17.10 of the DSU.

28. On 18 September 2008, the Division issued a Procedural Ruling in which it authorized the public observation of the oral hearing and adopted additional procedures for that purpose in accordance with Rule 16(1) of the *Working Procedures*.⁶² Notice of the opening of the hearing to public observation and registration instructions were provided on the WTO website.

⁵⁹Pursuant to Rule 24(1) of the *Working Procedures*.

⁶⁰Pursuant to Rule 24(2) of the *Working Procedures*.

⁶¹The *Rules of Conduct*, as adopted by the DSB on 3 December 1996 (see WT/DSB/RC/1), are incorporated into the *Working Procedures* as Annex II thereto (see WT/DSB/RC/2, WT/AB/WP/W/2).

⁶²The Procedural Ruling is attached as Annex IV to this Report.

29. The oral hearing in these appeals was held on 16-17 October 2008. The participants and third participants presented oral arguments (with the exception of Mexico) and responded to questions posed by the Division hearing the appeals. Public observation took place via simultaneous closed-circuit television broadcast to a separate room. Pursuant to the additional procedures adopted by the Division, no third participant requested that its oral statements and responses to questions remain confidential and not be subject to public observation.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. Article 9.3 of the DSU

30. The European Communities alleges that the Panel acted inconsistently, in both cases, with Article 9.3 of the DSU by failing to harmonize the timetables of the proceedings in the Ecuador and United States cases. The European Communities requests that the Panel's failure to harmonize the timetables, as well as the Panel's failure to provide reasons for not harmonizing the timetables of the two proceedings at the time the decision was taken and communicated to the parties, "be reversed".⁶³

31. The European Communities submits that the use of the word "shall" in Article 9.3 indicates an "absolute and unqualified" obligation for panels to harmonize timetables, which "does not allow panels any discretion" in deciding whether timetables should be harmonized.⁶⁴ Further, the European Communities maintains that the words "to the greatest extent possible" in Article 9.3 "only apply to the provision that 'the same persons shall serve as panelists'" and should not be read to cover also the obligation that "the timetable for the panel process shall be harmonized".⁶⁵ The European Communities asserts that conflicts of interests and personal reasons may prevent an individual from serving as a panelist, and that the phrase "to the greatest extent possible" in Article 9.3 is taken into account in this respect. However, the European Communities asserts that there are no similar reasons that could justify the application of that phrase to the obligation to harmonize the timetables for the panel process. Yet, the European Communities contends that, if, *arguendo*, the phrase "to the greatest extent possible" did relate also to a panel's obligation to harmonize the timetables, the panel could refuse to harmonize the timetables only where harmonization was virtually "impossible".⁶⁶ The European Communities further submits that the timetables "must absolutely be harmonized at some

⁶³European Communities' appellant's submission, para. 35 (US). See also European Communities' appellant's submission, para. 36 (Ecuador).

⁶⁴European Communities' appellant's submissions, para. 21 (Ecuador), para. 20 (US).

⁶⁵European Communities' appellant's submissions, para. 22 (Ecuador), para. 21 (US).

⁶⁶European Communities' appellant's submissions, para. 23 (Ecuador), para. 22 (US).

stage of the proceeding", and that the phrase "to the greatest extent possible" is only meant to allow a panel to take note of certain procedural acts that may have already been completed in one case, the occurrence of which makes it "impossible" to harmonize the timetable of that case with the timetable of another case.⁶⁷

32. In addition, the European Communities asserts that, if a panel decides not to harmonize the timetables of two proceedings, it must provide an objective justification for its decision. Yet, the European Communities maintains that the "justifications" provided by the Panel in its Reports do not support its decision. The European Communities argues that the Panel attributed too much weight to Ecuador's objection to harmonize the timetables thereby protecting the interests of Ecuador more than the interests of the European Communities. Further, by obliging the European Communities to provide its written submission to the United States in one proceeding before the United States had submitted its own first written submission in the other proceeding, the Panel allowed the United States an advantage at knowing what defences and arguments the European Communities would use in the latter proceeding, and thereby acted contrary to Article 12.6 of the DSU.

2. Legal Effect of the Understandings on Bananas

33. The European Communities alleges in both cases that the Panel erred in finding that Ecuador and the United States were not precluded from initiating Article 21.5 proceedings despite the Understandings on Bananas they each had agreed to with the European Communities in 2001. The European Communities refers to three reasons relied upon by the Panel in support of its finding that the Understandings on Bananas could not legally bar the complainants from bringing these compliance proceedings.

34. The first reason given by the Panel is that the Understandings on Bananas do not constitute in themselves a solution, but provide only for the means, that is, a series of future steps for resolving and settling the dispute. In this respect, the European Communities argues that Article 3 of the DSU does not provide that only agreements recording measures that had already been implemented should qualify as "mutually agreed solutions". The European Communities submits that, rather, in virtually every instance where the parties to a dispute reach a settlement, measures to implement that settlement will be taken after the conclusion of the settlement.⁶⁸

⁶⁷European Communities' appellant's submission, para. 23 (US). See also European Communities' appellant's submission, para. 24 (Ecuador).

⁶⁸European Communities' appellant's submissions, para. 44 (Ecuador), para. 75 (US).

35. The second reason relied upon by the Panel in support of its finding that the Understandings could not prevent the complainants from bringing these compliance proceedings is that the Understandings were agreed to subsequent to the recommendations, rulings, and suggestions made by the DSB in the original proceedings and previous compliance proceedings. In this respect, the European Communities argues that, under the Panel's reasoning, a settlement would qualify as a "mutually agreed solution" only if it were concluded before the DSB made recommendations and rulings. In the European Communities' view, nothing in the DSU supports such a restriction on WTO Members to enter into mutually agreed solutions. On the contrary, the European Communities submits that Articles 22.2 and 22.8 of the DSU expressly provide for settlement agreements that can be entered into following recommendations and rulings by the DSB.⁶⁹

36. Thirdly, the Panel relied on the fact that the parties had made conflicting communications to the DSB regarding the legal nature of the Understandings on Bananas after these Understandings had been signed. The European Communities alleges that, by relying on these statements, the Panel effectively allowed a signatory to a settlement to nullify the agreement's terms after having signed and reaped the benefits of it, simply by refusing to make a joint notification to the DSB. Furthermore, the European Communities argues that there is no requirement in the DSU for a mutually agreed solution to be notified to the DSB by one party or by both parties jointly. According to the European Communities, Article 3.6 of the DSU does not attach any legal significance to the complaining party's action or inaction in the DSB when the agreement is notified.

37. In addition, the European Communities challenges the Panel's finding that the Understandings on Bananas could preclude the complainants "from bringing [these] compliance challenge[s] only if the Understanding[s] constitute[d] a positive solution and effective settlement to the dispute in question" and the Panel's conclusion that this was not the case. The European Communities argues that the Panel introduced an erroneous limitation on the types of other legally binding arrangements that can be enforceable in the WTO legal order.⁷⁰ According to the European Communities, there are agreements between WTO Members that do not constitute a positive solution and effective settlement to a dispute, yet, they are given full legal effect by the WTO dispute settlement system. As examples of such agreements, the European Communities mentions, *inter alia*, agreements to dispense with the DSU requirement to hold consultations before making a request for the establishment of a panel, agreements to extend the deadlines for the adoption of panel reports by the DSB, and "sequencing agreements".⁷¹ The European Communities submits that the Panel's approach introduces uncertainty

⁶⁹European Communities' appellant's submissions, para. 48 (Ecuador), para. 79 (US).

⁷⁰European Communities' appellant's submissions, para. 55 (Ecuador), para. 87 (US).

⁷¹European Communities' appellant's submissions, para. 56 (Ecuador), para. 88 (US).

as to the legal effects of agreements reached between WTO Members, and should therefore be reversed.

38. The European Communities further argues that the Panel erred in its interpretation and application of the principle of good faith enshrined in Article 3.10 of the DSU. According to the European Communities, the Panel took the erroneous view that an objection based on the principle of good faith could be successful only if the European Communities had made out a *prima facie* case for the alleged violation of Article 3.10, and also for "something more than mere violation" of that provision.⁷² The European Communities argues that the Panel did not provide any justification for its conclusion that the European Communities had not established a *prima facie* case of a violation of Article 3.10. The European Communities submits that it had presented a number of arguments to the Panel, yet, the Panel did not provide any reasons for why it rejected those arguments. The European Communities submits that the Panel thereby acted inconsistently with its obligations under the DSU, including Article 11 of the DSU. Furthermore, the European Communities criticizes the Panel for taking the view that the principle of good faith could only be invoked as an "add-on"⁷³ to the violation of another WTO rule and could not, by itself, be the source of rights and obligations of WTO Members. The European Communities asserts that customary international law recognizes that the principle of good faith can itself be the source of rights and obligations.⁷⁴ The European Communities further submits that, given that the complainants have signed the Understandings on Bananas in the present case, the application of the principle of good faith precluded them from challenging the EC Bananas Import Regime at issue in this dispute.

39. Finally, the European Communities submits that the Panel was incoherent in its reasoning because, having found a "clear requirement for [the challenged measure] to be consistent with the covered agreements"⁷⁵, it should then have gone on to analyze the consistency with the covered agreements of the terms of the Understandings on Bananas and the consistency of the European Communities' measures with the terms of the Understandings. However, according to the European Communities, the Panel did neither.

⁷²European Communities' appellant's submissions, para. 60 (Ecuador) (referring to Ecuador Panel Report, para. 7.131), para. 92 (US) (referring to US Panel Report, para. 7.162).

⁷³European Communities' appellant's submissions, para. 67 (Ecuador), para. 98 (US).

⁷⁴European Communities' appellant's submissions, para. 68 (Ecuador), para. 99 (US) (referring to International Court of Justice, *Australia v. France (Nuclear Tests Case)*, ICJ Reports (1974) 253, at 268).

⁷⁵Ecuador Panel Report, para. 7.77; US Panel Report, para. 7.108.

3. Measure Taken to Comply

40. In the United States case, the European Communities appeals the Panel's finding that the EC Bananas Import Regime was a "measure taken to comply" with the recommendations and rulings of the DSB in the original *EC – Bananas III* dispute and that, therefore, the United States had properly brought this dispute under Article 21.5 of the DSU. The European Communities argues that the United States' acceptance to have its retaliation rights terminated upon implementation of the tariff quota-based import regime described in subparagraph C.2 of the Understanding on Bananas confirmed that the United States and the European Communities agreed that this constituted "implementation" of the original DSB recommendations and rulings. The European Communities submits that "the United States' retention of the right to re-impose retaliatory measures only if the [tariff quota-based] regime [did] not enter into force by 1 January 2002"⁷⁶ demonstrated the importance placed by the United States itself on the tariff quota import regime, and further supported the conclusion that the United States and the European Communities had agreed that, with the introduction of the tariff quota-based regime as the "measure taken to comply", the dispute would be settled.

41. The European Communities presents a number of further arguments in support of its position. First, the European Communities alleges that the Panel failed to take into account that there was "no link" between the original DSB recommendations and rulings and the political decision of the European Communities to introduce a tariff-only import regime by 1 January 2006. The European Communities takes issue with the Panel's finding that "the fact that the original recommendations and rulings did not *explicitly* require the European Communities to bring itself into compliance specifically through the introduction of a tariff-only import regime is irrelevant for establishing whether the current [EC Bananas Import Regime was] a measure taken to comply".⁷⁷ The European Communities argues that a "link" exists between a measure and the DSB recommendations rulings in the original proceedings when the introduction of the contested measure is necessary to address a specific finding of inconsistency with the covered agreements. Yet, the European Communities argues that there was no finding in the original *EC – Bananas III* dispute that could be addressed or implemented only through a tariff-only regime. Therefore, the European Communities submits that the required "link" to the DSB recommendations and rulings in *EC – Bananas III* was missing in the present dispute and that the EC Bananas Import Regime was therefore not a "measure taken to comply".

⁷⁶European Communities' appellant's submission, para. 41 (US).

⁷⁷European Communities' appellant's submission, para. 45 (US) (quoting US Panel Report, para. 7.470). (emphasis added by the European Communities)

42. Secondly, the European Communities takes issue with the Panel's finding that "a key element of the measure being reviewed and found inconsistent in the original proceedings was the preferential treatment by the European Communities of banana imports from ACP countries" and that the EC Bananas Import Regime at issue also "maintain[ed] a preference for ACP banana imports."⁷⁸ The European Communities contests the Panel's conclusion that the EC Bananas Import Regime was "closely related" to the measure reviewed and found inconsistent in the original proceedings and that it was closely related to the original DSB recommendations and rulings adopted in 1997.

43. Thirdly, the European Communities asserts that the Panel was wrong in relying on other panel reports concerning different parties in which the same questions of WTO law had arisen, and on reports issued in other proceedings between the same parties on different matters, because these reports were not binding on the participants in this dispute. The European Communities submits that the Panel acted inconsistently with Article 11 of the DSU when it took into consideration the findings of the panel in *EC – Bananas III (Article 21.5 – Ecuador)*, including the introductory language⁷⁹ of the suggestions made by that panel, while not taking into account the suggestions themselves. Moreover, the European Communities alleges that the Panel was wrong in relying on statements by the panel in *EC – Bananas III (Article 21.5 – EC)*, because that panel did not make any substantive findings, and because the report of that panel was never adopted by the DSB. In addition, the European Communities claims that the Panel was wrong in relying on the decision by the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*, because the mandate of arbitrators under Article 22.6 of the DSU is different from the mandate of a compliance panel under Article 21.5 of the DSU.

44. Finally, the European Communities contends that the Panel erroneously interpreted the Doha Article I Waiver as supporting the conclusion that the contested measure was a "measure taken to comply". The European Communities submits that the fact that a particular measure may need to be

⁷⁸European Communities' appellant's submission, para. 47 (US) (quoting US Panel Report, para. 7.323).

⁷⁹The Panel noted that the first Ecuador Article 21.5 panel provided the following introduction to its suggestion:

"While Members remain free to choose how they implement DSB recommendations and rulings, it seems appropriate, after one implementation attempt has proven to be at least partly unsuccessful, that an Article 21.5 panel make suggestions with a view toward promptly bringing the dispute to an end.

In light of our findings and conclusions with respect to Articles I and XIII of GATT, the requirements of the Lomé Convention and the coverage of the Lomé waiver, above, in our view, the European Communities has at least the following options for bringing its banana import regime into conformity with WTO rules."

(US Panel Report, para. 7.466 (quoting Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.154 and 6.155) (emphasis added by the current Panel))

covered by a WTO waiver is irrelevant for the determination of whether that measure is a "measure taken to comply" with prior DSB recommendations and rulings.

4. Repeal of the Challenged Measure

45. In the United States case, the European Communities claims that, by failing to take into consideration the repeal of the measure challenged in this dispute, the Panel failed to analyze properly the facts of the case and thereby violated Articles 3.4, 3.7, and 11 of the DSU. Moreover, the European Communities submits that the Panel erred in making a recommendation to the DSB in relation to a measure that no longer existed.

46. First, the European Communities argues that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, by failing to take into account that the tariff quota of 775,000 mt for imports of ACP bananas ceased to exist prior to the issuance of the US Panel Report.⁸⁰

47. Secondly, the European Communities contends that the Panel's failure to take into consideration the repeal of the challenged measure is inconsistent with Articles 3.4 and 3.7 of the DSU, because it fails to "achieve a satisfactory settlement of the matter" as required by Article 3.4, and also because it fails to "secure a positive solution to the dispute" pursuant to Article 3.7. The European Communities further submits that the Panel erred in declaring inadmissible the evidence submitted by the European Communities regarding the adoption of EC Regulation 1528/2007, by means of which the measure challenged in this dispute was repealed. The European Communities asserts that the Panel did not properly distinguish between factual evidence supporting a claim and evidence relating to the existence of the contested measure itself.

48. Thirdly, the European Communities claims that the Panel erred in making a recommendation with respect to a measure that had ceased to exist by the time the Panel issued its Report. The European Communities alleges that the Panel provided a "concealed" recommendation by stating that the original DSB recommendations and rulings "remained operative".⁸¹ The European Communities submits that, since the tariff rate quota reserved for ACP imports was repealed by EC Regulation 1528/2007 prior to the issuance of the Panel Report, there was no recommendation that could be made or that could "remain operative".

⁸⁰European Communities' appellant's submission, para. 180 (US).

⁸¹European Communities' appellant's submission, paras. 190 and 191 (US).

5. Article II of the GATT 1994

49. In the Ecuador case, the European Communities requests the Appellate Body to reverse the Panel's findings that the Doha Article I Waiver "modified the Schedule of the European Communities and extended the duration of the concession for the tariff quota beyond December 31, 2002"⁸², and the Panel's consequential finding that "the European Communities has breached Article II of the GATT".⁸³

50. The European Communities agrees with the Panel that the tariff quota of 2.2 million mt in the European Communities' Schedule of Concessions could not be read in isolation from the Annex to the Schedule (the Bananas Framework Agreement) and that it was subject to the terms, conditions, and qualifications set out in the Annex. The European Communities, therefore, agrees with the Panel's conclusion that the tariff quota concession was "unequivocally intended to expire on 31 December 2002"⁸⁴, in accordance with the terms of the Bananas Framework Agreement incorporated into the Schedule.

51. The European Communities, however, claims that the Panel erred in finding that the Doha Article I Waiver was a "subsequent agreement" to the European Communities' Schedule, which dealt with the provisions of the Schedule, and that the Waiver could be interpreted as an agreement by WTO Members "to extend the duration of the European Communities' tariff quota concession for bananas beyond 31 December 2002".⁸⁵ The European Communities also claims that the Panel made further errors of legal interpretation in relying on the Uruguay Round "Modalities Paper"⁸⁶ and the European Communities' initiation of negotiations pursuant to Article XXVIII of the GATT 1994 as supplementary means of interpretation.

52. The European Communities argues that the Doha Article I Waiver is not an international agreement, but a decision of the WTO. The European Communities submits that the Panel confused a decision taken by the Ministerial Conference pursuant to Article IX of the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement") with an "international agreement".⁸⁷ According to the European Communities, the Doha Article I Waiver, which was adopted by "consensus" with no Member present at the meeting formally objecting to the proposed

⁸²European Communities' appellant's submission, para. 164 (Ecuador).

⁸³European Communities' appellant's submission, para. 183 (Ecuador).

⁸⁴European Communities' appellant's submission, para. 147 (Ecuador) (quoting Ecuador Panel Report, para. 7.436).

⁸⁵European Communities' appellant's submission, para. 148 (Ecuador).

⁸⁶Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group, MTN.GNG/MA/W/24, 20 December 1993.

⁸⁷European Communities' appellant's submission, para. 151 (Ecuador).

decision, does not satisfy the conditions required by Articles 6*ff* of the *Vienna Convention on the Law of Treaties*⁸⁸ (the "*Vienna Convention*") for an international agreement to come into existence. As such, the Doha Article I Waiver cannot be assimilated to an international agreement, which "would require that all parties conclude the agreement according to their constitutional requirements and positively express consent to be bound by the agreement".⁸⁹ Moreover, the European Communities contends that the concessions on trade in goods included in WTO Members' GATT Schedules can only be modified through agreements concluded following the procedures of Article XXVIII, and that the Doha Article I Waiver is not an agreement that was reached following these procedures.

53. The European Communities claims that the Doha Article I Waiver cannot be considered a "plurilateral agreement" because the legal basis of the Ministerial Decision refers exclusively to Article IX of the *WTO Agreement* and the other WTO provisions relating to the granting of waivers. Moreover, the Waiver "does not have any of the characteristics that 'plurilateral' agreements consistently have".⁹⁰ The European Communities notes that the Doha Article I Waiver does not explicitly state that it was intended to modify the bananas concession in the European Communities' Schedule. The European Communities points out that there has never been an example of an "implied" agreement to modify the concessions in the Schedules of WTO Members participating in a "plurilateral" agreement. Moreover, the European Communities highlights that none of the parties to this dispute ever argued or even mentioned, at any stage of the proceedings, anything similar to the Panel's erroneous finding that the Doha Article I Waiver extended the tariff quota concession in the European Communities' Schedule.

54. The European Communities submits that the Panel confused Article IX with Article X of the *WTO Agreement*, and that the Doha Article I Waiver is not a decision amending the WTO agreements taken pursuant to Article X of the *WTO Agreement* but, rather, a decision taken on the basis of Article IX of the *WTO Agreement*, which cannot be used to amend the other WTO agreements, including the Schedules of Concessions. Moreover, the European Communities contends that, in the case of the Doha Article I Waiver, the procedures prescribed by Article X for the amendment of the WTO agreements, such as depositing an instrument of acceptance, were not followed. According to the European Communities, this confirmed that no WTO Member ever considered the Doha Article I Waiver to be a decision amending the European Communities' Schedule of Concessions and thereby extending the duration of the tariff quota concession.

⁸⁸Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

⁸⁹European Communities' appellant's submission, para. 152 (Ecuador).

⁹⁰European Communities' appellant's submission, para. 155 (Ecuador).

55. The European Communities further argues that the Panel erred in reading into the Doha Article I Waiver an agreement to extend the tariff quota concession that is not there; there is no reference in the Waiver to such an agreement, and the Waiver "does not even mention the European Communities' Schedule".⁹¹ The European Communities contends that the reference in the preamble of the Doha Article I Waiver to the tariff quota applying "until the entry into force of the EC tariff-only regime" does not support the Panel's interpretation, because the preamble uses the word "*noting*", which is not the same as "*deciding*", and because this issue is not addressed in the main body of the Waiver. The European Communities further contends that, even if it were assumed that through the Doha Article I Waiver it had accepted to apply the tariff rate of €75 to 2.2 million mt of bananas from MFN countries, nothing in the text of the Waiver established that Members intended to turn this applied tariff rate into a bound concession in the European Communities' Schedule. In this respect, the European Communities notes that, while its "*bound* concession in the Schedule was for a quantity of 2.2 million tons of bananas", it "*applied* the tariff of €75 per ton to the tariff quotas A and B, which had a total volume of more than 2.55 million tons in 2001"⁹², when the Doha Article I Waiver was adopted.

56. Furthermore, according to the European Communities, the Panel failed to reconcile its finding that the Doha Article I Waiver expired and "cannot extend to the [EC Bananas Import Regime] introduced from 1 January 2006"⁹³ with the finding that, through the Doha Article I Waiver, WTO Members agreed to extend the duration of the European Communities' tariff quota concessions until the completion of the Article XXVIII negotiations.⁹⁴

57. The European Communities submits that, even if the Doha Article I Waiver could be interpreted as an agreement between WTO Members extending the duration of the tariff quota concession for MFN suppliers in the European Communities' Schedule of Concessions, the procedural steps required to incorporate such modification into that Schedule were not completed. In particular, the European Communities points out that the Panel itself confirmed that "no withdrawal or modification of the original European Communities' schedule has so far been certified"⁹⁵ and that any

⁹¹European Communities' appellant's submission, para. 166 (Ecuador).

⁹²European Communities' appellant's submission, para. 171 (Ecuador). (original emphasis)

⁹³Ecuador Panel Report, para. 7.200.

⁹⁴European Communities' appellant's submission, para. 172 (Ecuador). The European Communities also submits that the Panel failed to reconcile its finding that the term "the new EC Tariff regime" used in the fifth tiret of the Annex on Bananas to the Doha Article I Waiver applies to the bananas import regime instituted through EC Regulation 1964/2005 on 1 January 2006, with its finding that the European Communities' tariff quota concession of 2.2 million mt at the in-quota tariff rate of €75/mt would extend beyond 1 January 2006, because, as noted in the preamble of the Doha Article I Waiver, it would apply "until the entry into force of the new EC tariff regime". (European Communities' appellant's submission, para. 173 (Ecuador))

⁹⁵European Communities' appellant's submission, para. 179 (Ecuador).

alleged modifications agreed through the Doha Article I Waiver "have not yet taken *'formal effect'* and are not yet *'provided in'* the Schedule that Article II of the GATT obliges the European Communities to respect."⁹⁶ The European Communities concludes, therefore, that its alleged failure to grant the terms of the tariff quota to the MFN suppliers cannot constitute a violation of Article II of the GATT.

58. The European Communities submits that the Panel erred in qualifying the Doha Article I Waiver as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention*, which applies to subsequent agreements "*regarding the interpretation of the treaty*".⁹⁷ The European Communities notes that "[a]n agreement *modifying* the terms of the original treaty does not qualify as a 'subsequent agreement' for purposes of Article 31(3)(a), because such an agreement does not 'regard the interpretation' of the terms of the original treaty; it simply changes those terms for the future."⁹⁸

59. The European Communities also challenges the Panel's reliance on (i) the Uruguay Round Modalities Paper for agricultural market access negotiations and (ii) the initiation of negotiations under Article XXVIII of the GATT 1994 by the European Communities to modify its bananas tariff concessions, as supplementary means of interpretation. The European Communities argues that the Panel erred in relying on the Modalities Paper because that document expressly provides that it cannot be invoked in dispute settlement, which was also confirmed by the Appellate Body in *EC – Export Subsidies on Sugar*.⁹⁹ The European Communities further submits that the Modalities Paper related to the agreements concluded at the end of the Uruguay Round and, even assuming that it could be used as supplementary means of interpretation, it could only be used to interpret the European Communities' Uruguay Round Schedule and not the Doha Article I Waiver, which was adopted by WTO Members in 2001.

60. Finally, the European Communities argues that the fact that it had initiated negotiations under Article XXVIII does not establish that it was the common intention of all WTO Members to extend the tariff quota concession for MFN suppliers. The European Communities notes that negotiations under Article XXVIII are "required"¹⁰⁰ even where the proposed changes do not affect the GATT rights of other countries or are purely formal. Therefore, the proposed reduction by the European Communities of its bound rates *a fortiori* justified the initiation of Article XXVIII negotiations,

⁹⁶European Communities' appellant's submission, para. 180 (Ecuador). (original emphasis)

⁹⁷European Communities' appellant's submission, para. 186 (Ecuador). (original emphasis)

⁹⁸European Communities' appellant's submission, para. 187 (Ecuador). (original emphasis) (quoting Article 31(3)(a) of the *Vienna Convention*).

⁹⁹European Communities' appellant's submission, para. 194 (Ecuador) (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 199).

¹⁰⁰European Communities' appellant's submission, para. 199 (Ecuador) (referring to GATT Panel Report, *EEC – Newsprint*, para. 50).

considering that it was not of a purely legal form and had the potential of affecting the situation of other WTO Members, such as the ACP countries. Moreover, the European Communities argues that, when it agreed with Ecuador in the Understanding on Bananas on negotiations pursuant to Article XXVIII, the outcome of those negotiations was not clear, that is to say, "no one could tell whether the new tariff rate was going to be above €680 euros or below".¹⁰¹

61. For all the above reasons, the European Communities requests the Appellate Body to reverse the Panel's finding and to find, instead, that the tariff quota concession expired according to the terms of the Bananas Framework Agreement in 2001 and has not been extended through the Doha Article I Waiver.

6. Article XIII of the GATT 1994

(a) Suggestions pursuant to Article 19.1 of the DSU

62. The European Communities requests the Appellate Body to reverse the Panel's findings in the Ecuador Panel Report that "the fact that a Member adopts a measure to implement a suggestion pursuant to Article 19.1' does not 'prevent another Member from challenging, pursuant to Article 21.5, the compliance of such measure with the covered agreements'" and that, "[e]ven if there was a presumption of the legality of measures taken to implement a suggestion pursuant to Article 19.1, there is nothing in the DSU suggesting that the alleged [il]legality of such measures could not be reviewed by a compliance panel".¹⁰²

63. The European Communities does not argue on appeal that the EC Bananas Import Regime in place between 1 January 2006 and 31 December 2007 complied fully with the second suggestion of the first Article 21.5 panel requested by Ecuador. However, the European Communities contends that the Panel developed certain legal interpretations that are wrong and create systemic problems for the proper interpretation and application of the DSU.

64. The European Communities argues that, while a panel's suggestions as to how the respondent may put itself in compliance with the WTO rules do not have binding force for the respondent, this does not mean that suggestions are "entirely devoid of legal significance".¹⁰³ According to the European Communities, the consistency of a panel's suggestions with the covered agreements may be challenged by the parties before the Appellate Body, but, "[o]nce the legality of the suggestions has

¹⁰¹European Communities' appellant's submission, para. 201 (Ecuador).

¹⁰²European Communities' appellant's submission, para. 80 (Ecuador) (quoting Ecuador Panel Report, para. 7.251).

¹⁰³European Communities' appellant's submission, para. 85 (Ecuador).

been established following their adoption by the DSB", they cannot be further challenged or revisited before an Article 21.5 panel because of the parties' obligation to "unconditionally accept" the DSB's recommendations and rulings "including the suggestions contained in them, as provided in Article 17.14 in combination with Article 16.4 of the DSU".¹⁰⁴ The European Communities argues that there is nothing in the DSU that would allow a complainant to have an additional opportunity to challenge before a compliance panel the legality of the implementing measures suggested by the original panel.

65. The European Communities contends that, if a respondent claims that its measures challenged before an Article 21.5 panel "were suggested by a previous panel as a means to achieve compliance with its WTO obligations", the Article 21.5 panel must "examine whether the challenged measures are indeed the measures suggested by the original panel", and, if it reaches this conclusion, "it should find that they are consistent with the covered agreements without any further analysis".¹⁰⁵ According to the European Communities, in the present case, the Panel should have first confirmed the characteristics that an import regime should have in order to satisfy the suggestions made by the first Ecuador Article 21.5 panel in 1999, and then examined whether the EC Bananas Import Regime had the suggested characteristics. If the Panel found that the EC Bananas Import Regime implemented the suggestions made in 1999, "then the Panel should have rejected Ecuador's claims under Article XIII without any further analysis".¹⁰⁶ The European Communities contends further that the Panel could have examined the consistency of the EC Bananas Import Regime with Article XIII of the GATT 1994 only if it had concluded that that regime did not implement the suggestions made in 1999. The European Communities argues that the Panel erred because it declined "to assess whether the European Communities [had] effectively implemented any of the suggestions of the first compliance panel requested by Ecuador"¹⁰⁷ in 1999 and considered that Ecuador's disagreement was sufficient to reject the European Communities' argument that the EC Bananas Import Regime had the characteristics suggested in 1999.

(b) Interpretation of Article XIII of the GATT 1994

66. The European Communities requests the Appellate Body to reverse, in both cases, the Panel's interpretation of Article XIII of the GATT 1994 and the Panel's consequential findings in the Panel Reports that the EC Bananas Import Regime was inconsistent with Article XIII:1 and 2 of the GATT 1994.

¹⁰⁴European Communities' appellant's submission, para. 88 (Ecuador).

¹⁰⁵European Communities' appellant's submission, para. 90 (Ecuador).

¹⁰⁶European Communities' appellant's submission, para. 92 (Ecuador).

¹⁰⁷European Communities' appellant's submission, para. 93 (Ecuador).

67. The European Communities argues that the Panel's error leads to unreasonable results. According to the Panel, if the European Communities had offered to the ACP countries an unlimited trade preference, its measure would have been consistent with Article XIII; however, if it protected the interests of MFN suppliers by limiting the quantity of ACP banana imports that can benefit from that trade preference, it would automatically breach Article XIII. According to the European Communities, this erroneous legal interpretation by the Panel would render limitations on trade preferences offered by developed countries to developing countries under the "Enabling Clause"¹⁰⁸ inconsistent with Article XIII, thereby raising doubts as to the legality of WTO Members' Schedules and creating legal confusion and uncertainty. The European Communities argues that this interpretation could lead to significant constraints in the application of the Enabling Clause. Developed countries might choose not to grant trade preferences if the only option they have is to grant preferences for unrestricted quantities.

68. The European Communities claims that the Panel developed a theory pursuant to which a lower tariff offered to one Member becomes automatically a "quantitative restriction" on all other Members when it is offered in respect of only some, and not all, quantities exported by the beneficiary. The European Communities contends that an advantage granted to one Member is not the same as a measure imposing a "prohibition or restriction" on another Member, and that the notion of "less favourable treatment" under Article I:1 of the GATT 1994 is not the same as the notion of "prohibition or restriction" under Article XIII. The European Communities also argues that, if the Panel's interpretation was correct, then any tariff preference would qualify as a restriction under Article XIII, because "[a]ny such preference would grant a 'benefit' to the beneficiary and, therefore, would operate as a 'disadvantage' for all other countries, negatively affecting the quantity of products they can export."¹⁰⁹ According to the European Communities, this interpretation would deprive Article I:1 of any value.

69. The European Communities highlights "important inconsistencies"¹¹⁰ in the reasoning of the Panel under Article XIII. The European Communities argues that the Panel's reasoning that the ACP preference would be a "quantitative restriction" for purposes of Article XIII even if it was unlimited in quantity¹¹¹, cannot be reconciled with the Panel's reasoning that a measure can qualify as a

¹⁰⁸GATT 1979 Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, L/4903, 28 November 1979, BISD 26S/203.

¹⁰⁹European Communities' appellant's submissions, para. 111 (Ecuador), para. 128 (US).

¹¹⁰European Communities' appellant's submissions, para. 112 (Ecuador), para. 129 (US).

¹¹¹European Communities' appellant's submissions, para. 112 (Ecuador) (referring to Ecuador Panel Report, paras. 7.332 and 7.334), para. 129 (US) (referring to US Panel Report, paras. 7.679 and 7.681).

quantitative restriction under Article XIII only when it has a quantitative limit.¹¹² The European Communities contends that, "[e]ither way, the Panel has misinterpreted the notion of 'quantitative restriction' for purposes of Article XIII of the GATT."¹¹³

70. The European Communities claims that the Panel erred in interpreting Article XIII as covering an import regime where imports from all MFN suppliers are subject to a simple tariff and no quantitative restrictions, and where there is a preferential tariff offered to some Members, which is applied only to part of the beneficiaries' imports. According to the European Communities, as there was no restriction on the quantities that Ecuador and the other MFN suppliers could export to the European Communities, Article XIII was not applicable, because no quantitative restrictions were imposed on the imports from the allegedly aggrieved Member. As a consequence, the European Communities contends that there was "no basis that would allow an examination of whether 'similar' quantitative restrictions are also imposed on all other countries."¹¹⁴

71. The European Communities further argues that Article XIII does not introduce an "MFN rule" and, accordingly, does not require the European Communities to extend the tariff preference it grants to ACP countries to all other WTO Members, whether or not this preference is subject to limitations. The European Communities submits that the Panel misinterpreted and misapplied the findings of the Appellate Body in the original *EC – Bananas III* proceedings. The import regime examined in the original proceedings was very different from the EC Bananas Import Regime at issue in the present proceedings: all imports were subject to tariff quotas; each group of suppliers was allocated a tariff quota with different terms; and some countries were allocated country-specific allocations, while some MFN countries had access only to a general allocation. The report of the Appellate Body in the original proceedings does not support extending the application of Article XIII:1 to cover situations of simple tariff discrimination where preferential treatment is offered only to part of the beneficiaries' exports.

72. The European Communities contends that the Panel failed to follow consistent GATT and WTO practice that "the anti-discrimination rules of Article XIII are aimed at quantitative discrimination, while tariff discrimination is the exclusive preserve of Article I."¹¹⁵ According to the European Communities, this practice is "concordant, common and consistent", and it, therefore, falls within the notion of "state practice" referred to in Article 31(3)(b) of the *Vienna Convention*.¹¹⁶ The

¹¹²European Communities' appellant's submissions, para. 112 (Ecuador) (referring to Ecuador Panel Report, para. 7.336), para. 129 (US) (referring to US Panel Report, para. 7.683).

¹¹³European Communities' appellant's submissions, para. 112 (Ecuador), para. 129 (US).

¹¹⁴European Communities' appellant's submissions, para. 116 (Ecuador), para. 133 (US).

¹¹⁵European Communities' appellant's submissions, para. 119 (Ecuador), para. 136 (US).

¹¹⁶European Communities' appellant's submissions, para. 120 (Ecuador), para. 137 (US).

European Communities refers to several examples of waivers from Article I:1 that covered tariff preferences granted by means of tariff quotas, whereby the preferential treatment was subject to quantitative limitations.¹¹⁷ The European Communities claims that this consistent practice establishes the common understanding on the part of the GATT Contracting Parties and WTO Members that exclusion from a preferential tariff quota does not constitute an infringement of Article XIII.

73. Regarding Article XIII:2 of the GATT 1994, the European Communities argues that this provision does not apply to the European Communities' rules governing imports from Ecuador and the United States, because these imports are subject to a simple tariff and not to any quantitative restriction or tariff quota. According to the European Communities, the Panel failed to interpret and apply properly Article XIII:2, which is concerned solely with quantitative restrictions imposed on the aggrieved Member, and not with other measures imposed on that Member such as simple tariffs. The European Communities finds support for its argument in the title of Article XIII and in the fact that "the four sub-paragraphs of Article XIII:2 are entirely focused on the scope and internal distribution of the quantitative restriction" and "do not deal with any measures that fall outside the quota, or tariff quota".¹¹⁸

74. Finally, the European Communities notes that the United States has never been a banana supplier to the European Communities and is not likely to become a banana supplier in the future. Therefore, the ACP preference could not be considered inconsistent with the chapeau of Article XIII:2 because, even in the absence of such preference, the United States' share in the European Communities' bananas market would approach as closely as possible the United States' existing share, which is zero.

(c) Nullification or Impairment with respect to Ecuador

75. The European Communities argues that the Panel rejected without any analysis its arguments that the limit on the quantities of ACP banana imports that could benefit from preferential treatment did not cause any nullification or impairment of benefits accruing to Ecuador under the covered agreements.

76. The European Communities submits that the Panel found that "'the competitive opportunities' of some Members can be negatively affected only where there is a '*benefit*' granted to some other Members"¹¹⁹ and, for the Panel's reasoning to stand, "the quantity limit imposed on the ACP

¹¹⁷European Communities' appellant's submissions, paras. 121-128 (Ecuador), paras. 138-145 (US).

¹¹⁸European Communities' appellant's submissions, para. 133 (Ecuador), para. 150 (US).

¹¹⁹European Communities' appellant's submission, para. 141 (Ecuador) (original emphasis) (referring to Ecuador Panel Report, para. 7.332).

preference must be both ... the element that triggered the violation of Article XIII of the GATT and ... the 'benefit' that could negatively affect the 'competitive opportunities' of the MFN banana suppliers."¹²⁰ The European Communities argues that the quantity limitation imposed on the ACP preference was not a "benefit" granted to the ACP countries but, rather, it was "a 'benefit' granted to the MFN countries".¹²¹

77. The European Communities contends that this fact is not affected by the Panel's finding that the Doha Article I Waiver had expired at the end of 2005 and, consequently, that the ACP preference granted between 1 January 2006 and 31 December 2007 was no longer consistent with Article I of the GATT 1994. The European Communities argues that the Panel failed to explain how the limitation of the quantities benefiting from the ACP preference "caused any *new* or *additional* nullification or impairment to Ecuador under Article XIII of the GATT"¹²² beyond the nullification or impairment under Article I. The European Communities submits that the Panel also failed to take into consideration that the quantity limitation had the effect of *limiting* the negative effects of the ACP preference on Ecuador's "competitive opportunities" under Article I. According to the European Communities, the Panel made a "double counting" of nullification or impairment, by counting as nullification or impairment not only the negative effects caused by the ACP preference, but also "the limitation of these negative effects through the quantity limit".¹²³

78. The European Communities, therefore, requests the Appellate Body to reverse the Panel's legal interpretations and the consequential rejection of the European Communities' argument that the limit on the quantities of ACP bananas that could benefit from preferential treatment did not cause any nullification or impairment of benefits accruing to Ecuador under the covered agreements.

7. Nullification or Impairment with respect to the United States

79. The European Communities appeals the Panel's finding that, "to the extent that the [EC Bananas Import Regime] contains measures inconsistent with various provisions of the GATT 1994, it has nullified or impaired benefits accruing to the United States under that Agreement."¹²⁴ The European Communities argues that the Panel erred in finding that the United States had suffered nullification or impairment as a result of the EC Bananas Import Regime.

¹²⁰European Communities' appellant's submission, para. 142 (Ecuador).

¹²¹European Communities' appellant's submission, para. 143 (Ecuador).

¹²²European Communities' appellant's submission, para. 144 (Ecuador). (original emphasis)

¹²³European Communities' appellant's submission, para. 145 (Ecuador).

¹²⁴US Panel Report, para. 8.12.

80. The European Communities argues that the Panel confused the notion of "nullification or impairment" in Article 3.8 of the DSU with the "interest" that a complaining party must have in order to have "standing" to commence dispute settlement proceedings.¹²⁵ According to the European Communities, the notion of "nullification or impairment" under Article 3.8 is the same as the notion of "nullification or impairment" under Article 22, but it is different from the type of "interest" that a complaining party must have in order to have "standing" to commence dispute settlement proceedings. In this respect, the European Communities argues that it was not enough for the Panel to rely on the potential export interest of the United States and the potential effects of the contested measures on world supplies and prices of bananas to find that the United States had suffered nullification or impairment within the meaning of Article 3.8.

81. The European Communities claims that, considering that the United States was a net importer of bananas and was not actively involved in the business of exporting bananas to any country, let alone the European Communities, the trade preference for bananas originating in ACP countries could not, and did not, deprive the United States from any "competitive opportunity" to export bananas to the European Communities; nor did it change the United States' "competitive relationship" with any banana exporting country in the world, because the United States has never had a "competitive relationship". The European Communities contends that the fact that the contested measures might affect the value of the United States' exports in goods or services towards third countries did not constitute "nullification or impairment" under the GATT 1994.

82. The European Communities also criticizes the Panel for relying on the findings of the Appellate Body in the original *EC – Bananas III* proceedings in 1997, because the facts of the present case are different from the facts as they existed in 1997. According to the European Communities, the Appellate Body report in the original proceedings "confirm[ed] that the finding of a 'nullification or impairment' of a benefit accruing to the United States was based on the European Communities' violation of the GATS."¹²⁶ The European Communities further recalls that the arbitrators acting pursuant to Article 22.6 of the DSU in 1999 found that the sources of "nullification or impairment" with respect to the United States were: "(a) the US share of wholesale trade services in bananas sold in the European Communities and (b) the US share of allocated banana import licences from which quota rents accrue."¹²⁷ The European Communities points out that the current proceedings do not involve any claim under the GATS and there is no longer an "inextricably

¹²⁵European Communities' appellant's submission, para. 156 (US).

¹²⁶European Communities' appellant's submission, para. 167 (US).

¹²⁷Decision of the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 7.8.

interwoven"¹²⁸ relation between the GATT 1994 and the GATS, so that none of the considerations on which the finding of "nullification or impairment" of the United States was based in 1997 existed at the time this Panel was established.

8. Notice of Appeal

83. Regarding the United States' allegation that the European Communities' Notice of Appeal did not satisfy the requirements of Rule 20(2)(d) of the *Working Procedures*, the European Communities does not dispute that its Notice of Appeal did not identify the specific paragraphs of the US Panel Report containing the alleged errors. The European Communities argues, however, that none of the participants had difficulty in identifying the scope and content of the European Communities' Notice of Appeal. Moreover, with respect to the alleged failure to list in its Notice of Appeal a claim under Article 11 of the DSU, the European Communities argues that a violation of Article 11 is always a means by which a panel makes an error of law or legal interpretation. Consequently, the European Communities contends that there was no need to cite Article 11 in conjunction with every error of law appealed in its Notice of Appeal.¹²⁹

B. *Arguments of Ecuador – Appellee and Third Participant*

1. Article 9.3 of the DSU

84. Ecuador submits that the Panel acted consistently with Article 9.3 of the DSU when it decided to maintain different timetables for the United States case and the Ecuador case. Ecuador emphasizes that it strongly objected when the Panel asked whether to delay the Ecuador proceedings in order to harmonize it with the case initiated by the United States. Ecuador disagrees with the European Communities' contention that Article 9.3 imposes an "absolute obligation to harmonize timetables".¹³⁰ Ecuador argues that the phrase "to the greatest extent possible" in Article 9.3 relates to the obligation to compose the two separate panels of the same persons as well as to the panel's obligation to harmonize the timetables.

85. Ecuador asserts that harmonization of the timetables would have led to a two-month delay of the proceedings in the Ecuador case in violation of the 90-day time period set out in Article 21.5 of the DSU. Ecuador further submits that the European Communities' interpretation would require harmonization regardless of how wide the time-gap between two cases may be, and that this could entail significant delays in WTO dispute settlement.

¹²⁸European Communities' appellant's submission, para. 169 (US).

¹²⁹European Communities' response to questioning at the oral hearing.

¹³⁰Ecuador's appellee's submission, para. 8.

2. Legal Effect of the Understanding on Bananas

86. Ecuador argues that the European Communities mischaracterized the Panel's findings when it submitted that the Panel had set out three "conditions" that had to be satisfied in order for the Understanding on Bananas to qualify as a mutually agreed solution within the meaning of Article 3.7 of the DSU.¹³¹ Ecuador maintains that, rather than creating an objectionable legal test for what constitutes a mutually agreed solution, the Panel had evaluated whether the terms of the Understanding read in their context were of a nature that could bar Ecuador from initiating compliance proceedings. Ecuador, however, contends that the Understanding could not immunize any steps the European Communities might have taken with respect to the reform of the EC Bananas Import Regime from challenges before the WTO dispute settlement system.

87. Ecuador disagrees with the European Communities that a complaining party that enters into a bilateral settlement cannot challenge the conformity of measures taken by the implementing party if that party claims that the measures are "accepted" under the bilateral agreement.¹³² Ecuador maintains that the European Communities' construction has no basis in the text of the DSU and would run counter to Article 21.5 of the DSU, in that it would deny the right to initiate compliance proceedings, which are expressly provided for in Article 21.5. Moreover, Ecuador contends that, as all mutually agreed solutions must be consistent with the covered agreements, precluding a party to a settlement agreement from challenging the agreement would nullify the requirement of conformity of the bilateral agreement with WTO law and render the agreement unenforceable under the DSU.

88. Ecuador further submits that the Panel was correct in rejecting the European Communities' contention that the principle of good faith precluded Ecuador from challenging the EC Bananas Import Regime. Ecuador supports the Panel's statement that Ecuador has "[n]owhere in the Understanding ... accepted that it would forego its right to challenge the conformity with the covered agreements of any measure that the European Communities might take to implement a step set out in the Bananas Understanding".¹³³ Furthermore, Ecuador contends that Article 3.10 of the DSU does not preclude initiation of dispute settlement proceedings.

¹³¹Ecuador's appellee's submission, para. 14 (referring to European Communities' appellant's submission, para. 41 (Ecuador), in turn referring to Ecuador Panel Report, para. 7.76).

¹³²Ecuador's appellee's submission, para. 18.

¹³³Ecuador's appellee's submission, para. 32 (quoting Ecuador Panel Report, para. 7.128).

3. Article II of the GATT 1994

89. Ecuador supports the Panel findings that the imposition of a tariff of €176/mt by the European Communities violated Article II of the GATT 1994, because that tariff is in excess of the tariff quota concession bound in the European Communities' Schedule of Concessions. Ecuador contends that the European Communities' concession for bananas continued to remain in force for two reasons: first, the Bananas Framework Agreement was not intended to (nor did it) terminate the tariff quota concession as of 31 December 2002; and, secondly, as the Panel found, the tariff quota concession remained in effect because of its extension through the agreement manifested in the Doha Article I Waiver.

90. Ecuador agrees with the Panel that "the Doha Waiver was an agreement regarding the *application* of the concession, which is within the scope of Article 31(3) [of the *Vienna Convention*]."¹³⁴ Moreover, according to Ecuador, "the Doha Waiver ... strongly support[s] Ecuador's position that the Concession was never intended to expire on account of paragraph 9 of the [Bananas Framework Agreement]."¹³⁵

91. Ecuador agrees with the Panel that "the Doha Waiver constituted an international agreement relating to the application of the Concession."¹³⁶ Ecuador also argues that Article 31(3) of the *Vienna Convention* does not prescribe formal requirements as to what may constitute a subsequent agreement, and that a waiver of obligations is an agreement that is binding on all Members and that alters, for the duration of the waiver, rights and obligations for all Members. Ecuador also notes that it is irrelevant that waivers are not adopted by consensus, because "even a Member who did not support a waiver will not be able to enforce compliance with a waived rule by the Member who received the waiver."¹³⁷

92. Ecuador contends that a waiver may be regarded as an agreement extending the concession, even if it does not meet WTO requirements and procedures for modifying a GATT tariff concession. Ecuador argues that "the modification of the duration of the Concession by the Doha Waiver is, if anything, a more transparent step than most modifications, which may help explain why dispute settlement panels and the Appellate Body have found that concessions cannot authorize deviations from other WTO rules."¹³⁸ Ecuador also agrees with the Panel's finding that, insofar as it modifies the European Communities' tariff concession, "the Doha Waiver was an agreement regarding the

¹³⁴Ecuador's appellee's submission, para. 58. (original emphasis)

¹³⁵Ecuador's appellee's submission, para. 66.

¹³⁶Ecuador's appellee's submission, para. 53.

¹³⁷Ecuador's appellee's submission, para. 55.

¹³⁸Ecuador's appellee's submission, para. 57.

application of the concession, which is within the scope of Article 31(3) [of the *Vienna Convention*]"¹³⁹.

93. Ecuador believes that, although the Doha Article I Waiver has expired with respect to bananas, it can nevertheless extend the tariff quota concession, because of the overall settlement manifested in the Waiver, which also relates to the Understanding on Bananas. According to Ecuador, the European Communities could not say "that it got its part of the bargain" and maintain its WTO inconsistent regime until 2008, but, at the same time, "ignore the commitments with permanent effect on which the Doha Waiver was conditioned".¹⁴⁰ Part of the European Communities' commitments was to "introduce and rebind a tariff only regime that would permanently and without the need for a waiver at least maintain total market access for MFN suppliers, taking into account all EC market access commitments".¹⁴¹

94. Ecuador argues that it had introduced evidence before the Panel demonstrating that all WTO Members, including the European Communities, had uniformly acted on the basis that the tariff quota concession was permanent. According to Ecuador, the first time that the European Communities ever argued or acted as if the concession had expired on 31 December 2002 was in the European Communities' rebuttal submission in these Panel proceedings.

95. Ecuador further contends that the Panel referred to the Modalities Paper as a guide to the common intentions of negotiators, not as enforceable rules. For Ecuador, "the modalities paper continues to operate as a guide, such as in accession negotiations"¹⁴², and therefore it was appropriate for the Panel to rely on it as supplementary means of interpretation. Ecuador also claims that the Panel was right to infer from the notifications and initiation of Article XXVIII negotiations by the European Communities in 2004 and in 2007 that "the EC would not have needed to invoke such negotiations if its bound duties were 680 euros/mt, since members do not need to negotiate under Article XXVIII to lower their bindings."¹⁴³

96. Finally, Ecuador contends that the Doha Article I Waiver should be seen as an agreement that supports Ecuador's other appeal and confirms Ecuador's interpretation that the tariff quota concession was never intended to expire by virtue of paragraph 9 of the Bananas Framework Agreement. In Ecuador's view, paragraph 9, at most, was intended to terminate those conditions of the Bananas Framework Agreement (such as the allocation of the tariff quota among suppliers) that are not

¹³⁹Ecuador's appellee's submission, para. 58. (original emphasis)

¹⁴⁰Ecuador's appellee's submission, para. 60.

¹⁴¹Ecuador's appellee's submission, para. 60.

¹⁴²Ecuador's appellee's submission, para. 64.

¹⁴³Ecuador's appellee's submission, para. 65.

included in the first six columns under the European Communities' tariff heading on bananas in its Schedule of Concessions.

4. Article XIII of the GATT 1994

(a) Suggestions pursuant to Article 19.1 DSU

97. Ecuador responds that the Panel properly dismissed the argument by the European Communities that the Panel could not review in these Article 21.5 proceedings the conformity of the measures taken to comply, which the European Communities claims to have taken to implement the suggestions made by the first Ecuador Article 21.5 panel pursuant to Article 19.1 of DSU. For Ecuador, the fact that the suggestions had not been appealed does not immunize measures taken to implement that suggestion from review under Article 21.5 of the DSU.

98. According to Ecuador, the European Communities' position regarding suggestions would have the net effect of discouraging requests for a panel to make suggestions and would imply that a party that gets a "suggestion" obtains immunity from a challenge under WTO rules for measures it undertakes consistently with that suggestion. Ecuador further contends that another unacceptable consequence would be that, if a panel made a "broad" suggestion, "the defending party would be free to adopt the most protectionist and WTO-inconsistent set of measures it could contrive that would still arguably fit within the parameters of the panel suggestion" and "would be immune from scrutiny for compliance with WTO rules, so long as [those measures] conformed with the contours of [the] suggestion."¹⁴⁴

(b) Interpretation of Article XIII of the GATT 1994

99. Ecuador requests the Appellate Body to reject the European Communities' appeal of the Panel's interpretation of Article XIII of the GATT 1994 and the Panel's consequential findings that the EC Bananas Import Regime was inconsistent with Article XIII:1 and 2 of the GATT 1994.

100. Ecuador submits that, in the present dispute, the prior DSB recommendations and rulings on Article XIII continue to apply, because the EC Bananas Import Regime included a tariff quota. In Ecuador's view, the Appellate Body clearly stated in *EC – Bananas III* that Article XIII applies "regardless whether there are one, two or many [tariff quotas]".¹⁴⁵ Ecuador emphasizes that the

¹⁴⁴Ecuador's appellee's submission, para. 38.

¹⁴⁵Ecuador's appellee's submission, para. 42 (referring to Appellate Body Report, *EC – Bananas III*, para. 190).

European Communities' preferential tariff quota for ACP bananas constitutes a restriction on imports of MFN bananas, which are denied access to the duty-free quota.

101. Regarding Article XIII:1, Ecuador rejects the European Communities' argument that "the tariff quota does not restrict, but rather helps Ecuador and the other MFN suppliers to the EC."¹⁴⁶ Ecuador argues that the Panel correctly found that bananas of MFN origin are treated less favourably because they have no access to the zero-duty tariff quota granted for ACP bananas, and that the preferential tariff quota granted by the European Communities to the ACP countries is inconsistent with Article XIII:1 of the GATT 1994.

102. According to Ecuador, certain previous waivers from Article I referred to by the European Communities do not demonstrate that there was "a common understanding that exclusion from a preferential tariff quota is not inconsistent with Article XIII".¹⁴⁷ In Ecuador's view, the existence of these waivers cannot constitute a legal basis for the Appellate Body to reverse its prior interpretation of Article XIII, because all these waivers "were all in existence when the EC's preferential tariff quotas were addressed by the Panel and the Appellate Body in [*EC – Bananas III*], yet were not deemed to affect the proper interpretation of Article XIII in accordance with the interpretive principles of the [*Vienna Convention*]"¹⁴⁸ Ecuador further contends that the European Communities itself received a waiver from Article XIII in order to maintain its discriminatory tariff quota reserved for ACP bananas, showing that the most recent WTO practice revealed that it was necessary to obtain a separate waiver for discriminatory tariff quotas.

103. Regarding Article XIII:2, Ecuador disagrees with the European Communities' interpretation that the chapeau of Article XIII:2 gives rights to only Members that are subject to a particular tariff quota. Ecuador emphasizes that the text of this provision does not refer to restrictions on countries, but, rather, refers to products. In any event, Ecuador was "plainly subject to the restrictions because the quotas exclude[d] Ecuadorian bananas altogether from the zero duty quota".¹⁴⁹ Ecuador submits that the Panel's rejection of the European Communities' interpretation of Article XIII was consistent with previous decisions of the Appellate Body in *EC – Bananas III* and *US – Line Pipe*.¹⁵⁰

¹⁴⁶Ecuador's appellee's submission, para. 43.

¹⁴⁷Ecuador's appellee's submission, para. 44 (referring to European Communities' appellant's submission, para.129 (Ecuador)).

¹⁴⁸Ecuador's appellee's submission, para. 44.

¹⁴⁹Ecuador's appellee's submission, para. 47.

¹⁵⁰Ecuador's appellee's submission, para. 47 (referring to Ecuador Panel Report, paras. 7.367-7.370).

(c) Nullification or Impairment with respect to Ecuador

104. Ecuador takes issue with the European Communities' claim that there was no nullification and impairment of benefits suffered by Ecuador because the tariff quota imposed by the European Communities limited the duty-free competition from the ACP countries. In Ecuador's view, "[t]his argument has no merit on policy or legal grounds."¹⁵¹ Ecuador argues that the alternative available to the European Communities in order to act consistently with Article XIII of the GATT 1994 was not to eliminate the tariff quota giving ACP bananas duty-free access, but, rather, "to allow Ecuador unlimited access to the duty free quota".¹⁵² Ecuador also submits that the European Communities failed to rebut the presumption of nullification or impairment under Article 3.8 of the DSU, because "it is well settled that such a policy argument would not rebut the presumption of nullification or impairment, which is not a question of [actual] trade flows, but rather of [trade] opportunities."¹⁵³

C. *Arguments of the United States – Appellee and Third Participant*

1. Article 9.3 of the DSU

105. The United States argues that the Panel acted within its margin of discretion when it decided to maintain different timetables for the United States case and the Ecuador case. The United States submits that the Panel was correct in taking into account that the present proceedings are compliance proceedings, which, pursuant to Article 21.5 of the DSU, are supposed to be completed within 90 days. The United States disagrees with the European Communities' contention that Article 9.3 of the DSU provides an "absolute and unqualified"¹⁵⁴ obligation with respect to the harmonization of timetables. Instead, the United States contends, the Panel's obligation was qualified by the terms "to the greatest extent possible" in Article 9.3. In the United States' view, the Panel "carefully considered" the request for harmonization "and reached an appropriate decision that addressed all the procedural issues implicated by the EC's request".¹⁵⁵

106. The United States further submits that the Panel did make adjustments to the timetable in order to protect the due process rights of the parties. The Panel made clear that it initially intended to harmonize the timetables, but was not able to find a better alternative to the one it adopted. The United States maintains that, in particular, the Panel ensured that replies to questions and comments

¹⁵¹Ecuador's appellee's submission, para. 48.

¹⁵²Ecuador's appellee's submission, para. 48.

¹⁵³Ecuador's appellee's submission, para. 49.

¹⁵⁴European Communities' appellant's submission, para. 20 (US) (referred to in United States' appellee's submission, paras. 122 and 123).

¹⁵⁵United States' appellee's submission, para. 121.

on replies in the United States case were received before the issuance of the interim report in the Ecuador case. The United States submits that this prevented the arguments of the parties from being influenced by advance knowledge of the findings of the Panel in the Ecuador case.¹⁵⁶ The United States also asserts that an appellant requesting reversal of a panel's ruling on matters of procedure must demonstrate the prejudice generated by that legal ruling, and that the European Communities has failed to do so.¹⁵⁷ Moreover, the United States contends that Article 9.3 does not require a panel to provide an objective justification for its decision on a request for harmonization; nonetheless, the Panel did in fact provide an "explanation as to why it was unable to harmonize the timetables".¹⁵⁸ Finally, the United States contends that, even if the Appellate Body reverses the Panel's finding relating to Article 9.3 of the DSU, that reversal should have no effect on the merits of the dispute or the substantive findings of the Panel.

2. Legal Effect of the Understanding on Bananas

107. The United States argues that the Panel did not set out three "conditions" that every mutually agreed solution must meet. Rather, the United States contends, the Panel explained on the basis of the "three reasons *taken together*" why the Understanding did not have the effect of barring the United States from initiating compliance proceedings.¹⁵⁹

108. With respect to the Panel's first reason—that the Understanding provides only for the means, that is, a series of future steps, for resolving and settling the dispute—the United States maintains that the Panel merely set out the facts based on a correct reading of the terms of the Understanding. The United States submits that the Panel did not, as the European Communities asserts, set a "condition" that only agreements recording measures that have already been implemented can qualify as mutually agreed solutions.¹⁶⁰ With respect to the Panel's second reason—that the Understanding was concluded subsequent to recommendations, rulings, and suggestions by the DSB—the United States argues that the Panel did not set this as a "condition" but, rather, used it as relevant historical context for assessing the European Communities' preliminary objection.¹⁶¹ Finally, with regard to the Panel's third reason—that the parties have made conflicting communications to the DSB concerning the Understanding on Bananas—the United States again contends that the Panel had not identified that fact as a "condition". In the United States' view, the Panel had correctly taken into account that the

¹⁵⁶United States' appellee's submission, para. 121 (referring to US Panel Report, para. 7.11).

¹⁵⁷United States' appellee's submission, para. 125.

¹⁵⁸United States' appellee's submission, para. 126.

¹⁵⁹United States' appellee's submission, para. 57 (original emphasis) (referring to US Panel Report, para. 7.107).

¹⁶⁰United States' appellee's submission, para. 61.

¹⁶¹United States' appellee's submission, para. 62.

United States disagrees with the European Communities' characterization of the Understanding as a "mutually agreed solution".¹⁶²

109. The United States takes issue with the European Communities' allegation that "the Panel has 'introduce[d] an erroneous limitation on the types of other "legally binding agreements" that can be enforceable and produce full legal effects in the WTO legal order.'"¹⁶³ The United States submits that the Panel did not introduce such a limitation; rather, the Panel merely found that, in the context of the present case, the United States was not precluded from having recourse to Article 21.5 of the DSU, because the Understanding between the United States and the European Communities did not provide for such a preclusion.

110. According to the United States, the European Communities' position would have the consequence that a responding party that failed to comply with the terms of a mutually agreed solution could claim immunity from further proceedings by virtue of the legal effect of mutually agreed solutions, as well as from a claim under the mutually agreed solution itself, because mutually agreed solutions are not "covered agreements". The United States emphasizes, however, that the DSU does not foresee such a limitation of the complainant's rights.

111. The United States also submits that the Panel did not err in its interpretation and application of the principle of good faith provided for in Article 3.10 of the DSU. The United States contends that the Panel was correct in relying on past panel and Appellate Body reports when finding that there must be something "more than mere violation" of a substantive provision of the covered agreements before a Member may be found to have failed to act in good faith.¹⁶⁴

112. Finally, with respect to the European Communities' claim pursuant to Article 11 of the DSU that the Panel failed to provide any justification for rejecting its claim based on the principle of good faith, the United States submits that, since the European Communities' Notice of Appeal does not contain a reference to Article 11 of the DSU, that claim is outside the scope of this appeal.¹⁶⁵

¹⁶²United States' appellee's submission, para. 63.

¹⁶³United States' appellee's submission, para. 65 (quoting European Communities' appellant's submission, para. 87 (US)).

¹⁶⁴United States' appellee's submission, para. 76 (referring to Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 297; and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.35).

¹⁶⁵United States' appellee's submission, para. 70.

3. Measure Taken to Comply

113. The United States submits that the Panel did not err in finding that the EC Bananas Import Regime was a "measure taken to comply" with the DSB recommendations and rulings in *EC – Bananas III*. The United States maintains that the "structure and language" of the Understanding on Bananas indicate that its purpose was to commit the European Communities to bring itself into WTO compliance on 1 January 2006. The United States argues that the reference to the Doha Article XIII Waiver in paragraph E of the Understanding demonstrates an agreement between the parties to the Understanding that further measures beyond the interim tariff quota-based regime would be necessary for the European Communities to achieve compliance with the recommendations and rulings of the DSB in the original proceedings.

114. The United States contends that its commitment to terminate retaliation upon the introduction of a tariff quota-based import regime under subparagraph C.2 of the Understanding did not indicate an agreement by the United States to regard the European Communities' interim regime as the final implementation of the original DSB recommendations and rulings. The United States asserts that it terminated only the imposition of retaliatory duties but that the multilateral authorization to suspend concessions had not been revoked. The United States maintains that a complainant may choose whether and to what extent to make use of the WTO authorization to suspend concessions, and that, therefore, the complainant's decision not to exercise that right does not imply the complainant's acceptance that the respondent's measures have become consistent with its WTO obligations.

115. The United States disagrees with the European Communities that there was no link between the contested measure and the DSB recommendations and rulings in *EC – Bananas III*. The United States submits that the European Communities agreed through the terms of the Understanding on Bananas to take certain interim steps culminating in a tariff-only regime by 1 January 2006. In the United States' view, this demonstrated that a "clear link"¹⁶⁶ existed between the recommendations and rulings of the DSB in *EC – Bananas III* and the EC Bananas Import Regime at issue in the present dispute.

116. According to the United States, the Panel did not err in taking into account the findings of the panels in *EC – Bananas III (Article 21.5 – Ecuador)* and *EC – Bananas III (Article 21.5 – EC)*, and the decision by the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*, when assessing whether the EC Bananas Import Regime at issue in the current dispute constituted a "measure taken to

¹⁶⁶United States' appellee's submission, para. 88.

comply" with the DSB recommendations and rulings in *EC – Bananas III*.¹⁶⁷ The United States points to the Appellate Body's statement in *Japan – Alcoholic Beverages II* that "adopted panel reports create legitimate expectations and should be taken into account when relevant".¹⁶⁸ In addition, the United States contends that the Panel merely used these reports as evidence of the link between the DSB's recommendations and rulings in the original proceedings and the EC Bananas Import Regime at issue in the present dispute.

117. With respect to the European Communities claim that the Panel acted inconsistently with Article 11 of the DSU when it relied on suggestions made by the panel in *EC – Bananas III (Article 21.5 – Ecuador)*, the United States argues that this claim is not properly before the Appellate Body because it was not included in the European Communities' Notice of Appeal.

4. Repeal of the Challenged Measure

118. The United States contends that the Panel did not err in making findings with respect to EC Regulation 1964/2005, even though that Regulation was repealed during the course of the Panel proceedings. The United States submits that a compliance panel is tasked with determining whether measures taken to comply exist, and, when such measures exist, whether they comply with the recommendations and rulings of the DSB.¹⁶⁹ The United States maintains that the Panel properly concluded that the challenged measure failed to implement the recommendations and rulings of the DSB in the original proceedings. In the United States' view, these findings were sufficient and the Panel did not need to make a recommendation. The United States therefore requested at the interim review stage that the Panel's recommendation be deleted from its Report.

119. With respect to the European Communities' claim under Article 11 of the DSU that the Panel failed to assess correctly the facts of the case by not taking into account the repeal of EC Regulation 1964/2005, the United States alleges that the European Communities improperly raises this claim because it was not included in its Notice of Appeal. In addition, the United States maintains that the European Communities introduced evidence regarding the repeal of EC Regulation 1964/2005 only at the interim review stage of the Panel proceedings. In the United States' view, the European Communities thereby acted inconsistently with the limitations regarding the introduction of new evidence at the interim review stage as stipulated in paragraph 11 of the Panel's Working Procedures,

¹⁶⁷United States' appellee's submission, para. 90 (referring to European Communities' appellant's submission, paras. 53-60 (US)).

¹⁶⁸United States' appellee's submission, para. 90 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 14, DSR 1996:I, 97, at 108).

¹⁶⁹United States' appellee's submission, para. 113 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 100(b)).

and in Article 15.2 of the DSU, and affirmed by the Appellate Body in *EC – Selected Customs Matters*.¹⁷⁰

5. Article II of the GATT 1994

120. The United States contends, as a third participant, that, in the event that the Appellate Body reverses the Panel's finding that the European Communities violated Article II:1(b) of the GATT 1994, the Appellate Body should also reverse the Panel's finding that the European Communities' tariff quota concession of 2.2 million mt expired by operation of the first sentence of paragraph 9 of the Bananas Framework Agreement. The United States argues that, as a consequence, the European Communities' applied tariff would nonetheless be in breach of the European Communities' obligations under Article II of the GATT 1994.

121. The United States contends that paragraph 9 of the Bananas Framework Agreement does not stipulate that the concession with which the agreement was associated would be of a limited duration. The United States alleges that the Panel erroneously equated the Bananas Framework Agreement with the tariff quota concession of 2.2 million mt when it found that the Bananas Framework Agreement "automatically impl[ied]"¹⁷¹ that the concession expired at the same time as the Bananas Framework Agreement. The United States maintains that the tariff quota concession is set out not only in the Bananas Framework Agreement, but also in the European Communities' Schedule, and that, as such, it applies to all WTO Members. The United States submits that the expiry of the Bananas Framework Agreement alone could not extinguish a concession inscribed in a WTO Member's Schedule. In support of its argument, the United States makes reference to notifications by the European Communities pursuant to Article XXVIII:5 of the GATT 1994 made in July 2004 and January 2005, in which the European Communities itself referred to the intention to withdraw "concessions" on bananas.¹⁷² In addition, the United States maintains that, in the context of the arbitration established under the Annex on Bananas to the Doha Article I Waiver, the European Communities proposed to modify its "current ... WTO Commitments".¹⁷³ The United States contends that such an expression

¹⁷⁰United States' appellee's submission, paras. 114-116 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 259).

¹⁷¹United States' third participant's submission, para. 8.

¹⁷²United States' third participant's submission, para. 12 (referring to Communication from the European Communities of 15 July 2004, Article XXVIII:5 Negotiations, Schedule CXL – European Communities, G/SECRET/22; and Communication from the European Communities of 31 January 2005, Article XXVIII:5 Negotiations, Schedule CXL – European Communities, Addendum, G/SECRET/22/Add.1). See also Ecuador's other appellant's submission, para. 34, fourth bullet.

¹⁷³United States' third participant's submission, para. 12 (quoting European Communities' written communication of 13 May 2005 in the arbitration in *EC – The ACP-EC Partnership Agreement* (Panel Exhibit ECU-4), para. 9 (emphasis added by the United States omitted)).

could not have referred to what the European Communities now claims is its only concession, namely, the €80/mt tariff rate.

122. The United States further asserts that the text of the Understanding on Bananas, as well as the Doha Article I Waiver, provide supplementary means supporting the conclusion that the European Communities' concession did not expire along with the Bananas Framework Agreement.

6. Article XIII of the GATT 1994

123. The United States submits that the Panel did not err in its interpretation and application of Article XIII of the GATT 1994. In the United States' view, the European Communities' argument that a cap on a tariff preference does not make it a tariff quota and that the two regimes (the ACP tariff quota and the MFN tariff) must be examined separately, should be rejected in these proceedings as they have been "some four times before".¹⁷⁴ The United States agrees with the Panel that, "[w]hile the EC measure subject to this proceeding may be simpler than the EC's prior bananas import regimes"¹⁷⁵, nothing in the text of Article XIII:5 suggests that the EC Bananas Import Regime was not subject to the disciplines of Article XIII:1 and 2. Emphasizing the use of the term "any" in front of the term "tariff quota" and the fact that Article XIII:5 refers to "tariff quota" in the singular, the United States submits that Article XIII:5 does not condition the applicability of Article XIII only to instances in which "all imports" of the product subject to the tariff quota are "effected through the allocation of tariff quotas".¹⁷⁶ The United States also argues that the Panel properly understood and applied the findings of the Appellate Body in the original proceedings: whilst the original case dealt with a regime where all imports were "effected through the allocation of tariff quotas"¹⁷⁷, the Appellate Body' reasoning in the original proceedings continues to be relevant.

124. The United States further supports the Panel's finding that the EC Bananas Import Regime violated Article XIII:1. The United States reiterates that the European Communities' position cannot be reconciled with the Appellate Body's reasoning in respect of the "separate regimes" argument in *EC – Bananas III*.¹⁷⁸ The United States emphasizes the panel and Appellate Body findings in the original proceedings that the European Communities' measure was a tariff quota subject to Article XIII and that "Article XIII:1 itself contains a non-discrimination requirement when a tariff

¹⁷⁴United States' appellee's submission, para. 12.

¹⁷⁵United States' appellee's submission, para. 17.

¹⁷⁶United States' appellee's submission, para. 17 (quoting European Communities' appellant's submission, para. 135 (US)).

¹⁷⁷United States' appellee's submission, para. 18.

¹⁷⁸United States' appellee's submission, para. 19.

quota is used".¹⁷⁹ Therefore, according to the United States, the European Communities cannot avoid the obligations of Article XIII by carving out a portion of its market for preferential access without any multilateral controls over how the carve-out affects access into the same market for "like" products from other suppliers. The United States agrees with the Panel that Article XIII:5 makes clear that the obligation of Article XIII:1 applies to the ACP tariff quotas, even if MFN suppliers were subject to a tariff-only regime. The United States argues that the "restriction" in the present case is the quantitative limit on a benefit (that is, zero-duty access) available only to the ACP countries; given that the MFN countries "are completely denied access to this benefit", they are therefore "restricted" in their access to the European Communities' market for bananas and clearly not "treated equally" as the ACP countries.¹⁸⁰ The United States also points out that the Appellate Body found in the original proceedings that a waiver from Article I of the GATT 1994 covering a preferential tariff quota cannot be read to "excuse" that tariff quota from the obligations of Article XIII. Therefore, any waiver covering preferential tariff quotas cannot establish "the common understanding on the part of the GATT contracting parties and WTO Members that exclusion from a preferential tariff quota does not constitute an infringement of Article XIII".¹⁸¹

125. Finally, the United States rejects the European Communities' argument that Article XIII:2 is solely concerned with quantitative restrictions. The United States refers to the Appellate Body's explanation in the original proceedings that Article XIII:2 "is logically concerned with the market for the product and what restrictions may be applied to that market".¹⁸² The United States concludes that the EC Bananas Import Regime subject to this proceeding contained an import restriction in the form of the preferential tariff quota for ACP bananas. Therefore, the European Communities was required to follow the allocation rules set forth in Article XIII:2. According to the United States, the European Communities' argument that the preference cannot be considered inconsistent with the chapeau of Article XIII:2 because the United States' share of trade in bananas with the European Communities, with or without the preference, is zero, is simply a "different version of the EC's procedural argument that the United States suffers no nullification or impairment".¹⁸³

¹⁷⁹United States' appellee's submission, paras. 22-25.

¹⁸⁰United States' appellee's submission, para. 35.

¹⁸¹United States' appellee's submission, para. 39 (referring to European Communities' appellant's submission, para. 146 (US)).

¹⁸²United States' appellee's submission, para. 46.

¹⁸³United States' appellee's submission, para. 43.

7. Nullification or Impairment with respect to the United States

126. The United States rejects the European Communities' claim that the Panel erred in concluding that the United States had suffered nullification or impairment. According to the United States, it was not the Panel who confused "standing" with "nullification or impairment", but the European Communities itself who "confused" the issues by arguing that, as a threshold matter, the Panel needed to determine whether the United States had "standing" to bring this proceeding and, if so and if it found a violation, "whether 'there is nullification or impairment of a benefit accruing to the United States for which the European Communities can face suspension of concessions'" .¹⁸⁴

127. The United States recalls that the Appellate Body already rejected similar arguments made by the European Communities in the original proceedings. The United States argues that, considering that these are compliance proceedings under Article 21.5 of the DSU, the findings of the Appellate Body in the original proceedings form the basis for the rulings and recommendations addressed to the European Communities in this dispute.

128. Citing the Appellate Body's affirmation of the GATT panel's reasoning in *US – Superfund*, the United States submits that a showing of adverse trade effects is unnecessary for the purposes of demonstrating that a breach of a GATT provision results in the nullification or impairment of benefits.¹⁸⁵ The United States argues that the clear breaches of Articles I and XIII of the GATT 1994 obviate the need for the United States to demonstrate affirmatively the trade effects caused by the European Communities' banana measures. For the United States, to make a finding of nullification or impairment, it is sufficient that the United States is a producer of bananas, has a potential export interest, and its internal market for bananas could also be affected by the effects of the European Communities' measures on world supplies and world prices of bananas. The United States further submits that "these realities have not changed"¹⁸⁶, and the Panel did not err in relying on the findings of the panel and the Appellate Body in the original proceedings.

129. The United States disagrees with the European Communities that nullification or impairment was found to exist in the original proceedings only because of the violations of the GATS. The United States contends that, in the original proceedings, the Appellate Body clearly found that the United States was justified to make claims under the GATT 1994. Finally, the United States submits that the European Communities confused the issue of the existence of nullification or impairment as a

¹⁸⁴United States' appellee's submission, para. 95 (quoting European Communities' first written submission to the Panel).

¹⁸⁵United States' appellee's submission, paras. 96-98 (referring to GATT Panel Report, *US – Superfund*, para. 5.19).

¹⁸⁶United States' appellee's submission, para. 99.

result of a violation under Article 3.8 of the DSU with the issue of what the actual level of nullification or impairment is under Article 22.6 of the DSU.¹⁸⁷

8. Notice of Appeal

130. The United States contends that the European Communities' Notice of Appeal does not satisfy the requirements of Rule 20(2)(d)(iii) of the *Working Procedures* because it does not contain an indicative list of the paragraphs of the Panel Report containing the alleged errors, as required under that Rule.¹⁸⁸ The United States further submits that compliance of the Notice of Appeal with Rule 20(2)(d)(i) is doubtful because several paragraphs of the Notice of Appeal speak of "erroneous findings" of the Panel without identifying which findings are alleged to be erroneous.¹⁸⁹ The United States requests the Appellate Body to dismiss the appeal on this basis.

131. Further, the United States maintains that the Notice of Appeal makes no mention of Article 11 of the DSU. In the event that the Appellate Body does not dismiss the appeal in its entirety, the United States solicits the Appellate Body to consider the European Communities' claims under Article 11 as not properly before it, in keeping with the Appellate Body's treatment of this issue in a previous appeal.¹⁹⁰

D. *Claims of Error by Ecuador – Other Appellant*

1. Article II of the GATT 1994

132. Ecuador's other appeal is conditional upon the Appellate Body reversing the Panel's conclusions under Article II of the GATT 1994 on the basis of the issues appealed by the European Communities. In that event, Ecuador requests the Appellate Body to reverse the Panel's finding that the tariff quota concession of the European Communities on bananas was intended to expire on 31 December 2002 by virtue of paragraph 9 of the Bananas Framework Agreement, and to find, instead, that the concession remains in effect, and consequently to uphold the Panel's conclusion that the European Communities is applying its duty at a level inconsistent with Article II:1(b).

¹⁸⁷United States' appellee's submission, para. 102-104 (referring to United States' response to Panel Question 24).

¹⁸⁸United States' appellee's submission, para. 128.

¹⁸⁹In particular, the United States takes issue with paragraph 2(a), (c), and (d) of the Notice of Appeal.

¹⁹⁰United States' appellee's submission, para. 133 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 75).

133. Ecuador submits that there is consistent and overwhelming interpretative evidence that no WTO Member (including the European Communities) has ever argued that, or acted as if, the European Communities' concession for bananas expired on 31 December 2002, until the European Communities itself made this argument in its rebuttal submission to this Panel. In Ecuador's view, the action and inaction of WTO Members individually (including the European Communities) and collectively could only be considered absurd if they were done with the understanding that the concession would expire on 31 December 2002, or had expired as of that date.¹⁹¹

134. Ecuador argues that the Panel's interpretation does not give effect to all the terms of the concession and ignores critical context. Ecuador disagrees with the Panel's characterization of the concession as the "quota of 2.2 million mt at a bound rate of €75/mt" and that the "terms, conditions and qualifications" that the concession is subject to is "the Bananas Framework Agreement".¹⁹² According to Ecuador, the €75/mt duty is subject to various conditions as set out in the European Communities' Schedule, including, but not limited to, those specified in column 7, which does not read "terms and conditions", but "Other Terms and Conditions", thus indicating that those terms and conditions "indicated" in the Annex are "*in addition*" to the terms set out in the first six columns.¹⁹³

135. Ecuador disagrees with the Panel's finding that all the elements of the European Communities' concession are restated in the Bananas Framework Agreement, pointing out that elements such as the final tariff rate and quota quantity were not. Ecuador claims that the Panel failed to take into account that the Appellate Body had found in the original proceedings that most of the terms and conditions set out in the Bananas Framework Agreement were inconsistent with the GATT 1994. Ecuador questions the Panel's failure to attribute any significance to "the nullification of the terms for which the [Bananas Framework Agreement] provides by far the most detail".¹⁹⁴ Ecuador agrees with the Panel that the concession cannot be read in isolation from the Bananas Framework Agreement, as contained in the Annex referred to in column 7. However, in Ecuador's view, the European Communities' tariff quota concession is not provided in column 7 alone, and may not be read as simply comprising the Bananas Framework Agreement without regard to other elements of the concession.

¹⁹¹Ecuador's other appellant's submission, para. 5.

¹⁹²Ecuador's other appellant's submission, para. 18 (referring to Ecuador Panel Report, para. 7.424).

¹⁹³Ecuador's other appellant's submission, para. 20. (original emphasis)

¹⁹⁴Ecuador's other appellant's submission, para. 23.

136. Ecuador claims that the Panel erred in finding that the expiration of the Bananas Framework Agreement "would automatically imply [the] expiration of the European Communities' tariff quota concession under the terms of its Schedule."¹⁹⁵ According to Ecuador, "it is legally possible ... to set a time limit as a condition of a concession"¹⁹⁶ when this is done clearly, which was not the case with paragraph 9 of the Bananas Framework Agreement.

137. Ecuador argues that it is possible to give legal effect to paragraph 9 of the Bananas Framework Agreement without invalidating the entire European Communities' tariff quota concession. According to Ecuador, a plausible interpretation of paragraph 9 would be that the other terms and conditions set out in the Bananas Framework Agreement, such as the quota allocation provisions, would expire on 31 December 2002, leaving only the €75/mt duty concession for 2.2 million mt. In support of this argument, Ecuador argues that, given the obligations of Article XIII, Members cannot expect to retain quota allocation rights indefinitely.

138. Ecuador submits that its interpretation of the Bananas Framework Agreement as containing a quota allocation with a time-limit would not reduce paragraph 9 of the Bananas Framework Agreement to inutility; rather, it would "give effect to all the words of the concession, including, but not limited to, the [Bananas Framework Agreement] as it was incorporated" into the European Communities' Schedule. Ecuador argues that its interpretation would also avoid the "completely implausible"¹⁹⁷ interpretation of the common intention of the WTO Members with regard to the concession of 1994 until the Members extended the concession in 2002.

139. Ecuador further refers to evidence supporting the proposition that the concession was never intended to expire on account of paragraph 9 of the Bananas Framework Agreement. In particular, Ecuador argues that: (i) a time-limited minimum access commitment would have been directly contrary to the Modalities Paper that guided the Uruguay Round negotiations; (ii) the Doha Article I Waiver was based on the premise that, and required that, the concession remain bound unless and until rebound; (iii) numerous statements made by the European Communities and by arbitrators in 2005 acknowledged or were based on the continued binding character of the concession under Article II; and (iv) the European Communities filed Article XXVIII:5 notifications, in July 2004 and in January 2005, on the assumption that the tariff quota concession was still in force.¹⁹⁸ In this respect, Ecuador notes that, in these notifications, the European Communities announced its intention

¹⁹⁵Ecuador's other appellant's submission, para. 26.

¹⁹⁶Ecuador's other appellant's submission, para. 27.

¹⁹⁷Ecuador's other appellant's submission, para. 32.

¹⁹⁸See Notifications, *supra*, footnote 172.

to withdraw concessions (in the plural). Ecuador further contends that no Member would invoke Article XXVIII:5 procedures to lower its bound rate.¹⁹⁹

140. Ecuador argues that the Panel's view of the object and purpose of the covered agreements does not add any weight to the Panel's erroneous interpretation of the first sentence of paragraph 9 of the Bananas Framework Agreement. According to Ecuador, the Panel read the object and purpose of the Bananas Framework Agreement broadly and emphasized the objective therein of "promoting security and predictability of international trade" in order to justify its conclusions regarding paragraph 9. Ecuador contends, however, that the objectives of "expanding trade in goods and services and reducing barriers to trade, through the negotiation of reciprocal and mutually advantageous arrangements"²⁰⁰, would be harmed by implying the termination of the concession. Moreover, Ecuador argues that, in its analysis of the object and purpose of the WTO agreements in relation to the European Communities' tariff quota concession, the Panel failed to consider the stated purposes of the *Agreement on Agriculture*, which in its preamble states the intent of creating a "reform process" that would enable "substantial progressive reductions" in protection over time.²⁰¹

E. *Arguments of the European Communities – Appellee*

1. Article II of the GATT 1994

141. The European Communities contends that Ecuador's other appeal is "conditional" and, therefore, the Appellate Body will have to examine it only if the Appellate Body accepts the European Communities' appeal of the Panel's findings on the purported effects of the Doha Article I Waiver on the tariff quota concession in the European Communities' Schedule of Concessions.²⁰²

142. The European Communities agrees with the Panel's conclusion that the tariff binding on bananas in the European Communities' Schedule of Concessions "was unequivocally intended to expire on 31 December 2002".²⁰³ In the European Communities' view, Article II:1(b) of the GATT 1994 expressly provides that WTO Members may legally grant concessions subject to "terms, conditions and qualifications". Moreover, it is well settled that a time limitation in the duration of a concession qualifies as a "term, condition or qualification".²⁰⁴ For these reasons, the European

¹⁹⁹Ecuador's other appellant's submission, para. 34.

²⁰⁰Ecuador's other appellant's submission, para. 29.

²⁰¹Ecuador's other appellant's submission, para. 30. (emphasis omitted)

²⁰²European Communities' appellee's submission, para. 1 (Ecuador) (referring to Ecuador's other appellant's submission, para. 38).

²⁰³European Communities' appellee's submission, para. 5 (Ecuador) (referring to Ecuador Panel Report, para. 7.436).

²⁰⁴European Communities' appellee's submission, para. 8 (Ecuador) (referring to GATT Panel Report, *US – Sugar Waiver*, para.5.8).

Communities disagrees with Ecuador that "grant[ing] a 'time-limited access commitment for an agricultural product' would qualify as a 'contextual shock' and would be a 'completely implausible, even absurd interpretation of the common intention of the WTO members.'"²⁰⁵

143. The European Communities argues that it is common practice for WTO Members to include "terms, conditions and qualifications" of their concessions either in the section of "headnotes" (usually when they apply to all concessions in the specific part or section of the Schedule) or in "annexes" (usually when they apply to a specific concession or group of concessions). The European Communities further contends that reference to the corresponding "annex" is usually found in the column entitled "comments" or "other terms and conditions". According to the European Communities, all terms of a Schedule have the same legal value, irrespective of whether they are placed under the columns of a specific section, in the "headnotes" to the section, or in the "annexes" to the section. Therefore, the Panel was correct in concluding that the European Communities' tariff quota concession for bananas provided in column 7 of Part I, Section I-B of the European Communities' Schedule²⁰⁶ cannot be read in isolation from the terms in the Bananas Framework Agreement, annexed to European Communities' Schedule.²⁰⁷ The European Communities further claims that the text of the Annex clearly provided for a time limitation of the concession (that is, 31 December 2002), and that the context of the Annex also fully confirmed this interpretation of the text.

144. Contrary to Ecuador's claim, the European Communities contends that the structure of WTO Members' GATT Schedules of Concessions makes clear that Column 7 is the most appropriate place to include the reference to "term, condition and qualification". The European Communities disagrees with Ecuador's argument that the time limitation should not apply to the European Communities' Schedule because it is placed in the Annex and not on the same page of the Schedule with the columns. In the European Communities' view, this argument should be rejected because it would create confusion as to the legal effects of "terms, conditions or qualifications", which are not placed in the "columns" of WTO Members' Schedules due to space constraints.

145. Moreover, the European Communities submits that the tariff on bananas from Ecuador and other MFN supplier countries, applied in the period between the end of 2002 and the end of 2005, was not intended to be bound in the Schedule of Concessions. The European Communities argues that the more favourable tariff treatment was applied only as a consequence of the Understanding on Bananas

²⁰⁵European Communities' appellee's submission, para. 21 (Ecuador).

²⁰⁶The relevant excerpts from Part I, Section I-B of the European Communities' Schedule LXXX are reproduced in Annex VI attached to this Report.

²⁰⁷European Communities' appellee's submission, para. 12 (Ecuador) (referring to Ecuador Panel Report, para. 7.426).

agreed to in 2001, and that Ecuador cannot use the European Communities' good faith implementation of the terms of the Understanding against the European Communities and seek to transform that applied favourable rate into a bound rate.

146. The European Communities further contends that the text and context of the Schedule could not be modified or interpreted by the description of the European Communities' bananas import regime in the 2005 arbitration proceedings under the Annex on Bananas to the Doha Article I Waiver, because such proceedings took place outside the rules of the DSU and the object was not to determine the banana concession bound in the European Communities' Schedule. The European Communities submits that, the fact it engaged in negotiations pursuant to Article XXVIII of the GATT 1994, does not alter the fact that the concession expired in December 2002. The European Communities argues that Members can initiate Article XXVIII negotiations also with the intention of lowering their tariff. The European Communities had started Article XXVIII negotiations in order to implement its commitments under the terms of the Understandings on Bananas agreed to with Ecuador and the United States in 2001. Finally, the European Communities argues that the Panel could not have relied on the Modalities Paper to interpret the European Communities' Schedule, because the Modalities Paper itself provides that it shall "not be used as a basis for dispute settlement proceedings".²⁰⁸

147. The European Communities, therefore, asks the Appellate Body to reject Ecuador's other appeal and to uphold the Panel's finding that the tariff quota concession in the European Communities' Schedule of Concessions expired at the end of 2002.

F. *Arguments of the Third Participants*

1. ACP Countries

148. Certain ACP countries (the "ACP Countries"²⁰⁹) assert that the Understandings on Bananas have put an end to the disputes on bananas and, therefore, prevent the parties to the Understandings from subsequently initiating compliance proceedings under Article 21.5 of the DSU. The ACP Countries further contend that these Understandings are binding on the parties and thus prevent them from putting the terms of the Understandings into question. The ACP Countries allege that, in both the Ecuador and US Panel Reports, the Panel erred in its legal interpretation and findings concerning

²⁰⁸European Communities' appellee's submission, para. 30 (Ecuador) (quoting Modalities Paper, p. 1).

²⁰⁹In this Report, "ACP Countries" refers to the following seven countries that submitted a joint third participants' submission in the appeal of the Ecuador Panel Report: Belize, Dominica, the Dominican Republic, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, and Suriname; and to these same seven countries along with Cameroon and Côte d'Ivoire that submitted a joint third participants' submission in the appeal of the US Panel Report. Cameroon, Cote d'Ivoire, and Ghana submitted a separate joint third participants' submission in the appeal of the Ecuador Panel Report.

the Understandings on Bananas. The ACP Countries submit that the methodology applied by the Panel was not correct: in order to determine whether the United States was prevented from bringing this compliance challenge, the Panel should have examined whether the Understandings constituted mutually agreed solutions and, if not, whether they constituted legally binding agreements, and should have analyzed the legal effects attached to the Understanding in either case. The ACP Countries contend that the Panel erred when it did not consider it necessary to analyze the "legal status" of the Understandings on Bananas, and, in particular, whether they constituted mutually agreed solutions, within the meaning of Article 3.7 of the DSU, or otherwise legally binding agreements. In the United States case, the ACP Countries make reference to letters exchanged between the European Communities and the United States on 29 and 30 May 2001. In the view of the ACP Countries, the parties confirmed in these letters the "common understanding" of their agreement, and the United States acknowledged having reached a mutually agreed solution with the European Communities.²¹⁰

149. The ACP Countries argue further that it was incorrect for the Panel to rely on the Panel Report in *India – Autos*, because the mutually agreed solution in that case did not relate to the same matter as the dispute before the panel in *India – Autos*. However, the ACP Countries submit that, in the present case, the original dispute had been settled by means of a mutually agreed solution, the content of which cannot be called into question in Article 21.5 proceedings. In addition, the ACP Countries object to the Panel's finding that the Understandings could preclude the complainants from initiating Article 21.5 proceedings only if the Understandings constituted a "positive solution and effective settlement" to the dispute. The ACP Countries submit that such a standard could not be derived from the DSU. For the same reason, the ACP Countries disagree with the three reasons relied upon by the Panel in its finding that the Understandings did not constitute an impediment for the complainants to initiate Article 21.5 proceedings.

150. With respect to the first reason relied upon by the Panel, namely, that the Understandings on Bananas provide only for the means, or, a series of future steps, for resolving and settling the dispute, the ACP Countries assert that mutually agreed solutions notified to the DSB can either refer to measures that have already been taken, or provide for steps still to be undertaken. In this respect, the ACP Countries make reference to the mutually agreed solution in *Australia – Automotive Leather II* and assert that this mutually agreed solution sets out a series of elements to be undertaken in the future.

²¹⁰Third participants' submission of the ACP Countries, paras. 36 and 37 (US); Panel Exhibit EC-3.

151. Concerning the second reason, namely, that the Understandings were agreed to subsequent to the recommendations, rulings, and suggestions made by the DSB in the original proceedings and previous compliance proceedings, the ACP Countries argue that there are strong indications that mutually agreed solutions referred to in the DSU can take place at all stages of the proceedings. In the view of the ACP Countries, the preference articulated in Article 3.7 of the DSU for mutually agreed solutions applies generally throughout all stages of the dispute settlement process. In that respect, the ACP Countries draw further support from the title of Article 3, which is "General Provisions".

152. With respect to the third reason, that the parties had made conflicting communications to the DSB regarding the legal nature of the Understandings on Bananas after these Understandings had been signed, the ACP Countries question the relevance of these communications and argue that the DSU does not require that a solution be jointly notified to be regarded as a mutually agreed solution. In addition, the ACP Countries submit that the content of the Understandings is more important to determine their legal status than unilateral declarations made subsequently.

153. The ACP Countries contend that the Panel erred in both the Ecuador and US Panel Reports in its interpretation and findings concerning Article XIII of the GATT 1994. In particular, they argue that the Panel's incorrect interpretation of the term "restriction" led to a flawed conclusion that Article XIII:1 of the GATT 1994 is applicable, when in fact the "applicable non-discrimination rule is contained in Article I of the GATT and not in Article XIII".²¹¹ The ACP Countries point to the ordinary meaning and context of the term "restriction", and submit that the existence of a restriction "requires that a *limitation* be applied on the importation of the product concerned"²¹², which, under Article XIII:1, "necessarily implies a *quantitative* element".²¹³ The ACP Countries highlight the Panel's statement that the quantity of bananas that MFN suppliers can export is not restricted, and submit that the Panel's interpretation of "restriction" as including situations where a Member "is not protected in its competitive opportunities regarding imports of like products originating from other WTO Members, is not in line with the requirement that Article XIII only applies to 'quantitative restrictions'".²¹⁴

²¹¹Third participants' submissions of the ACP Countries, para. 62 (Ecuador), para. 59 (US).

²¹²Third participants' submissions of the ACP Countries, para. 54 (Ecuador), para. 51 (US). (original emphasis)

²¹³Third participants' submissions of the ACP Countries, para. 57 (Ecuador), para. 54 (US). (original emphasis)

²¹⁴Third participants' submissions of the ACP Countries, para. 57 (Ecuador), para. 54 (US).

154. The ACP Countries further maintain that the Panel failed to take into account the consistent practice of WTO Members to impose ceilings on preferential imports and to consider them covered by the Enabling Clause or Article XXIV of the GATT 1994. The ACP Countries contend that, if preferential access consistent with Article I, by virtue of a waiver or Article XXIV, fell afoul of Article XIII of the GATT 1994, and if this preferential access were capped, then virtually all preferential tariff quotas used in the context of free trade agreements would presumably be WTO-inconsistent. In addition, the ACP Countries claim that the Panel failed to accept that Article XIII:2 is not applicable, because the EC Bananas Import Regime did not apply any quantitative restrictions. In respect of the US Panel Report, the ACP Countries submit in the alternative that, even if the Panel's interpretation of Article XIII:2 was correct, it would not be applicable to the United States as it "[cannot] claim to have expected any market share that goes above zero in the European market".²¹⁵

155. In the Ecuador case, the ACP Countries allege that the Panel erred in finding that the European Communities is bound by the tariff quota concession of 2.2 million mt at €75/mt. The ACP Countries refer to the Panel's finding that the tariff quota for bananas was subject to the terms and conditions set forth in the Bananas Framework Agreement, which provided that the agreement would expire on 31 December 2002. The ACP Countries argue that, therefore, the European Communities' tariff quota concession for bananas had expired at the end of 2002, and that, consequently, the Panel should have dismissed Ecuador's claim under Article II of the GATT 1994.

156. The ACP Countries also contest the Panel's interpretation of the Doha Article I Waiver as a "subsequent agreement" modifying the European Communities' Schedule of Concessions. In their view, "modification" is a concept that could not reasonably be regarded as covered by or included in the terms "interpretation" and "application" as set forth in Article 31(3)(a) of the *Vienna Convention*. The ACP Countries object to the Panel's finding that the preamble of the Doha Article I Waiver expressed the WTO Members' "common intention" that the in-quota tariff applied to bananas shall not exceed 75€mt, and that any rebinding under Article XXVIII of the GATT 1994 should result in at least maintaining total market access for MFN banana suppliers. The ACP Countries submit that this interpretation would add obligations beyond those negotiated and accepted by the WTO Members.

157. In the United States case, the ACP Countries further submit that there is no nullification or impairment of benefits accruing to the United States as it does not export bananas to the European Communities. The ACP Countries contend that, in the original dispute, impairment was found in relation to the European Communities' violation of its GATS commitments. However, in the present case, GATS commitments are not at issue. The ACP Countries argue that, for the United States to

²¹⁵Third participants' submission of the ACP Countries, para. 72 (US).

have suffered nullification or impairment as a result of a violation of the GATT 1994, the United States would have to have an export trade in bananas to the European Communities, which it does not have. Therefore, the ACP Countries submit that the United States did not suffer nullification or impairment from the EC Bananas Import Regime. The ACP Countries further argue that the United States, in its arguments, confused the issue of nullification or impairment with the question of whether the United States had standing.

158. At the oral hearing, Suriname argued that the Modalities Paper could not be used as a means to support the analysis of the ordinary meaning of the tariff quota concession for bananas because it is not part of the European Communities' Schedule of Concessions and, according to an express provision in the Modalities Paper, it cannot serve as a supplementary means of interpretation in the context of dispute settlement. Dominica contended that, if the Panel's reasoning were followed, any cap on preferential access for the ACP Countries would also run afoul of Article XXIV:5(b) of the GATT 1994, which precludes "more restrictive" regulations of commerce on MFN trade in the context of the creation of a free trade agreement.

2. Brazil

159. Pursuant to Rule 24(2) of the *Working Procedures*, Brazil chose not to submit a third participant's submission. Brazil's statement at the oral hearing focused on the legal effects of the Understandings on Bananas and the Panel's findings with respect to Article II of the GATT 1994.

3. Cameroon, Cote d'Ivoire, and Ghana

160. Cameroon, Cote d'Ivoire, and Ghana allege that, in the Ecuador case, the Panel failed to properly take into account the Ministerial Declaration of 14 November 2001. They submit that the Panel erred in finding that the conditions for the waiver from Article I of the GATT 1994 granted by the Ministerial Decision on 14 November 2001 had not been met. Cameroon, Cote d'Ivoire, and Ghana assert that the European Communities had complied with the steps set out in the Annex on Bananas to the Doha Article I Waiver.

161. Cameroon, Cote d'Ivoire, and Ghana further contend that the European Communities had altered the level of the envisaged rebinding of the customs duty on bananas in accordance with the decision in the arbitration proceeding pursuant to the Annex on Bananas. They further allege that the Panel failed to take into account a decision taken at the time of the Hong Kong Ministerial Conference, according to which a regular examination of trade in bananas would be carried out under

the aegis of the Minister of Trade of Norway.²¹⁶ Cameroon, Cote d'Ivoire, and Ghana contend that the results of this monitoring process demonstrated that market access for MFN suppliers had increased considerably. They allege that the Panel failed to make an objective assessment of the matter by not taking this into account.

162. According to Cameroon, Cote d'Ivoire, and Ghana, the Panel wrongly concluded that it did not have the authority to determine whether the EC Bananas Import Regime resulted in "at least maintaining total market access for MFN banana suppliers".²¹⁷ They submit that, instead, the Panel should have examined the "trend of banana imports coming from MFN countries occurring in 2006 and 2007 under the new regime, in comparison with those that had taken place within the remit of the former regime"²¹⁸ and assessed this in the light of the access commitments contained in the Annex to the Doha Article I Waiver. In this respect, Cameroon, Cote d'Ivoire, and Ghana submit that banana imports from MFN countries to the European Communities increased by 360,000 mt in 2006 compared to 2005, and by 680,000 mt in 2007 compared to 2005.²¹⁹ They further maintain that the number of exporters from MFN countries has increased following the elimination of the import quota licenses.

4. Colombia

163. Colombia argues that the European Communities' tariff quota concession for bananas did not expire on 31 December 2002 and that, therefore, the EC Bananas Import Regime was inconsistent with the European Communities' obligations under Article II:1(b) of the GATT 1994. Colombia contends that the European Communities' Schedule provides for an indefinite 2.2 million mt tariff quota concession for bananas that is not dependent on the Bananas Framework Agreement. However, Colombia maintains that, while the commitments set out in the Bananas Framework Agreement expired on 31 December 2002 pursuant to paragraph 9 of that agreement, the commitments separately inscribed in columns 3 and 4 of the European Communities' Schedule did not expire on that date. Colombia alleges that the Panel assumed that the terms of the Bananas Framework Agreement qualified the duration of the commitments separately inscribed in columns 3 and 4.²²⁰ According to Colombia, if the drafters had intended to limit the duration of the tariff quota concession for bananas, they would have made specific reference to "concessions inscribed in columns 3 and 4 of the EC's

²¹⁶Third participants' submission of Cameroon, Cote d'Ivoire, and Ghana, para. 10 (Ecuador).

²¹⁷Third participants' submission of Cameroon, Cote d'Ivoire, and Ghana, para. 15 (Ecuador).

²¹⁸Third participants' submission of Cameroon, Cote d'Ivoire, and Ghana, para. 34 (Ecuador).

²¹⁹Third participants' submission of Cameroon, Cote d'Ivoire, and Ghana, para. 36 (Ecuador).

²²⁰Colombia's third participant's submission, para. 7 (Ecuador) (referring to Ecuador Panel Report, paras. 7.428-7.429).

Schedule" in paragraph 9 of the annexed Bananas Framework Agreement or otherwise explicitly linked the duration of the concessions to the duration of the Bananas Framework Agreement.²²¹

164. Colombia asserts that the Panel erred in holding that Ecuador's interpretation would render inutile paragraph 9 of the Bananas Framework Agreement.²²² Colombia argues that the intended effect of this paragraph was to release the European Communities from the Bananas Framework Agreement's quota allocation commitments on 31 December 2002. Colombia further asserts that preparatory work of the GATT 1994 confirms that the European Communities is bound by an indefinite 2.2 million mt tariff quota concession for bananas with an in-quota tariff rate of €75/mt. In support of this argument, Colombia relies on the Modalities Paper, the draft Schedule of the European Communities submitted in the context of the Uruguay Round negotiations, and statements by the European Communities in the context of the arbitration established under the Annex on Bananas to the Doha Article I Waiver. Colombia contends that such "pronouncements" by WTO Members are to be taken into account as subsequent "practice" within the meaning of Article 31(3)(b) of the *Vienna Convention*.²²³

5. Japan

165. Japan agrees with the Panel's finding that the Understandings on Bananas did not preclude Ecuador and the United States from initiating compliance proceedings pursuant to Article 21.5 of the DSU. Yet, Japan takes issue with some of the underlying legal interpretations and reasoning developed by the Panel, in particular, with the "three reasons" for which the Panel found that the Understandings did not constitute a legal impediment for the complainants to initiate compliance proceedings.

166. Japan supports the Panel's finding that a mutually agreed solution must be consistent with the covered agreements. However, with respect to the Panel's finding that the Understandings on Bananas could not bar the complainants from initiating compliance proceedings because they were adopted subsequent to the recommendations and rulings of the DSB in the original proceedings, Japan questions why the timing of the settlement should be an important factor in determining whether the Understandings would constitute an impediment to the initiation of compliance proceedings. With regard to the Panel's reliance on the fact that the parties made conflicting communications to the WTO about the Understandings on Bananas, Japan considers that a party should not be allowed to declare a

²²¹Colombia's third participant's submission, para. 8 (Ecuador).

²²²Colombia's third participant's submission, para. 9 (Ecuador) (referring to Ecuador Panel Report, para. 7.436).

²²³Colombia's third participant's submission, para. 28 (Ecuador).

solution unilaterally and notify a settlement agreement to prevent another party from bringing a compliance dispute. Japan contends that, unless the parties to a mutually agreed solution explicitly relinquish their rights under the DSU in the mutually agreed solution, that solution should not be interpreted as barring the complaining party from pursuing challenges in WTO dispute settlement. Japan maintains that, in the context of the present case, the Understandings on Bananas do not have such effect.

167. Japan further agrees with the Panel in the dispute initiated by the United States that the EC Bananas Import Regime was a "measure taken to comply" with the recommendations and rulings of the DSB in the original proceedings and thus fell within the purview of compliance proceedings pursuant to Article 21.5 of the DSU. Japan contends that the timing, nature, and effect of the EC Bananas Import Regime, as well as the fact that paragraph A of the Understandings on Bananas identifies the EC Bananas Import Regime as a measure "by which the long standing dispute over the EC's banana import regime can be resolved", are evidence of a "particularly close relationship" of the EC Bananas Import regime with the ruling and recommendations of the DSB.²²⁴

168. Finally, in the United States case, Japan further supports the Panel's rejection of the European Communities' preliminary objection as to the standing of the United States to initiate a dispute and the alleged lack of nullification or impairment of benefits suffered by the United States. In this respect, Japan maintains that the Panel correctly concluded that the European Communities had not rebutted the presumption in Article 3.8 of the DSU pursuant to which the EC Bananas Import Regime nullified or impaired benefits accruing to the United States.

6. Mexico

169. Pursuant to Rule 24(2) of the *Working Procedures*, Mexico chose not to submit a third participant's submission. At the oral hearing, Mexico's comments focused on the legal effects of mutually agreed solutions and the legal status of "suggestions" made by a panel pursuant to Article 19.1 of the DSU.

7. Panama and Nicaragua

170. Panama and Nicaragua submit that the Panel correctly found that the ACP preferential tariff quota violates Article XIII:1 and 2 of the GATT 1994. According to Panama and Nicaragua, if discriminatory preferential tariff quotas were permitted to escape Article XIII disciplines on the

²²⁴Japan's third participant's submission, para. 23 (US) (referring to Understanding on Bananas (US), WT/DS27/59, G/C/W/270, para. A).

grounds that other excluded non-preferred suppliers were subject to a "different tariff rate", there would be no limit to the trade restrictions caused by the quantitative element of preferred tariff quotas.²²⁵

171. In relation to the Ecuador Panel Report, Panama and Nicaragua request the Appellate Body to reject the European Communities' preliminary allegation that the "second suggestion" of the first Ecuador Article 21.5 panel barred the Panel in these proceedings from assessing the new European Communities' tariff quota under Article 21.5 of the DSU.

172. Regarding Article XIII of the GATT 1994, Panama and Nicaragua disagree with the European Communities' argument that the Panel misinterpreted the notion of "restriction" in Article XIII:1. Panama and Nicaragua argue that the Panel correctly determined that an exclusive preferential tariff quota reserved for ACP suppliers that denies all access for MFN countries represents a "restriction" on those MFN suppliers within the meaning of Article XIII:1. Panama and Nicaragua submit that the Panel correctly found, on the basis of Article XIII:5, that Article XIII applies to "any tariff quota", irrespective of whether a similar quantitative restriction is also applied to other Members. In their view, this interpretation of Article XIII is consistent with the findings of the Appellate Body in the original *EC – Bananas III* proceedings.²²⁶

173. Panama and Nicaragua argue that Article XIII provides for strict non-discrimination requirements, so that, when the European Communities applied a quantitative limit to its ACP tariff preference, it was "very much 'obliged' to satisfy the Article XIII non-discrimination (i.e., MFN) 'rule'."²²⁷ Panama and Nicaragua also contend that there is no WTO waiver practice revealing a "common understanding" among WTO Members that preferential tariff quotas are exempt from Article XIII. On the contrary, they submit that recent waiver practice after the *EC – Bananas III* case clearly demonstrates that preferential tariff quotas require a waiver from Article XIII, including the waiver requested by the European Communities for the preferential ACP tariff quota pursuant to the Understandings on Bananas.

174. Panama and Nicaragua argue that the chapeau of Article XIII:2 applies regardless of whether there are several tariff quotas or a single tariff quota to which MFN suppliers are denied access. Panama and Nicaragua also submit that the European Communities' preferential ACP tariff quota violated the obligation in the chapeau of Article XIII:2 "to 'aim at a distribution of trade' in bananas

²²⁵Third participants' submissions of Panama and Nicaragua, para. 10 (Ecuador), para. 10 (US).

²²⁶Third participants' submissions of Panama and Nicaragua, para. 35 (Ecuador), para. 22 (US) (quoting Appellate Body Report, *EC – Bananas III*, para. 190).

²²⁷Third participants' submissions of Panama and Nicaragua, para. 40 (Ecuador), para. 27 (US).

resembling the shares that would have occurred 'in the absence of' that restriction", because it granted a market share to ACP non-substantial suppliers that was not accorded to other suppliers.²²⁸ Regarding Article XIII:2(d), Panama and Nicaragua contend that the European Communities could not have made an allocation to any substantial MFN supplier based on a "representative period" because the European Communities' market had been subject to continuous discrimination, which made it impossible to define a "previous representative period".²²⁹

175. In relation to the US Panel Report, Panama and Nicaragua contend that the Panel correctly applied the previous findings in *EC – Bananas III* regarding the issues of "nullification or impairment" and "standing".²³⁰ Moreover, Panama and Nicaragua consider that the Panel did not have to explain how the United States' potential export interest and internal market would be affected because "the findings of *US – Superfund* ... established that a claim of no or insignificant trade effects is irrelevant to nullification or impairment."²³¹

176. Panama and Nicaragua also request the Appellate Body to reject the European Communities' claim that the presumption of nullification or impairment caused by the discriminatory quantitative limit can be considered one and the same with the nullification and impairment under Article I. In Panama's and Nicaragua's view, the European Communities' concern of "additional or double counted nullification or impairment" is misplaced because it "confuses [the matter of] the nullification or impairment established by an infringement under the cover agreements with the *level* of nullification or impairment separately addressed under Article 22 of the DSU" which is not at issue in the present case.²³²

177. Panama and Nicaragua support the Panel's conclusion that the European Communities' Schedule of Concession did not expire on 31 December 2002 (the termination date of the Bananas Framework Agreement), but was extended until Article XXVIII rebinding procedures were concluded. Panama and Nicaragua submit that the European Communities has "*never once* in the 13-year history of the [*EC – Bananas III*] dispute"²³³ claimed that its €75/mt Uruguay Round concessions expired as of 31 December 2002. Panama and Nicaragua submit that to accept the

²²⁸Third participants' submissions of Panama and Nicaragua, para. 50 (Ecuador), para. 37 (US).

²²⁹Third participants' submissions of Panama and Nicaragua, para. 52 (Ecuador), para. 39 (US).

²³⁰Third participants' submission of Panama and Nicaragua, para. 44 (US) (referring to Appellate Body Report, *EC – Bananas III*, para. 251).

²³¹Third participants' submission of Panama and Nicaragua, para. 46 (US).

²³²Third participants' submissions of Panama and Nicaragua, para. 58 (Ecuador), para. 48 (US). (original emphasis)

²³³Third participants' submission of Panama and Nicaragua, para. 64 (Ecuador). (original emphasis)

European Communities' arguments would mean the application of a bound rate of €80/mt—a concession equivalent to "a ban on all MFN access into the world's largest banana market".²³⁴

178. Panama and Nicaragua contend that the Panel correctly read in paragraph 9 of the Bananas Framework Agreement that the European Communities' in-quota bananas concession was qualified not only by the termination date of 31 December 2002, but also by the requirement that "[f]ull consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001".²³⁵ In Panama's and Nicaragua's view, the Panel correctly interpreted the Doha Article I Waiver as a subsequent agreement regarding the application of the European Communities' Schedule of Concessions in accordance with Article 31(3)(a) of the *Vienna Convention*. Panama and Nicaragua argue that the *Vienna Convention* does not require any formal decision of the parties or a "positively express consent to be bound"²³⁶ to an international agreement. Moreover, Panama and Nicaragua contend that, as the Doha Article I Waiver was adopted by the Ministerial Conference, "the top-most decision-making body of the WTO", it had all the authority "to take a decision by consensus regarding the application of the consultation prerogatives of paragraph 9 of the [Bananas Framework Agreement] so as to extend the EC's concessions until rebound prior to Tariff Only."²³⁷

179. Panama and Nicaragua support the Panel's conclusion that "by delaying Article XXVIII rebinding procedures ... Members were necessarily reflecting their intention to continue the EC's existing concession until Article XXVIII rebinding procedures were completed."²³⁸ Moreover, Panama and Nicaragua argue that, "[i]f the only concession to be protected by 'any rebinding' was the prohibitive 680€mt tariff, it would have been illogical for the Members to state that 'all EC WTO market-access commitments' must 'at least maintai[n] total market access'²³⁹, because a €80/mt tariff would eliminate market access, rather than maintain it. In Panama's and Nicaragua's opinions, the text of the Doha Article I Waiver is clear in affirming that the European Communities' concession is extended until Article XXVIII procedures are concluded, and given that the European Communities has not concluded these procedures, "the Panel was correct in finding that the EC's Uruguay Round concessions continue to apply."²⁴⁰

²³⁴Third participants' submission of Panama and Nicaragua, para. 63 (Ecuador).

²³⁵Third participants' submission of Panama and Nicaragua, para. 69 (Ecuador) (quoting Ecuador Panel Report, para. 7.439).

²³⁶Third participants' submission of Panama and Nicaragua, para. 77 (Ecuador).

²³⁷Third participants' submission of Panama and Nicaragua, para. 78 (Ecuador). (footnote omitted)

²³⁸Third participants' submission of Panama and Nicaragua, para. 83 (Ecuador).

²³⁹Third participants' submission of Panama and Nicaragua, para. 84 (Ecuador).

²⁴⁰Third participants' submission of Panama and Nicaragua, para. 94 (Ecuador).

180. Panama and Nicaragua also agree with Ecuador's other appeal that, if the Appellate Body were to consider that the Doha Article I Waiver did not extend the European Communities' tariff quota concession, it should read the European Communities' Schedule of Concessions as remaining in force beyond the expiration of the Bananas Framework Agreement. In their view, "Column 7, of Section 1.B of the European Communities' Concession (*Other* Terms and Conditions)" is intended to mean "existing beside, further, additional".²⁴¹ Therefore, the Bananas Framework Agreement can only supplement the current access conditions, and cannot diminish the "final" scheduled in-quota commitments of €75/mt tariff for 2.2 million mt, identified in columns 3 and 4.²⁴² Panama and Nicaragua contend that the Bananas Framework Agreement was a "*plurilateral settlement*"²⁴³ clearly distinct from the Schedule, and that the terms of the Bananas Framework Agreement could not terminate the concession for all WTO Members.

181. Regarding the "object and purpose" of the European Communities' concession, Panama and Nicaragua contend that the WTO's aim of "providing security and predictability" to arrangements that substantially reduce tariffs is "destroyed"²⁴⁴ if the first sentence of paragraph 9 of the Bananas Framework Agreement is read to repeal current access with a 680 €mt access ban. Panama and Nicaragua submit that this argument is supported by the preamble of the *Agreement on Agriculture*, which aims "at accomplishing a special 'reform process' that would enable 'substantial *progressive reductions*' in protection over time."²⁴⁵

182. Finally, Panama and Nicaragua reject the European Communities' claim that the Panel could not have made a recommendation regarding its tariff quota, because the measure has ceased to exist and should be considered "settled law". Panama and Nicaragua contend that it is well settled in WTO law that panels can make recommendations on measures at issue, or elements of those measures, that have expired, and that, in the cases cited by the European Communities, the expired measures were submitted within the proper review period.

²⁴¹Third participants' submission of Panama and Nicaragua, para. 130 (Ecuador).

²⁴²Third participants' submission of Panama and Nicaragua, para. 130 (Ecuador).

²⁴³Third participants' submission of Panama and Nicaragua, para. 133 (Ecuador).

²⁴⁴Third participants' submission of Panama and Nicaragua, para. 142 (Ecuador).

²⁴⁵Third participants' submission of Panama and Nicaragua, para. 143 (Ecuador) (quoting preambles 2 and 3 of the *Agreement on Agriculture*). (emphasis added by Panama and Nicaragua)

III. Issues Raised in the Appeal of the Ecuador Panel Report

183. The following issues are raised in the appeal of the 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):

- (a) with respect to procedural issues:
 - (i) whether the Panel acted inconsistently with Article 9.3 of the DSU by maintaining different timetables for the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States; and
 - (ii) whether the Panel erred in finding that Ecuador was not barred by the Understanding on Bananas from initiating this compliance proceeding;
- (b) with respect to Article XIII of the GATT 1994:
 - (i) whether the Panel erred in finding that, to the extent that the European Communities argues that it has implemented a suggestion pursuant to Article 19.1 of the DSU, the Panel was not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador; and that, therefore, the Panel did not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador; and
 - (ii) whether the Panel erred in finding that the duty-free tariff quota reserved for bananas of ACP country origin was inconsistent with Article XIII:1 and 2 of the GATT 1994;
- (c) with respect to Article II of the GATT 1994:
 - (i) whether the Panel erred in finding that the Doha Article I Waiver constituted a subsequent agreement between the parties extending the tariff quota concession for bananas listed in the European Communities' Schedule of Concessions beyond 31 December 2002, until the rebinding of the European Communities' tariff on bananas;

- (ii) if the Appellate Body reverses the Panel's finding that the subsequent agreement between the parties resulted in an extension of the tariff quota concession for bananas beyond 31 December 2002 until the rebinding of the European Communities' tariff on bananas, whether the Panel erred in finding that the European Communities' tariff quota concession for bananas was intended to expire on 31 December 2002 on account of paragraph 9 of the Bananas Framework Agreement; and
- (iii) whether the Panel erred in finding that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of 75€/mt, is an ordinary customs duty in excess of that provided for in the European Communities' Schedule of Concessions, and thus inconsistent with Article II:1(b) of the GATT 1994; and
- (d) whether the Panel erred in finding that the European Communities, by having maintained measures inconsistent with different provisions of the GATT 1994, continues to nullify or impair benefits accruing to Ecuador under that Agreement.

184. We proceed to analyze these issues in the order set out above.

IV. Issues Raised in the Appeal of the US Panel Report

185. The following issues are raised in the appeal of the Panel Report, *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/RW/USA):

- (a) with respect to procedural issues:
 - (i) whether the Panel acted inconsistently with Article 9.3 of the DSU by maintaining different timetables for the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States;
 - (ii) whether the Panel erred in finding that the United States was not barred by the Understanding on Bananas from initiating this compliance proceeding;

- (iii) whether the Panel erred in finding that the EC Bananas Import Regime constituted a "measure taken to comply" within the meaning of Article 21.5 of the DSU and was therefore properly before the Panel;
 - (iv) whether the Panel erred in making findings with respect to a measure that had ceased to exist subsequent to the establishment of the Panel, but before the Panel issued its Report; and
 - (v) whether the European Communities' Notice of Appeal satisfies the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*;
- (b) with respect to Article XIII of the GATT 1994:
- whether the Panel erred in finding that the duty-free tariff quota reserved for bananas of ACP country origin was inconsistent with Article XIII:1 and 2 of the GATT 1994; and
 - (c) whether the Panel erred in finding that the European Communities, by having maintained measures inconsistent with different provisions of the GATT 1994, continues to nullify or impair benefits accruing to the United States under that Agreement.

186. We proceed to analyze these issues in the order set out above.

V. Article 9.3 of the DSU – Harmonization of Timetables (Ecuador and United States)

187. We begin by addressing the question whether, by maintaining different timetables for the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States, the Panel acted inconsistently with Article 9.3 of the DSU.

188. Article 9.3 of the DSU reads:

If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

189. Several times during the course of the Panel proceedings, the European Communities requested the Panel to harmonize the timetables of the two proceedings. The Panel considered that modifying the timetables "would have most likely involved a delay in the proceedings requested by

Ecuador".²⁴⁶ Ecuador objected to any delay in the proceeding it had initiated, emphasizing that an accelerated timeframe applied to Article 21.5 proceedings. The Panel stated that harmonizing the timetables for the Panel processes in these cases was particularly difficult because of the two-month period that had elapsed between the dates on which the panelists began their work in each of the cases. The Panel noted that the WTO Director-General composed the panel requested by Ecuador on 18 June 2007, and composed the panel requested by the United States on 13 August 2007. The Panel considered that this two-month difference between the disputes was significant, since compliance proceedings, by their very nature, are intended to be brief. The Panel concluded:

... notwithstanding the Panel's initial intention to harmonize the timetable of both the proceedings requested by Ecuador and those requested by the United States, the Panel was unable to find a better alternative for the timetable that was ... adopted in these proceedings. This despite the fact that the Panel was aware that the approved timetable implied a considerable burden of work, peaking at particular moments for the parties, as well as for the Panel and the Secretariat.[*]²⁴⁷

[*]As noted above, however, issuance of the interim report was delayed by the Panel in order to ensure that replies to questions and comments on replies in the proceedings requested by the United States had been received by that panel, before the interim report in the current proceedings was issued.

190. On appeal, the European Communities alleges that the Panel acted inconsistently with Article 9.3 of the DSU by failing to harmonize the timetables of the two Panel proceedings and requests the Appellate Body to reverse the Panel's interpretation and application of Article 9.3. In support of its claim, the European Communities submits that the use of the word "shall" in Article 9.3 indicates an "absolute and unqualified" obligation for panels to harmonize timetables, which "does not allow panels any discretion" in deciding whether timetables should be harmonized.²⁴⁸ The European Communities submits that the timetables "must absolutely be harmonized at some stage of the proceeding". In the European Communities' view, the phrase "to the greatest extent possible" is no indication that panels have discretion, but is only meant to allow a panel to take note of certain procedural acts that may have already been completed in one case, the occurrence of which makes it "impossible" to harmonize the timetable of that case with the timetable of another case.²⁴⁹ The European Communities contends that it had to provide its written submission to the United States in one proceeding before the United States had submitted its own first written submission in the other

²⁴⁶US Panel Report, para. 7.7.

²⁴⁷Ecuador Panel Report, para. 7.10 and footnote 298 thereto; US Panel Report, para. 7.10.

²⁴⁸European Communities' appellant's submissions, para. 21 (Ecuador), para. 20 (US).

²⁴⁹European Communities' appellant's submissions, para. 24 (Ecuador), para. 23 (US).

proceeding, and that the United States thus had the advantage of knowing what defences and arguments the European Communities would use in the latter proceeding.

191. The United States and Ecuador disagree with the European Communities' contention that Article 9.3 provides an "absolute and unqualified" obligation.²⁵⁰ Instead, they contend that the Panel's obligation is qualified by the phrase "to the greatest extent possible" in Article 9.3. They further support the Panel's decision to take into account that the present proceedings are compliance proceedings, which, pursuant to Article 21.5, should be completed within 90 days.

192. Article 9.3 may appear to be cast in the way of an obligation, but the word "harmony" is defined as the combination or adaptation of parts, so as to form a "consistent and orderly whole".²⁵¹ Quite distinct from "synchrony", "harmony" does not require that elements coincide exactly in time. Therefore, we consider that the use of the word "harmonized" rather than "synchronized" in Article 9.3 confers to panels a judgement of degree and practicality. It rests with panels to organize the steps of the proceedings in a way that will ensure that they form a consistent and orderly whole. Whereas the use of the word "shall" ordinarily connotes an obligation, here, while the panel must seek to harmonize, the extent to which that is possible lies within its power. We do not consider that "harmonization" requires adoption of identical timetables in multiple proceedings. As we see it, this provision addresses a practical concern that each timetable must be framed in the light of the other.

193. The phrase "to the greatest extent possible" in Article 9.3 lends further support to our interpretation. This phrase introduces the main clause of the sentence. The phrase "to the greatest extent possible" qualifies both elements of the main clause—the selection of the same persons as panelists and the harmonization of the panel processes—and thus qualifies what the panel must do to harmonize the timetables. We therefore disagree with the European Communities' reading that Article 9.3 "does not allow panels any discretion in deciding whether the timetables should be harmonized".²⁵²

194. Furthermore, we note that Articles 12.1 and 12.2 of the DSU confer a margin of discretion on panels to draw up their working procedures. Article 12.1 authorizes panels to establish their own working procedures in the event that the panel decides, after consulting the parties, not to follow the Working Procedures for panels set out in Appendix 3 to the DSU. Pursuant to Article 12.2, panel procedures should provide "sufficient flexibility so as to ensure high-quality panel reports, while not

²⁵⁰United States' appellee's submission, paras. 122 and 123 (referring to European Communities' appellant's submission, para. 23 (US)); Ecuador's appellee's submission, para. 8.

²⁵¹*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 1, p. 1200.

²⁵²European Communities' appellant's submissions, para. 21 (Ecuador), para. 20 (US).

unduly delaying the panel process". By virtue of this provision, panels are vested with a degree of discretion and flexibility to take the necessary procedural decisions to strike a balance between providing "high-quality panel reports" and avoiding delays in the panel process. The panel's margin of discretion, in turn, informs our standard of review of the panels' application of its obligations under Article 9.3.

195. As this Panel was established pursuant to Article 21.5 of the DSU, we consider that the obligations of Article 9.3 must be read in the context of Article 21.5, which requires a compressed timeframe. Article 21.5 provides that a panel *shall* circulate its report within 90 days after the date of referral of the matter to it. If an Article 21.5 panel considers that it cannot provide its report within that timeframe, it must notify the DSB, specifying the reasons for the delay together with an estimate of the period within which it will issue its report. By contrast, Articles 12.8 and 12.9 of the DSU prescribe that original panel proceedings "shall, as a general rule, not exceed six months" and "should" in no case exceed nine months. We therefore consider that Article 21.5 and, in particular, the obligation to circulate the compliance panel report within 90 days after the date of referral of the matter to it, frames a compliance panel's discretion.

196. The European Communities alleges that the Panel, by obliging the European Communities to provide its written submission to the United States in the Ecuador case before the United States had submitted its own first written submission in the United States case, gave the United States the advantage of knowing what defences and arguments the European Communities would use in the United States case, and thereby acted contrary to Article 12.6 of the DSU.²⁵³

197. We recall that the Appellate Body has previously held that a panel's exercise of discretion is circumscribed by the due process rights of the parties to the dispute.²⁵⁴ In our view, the situation described by the European Communities may arise under the DSU whenever a measure that is challenged by one Member is subsequently challenged by a second Member, and the complainant in the latter proceeding is a third party in the earlier proceeding. We recognize that this may entail a risk of putting the respondent in the later proceeding at a disadvantage in terms of litigation strategy. However, in the present case, the European Communities and, in fact, all parties were provided with an opportunity to rebut factual and legal arguments presented by the other parties. The European Communities does not deny that it was given an opportunity to respond to the United States' first written submission, including the United States' arguments addressing the defences and arguments made by the European Communities in earlier submissions. The European Communities has not

²⁵³European Communities' appellant's submissions, para. 31 (Ecuador), para. 30 (US).

²⁵⁴Appellate Body Report, *US – Gambling*, para. 270.

identified specific aspects in which its procedural due process rights were infringed, resulting from the Panel's decision to maintain separate timetables. In our view, however, the mere possibility that the due process rights of the European Communities could have been adversely affected by the Panel's decision to maintain separate timetables in these proceedings is not sufficient to establish that the due process rights of the European Communities have indeed been compromised. In the present cases, the Panel consulted with the parties and made efforts to adopt a single working schedule for both proceedings. Furthermore, the Panel did take steps to harmonize the proceedings, when it delayed the issuance of the interim report in the Ecuador case to ensure that the replies to questions and comments on the replies in the United States case had been received by the Panel before the interim report in the Ecuador case was issued.²⁵⁵

198. There is no basis for interfering with the Panel's exercise of its power to harmonize, because the actions of the Panel have not infringed the European Communities' due process rights. We therefore *find* that the Panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the two Article 21.5 proceedings initiated by Ecuador and the United States.

VI. Legal Effect of the Understandings on Bananas (Ecuador and United States)

199. We turn now to address the question whether the Understandings on Bananas²⁵⁶, which the European Communities concluded with the United States and with Ecuador, prevented the complainants from initiating compliance proceedings pursuant to Article 21.5 of the DSU with respect to the European Communities' regime for the importation of bananas introduced by Council Regulation (EC) No. 1964/2005 of 29 November 2005²⁵⁷ ("EC Regulation 1964/2005") (the "EC Bananas Import Regime").

200. Based on Articles 3.3, 3.4, and 3.7 of the DSU, the Panel found that the Understandings on Bananas could prevent the complainants from initiating compliance proceedings pursuant to Article 21.5 only if these Understandings constituted a "positive solution and effective settlement to the dispute in question".²⁵⁸ The Panel found that this condition was not fulfilled for the following three reasons taken together:

²⁵⁵Ecuador Panel Report, footnote 298 to para. 7.10.

²⁵⁶Understanding on Bananas between the European Communities and the United States signed on 11 April 2001 (WT/DS27/59, G/C/W/270; WT/DS27/58, Enclosure 1), and Understanding on Bananas between the European Communities and Ecuador signed on 30 April 2001 (WT/DS27/60, G/C/W/274; WT/DS27/58, Enclosure 2).

²⁵⁷Council Regulation (EC) No. 1964/2005 of 29 November 2005 on the tariff rates for bananas, *Official Journal of the European Union*, L Series, No. 316 (2 December 2005) 1 (Panel Exhibits ECU-1 and US-1).

²⁵⁸Ecuador Panel Report, para. 7.75. See also US Panel Report, para. 7.105.

- (a) the Bananas Understanding provides only for a means, i.e. a series of future steps, for resolving and settling the dispute;
- (b) the adoption of the Bananas Understanding was subsequent to recommendations, rulings and suggestions by the DSB; and,
- (c) parties have made conflicting communications to the WTO concerning the Bananas Understanding.²⁵⁹

201. The Panel considered that it did not need to assess whether the Understandings on Bananas were notified appropriately under Article 3.6 of the DSU, and whether these Understandings were a mutually agreed solution within the meaning of Article 3.6, and went on to find that:

... it is difficult ... to see how the Bananas Understanding could provide a positive solution and effective settlement to the dispute when, immediately following the respondent's communication of the Understanding to the WTO, the complainant in the dispute contested the multilateral status of the Understanding and its role in definitively resolving the dispute.

It would seem appropriate to assume that an alleged mutually agreed solution or legally binding agreement that could bar the complainant from bringing a subsequent compliance dispute, would need to provide a solution to the dispute for both parties, including in particular for the complainant, and especially after the DSB established the inconsistency with the covered agreement of measures adopted by the respondent.²⁶⁰

202. The Panel concluded that the European Communities had "not succeeded in making a *prima facie* case in favour of its preliminary objection", and thus rejected the European Communities' preliminary objection.²⁶¹

203. The Panel found that the Understandings on Bananas had to constitute a "positive solution and effective settlement to the dispute" in order to preclude the complainants from initiating Article 21.5 proceedings. The European Communities challenges this position on appeal. According to the European Communities, there are agreements between WTO Members that do not constitute a positive solution and effective settlement to a dispute, yet, they are given full legal effect by the WTO dispute settlement system. As examples of such agreements, the European Communities mentions, *inter alia*: agreements to dispense with the DSU requirement to hold consultations before requesting

²⁵⁹Ecuador Panel Report, para. 7.76; US Panel Report, para. 7.107.

²⁶⁰Ecuador Panel Report, paras. 7.107 and 7.108. See also US Panel Report, paras. 7.140 and 7.141.

²⁶¹Ecuador Panel Report, para. 7.136; US Panel Report, para. 7.165.

the establishment of a panel; agreements extending the deadline for the adoption of panel reports by the DSB; and "sequencing agreements".²⁶²

204. Furthermore, the European Communities takes issue with the three reasons relied upon by the Panel in support of its finding that the Understandings on Bananas could not legally bar the complainants from bringing these compliance proceedings. The first reason given by the Panel is that the Understandings do not in themselves constitute a solution, but provide only for the means, that is, a series of future steps for resolving and settling the dispute. In this respect, the European Communities argues that Article 3 of the DSU does not provide that only agreements recording measures that had already been implemented should qualify as "mutually agreed solutions". The European Communities submits that, rather, in virtually every instance where the parties to a dispute reach a settlement, measures to implement that settlement will be taken after the conclusion of the settlement.²⁶³

205. The second reason relied upon by the Panel is that the Understandings were agreed to subsequent to the recommendations, rulings, and suggestions made by the DSB in the original proceedings and previous compliance proceedings. In the European Communities' view, nothing in the DSU prevents WTO Members from entering into mutually agreed solutions subsequent to recommendations and rulings by the DSB. On the contrary, the European Communities submits that Articles 22.2 and 22.8 of the DSU expressly provide for settlement agreements that can be entered into following recommendations and rulings by the DSB.²⁶⁴

206. Thirdly, the Panel relied on the fact that the parties, after having signed the Understandings, made conflicting statements at the DSB meeting²⁶⁵ regarding their legal nature. The European Communities alleges that, by relying on these statements, the Panel effectively allowed a signatory to a settlement to nullify the terms of the agreement after having signed and reaped the benefits of it, simply by refusing to make a joint notification of settlement to the DSB. The European Communities contends that there is no requirement in the DSU that a mutually agreed solution must be notified to the DSB by one party or by both parties jointly.

²⁶²European Communities' appellant's submissions, para. 56 (Ecuador), para. 88 (US).

²⁶³European Communities' appellant's submissions, para. 44 (Ecuador), para. 75 (US).

²⁶⁴European Communities' appellant's submissions, para. 48 (Ecuador), para. 79 (US).

²⁶⁵Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, paras. 5 and 8.

207. Ecuador contends that the European Communities mischaracterized the Panel's findings as setting out three "conditions" that had to be satisfied in order for the Understanding on Bananas between the European Communities and Ecuador to qualify as a mutually agreed solution within the meaning of Article 3.7 of the DSU.²⁶⁶ Ecuador maintains that the European Communities' construction of the Understanding has no basis in the text of the DSU and would run counter to Article 21.5, as it would deny the parties to the Understanding the right to initiate compliance proceedings.

208. The United States argues that the Panel did not set out three "conditions" that every mutually agreed solution must meet. Rather, the Panel explained on the basis of "three reasons *taken together*" why the Understanding on Bananas between the European Communities and the United States did not have the effect of barring the latter from initiating this compliance proceeding.²⁶⁷ With respect to the Panel's first reason, namely, that the Understanding provides only for the means for resolving and settling the dispute, the United States maintains that the Panel merely set out the facts according to the terms of the Understanding, and did not, as the European Communities asserts, set a "condition" that only agreements recording measures that have already been implemented can qualify as mutually agreed solutions.²⁶⁸ With respect to the Panel's second reason, namely, that the Understanding postdates the DSB recommendations and rulings, the United States argues that the Panel did not set this as a "condition" but, rather, used it as relevant historical context for assessing the European Communities' preliminary objection.²⁶⁹ With regard to the Panel's third reason, namely, that the parties had made conflicting statements at the DSB meeting regarding the legal nature of the Understanding after it had been signed, the United States maintains that the Panel correctly took into account the United States' disagreement with the European Communities' characterization of the Understanding at the DSB as a "mutually agreed solution".²⁷⁰

209. We first address the European Communities' challenge to the criterion of a "positive solution and effective settlement" to the dispute. We then address the "three reasons" for which the Panel considered that the Understandings on Bananas did not constitute a positive solution and effective settlement to the dispute in question. Finally, we turn to the European Communities' arguments relating to the principle of "good faith".

²⁶⁶Ecuador's appellee's submission, para. 14 (referring to European Communities' appellant's submission, para. 41 (Ecuador), in turn referring to Ecuador Panel Report, para. 7.76).

²⁶⁷United States' appellee's submission, para. 57 (original emphasis) (referring to US Panel Report, para. 7.107).

²⁶⁸United States' appellee's submission, para. 61.

²⁶⁹United States' appellee's submission, para. 62.

²⁷⁰United States' appellee's submission, para. 63.

210. At the outset, we refer to the text of Articles 3.5, 3.6, and 3.7 of the DSU, which provide, in relevant part:

(5) All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

(6) Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.

(7) Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements

211. In respect of the criterion of a "positive solution and effective settlement", the Panel relied on Article 3.7 of the DSU. Article 3.7 states the "aim" of the dispute settlement system. It articulates a preference for solutions that are mutually acceptable to the parties to a dispute and consistent with the covered agreements. However, nothing in Article 3.7 establishes a condition under which a party would be prevented from initiating compliance proceedings or, indeed, dictates that the only kind of settlement envisaged in that provision is one that bars recourse to compliance proceedings under Article 21.5. Article 3.7 is not prescriptive as to the content of a mutually agreed solution, save that it must be consistent with the covered agreements. The only express limitation referred to in Article 3.7 is that "a Member shall exercise its judgement as to whether action under these procedures would be fruitful". The Appellate Body has interpreted this phrase to indicate that a Member is "expected to be largely self-regulating in deciding whether any such action would be 'fruitful'".²⁷¹ This is also borne out by Article 3.3, which provides that the prompt settlement of situations in which a Member, in its own judgement, considers that a benefit accruing to it under the covered agreements is being impaired by a measure taken by another Member is essential to the effective functioning of the WTO.

²⁷¹ Appellate Body Report, *EC – Bananas III*, para. 135.

212. The term "solution" employed in Article 3.7 refers to the "act of solving a problem".²⁷² There are usually different ways of solving any given problem. Pursuant to Article 19.1 of the DSU, when a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. Accordingly, it is, in principle, within the Member's discretion to choose the means of implementation and to decide in which way it will seek to achieve compliance. The DSU thus recognizes that a solution leading to compliance can be implemented in various ways. Similarly, a mutually agreed solution pursuant to Article 3.7 may encompass an agreement to forego the right to initiate compliance proceedings. Or it may provide for the suspension of the right of recourse to Article 21.5 until the steps agreed upon in a mutually agreed solution have been implemented. Yet, this need not always be so. We therefore do not consider that the mere agreement to a "solution" necessarily implies that parties waive their right to have recourse to the dispute settlement system in the event of a disagreement as to the existence or consistency with the covered agreements of a measure taken to comply. Instead, we consider that there must be a clear indication in the agreement between the parties of a relinquishment of the right to have recourse to Article 21.5. In our view, the Panel's requirement that the Understandings must constitute a "positive solution and effective settlement" to the dispute in question to preclude recourse to Article 21.5 proceedings was not a correct interpretation of what the DSU requires.

213. Before we assess the question whether, in the present cases, the participants did in fact agree to relinquish their right to have recourse to Article 21.5 proceedings, we address the "three reasons" relied upon by the Panel as to why the Understandings on Bananas did not constitute a "positive solution and effective settlement" to the dispute. At the outset, we note the European Communities' allegation that the Panel established three "conditions" that an agreement between the parties had to meet in order to qualify as a "mutually agreed solution".²⁷³ We disagree. The Panel used the word "reasons" and not the word "conditions", and also clearly stated that it was looking at the particular "dispute in question".²⁷⁴ In our view, it is clear from the language used by the Panel that it articulated reasons as to why the Understandings on Bananas, given their particular terms, did not prevent the complainants from initiating Article 21.5 proceedings, rather than establishing "conditions" an agreement would have to fulfil in order to constitute a "mutually agreed solution".

²⁷²*Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2002), Vol. 2, p. 2917.

²⁷³European Communities' appellant's submission, para. 73 (US).

²⁷⁴US Panel Report, para. 7.107.

214. The Panel relied on the reason that "the Bananas Understanding[s] provide[] only for a means, i.e. a series of future steps, for resolving the dispute".²⁷⁵ The proper interpretation of the Understandings is that they set out a series of steps which were intended as a precursor to the possible conclusion of a final settlement agreement. Therefore, we see no reason to find fault with the Panel's reliance on this element as one reason for which it considered that the parties to the Understandings had not waived their right of recourse to Article 21.5 proceedings.

215. The second reason relied upon by the Panel in support of its finding that the Understandings could not legally bar the complainants from bringing these compliance proceedings is that these Understandings were agreed upon subsequent to the adoption of recommendations, rulings, and suggestions by the DSB. We disagree with the Panel's reasoning. We see nothing in Article 3.7 or elsewhere in the DSU that prevents parties to a dispute from reaching a settlement that would preclude recourse to Article 21.5 proceedings after the adoption of recommendations and rulings by the DSB. In fact, Article 22.8 of the DSU stipulates that suspension of concessions shall only be applied until such time as a mutually satisfactory solution is reached. Thus, the DSU itself clearly envisages the possibility of entering into mutually agreed solutions after recommendations and rulings are made by the DSB. We do not consider that the factor that the Understandings were concluded only after the DSB made recommendations and rulings assists to determine whether the Understandings precluded the parties from initiating Article 21.5 proceedings.

216. The third reason relied upon by the Panel is that the parties had made conflicting statements at the DSB meeting as to the legal nature of the Understandings after they were signed. We consider that these statements may be taken into account where the interpretation of the Understandings is not clear from the language used in its context. However, where the text of the Understandings is clear, these statements have limited relevance, if any, for the purpose of interpreting the Understandings. The parties' obligations must first and foremost be determined on the basis of the text of the Understandings. In any event, *ex post* communications of the parties concerning the Understandings have, at best, slight evidentiary value.

217. With this in mind, we turn to analyze of the Understandings on Bananas at issue. We consider that the complainants could be precluded from initiating Article 21.5 proceedings by means of these Understandings only if the parties to these Understandings had, either explicitly or by necessary implication, agreed to waive their right to have recourse to Article 21.5. In our view, the

²⁷⁵Ecuador Panel Report, para. 7.78; US Panel Report, para. 7.107.

relinquishment of rights granted by the DSU cannot be lightly assumed. Rather, the language in the Understandings must reveal clearly that the parties intended to relinquish their rights.²⁷⁶

218. The Understandings state, in paragraph A, that the parties:

... have identified the means by which the long-standing dispute over the EC banana import regime can be resolved.

219. The identification of the means for the resolution of a dispute is an intermediate step towards a final solution to a dispute. The mere identification of the means will not resolve the dispute. Furthermore, we note the use of the term "can be resolved" in the same clause. The word "can" expresses a possibility, but not the finality, of a resolution of the dispute. In our view, had the parties to the Understandings intended to stipulate that they considered that the Understandings themselves constituted the solution to this dispute, they would have stated that the dispute "is" resolved, rather than that the dispute "can" be resolved.

220. We find further support for our interpretation in the fact that all the steps identified in the Understandings refer to a sequence of actions to be taken over a future period. The Understandings state that the European Communities "will implement"²⁷⁷ and the European Communities "will introduce".²⁷⁸ Consequently, Ecuador and the United States agreed that they "will lift [their] reserve"²⁷⁹ concerning the waiver from Article I:1 of the GATT 1994 (the "Doha Article I Waiver"²⁸⁰)—which was subsequently adopted by the Ministerial Conference meeting in Doha on 14 November 2001. The use of the future tense confirms our reading of the Understandings as a way forward to resolving the dispute, rather than as being in itself the solution to the dispute. We wish to clarify that an agreement that requires future performance does not for that reason alone indicate that the parties have not relinquished their right to have recourse to Article 21.5 proceedings. However, this particular agreement does.

²⁷⁶In this respect, we note the International Court of Justice, Preliminary Objections, *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 26 May 1961, ICJ Reports (1961) 32, addressing the interpretation of declarations of acceptance of the compulsory jurisdiction of the Court. In order to determine whether Thailand had recognized as compulsory the jurisdiction of the Court, the Court considered that the "sole relevant question" was whether Thailand's declaration clearly revealed such intention.

²⁷⁷Understandings on Bananas, para. C.

²⁷⁸Understandings on Bananas, para. B.

²⁷⁹Understandings on Bananas, para. F.

²⁸⁰Fourth Session of the Ministerial Conference held in Doha, European Communities – The ACP-EC Partnership Agreement, Decision of 14 November 2001, WT/MIN(01)/15; WT/L/436 (attached as Annex V to this Report; this document was also submitted as Panel Exhibits US-3 and EC-2 (Ecuador)). The Doha Article I Waiver expired on 31 December 2007 in respect of ACP products other than bananas.

221. We disagree with the European Communities' assertion that paragraph G of the Understanding involving Ecuador contains a manifestation of the intention of the parties to forego their right to initiate Article 21.5 proceedings because it states that "[t]he EC and Ecuador consider that this Understanding constitutes a mutually agreed solution to the banana dispute". The text of that clause is neutral with respect to the question of whether the solution entailed a relinquishment of the right of recourse to compliance proceedings. It therefore leaves the result of the above analysis untouched, and does nothing to alter the conclusion that the Understandings on Bananas did not contain a relinquishment of the right to initiate compliance proceedings.

222. In the light of these considerations, we conclude that the Panel erred in placing the relevance it did on the conflicting statements of the parties at the meeting of the DSB, because, what the Panel was required to do was to provide an interpretation of the text of the Understandings. Only once it had done so, could it then consider conflicting statements to the DSB for the limited purpose of either seeking confirmation of the Panel's interpretation, or determining the meaning because the textual interpretation left the meaning ambiguous or led to manifestly absurd results. Having found, based on the interpretation of the text of the Understandings, that these Understandings did not contain a relinquishment of the right to initiate compliance proceedings, we arrive at the same conclusion as the Panel, in paragraph 7.136 of the Ecuador Panel Report and in paragraph 7.165 of the US Panel Report, namely, that the complainants were not precluded from initiating these proceedings due to the Understandings on Bananas.

223. In addition, the European Communities submits that the Panel erred in its interpretation and application of the principle of good faith referred to in Article 3.10 of the DSU. According to the European Communities, the Panel took the erroneous view that an objection based on the principle of good faith could be successful only if the European Communities had made out a *prima facie* case for the alleged violation of Article 3.10, and also for "something more than mere violation".²⁸¹ The European Communities alleges that the Panel erred in finding that the principle of good faith could only be invoked as an "add-on"²⁸² to the violation of another WTO rule and could not by itself be the source of rights and obligations of WTO Members.

224. Ecuador submits that the Panel was correct in rejecting the European Communities' contention that the principle of good faith precluded Ecuador from challenging the EC Bananas Import Regime. Ecuador supports the Panel's statement that Ecuador has "[n]owhere in the

²⁸¹European Communities' appellant's submissions, para. 60 (Ecuador) (referring to Ecuador Panel Report, para. 7.131), para. 92 (US) (referring to US Panel Report, para. 7.162).

²⁸²European Communities' appellant's submissions, para. 67 (Ecuador), para. 98 (US).

Understanding ... accepted that it would forego its right to challenge the conformity with the covered agreements of any measure that the European Communities might take to implement a step set out in the Bananas Understanding".²⁸³ Furthermore, Ecuador contends that Article 3.10 does not preclude initiation of dispute settlement proceedings.

225. The United States submits that the Panel did not err in its interpretation and application of the principle of good faith enshrined in Article 3.10. The United States contends that the Panel was correct in relying on past panel and Appellate Body reports when finding that there must be something "more than mere violation" of a substantive provision of the covered agreements before a Member can be found to have failed to act in good faith.²⁸⁴

226. The Panel relied on the Appellate Body Report in *US – Offset Act (Byrd Amendment)* in support of its finding that there must be something "more than mere violation" of a substantive provision of the covered agreements before a Member may be found to have failed to act in good faith.²⁸⁵ In our view, the Panel did not consider the quotation from *US – Offset Act (Byrd Amendment)* in its proper context. In that report, the Appellate Body reversed the panel's findings that the measure at issue was inconsistent with Article 5.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and Article 11.4 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"). That panel further found that the United States had not acted in good faith with respect to its obligations under those provisions. Having reversed the panel's finding concerning Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, the Appellate Body was left with an accessory finding of violation of the good faith principle. The Appellate Body reversed that finding and stated, as quoted in the Panel Reports in the present case:

Nothing ... in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.²⁸⁶

227. This finding, however, is not pertinent in the context of the present appeals, because the legal question before the Panel in the present cases is different from the legal question before the Appellate Body in *US – Offset Act (Byrd Amendment)*. While, in that case, the Appellate Body considered the

²⁸³Ecuador's appellee's submission, para. 32 (quoting Ecuador Panel Report, para. 7.128).

²⁸⁴United States' appellee's submission, para. 76.

²⁸⁵Ecuador Panel Report, para. 7.129, US Panel Report, para. 7.160 (quoting Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 298).

²⁸⁶Ecuador Panel Report, para. 7.129, US Panel Report, para. 7.160 (referring to Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 298).

principle of good faith as it relates to a substantive provision of the WTO agreements, the Panel in the present cases was faced with the allegation of a lack of good faith as a procedural impediment for a WTO Member to initiate Article 21.5 proceedings. Although not using the term, the European Communities, in the present cases, in fact advances an estoppel argument. The Appellate Body addressed this dimension of the principle of good faith in *EC – Export Subsidies on Sugar*:

We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgement as to whether action under these procedures would be fruitful", by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU.²⁸⁷

228. We consider this to be the applicable standard and therefore agree with the European Communities that the Panel erred when it rejected the European Communities' claim on the basis that the European Communities had not made out a *prima facie* case for something "more than mere violation". The above quoted statement of the Appellate Body relates to an allegation that the complainants were estopped from challenging certain elements of the European Communities' sugar regime in the original proceedings. The present cases, however, involve compliance proceedings pursuant to Article 21.5 of the DSU. Yet, we consider that, irrespective of the type of proceeding, if a WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it cannot be regarded as failing to act in good faith if it challenges that measure. In that vein, the Appellate Body found, in *EC – Export Subsidies on Sugar*, that it was not possible to identify any facts or statements made by the complainants admitting that the European Communities' measure was WTO-consistent or promising that they would not take legal action against the European Communities.²⁸⁸ In the present cases, if the complainants were to be regarded as being estopped from initiating these Article 21.5 proceedings, such estoppel would have to attach to a representation outside of the Understandings on Bananas. This, however, is not the case. Therefore, we consider that the United States and Ecuador have not failed to act in good faith in requesting compliance proceedings pursuant to Article 21.5.

²⁸⁷ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 312.

²⁸⁸ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 315.

229. Making reference to Article 11 of the DSU, the European Communities further alleges that the Panel failed to provide any justification for rejecting its claim based on the principle of good faith. The United States responds that this claim is outside the scope of this appeal because the European Communities' Notice of Appeal does not contain a reference to Article 11 of the DSU. We note that the European Communities clarified at the oral hearing that it was not advancing a claim under Article 11 of the DSU. Therefore, we make no finding in respect to that provision.

VII. Scope of Article 21.5 Proceedings – Measure Taken to Comply (United States)

230. We now turn to address the European Communities' appeal of the Panel's finding that the EC Bananas Import Regime constituted a "measure taken to comply" within the meaning of Article 21.5 of the DSU and was therefore properly before the Panel. The European Communities appeals this finding only in the proceeding initiated by the United States.

231. The Panel first assessed whether the EC Bananas Import Regime was a measure taken to comply because of "a particularly close relationship" to the declared measure taken to comply, that is, the 2002-2005 bananas import regime of the European Communities, and to the original recommendations and rulings of the DSB.²⁸⁹ Thereafter, the Panel assessed whether, based on the criteria identified by the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*, the EC Bananas Import Regime was in itself a measure taken to comply.

232. With respect to the latter question, whether the EC Bananas Import Regime was in itself a measure taken to comply, the Panel considered the European Communities' "attempt" to comply with the original DSB recommendations and rulings by adopting, on 1 January 1999, Council Regulation (EC) No. 1637/98²⁹⁰ ("EC Regulation 1637/98") and Commission Regulation (EC) No. 2362/98²⁹¹ ("EC Regulation 2362/98"). The Panel also referred to the Decision by the Arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*, the Panel Report in *EC – Bananas III (Article 21.5 – Ecuador)*, and the Panel Report in *EC – Bananas III (Article 21.5 – EC)*, and concluded that it had been established in those proceedings that the European Communities had failed to bring itself into

²⁸⁹US Panel Report, para. 7.314 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

²⁹⁰Council Regulation (EC) No. 1637/98 of 20 July 1998 amending Council Regulation (EEC) No. 404/93 on the common organisation of the market in bananas, *Official Journal of the European Communities*, L Series, No. 210 (28 July 1998) 28.

²⁹¹Commission Regulation (EC) No. 2362/98 of 28 October 1998 laying down rules for the implementation of Council Regulation (EEC) No. 404/93 regarding imports of bananas into the Community, *Official Journal of the European Communities*, L Series, No. 293 (28 October 1998) 32.

compliance with the original recommendations and rulings adopted by the DSB in the *EC – Bananas III* dispute in 1997.²⁹²

233. In its analysis, the Panel also took into account the Understanding on Bananas concluded between the European Communities and the United States.²⁹³ The relevant sections of this Understanding provide as follows:

- B. In accordance with Article 16(1) of Regulation No. (EEC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006.
- C. In the interim, the EC will implement an import regime on the basis of historical licensing as follows:
 - 1. Effective 1 July 2001, the EC will implement an import regime on the basis of historical licensing as set out in Annex 1.
 - 2. Effective as soon as possible thereafter, subject to Council and European Parliament approval and to adoption of the Article XIII waiver referred to in paragraph E, the EC will implement an import regime on the basis of historical licensing as set out in Annex 2. The Commission will seek to obtain the implementation of such an import regime as soon as possible.

234. The Panel considered the language of the Understanding and found, with respect to EC Regulation 1964/2005, which introduced the EC Bananas Import Regime at issue in the present dispute, that:

... the European Communities does not contest that EC Regulation 1964/2005 corresponds to paragraph B of the Bananas Understanding, which provides that "In accordance with Article 16(1) of Regulation No. (EC) 404/93 (as amended by Regulation No. (EC) 216/2001), the European Communities (EC) will introduce a Tariff Only regime for imports of bananas no later than 1 January 2006."²⁹⁴

235. Furthermore, the Panel relied on statements by the European Communities at the DSB meeting held on 19 November 1999, as well as the status report to the DSB on 11 February 2000, in which the European Communities proposed a two-stage process for the reform of its banana regime,

²⁹²US Panel Report, para. 7.352.

²⁹³US Panel Report, para. 7.357 (referring to WT/DS27/58; WT/DS27/59; and WT/DS27/60).

²⁹⁴US Panel Report, para. 7.381.

as acknowledgements by the European Communities that, at that time, it had not yet achieved compliance.²⁹⁵

236. In addition, the Panel assessed whether the EC Bananas Import Regime at issue in this dispute was a measure taken to comply because of "a particularly close relationship" to the declared measure taken to comply, that is, the 2002-2005 bananas import regime of the European Communities, and to the original recommendations and rulings of the DSB.²⁹⁶ In this respect, the Panel observed that both the original bananas import regime and the EC Bananas Import Regime at issue in the present case "maintain, in the form of one or more tariff rate quotas at a zero in-quota duty, a preferential treatment for ACP countries in comparison with the treatment accorded to other WTO Members."²⁹⁷ For the Panel, these were "important similarities in the nature and effects of the import regime reviewed in the original panel and appellate proceedings, and the [EC Bananas Import Regime at issue in this dispute]".²⁹⁸

237. The Panel concluded that:

... in itself the [EC Bananas Import Regime at issue in the current dispute] is a measure taken to comply with the original recommendations and rulings of the DSB in the *EC – Bananas III* dispute. Further, the [EC Bananas Import Regime at issue in the current dispute] is a measure taken to comply with the original recommendations and rulings of the DSB in the *EC – Bananas III* dispute also on the basis of its particularly close relationship to the alleged final measure taken to comply by the European Communities, i.e. the 2002-2005 EC bananas import regime.

Accordingly, the Panel rejects the third preliminary objection of the European Communities and finds that the United States has properly brought this dispute under Article 21.5 of the DSU.²⁹⁹

238. On appeal, the European Communities argues that the United States' decision to terminate the suspension of concessions upon implementation of the tariff quota-based import regime described in subparagraph C.2 of the Understanding on Bananas confirmed that the United States and the European Communities had agreed that the European Communities had complied with the recommendations and rulings of the DSB in the original dispute. The European Communities submits

²⁹⁵US Panel Report, para. 7.353 (referring to Minutes of the DSB meeting held on 19 November 1999, WT/DSB/M/71) and para. 7.356 (referring to *EC – Bananas III*, Status Report by the European Communities, WT/DS27/51/Add.5).

²⁹⁶US Panel Report, para. 7.314 (quoting Appellate Body Report, *US – Softwood Lumber IV* (Article 21.5 – Canada), para. 74). (text in square brackets added by the Panel)

²⁹⁷US Panel Report, para. 7.326.

²⁹⁸US Panel Report, para. 7.326.

²⁹⁹US Panel Report, paras. 7.531 and 7.532.

that "the United States' retention of the right to re-impose retaliatory measures only if the [tariff quota-based] regime [did] not enter into force by 1 January 2002"³⁰⁰ demonstrated the importance placed by the United States, itself, on the tariff quota import regime, and further supported the conclusion that the United States and the European Communities had agreed that, with the introduction of the tariff quota-based regime as the "measure taken to comply", the dispute would be settled.

239. In addition, the European Communities submits that there was "no link" between the original DSB recommendations and rulings and the political decision of the European Communities to introduce a tariff-only import regime by 1 January 2006. The European Communities argues that a "link" exists between a measure and the DSB recommendations and rulings in the original proceedings when the introduction of the contested measure is necessary to address a specific finding of inconsistency with the covered agreements. Yet, the European Communities argues that there was no finding in the original *EC – Bananas III* proceedings that could be implemented only through a tariff-only regime. Therefore, the European Communities submits that a link to the DSB recommendations and rulings in the original proceedings was missing in the present proceedings, and that the EC Bananas Import Regime was therefore not a "measure taken to comply". Thus, if the United States intended to challenge the consistency with WTO law of EC Regulation 1964/2005, it had to do so in a regular panel proceeding, not under Article 21.5 of the DSU.

240. The United States contends that its commitment to terminate retaliation upon the introduction of a tariff quota-based import regime under subparagraph C.2 of the Understanding on Bananas did not indicate an agreement by the United States to regard the European Communities' interim regime as the final implementation of the original DSB recommendations and rulings. The United States asserts that it terminated only the imposition of retaliatory duties, but that the multilateral authorization to suspend concessions had not been revoked. The United States maintains that a complainant may choose whether and to what extent to make use of the WTO authorization to suspend concessions, and that, therefore, the complainant's decision not to exercise that right does not imply the complainant's acceptance that the respondent's measures have become consistent with its WTO obligations. In addition, the United States disagrees with the European Communities that there was no link between the contested measure and the DSB recommendations and rulings in *EC – Bananas III*. The United States submits that, instead, the European Communities agreed through the terms of the Understanding on Bananas to take certain interim steps culminating in a tariff-only regime by 1 January 2006, and that this constituted a "clear link"³⁰¹ between the recommendations and

³⁰⁰European Communities' appellant's submission, para. 41 (US) (quoting subparagraph D.3 of the Understanding on Bananas).

³⁰¹United States' appellee's submission, para. 88.

rulings of the DSB in *EC – Bananas III* and the EC Bananas Import Regime at issue in the present dispute.

241. We begin our analysis by recalling the text of Article 21.5 of the DSU, which provides in relevant part:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

242. We address, first, the legal standard articulated by the Panel for determining whether the EC Bananas Import Regime was a measure taken to comply, and whether it was properly before this Panel. Thereafter, we examine whether the Panel correctly applied Article 21.5 to the facts of this case when it determined that the EC Bananas Import Regime constituted a "measure taken to comply" that could properly be challenged in an Article 21.5 proceeding.

243. With respect to the legal standard adopted by the Panel, we note that the Panel relied upon the Appellate Body's finding in *US – Softwood Lumber IV (Article 21.5 – Canada)* that "[s]ome measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5."³⁰² In its conclusion, the Panel found that the EC Bananas Import Regime was a measure taken to comply "in itself" and also "on the basis of its particularly close relationship to the alleged final measure taken to comply".³⁰³

244. The conclusions of the Panel derived from its application of the reasoning in *US – Softwood Lumber IV (Article 21.5 – Canada)*. The Panel, however, failed to reflect in its reasoning that *US – Softwood Lumber IV (Article 21.5 – Canada)* was not concerned with whether a measure is in itself a measure taken to comply. That dispute concerned the situation where, by reason of the close relationship between the measure at issue and the declared measure taken to comply, the measure at issue fell within the scope of Article 21.5. It will ordinarily be necessary to consider first whether the measure at issue is in itself a measure taken to comply. Only if that analysis cannot provide a clear answer, is the analysis of *US – Softwood Lumber IV (Article 21.5 – Canada)* of application.

³⁰²US Panel Report, para. 7.310 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

³⁰³US Panel Report, paras. 7.531.

245. In our view, the situation in the present case is different from the situation before the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)*. The Appellate Body has emphasized that the reasoning in *US – Softwood Lumber IV (Article 21.5 – Canada)* concerned the identification of closely connected measures so as to avoid circumvention.³⁰⁴ Therefore, if the measure at issue is found to constitute in itself a measure taken to comply, it will not be necessary to establish a "particularly close relationship" of the measure at issue to the declared measure taken to comply in order to subject the measure at issue to the scope of Article 21.5. Our analysis must thus begin with the question whether the measure at issue in this case was in itself a measure taken to comply. In the event that the measure at issue is found not to be in itself a measure taken to comply, our analysis will turn to the question whether a "particularly close relationship" exists between the measure at issue and the declared measure taken to comply, which would warrant subjecting the measure at issue to the scope of Article 21.5 of the DSU.

246. We, therefore, turn first to the question whether the EC Bananas Import Regime was in itself a measure taken to comply. We recall the European Communities' argument that, in the Understanding on Bananas, the United States and the European Communities had agreed to consider the adoption of a tariff quota-based import regime on the basis of historical licensing, as provided in subparagraph C.2 of the Understanding, as the final "measure taken to comply" in this dispute, and that the dispute was resolved with the introduction of that regime.

247. Paragraph C of the Understanding provides that the import regimes foreseen therein would be implemented by the European Communities "in the interim". An interim regime is not a final measure. The final regime is set out in paragraph B of the Understanding, which provides that the European Communities would introduce a tariff-only regime for imports of bananas no later than 1 January 2006. The interim measures set out in paragraph C of the Understanding would remain in place until the tariff-only system was introduced, at the latest by 1 January 2006. It is therefore clear from the language of the Understanding that the tariff quota-based import regime was intended to be of an interim nature. The Understanding sets out several consecutive steps for the European Communities to take in order to achieve compliance. Accordingly, we see no basis in the text of the Understanding to support the position that the United States had agreed that a tariff quota-based import regime would be the final measure taken to comply.

³⁰⁴Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205, states: "The dispute in *US – Softwood Lumber IV (Article 21.5 – Canada)* concerned the identification of closely connected measures so as to avoid circumvention."

248. Furthermore, the European Communities maintains that the United States' undertaking to terminate its imposition of increased duties in consideration of the European Communities' implementation of the tariff quota-based import regime finally resolved the dispute between the parties. The Panel dismissed this argument for the reason that Article 21.5 does not contain any reference to the suspension of concessions. It further considered that the authorization to suspend concessions confers a right, but not an obligation, to do so. On that basis, the Panel concluded that the termination of the United States' suspension of concessions cannot in itself be read as a waiver of the right to bring a compliance dispute, or as an acceptance by the United States that the 2002-2005 import regime of the European Communities would constitute the final measure taken to comply.³⁰⁵

249. The European Communities relies on the conduct of the United States terminating its suspension of concessions as probative of its contention as to finality. Article 22.1 of the DSU provides that suspension of concessions is a temporary measure "available" in the event that it has been determined that the original DSB recommendations and rulings have not been fully implemented by the end of the reasonable period of time. The term "available" indicates that, once suspension of concessions is authorized, it is within the Members' discretion to exercise that authorization subject to the conditions set out in Article 22.8. The conduct of the United States is consistent with the Understanding being an interim measure not finally settling the dispute. Contrary to the European Communities' assertion, we do not consider that the conduct of the United States establishes its acceptance of the tariff quota system introduced pursuant to subparagraph C.2 of the Understanding as the final "measure taken to comply". The fact that the United States ceased suspending concessions in 2002 is not probative of the European Communities' case.

250. We consider next whether statements made by the United States in the context of the suspension of concessions and subsequent termination of that suspension changes our evaluation of the matter. In particular, we consider that the Panel was correct in taking into account the United States' statement at the DSB meeting held on 1 February 2002 in assessing whether the United States' termination of the suspension of concessions could be regarded as a final solution to the dispute. The United States explained that, upon the introduction by the European Communities of the tariff quota on the basis of historical licensing:

³⁰⁵US Panel Report, paras. 7.393, 7.399, and 7.404.

[t]he United States had, therefore, terminated the suspension of concessions in effect since 1999. The United States would continue to work closely with the EC and other Members to address any issues that might arise as the EC moved to a tariff-based system for bananas and implemented the terms of the bilateral Understanding on Bananas.³⁰⁶ (footnote omitted)

251. It is clear from this statement that the United States did not accept that, by introducing the transitional tariff quota regime, the European Communities had brought its bananas import regime fully into compliance with the recommendations and rulings of the DSB in the original *EC – Bananas III* dispute. If, as the European Communities suggests, the United States had considered that the European Communities had achieved full compliance by introducing the tariff quota pursuant to paragraph C of the Understanding, there would have been no reason for the United States to continue to work closely with the European Communities and other Members to address any issues that might arise as the EC moved to a tariff-based system for bananas. In fact, in this statement, the United States linked its intention to "work closely with the EC" to its expectation that the European Communities would "implement[] the terms of the bilateral Understanding on Bananas". This indicates that the United States did not consider that the European Communities had fully complied with its obligations at the time the United States decided to terminate the suspension of its concessions. We, therefore, reject the European Communities' argument that the United States and the European Communities had agreed to consider the introduction of the tariff quota as the final "measure taken to comply" that would resolve this dispute.

252. We find that the Understanding on Bananas is in itself a "measure taken to comply" within the sense of Article 21.5 of the DSU. Therefore, strictly speaking, we would not be required to assess whether the EC Bananas Import Regime fell within the scope of Article 21.5 because of a "particularly close relationship" to the declared measure taken to comply—that is, the 2002-2005 bananas import regime of the European Communities—and to the original recommendations and rulings of the DSB. Nonetheless, as the Panel made findings in this respect, and given that the parties advance several arguments relating thereto, we briefly address these additional findings.

253. First, the European Communities alleges that there was "no link" and therefore no "particularly close relationship" between the recommendations and rulings of the DSB in *EC – Bananas III* and the political decision of the European Communities to introduce a tariff-only import regime by 1 January 2006. The European Communities argues that a link exists when the

³⁰⁶US Panel Report, para. 7.391 (quoting Minutes of the DSB meeting held on 1 February 2002, WT/DSB/M/119, para. 8).

introduction of the challenged measure is "necessary"³⁰⁷ to address a specific finding of inconsistency with the covered agreements. Yet, in the European Communities' submission, there is no finding in the 1997 *EC – Bananas III* dispute that could be complied with only through the introduction of a tariff-only regime.

254. Like the Panel, we do not see why it should be relevant that the original recommendations and rulings of the DSB did not expressly suggest that the European Communities bring itself into compliance specifically through the introduction of a tariff-only regime. We see no basis in the DSU for requiring that a measure must be "necessary" to address a specific finding of inconsistency in order for that measure to be introduced; nor does the European Communities identify any textual basis for this in the DSU. WTO Members enjoy some discretion in choosing how to implement DSB recommendations and rulings. In that vein, the chapeau of Article 21.3 of the DSU provides that "the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB." In *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body stated:

Where alternative means of implementation are available, a WTO Member enjoys some discretion in deciding what measures to take to comply with the DSB's recommendations and rulings.³⁰⁸

255. The Appellate Body addressed the link between the "measure taken to comply" and the original recommendations and rulings of the DSB in *US – Softwood Lumber IV (Article 21.5 – Canada)*, *US – FSC (Article 21.5 – EC II)*, and *Chile – Price Band System (Article 21.5 – Argentina)*.³⁰⁹ The Appellate Body did not find that a link between a measure taken to comply and the original DSB recommendations and rulings exists only when the measure is "necessary" to address a specific finding of inconsistency. We therefore reject this argument of the European Communities.

256. The European Communities alleges further that, in concluding that the EC Bananas Import Regime at issue in the present case was closely related to the recommendations and rulings in *EC – Bananas III*, the Panel overstepped the limitations imposed by its terms of reference, which confined the scope of the Panel's review to the "specific measure at issue".³¹⁰ The European Communities claims that the Panel thereby acted inconsistently with Articles 6.2 and 7 of the DSU. We see no error in the Panel's reference to findings of the original panel in *EC – Bananas III*. The Panel did not

³⁰⁷European Communities' appellant's submission, para. 46 (US).

³⁰⁸Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 202.

³⁰⁹Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68; Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61; Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136.

³¹⁰European Communities' appellant's submission, para. 48 (US).

reassess the measure at issue in *EC – Bananas III*. Instead, the Panel had regard to that measure in an evidentiary sense for the purpose of assessing whether there was a link between the bananas import regime reviewed in the *EC – Bananas III* dispute and that at issue in the present proceedings. In doing so, the Panel did not exceed its mandate.

257. The European Communities also asserts that the Panel was wrong in relying on the findings of the panels in *EC – Bananas III (Article 21.5 – Ecuador)* and *EC – Bananas III (Article 21.5 – EC)*, and on the decision by the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)*, when assessing whether the EC Bananas Import Regime at issue in the current proceedings constituted a "measure taken to comply".³¹¹ The European Communities contends that those proceedings related to a different matter and involved different WTO Members to those in the present proceedings. Therefore, the European Communities contends that "the resulting report[s] [are] not binding precedent for other disputes between the same parties on other matters, or between different parties on the same matter even where the same question of WTO law might arise."³¹²

258. We note that the Panel stated that it read the "above three procedures" as an "indication" that the European Communities' attempt to bring itself into compliance by 1 January 1999 was unsuccessful.³¹³ In so stating, the Panel considered the result of these three reports as evidence in the context of its assessment of whether the EC Bananas Import Regime constituted a measure taken "in the direction of, or hav[ing] the objective of achieving, compliance".³¹⁴ We see no error in the Panel's reliance on the outcome of these proceedings for assessing whether the European Communities had brought itself into compliance. There is no question that these previous reports and decisions form part of a continuum of events that provide an indication that the European Communities had not yet fully implemented the DSB's recommendations and rulings in the original proceedings.

259. With respect to the European Communities' mention of Article 11 of the DSU, we note that the European Communities clarified, at the oral hearing, that it was not invoking Article 11 as the basis of a separate claim. The European Communities explained that, rather, it made reference to Article 11 of the DSU as a supporting argument in the context of allegations of violation of other provisions of the GATT 1994 or the DSU. We also note that Article 11 has not been listed by the

³¹¹European Communities' appellant's submission, para. 53 (US) (referring to US Panel Report, para. 7.352).

³¹²European Communities' appellant's submission, para. 56 (US).

³¹³US Panel Report, para. 7.352.

³¹⁴US Panel Report, para. 7.306 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 67 (original emphasis)).

European Communities in its Notice of Appeal. In these circumstances, we make no finding with respect to Article 11 of the DSU.

260. For all these reasons, we *find* that the EC Bananas Import Regime constituted, in itself, a "measure taken to comply". We therefore *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.531 of the US Panel Report, that the EC Bananas Import Regime, set out in EC Regulation 1964/2005 and implementing regulations, constituted a measure taken to comply and was therefore properly before the Panel in these Article 21.5 proceedings.

VIII. Repeal of the Challenged Measure (United States)

261. We now address the question whether the Panel erred, in the case initiated by the United States, in failing to take into consideration the repeal of the challenged measure.

262. Addressing a request by the European Communities at the interim review stage to make several modifications to reflect the adoption of EC Regulation 1528/2007, which repealed, *inter alia*, the tariff quota of 775,000 metric tonnes ("mt") established through Article 1(2) of EC Regulation 1964/2005, the Panel found:

[E]vidence submitted at this late stage by the European Communities regarding the adoption of amendments to the EC bananas import regime is inadmissible. Furthermore, the Panel does not consider that the language contained in paragraph 8.3(c) of the interim report creates any impression that the Panel is making findings regarding aspects of the EC bananas import regime other than the preferential tariff quota reserved for ACP bananas.³¹⁵

263. Nonetheless, the Panel modified paragraph 8.5 of the Interim Report, which read "[t]he Panel recommends that the Dispute Settlement Body request the European Communities to bring the inconsistent measures into conformity with its obligations under the GATT 1994" to read as follows in the Final Report:

Since the original DSB recommendations and rulings in this dispute remain operative through the results of the current compliance proceedings, the Panel makes no new recommendation.³¹⁶

³¹⁵US Panel Report, para. 6.42.

³¹⁶US Panel Report, para. 8.13. In contrast, the Ecuador Panel Report states, in paragraph 8.5: The Panel recommends that the Dispute Settlement Body request the European Communities to bring the inconsistent measures into conformity with its obligations under the GATT 1994.

We note that paragraph 8.13 of the US Interim Report was identical to paragraph 8.5 of the Final Report in the Ecuador case. However, the Panel modified this recommendation in the Final US Panel Report. (See European Communities' appellant's submission, paras. 177 and 178 (US))

264. On appeal, the European Communities contends that the Panel failed to take into consideration the repeal of the contested measure, and thereby acted inconsistently with its obligation under Article 3.4 of the DSU to "achieve[] a satisfactory settlement of the matter" and its obligation under Article 3.7 of the DSU to "secure a positive solution to the dispute".³¹⁷ In this context, the European Communities also makes reference to Article 11 of the DSU. The European Communities submits that the Panel did not distinguish properly between factual evidence supporting a claim and evidence relating to the existence of the contested measure itself when it dismissed evidence submitted by the European Communities regarding the adoption of EC Regulation 1528/2007.

265. The European Communities also claims that the Panel erred in making a recommendation with respect to a measure that had ceased to exist subsequent to the establishment of the Panel³¹⁸, and alleges that the Panel provided a "concealed" recommendation by stating that the original DSB recommendations and rulings remained operative.³¹⁹ The European Communities refers to the Appellate Body Report in *US – Certain EC Products* in support of its proposition that panels cannot make recommendations with respect to measures that have ceased to exist. The European Communities submits that, since the 775,000 mt duty-free tariff quota reserved for ACP imports was repealed by EC Regulation 1528/2007 prior to the issuance of the US Panel Report, there was no recommendation that could be made or that could "remain operative".³²⁰

266. The United States contends that the Panel did not err in making findings with respect to EC Regulation 1964/2005, even though that Regulation was repealed during the course of the Panel proceedings. The United States asserts that various panels and the Appellate Body have made recommendations with respect to expired measures.³²¹ With respect to the European Communities' reliance on the Appellate Body Report in *US – Certain EC Products*, the United States contends that the measure at issue in that dispute had ceased to exist prior to the establishment of the panel's terms of reference, while, in the present dispute, the European Communities repealed EC Regulation 1964/2005 only towards the conclusion of the Panel proceedings.³²²

³¹⁷European Communities' appellant's submission, para. 180 (US).

³¹⁸European Communities' appellant's submission, para. 187 (US).

³¹⁹European Communities' appellant's submission, paras. 190 and 191 (US).

³²⁰European Communities' appellant's submission, para. 191 (US).

³²¹United States' appellee's submission, para. 108 (referring to Panel Report, *EC – Approval and Marketing of Biotech Product*, paras. 8.16 and 8.36; Appellate Body Report, *EC – Selected Customs Matters*, para. 310; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 129).

³²²United States' appellee's submission, para. 109.

267. Turning to our analysis, we first examine the European Communities' allegation that the Panel failed to take into consideration the repeal of the contested measure and erred in making findings with respect to EC Regulation 1964/2005. The Appellate Body previously addressed the questions whether expired measures can be subject to consultations and whether the "measure at issue" within the meaning of Article 6.2 of the DSU can be an expired measure. The Appellate Body answered both questions in the affirmative. In particular, with respect to the question of which measures may be subject to consultations, the Appellate Body referred to the phrase "measures affecting the operation of any covered agreement" in Article 4.2 of the DSU. In this respect, the Appellate Body found, in *US – Upland Cotton*, that whether or not a measure is still in force is not dispositive of whether that measure is currently affecting the operation of any covered agreement, and can therefore be subject to consultations.³²³

268. The Appellate Body also rejected the notion that an expired measure could not be a measure that is "at issue" in terms of Article 6.2 of the DSU. The Appellate Body explained that Article 6.2 requires that measures must be "at issue", that is "in dispute" at the time the panel request is made. Yet, the Appellate Body found that, since the term "at issue" does not shed light on whether measures at issue must currently be in force or whether they can have expired, the fact that a measure has expired is not dispositive of the question whether the panel can address claims in respect of that measure.³²⁴ The Appellate Body found contextual support for rejecting the notion that an expired measure could not be a measure "at issue" in Article 3.3 of the DSU, which refers to the "prompt settlement" of certain situations that, in the absence of settlement, could undermine the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. The Appellate Body observed that Article 3.3 focuses not upon "existing" measures, or measures that are "currently in force", but, rather, upon "measures taken" by a Member, which includes measures taken in the past.³²⁵

269. The situation in the present case is different from that in *US – Upland Cotton*, in that the measure in the present appeal was still in force when the Panel was established and expired only towards the end of the Panel proceedings. In *US – Upland Cotton*, certain measures were no longer in force at the time of the establishment of the panel, but the continued effect of past subsidies was claimed to still cause serious prejudice to the complainants' interests. However, we consider that, if the DSU does not exclude from the scope of consultations, or from the scope of panel proceedings, a measure that was no longer in force when the dispute was initiated, then, *a fortiori*, a panel is not

³²³ Appellate Body Report, *US – Upland Cotton*, para. 262.

³²⁴ Appellate Body Report, *US – Upland Cotton*, paras. 269-272.

³²⁵ Appellate Body Report, *US – Upland Cotton*, para. 264.

precluded from making findings with respect to measures that expire during the course of the proceedings.

270. We find further support for this interpretation in Article 7 of the DSU, which sets out the standard terms of reference for panels. The terms of reference for a panel pursuant to Article 7 define the scope of the dispute and the mandate of the panel. In the present case, the panel request identified, *inter alia*, EC Regulation 1964/2005, and the DSB established the Panel on that basis with standard terms of reference.³²⁶ The European Communities and the United States both agreed at the outset of the proceedings that this Regulation was the measure at issue included in the Panel's terms of reference. The parties agreed that this measure was within the jurisdiction of the Panel. The DSU nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of the measure at issue. On the contrary, when the DSU provides for limitations on the authority of the panel in other instances, it does so in express terms. Article 12.12 of the DSU, for example, provides that a panel's authority lapses if the work of the panel has been suspended for more than 12 months. The absence of a similar limitation, with respect to changes to the scope of the panel's jurisdiction after the panel has been established and the terms of reference have been determined by the DSB, lends further support to our interpretation that, once a panel has been established and the terms of reference for the panel have been set, the panel has the competence to make findings with respect to the measures covered by its terms of reference. We thus consider it to be within the discretion of the panel to decide how it takes into account subsequent modifications or a repeal of the measure at issue. Accordingly, panels have made findings on expired measures in some cases and declined to do so in others, depending on the particularities of the disputes before them.³²⁷ In the present case, the European Communities has advanced no reason, nor do we see a reason, for interfering with the Panel's exercise of that discretion.

271. We turn next to the European Communities' allegation that the Panel erred in making a recommendation with respect to an expired measure. We recall that the Appellate Body has distinguished the question whether a panel can make a *finding* concerning an expired measure from the question whether a panel can make a *recommendation* relating to an expired measure. In *US – Certain EC Products*, the Appellate Body reversed the panel's decision to make a recommendation pursuant to Article 19.1 of the DSU on the grounds that the panel had already found that the measure at issue in that dispute had expired.³²⁸ The Appellate Body confirmed, in *US – Upland Cotton*, that

³²⁶US Panel Report, para. 1.3.

³²⁷See, for instance, Panel Report, *Wool Shirts and Blouses*, para. 6.2; Panel Report, *Indonesia – Autos*, para. 14.9; Panel Report, *Chile – Price Band System*, para. 7.126; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.344; and Panel Report, *EC – Approval and Marketing of Biotech Product*, para. 7.1312.

³²⁸Appellate Body Report, *US – Certain EC Products*, para. 81.

the fact that a measure has expired may affect what recommendation a panel may make, but it is not dispositive of the question whether a panel can make findings relating to an expired measure.³²⁹

272. In keeping with this distinction, we assess whether the Panel made a recommendation to the DSB in the present case; and, if so, what kind of recommendation it made. We note that the Panel stated, in paragraph 8.13 of the US Panel Report, that it "makes no new recommendation". It is not clear what is meant by the word "new" in this context: it seems to relate to the fact that the original DSB recommendations and rulings in *EC – Bananas III* remain operative until the European Communities has achieved substantive compliance with these recommendations and rulings. While making the allegation that the Panel made a "concealed" recommendation, the European Communities does not specify the content of this alleged "concealed" recommendation. In this situation, we are unable to discern what would be the content of this alleged "concealed" recommendation. We do not believe that the Panel made a specific recommendation with respect to a measure that was no longer in force at the time the US Panel Report was circulated.

273. Furthermore, we consider that the Panel's statement that the "original DSB recommendations and rulings in this dispute remain operative" was not incorrect. The DSB recommendations and rulings from the original proceedings remain in effect until the European Communities brings itself into substantive compliance. The statement by the Panel does not in any way affect the legal status of the DSB recommendations and rulings in the original dispute. We see no error in the Panel's statement in paragraph 8.13 of the US Panel Report. We therefore *find* that the Panel did not err in making findings with respect to a measure that had ceased to exist subsequent to the establishment of the Panel, but before the Panel issued its Report.

274. With respect to the European Communities' reference to Article 11 of the DSU, we note that the European Communities clarified, at the oral hearing, that it was not invoking Article 11 as the basis of a separate claim. The European Communities explained that, rather, it made reference to Article 11 of the DSU as a supporting argument in the context of allegations of violation of other provisions of the GATT 1994 or the DSU. We also recall that the European Communities' Notice of Appeal makes no mention of Article 11 of the DSU. In these circumstances, we make no finding with respect to that provision.

³²⁹Appellate Body Report, *US – Upland Cotton*, para. 272.

IX. The European Communities' Notice of Appeal (United States)

275. In its appellee's submission, the United States contends that the European Communities' Notice of Appeal does not satisfy the requirements of Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, because it does not contain an indicative list of the paragraphs of the US Panel Report containing the alleged errors.³³⁰ The United States further submits that the Notice of Appeal fails to comply with Rule 20(2)(d)(i), because several paragraphs of the Notice of Appeal speak of "erroneous findings" of the Panel without identifying which findings are alleged to be erroneous. In particular, the United States takes issue with paragraph 2(a), (c), and (d) of the Notice of Appeal. The United States requests that we dismiss the appeal for these reasons.

276. In addition, the United States asserts that the Notice of Appeal makes no mention of a claim under Article 11 of the DSU. Yet, the United States notes that the European Communities' appellant's submission contains several allegations of violation of Article 11 of the DSU. The United States requests that, in any event, the Appellate Body should consider the European Communities' Article 11 claims as not properly before it.³³¹

277. In reply, the European Communities does not dispute that its Notice of Appeal did not identify the specific paragraphs of the US Panel Report containing the alleged errors. The European Communities argues, however, that none of the participants or third participants had difficulty in identifying the scope and content of the Notice of Appeal. Moreover, with respect to the alleged failure to list in its Notice of Appeal a claim under Article 11 of the DSU, the European Communities accepts that Article 11 of the DSU is indeed not identified in the Notice of Appeal. However, the European Communities clarified, at the oral hearing, that it did not invoke Article 11 as the basis of a claim, but rather as a supporting argument.³³²

278. Rule 20(2)(d) of the *Working Procedures* provides that a Notice of Appeal shall include the following information:

[A] brief statement of the nature of the appeal, including:

- (i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;

³³⁰United States' appellee's submission, para. 128.

³³¹United States' appellee's submission, para. 133.

³³²European Communities' response to questioning at the oral hearing.

- (ii) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
- (iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

279. In its Notice of Appeal, the European Communities "seeks review" of seven "issues of law and legal interpretations" contained in the US Panel Report. The Notice of Appeal, however, does not provide a list of the legal provisions of the covered agreements that the Panel is alleged to have erred in interpreting or applying, as required by Rule 20(2)(d)(ii) of the *Working Procedures*. Furthermore, the Notice of Appeal does not contain an "indicative list of the paragraphs of the panel report containing the alleged errors", as required under Rule 20(2)(d)(iii).

280. Rule 20(2)(d) does not stipulate what consequences flow from a failure to meet its requirements. In assessing the potential consequences, we are mindful of the due process function that this Rule fulfils. The Appellate Body recognized in *US – Countervailing Measures on Certain EC Products*:

... the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively.³³³

281. The Appellate Body stated in that case that the requirements of Rule 20(2) "serve to ensure that the appellee also receives notice, albeit brief, of the 'nature of the appeal' and the 'allegations of errors' by the panel."³³⁴ The Appellate Body held, in *Japan – Apples*, that "an evaluation of the sufficiency of a Notice of Appeal must examine whether the appellee received notice therein of the issues to be argued on appeal".³³⁵

282. In keeping with this approach, we assess, in the present case, whether the United States was put on notice of the alleged errors of law and legal interpretations in the US Panel Report by the European Communities' Notice of Appeal. We first address the European Communities' omission to refer to specific paragraphs of the US Panel Report in its Notice of Appeal. Thereafter, we address the United States' allegation that various claims by the European Communities under Article 11 of the

³³³ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62.

³³⁴ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62.

³³⁵ Appellate Body Report, *Japan – Apples*, para. 121.

DSU are not properly before the Appellate Body because they were not included in the Notice of Appeal.

283. The European Communities' Notice of Appeal identifies seven distinct legal issues. However, it makes no mention of any paragraph number of the US Panel Report to which the issues appealed relate. Nonetheless, we consider that the United States was in a position to discern the issues raised in the European Communities' Notice of Appeal. The European Communities has provided a brief description of each legal issue it raises on appeal. The fact that the United States has provided a comprehensive appellee's submission responding to all the issues of which the European Communities seeks review, suggests to us that the United States was, in fact, in a position to identify the Panel findings the European Communities is appealing, and did not suffer prejudice from the failure of the European Communities to provide a list of relevant paragraphs of the US Panel Report in its Notice of Appeal. Furthermore, we note that, in response to questioning at the oral hearing, the United States confirmed that it was not alleging that it had been prejudiced by the absence of paragraph numbers of the US Panel Report in the European Communities' Notice of Appeal. We therefore consider that, with respect to items (a)–(g) set out in paragraph 2 of the Notice of Appeal, the United States was in the position to "know the case [it had] to meet"³³⁶, and was thus placed on notice of the issues raised in the European Communities' Notice of Appeal. The formal defects in the Notice of Appeal thus do not give rise to procedural detriment of the kind that would warrant the dismissal of the European Communities' appeal. We therefore *find* that the deficiencies in the European Communities' Notice of Appeal do not lead to dismissal of the European Communities' appeal.

284. We turn now to the United States' request that we dismiss the European Communities' claims under Article 11 of the DSU as not properly before the Appellate Body because such claims were not included in the Notice of Appeal.³³⁷ The United States submits that, while the European Communities' Notice of Appeal nowhere contains a claim under Article 11 of the DSU, the European Communities' appellant's submission asserts, in several places, that the Panel acted inconsistently with Article 11. Therefore, the United States requests the Appellate Body to consider the European Communities' claims under Article 11 as not properly before it, consistent with the Appellate Body's treatment of this issue in previous cases.

³³⁶ Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 74.

³³⁷ United States' appellee's submission, para. 133.

285. The European Communities clarified, at the oral hearing, that it was not invoking Article 11 as the basis of a separate claim. The European Communities explained that, rather, it made reference to Article 11 of the DSU as a supporting argument in the context of its claims under other provisions of the GATT 1994 or the DSU. In our view, a party is not prevented from making reference to Article 11 in support of an argument, and we do not find fault with the European Communities for making various references to Article 11 in its appellant's submission. However, as no separate claim under Article 11 of the DSU has been raised in the Notice of Appeal, and as we have not been asked to make findings with respect to Article 11, we make no such findings.

286. For all these reasons, we *reject* the United States' request to dismiss the European Communities' appeal on account of the European Communities' failure to comply with the requirement set out in Rule 20(2)(d) of the *Working Procedures*. Moreover, as the European Communities has not included claims based on Article 11 of the DSU in its Notice of Appeal, and has clarified that it has made no separate claim based on Article 11, we make no findings in this respect.

X. Article XIII of the GATT 1994 (Ecuador and United States)

287. We turn next to the European Communities' appeal of the Panel's finding that the duty-free tariff quota reserved for bananas of ACP origin falls within the scope of Article XIII of the GATT 1994 and was, therefore, inconsistent with Article XIII:1, the chapeau of Article XIII:2, and Article XIII:2(d) of the GATT 1994.³³⁸ As a preliminary issue, we address the European Communities' appeal in the Ecuador case of the Panel's finding that "the fact that a Member adopts a measure to implement a suggestion pursuant to Article 19.1 would [not] prevent another Member from challenging, pursuant to Article 21.5, the compliance of such measure with the covered agreements."³³⁹

288. Section A summarizes the findings made in the original proceedings and by the first Article 21.5 panel requested by Ecuador. Section B describes the measures taken by the European Communities to comply with the DSB's recommendations and rulings. The current Article 21.5 proceedings are summarized in section C. Section D provides an overview of the arguments raised on appeal by the participants and the third participants. Finally, in section E, we discuss the issues appealed.

³³⁸Ecuador Panel Report, para. 7.382; US Panel Report, para. 7.720.

³³⁹Ecuador Panel Report, para. 7.251.

A. *The Original Proceedings and the First Ecuador Article 21.5 Panel*

289. In the original *EC – Bananas III* proceedings, the allocation of tariff quota shares under the European Communities' bananas import regime in force at that time was found to be inconsistent with Article XIII of the GATT 1994. This inconsistency was found not to be justified by either the "Bananas Framework Agreement"³⁴⁰ annexed to the European Communities' GATT Schedule of Concessions, or the *Agreement on Agriculture*. The Appellate Body also found that the "Lomé Waiver"³⁴¹ from Article I did not justify inconsistencies with Article XIII of the GATT 1994.³⁴² On 25 September 1997, the DSB adopted the original panel and Appellate Body Reports in *EC – Bananas III* and recommended that the European Communities bring its measures into conformity with the covered agreements.³⁴³

290. The import regime introduced pursuant to EC Regulation 1637/98 maintained a tariff quota of 857,000 mt reserved for duty-free imports of bananas from traditional ACP suppliers and tariff quotas totalling 2,553,000 mt for imports from third countries and non-traditional ACP suppliers.³⁴⁴ Under these tariff quotas, imports from third countries were subject to an in-quota duty of ECU75/mt, while imports from ACP suppliers were duty free. Out-of-quota imports from ACP suppliers benefited from an ECU200 preference over the out-of-quota duty applicable to imports from non-ACP suppliers.

291. On 18 December 1998, Ecuador initiated proceedings pursuant to Article 21.5 of the DSU, alleging that the measures taken by the European Communities failed to implement the DSB's recommendations and rulings. The first Article 21.5 panel requested by Ecuador found that the measures taken to comply by the European Communities were inconsistent with Articles I and XIII of

³⁴⁰Framework Agreement on Bananas, annexed to both EC Schedule LXXX and EC Schedule CXL, originally negotiated in 1994 by the European Communities with Colombia, Costa Rica, Nicaragua, and Venezuela (reproduced in Annex VII attached to this Report).

³⁴¹The Fourth ACP-EEC Convention of Lomé, Decision of the CONTRACTING PARTIES of 9 December 1994, L/7604, 19 December 1994, extended by EC – The Fourth ACP-EEC Convention of Lomé, Extension of Waiver, Decision of the WTO General Council of 14 October 1996, WT/L/186, 18 October 1996 (the "Lomé Waiver").

³⁴²The Appellate Body and the original panel also found that licence allocation procedures violated Articles I:1 and III:4 of the GATT 1994 and Articles II and XVII of the GATS. (Appellate Body Report, *EC – Bananas III*, para. 225) The original panel and the Appellate Body found that this violation of Article I:1 was not justified by the Lomé Waiver from Article I, because it was not required by the *Lomé Convention*.

³⁴³On 20 July 1998, the European Communities adopted EC Regulation 1637/98 amending EEC Regulation 404/93 and, on 28 October 1998, adopted EC Regulation 2362/98 repealing EEC Regulation 1442/93.

³⁴⁴Of these 2,253,000 mt, a tariff quota of 2.2 million mt was bound in the European Communities' Schedule and the European Communities opened an autonomous tariff quota of 353,000 mt due to the enlargement of the European Communities in 1995.

the GATT 1994.³⁴⁵ The first Ecuador Article 21.5 panel report was not appealed and was adopted by the DSB on 6 May 1999.³⁴⁶

292. The first Ecuador Article 21.5 panel made suggestions, pursuant to Article 19.1 of the DSU, that the European Communities could bring its measures into conformity by: (i) applying a tariff-only system without a tariff quota that could include a preference for ACP countries covered by a waiver or a free trade agreement consistent with Article XXIV of the GATT 1994; (ii) applying a tariff-only system with a duty-free tariff quota for ACP countries covered by a suitable waiver; or (iii) maintaining its bound and autonomous most-favoured nation ("MFN") tariff quotas, either without allocating country-specific shares or by allocating such shares by agreement with all substantive suppliers consistently with Article XIII:2 of the GATT 1994. The MFN tariff quota could be combined with the extension of duty-free treatment to ACP countries covered by the Lomé Waiver from Article I of the GATT 1994 or with a duty-free tariff quota for ACP countries, provided that a waiver from Article XIII of the GATT 1994 was obtained.³⁴⁷

293. Following arbitration proceedings pursuant to Article 22.6 of the DSU, the United States and Ecuador requested and obtained authorization from the DSB to suspend concessions or other obligations.³⁴⁸

B. *Measure Taken to Comply*

294. Following the signing, in April 2001, of the Understandings on Bananas between the European Communities and Ecuador and between the European Communities and the United States, and the adoption, in November 2001, at the Doha Ministerial Conference of two waivers, from Article I and from Article XIII of the GATT 1994, the European Communities further amended its bananas import regime.

³⁴⁵The first Ecuador Article 21.5 panel also found that the revised licence allocation procedures were also inconsistent with Articles II and XVII of the GATS. (Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.134 and 7.1)

³⁴⁶WT/DSB/M/61.

³⁴⁷Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.156-6.158.

³⁴⁸Pursuant to arbitrations on the level of suspension of concessions and other obligations in the years 1999 and 2000, the DSB authorized the United States to suspend concessions and other obligations up to an amount of US\$191.4 million per year, and Ecuador up to an amount of US\$201.6 million per year. (Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 8.1; Decision by the Arbitrators, *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 173) The United States suspended tariff concessions; Ecuador, however, did not exercise its right to suspend concessions and other obligations under the GATT 1994, the GATS, or the *TRIPS Agreement*.

295. EC Regulation 216/2001 reorganized the EC Bananas Import Regime into tariff quotas A and B, totalling 2,553,000 mt, and tariff quota C, at the level of 850,000 mt. These three tariff quotas were open for imports of bananas from third countries. However, in-quota imports of ACP bananas entered duty free and out-of-quota imports entered with a tariff preference of €300/mt over the MFN duty specified in the European Communities' common customs tariff.³⁴⁹ Imports from non-ACP suppliers under tariff quotas A and B were subject to an in-quota duty of €75/mt and imports under tariff quota C were subject to a duty of €300/mt. EC Regulation 216/2001 established that the Commission, on the basis of an agreement with the WTO Members with a substantial interest in the supply of bananas, would allocate tariff quotas A and B among supplier countries.³⁵⁰

296. EC Regulation 2587/2001 further amended the European Communities' common market organization in order to implement Phase II of the Understandings on Bananas for the period from 1 January 2002 to 31 December 2005. EC Regulation 2587/2001 modified the tariff quotas in the following ways: (i) tariff quota A of 2.2 million mt was maintained, while tariff quota B was increased to 453,000 mt; (ii) within tariff quotas A and B, imports from third countries were subject to a duty of €75/mt, while imports from ACP countries entered duty free; and (iii) tariff quota C, reserved for imports from ACP countries and subject to a zero duty, was decreased to 750,000 mt.³⁵¹ Out-of-quota imports from ACP countries enjoyed a tariff preference of €300/mt over imports from non-ACP supplier countries.³⁵²

297. Finally, on 29 November 2005, the European Communities adopted EC Regulation 1964/2005, which introduced the EC Bananas Import Regime at issue in these Article 21.5 proceedings. The new import regime entered into force on 1 January 2006 and established a tariff-only regime for imports from non-ACP suppliers with an MFN tariff rate of €176/mt for bananas. In addition, it established a zero duty preference for 775,000 mt of imports from ACP countries.³⁵³ On 20 December 2007, the European Communities adopted EC Regulation 1528/2007, which repealed EEC Regulation 404/93 and modified EC Regulation 1964/2005, eliminating the 775,000 mt tariff quota for duty-free imports from ACP countries.

³⁴⁹EC Regulation 216/2001, Article 18.4, as amended.

³⁵⁰EC Regulation 216/2001, Article 19.1, as amended.

³⁵¹EC Regulation 2587/2001, Articles 18.1, 18.2, and 18.3, as amended.

³⁵²EC Regulation 2587/2001, Article 18.4, as amended.

³⁵³See *supra*, footnote 11.

C. *The Current Article 21.5 Proceedings*

298. Before the Panel, Ecuador and the United States (the complainants) claimed that the EC Bananas Import Regime was inconsistent with Article XIII:1 and 2 of the GATT 1994.³⁵⁴

299. The complainants argued that, notwithstanding the expiration of the Doha Article XIII Waiver³⁵⁵ on 31 December 2005, the European Communities continued to apply a tariff quota at the level of 775,000 mt reserved for duty-free imports from ACP countries. Imports from all other supplier countries did not have access to the ACP duty-free tariff quota and were subject to the MFN tariff at the level of €176/mt.³⁵⁶ The complainants claimed that the European Communities' measure was inconsistent with Article XIII:1 of the GATT 1994, in that banana imports of non-ACP origin were not "similarly restricted" as were imports of ACP bananas because non-ACP suppliers were excluded from that duty-free tariff quota.³⁵⁷ The complainants also argued that the measure was inconsistent with the chapeau of Article XIII:2 because it discriminated between ACP bananas and like non-ACP bananas in the application of the tariff quota; neither did it aim at a distribution of trade approaching as closely as possible the tariff quota shares, which the various Members might be expected to obtain in the absence of such restrictions.³⁵⁸ Finally, the complainants claimed that the measure was inconsistent with Article XIII:2(d) because the allocation of the duty-free tariff quota, extended exclusively to ACP suppliers, bears no relation to trading patterns in the world market or the European Communities' market.³⁵⁹

300. The European Communities raised a preliminary objection in the Ecuador case. It argued that Ecuador's claim under Article XIII should be rejected because, in enacting the challenged measure, the European Communities had followed a suggestion for implementation made by the first Ecuador Article 21.5 panel, namely, "applying a tariff-only system with a duty-free tariff quota for ACP countries covered by a suitable waiver".³⁶⁰ On the substance of the Article XIII claims, the European Communities contended that Article XIII was not applicable to the challenged measure because the "cap" on the tariff preference for ACP suppliers fell within the scope of Article I:1 of the GATT 1994.³⁶¹ The European Communities also argued that the cap on duty-free imports from ACP

³⁵⁴Ecuador Panel Report, para. 7.202; US Panel Report, para. 7.608.

³⁵⁵Fourth Session of the Ministerial Conference held in Doha, European Communities – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Decision of 14 November 2001, WT/MIN(01)/16; WT/L/437 (Panel Exhibit US-5). The Doha Article XIII Waiver expired on 31 December 2005.

³⁵⁶Ecuador Panel Report, para.7.205; US Panel Report, paras. 7.613 and 7.614.

³⁵⁷Ecuador Panel Report, para.7.205; US Panel Report, para. 7.613.

³⁵⁸Ecuador Panel Report, para.7.206; US Panel Report, para. 7.614.

³⁵⁹Ecuador Panel Report, para. 7.208; US Panel Report, para. 7.614.

³⁶⁰Ecuador Panel Report, para. 7.209.

³⁶¹Ecuador Panel Report, para. 7.210; US Panel Report, para. 7.617.

suppliers was not a "restriction" within the meaning of Article XIII because the cap on the tariff preference was imposed on ACP countries and not on the non-ACP supplier countries.³⁶² According to the European Communities, Article XIII did not require the extension to all Members of the tariff preference granted to ACP countries.³⁶³ In the Ecuador case, the European Communities further argued that Ecuador could not challenge the limit on the tariff preference for imports from ACP countries, because this cap did not result in any nullification or impairment of benefits accruing to Ecuador.³⁶⁴ To the contrary, the cap on duty-free imports from ACP countries benefited non-ACP supplier countries, including Ecuador.

301. The Panel considered, first, the preliminary objection raised by the European Communities against Ecuador's claim under Article XIII. According to the Panel, to the extent the European Communities implemented the suggestion made pursuant to Article 19.1 by the first Ecuador Article 21.5 panel, the Panel was not precluded from conducting the assessment requested by Ecuador under Article 21.5 in these proceedings.³⁶⁵ The Panel reasoned that Ecuador was not asking for an assessment of the conformity with the covered agreements of the *suggestions* made by the first Ecuador Article 21.5 panel but, rather, of the *measure* actually taken by the European Communities to implement such suggestions.³⁶⁶ The Panel held that the conformity with the covered agreements of any measure taken by a Member to implement a suggestion will depend on the actual implementation of the suggestion by the Member in question.³⁶⁷ The Panel concluded that:

... once the respondent has taken the measure allegedly to implement a suggestion under Article 19.1, to the extent that the complainant contests the existence of such measures or their conformity with the covered agreements, existence and conformity with the covered agreements may be verified, if requested by the complainant, by a compliance panel pursuant to Article 21.5.³⁶⁸

302. The Panel also noted that:

... in addressing the European Communities' first preliminary objection, the Panel does not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador. Therefore, the Panel does not need to address, in the context of the European Communities' first preliminary objection, whether the EC has fulfilled the two parts of the second suggestion of that

³⁶²Ecuador Panel Report, para. 7.211; US Panel Report, para. 7.616.

³⁶³Ecuador Panel Report, para. 7.212; US Panel Report, para. 7.617.

³⁶⁴Ecuador Panel Report, para. 7.213.

³⁶⁵Ecuador Panel Report, para. 7.238.

³⁶⁶Ecuador Panel Report, para. 7.228.

³⁶⁷Ecuador Panel Report, para. 7.247.

³⁶⁸Ecuador Panel Report, para. 7.262.

compliance panel, in particular whether the term "suitable waiver" refers to a waiver from only Article I or also from Article XIII of the GATT 1994.³⁶⁹

303. Regarding the relationship between Articles I and XIII of the GATT 1994, the Panel reasoned that, "if there was some overlap between those two Articles, giving effect to Article XIII would not nullify the effect of Article I".³⁷⁰ The Panel also relied on the findings of the first Ecuador Article 21.5 panel that Article XIII did not only apply to quantitative prohibitions and restrictions, but that Article XIII:5 subjected tariff quotas to the requirements of Article XIII.³⁷¹

304. In respect of the claim under Article XIII:1, the Panel found that the duty-free tariff quota for ACP bananas at a level of 775,000 mt represented a quantitative restriction, within the meaning of Article XIII:1, on banana imports from non-ACP suppliers that "cannot have access to that quantitatively limited benefit."³⁷² The Panel found that imports from ACP countries were not similarly restricted as were like imports from non-ACP suppliers. Therefore, the duty-free tariff quota reserved for ACP countries was inconsistent with Article XIII:1.³⁷³

305. Having found that banana imports from Ecuador were "restricted" within the meaning of Article XIII:1, the Panel also rejected, in the Ecuador case, the European Communities' argument that, even assuming *arguendo* that there was a quantitative restriction imposed on ACP countries, Ecuador could not successfully challenge it, because this quantitative restriction imposed on ACP countries would not result in any nullification or impairment of any benefit accruing to Ecuador.³⁷⁴

306. In respect of Article XIII:2 of the GATT 1994, the Panel found that:

... given that MFN countries are excluded from the European Communities' preferential ACP tariff quota, by definition, the ACP preference cannot and does not "aim at a distribution of trade in [bananas] approaching as closely as possible the shares which the various [Members, including both ACP and MFN countries] might be expected to obtain in the absence of such restrictions".³⁷⁵

³⁶⁹Ecuador Panel Report, para. 7.265.

³⁷⁰Ecuador Panel Report, para. 7.299; US Panel Report, para. 7.654.

³⁷¹Ecuador Panel Report, para. 7.304; US Panel Report, para. 7.659.

³⁷²Ecuador Panel Report, para. 7.332; US Panel Report, para. 7.679.

³⁷³Ecuador Panel Report, para. 7.349 and 7.350; US Panel Report, paras. 7.697 and 7.698.

³⁷⁴Ecuador Panel Report, para. 7.337.

³⁷⁵Ecuador Panel Report, para. 7.366; US Panel Report, para. 7.708.

The Panel thus found that, on its face, the EC Bananas Import Regime, including its ACP duty-free tariff quota, was inconsistent with the chapeau of Article XIII:2.³⁷⁶

307. Finally, the Panel concluded that the ACP duty-free tariff quota, which is granted exclusively to some WTO Members and not to others, including substantial suppliers, does not comply with the requirements of Article XIII:2(d) because, in the absence of an agreement on the allocation of tariff quota shares, it does not result in an allocation of quota shares to Members having a substantial interest in supplying the product shares based upon the proportions supplied by such Members during a previous representative period.³⁷⁷

D. *Claims and Arguments on Appeal*

308. In the Ecuador case, the European Communities requests the Appellate Body to reverse the Panel's finding that the adoption by a Member of a measure that implements a suggestion made by a panel pursuant to Article 19.1 of the DSU does not prevent another Member from challenging, in Article 21.5 proceedings, the consistency of that measure with the covered agreements. The European Communities also challenges the Panel's finding that, "[e]ven if there was a presumption of the legality of measures taken to implement a suggestion pursuant to Article 19.1, there is nothing in the DSU suggesting that the alleged legality of such measures could not be reviewed by a compliance panel."³⁷⁸

309. In both the Ecuador and United States cases, the European Communities requests the Appellate Body to reverse the Panel's interpretation of Article XIII of the GATT 1994 and the Panel's consequential findings that the EC Bananas Import Regime was inconsistent with Article XIII:1, the chapeau of Article XIII:2, and Article XIII:2(d).³⁷⁹ In particular, the European Communities argues that the limit on the tariff preference for ACP bananas falls within the scope of Article I:1 and does not constitute a "quantitative restriction" within the meaning of Article XIII.³⁸⁰ Moreover, the European Communities contends that the quantitative limitation applies to the preference granted to ACP countries and is not imposed on the allegedly aggrieved Members—that is, the non-ACP suppliers—as would be required in order for Article XIII to apply.³⁸¹

³⁷⁶Ecuador Panel Report, para. 7.366; US Panel Report, para. 7.708.

³⁷⁷Ecuador Panel Report, para. 7.377; US Panel Report, para. 7.715.

³⁷⁸European Communities' appellant's submission, para. 80 (Ecuador) (quoting Ecuador Panel Report, para. 7.251).

³⁷⁹European Communities' appellant's submissions, paras. 113, 130, and 134 (Ecuador), paras. 130, 147, and 151 (US).

³⁸⁰European Communities' appellant's submissions, para. 109 (Ecuador), para. 126 (US).

³⁸¹European Communities' appellant's submissions, para. 133 (Ecuador), para. 150 (US).

310. In the United States case only, the European Communities emphasizes that "the United States has never been a banana supplier to the European Communities and is not likely to become such a banana supplier in the future."³⁸² For that reason, the ACP tariff preference could not be inconsistent with the requirement of the chapeau of Article XIII:2 that import restrictions aim at a distribution of trade approaching as closely as possible the shares in the absence of the restriction. This is so because, even in the absence of the ACP tariff preference, the United States' share of trade in bananas in the European Communities would be zero.³⁸³

311. In the Ecuador case, the European Communities requests the Appellate Body to reverse the Panel's finding that the limit on the tariff preference for imports of ACP bananas caused nullification or impairment to Ecuador's interests under the covered agreements; rather, it was a benefit for Ecuador that the ACP tariff preference was limited.³⁸⁴

312. Ecuador requests the Appellate Body to uphold the Panel's finding that it could review under Article 21.5 the conformity of the measures taken to comply by the European Communities, even though the European Communities had taken the measures to implement a suggestion made by the first Ecuador Article 21.5 panel pursuant to Article 19.1 of the DSU. Ecuador argues that "nothing in the DSU suggests that the absence of an appeal ... of a panel[']s suggestion immunizes measures taken to implement that suggestion from an Article 21.5 review."³⁸⁵

313. As to the substance of their Article XIII claims, Ecuador and the United States contend that the Panel was correct to find, consistent with the reports of earlier panels, arbitrators, and the Appellate Body in this continuing dispute, that the duty-free tariff quota for ACP bananas constituted a restriction within the meaning of Article XIII, and violated Article XIII:1, the chapeau of Article XIII:2, and Article XIII:2(d).³⁸⁶ Ecuador and the United States emphasize that Article XIII:5 makes the requirements of Article XIII applicable to any tariff quota, and that the European Communities' duty-free tariff quota for ACP suppliers constituted a restriction on non-ACP suppliers that were denied access to the duty-free quota.³⁸⁷

314. Ecuador further agrees with the Panel's rejection of the European Communities' argument that "there was no nullification or impairment of benefits, essentially because ... the tariff quota helped Ecuador by limiting duty-free competition from ACP countries relative to the competition that would

³⁸²European Communities' appellant's submission, para. 153 (US).

³⁸³European Communities' appellant's submission, para. 153 (US).

³⁸⁴European Communities' appellant's submission, para. 146 (Ecuador).

³⁸⁵Ecuador's appellee's submission, para. 35.

³⁸⁶Ecuador's appellee's submission, paras. 41 and 42; United States' appellee's submission, para. 10.

³⁸⁷Ecuador's appellee's submission, para. 47; United States' appellee's submission, para. 35.

have existed if there had been no quantitative limitations."³⁸⁸ Ecuador claims that "presumption of nullification or impairment ... is not a question of trade flows, but rather of [trade] opportunities."³⁸⁹

315. The ACP Countries³⁹⁰ support the arguments made by the European Communities in relation to Article XIII, while Panama and Nicaragua support the position of Ecuador and the United States in this regard.³⁹¹

E. *Analysis of the Appealed Findings of the Panel under Article XIII of the GATT 1994*

316. We begin our analysis by addressing the European Communities' appeal of the Panel's finding regarding the European Communities' preliminary objection to Ecuador's claim under Article XIII of the GATT 1994, and the issue of the legal effect of suggestions made pursuant to Article 19.1 of the DSU. We then turn to the substantive issues appealed in relation to Article XIII:1 and 2 of the GATT 1994.

1. Legal Effect of Suggestions Made pursuant to Article 19.1 of the DSU (Ecuador)

317. The European Communities submits that Ecuador's claim under Article XIII should be dismissed because "Ecuador's claims are in reality a challenge on the measures *suggested* by the [first Ecuador Article 21.5] Panel, rather than on the measures *actually taken* by the European Communities."³⁹² The European Communities argues that, once a panel or an Appellate Body report, containing suggestions made pursuant to the second sentence of Article 19.1 of the DSU, has been adopted, "the consistency of the *measures suggested* by the original panel with the covered

³⁸⁸Ecuador's appellee's submission, para. 48.

³⁸⁹Ecuador's appellee's submission, para. 49.

³⁹⁰The ACP Countries (see *supra*, footnote 209) contend that the Panel incorrectly interpreted and applied Article XIII:1 because the "applicable non-discrimination rule is contained in Article I ... not in Article XIII". The ACP Countries submit that a "restriction" requires a "limitation" be applied on the imported product, which, under Article XIII:1, "necessarily implies a *quantitative* element". However, the ACP Countries maintain that the Panel failed to consider the consistent practice of WTO Members to impose ceilings on preferential imports as justified by the Enabling Clause or Article XXIV of the GATT 1994. According to the ACP Countries, if limitations on preferential access fell afoul of Article XIII, and if preferential access were capped, then virtually all duty-free tariff quotas used in the context of free trade agreements would presumably be WTO-inconsistent. (Third participants' submissions of the ACP Countries, paras. 57-62 (Ecuador), paras. 54-59 (US))

³⁹¹Panama and Nicaragua agree with the Panel that the ACP duty-free tariff quota violates Article XIII:1 and 2. Panama and Nicaragua argue that the Panel correctly determined that an exclusive duty-free tariff quota that is reserved for ACP suppliers and denies all access for MFN suppliers represents a "restriction" on those MFN suppliers within the meaning of Article XIII:1. Panama and Nicaragua also submit that the European Communities' ACP duty-free tariff quota violates the requirements of the chapeau and paragraph (d) of Article XIII:2, because the European Communities' market has been subject to continuous discrimination, which makes it impossible to define a "previous representative period". (Third participants' submissions of Panama and Nicaragua, paras. 50-52 (Ecuador), paras. 37-39 (US))

³⁹²European Communities' first written submission to the Panel, para. 88 (Ecuador). (original emphasis)

agreement cannot be challenged by the complaining party before an Article 21.5 panel".³⁹³ This is so because of that party's obligation to "unconditionally accept", pursuant to Article 17.14 read in combination with Article 16.4 of the DSU, the DSB's recommendations and rulings, which also covers any suggestions contained therein.

318. The European Communities also argues that, if measures suggested by a panel or the Appellate Body in previous proceedings are challenged before an Article 21.5 panel, and the Article 21.5 panel is "satisfied that the challenged measures are indeed the measures suggested by the original panel", then the Article 21.5 panel "should find that they are consistent with the covered agreements without any further analysis."³⁹⁴ The European Communities contends that, in the present proceedings, the Panel failed "to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador"³⁹⁵, and erroneously concluded that Ecuador's disagreement as to whether the European Communities' bananas import regime complied with the suggestions made in 1999 was sufficient to reject the European Communities' argument to the contrary.³⁹⁶

319. The Panel noted that Ecuador was asking it to assess the consistency with the covered agreements of the *measures* the European Communities claims to have taken to comply with a suggestion for implementation made by the first Ecuador Article 21.5 panel, not to assess the conformity with WTO law of the suggestion itself.³⁹⁷ The Panel did not focus, as the European Communities argues, on whether the measures taken to comply conformed to any of the suggestions made by the first Ecuador Article 21.5 panel; rather, the Panel examined directly whether the EC Bananas Import Regime was consistent with the covered agreements. The Panel distinguished between suggestions made under Article 19.1 by a panel or the Appellate Body, on the one hand, and the measures actually taken by Members to implement such suggestions so as to comply with the DSB recommendations and rulings, on the other hand. The Panel noted that Article 21.5 creates an unconditional right that any dispute resulting from "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" can be decided through recourse to compliance proceedings.

³⁹³European Communities' appellant's submission, para. 88 (Ecuador). (emphasis added)

³⁹⁴European Communities' appellant's submission, para. 90 (Ecuador).

³⁹⁵European Communities' appellant's submission, para. 93 (Ecuador).

³⁹⁶European Communities' appellant's submission, para. 93 (Ecuador).

³⁹⁷Ecuador Panel Report, para. 7.228.

320. Article 19.1 of the DSU, entitled "Panel and Appellate Body Recommendations", reads:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. (footnotes omitted)

321. Suggestions made by panels or the Appellate Body pursuant to Article 19.1 of the DSU regarding ways of implementation form part of panel or Appellate Body reports adopted by the DSB in previous proceedings. The DSU does not expressly address the question of the legal status of suggestions that form part of a report adopted by the DSB, nor does it specify the legal consequences when a Member chooses to implement DSB recommendations and rulings by following a suggestion for implementation. A Member may choose whether or not to follow a suggestion. The use of the term "could" in Article 19.1 clarifies that Members are not obliged to follow suggestions for implementation.

322. Suggestions made pursuant to Article 19.1 are not in themselves the subject of review by a compliance panel. Article 21.5 of the DSU only refers to "measures taken to comply with the recommendations and rulings" and not to measures taken to comply with suggestions issued pursuant to the second sentence of Article 19.1. This confirms that an Article 21.5 panel's power of review is limited to the assessment of the existence or consistency with the covered agreements of the measures taken to comply with recommendations and rulings of the DSB. Thus, what matters in Article 21.5 proceedings is whether the result of implementation—whatever means are chosen—brings about substantive compliance with the DSB recommendations and rulings. As the Panel noted, the conformity of the measures taken to comply with the covered agreements will depend on whether actual implementation of the DSB recommendations and rulings has been achieved by the Member concerned.³⁹⁸ Therefore, we agree with the Panel that the measures actually taken by a Member to comply with DSB recommendations and rulings, whether or not they follow the suggestions for implementation made in previous proceedings, are the subject matter of the challenge in Article 21.5 proceedings.

323. We consider that suggestions made by panels or the Appellate Body may, if correctly and fully implemented, lead to compliance with the DSB's recommendations and rulings. However, full compliance with DSB rulings and WTO-consistency of the measures actually taken to comply cannot be presumed simply because a Member declares that its measures taken to comply conform to a

³⁹⁸Ecuador Panel Report, para. 7.247.

suggestion made under Article 19.1 of the DSU. As pointed out above, Article 21.5 proceedings focus on the measure actually taken to comply, not the ways in which the Member could implement the recommendations and rulings. Following a suggestion does not guarantee substantive compliance with the recommendations and rulings by the DSB. Whether such compliance has been achieved needs to be determined through Article 21.5 proceedings. The adoption of a panel or Appellate Body report by the DSB makes the recommendations and rulings therein binding upon the parties. As noted earlier, such adoption by the DSB does not make suggestions for implementation binding upon the parties (especially, where, as in this case, the first Ecuador Article 21.5 panel made several suggestions); nor does DSB adoption mean that actions taken to implement suggestions must be presumed to be WTO-consistent or shielded from review in Article 21.5 proceedings.

324. We, therefore, agree with the Panel that Ecuador had the right to challenge before an Article 21.5 panel the European Communities' measure taken to comply, whether or not such measure implemented a suggestion made by an earlier panel or the Appellate Body. The function of Article 21.5 proceedings is to resolve disagreement over compliance. Even if the measure taken to comply conformed to a suggestion made, this would not bar Ecuador from bringing Article 21.5 proceedings to determine whether the implementing measure achieves full compliance with the DSB recommendations and rulings. We do not consider that, as a consequence of the DSB adoption of a panel or Appellate Body report containing a suggestion, the measure implementing such a suggestion can be presumed to be WTO-consistent.³⁹⁹ In our view, a DSU rule that establishes a legal presumption of conformity should do so in clear and unambiguous terms.⁴⁰⁰ Therefore, we do not see how the terms in Article 19.1, second sentence, "imply" a legal presumption, particularly as this provision has to be read in the context of Article 21.5, which entitles Members to the review of implementation measures in compliance proceedings.

325. Suggestions made by panels or the Appellate Body may provide useful guidance and assistance to Members and facilitate implementation of DSB recommendations and rulings, particularly in complex cases. However, the fact that a Member has chosen to follow a suggestion does not create a presumption of compliance in Article 21.5 proceedings. The fact that a Member has chosen to follow a suggestion is part of the history and background of the measure at issue in Article 21.5 proceedings, but it should not in itself pre-empt a panel's assessment of compliance under

³⁹⁹European Communities' appellant's submission, para. 90 (Ecuador).

⁴⁰⁰For example, Article 3.8 of the DSU, which establishes a legal presumption that a breach of WTO rules constitutes nullification or impairment, does so in clear and unambiguous terms. Similarly, a legal presumption of conformity with the GATT 1994 is established in clear and unambiguous terms by Article 2.4 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* for measures conforming to that Agreement.

Article 21.5. In our view, suggestions provide guidance, which is necessarily prospective in nature and cannot, therefore, take account of all circumstances in which implementation may occur.

326. In these circumstances, we consider that the Panel did not err when it decided to examine whether the EC Bananas Import Regime was consistent with the covered agreements, rather than examining whether it complied with the suggestions for implementation made by the first Ecuador Article 21.5 panel.

327. We therefore *uphold* the Panel's finding, in paragraphs 7.263 and 7.265 of the Ecuador Panel Report, that, to the extent that the European Communities argues that it has implemented a suggestion pursuant to Article 19.1 of the DSU, the Panel was not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador; and that, therefore, the Panel did not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador.

2. Articles XIII:1 and XIII:2 of the GATT 1994 (Ecuador and United States)

328. We now turn to the European Communities' appeal of the Panel's findings that the EC Bananas Import Regime was inconsistent with Article XIII:1, the chapeau of Article XIII:2, and Article XIII:2(d) of the GATT 1994.

(a) Article XIII:1 of the GATT 1994

329. The European Communities argues that the Panel misinterpreted the notion of "quantitative restriction" in Article XIII:1 of the GATT 1994. According to the European Communities, the limitation on the tariff preference for ACP suppliers does not fall within the scope of Article XIII:1 of the GATT 1994 because it does not constitute a "quantitative restriction" imposed on the imports of the "aggrieved Member".⁴⁰¹ The European Communities contends that the Panel "developed a theory pursuant to which a lower tariff offered to one Member [—the ACP zero tariff—] becomes automatically a 'quantitative restriction' on all other Members, provided that it is offered to only some [—775,000 mt—], and not all, quantities exported by the beneficiary".⁴⁰²

330. The Panel found that the EC Bananas Import Regime was a "tariff-quota-based import regime", with an in-quota zero duty reserved for 775,000 mt of ACP bananas and an out-of-quota duty of €176/mt for ACP imports in excess of the quota and for imports from all other countries.⁴⁰³

⁴⁰¹European Communities' appellant's submissions, para. 115 (Ecuador), para. 132 (US).

⁴⁰²European Communities' appellant's submissions, para. 105 (Ecuador), para. 122 (US).

⁴⁰³Ecuador Panel Report, para. 7.293; US Panel Report, para. 7.648.

According to the Panel, the EC Bananas Import Regime "confer[ed] a benefit, although a quantitatively limited one, to ACP countries, and Ecuador, like other MFN banana suppliers, [could not] have access to that quantitatively limited benefit"; and, "[b]y its very nature, such a benefit reserved for some Members generally represents a disadvantage for other Members."⁴⁰⁴ The Panel concluded that, under the terms of Article XIII:1, MFN imports are not similarly restricted because ACP suppliers have access to the duty-free tariff quota, while non-ACP suppliers are denied access to that quota⁴⁰⁵, and that, for the same reasons, the duty-free tariff quota fails to comply with the allocation rules set out in Article XIII:2 of the GATT 1994.⁴⁰⁶

331. Article XIII:1 of the GATT 1994, on "Non-discriminatory Administration of Quantitative Restrictions", states:

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.

332. The chapeau Article XIII:2 and Article XIII:2(d) of the GATT 1994 provide:

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.

⁴⁰⁴Ecuador Panel Report, para. 7.332. (footnote omitted) See also US Panel Report, para. 7.679.

⁴⁰⁵Ecuador Panel Report, para. 7.349; US Panel Report, para. 7.681.

⁴⁰⁶Ecuador Panel Report, para. 7.366; US Panel Report, para. 7.708.

333. Article XIII:5 of the GATT 1994 reads:

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.

334. We begin our analysis by considering the relationship between Article XI of the GATT 1994 on "General Elimination of Quantitative Restrictions" and Article XIII on "Non-discriminatory Administration of Quantitative Restrictions". Article XI:1 contains a general prohibition on quantitative restrictions. Article XI:2 provides for exceptions to the general prohibition in Article XI:1.⁴⁰⁷ A quantitative restriction that is lawful by reason of an exception under Article XI:2 must nevertheless satisfy the requirements of Article XIII in respect of its non-discriminatory administration.

335. In contrast to quantitative restrictions, tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I. Members are required, in accordance with Article II, to provide treatment no less favourable than that bound in their Schedules of Concessions. Accordingly, in-quota and out-of-quota tariffs must not exceed bound tariff rates, and import quantities made available under the tariff quota must not fall short of the scheduled amount. In addition, tariff quotas are, under the terms of Article XIII:5, made subject to the disciplines of Article XIII.

336. Article XIII has a dual function. It regulates the non-discriminatory administration of quantitative restrictions and also subjects the application of tariff quotas to these disciplines. Although the language of XIII:1 is facially more easily applied to quantitative restrictions, the text must be interpreted so as to ensure that the provisions of Article XIII are also applied to tariff quotas.

337. We interpret Article XIII:1 and XIII:2 in the following way. Applying Article XIII:1 to a tariff quota requires that the word "restriction" be read as a reference to a tariff quota. Article XIII:1 is then rendered thus: no tariff quota shall be applied by a Member on the importation of any product of the territory of any other Member, unless the importation of the like product of all third countries is similarly made subject to the tariff quota. The application of the tariff quota is thus on a product-wide basis. The principle of non-discriminatory application captured by Article XIII:1 requires that, if a tariff quota is applied to one Member, it must be applied to all; and, consequently, the term "similarly restricted" means, in the case of tariff quotas, that imports of like products of all third countries must have access to, and be given an opportunity of, participation. If a Member is excluded from access to,

⁴⁰⁷We note that there are other provisions in the covered agreements that may provide a legal basis for the imposition of a quantitative restriction, whose application is then subject to the requirements of Article XIII.

and participation in, the tariff quota, then imports of like products from all third countries are not "similarly restricted".

338. Article XIII:2 regulates the distribution of the tariff quota among Members. The chapeau of Article XIII:2 requires that the tariff quota be distributed so as to serve the aim of a distribution of trade approaching as closely as possible the shares that various Members may be expected to obtain in the absence of the tariff quota. In this way, all Members producing the like product are afforded access to, and competitive opportunities under, the tariff quota in a manner that mimics their comparative advantage vis-à-vis other Members who would participate under the quota. Thus, while Article XIII:1 establishes a principle of non-discriminatory access to and participation in the overall tariff quota, the chapeau of Article XIII:2 stipulates a principle regarding the distribution of the tariff quota in the least trade-distorting manner. The provisions of Article XIII:2(a)-(d) are specific instances of authorized forms of allocation when a Member chooses to allocate shares of the tariff quota. Article XIII:2(d) allows for the case where a quota is allocated among supplying countries, either by way of agreement or, where this is not reasonably practicable, by allotment to Members having a substantial interest in supplying the product concerned, and in accordance with the proportions supplied by those Members during a previous representative period, taking due account of "special factors". In other words, Article XIII:2(d) is a permissive "safe harbour"; compliance with the requirements of Article XIII:2(d) is presumed to lead to a distribution of trade as foreseen in the chapeau of Article XIII:2, as far as substantial suppliers are concerned.⁴⁰⁸ It follows from this analysis that a tariff quota is not *per se* unlawful because it fails to adhere to the disciplines of Article XIII. Rather, the administration of the tariff quota is unlawful if it is applied in a manner that does not comply with the requirements of Article XIII.

339. We now turn to examine whether the tariff quota of 775,000 mt reserved for imports from ACP countries was applied and administered consistently with the requirements of Article XIII. Under the EC Bananas Import Regime, the duty-free tariff quota of 775,000 mt is reserved for imports from ACP countries; non-ACP suppliers do not have access to this tariff quota. Article XIII:1, as we have observed, articulates a principle of access to, and participation in, a tariff quota for imports of the like product from all Members. The duty-free tariff quota reserved for ACP countries plainly excludes non-ACP countries. By so doing, the tariff quota does not apply to, or "similarly restrict",

⁴⁰⁸If a Member allocates quota shares to Members with a substantial interest in supplying the product, in accordance with Article XIII:2(d), it must also respect the requirement in the chapeau of Article XIII:2—that distribution of trade approach as closely as possible the shares that Members may be expected to obtain in the absence of the restriction. This is usually done by allocating a share to a general "others" category for all suppliers other than Members with a substantial interest in supplying the product.

imports of like products from non-ACP countries, and thus offends the principle of access to, and participation in, a tariff quota in Article XIII:1.

340. The tariff quota also fails to meet the requirements regarding distribution and allocation in Article XIII:2. The exclusion of non-ACP suppliers from the tariff quota is not aimed "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 [the] restrictions", as required by Article XIII:2. On the contrary, the exclusion of non-ACP suppliers is not aimed at a distribution of trade that affords access to, and competitive opportunities under, the tariff quota to all supplying Members reflecting their comparative advantage; nor does the exclusion of non-ACP suppliers respect the "safe harbour" allocation requirements in Article XIII:2(d) based upon the representative proportions of Members having a substantial interest in the supply of bananas to the European Communities. Allocating the entire tariff quota exclusively to ACP countries, and reserving no shares to non-ACP suppliers, cannot be considered to be based on the respective shares of ACP and non-ACP supplier countries in the European Communities' banana market. As a result, the exclusion of non-ACP suppliers from the tariff quota of 775,000 mt reserved for ACP countries is inconsistent with the requirements of Article XIII:1, the chapeau of Article XIII:2, and Article XIII:2(d) of the GATT 1994. Our conclusion is not altered by the fact that imports from non-ACP suppliers are subject to an MFN tariff only under the EC Bananas Import Regime.

341. The European Communities argues that, for Article XIII:1 to apply to a tariff quota, it must be shown that it imposes a "restriction" on the "aggrieved Members", in this case, the non-ACP supplier countries. We note that the text of Article XIII:1 expressly refers to "prohibition or restriction" applied "by any Member" on the importation of "any product" of the territory of "any other Member". We reject, therefore, the European Communities' argument that, because there was no restriction on the quantities of bananas that Ecuador and the other MFN countries could export to the European Communities, "the first condition for the application of Article XIII:1 (i.e., the imposition of a quantitative restriction on the imports coming from the aggrieved Member) [was] not satisfied".⁴⁰⁹ Therefore, the ACP duty-free tariff quota is subject to the requirements of Article XIII:1, regardless of the Members upon which the restriction is imposed.

⁴⁰⁹European Communities' appellant's submissions, para. 115 (Ecuador) (referring to Ecuador Panel Report, para. 7.334), para. 132 (US) (referring to US Panel Report, para. 7.681).

342. The European Communities further contends that, "[a]n advantage granted to a different country, is not the same as a measure imposing a 'prohibition or restriction' on that specific WTO Member."⁴¹⁰ The European Communities claims that "the notion of 'less favourable treatment' [under Article I of the GATT 1994] is not the same as the notion of 'prohibition or restriction' under Article XIII."⁴¹¹ The European Communities further argues that "Article XIII:1 does not introduce an MFN rule, i.e., it does not impose on a Member the obligation to extend to all Members the preferences it grants to only some countries."⁴¹²

343. We consider that the notion of "non-discrimination" in the application of tariffs under Article I:1 and the notion of non-discriminatory application of a "prohibition or restriction" under Article XIII are distinct, and that Article XIII ensures that a Member applying a restriction or prohibition does not discriminate among all other Members. Article I:1, which applies to tariffs, and Article XIII:1, which applies to quantitative restrictions and tariff quotas, may apply to different elements of a measure or import regime. Article XIII adapts the MFN-treatment principle to specific types of measures, that is, quantitative restrictions, and, by virtue of Article XIII:5, tariff quotas. Tariff quotas must comply with the requirements of both Article I:1 and Article XIII of the GATT 1994. This, in our view, does not make Article XIII redundant in respect of tariff quotas: if a Member imposes differential in-quota duties on imports of like products from different supplier countries under a tariff quota, Article I:1 would be implicated; if that Member fails to give access to or allocate tariff quota shares on a non-discriminatory basis among supplier countries, the requirements of Articles XIII:1 and XIII:2 would apply. In the absence of Article XIII, Article I would not provide specific guidance on how to administer tariff quotas in a manner that avoids discrimination in the allocation of shares.

344. The ACP duty-free tariff quota, insofar as it grants more favourable tariff treatment and quota allocation to ACP suppliers, falls within the scope of both provisions. We consider that the ACP duty-free tariff quota is not a limitation on a tariff preference that is subject only to Article I:1, but a tariff quota subject also to Article XIII.

345. In our view, therefore, the preferential in-quota tariff rate falls within the scope of Article I:1, while the application and the distribution of the tariff quota must comply with the non-discrimination requirements of Article XIII as well, regardless of the applicable in-quota and out-of-quota duty rates,

⁴¹⁰European Communities' appellant's submissions, para. 109 (Ecuador), para. 126 (US).

⁴¹¹European Communities' appellant's submissions, para. 109 (Ecuador), para. 126 (US).

⁴¹²European Communities' appellant's submissions, para. 117 (Ecuador), para. 134 (US).

and regardless of which Members may be considered to be "aggrieved". This is also the case when preferential in-quota tariff treatment is reserved for a group of Members such as the ACP countries.

346. Having said that, we note our disagreement with the Panel's overly broad interpretation of the term "restriction" in Article XIII:1 as "[a]ny benefit accorded to fresh bananas of only some Members presumably affect[ing] the competitive opportunities of like bananas imported from other Members" considering that "[b]y its very nature, ... a benefit reserved for some Members generally represents a disadvantage for other Members."⁴¹³ Such a broad reading of the term "restriction" in Article XIII would mean that even a simple tariff preference without a limitation would lead to dissimilar restrictions within the meaning of Article XIII, thus confounding the function and coverage of Article I and Article XIII. Such an interpretation would also ignore the fact that Article XIII is concerned with the non-discriminatory administration of tariff quotas, and does not prohibit them as such.

347. The European Communities also refers to past GATT and WTO practice of granting waivers from Article I in order to justify duty-free tariff quotas. For the European Communities, this confirms its argument that Article XIII is aimed at quantitative restrictions, and does not apply to tariff discrimination, which is the purview of Article I.⁴¹⁴ According to the European Communities, this "concordant, common and consistent" practice falls within the notion of "state practice" referred to in Article 31(3)(b) of the *Vienna Convention*, and such waiver decisions approximate the notion of "subsequent agreements" referred to in Article 31(3)(a).⁴¹⁵

348. Ecuador and the United States contend that the recent Doha Article XIII Waiver constitutes the most relevant practice. Indeed, in 2001, the European Communities requested and obtained waivers from both Articles I and XIII to cover the preferential tariff quota applicable to ACP countries at that time. Almost all the waivers cited by the European Communities were granted between 1948 and 1994 (only one was granted after that year, in 2000), while the Doha Article XIII

⁴¹³Ecuador Panel Report, para. 7.332; US Panel Report, para. 7.679.

⁴¹⁴European Communities' appellant's submissions, paras. 119 and 120 (Ecuador), paras. 136 and 137 (US).

⁴¹⁵European Communities' appellant's submissions, para. 120 (Ecuador), para. 137 (US). The European Communities refers to, *inter alia*, the following waivers from Article I of the GATT 1994: the 1960 waiver from Article I:1 granted to France "to the extent necessary to permit the Government of France to apply ... tariff quotas to goods originating in any part of the territory of the Kingdom of Morocco"; the 1966 waiver granted to Australia, which explicitly authorized the use of tariff quotas; the 1985 waiver from Article I:1 granted to the United States regarding duty-free treatment for imports from Caribbean countries, which "overlapped with a system of quotas"; and the 2000 waiver from Article I:1 granted to the European Communities to allow duty-free or preferential treatment to products from western Balkan countries, which "included tariff quotas on several products". (European Communities' appellant's submissions, paras. 121-128 (Ecuador), paras. 138-145 (US))

Waiver was granted in 2001, after the Appellate Body had rendered its findings in the original *EC – Bananas III* proceedings, clarifying that the Lomé Waiver from Article I:1 could not justify measures inconsistent with Article XIII.⁴¹⁶

349. We do not consider that GATT and WTO practice of granting waivers from Article I:1 and Article XIII provide conclusive guidance on whether duty-free tariff quotas are subject to Article XIII. However, we find the argument that the Doha Article XIII Waiver confirms the applicability of Article XIII to duty-free tariff quotas more persuasive. This is so because the Doha Article XIII Waiver is related to a previous ACP duty-free tariff quota⁴¹⁷, and because it was adopted subsequent to the DSB recommendations and rulings in the original proceedings, which clarified the relationship between Article I:1 and Article XIII of the GATT 1994.

350. We consider that our conclusions on Article XIII are consistent with the DSB recommendations and rulings in the original *EC – Bananas III* proceedings and the first Ecuador Article 21.5 proceedings. The panel in the original proceedings found that tariff quotas "are not quantitative restrictions *per se*" and are permitted under GATT rules, but "Article XIII:5 makes it clear ... that Article XIII applies to the administration of tariff quotas".⁴¹⁸ The Appellate Body found that, "although Articles I and XIII of the GATT 1994 are both non-discrimination provisions, their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII", and that, therefore, the Lomé Waiver from Article I did not waive the inconsistency with Article XIII of the duty-free tariff quota applicable to ACP countries at that time.⁴¹⁹

351. The Appellate Body had also found that "the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons"⁴²⁰ and that, therefore, the existence of separate regimes

⁴¹⁶In its appellee's submission, the United States notes that its most recent waiver requests for preferential programmes covered both Articles I and XIII of the GATT 1994. The United States refers to the following waiver requests dated 22 March 2007: Council for Trade in Goods, Request for a Waiver, Caribbean Basin Economic Recovery Act (CBERA as amended), G/C/W/508 and Rev.1; Council for Trade in Goods, Request for a Waiver, African Growth and Opportunity Act (AGOA), G/C/W/509 and Rev.1; Council for Trade in Goods, Request for a Waiver, Andean Trade Preference Act (ATPA as amended), G/C/W/510 and Rev.1. (United States' appellee's submission, footnote 38 to para. 41)

⁴¹⁷The Doha Article XIII Waiver waived Article XIII:1 and 2 with respect to a similar duty-free tariff quota for ACP countries under a previous bananas import regime of the European Communities. Paragraph 1 of the Doha Article XIII Waiver states:

With respect to the EC's imports of bananas, as of 1 January 2002, and until 31 December 2005, paragraphs 1 and 2 of Article XIII of the GATT 1994 are waived with respect to the EC's separate tariff quota of 750,000 tonnes for bananas of ACP origin.

⁴¹⁸Panel Reports, *EC – Bananas III (Ecuador)* and (*US*), para. 7.68.

⁴¹⁹Appellate Body Report, *EC – Bananas III*, para. 183.

⁴²⁰Appellate Body Report, *EC – Bananas III*, para. 190. (original emphasis)

for the importation of bananas (the duty-free tariff quota for traditional ACP bananas and the *erga omnes* tariff quota regime for all other imports of bananas) did not exclude the application of the non-discrimination provisions of the GATT 1994—specifically, Articles I:1 and XIII.⁴²¹ It follows, in our view, that the applicability of Article XIII does not depend on whether the ACP duty-free tariff quota exists side by side with other MFN tariff quotas or with an MFN tariff rate without quantitative restriction.

352. Finally, we note that the first Ecuador Article 21.5 panel found that "the reservation of the quantity of 857,700 tonnes for traditional ACP imports under the revised regime [was] inconsistent with paragraphs 1 and 2 of Article XIII of GATT".⁴²² We agree with the Panel that the main difference between the tariff quota regime examined by the first Ecuador Article 21.5 panel and the EC Bananas Import Regime at issue in these proceedings is the level of the quantitative limit (857,700 mt versus 775,000 mt on duty-free imports).⁴²³ However, that difference is of no relevance for the question whether Article XIII applies.

353. In conclusion, we recall that the Panel found that the EC Bananas Import Regime was inconsistent with both Article I:1 and Article XIII of the GATT 1994, and that both the Doha Article I Waiver and the Doha Article XIII Waiver had expired on 31 December 2005. We note that the European Communities has not appealed the Panel's findings concerning Article I:1 of the GATT 1994 and the Doha Article I Waiver, nor does it contest that the Doha Article XIII Waiver expired on 31 December 2005. Thus, on appeal, the European Communities does not contest that the zero duty within the ACP tariff quota is inconsistent with Article I:1 and is not covered by a suitable waiver. Considering that by virtue of Article XIII:5 any tariff quota is subject to the disciplines of Article XIII, and for the reasons explained above, we conclude that the duty-free ACP tariff quota is also inconsistent with Article XIII:1, the chapeau of Article XIII:2, and Article XIII:2(d) of the GATT 1994.

354. Therefore, in the light of the foregoing, we *uphold* the Panel's findings, albeit for different reasons, in paragraph 7.382 of the Ecuador Panel Report and paragraph 7.720 of the US Panel Report, that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994.

⁴²¹ Appellate Body Report, *EC – Bananas III*, para. 191.

⁴²² Panel Report, *EC – Bananas III (Article 21.5 – Ecuador)*, para. 6.29.

⁴²³ Ecuador Panel Report, para. 7.304; US Panel Report, para. 7.659.

(b) Nullification or Impairment under Article XIII:2 (United States)

355. Finally, we turn to an issue that the European Communities appeals only in the United States case in relation to Article XIII:2 of the GATT 1994. The European Communities argues that "the United States has never been a banana supplier to the European Communities and is not likely to become such a banana supplier in the future"⁴²⁴, and that, therefore, the ACP tariff preference could not be inconsistent with the chapeau of Article XIII:2 because, even in its absence, the United States' share of trade in bananas in the European Communities would be zero.⁴²⁵

356. The European Communities is suggesting that the United States cannot prevail with its claim under Article XIII because the ACP preference has no actual or potential effects on the United States' share of trade in bananas in the European Communities. In our view, this argument relates to the European Communities' more general argument that the EC Bananas Import Regime caused no nullification of benefits to the United States.⁴²⁶ Therefore, we shall address this argument by the European Communities below together with the broader argument relating to the nullification or impairment of benefits accruing to the United States under the covered agreements.

(c) Nullification or Impairment under Article XIII (Ecuador)

357. The European Communities argues that the ACP preference did not cause any nullification or impairment to Ecuador in relation to the alleged violation of Article XIII of the GATT 1994. According to the European Communities, "the quantity limitation imposed on the ACP preference was not a 'benefit' granted to the ACP countries" but, to the contrary, it "was a 'benefit' granted to the MFN countries" because, "[b]y limiting the quantities of ACP bananas that could be imported into the European Communities at the preferential rate, the quantity limit protected the 'competitive opportunities' of the MFN countries and caused them less 'harm' than an unrestricted ACP preference."⁴²⁷

358. The European Communities further contends that, in finding that the ACP preference was inconsistent with Article I of the GATT 1994, the Panel had already found that "the ACP preference *by itself* negatively affected the 'competitive opportunities' of Ecuador and, therefore, caused nullification or impairment under Article I of the GATT."⁴²⁸ However, according to the European Communities, "the Panel failed to explain how the limitation of the quantities that benefited from the

⁴²⁴European Communities' appellant's submission, para. 153 (US).

⁴²⁵European Communities' appellant's submission, para. 153 (US).

⁴²⁶European Communities' appellant's submission, para. 155 (US).

⁴²⁷European Communities' appellant's submission, para. 143 (Ecuador).

⁴²⁸European Communities' appellant's submission, para. 144 (Ecuador). (original emphasis)

ACP preference caused any *new* or *additional* nullification or impairment to Ecuador under Article XIII of the GATT."⁴²⁹

359. We have concluded above that the ACP duty-free tariff quota was inconsistent with Article XIII of the GATT 1994 and that the denial of access to the ACP duty-free tariff quota nullified or impaired Ecuador's benefits under the GATT 1994. However, having reached this conclusion, we do not exclude that any nullification or impairment caused to Ecuador by the inconsistency of the ACP duty-free tariff quota with Article XIII may coincide with the nullification or impairment resulting from a violation of Article I:1.

360. We believe that nullification or impairment resulting from inconsistencies with Articles I:1 and XIII may coincide or overlap, and that any such overlap is relevant only to the calculation of the total level of nullification or impairment suffered for the purposes of negotiating compensation or assessing the amount of nullification and impairment in an arbitration under Article 22 of the DSU. However, we do not need to pronounce on such questions in these Article 21.5 proceedings. Whether or not nullification or impairment caused by the violation of one provision overlap or coincide with that caused by the violation of another provision does not alter the fact that both infringements trigger the presumption of nullification or impairment under Article 3.8. In any event, a demonstration that nullification or impairment caused by the infringements of distinct WTO obligations may overlap is not sufficient to rebut the presumption in Article 3.8 of the DSU that any of these infringements constitutes a *prima facie* case of nullification or impairment.

361. In sum, we do not need to decide, in this case, whether nullification or impairment to Ecuador's interests due to the inconsistency of the quota allocation under the ACP tariff quota with Article XIII may coincide or overlap with that due to the inconsistency of the tariff preference with Article I:1. In any event, our conclusion reached above that the application of the ACP duty-free tariff quota was inconsistent with Article XIII of the GATT 1994 would stand.

362. We therefore *uphold* the Panel's finding, in paragraph 8.4 of the Ecuador Panel Report, that the European Communities, by maintaining measures inconsistent with different provisions of the GATT 1994, including Article XIII, has nullified or impaired benefits accruing to Ecuador under that Agreement.

⁴²⁹European Communities' appellant's submission, para. 144 (Ecuador). (original emphasis)

XI. Article II of the GATT 1994 (Ecuador)

363. We now turn to the European Communities' appeal of the Panel's finding that, through the Doha Article I Waiver, WTO Members agreed to extend beyond 31 December 2002⁴³⁰ the tariff quota concession (at a level of 2.2 million mt with an in-quota rate of €75/mt) in the European Communities' Schedule of Concessions; and the European Communities' appeal of the Panel's consequential finding that the tariff of €176/mt applied by the European Communities to MFN imports of bananas is inconsistent with Article II:1(b) of the GATT 1994 because it is in excess of its tariff bindings on bananas.⁴³¹ We will then consider Ecuador's other appeal of the Panel's finding that the European Communities' tariff quota concession for bananas was intended to expire on 31 December 2002⁴³² pursuant to paragraph 9 of the Bananas Framework Agreement annexed to the European Communities' Schedule of Concessions.

364. Section A summarizes the findings made by the Panel in the current Article 21.5 proceedings. Section B presents the arguments raised on appeal by the participants and the third participants in relation to the European Communities' appeal. In section C, we discuss the European Communities' claim that the Panel erred in finding that the Doha Article I Waiver modified the European Communities' Schedule of Concessions and extended the tariff quota concession of 2.2 million mt bound at an in-quota rate of €75/mt beyond 31 December 2002.⁴³³

365. Section D presents the participant's arguments relating to Ecuador's other appeal. In section E, we discuss Ecuador's other appeal of the Panel's finding that the European Communities' tariff quota concession for bananas of 2.2 million mt bound at an in-quota rate of €75/mt was intended to expire on 31 December 2002 as a result of paragraph 9 of the Bananas Framework Agreement.⁴³⁴ Finally, we consider whether the Panel erred in finding that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, was inconsistent with Article II:1(b) of the GATT 1994.⁴³⁵

⁴³⁰Ecuador Panel Report, para. 7.492.

⁴³¹Ecuador Panel Report, para. 7.504.

⁴³²Ecuador Panel Report, para. 7.436.

⁴³³Ecuador Panel Report, para. 7.492.

⁴³⁴Ecuador Panel Report, para. 7.436.

⁴³⁵Ecuador Panel Report, para. 7.504.

A. *The Current Article 21.5 Proceedings*

366. Before the Panel, Ecuador claimed that the European Communities' measure, consisting of a "tariff-rate quota with a single duty rate applicable to bananas not benefiting from the zero duty tariff-rate quota" and applied to all bananas originating in Ecuador and other MFN countries, was in breach of the European Communities' tariff binding on bananas.⁴³⁶ Ecuador argued that, in particular, the European Communities' duty of €176/mt was inconsistent with the European Communities' obligations under Article II of the GATT 1994 and the European Communities' Schedule⁴³⁷, which contained an MFN tariff quota of 2.2 million mt with an in-quota tariff rate bound at €75/mt. The European Communities contended that the tariff rate for bananas bound in its Schedule was €680/mt, and that the tariff quota of 2.2 million mt at the in-quota tariff rate of €75/mt had expired on 31 December 2002 in accordance with the terms and conditions set forth in the Bananas Framework Agreement, as annexed to the European Communities' Schedule.

367. The Panel noted that the tariff quota binding of 2.2 million mt and the in-quota tariff rate of €75/mt in the European Communities' Schedule was subject to the terms and conditions "as indicated in the Annex".⁴³⁸ The Annex contained the Bananas Framework Agreement, which provided, in paragraph 9, that "this agreement shall apply until 31 December 2002". The Panel also noted that Article II:1(b) allows Members to attach "terms, conditions or qualifications" to the tariff concessions in their Schedules⁴³⁹, and that "there is nothing in the WTO Agreement that would prevent a Member from qualifying a specific concession in its Schedule by subjecting it to a date of expiry."⁴⁴⁰ The Panel therefore found that the tariff quota of 2.2 million mt at a bound tariff rate of €75/mt in the European Communities' Schedule was unequivocally intended to expire on 31 December 2002.⁴⁴¹

368. The Panel, however, went on to find that, in adopting the Doha Article I Waiver, "WTO Members agreed to extend the duration of the European Communities' tariff quota concession for bananas beyond 31 December 2002" and "until the completion of the Article XXVIII negotiations for the purpose of the rebinding of the European Communities' tariff on bananas".⁴⁴²

⁴³⁶Ecuador's first written submission to the Panel, para. 33.

⁴³⁷Ecuador's first written submission to the Panel, para. 34.

⁴³⁸Ecuador Panel Report, para. 7.421.

⁴³⁹Ecuador Panel Report, para. 7.423.

⁴⁴⁰Ecuador Panel Report, para. 7.429.

⁴⁴¹Ecuador Panel Report, para. 7.436.

⁴⁴²Ecuador Panel Report, para. 7.446.

369. The Panel considered that the Doha Article I Waiver, "as it relates to the European Communities' WTO market-access commitments relating to bananas, is a 'subsequent agreement between the parties' to the Bananas Framework Agreement (i.e., the WTO Members), regarding the application of the provisions of the WTO agreement as it pertains to such market access commitments", which could not be ignored "in order to ascertain the common intentions of the WTO Members, regarding the European Communities' WTO market access commitments relating to bananas".⁴⁴³ In this respect, the Panel found that the Doha Article I Waiver "recognizes the WTO Members' common intention that, until the entry into force of the new European Communities' tariff-only regime, the in-quota tariff applied to bananas 'shall not exceed 75€/mt', as well as the common intention that any rebinding of the European Communities' tariff on bananas under GATT Article XXVIII procedures 'should result in at least maintaining total market access for MFN banana suppliers'."⁴⁴⁴

370. The Panel also relied on supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention* to confirm the conclusion it had reached "regarding the common intention of the WTO Members ... that the European Communities' tariff quota concession for bananas would remain in force, in its substance, pending any later rebinding of the European Communities' tariff on bananas."⁴⁴⁵ The Panel found, in particular, that the following elements confirmed its findings on the European Communities' market access commitments on bananas: (i) the Uruguay Round "Modalities Paper"⁴⁴⁶ for agricultural market access negotiations "called for binding tariff quotas in an amount and at a duty level sufficient to permit access at least equivalent to that existing in the base period"⁴⁴⁷; (ii) the European Communities initiated negotiations pursuant to Article XXVIII of the GATT 1994, which were necessary in order to increase the tariff binding (from the in-quota level of €75/mt) and not to reduce it (from the out-of-quota level of €80/mt)⁴⁴⁸; and (iii) the first award of the arbitrator acting pursuant to the "Annex on Bananas" to the Doha Article I Waiver described the European Communities' Schedule of Concessions as including a quota of 2.2 million mt with an in-quota tariff rate of €75/mt.⁴⁴⁹

⁴⁴³Ecuador Panel Report, para. 7.443.

⁴⁴⁴Ecuador Panel Report, para. 7.444.

⁴⁴⁵Ecuador Panel Report, para. 7.478.

⁴⁴⁶Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group, MTN.GNG/MA/W/24, 20 December 1993.

⁴⁴⁷Ecuador's second written submission to the Panel, para. 59.

⁴⁴⁸Ecuador Panel Report, para. 7.485.

⁴⁴⁹Ecuador Panel Report, para. 7.491.

B. *Claims and Arguments relating to the European Communities' Appeal*

371. The European Communities requests the Appellate Body to reverse the Panel's findings that the Doha Article I Waiver "modified the Schedule of the European Communities and extended the concession for the tariff quota beyond December 31, 2002"⁴⁵⁰, as well as the Panel's consequential finding that "the European Communities has breached Article II of the GATT".⁴⁵¹

372. The European Communities argues that the Panel erred in finding that the Doha Article I Waiver was a "subsequent agreement" relating to the tariff quota concession bound in the European Communities' Schedule of Concessions, and that the Waiver could be interpreted as an agreement by WTO Members "to extend the duration of the European Communities' tariff quota concession for bananas beyond 31 December 2002."⁴⁵² The European Communities also claims that the Panel made further errors of legal interpretation and reasoning in relying on, as supplementary means of interpretation, the Uruguay Round Modalities Paper and the fact that the European Communities initiated tariff renegotiations pursuant to Article XXVIII of the GATT 1994.⁴⁵³

373. Ecuador responds that the Panel did not err in finding that the Doha Article I Waiver was a subsequent agreement, within the meaning of Article 31(3)(a) of the *Vienna Convention*⁴⁵⁴, regarding the application of the European Communities' concession, and that the Waiver confirmed or extended the effectiveness of the concession.⁴⁵⁵

374. Ecuador submits that the Panel was correct in finding "that the Concession remains in effect because of its extension via the agreement manifested in the Doha Waiver"⁴⁵⁶ and that "the Doha Waiver was an agreement regarding the *application* of the concession, which is within the scope of Article 31(3) [of the *Vienna Convention*]"⁴⁵⁷ Furthermore, according to Ecuador, "the Doha Waiver ... strongly support[s] Ecuador's position that the Concession was never intended to expire on account of paragraph 9 of the [Bananas Framework Agreement]."⁴⁵⁸

⁴⁵⁰European Communities' appellant's submission, para. 164 (Ecuador).

⁴⁵¹European Communities' appellant's submission, para. 183 (Ecuador).

⁴⁵²European Communities' appellant's submission, para. 148 (Ecuador).

⁴⁵³European Communities' appellant's submission, para. 149 (Ecuador).

⁴⁵⁴Ecuador's appellee's submission, para. 58.

⁴⁵⁵Ecuador's appellee's submission, para. 59.

⁴⁵⁶Ecuador's appellee's submission, para. 51.

⁴⁵⁷Ecuador's appellee's submission, para. 58.

⁴⁵⁸Ecuador's appellee's submission, para. 66.

C. *Analysis of the European Communities' Appeal*

375. In this section, we address the European Communities' claim that the Panel erred in finding that the Doha Article I Waiver modified the European Communities' Schedule of Concessions and extended the tariff quota concession of 2.2 million mt bound at an in-quota rate of €75/mt beyond 31 December 2002.⁴⁵⁹

376. The Panel found that "the European Communities' tariff quota concession for bananas was unequivocally intended to expire on 31 December 2002."⁴⁶⁰ The Panel then found that the Doha Article I Waiver, "as it relates to the European Communities' WTO market access commitments on bananas, is a 'subsequent agreement between the parties' ... regarding the application of the provisions of the WTO Agreement as it pertains to such market access commitments."⁴⁶¹ In making this finding, the Panel noted that the Doha Article I Waiver is an agreement reached between the same parties that agreed to incorporate the Bananas Framework Agreement as an annex to the European Communities' Schedule of Concessions; it is subsequent to the Bananas Framework Agreement; and, like that agreement, the Waiver deals with, *inter alia*, the European Communities' WTO market access commitments relating to bananas.⁴⁶²

377. The Panel then turned to the question whether, in adopting the Doha Article I Waiver, WTO Members had agreed to extend the European Communities' tariff quota concession for bananas beyond 31 December 2002, the date the Bananas Framework Agreement was intended to expire.⁴⁶³ The Panel concluded that the common intention of WTO Members as reflected in the text of the Doha Article I Waiver decision was that, pending the Article XXVIII negotiations on the rebinding of the banana tariff in the European Communities' Schedule, the European Communities' tariff quota concession would continue to constitute the European Communities' bound commitments regarding bananas.⁴⁶⁴

1. Waivers, Multilateral Interpretations, and Amendments

378. We begin by noting three different methods that Members may use to interpret or modify WTO law provided for in the *WTO Agreement*: (i) waivers (Article IX:3); (ii) multilateral interpretations (Article IX:2); and (iii) amendments (Article X). We will next consider the distinct

⁴⁵⁹Ecuador Panel Report, para. 7.492.

⁴⁶⁰Ecuador Panel Report, para. 7.436.

⁴⁶¹Ecuador Panel Report, para. 7.443.

⁴⁶²Ecuador Panel Report, para. 7.443.

⁴⁶³Ecuador Panel Report, para. 7.444.

⁴⁶⁴Ecuador Panel Report, para. 7.456.

roles and functions of these methods in WTO law. We will then address the Panel's finding that the Doha Article I Waiver was a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention* that resulted in an extension of the tariff quota concession beyond 31 December 2002, the date when, according to paragraph 9 of the Banana Framework Agreement, "this agreement" was to expire.

379. The first method identified above is a waiver. Article IX:3 of the *WTO Agreement* allows the Ministerial Conference to waive, in exceptional circumstances and by a decision taken by at least three fourths of WTO Members, an obligation imposed on a Member by the *WTO Agreement* and by any of the multilateral agreements. Article IX:4 of the *WTO Agreement* states:

A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

380. Article IX:4 requires that the decision granting the waiver state the date on which the waiver shall terminate, thus ensuring that waivers are granted for limited periods of time. A waiver must state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date it terminates. The *Uruguay Round Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994* describes, in detail, the contents of a request for a waiver. Paragraph 1 of this Understanding states:

A request for a waiver or for an extension of an existing waiver shall describe the measures which the Member proposes to take, the specific policy objectives which the Member seeks to pursue and the reasons which prevent the Member from achieving its policy objectives by measures consistent with its obligations under GATT 1994.

381. These provisions specify the elements that must be included in waiver requests and decisions. The need to state the exceptional circumstances, to specify the terms and conditions governing the application of the waiver, and to describe the specific policy objectives that a Member seeks to pursue, make clear that a waiver is a specific and exceptional instrument subject to strict disciplines. These elements do not suggest that a waiver should be construed as an agreement on issues not

explicitly reflected in its terms and conditions, justifying circumstances, and stated policy objectives.

In the original *EC – Bananas III* proceedings, the Appellate Body emphasized:

Although the *WTO Agreement* does not provide any specific rules on the interpretation of waivers, Article IX of the *WTO Agreement* and the *Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994*, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care.⁴⁶⁵

382. In our view, the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision. Its purpose is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care.

383. Multilateral interpretations of provisions of WTO law are the next method identified above. Article IX:2 of the *WTO Agreement* sets out specific requirements for decisions that may be taken by the Ministerial Conference or the General Council to adopt interpretations of provisions of the Multilateral Trade Agreements. Such multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content. Article IX:2 emphasizes that such interpretations "shall not be used in a manner that would undermine the amendment provisions in Article X". A multilateral interpretation should also be distinguished from a waiver, which allows a Member to depart from an existing WTO obligation for a limited period of time. We consider that a multilateral interpretation pursuant to Article IX:2 of the *WTO Agreement* can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31(3)(a) of the *Vienna Convention*, as far as the interpretation of the WTO agreements is concerned.

384. The third method mentioned above is amendments to the WTO agreements. Article X of the *WTO Agreement* sets out rules and procedures to amend the provisions in the Multilateral Trade Agreements. Article X specifies the process and quorum required to amend particular provisions or covered agreements. Amendments, unlike waivers, are not limited in time and create new or modify existing rights and obligations for WTO Members. Special rules on acceptance and entry into force apply, depending on the provisions that are being amended and on whether the amendment "would

⁴⁶⁵ Appellate Body Report, *EC – Bananas III*, para. 185.

alter the rights and obligations of the Members". Amendments to the *WTO Agreement* and to a Multilateral Trade Agreement in Annex 1 enter into force following a formal acceptance process pursuant to Article X:7.

385. The modification of Schedules of Concessions, which are an integral part of the GATT 1994, does not require a formal amendment pursuant to Article X of the *WTO Agreement*, but is enacted through a special procedure set out in Article XXVIII of the GATT 1994 or through multilateral rounds of tariff negotiations. Pursuant to Article XXVIII, a Member may modify or withdraw a concession annexed to the GATT 1994 by negotiation and agreement with other Members that are "primarily concerned", and in consultation with Members that have a substantial interest in the concession. Article XXVIII:2 provides that, in an agreement on the renegotiation of a concession, which may include compensatory adjustment, WTO Members "shall endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for in this Agreement prior to such negotiations". If an agreement cannot be reached, the modifying Member is free to modify or withdraw the concession, while other Members that are primarily concerned or have a substantial interest in the concession are free to withdraw substantially equivalent concessions initially negotiated with the modifying Member.

2. Whether the Doha Article I Waiver is a "Subsequent Agreement" within the Meaning of Article 31(3)(a) of the Vienna Convention

386. The European Communities argues that the Panel erred in finding that the Doha Article I Waiver "was a 'subsequent agreement', to the European Communities' Schedule, which dealt with the provisions of the Schedule".⁴⁶⁶ The European Communities argues that "the Doha waiver would not qualify as a 'subsequent agreement regarding the interpretation' of the original treaty for purposes of Article 31(3)(a) of the Vienna Convention" because, according to the Panel's own interpretation, it does not "interpret" but "modifies" the European Communities' Schedule and extends the tariff quota concession (that is, the tariff quota of 2.2 million mt bound at an in-quota rate of €75/mt) beyond 31 December 2002, the date on which the Bananas Framework Agreement was to expire.⁴⁶⁷

387. We recall that Article 31(3)(a) of the *Vienna Convention* provides:

There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.

⁴⁶⁶European Communities' appellant's submission, para. 148 (Ecuador).

⁴⁶⁷European Communities' appellant's submission, para. 191 (Ecuador).

388. We agree with the Panel that the Doha Article I Waiver was adopted by the same parties that approved the European Communities' Schedule, including the Bananas Framework Agreement annexed thereto. The Waiver decision was also taken subsequent to the entry into force of the European Communities' Schedule. However, we are not persuaded that the Doha Article I Waiver could qualify as a "subsequent agreement" regarding the interpretation of the treaty or application of its provisions within the meaning of Article 31(3)(a) of the *Vienna Convention*.

389. We have considered above the differences between a waiver as opposed to a multilateral interpretation and an amendment to a covered agreement. As noted earlier, a waiver decision relieves a Member, for a limited period, from a particular existing obligation under the covered agreements, subject to the terms and conditions, justifying exceptional circumstances, or policy objectives described in the waiver decision. The purpose of a waiver is not to modify the interpretation or application of existing provisions in the agreements, let alone to add to or amend the obligations under a covered agreement or Schedule. As we discuss below, the decision to grant the Doha Article I Waiver pursuant to Article IX:3 of the *WTO Agreement* does not qualify as an agreement on the interpretation or application of a treaty provision within the meaning of Article 31(3)(a) of the *Vienna Convention*.

390. We further observe that, in its commentary on the Draft Articles on the Law of Treaties, the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* "as a further *authentic element of interpretation* to be taken into account together with the context".⁴⁶⁸ In our view, by referring to "authentic interpretation", the ILC reads Article 31(3)(a) as referring to agreements bearing specifically upon the interpretation of a treaty. In the WTO context, multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* are most akin to subsequent agreements within the meaning of Article 31(3)(a) of the *Vienna Convention*, but not waivers adopted pursuant to Articles IX:3 and 4 of the *WTO Agreement*.

391. Also, for another reason, we do not believe that the Doha Article I Waiver qualifies as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention* between all WTO Members regarding the application of the tariff quota concession in Part I, Section I-B of the European Communities' Schedule.⁴⁶⁹ In this respect, we recall that the Panel concluded that:

⁴⁶⁸"Report of the International Law Commission on the Work of its 18th Session, Geneva, 4 May-19 July 1966" (1966) II *Yearbook of the International Law Commission* 172, at 221, para. 14. (emphasis added)

⁴⁶⁹Ecuador Panel Report, para. 7.443. The relevant excerpts from Sections I-A and I-B of Part I of the European Communities' Schedule LXXX are reproduced in Annex VI attached to this Report.

... the Waiver, as it relates to the European Communities' WTO market-access commitments relating to bananas, is a "subsequent agreement between the parties" to the Bananas Framework Agreement (i.e., the WTO Members), regarding the *application* of the provisions of the WTO agreement as it pertains to such market access commitments.⁴⁷⁰ (emphasis added)

In our view, the term "application" in Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied"; the term does not connote the creation of new or the extension of existing obligations that are subject to a temporal limitation and are to expire. We find the Panel's conclusion that the Doha Article I Waiver extended the duration of the tariff quota concession beyond 31 December 2002, and thereby modified or changed the content of the European Communities' Schedule, difficult to reconcile with its conclusion that the Waiver should be considered an agreement on the *application* of existing commitments contained in that Schedule. As such, we do not consider that the Doha Article I Waiver could be regarded as an agreement on the application of the tariff quota concession in the European Communities' Schedule within the meaning of Article 31(3)(a) of the *Vienna Convention*.

392. Indeed, the Panel appears to have read the Doha Article I Waiver as an agreement modifying the European Communities' Schedule, in that it would provide for an extension of the tariff quota concession beyond 31 December 2002, the expiry date of the Bananas Framework Agreement. The Panel specifically found that "the European Communities' tariff quota concession for bananas was unequivocally intended to expire on 31 December 2002"⁴⁷¹ and that, "in adopting the Waiver, the WTO Members agreed to extend the duration of the European Communities' tariff quota concession beyond 31 December 2002".⁴⁷² This finding of the Panel means that the Panel considered that the Waiver in fact *modified* the European Communities' original Schedule, rather than simply *interpreted or applied* it. Therefore, by the Panel's own logic, it cannot be sustained that the Doha Article I Waiver could be characterized as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention* on the *application* of the market access commitments for bananas in the European Communities' Schedule.

393. For all these reasons, we disagree with the Panel's finding that the "the Doha Waiver, as it relates to the European Communities' WTO market-access commitments relating to bananas, is a 'subsequent agreement between the parties' to the Bananas Framework Agreement (i.e., the WTO

⁴⁷⁰Ecuador Panel Report, para. 7.443.

⁴⁷¹Ecuador Panel Report, para. 7.436.

⁴⁷²Ecuador Panel Report, para. 7.446.

Members), regarding the application of the provisions of the [*WTO Agreement*] as it pertains to such market access commitments."⁴⁷³

394. We are also of the view that the Doha Article I Waiver does not constitute an amendment of the European Communities' Schedule adopted in accordance with the requirements and procedures of Article X of the *WTO Agreement*. Extending an obligation with a temporal limitation is a modification that "alter[s] the rights and obligations of the Members". Therefore, if implemented by means of an amendment, Article X:3 requires that such an amendment "shall take effect for the Members that have accepted [it] upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it". According to Article X:7, acceptance of such an amendment requires depositing an instrument of acceptance with the Director-General of the WTO. The Doha Article I Waiver is a decision taken by the Ministerial Conference, which did not require formal acceptance by the Membership as foreseen under Article X:7.

395. Moreover, while it is true that pursuant to Article II:7 of the GATT 1994 Members' Schedules of Concessions are integral parts of the covered agreements, Schedules are usually not modified by means of an amendment pursuant to Article X of the *WTO Agreement*: special rules and procedures that Members are required to follow when they wish to modify their Schedules unless they enter into tariff commitments by means of the conclusion of multilateral rounds of trade negotiations are provided in Article XXVIII of the GATT 1994. In our view, if the duration of the tariff quota concession in the European Communities' Schedule had to be modified or extended, negotiations under Article XXVIII would be the proper procedure to follow.⁴⁷⁴

3. Whether the Tariff Quota Concession in the European Communities' Schedule was Extended by the Doha Article I Waiver

396. According to the Panel, the tariff quota concession in the European Communities' Schedule of Concessions was to expire under the terms of the Bananas Framework Agreement, and the Doha Article I Waiver extended that concession beyond the date when the Bananas Framework Agreement was to expire. In this section, we consider the argument by the European Communities that the Panel erred in its interpretation of the terms and conditions in the Doha Article I Waiver when it found that, through the Waiver, "WTO Members agreed to extend the duration of the European Communities'

⁴⁷³Ecuador Panel Report, para. 7.443.

⁴⁷⁴While the European Communities has initiated Article XXVIII negotiations for the purpose of introducing a tariff-only regime, these negotiations did not involve a possible extension of the tariff quota concession beyond 31 December 2002. In any event, the renegotiations under Articles XXVIII and XXIV:6 have not been completed to date.

tariff quota concession for bananas beyond 31 December 2002".⁴⁷⁵ The European Communities argues that there is no reference in the Doha Article I Waiver to the European Communities' Schedule, let alone to any agreement to extend the tariff quota concession.⁴⁷⁶

397. The Panel considered that the text of the Doha Article I Waiver reflected the common intention of WTO Members that, pending the completion of the Article XXVIII negotiations and until the entry into force of a new tariff regime, the European Communities' Uruguay Round tariff quota concession for bananas would continue to apply.⁴⁷⁷

398. We noted above that a decision granting a waiver is an exceptional instrument. Waivers are subject to the strict disciplines set out in Article IX:3 of the *WTO Agreement*. We note that the Doha Article I Waiver authorized the European Communities, "[s]ubject to the terms and conditions set out [t]hereunder", to derogate, until 31 December 2007, from Article I:1 of the GATT 1994:

... to the extent necessary to permit [it] to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement, without being required to extend the same preferential treatment to like products of any other member. (footnote omitted)

399. The Waiver's terms and conditions do not expressly interpret or modify the tariff quota of 2.2 million mt bound in the European Communities' Schedule, the in-quota tariff rate of €75/mt applicable to MFN suppliers, or the terms of the Bananas Framework Agreement as annexed to the European Communities' Schedule. The Doha Article I Waiver is concerned with the zero-duty preference for ACP suppliers, not with the tariff quota concession for MFN suppliers specified in the European Communities' Schedule.

400. The reference in the recital of the preamble of the Doha Article I Waiver to tariff quotas "A" and "B" for banana imports from MFN suppliers, and to the in-quota tariff rate of €75/mt applicable to MFN suppliers, does not persuade us otherwise. In fact, tariff quotas A and B add up to 2.55 million mt, which is not the same as the 2.2 million mt inscribed in the European Communities' Schedule. Moreover, the preamble recital is introduced by the word "noting", and does not form part of the operational section of the Waiver decision. Therefore, the reference in the preamble of the

⁴⁷⁵Ecuador Panel Report, para. 7.446.

⁴⁷⁶European Communities' appellant's submission, paras. 165 and 166 (Ecuador).

⁴⁷⁷Ecuador Panel Report, para. 7.456.

Doha Article I Waiver to the tariff quotas relating to MFN suppliers cannot be deemed to constitute a decision to extend the tariff quota concession beyond 31 December 2002.⁴⁷⁸

401. In reaching this conclusion, the Panel also relied on the Annex on Bananas to the Doha Article I Waiver, which states that, in the rebinding of the European Communities' tariff concession pursuant to Article XXVIII of the GATT 1994, "all EC WTO market-access commitments relating to bananas should be taken into account".⁴⁷⁹ The Annex also prescribed the arbitrators' mandate to be the determination of whether such rebinding "result[ed] in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments".⁴⁸⁰ Finally, the Annex on Bananas provided that "[t]he Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006."⁴⁸¹ The Panel further concluded that, considering that the European Communities had not complied with

⁴⁷⁸Recital 9 of the preamble reads:

Noting that the tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.

⁴⁷⁹Annex on Bananas, second tiret, reads:

No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.

⁴⁸⁰Annex on Bananas, fourth tiret, reads:

The arbitrator shall be appointed within 10 days, following the request subject to agreement between the two parties, failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request. The mandate of the arbitrator shall be to determine, within 90 days of his appointment, 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 the above-mentioned EC commitments.

⁴⁸¹Annex on Bananas, fifth tiret, reads:

If the arbitrator determines that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If 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 Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

the provisions in the Annex on Bananas⁴⁸², and that Article XXVIII negotiations had not been concluded, "the new EC tariff regime" had not yet entered into force.⁴⁸³

402. The provisions in the Annex on Bananas were aimed at ensuring, in the course of the introduction of a tariff-only system, the rebinding of the European Communities' tariff at a level that would result in at least maintaining total market access for MFN banana suppliers, taking into account all the European Communities' commitments, including the size of the tariff quota and the in-quota tariff applicable to MFN suppliers. We do not see in this provision any express or implied extension of the tariff quota concession until the process of rebinding of a tariff-only system is completed. Several paragraphs of the Annex on Bananas refer to the need to take into account, in the rebinding of the European Communities' banana tariff, "all EC WTO market-access commitments relating to bananas". However, the object of that Annex is to set out the benchmark and the arbitration process for assessing whether the "envisaged rebinding of the EC tariff on bananas would result in at least maintaining total market access for MFN banana suppliers". It does not provide for the extension of the European Communities' tariff quota concession; rather, it appears to assume the continued validity of the tariff quota concession that forms part of the existing total market access commitments vis-à-vis MFN suppliers that a tariff rebinding by the European Communities would have to at least maintain.

403. For these reasons, we cannot discern from the terms and conditions, and the circumstances identified as justification for the Doha Article I Waiver, a decision modifying the tariff quota concession relating to imports from MFN suppliers in the European Communities' Schedule. The focus of the Annex is clearly the preferential tariff treatment for ACP countries. We also note that no party argued before the Panel that the Doha Article I Waiver, authorizing the European Communities to provide, subject to certain terms and conditions, preferential tariff treatment to products of ACP origin, extended the duration of the tariff quota concession relating to imports from MFN supplier countries.

⁴⁸²In the second award by the arbitrators acting pursuant to the Annex on Bananas attached to the Doha Article I Waiver, the arbitrators found that the second proposed tariff rebinding (at the level of €187/mt) by the European Communities did not "result in at least maintaining total market access for MFN banana suppliers, taking into account the above-mentioned EC commitments" and that, therefore, the European Communities had failed to rectify the matter in accordance with the fifth tiret of the Annex on Bananas. (Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement II*, para. 127)

⁴⁸³Ecuador Panel Report, paras. 7.451 and 7.452.

404. Finally, the European Communities argues that the Panel made contradictory statements in its legal interpretation and reasoning. The European Communities argues that the Panel had found earlier in its Report⁴⁸⁴ that the Doha Article I Waiver expired on 1 January 2006 and therefore could not apply to the EC Bananas Import Regime, in clear contradiction with its later finding that the Doha Article I Waiver extended the tariff quota concession beyond that date.⁴⁸⁵

405. We note that, in its reasoning regarding Article I:1 of the GATT 1994, the Panel stated that the Doha Article I Waiver no longer applied to the EC Bananas Import Regime, considering that it had expired on 1 January 2006, because all the intermediate procedural steps under the Annex on Bananas had been completed and the "new EC tariff regime" had entered into force.⁴⁸⁶ In contrast, in its findings under Article II of the GATT 1994, the Panel found that, through the same Doha Article I Waiver, WTO Members had agreed to extend the tariff quota concession beyond 1 January 2006 and until the European Communities' Schedule of Concessions for bananas had been rebound in accordance with the Article XXVIII procedures.⁴⁸⁷

406. We have some difficulty understanding how the Doha Article I Waiver could extend the validity of a concession beyond the expiry date of the Waiver. On the one hand, the Panel stated that the Doha Article I Waiver had expired on 1 January 2006 and could not apply to the EC Bananas Import Regime. On the other hand, the Panel considered that an aspect of the Waiver still applied to the EC Bananas Import Regime, insofar as it contains an agreement to extend the tariff quota concession beyond 1 January 2006.⁴⁸⁸ We consider that this incoherence in the Panel's reasoning further undermines the Panel's finding that, through the Doha Article I Waiver, WTO Members agreed to extend the European Communities' tariff quota concession for bananas.

407. Based on the above mentioned considerations, we are not persuaded that the terms and conditions, exceptional circumstances, and justifications identified in the Doha Article I Waiver reflect a decision by WTO Members to extend the duration of the European Communities' tariff quota concession for bananas—that, according to the Panel, was to expire on 31 December 2002—until the rebinding of the European Communities' tariff concession was completed.

⁴⁸⁴Ecuador Panel Report, paras. 7.200 and 7.201.

⁴⁸⁵European Communities' appellant's submission, para. 172 (Ecuador).

⁴⁸⁶Ecuador Panel Report, paras. 7.200 and 7.201. In its appeal, the European Communities does not challenge this finding by the Panel. The Panel had earlier found that the expression "the new EC Tariff regime" used in the fifth tirit of the Annex on Bananas applied to EC Regulation 1964/2005. (Ecuador Panel Report, para. 7.183)

⁴⁸⁷Ecuador Panel Report, para. 7.456.

⁴⁸⁸European Communities' appellant's submission, para. 172 (Ecuador).

4. Supplementary Means of Interpretation

408. We explained above why we believe that the Panel erred in finding that the terms and conditions in the Doha Article I Waiver reflect the common intention of WTO Members to extend the European Communities' tariff quota concession beyond 31 December 2002 until the rebinding of its tariff concession is completed. The Panel combined its analysis by considering supplementary means of interpretation to confirm its reading of the Doha Article I Waiver. The Panel considered the Modalities Paper and the Article XXVIII negotiations initiated by the European Communities. We do not see how the consideration of supplementary means of interpretation referred to by the Panel could change our conclusion on this issue. In this respect, we agree with the Panel that both the Modalities Paper and the Article XXVIII negotiations initiated by the European Communities do not in themselves "provide a definitive orientation regarding the common intention of the WTO Members, as it pertains to the European Communities' WTO market-access commitments relating to bananas".⁴⁸⁹

5. Conclusion

409. For the above reasons, we do not consider that the Doha Article I Waiver constituted a "subsequent agreement" under Article 31(3)(a) of the *Vienna Convention* regarding the interpretation or application of the European Communities' Schedule of Concessions. We also do not consider that the Doha Article I Waiver constituted an agreement by WTO Members to extend the duration of the European Communities' tariff quota concession for bananas, which, in the Panel's view, was to expire on 31 December 2002. We, therefore, *reverse* the Panel's findings, in paragraphs 7.456 and 7.492 of the Ecuador Panel Report, that the Doha Article I Waiver constituted a subsequent agreement reflecting the common intention of WTO Members that the European Communities' tariff quota concession for bananas would continue to constitute its scheduled commitments regarding bananas, pending the completion of the Article XXVIII negotiations for the purpose of the rebinding of the European Communities' tariff on bananas and the subsequent entry into force of a new European Communities tariff regime.

D. *Claims and Arguments relating to Ecuador's Other Appeal*

410. Ecuador's other appeal is conditional upon a reversal of the Panel's finding that, through the Doha Article I Waiver, WTO Members agreed to extend the tariff quota concession beyond 31 December 2002 until the rebinding of the European Communities' Schedule of Concessions for bananas. Having reversed this finding, we now turn to consider Ecuador's other appeal.

⁴⁸⁹Ecuador Panel Report, paras. 7.478 and 7.488.

411. Ecuador submits that the Panel erred in finding that the expiration of the Bananas Framework Agreement "would automatically imply [the] expiration of the European Communities' tariff quota concession under the terms of its Schedule".⁴⁹⁰ Ecuador claims that paragraph 9 of the Bananas Framework Agreement did not establish an expiration date for the entire concession as it relates to bananas; rather, it established an expiration date only for the terms and conditions in the Bananas Framework Agreement, other than those set out in columns 1 to 6 in the European Communities' Schedule itself.⁴⁹¹

412. Ecuador therefore requests the Appellate Body to reverse the Panel's finding that the European Communities' tariff quota concession was intended to expire on 31 December 2002 pursuant to paragraph 9 of the Bananas Framework Agreement. Ecuador requests the Appellate Body to find, instead, that the European Communities' tariff quota concession remains in effect and, accordingly, to uphold the Panel's conclusion "that the tariff applied by the European Communities to MFN imports of bananas set at €176/mt ... without consideration of the tariff quota for 2.2 million mt bound at an in-quota tariff rate of €75/mt, [is] in excess of that set forth ... in the European Communities' Schedule" and, consequently, inconsistent with Article II:1(b) of the GATT 1994."⁴⁹²

413. The European Communities responds that the tariff quota of 2.2 million mt of bananas and the in-quota tariff of €75/mt inscribed in the European Communities' Schedule were subject to the terms, conditions, and qualifications set out in the Bananas Framework Agreement annexed to the Schedule and, therefore, cannot be read in isolation from that Agreement.⁴⁹³ The European Communities agrees with the Panel's conclusion that the tariff quota concession was unequivocally intended to expire on 31 December 2002 in accordance with the terms of the Bananas Framework Agreement.⁴⁹⁴ The European Communities therefore requests the Appellate Body to reverse the Panel's finding that the tariff of €176/mt is inconsistent with Article II of the GATT 1994.

E. *Analysis of Ecuador's Other Appeal*

1. Interpretation of the European Communities' Market Access Commitments on Bananas

414. The Panel found that "all elements of the European Communities' tariff quota for bananas are described in the Bananas Framework Agreement" and that "the European Communities' tariff quota

⁴⁹⁰Ecuador's other appellant's submission, para. 26.

⁴⁹¹Ecuador's other appellant's submission, paras. 11 and 28.

⁴⁹²Ecuador's other appellant's submission, para. 4. (footnote omitted)

⁴⁹³European Communities' appellee's submission, paras. 12 and 13 (Ecuador).

⁴⁹⁴European Communities' appellee's submission, para. 16.

concession for bananas must therefore be understood, under the 'terms, conditions or qualifications' set forth ... in the Bananas Framework Agreement" and "cannot be read in isolation from the terms in the Bananas Framework Agreement."⁴⁹⁵ The Panel therefore concluded:

[I]n light of the ordinary meaning to be given to the terms of the European Communities' Schedule, taking into account Part I, Sections I.A (Tariffs) and I.B (Tariff quotas), and the Bananas Framework Agreement, in their context and in the light of the treaty's object and purpose, the European Communities' tariff quota concession for bananas was unequivocally intended to expire on 31 December 2002.⁴⁹⁶

415. We note that Article II:1(b) of the GATT 1994 states:

The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

416. While it is unusual that a tariff concession inscribed in a Member's Schedule would be limited in time, such limitation does not appear to be precluded by the wording of Article II:1(b), which refers to "terms, conditions or qualifications" set forth in a Member's Schedule. The parties agree in principle that Article II:1(b) allows WTO Members to subject tariff concessions to the "terms, conditions or qualifications set forth in [their] Schedule".⁴⁹⁷ However, the parties disagree on the legal status of the Bananas Framework Agreement annexed to the European Communities' Schedule and, in particular, on whether, and if so how, it should be read to condition the tariff quota concession for bananas in the European Communities' Schedule.

⁴⁹⁵Ecuador Panel Report, paras. 7.425 and 7.426.

⁴⁹⁶Ecuador Panel Report, para. 7.436.

⁴⁹⁷Ecuador argues however that, if a time-limit is attached to a specific concession, this should be done clearly and unequivocally. (Ecuador's other appellant's submission, para. 27) The only other example provided by the Panel and cited by the European Communities in its appellee's submission of a tariff concession subject to a "date of expiry" is the United States' tariff concession on sugar reviewed by the GATT panel in *US – Sugar Waiver*. It should be noted, however, that this concession, unlike the European Communities' tariff quota concession for bananas, was not set to expire on a fixed date, but was made dependent on the continued existence of certain domestic legislation. The panel in *US – Sugar Waiver* noted that the United States' concession on sugar was:

... subject to the condition that the bound rates "shall be effective only during such time as Title II of the Sugar Act of 1948 or substantially equivalent legislation is in effect in the United States" and that they "shall resume full effectiveness ... if legislation substantially equivalent to Title II of the Sugar Act of 1948 should subsequently become effective".

(GATT Panel Report, *US – Sugar Waiver*, para. 2.3) We further note that the United States' concession on sugar was subject to the existence of "Title II of the Sugar Act of 1948 or substantially equivalent legislation", making it clear that such condition applied to the concession in its entirety.

417. In GATT and WTO jurisprudence, it has been recognized that there are limits to the terms, conditions, or qualifications that may be incorporated in a Member's Schedule of Concessions. In *EC – Bananas III*, the Appellate Body stated that "the ordinary meaning of the term 'concession' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations" under the WTO covered agreements through an entry in its Schedule.⁴⁹⁸ The GATT panel in *US – Sugar* found that:

Article II gives Members the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, not however to reduce their commitments under other provisions of that Agreement.⁴⁹⁹

418. Insofar as a temporal limitation does not diminish obligations or reduce commitments under other provisions of the covered agreements, scheduling a temporal limitation to a tariff concession does not seem incompatible with the findings of the Appellate Body in *EC – Bananas III* and the GATT panel in *US – Sugar*.

419. The following bindings in the European Communities' Schedule are relevant to this dispute. Part I, Section I-A (Tariffs) of the European Communities' Schedule⁵⁰⁰ contains a tariff binding on bananas at the level of €680/mt. The parties agree that it would apply to out-of-quota MFN imports and has no temporal limitation. The contested tariff quota concession (that is, the tariff quota of 2.2 million mt of bananas bound at an in-quota tariff of €75/mt) is found in Part I, Section I-B (Tariff quotas) of the European Communities' Schedule. It reads:

Description of product	Tariff item number(s)	Initial quota quantity and in-quota tariff rate	Final quota quantity and in-quota tariff rate	Implementation period from/to	Initial negotiating right	Other terms and conditions
1	2	3	4	5	6	7
Fresh bananas, other than plantains	0803 00 12	2.200.000 t 75 ECU/t	2.200.000 t 75 ECU/t			As indicated in the Annex

⁴⁹⁸Appellate Body Report, *EC – Bananas III*, para. 154 (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 220).

⁴⁹⁹GATT Panel Report, *US – Sugar*, para. 5.3.

⁵⁰⁰The relevant excerpts from Sections I-A and I-B of Part I of the European Communities' Schedule LXXX are reproduced in Annex VII attached to this Report.

420. The Annex mentioned under "Other terms and conditions" in column 7 contains the text of the Bananas Framework Agreement, which reads, in relevant part:

1. The global basic tariff quota is fixed at 2.100.000 t for 1994 and at 2.200.000 t for 1995 and the following years, subject to any increase resulting from the enlargement of the Community.
2. This quota is divided up into specific quotas allocated to the following countries:

<u>Country</u>	<u>Percentage of the global quota</u>
Costa Rica	23.4
Colombia	21.0
Nicaragua	3.0
Venezuela	2.0
Dominican Republic and other ACP concerning non-traditional quantities	90.000 t.
Others	46.32% (1994)–46% (1995)

...

7. The in-quota tariff rate shall be 75 Ecus tonne.
8. The agreed system will be operational by 1 October 1994 at the latest, without prejudice to any provisional or transitional measures to be examined for the year 1994.
9. This agreement shall apply until 31 December 2002. Full consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001.

The functioning of the agreement will be reviewed before the end of the third year, with full consultation of GATT Member Latin American suppliers.
10. This agreement will be incorporated into the Community's Uruguay Round Schedule.
11. This agreement represents a settlement of the dispute between Colombia, Costa Rica, Venezuela, Nicaragua and the Community on the Community's banana regime. The parties to this agreement will not pursue the adoption of the GATT panel report on this issue.

421. In determining whether the tariff quota concession at issue expired on 31 December 2002 or remained in force, we need to examine the elements of Part I, Section I-B of the European Communities' Schedule and the Bananas Framework Agreement annexed thereto in their entirety. All the columns of Section I-B of the Schedule and the paragraphs of the Bananas Framework Agreement may provide interpretative guidance.

422. We start by noting that all terms and conditions in the European Communities' Schedule should be given meaning and effect, regardless of the column in which they are inscribed, or whether they are contained in an annex that is cross-referenced in one of the columns.

423. We observe that the global tariff quota of 2.2 million mt and the in-quota rate of €75/mt bound in columns 3 and 4 of Section I-B are restated in paragraphs 1 and 7 of the Bananas Framework Agreement. In our view, meaning must be given to the fact that the tariff quota quantity and the in-quota rate are inscribed in columns 3 and 4 of the Schedule and restated in paragraphs 1 and 7 of the Bananas Framework Agreement. We are not persuaded by the conclusion that the same concession has been stated twice with the same meaning, first in the Schedule and then in the Bananas Framework Agreement. We consider that the Bananas Framework Agreement performs a different function to that of the Schedule and that the Agreement does not subsume the terms and conditions contained in columns 3 and 4 of the Schedule. It is the "other terms and conditions" in the Bananas Framework Agreement that should be read in the light of the commitments in columns 3 and 4 of the Schedule. The tariff quota quantity and the in-quota rate, which are committed in the Schedule, are restated in paragraphs 1 and 7 of the Bananas Framework Agreement for the purpose of allocating the tariff quota. As such, therefore, paragraphs 1 and 7 of the Bananas Framework Agreement do not establish the tariff quota concession.

424. We further note that paragraphs 2 through 6 of the Bananas Framework Agreement deal at length with the allocation among supplier countries of the "global basic tariff quota" identified in paragraph 1: paragraph 2 allocates specific quota shares to the supplier countries that were parties to the GATT panel in *EEC – Bananas II* and leaves a residual allocation to "others"; paragraphs 3 and 4 specify when a country may fill its allocation with deliveries from other suppliers and how shortfalls may be re-allocated among supplier countries; paragraph 5 provides that autonomous quota increases by the European Communities are allocated according to the same percentage shares set out in paragraph 2, yet, suppliers with country-specific allocations may jointly request and the Commission "shall agree to a different allocation"; and paragraph 6 contains additional rules on the management of the quota shares. According to paragraph 8, "[t]he *agreed system* will be operational by 1 October 1994"; and the first sentence of paragraph 9 follows stating that "[t]his *agreement* shall apply until

31 December 2002."⁵⁰¹ Paragraph 9 further provides for consultations with suppliers and the review of the agreement's functioning after three years. Paragraph 10 requires incorporation of "this agreement" into the European Communities' Schedule. According to paragraph 11, "[t]his agreement represents a settlement" among the parties to the *EEC – Bananas II* dispute.

425. Our review of these elements reveals that the Bananas Framework Agreement constitutes an agreement on the allocation, management, and reallocation of country-specific shares within the "global basic tariff quota" referred to in paragraph 1. Therefore, we are of the view that the sentence "[t]his agreement shall apply until 31 December 2002" in paragraph 9 refers to an agreement on the allocation of shares. It does not mention the "global basic tariff quota", nor does it refer to the tariff quota concession inscribed in column 4 of Part I, Section I-B of the European Communities' Schedule under the heading "*Final* quota quantity and in-quota tariff rate".⁵⁰² When a critical temporal limitation is contained in an annex to a Schedule, the fact that an "agreement" is mentioned but no reference is made to the final tariff quota concession, is significant and must be given weight in any interpretation. We believe that the temporary nature of the agreement referred to in paragraph 9 of the Bananas Framework Agreement and the tariff quota concession bound in column 4 of Section I-B of the European Communities' Schedule can both be given meaning and effect. In our view, the tariff quota quantity of 2.2 million mt and the in-quota tariff are bound in column 4 as "final". The Bananas Framework Agreement, according to column 7 of the Schedule under the heading "Other terms and conditions", concerns elements *other* than those inscribed in columns 3 and 4. The expiration date and the review contemplated after three years in paragraph 9 relate to the allocation of shares within the "global basic tariff quota" of 2.2 million mt as restated in paragraph 1 of the Bananas Framework Agreement. This reading of Section I-B of the European Communities' Schedule and, specifically, of paragraph 9 of the Bananas Framework Agreement is also borne out by Article XIII:2(d) and Article XIII:4 of the GATT 1994.

426. One of the options under Article XIII:2(d) for tariff quota management is the allocation of shares with the agreement of substantial suppliers according to proportions taken from a previous representative period, taking due account of any special factors. Ecuador points out that the country-specific allocations and certain terms and conditions of quota management set out in the Bananas Framework Agreement have become inapplicable, because they were found to be inconsistent with Article XIII:2 in the original proceedings.⁵⁰³ The Panel recalled that "certain provisions of the Bananas Framework Agreement, such as the allocation of country-specific quota shares, but not the

⁵⁰¹Emphasis added.

⁵⁰²Emphasis added.

⁵⁰³Ecuador's other appellant's submission, para. 23.

Bananas Framework Agreement as a whole, were found in the original proceedings to be inconsistent with the WTO agreements."⁵⁰⁴ In our view, this confirms that the European Communities' bound tariff quota concession remains in force even though certain terms and the agreement set out in the Bananas Framework Agreement have expired.⁵⁰⁵ This is particularly so when the relevant terms and conditions concern elements that are distinct and severable from one another (such as the overall tariff quota quantity and the in-quota tariff rate, on the one hand, and the allocation of the quota shares among suppliers, on the other hand).

427. We further note that a Member seeking an allocation agreement with supplying countries is required under Article XIII:4 to consult with Members having a substantial interest in supplying the product "regarding the need for an adjustment of the proportion determined or the base period selected". In this respect, we recall that the original panel found that:

... although the EC reached an agreement with all Members who had a substantial interest in supplying the product at one point in time, under the consultation provisions of Article XIII:4, the EC would have to consider the interests of a new Member who had a substantial interest in supplying the product if that new Member requested it to do so. The provisions on consultations and adjustments in Article XIII:4 mean in any event that the [Bananas Framework Agreement] could not be invoked to justify a permanent allocation of tariff quota shares.⁵⁰⁶ (footnote omitted)

428. In our view, paragraph 9 of the Bananas Framework Agreement, which set an expiry date for the agreement at 31 December 2002, provided for consultations between the European Communities and "Latin American suppliers that are GATT Members" by 2001, and the review of the functioning of the agreement within three years, reflects the requirements of Article XIII:4, which requires consultation with substantial suppliers, reappraisal of special factors, and an adjustment of the allocation agreement.

429. For these reasons, we consider that the expiry date in paragraph 9 of the Bananas Framework Agreement refers only to the agreement on the allocation of the tariff quota shares. The overall tariff quota quantity and the in-quota tariff rate, on the one hand, and the allocation of the quota shares among supplier countries, on the other hand, are distinct aspects of the European Communities' market access commitments relating to bananas. The main function and content of the Bananas Framework Agreement is the allocation of the quota shares for a certain period of time, whereas the tariff quota quantity and the in-quota tariff rate are set out as "initial" and "final" commitments in

⁵⁰⁴Ecuador Panel Report, para. 7.425.

⁵⁰⁵Ecuador Panel Report, paras. 7.425 and 7.426.

⁵⁰⁶Panel Report, *EC – Bananas III (Ecuador)*, para. 7.92. (footnote omitted)

columns 3 and 4 respectively of Part I, Section I-B of the European Communities' Schedule and identified as the "global basic tariff quota" in paragraph 1 of the Bananas Framework Agreement.

430. We disagree with the Panel that "the expiration of the Bananas Framework Agreement on 31 December 2002 would automatically imply expiration of the European Communities' tariff quota concession under the terms of its Schedule".⁵⁰⁷ In reaching this conclusion, we are giving full effect to all terms and conditions contained in the European Communities' Schedule of Concessions. However, in our view, paragraph 9 of the Bananas Framework Agreement relates to the agreement on the allocation of quota shares set out in paragraph 2, not to the entire quota concession, and provides that this agreement expired on 31 December 2002. We therefore consider that the tariff quota concession for 2.2 million mt bound at the in-quota rate of €75/mt remained in force beyond 31 December 2002 until the rebinding of the European Communities' Schedule of Concessions for bananas.

431. Ecuador argues that the Panel erred in concluding that the object and purpose of the WTO agreements supported its interpretation that the tariff quota concession in the European Communities' Schedule had expired.⁵⁰⁸ The European Communities agrees with the Panel's considerations.

432. The Panel relied on the object and purpose of the *WTO Agreement* and the GATT 1994, as reflected in the preambles of these two Agreements. It noted that "concessions made by WTO Members should be interpreted so as to further the general objective of expanding trade in goods and services and reducing barriers to trade, through the negotiation of reciprocal and mutually advantageous arrangements."⁵⁰⁹ At the same time, the Panel considered that "this general object and purpose is consistent with the more specific object and purpose of Article II:1(a) and (b)."⁵¹⁰ It referred, in particular, to the "objective of promoting security and predictability in international trade, through the exchange of concessions"⁵¹¹, which is subject to conditions and qualifications in Members' Schedules. According to the Panel, its finding that the tariff quota concession had expired was consistent with the specific objective of promoting security and predictability in international trade through the exchange of concessions, because it gave effect to the terms and conditions incorporated into the European Communities' Schedule, including the temporal limitation provided for in the Bananas Framework Agreement. The Panel considered that the general object and purpose of the *WTO Agreement* and the GATT 1994 of expanding trade and reducing barriers to trade through

⁵⁰⁷Ecuador Panel Report, para. 7.427.

⁵⁰⁸Ecuador's other appellant's submission, para. 29.

⁵⁰⁹Ecuador Panel Report, para. 7.431.

⁵¹⁰Ecuador Panel Report, para. 7.433.

⁵¹¹Ecuador Panel Report, para. 7.433.

the negotiation of reciprocal and mutually advantageous arrangements had to be reconciled with the specific objective of respecting scheduled concessions including the terms and conditions inscribed in Schedules. In the Panel's view, these considerations of the object and purpose confirmed its interpretation that paragraph 9 of the Bananas Framework Agreement provided a temporal limitation to the European Communities' tariff quota concession for bananas.

433. We agree with the Panel that "concessions made by WTO Members should be interpreted so as to further the general objective of expanding trade in goods and services and reducing barriers to trade, through the negotiation of reciprocal and mutually advantageous arrangements."⁵¹² We also consider that the "objective of promoting security and predictability in international trade" is furthered "through the exchange of concessions"⁵¹³, which are subject to conditions and qualifications inscribed in Members' Schedules. However, as explained above, the temporal limitation in paragraph 9 of the Banana Framework Agreement, that "this agreement shall apply until 31 December 2002", is properly read to relate to the agreement on the allocation of quota shares reflected in paragraph 2. In our view, it is not consistent with the objective of promoting security and predictability in international trade through the exchange of concessions if terms, conditions, and temporal limitations relating to an agreement on quota allocation are improperly read to qualify a tariff quota concession that is bound as the "final quota quantity and in-quota tariff rate". To the contrary, our interpretation that the tariff quota concession bound in Part I, Section I-B (that is, 2.2 million mt at an in-quota rate of €75/mt) of the European Communities' Schedule remains in force is consistent with the objective of promoting security and predictability in international trade through the exchange of concessions, and with the objective of expanding trade and reducing barriers to trade through the negotiation of reciprocal and mutually advantageous arrangements.

434. We further note that the second sentence of paragraph 9 of the Bananas Framework Agreement states that "[f]ull consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001." If we assume, *arguendo*, that the tariff quota concession expired on 31 December 2002 pursuant to the first sentence of paragraph 9, this would leave MFN suppliers with the out-of-quota tariff rate bound at €680/mt, and a commitment by the European Communities to consult on a possible rebinding. The substantial suppliers of the European Communities that negotiated the market access commitments on bananas and made reciprocal tariff concessions would remain bound by their scheduled concessions, but would forego the tariff quota concession for bananas they bargained for with the European Communities. If the Panel's interpretation that paragraph 9 of the Bananas Framework Agreement "extinguished" the tariff quota

⁵¹²Ecuador Panel Report, para. 7.434.

⁵¹³Ecuador Panel Report, para. 7.433.

concession from Part I, Section I-B of the European Communities' Schedule were accepted, only the out-of-quota tariff rate bound in Part I, Section I-A at a level of at €680/mt would remain, coupled with a requirement to consult on a rebinding. In our view, this would not provide security or predictability of tariff concessions and would not promote the objective of expanding trade and reducing barriers to trade through the negotiation of reciprocal and mutually advantageous concessions and arrangements.

435. For these reasons, we believe that our interpretation of the European Communities' Schedule of Concessions and the Bananas Framework Agreement annexed thereto is consistent with the objective to provide predictability and security to the multilateral trading system and to promote the objective of expanding trade and reducing barriers to trade through "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs."⁵¹⁴ We consider, therefore, that paragraph 9 of the Bananas Framework Agreement should not be read to affect the validity of the European Communities' tariff quota concession inscribed in columns 3 and 4 of Part I, Section I-B of its Schedule until the Article XXVIII negotiations have been completed, and that this is consistent with the object and purpose of the GATT 1994 and the *WTO Agreement*.

2. Supplementary Means of Interpretation

436. We turn next to the negotiating history of the European Communities' Uruguay Round Schedule of Concessions and the Bananas Framework Agreement. The Schedule, including the tariff quota concession, is a multilaterally agreed instrument, which is an integral part of the GATT 1994 pursuant to Article II:7 therein. In contrast, the Bananas Framework Agreement—incorporated into the Schedule as "Other terms and condition" in column 7—was originally a plurilateral agreement concluded between the European Communities and four Latin American GATT Members (Colombia, Costa Rica, Venezuela, and Nicaragua) as a settlement of the *EEC – Bananas II* dispute.

437. The final offer presented by the European Communities in the framework of the Uruguay Round agricultural negotiations on 14 December 1993 included reference to an earlier draft of the Bananas Framework Agreement, which allocated shares of the quota also to Ecuador, Panama, Honduras, and Guatemala (excluded from the final Bananas Framework Agreement) and provided for the agreement to expire on 31 December 2002. The Bananas Framework Agreement in the 1993 offer established that it would be "registered and legalized in the Uruguay Round". At the conclusion of the Uruguay Round negotiations, GATT Members agreed to submit "draft final Schedules" of Concessions on agricultural and non-agricultural market access by 15 February 1994. Between

⁵¹⁴Preamble of the *WTO Agreement*, third recital.

15 February and 31 March 1994, "a process of verification [took] place to ensure that the final schedules duly reflected the negotiated concessions exchanged between participants and that errors and omissions were rectified".⁵¹⁵

438. The "draft final Schedule" of Concessions submitted by the European Communities included a tariff quota concession for 2 million mt bound at an in-quota rate of €100/mt, without reference to the Bananas Framework Agreement. The European Communities' draft final Schedule of Concessions did not, therefore, contain an expiry date for the tariff quota concession. On 29 March 1994, during the verification process, the European Communities submitted a "corrigendum" to its Schedule as regards bananas, which included reference to the Bananas Framework Agreement in column 7 of Part I, Section I-B of its Schedule. This corrected version of the European Communities' Schedule on bananas was incorporated in Schedule LXXX, which was adopted by the WTO Members together with the results of the Uruguay Round of negotiations.

439. As noted earlier, paragraph 11 of the Bananas Framework Agreement states that it "represents a settlement of the dispute between Colombia, Costa Rica, Venezuela, Nicaragua and the Community on the Community's banana regime". The negotiating history confirms that the Bananas Framework Agreement was not originally a component of the European Communities' MFN tariff quota concession for bananas. It was an agreement between the European Communities and a group of banana supplying country Members, which allocated quota shares in exchange for the settlement of the GATT dispute in *EEC – Bananas II*.

440. The "draft final Schedule" submitted by the European Communities, before the verification process, included a tariff quota concession for bananas for a quantity of 2 million mt at the in-quota rate of €100/mt, but did not contain an expiry date. We understand that the inclusion of the reference to the Bananas Framework Agreement in the European Communities' Schedule was meant to "register and legalize" (as stated in the draft 1993 offer) the agreement reached between the European Communities, Colombia, Costa Rica, Nicaragua, and Venezuela.

441. Finally, we turn to consider several arguments made by Ecuador that relate to supplementary means of interpretation in support of its position that the European Communities' tariff quota concession did not expire. Ecuador argues that: (i) a time-limited commitment would be contrary to the Uruguay Round Modalities Paper; (ii) the Doha Article I Waiver is premised on the bound tariff quota concession remaining in force unless and until rebound; and (iii) the European Communities

⁵¹⁵Negotiating Group on Market Access, Meeting of 15 December 1993, Note by the Secretariat, para. 2.

initiated twice Article XXVIII negotiations to modify its concessions, which have not as yet been completed.⁵¹⁶

442. The introduction to the Modalities Paper states that it is "being re-issued for the purpose of completing draft Schedules of concession and commitments in the agricultural negotiations and for facilitating the verification process leading to the establishment of formal Schedules to be annexed to the Uruguay Round Protocol." In our view, this introductory language and the content of the Modalities Paper make clear that it qualifies as "preparatory work of the treaty" within the meaning of Article 32 of the *Vienna Convention*. The Modalities Paper explicitly states that it "shall not be used as a basis for dispute settlement proceedings"; this means that it does not in itself confer on WTO Members rights and obligations enforceable in dispute settlement. However, this does not preclude reference to the Modalities Paper when interpreting the WTO agreements and Members' Schedules of Concessions that were prepared in accordance with these modalities.⁵¹⁷ Therefore, we consider that it is not inappropriate to refer to the Modalities Paper as supplementary means of interpretation to confirm our interpretation of the European Communities' Schedule of Concessions and of the Bananas Framework Agreement.

443. If the Panel's interpretation were correct, and the tariff quota concession had expired on 31 December 2002, the default tariff in the European Communities' Schedule would be the bound out-of-quota tariff rate of €80/mt. The requirement to consult with Latin American suppliers by 2001 pursuant to paragraph 9 of the Bananas Framework Agreement would provide no guarantee that a rebinding would be agreed and consolidated in the European Communities' Schedule by the end of 2002, let alone any certainty and predictability regarding the level of any such rebinding. In contrast, the Modalities Paper, as part of the Uruguay Round tariffication process, required Members to maintain "current access opportunities" that should be "no less than average annual import quantities for the years 1986 to 1988 (the 'reference period')." ⁵¹⁸ As we understand it, the tariff quota of 2.2 million mt at €75/mt for bananas was meant to maintain "current access opportunities" for MFN

⁵¹⁶Ecuador's other appellant's submission, para. 34.

⁵¹⁷Regarding the use of the Modalities Paper to interpret Members' Schedules of Concessions, the panel in *EC – Export Subsidies on Sugar* stated:

Clearly, the so-called Modalities Paper is not a covered agreement and thus cannot provide for WTO rights and obligations to Members. Nonetheless, it could be relevant when interpreting the Agreement on Agriculture, including Members' Schedules.

(Panel Reports, *EC – Export Subsidies on Sugar*, para. 7.350 (footnotes omitted)) The Appellate Body, in that case, confirmed the panel's findings that the Modalities Paper was "not an agreement among WTO Members and, by its terms, [could not] be the basis of dispute settlement", but did not rule on the relevance of the Modalities Paper to the interpretation of Members' Schedules. (Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 199 (quoting Appellate Body Report, *EC – Bananas III*, para. 157))

⁵¹⁸Modalities Paper, Annex 3, para. 11.

banana suppliers in accordance with the Modalities Paper. Moreover, the Modalities Paper does not envisage temporal limitations to this commitment resulting from the tariffication process. However, if the Panel's interpretation of the European Communities' Schedule of Concessions were accepted, from 31 December 2002 onwards, the Schedule would no longer provide for such "current access opportunities" for bananas to be maintained.

444. We therefore consider that the Modalities Paper, as a supplementary means of interpretation, confirms the conclusion we reached above that the tariff quota concession in the European Communities' Schedule did not expire on 31 December 2002 according to paragraph 9 of the Bananas Framework Agreement, considering that the requirement in the Modalities Paper to maintain "current access opportunities" is not limited in time.

445. Regarding the Doha Article I Waiver, we concluded above that the Panel erred in finding that the Waiver constitutes a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention*, and that it extended the tariff quota concession beyond 31 December 2002. It could be argued, however, that the Doha Article I Waiver could qualify as supplementary means of interpretation to confirm the meaning of the European Communities' Schedule of Concessions.⁵¹⁹

446. The Doha Article I Waiver appears to be predicated on the continued application of the European Communities' tariff quota concession beyond 31 December 2002, insofar as it states in its preamble:

Noting that the tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.

447. Furthermore, the rules and procedures set out in the Annex on Bananas presuppose the continued existence of the tariff quota concession, insofar as they require that, in "the rebinding of the EC tariff on bananas ... all EC WTO market-access commitments relating to bananas should be taken into account." Indeed, the award of the arbitrator issued on 1 August 2005 pursuant to the Annex on

⁵¹⁹We recall in this regard that, in *EC – Chicken Cuts*, the Appellate Body stated:

We stress ... that Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they *include* the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.

(Appellate Body Report, *EC – Chicken Cuts*, para. 283)

Bananas reiterates that the tariff quota concession of 2.2 million mt and the in-quota tariff rate of €75/mt continue to bind the European Communities.⁵²⁰

448. Therefore, in our view, the language of the Doha Article I Waiver confirms the conclusion we reached above that the tariff quota concession has not expired and remains in force until the rebinding process and the Article XXVIII negotiations have been completed, and the resulting tariff rate has been consolidated into the European Communities' Schedule.

449. Finally, Ecuador argues, its position that the European Communities' tariff quota concession did not expire on 31 December 2002 is further supported by the fact that the European Communities initiated twice negotiations pursuant to Article XXVIII of the GATT 1994 to modify its concessions. Ecuador argues that initiation of Article XXVIII procedures would not have been necessary if the European Communities merely intended to lower its bound rate from €80/mt.⁵²¹ The European Communities contends that any modification of a tariff concession requires recourse to Article XXVIII.

450. We note that Article XXVIII, entitled "Modification of Schedules", states that a Member "may ... modify or withdraw a concession", without specifying whether "modify" refers only to a reduction in the scope of the concession (such as an increase in the tariff binding). The ordinary meaning of the term "modify" appears to include both the situation in which the scope of a concession is reduced (for example, a tariff increase) and when the scope is expanded (for example, a tariff reduction). In fact, whether the proposed modification actually constitutes a reduction or an expansion of the concession may only become clear in the course of the renegotiations and will determine whether and to what extent the modifying Member owes compensatory adjustment within the meaning of Article XXVIII:2.

451. We also find support for the argument that any modification of the scope of a concession would require initiation of Article XXVIII procedures in the Decision on the Procedures for Modification and Rectification of Schedules of Tariff Concession adopted by the GATT Ministerial Conference on 26 March 1980.⁵²² These procedures identify two types of changes to the authentic texts of Schedules, which can be adopted by Members by means of certification. The first are "changes in the authentic texts of Schedules annexed to the General Agreement which reflect modifications resulting from action under Article II, Article XVIII, Article XXIV, Article XXVII or

⁵²⁰Award of the Arbitrator, *EC – The ACP-EC Partnership Agreement*, para. 13.

⁵²¹Ecuador's other appellant's submission, para. 34.

⁵²²Decision of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25.

Article XXVIII"⁵²³; the second are "changes in the authentic texts of Schedules ... made when amendments or rearrangements which do not alter the scope of a concession are introduced in national customs tariffs in respect of bound items".⁵²⁴

452. In our view, the European Communities' proposed rebinding cannot be regarded as a change that would not alter the scope of a concession. Thus, we consider that the European Communities had to initiate Article XXVIII negotiations to rebind its tariff concession in its Schedule, whether it resulted in an increase or in a reduction of the bound tariff rate. For this reason, the initiation by the European Communities of Article XXVIII negotiations would not provide a clear indication that the tariff quota concession had not expired and the tariff rate needed to be increased through negotiations. We consider, therefore, that the fact that the European Communities initiated twice Article XXVIII negotiations to modify its concessions is not conclusive as to whether the tariff quota concession did not expire on 31 December 2002.

3. Conclusion

453. For all the above reasons, we conclude that the tariff quota concession of 2.2 million mt bound at the in-quota rate of €75/mt in the European Communities' Schedule of Concessions did not expire on 31 December 2002 and remains in force until the rebinding process and the Article XXVIII negotiations have been completed, and the resulting tariff rate has been consolidated in the European Communities' Schedule. We therefore *reverse* the Panel's finding, in paragraph 7.436 of the Ecuador Panel Report, that "the European Communities' tariff quota concession for bananas was unequivocally intended to expire on 31 December 2002."

4. Article II:1(b) of the GATT 1994

454. We have reversed the Panel's finding that, through the Doha Article I Waiver, WTO Members agreed to extend the tariff quota concession for 2.2 million mt bound at the in-quota rate of €75/mt in the European Communities' Schedule of Concessions beyond 31 December 2002. We have also reversed the Panel's finding that the same tariff quota concession was intended to expire on 31 December 2002 in accordance with paragraph 9 of the Bananas Framework Agreement, and found, instead, that the European Communities' tariff quota concession remains in force until the rebinding process and the Article XXVIII negotiations have been completed, and the resulting tariff rate has been consolidated in the European Communities' Schedule.

⁵²³Decision of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25, para. 1.

⁵²⁴Decision of 26 March 1980, Procedures for Modification and Rectification of Schedules of Tariff Concessions, GATT document L/4962, BISD S27/25, para. 2.

455. Accordingly, we *uphold* the Panel's findings, albeit for different reasons, in paragraph 7.504 of the Ecuador Panel Report, that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of €75/mt, is inconsistent with the first sentence of Article II:1(b) of the GATT 1994, insofar as it constitutes "an ordinary customs duty in excess of that set forth and provided for in Part I of the European Communities' Schedule, and results in a treatment for the commerce of bananas from MFN countries (i.e., non-ACP WTO Members) that is less favourable than that provided for in Part I [of the] European Communities' Schedule."

XII. Nullification or Impairment (United States)

456. We now turn to the European Communities' appeal of the Panel's finding that, "to the extent that the [EC Bananas Import Regime] contain[ed] measures inconsistent with various provisions of the GATT 1994, it ... nullified or impaired benefits accruing to the United States under that Agreement."⁵²⁵

457. Section A summarizes the findings made in the original proceedings. The current Article 21.5 proceedings are summarized in section B. Section C provides an overview of the arguments raised on appeal by the participants and the third participants. Finally, in section D, we discuss the issues appealed.

A. The Original Proceedings

458. In the original *EC – Bananas III* dispute, the panel and the Appellate Body relied on the conclusions of the GATT panel in *US – Superfund* to find that proving the absence of actual trade effects is insufficient to rebut the presumption of nullification or impairment under Article 3.8 of the DSU. The Appellate Body agreed with the original panel that "the United States is a producer of bananas and that a potential export interest by the United States cannot be excluded", and that "the internal market of the United States for bananas could be affected by the EC bananas regime and by its effects on world supplies and world prices of bananas".⁵²⁶ The Appellate Body therefore upheld the original panel's findings that "the European Communities ha[d] not succeeded in rebutting the presumption that its breaches of the GATT 1994 ... nullified or impaired the benefits of the United States, with the modification that this finding should be limited to the United States and to the EC's obligations under the GATT 1994".⁵²⁷

⁵²⁵US Panel Report, para. 8.12.

⁵²⁶Appellate Body Report, *EC – Bananas III*, para. 251.

⁵²⁷Appellate Body Report, *EC – Bananas III*, para. 255(x).

B. *The Current Article 21.5 Proceedings*

459. In the current proceedings, the Panel addressed the European Communities' arguments that "the preferential tariff quota reserved for ACP countries has no impact on the value of relevant EC banana imports from the United States", and that the "preferential tariff quota therefore does not cause the United States any nullification or impairment of a benefit for which the European Communities can face suspension of concessions [under Article 22 of the DSU]".⁵²⁸

460. The Panel in these proceedings relied on the findings by the panel and the Appellate Body in the original proceedings rejecting a similar claim by the European Communities that the United States had not suffered nullification or impairment because of the inconsistencies with the GATT 1994 and the GATS of the European Communities' bananas import regime at issue in the original proceedings. The Panel also emphasized that these compliance proceedings were conducted pursuant to Article 21.5 and thus "[did] not occur in isolation from the original proceedings", but "form[ed] part of a continuum of events".⁵²⁹ The Panel concluded that, "[c]onsidering the link between the current compliance proceedings and the original proceedings ... the European Communities has [not] successfully rebutted the legal presumption established by Article 3.8 of the DSU that its inconsistent measures nullify or impair benefits accruing to the United States under the WTO agreements".⁵³⁰

C. *Claims and Arguments on Appeal*

461. The European Communities argues that the Panel erred in finding that the United States had suffered nullification or impairment as a result of the EC Bananas Import Regime. Considering that the United States is a net importer of bananas that did not export bananas to any country in the world, the preference for ACP bananas "did not deprive the United States from any 'competitive opportunity' to export bananas towards the market of the European Communities, nor did it change the United States' 'competitive relationship' with any banana exporting country in the world".⁵³¹

462. The United States responds that the Appellate Body already rejected similar arguments made by the European Communities in the original proceedings, and that the findings of the Appellate Body in the original proceedings formed the basis for the rulings and recommendations addressed to the European Communities in this proceeding.⁵³² The United States argues that a showing of adverse

⁵²⁸US Panel Report, para. 8.5.

⁵²⁹US Panel Report, para. 8.9 (referring to Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 136).

⁵³⁰US Panel Report, para. 8.10.

⁵³¹European Communities' appellant's submission, para. 165 (US).

⁵³²United States' appellee's submission, para. 96.

trade effects is unnecessary for the purpose of demonstrating that a breach of a GATT provision results in the nullification or impairment of benefits.⁵³³ The United States further submits that the clear breaches of Articles I and XIII of the GATT 1994 obviated the need for the United States to demonstrate affirmatively the trade effects caused by the European Communities' banana measures.⁵³⁴

D. *The Panel's Findings under Article 3.8 of the DSU*

463. The European Communities claims that the Panel "confused the notion of 'nullification or impairment' in Article 3.8 of the DSU with the 'interest' that a complaining party must have in order to have 'standing' to commence dispute settlement proceedings".⁵³⁵ By contrast, the "standard that needs to be satisfied for a finding of 'nullification or impairment' under Article 3.8 is more difficult to satisfy than the standard that needs to be satisfied for a finding of 'standing' to bring a complaint."⁵³⁶

464. We consider that the notion of "standing", as interpreted by the Appellate Body in the original proceedings, is broader than the notion of "nullification or impairment". In other words, if there is nullification or impairment, there will also be standing to bring a complaint. However, standing may also exist in cases that result in no finding of nullification or impairment. In the original *EC – Bananas III* proceedings, the Appellate Body found that "a Member has broad discretion in deciding whether to bring a case against another Member under the DSU", and that "a Member is expected to be largely self-regulating in deciding whether any such action would be 'fruitful'".⁵³⁷ The Appellate Body further concluded that, considering that the United States was a producer and potential exporter of bananas, it was justified in bringing its claims under the GATT 1994.⁵³⁸ The Appellate Body then used this same argument to find that the United States had suffered nullification or impairment of benefits.⁵³⁹

465. We do not believe that the Panel in the current proceedings confused the notions of "nullification or impairment" and "standing". Indeed, the Panel addressed these issues separately, even though the European Communities had presented these claims jointly.⁵⁴⁰ In fact, in a section of

⁵³³United States' appellee's submission, paras. 96-98 (referring to GATT Panel Report, *US – Superfund*, para. 5.19).

⁵³⁴United States' appellee's submission, para. 99

⁵³⁵European Communities' appellant's submission, para. 156 (US).

⁵³⁶European Communities' appellant's submission, para. 159 (US).

⁵³⁷Appellate Body Report, *EC – Bananas III*, para. 135.

⁵³⁸The panel and the Appellate Body in the original proceedings used the same argument to conclude that the United States had "standing" to bring the case and that it had suffered nullification or impairment of benefits (that is, that the United States is a potential exporter of bananas to the European Communities and that there could be effects on its internal market). However, the fact that nullification or impairment implies a higher standard than "legal standing" does not mean that "standing" cannot be found based on such higher standard.

⁵³⁹Appellate Body Report, *EC – Bananas III*, para. 251.

⁵⁴⁰US Panel Report, paras. 7.17-7.22.

the US Panel Report entitled "Verification of the United States' standing to commence these proceedings", the Panel found that the United States had standing to initiate the proceedings.⁵⁴¹ It stated in the same section that it would turn to the issue of nullification or impairment later in the Report only "after having considered the substantive claims made, under Articles I and XIII of the GATT 1994, by the United States against the preferences granted by the European Communities".⁵⁴²

466. Having found that the preferential ACP tariff quota was inconsistent with Articles I:1 and XIII, the Panel addressed the question of nullification or impairment in a separate section at the end of the US Panel Report. Relying on panel and Appellate Body findings in the original proceedings, the Panel found that, considering that "WTO rules are not concerned with actual trade effects, but rather with competitive opportunities"⁵⁴³, the United States, as a potential exporter of bananas, had suffered nullification or impairment because of the European Communities' inconsistent measures. The Panel also referred to the statements made by the panel and the Appellate Body in the original proceedings that, even if the United States did not have a potential export interest, "[t]he internal market of the United States for bananas could be affected by the EC bananas regime by its effects on world supplies and world prices of bananas."⁵⁴⁴

467. The European Communities claims that the Panel erred in finding that the United States had suffered nullification or impairment as a result of the inconsistencies found in respect of the measures at issue. The European Communities argues that, as a net importer of bananas, the United States was "not actively involved in the business of exporting bananas to any country in the world, let alone the European Communities", and that, as a result, the contested measures "could not, and did not deprive the United States of any competitive opportunity to export bananas towards the market of the European Communities, nor did it change the United States' 'competitive relationship' with any banana exporting country in the world" considering that "the United States never had such a 'competitive relationship'".⁵⁴⁵ Moreover, the European Communities argues that the Panel "failed to explain what could be the effect of the contested measures on the 'world supplies and prices' of bananas and how this potential effect could result in 'nullification or impairment' for the United States."⁵⁴⁶

⁵⁴¹US Panel Report, para. 7.35.

⁵⁴²US Panel Report, para. 7.37.

⁵⁴³US Panel Report, para. 8.7 (quoting Panel Report, *EC – Bananas III (US)*, para. 7.50).

⁵⁴⁴Appellate Body Report, *EC – Bananas III*, para. 251 (referring to Panel Reports, *EC – Bananas III*, paras. 7.47-7.52).

⁵⁴⁵European Communities' appellant's submission, para. 165 (US).

⁵⁴⁶European Communities' appellant's submission, para. 161 (US).

468. We note that Article 3.8 of the DSU places the burden on the respondent of rebutting the presumption that the inconsistent measure nullifies or impairs the benefits accruing to the complainant under the WTO agreement concerned. Article 3.8 provides:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

469. In these proceedings, as in the original proceedings, the contested measure may not have actual trade effects because, at present, there are no exports of bananas from the United States to the European Communities. However, in order to determine whether the United States has suffered nullification or impairment, "competitive opportunities" and, in particular, any potential export interest of the United States must be taken into account. We do not consider that the European Communities' argument—that, as a net importer of bananas, the United States could not credibly have a "potential" interest in exporting bananas to the European Communities—is sufficient to rebut the presumption of nullification or impairment under Article 3.8. As noted by the panel and the Appellate Body in the original proceedings, while present production in the United States is minimal, it could at any time start exporting the few bananas it produces to the European Communities. That this may be unlikely does not disprove that the United States is a potential exporter of bananas to the European Communities. In this respect, we recall the conclusion of the GATT panel in *US – Superfund*:

Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.⁵⁴⁷

470. We do not consider it sufficient for the European Communities to allege that the Panel failed to explain what could be the effect of the inconsistent measure on the United States' internal market. In fact, it is the European Communities that bears the burden of rebutting the presumption that the

⁵⁴⁷ Appellate Body Report in *EC – Bananas III*, para. 252 (referring to GATT Panel Report, *US – Superfund*, para. 5.1.9.)

measure found to be inconsistent with the GATT 1994 nullifies or impairs benefits accruing directly or indirectly to the United States under the covered agreements.

471. Furthermore, we recall that the DSB adopted recommendations and rulings in the original proceedings for the European Communities to bring itself into compliance with the GATT 1994 and the GATS. The measure at issue in these compliance proceedings was found to be in breach of the same provisions of the covered agreements as in the original proceedings. The Panel's mandate was to examine whether the European Communities had complied with the DSB's recommendations and rulings in the original proceedings. We agree with the Panel that "[t]he arguments advanced by the European Communities on the alleged lack of nullification or impairment have not rendered irrelevant the considerations made by the panel and by the Appellate Body in the course of the original proceedings, regarding the actual and potential trade interests of the United States in the dispute".⁵⁴⁸

472. In addition, the European Communities contends that the Panel erred in relying on the findings of the panel and the Appellate Body in the original proceedings "because the facts of the present case are very different from the facts of 1997", when the finding of nullification or impairment of benefits accruing to the United States was based on the inconsistency of the European Communities' bananas import regime in force at that time with the GATS and the *Agreement on Import Licensing Procedures*.⁵⁴⁹

473. We observe that, in the original proceedings, nullification or impairment of benefits accruing to the United States was found to result from the inconsistencies of the European Communities' measures with certain provisions of the GATT 1994 and the GATS. As a supplier of wholesale trade services in bananas, the United States' service supply to and in the European Communities was directly affected by the inconsistent measures. We further note that, in the original proceedings, the Appellate Body did not hold that the United States had suffered nullification or impairment exclusively as a result of violations of the GATS. Indeed, the Appellate Body declined to reverse the original panel's finding that the European Communities' breaches of the GATT had nullified or impaired benefits accruing to the complainants (including the United States).⁵⁵⁰ In addition, we note that the allocation procedures for the banana import licences at issue in the original dispute were found to be measures affecting both trade in goods and services, and inconsistent with both the national and MFN treatment provisions of the GATT 1994 and the GATS. Thus, the import licensing procedures found to be GATT-inconsistent were also found to be discriminating against United States

⁵⁴⁸US Panel Report, para. 8.10.

⁵⁴⁹European Communities' appellant's submission, para. 167 (US).

⁵⁵⁰Appellate Body Report, *EC – Bananas III*, para. 254 (referring to Panel Reports, *EC – Bananas III*, para. 7.398).

wholesale service suppliers. Therefore, the findings of nullification or impairment in the original proceedings were not based exclusively on covered agreements other than the GATT 1994. For these reasons, the fact that these compliance proceedings involve only GATT 1994 claims, and are thus narrower in scope than the original proceedings, does not mean that the Panel should not have relied on the findings of nullification and impairment in relation to the GATT 1994 in the original proceedings.

474. Finally, the European Communities argues that the award in the arbitration under Article 22.6 of the DSU in 1999, involving the United States, confirmed that the only source of nullification or impairment of benefits accruing to the United States in the original proceedings were the GATS-inconsistent aspects of the measures and, in particular, the impact on the United States' share of wholesale trade services sold in the European Communities and on the United States' share of allocated banana import licences.⁵⁵¹ We already considered above that the findings of nullification or impairment by the Appellate Body in the original proceedings also related to the GATT 1994, as do those of this compliance Panel. We do not, therefore, believe that the fact that the original proceedings resulted in additional findings of violation of the GATS assists the European Communities in distinguishing the current compliance proceedings from the original proceedings and in rebutting the presumption of nullification or impairment with respect to the violations of the GATT 1994 found by this Panel.

475. In making this argument, the European Communities refers to the Article 22.6 arbitration involving the United States in the *EC – Bananas III* dispute. We agree with the arbitrators that the question whether nullification or impairment exists within the meaning of Article 3.8 of the DSU, and the question of what level of suspension of concessions is equivalent to the level of nullification or impairment under Article 22.6, are distinct.⁵⁵² Therefore, the question how the arbitrators calculated the level of nullification or impairment under Article 22.6 arises in a different procedural context in WTO dispute settlement. In any event, the arbitrators stated that there was "continuation of

⁵⁵¹European Communities' appellant's submission, para. 168 (US).

⁵⁵²The Article 22.6 arbitrators found that:

[t]he *presumption* of nullification or impairment in the case of an infringement of a GATT provision as set forth by Article 3.8 of the DSU cannot in and of itself be taken simultaneously as *evidence* proving a particular level of nullification or impairment allegedly suffered by a Member requesting authorization to suspend concessions under Article 22 of the DSU at a much later stage of the WTO dispute settlement system.

(Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.10)

nullification or impairment of US benefits under the revised EC regime", including as a consequence of an inconsistency with Article XIII of the GATT 1994.⁵⁵³

476. For these reasons, we *find* that the European Communities has not succeeded in rebutting the *prima facie* presumption that its breaches of Articles I and XIII of the GATT 1994 had an adverse impact on the United States' competitive opportunities as a potential exporter of bananas to the European Communities and on the United States' internal market for bananas. We recall that, under Article 3.8 of the DSU, the burden of demonstrating that the United States has not suffered any nullification or impairment of benefits rests on the European Communities.

477. Therefore, we *uphold* the Panel's finding, in paragraph 8.12 of the US Panel Report, that, "to the extent that the [EC Bananas Import Regime] contain[ed] measures inconsistent with various provisions of the GATT 1994, it ... nullified or impaired benefits accruing to the United States under that Agreement".

⁵⁵³Decision by the Arbitrators, *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 5.96-5.98.

XIII. Findings and Conclusions in the Appellate Body Report WT/DS27/AB/RW2/ECU (Ecuador)

478. In the appeal of the 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), for the reasons set out in this Report, the Appellate Body:

- (a) with respect to procedural issues:
 - (i) finds that the Panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States; and
 - (ii) upholds the Panel's finding, albeit for different reasons, in paragraph 7.136 of the Ecuador Panel Report, that Ecuador was not barred by the Understanding on Bananas from initiating this compliance proceeding;

- (b) with respect to Article XIII of the GATT 1994:
 - (i) upholds the Panel's findings, in paragraphs 7.263 and 7.265 of the Ecuador Panel Report, that, to the extent that the European Communities argues that it has implemented a suggestion pursuant to Article 19.1 of the DSU, the Panel was not prevented from conducting, under Article 21.5 of the DSU, the assessment requested by Ecuador; and that, therefore, the Panel did not need to assess whether the European Communities has effectively implemented any of the suggestions of the first compliance panel requested by Ecuador; and
 - (ii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.382 of the Ecuador Panel Report, that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994;

- (c) with respect to Article II of the GATT 1994:
- (i) reverses the Panel's finding, in paragraphs 7.456 and 7.492 of the Ecuador Panel Report, that the Doha Article I Waiver constituted a subsequent agreement between the parties extending the tariff quota concession for bananas listed in the European Communities' Schedule of Concessions beyond 31 December 2002, until the rebinding of the European Communities' tariff on bananas;
 - (ii) reverses the Panel's finding, in paragraph 7.436 of the Ecuador Panel Report, that the European Communities' tariff quota concession for bananas was intended to expire on 31 December 2002 on account of paragraph 9 of the Bananas Framework Agreement; and
 - (iii) upholds, albeit for different reasons, the Panel's findings, in paragraph 7.504 of the Ecuador Panel Report, that the tariff applied by the European Communities to MFN imports of bananas, set at €176/mt, without consideration of the tariff quota of 2.2 million mt bound at an in-quota tariff rate of 75€/mt, is an ordinary customs duty in excess of that provided for in the European Communities' Schedule of Concessions, and thus inconsistent with Article II:1(b) of the GATT 1994; and
- (d) upholds the Panel's finding, in paragraph 8.4 of the Ecuador Panel Report, that the European Communities, by maintaining measures inconsistent with different provisions of the GATT 1994, including Article XIII, has nullified or impaired benefits accruing to Ecuador under that Agreement.

479. The Appellate Body recommends that the DSB request the European Communities to bring its measure, found in this Report and in the Ecuador Panel Report, as modified by this Report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 14th day of November 2008 by:

Luiz Olavo Baptista
Presiding Member

Shotaro Oshima
Member

David Unterhalter
Member

XIII. Findings and Conclusions in the Appellate Body Report WT/DS27/AB/RW/USA (United States)

478. In the appeal of the Panel Report, *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/RW/USA), for the reasons set out in this Report, the Appellate Body:

- (a) with respect to procedural issues:
 - (i) finds that the Panel did not act inconsistently with Article 9.3 of the DSU by maintaining different timetables in the Article 21.5 proceedings between the European Communities and Ecuador and between the European Communities and the United States;
 - (ii) upholds the Panel's finding, albeit for different reasons, in paragraph 7.165 of the US Panel Report, that the United States was not barred by the Understanding on Bananas from initiating this compliance proceeding;
 - (iii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.531 of the US Panel Report, that the EC Bananas Import Regime constituted a "measure taken to comply" within the meaning of Article 21.5 of the DSU and was therefore properly before the Panel;
 - (iv) finds that the Panel did not err in making findings with respect to a measure that had ceased to exist subsequent to the establishment of the Panel, but before the Panel issued its Report; and
 - (v) finds that the deficiencies in the European Communities' Notice of Appeal do not lead to dismissal of the European Communities' appeal;
- (b) with respect to Article XIII of the GATT 1994:
 - upholds, albeit for different reasons, the Panel's finding, in paragraph 7.720 of the US Panel Report, that the EC Bananas Import Regime, in particular, its duty-free tariff quota reserved for ACP countries, was inconsistent with Article XIII:1 and Article XIII:2 of the GATT 1994; and

- (c) upholds the Panel's finding, in paragraph 8.12 of the US Panel Report, that to the extent that the EC Bananas Import Regime contained measures inconsistent with various provisions of the GATT 1994, it nullified or impaired benefits accruing to the United States under that Agreement.

479. As the measure at issue in this dispute is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original in Geneva this 14th day of November 2008 by:

Luiz Olavo Baptista
Presiding Member

Shotaro Oshima
Member

David Unterhalter
Member

ANNEX I

**WORLD TRADE
ORGANIZATION**

WT/DS27/89
29 August 2008

(08-4061)

Original: English

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

Second Recourse to Article 21.5 of the DSU by Ecuador

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 28 August 2008, from the Delegation of the European Commission, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the Working Procedures for Appellate Review, the European Communities submits its Notice of Appeal on certain issues of law and certain legal interpretations developed by the Panel in the Report on *European Communities' regime for the importation, sale and distribution of bananas – Recourse to Article 21.5 of the DSU by Ecuador*.¹
2. The European Communities seeks review by the Appellate Body of the following issues of law and legal interpretations in the Report of the Panel:
 - (a) The Panel's erroneous interpretation and application of Article 9.3 of the DSU;
 - (b) the Panel's erroneous findings concerning the legal effects of the Understanding on Bananas signed by Ecuador and the European Communities in 2001;
 - (c) the Panel's erroneous interpretation and application of the principle of good faith in WTO law;
 - (d) the Panel's legal errors concerning the legal effects of the Doha waiver on the European Communities' Schedule of Concessions;
 - (e) the Panel's erroneous interpretation of Article XIII of the GATT and erroneous finding of a violation of that provision;

¹WT/DS27/RW2/ECU circulated on 7 April 2008.

- (f) the Panel's legal errors in considering that a limitation imposed on the quantity of goods that can benefit from a preferential tariff lawfully granted to certain Members nullifies or impairs benefits accruing under the GATT to all other Members and the Panel's erroneous finding that Ecuador suffered nullification or impairment arising from any inconsistency of the European Communities' measures with Article XIII of the GATT;
- (g) the Panel's legal errors relating to the legal effects of suggestions made by panels pursuant to Article 19.1 of the DSU and the Panel's failure to examine the European Communities' measures in the light of these suggestions.

ANNEX II

**WORLD TRADE
ORGANIZATION**

WT/DS27/90
29 August 2008

(08-4060)

Original: English

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

Recourse to Article 21.5 of the DSU by the United States

Notification of an Appeal by the European Communities
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 28 August 2008, from the Delegation of the European Commission, is being circulated to Members.

-
1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 20.1 of the Working Procedures for Appellate Review, the European Communities submits its Notice of Appeal on certain issues of law and certain legal interpretations developed by the Panel in the Report on *European Communities' regime for the importation, sale and distribution of bananas – Recourse to Article 21.5 of the DSU by the United States of America*.¹
 2. The European Communities seeks review by the Appellate Body of the following issues of law and legal interpretations in the Report of the Panel:
 - (a) The Panel's erroneous interpretation and application of Article 9.3 of the DSU;
 - (b) the Panel's erroneous finding that the banana import regime that the European Communities had in place between January 1, 2006 and December 31, 2007 was a "measure taken to comply" with the rulings and recommendations adopted by the DSB in 1997;
 - (c) the Panel's erroneous findings concerning the legal effects of the Understanding on Bananas signed by the United States and the European Communities in 2001;
 - (d) the Panel's erroneous interpretation and application of the principle of good faith in WTO law;

¹WT/DS27/RW/USA circulated on 19 May 2008.

- (e) the Panel's erroneous interpretation of Article XIII of the GATT and its erroneous finding of a violation of that provision;
- (f) the Panel's erroneous finding that the United States suffered "nullification or impairment" as a result of the banana import regime that the European Communities had in place between January 1, 2006 and December 31, 2007;
- (g) the Panel's failure to take into consideration the repeal of the contested measure.

ANNEX III

**WORLD TRADE
ORGANIZATION**

WT/DS27/91
15 September 2008

(08-4258)

Original: English

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

Second Recourse to Article 21.5 of the DSU by Ecuador

Notification of an Other Appeal by Ecuador
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 9 September 2008, from the Delegation of Ecuador, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23(1) of the *Working Procedures for Appellate Review*, Ecuador submits this Notice of Other Appeal on certain issues of law covered and certain legal interpretations developed by the Panel in the Report on: *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*.¹

On 28 August 2008, the European Communities (EC) filed its Notice of Appeal pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*. The EC requested that the Appellate Body review certain findings and conclusions of the Panel.

If, as a result of its review of any of the matters appealed by the EC, the Appellate Body considers that the Panel's conclusion that the EC's applied duty on bananas is inconsistent with the first sentence of Article II:1(b) of the GATT 1994 is not justified on the bases found by the Panel, Ecuador appeals the following issues of law and legal interpretation in the Report of the Panel:

¹Panel 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, circulated on 7 April 2008 (the "Panel Report").

The Panel's erroneous findings (e.g. in paragraphs 7.427, 7.436, 7.482, 7.492) concerning the effect of the expiration clause (paragraph 9) of the Banana Framework Agreement on the continued binding effect under Article II of the GATT 1994 of the EC's tariff quota at 75 euro/mt.

ANNEX IV

ORGANISATION MONDIALE
DU COMMERCE

ORGANIZACIÓN MUNDIAL
DEL COMERCIO

WORLD TRADE ORGANIZATION

APPELLATE BODY

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

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

Procedural Ruling

1. On 29 August 2008, the Appellate Body Division hearing the above appeals received two joint requests from Ecuador and the European Communities, and from the United States and the European Communities, to allow observation by the public of the oral hearing in the appellate proceedings.¹ The participants argued that nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") or the *Working Procedures for Appellate Review* (the "*Working Procedures*") precludes the Appellate Body from authorizing public observation of the oral hearing.

2. On 1 September 2008, we invited the third participants to comment in writing on the requests of the participants. In particular, we asked the third participants to provide their views on the permissibility of opening the hearing under the DSU and the *Working Procedures*, and, if they so wished, on the specific logistical arrangements proposed in the requests. We received comments on 5 September from Colombia, on 9 September from Panama and Nicaragua, and on 10 September from Brazil, Jamaica, and Japan. Colombia, Jamaica, Japan, Nicaragua, and Panama expressed their support for the request of the participants. Brazil expressed the view that the provision of the DSU expressly disallow public hearings at the appellate stage. According to Brazil, opening the oral hearing in these proceedings to public observation would extrapolate the flexibility granted to Members in Article 18.2 of the DSU and run counter to the obligation of confidentiality imposed by Article 17.10 of the DSU.

3. We consider it necessary that a ruling is made by us on the requests of the participants. Accordingly, we make the following ruling.

4. Similar requests were made in the *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* appeals, in which the Appellate Body set out its reasoning for granting the requests. The salient reasoning reflected in that case is as follows:

¹The participants expressed a preference for simultaneous, closed-circuit television broadcast to another room, with the broadcast being interrupted when any third participant that does not wish to make its statement public, takes the floor.

The third participants that object to the request to allow public observation argue that the confidentiality requirement in Article 17.10 is absolute and permits of no derogation. We disagree with this interpretation because Article 17.10 must be read in context, particularly in relation to Article 18.2 of the DSU. The second sentence of Article 18.2 expressly provides that "[n]othing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public". Thus, under Article 18.2, the parties may decide to forego confidentiality protection in respect of their statements of position. With the exception of India, the participants and third participants agreed that the term "statements of its own positions" in Article 18.2 extends beyond the written submissions referred to in the first sentence of Article 18.2, and includes oral statements and responses to questions posed by the Appellate Body at the oral hearing. The third sentence of Article 18.2 states that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." This provision would be redundant if Article 17.10 were interpreted to require absolute confidentiality in respect of all elements of appellate proceedings. There would be no need to require, pursuant to Article 18.2, that a Member designate certain information as confidential. The last sentence of Article 18.2 ensures that even such designation by a Member does not put an end to the right of another Member to make disclosure to the public. Upon request, a Member must provide a non-confidential summary of the information contained in its written submissions that it designated as confidential, which can then be disclosed to the public. Thus, Article 18.2 provides contextual support for the view that the confidentiality rule in Article 17.10 is not absolute. Otherwise, no disclosure of written submissions or other statements would be permitted during any stage of the proceedings.

In practice, the confidentiality requirement in Article 17.10 has its limits. Notices of Appeal and Appellate Body reports are disclosed to the public. Appellate Body reports contain summaries of the participants' and third participants' written and oral submissions and frequently quote directly from them. Public disclosure of Appellate Body reports is an inherent and necessary feature of our rules-based system of adjudication. Consequently, under the DSU, confidentiality is relative and time-bound.

In our view, the confidentiality requirement in Article 17.10 is more properly understood as operating in a relational manner.[*] There are different sets of relationships that are implicated in appellate proceedings. Among them are the following relationships. First, a relationship between the participants and the Appellate Body. Secondly, a relationship between the third participants and the Appellate Body. The requirement that the proceedings of the Appellate Body are confidential affords protection to these separate relationships and is intended to safeguard the interests of the participants and third participants and the adjudicative function of the Appellate Body, so as to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity. In this case, the participants have jointly requested authorization to forego confidentiality protection for their communications with the Appellate Body at the oral hearing. The request of the participants does not extend to any communications, nor touches upon the relationship, between the third participants and the Appellate Body. The right to confidentiality of third participants *vis-à-vis* the Appellate Body is not implicated by the joint request. The question is thus whether the request of the participants to forego confidentiality protection satisfies the requirements of fairness and integrity that are the essential attributes of the appellate process and define the relationship between the Appellate Body and the participants. If the request meets these standards, then the Appellate Body would incline towards authorizing such a joint request.

[*]This relational view of rights and obligations of confidentiality is consistent with the approach followed in domestic jurisdictions with respect to similar issues, such as privilege.

We note that the DSU does not specifically provide for an oral hearing at the appellate stage. The oral hearing was instituted by the Appellate Body in its *Working Procedures*, which were drawn up pursuant to Article 17.9 of the DSU. The conduct and organization of the oral hearing falls within the authority of the Appellate Body (*compétence de la compétence*) pursuant to Rule 27 of the *Working Procedures*. Thus, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the joint request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process. As we observed earlier, Article 17.10 also applies to the relationship between third participants and the Appellate Body. Nevertheless, in our view, the third participants cannot invoke Article 17.10, as it applies to their relationship with the Appellate Body, so as to bar the lifting of confidentiality protection in the relationship between the participants and the Appellate Body. Likewise, authorizing the participants' request to forego confidentiality, does not affect the rights of third participants to preserve the confidentiality of their communications with the Appellate Body.

Some of the third participants argued that the Appellate Body is itself constrained by Article 17.10 in its power to authorize the lifting of confidentiality. We agree that the powers of the Appellate Body are themselves circumscribed in that certain aspects of confidentiality are incapable of derogation—even by the Appellate Body—where derogation may undermine the exercise and integrity of the Appellate Body's adjudicative function. This includes the situation contemplated in the second sentence of Article 17.10, which provides that "[t]he reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made." As noted by the participants, the confidentiality of the deliberations is necessary to protect the integrity, impartiality, and independence of the appellate process. In our view, such concerns do not arise in a situation where, following a joint request of the participants, the Appellate Body authorizes the lifting of the confidentiality of the participants' statements at the oral hearing.

The Appellate Body has fostered the active participation of third parties in the appellate process in drawing up the *Working Procedures* and in appeal practice. Article 17.4 provides that third participants "may make written submissions to, and be given an opportunity to be heard by, the Appellate Body." In its *Working Procedures*, the Appellate Body has given full effect to this right by providing for participation of third participants during the entirety of the oral hearing, while third parties meet with panels only in a separate session at the first substantive meeting. Third participants, however, are not the main parties to a dispute. Rather, they have a systemic interest in the interpretation of the provisions of the covered agreements that may be at issue in an appeal. Although their views on the questions of legal interpretation that come before the Appellate Body are always valuable and thoroughly considered, these issues of legal interpretation are not inherently confidential. Nor is it a matter for the third participants to determine how the protection of confidentiality in the relationship between the participants and the Appellate Body is best dealt with. In order to sustain their objections to public observation of the oral hearing, third participants would have to identify a specific interest in their relationship with the Appellate Body that would be adversely affected if we were to authorize the participants' request—in this case, we can discern no such interests.

5. We are not persuaded that there is any basis to depart from this reasoning.
6. The request for public observation of the oral hearing in these disputes has been made jointly by the three participants, Ecuador, the European Communities, and the United States. As we explained in our reasoning in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* and *Canada – Continued Suspension of Obligations in the EC – Hormones*

Dispute, the Appellate Body has the power to authorize a joint request by the participants to lift confidentiality, provided that this does not affect the confidentiality of the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. There is no reason in this case not to authorize the requests made to us. The participants have suggested alternative modalities that allow for public observation of the oral hearing, while safeguarding the confidentiality protection enjoyed by the third participants. The modalities include simultaneous or delayed closed-circuit television broadcasting in a room separate from the room used for the oral hearing. Finally, we do not see the public observation of the oral hearing, using the means described above, as having an adverse impact on the integrity of the adjudicative functions performed by the Appellate Body.

7. For these reasons, the Appellate Body Division hearing this appeal authorizes the public observation of the oral hearing in these proceedings on the terms set out below. Accordingly, pursuant to Rule 16(1) of the *Working Procedures*, we adopt the following additional procedures for the purposes of this appeal:

- (a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television. The closed-circuit television signal will be shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.
- (b) Oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation.
- (c) Any third participant that has not already done so may request that its oral statements and responses to questions remain confidential and not be subject to public observation. Such requests must be received by the Appellate Body Secretariat no later than 5:00 p.m. Geneva time on Friday, 26 September 2008.
- (d) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit broadcast will be shown.
- (e) Notice of the oral hearing will be provided to the general public through the WTO website. WTO delegates and members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat.
- (f) Should practical considerations not allow simultaneous broadcast of the oral hearing, deferred showing of the video recording will be used in the alternative.

Geneva, 18 September 2008

ANNEX V

**WORLD TRADE
ORGANIZATION**

WT/MIN(01)/15
14 November 2001

(01-5786)

MINISTERIAL CONFERENCE
Fourth Session
Doha, 9 - 14 November 2001

EUROPEAN COMMUNITIES – THE ACP-EC PARTNERSHIP AGREEMENT

Decision of 14 November 2001

The Ministerial Conference,

Having regard to paragraphs 1 and 3 of Article IX of the Marrakech Agreement Establishing the World Trade Organisation (the "WTO Agreement"), the Guiding Principles to be followed in considering applications for waivers adopted on 1 November 1956 (BISD 5S/25), the Understanding in Respect to Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, paragraph 3 of Article IX of the WTO Agreement, and Decision-Making Procedures under Articles IX and XII of the WTO Agreement agreed by the General Council (WT/L/93);

Taking note of the request of the European Communities (EC) and of the Governments of the ACP States which are also WTO members (hereinafter also the "Parties to the Agreement") for a waiver from the obligations of the European Communities under paragraph 1 of Article I of the General Agreement with respect to the granting of preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement (hereinafter also referred to as "the Agreement")¹;

Considering that, in the field of trade, the provisions of the ACP-EC Partnership Agreement requires preferential tariff treatment by the EC of exports of products originating in the ACP States;

Considering that the Agreement is aimed at improving the standard of living and economic development of the ACP States, including the least developed among them;

Considering also that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is designed to promote the expansion of trade and economic development of beneficiaries in a manner consistent with the objectives of the WTO and with the trade, financial and development needs of the beneficiaries and not to raise undue barriers or to create undue difficulties for the trade of other members;

¹As contained in documents G/C/W/187, G/C/W/204, G/C/W/254 and G/C/W/269.

Considering that the Agreement establishes a preparatory period extending until 31 December 2007, by the end of which new trading arrangements shall be concluded between the Parties to the Agreement;

Considering that the trade provisions of the Agreement have been applied since 1 March 2000 on the basis of transitional measures adopted by the ACP-EC joint institutions;

Noting the assurances given by the Parties to the Agreement that they will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement;

Noting that the tariff applied to bananas imported in the "A" and "B" quotas shall not exceed 75 €/tonne until the entry into force of the new EC tariff-only regime.

Noting that the implementation of the preferential tariff treatment for bananas may be affected as a result of GATT Article XXVIII negotiations;

Noting the assurances from the Parties to the 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 and their willingness to accept a multilateral control on the implementation of this commitment.

Considering that, in light of the foregoing, the exceptional circumstances justifying a waiver from paragraph 1 of Article I of the General Agreement exist;

Decides as follows:

1. Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement,² without being required to extend the same preferential treatment to like products of any other member.
2. The Parties to the Agreement shall promptly notify the General Council of any changes in the preferential tariff treatment to products originating in ACP States as required by the relevant provisions of the Agreement covered by this waiver.
3. The Parties to the Agreement will, upon request, promptly enter into consultations with any interested member with respect to any difficulty or matter that may arise as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement; where a member considers that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of such implementation, such consultations shall examine the possibility of action for a satisfactory adjustment of the matter.

²Any reference to the Partnership Agreement in this Decision shall also include the period during which the trade provisions of this Agreement are applied on the basis of transitional measures adopted by the ACP-EC joint institutions.

- 3bis With respect to bananas, the additional provisions in the Annex shall apply.
4. Any member which considers that the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement is being applied inconsistently with this waiver or that any benefit accruing to it under the General Agreement may be or is being impaired unduly as a result of the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement and that consultations have proved unsatisfactory, may bring the matter before the General Council, which will examine it promptly and will formulate any recommendations that they judge appropriate.
 5. The Parties to the Agreement will submit to the General Council an annual report on the implementation of the preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the Agreement.
 6. This waiver shall not preclude the right of affected members to have recourse to Articles XXII and XXIII of the General Agreement.

ANNEX

The waiver would apply for ACP products under the Cotonou Agreement until 31 December 2007. In the case of bananas, the waiver will also apply until 31 December 2007, subject to the following, which is without prejudice to rights and obligations under Article XXVIII.

- The parties to the Cotonou Agreement will initiate consultations with Members exporting to the EU on a MFN basis (interested parties) early enough to finalize the process of consultations under the procedures hereby established at least three months before the entry into force of the new EC tariff only regime.
- No later than 10 days after the conclusion of Article XXVIII negotiations, interested parties will be informed of the EC intentions concerning the rebinding of the EC tariff on bananas. In the course of such consultations, the EC will provide information on the methodology used for such rebinding. In this regard, all EC WTO market-access commitments relating to bananas should be taken into account.
- Within 60 days of such an announcement, any such interested party may request arbitration.
- The arbitrator shall be appointed within 10 days, following the request subject to agreement between the two parties, failing which the arbitrator shall be appointed by the Director-General of the WTO, following consultations with the parties, within 30 days of the arbitration request. The mandate of the arbitrator shall be to determine, within 90 days of his appointment, 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 the above-mentioned EC commitments.
- If the arbitrator determines that the rebinding would not result in at least maintaining total market access for MFN suppliers, the EC shall rectify the matter. Within 10 days of the notification of the arbitration award to the General Council, the EC will enter into consultations with those interested parties that requested the arbitration. In the absence of a mutually satisfactory solution, the same arbitrator will be asked to determine, within 30 days of the new arbitration request, whether the EC has rectified the matter. The second arbitration award will be notified to the General Council. If 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 Article XXVIII negotiations and the arbitration procedures shall be concluded before the entry into force of the new EC tariff only regime on 1 January 2006.

ANNEX VI

SCHEDULE LXXX – EUROPEAN COMMUNITIES

PART I MOST-FAVOURLED-NATION TARIFF

SECTION I – Agricultural Products

SECTION I - A Tariffs

(Reproduced excerpt)

Tariff item number	Description of products	Base rate of duty	Bound rate of duty	Implementation period from/to	Special safeguard	Initial negotiating right	Other duties and charges	Comments
1	2	3	4	5	6	7	8	9
080300	Bananas, including plantains, fresh or dried:							
0803001	-Fresh:							
08030011	--Plantains	20.0 %	16.0 %					
08030012	--Other	850 ECU/T	680 ECU/T		SSG			
08030090	-Dried	20.0 %	16.0 %					

SECTION I - B Tariff Quotas

(Reproduced excerpt)

Current Access Quotas

Description of product	Tariff item number(s)	Initial quota quantity and in-quota tariff rate	Final quota quantity and in-quota tariff rate	Implementation period from/to	Initial negotiating right	Other terms and conditions
1	2	3	4	5	6	7
Fresh bananas, other than plantains	0803 00 12	2.200.000 t 75 ECU/t	2.200.000 t 75 ECU/t			As indicated in the Annex.

ANNEX VII

ANNEX

SCHEDULE LXXX - EUROPEAN COMMUNITIES

FRAMEWORK AGREEMENT ON BANANAS

1. The global basic tariff quota is fixed at 2.100.000 t for 1994 and at 2.200.000 t for 1995 and the following years, subject to any increase resulting from the enlargement of the Community.

2. This quota is divided up into specific quotas allocated to the following countries:

<u>Country</u>	<u>Percentage of the global quota</u>
Costa Rica	23.4
Colombia	21.0
Nicaragua	3.0
Venezuela	2.0
Dominican Republic and other ACP concerning non traditional quantities	90.000 t.
Others	46.32% (1994) - 46.51% (1995)

3. In case of force majeure, a country listed in paragraph 2 with a country quota, may, on the basis of an agreement notified in advance to the Commission, fulfill all or part of its quota with bananas originating in another country listed in paragraph 2. In this case, the deliveries from the two countries concerned shall be adjusted accordingly in the following year.

4. If a banana exporting country with a country quota informs the Community that it will be unable to deliver the quantity allocated to it, the short-fall shall be reallocated by the Community in accordance with the same percentage shares indicated under point 2 (including "others"). However, countries with country quotas may jointly request and the Commission shall agree to a different allocation amongst those countries.

5. The Community shall allocate any autonomous increase in the Community quota according to the same percentage shares as under point 2 (including "others"). However, countries with country quotas may jointly request and the Commission shall agree to a different allocation amongst those countries.

6. Management of the quotas, including any increase under point 5, will remain as laid down in regulation 404/93. However, the supplying countries with country quotas may deliver special export certificates for up to 70% of their quota, which, in turn, constitute a prerequisite for the issuance, by the Community, of certificates for the importation of bananas from said countries by "Category A" and "Category C" operators.

The authorization to deliver the special export certificates shall be granted by the Commission in order to make it possible to improve regular and stable trade relations between producers and importers and on the condition that the export certificates will be issued without any discrimination among operators.

7. The in-quota tariff rate shall be 75 Ecus/tonne.
8. The agreed system will be operational by 1 October 1994 at the latest, without prejudice to any provisional or transitional measures to be examined for the year 1994.
9. This agreement shall apply until 31 December 2002. Full consultations with the Latin American suppliers that are GATT Members should start no later than in year 2001.

The functioning of the agreement will be reviewed before the end of the third year, with full consultation of GATT Member Latin American suppliers.

10. This agreement will be incorporated into the Community's Uruguay Round Schedule.
11. This agreement represents a settlement of the dispute between Colombia, Costa Rica, Venezuela, Nicaragua, and the Community on the Community's banana regime. The parties to this agreement will not pursue the adoption of the GATT panel report on this issue.
